

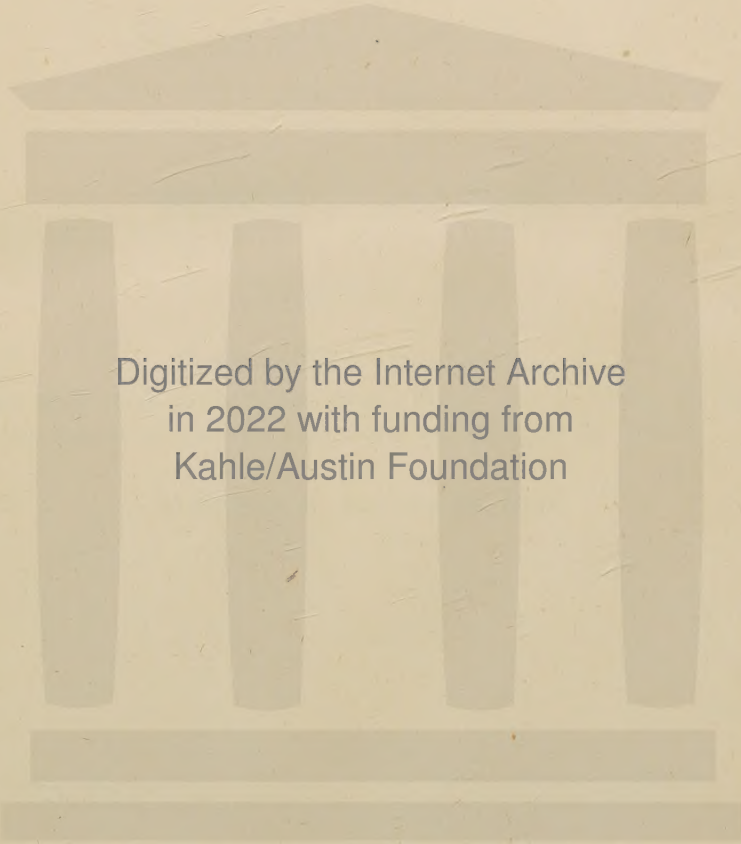
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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERMS, 1878, 1879, IN
98, 99, 100, 101, U. S.

WITH OTHERS,

GEORGE E. MAYCOCK

BOOK 25,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LL.D.

WITH
"NOTES ON U. S. REPORTS"
BY
WALTER MALINS ROSE.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY,
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PREFACE TO SECOND EDITION.

THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

At the end of each volume of reports, several of which are bound in every book of this set, will be found Rose's Notes for that volume. These volumes are separated by colored sheets.

JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,
HON. MORRISON R. WAITE.

ASSOCIATE JUSTICES,

HON. NATHAN CLIFFORD,	HON. WILLIAM STRONG,
HON. NOAH H. SWAYNE,	HON. JOSEPH P. BRADLEY,
HON. SAMUEL F. MILLER,	HON. WARD HUNT,
HON. STEPHEN J. FIELD,	HON. JOHN M. HARLAN.

ATTORNEY-GENERAL,
HON. CHARLES DEVENS.

SOLICITOR-GENERAL.
HON. SAMUEL F. PHILLIPS.

CLERKS,
DANIEL WESLEY MIDDLETON, Esq.
to his death, April 27, 1880.

JAMES H. MCKENNEY, Esq.
Appointed May 10, 1880.

REPORTER,
WILLIAM T. OTTO, Esq.

MARSHAL,
JOHN G. NICOLAY, Esq.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1878-79, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM AP- POINTED.	CIRCUITS, 1868-1879.	COMMIS- SIONED.	SWORN IN.	TERMINA- TION.
ASSOCIATE JJ. NATHAN CLIFFORD, Maine.	President BUCHANAN.	FIRST. ME., N. H., MASS., RHODE ISLAND.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died. 1881. (July 25.)
WARD HUNT, New York.	President GRANT.	SECOND. VERMONT, CONN., NEW YORK.	1872. (Dec. 11.)	1873. (Jan. 9.)	Resigned. 1882. (Feb. 1.)
WILLIAM STRONG, Pennsylvania.	President GRANT.	THIRD. NEW JERSEY, PENN., DEL.	1870. (Feb. 18.)	1870. (Mar. 14.)	Resigned. 1880. (Dec. 14.)
CHIEF JUSTICE. MORRISON R. WAITE, Ohio.	President GRANT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1874. (Jan. 21.)	1874. (Mar. 4.)	
ASSOCIATE JJ. JOSEPH P. BRADLEY, New Jersey.	President GRANT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1870. (Mar. 21.)	1870. (Mar. 23.)	
NOAH H. SWAYNE, Ohio.	President LINCOLN.	SIXTH. KY., TENN., OHIO, MICH.	1862 (Jan. 24.)	1862. (Jan. 27.)	Resigned. 1881. (Jan. 24.)
JOHN M. HARLAN, Kentucky.	President Hayes.	SEVENTH. IND., ILL., WIS.	1877. (Nov. 29.)	1877. (Dec. 10.)	
SAMUEL F. MILLER, Iowa.	President LINCOLN.	EIGHTH. MINN., IOWA, MO., KAN., ARK, NEB.	1862. (July 16.)	1862 (Dec. 1.)	
STEPHEN J. FIELD. California.	President LINCOLN	NINTH. CALIFORNIA, ORE- GON, NEVADA.	1863. (Mar. 10.)	1863. (Dec. 7.)	

IN MEMORIAM.

DANIEL WESLEY MIDDLETON.

(From the records.)

Wednesday, April 28, 1880.

Mr. Chief Justice **Waite** said:

It is our sad duty to announce that Mr. Daniel Wesley Middleton, the Clerk of this Court, departed this life at half past eleven o'clock last night. For more than fifty-five years he has been actively connected with the office he held at the time of his death. Out of respect to his memory, the Court will now adjourn until ten o'clock to-morrow morning.

ORDER APPOINTING CLERK.

Monday, May 10, 1880.

"It is hereby ordered that JAMES HALL MCKENNEY be appointed clerk of this court in the place of DANIEL WESLEY MIDDLETON, deceased, and that he forthwith take the oath of office and give bond, conditioned according to law. In this connection, we cannot refrain from giving expression to our high regard for the personal and official character of MR. MIDDLETON. His handwriting first appears on the records of the court under date of the 7th of February, in the year 1825. From that day until his death he was, without interruption, actively engaged in the business of the office to which his successor has just been appointed, and even a whisper of complaint against him, in any particular, has never reached our ears. Three Chief Justices of the court and eighteen Associate Justices have died since his service began. He was a most accomplished officer, courteous in manner, dignified in deportment, faithful in every duty, and never unmindful of the confidential relations he had with the court. We sincerely mourn his loss, both as an officer and a friend, and direct that this testimonial be entered on the records of the court and a copy transmitted to his widow, in token of our respect for the memory of him that is gone, and our sympathy for his family in their affliction."

James Hall McKenney then appeared and took the oath of office and gave bond which was approved and ordered to be entered on the minutes.

MEMORANDUM.

By reason of indisposition *Mr. Justice* **Hunt** took no part in deciding any cases after the 23d day of December, 1878.

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 98, 99, 100, 101.

A.

"Abbotsford, The," - - - -	168
Abbotsford, The, v. Johnson, - - -	168
Adams County, Am. Emigrant Co. v. -	563
Ætna L. Ins. Co., Town of Brooklyn v. -	416
Airhart v. Massieu, - - - -	213
Alabama, So. & No. Ala. R. R. Co. v. -	973
Aldridge v. Muirhead, Assignee, - - -	1013
Alling, Denver & R. G. Ry. Co. v. - -	438
Alvord v. United States, - - - -	399
American Bible Society v. Grove, - - -	847
American Emigrant Co. v. County of Adams, - - - -	563
American & For. Christian Union v. Yount,	888
American L. Ins. Co., Moulton v. - - -	1077
Ames, Exr., United States v. - - - -	295
Amoskeag Mfg. Co. v. Trainer, - - - -	983
Amy v. Dubuque, - - - -	228
Andreae v. Redfield, Exrx., - - - -	158
Anthony v. County of Jasper, - - - -	1005
Arthur, Coll., v. Dodge, - - - -	948
Arthur, Coll., v. Herold, - - - -	568
Atlantic F. & M. Ins. Co., Snell v. - -	52
Atlantic & Gulf R. R. Co. v. Georgia, -	185
Atwood v. Weems, Exrx., - - - -	471
Avery, Leggett v. - - - -	865
Ayer, Smith, Admr., v. - - - -	955
Ayers, Exr., v. City of Chicago, - - -	838
Ayling, Town of Weyauwega v. - - -	470

B.

Babbitt, Assignee, v. Shields, - - - -	820
"Babbitt v. Finn," - - - -	820
Baker v. Humphrey, - - - -	1065
Baker v. Selden, - - - -	841
Ballard Paving Co., Follansbee v. - -	802
Ballard Paving Co. v. Mulford, - - -	591
Baltimore, Mayor, etc., Guy v. - - -	743
"Baltimore, United States v." - - -	167
Balt. & P. R. R. Co. v. Grant, - - -	231
Balt. & P. R. R. Co. v. Trook, - - -	571
Bank of America v. Banks, - - - -	850
Bank of Ashland, First Nat., Bast v. -	794
Bank, Canal of N. O., v. Partee, - - -	390
Bank, Citizens', Case, Receiver, v. - -	695
Bank, Com. Nat., of Cleveland, Pelton, Treas., v. - - - -	901
Bank, Contl., Biebinge, Assignee v. - -	271
Bank, First Nat., of Brunswick, v. Co. of Yankton, - - - -	1046
Bank, First Nat., of Cin., v. Burkhardt,	766
Bank, First Nat., of Montgomery, Oates v.	580
Bank, First Nat., of Mt. Pleasant, Tinst- man v. - - - -	530

B.

Bank, First Nat., of Quincy, v. Hall, -	822
Bank, First Nat., of Westboro, Smith, Admr., v. - - - -	955
Bank, First Nat., of Wyandotte, Cent. Trust Co. of N. Y. v. - - - -	876
Bank, Germania Nat., of N. O., v. Case, Receiver, - - - -	448
Bank, International, v. Sherman, As- signee, - - - -	866
Bank, Mfrs. Nat., of Chicago, People's Bk. v. - - - -	907
Bank, Mercantile Nat., v. Carpenter, -	815
Bank, Merch. Nat., Little Rock v. - -	108
Bank, Merch. Nat., of Little Rock v. U. S.,	979
Bank, Merch. Nat., of St. Louis, Shaw v.	892
Bank, Merch. Nat., of Toledo, Cummings, Treas., v. - - - -	903
Bank, Muncie Nat., Barnet, Assignee, v.	212
Bank, Nat., of Carlisle, v. Graham, - -	750
Bank, Nat., of N. Y., Cox v. - - - -	739
Bank, Nat., in New York, Nat. Bk. in St. L. v. - - - -	362
Bank, Nat., of Republic, v. Miller, - -	529
Bank, Nat. Sav., of D. C. v. Creswell, Com., - - - -	713
Bank, Nat. Sav., of D. C. v. Ward, - -	621
Bank, Nat., in St. L. v. Nat. Bk. in N. Y.,	362
Bank, Nat., St. Louis v. U. S. Ins. Co.,	547
Bank of the Old Dominion v. McVeigh,	110
Bank, People's, of Belleville, v. Mfrs. Nat. Bk., - - - -	907
Bank, Second Nat., of St. L., v. Grand Lodge of F. & A. M., - - - -	75
Bank, Union Nat., of St. L., v. Matthews,	188
Banks, Bank of America v. - - - -	850
Barnet, Assignee, v. Muncie Nat. Bk., -	212
Barrow, Admr., v. Hunton, - - - -	407
Bast v. First Nat. Bk. of Ashland, - -	794
Bates v. Coe, - - - -	68
Bean, Beckwith v. - - - -	124
Bean, Coll., Hartman v. - - - -	455
"Beauregard, Case v." - - - -	1004
Beauregard, Case, Receiver, v. - - -	370
Bechtel v. United States, - - - -	1019
Beckwith v. Bean, - - - -	124
Beckwith, Town of Mt. Pleasant v. - -	699
Benecke, United States v. - - - -	192
Benedict, Lange v. - - - -	469
Betts v. Mugridge, - - - -	157
Bible Society, American, v. Grove, - -	847
Biebinge, Assignee, v. Continental Bk.,	271
Blackwell, Jones, Exrx., v. - - - -	752
Blair, Chicago & Pacific R. R. Co. v. -	587

B.		C.	
Blake v. Hawkins, Assignee, - - -	139	Chicago, City of, Ayers, Exr., v. - - -	838
Blakeslee, Coll., Wright v. - - -	1048	Chicago, Nor. Trans. Co. of Ohio v. - - -	336
Block v. Comrs. of Bourbon County, - - -	491	Chicago & Alton R. R. Co. v. Turrill, - - -	1009
Board of Liquidation, Louisiana v. - - -	114	Chicago, B. & Q. R. R. Co. v. Turrill, - - -	1009
Bolles, Town of Roberts v. - - -	880	Chicago & N. W. Ry. Co. v. McKinley, - - -	272
Boston, Bowditch, Assignee, v. - - -	980	Chicago & Pacific R. R. Co. v. Blair, - - -	587
Bourbon Co. Comrs. v. Block, - - -	491	Citizens' Bk., Case, Receiver, v. - - -	695
Bowditch, Assignee, v. Boston, - - -	980	Citizens' Ins. Co., Marsh v. - - -	90
Bowen v. Chase, - - -	47	City of Chicago, Ayres, Exr., v. - - -	838
Bowen, United States v. - - -	631	City and Co. of San Francisco, Tre-	
Bowie, Weatherly v. - - -	606	nouth v. - - -	626
Bowman, Admr., Peters v. - - -	91	"City of Panama, The," v. Phelps, - - -	1061
Bowman v. Lewis, - - -	989	Clamorgan v. United States, - - -	836
Bradley v. United States, - - -	105	Clapp, Nogue v. - - -	1026
Bradley, Young v. - - -	1044	"Clardy v. National Bank," - - -	739
Branch, Admr., v. United States, - - -	759	"Clark v. Trust Co.," - - -	573
Branson, Wirth v. - - -	86	Clark, Trustee, v. Eaton, Comr., - - -	573
Brick v. Brick, Exr., - - -	256	Clark v. United States, - - -	481
Broder v. Natoma Water & Mining Co., - - -	790	Clarke, <i>Ex Parte</i> , - - -	715
Brooklyn, Town of, v. Aetna L. Ins. Co., - - -	416	Cleveland Ins. Co. v. Globe Ins. Co. - - -	201
Brooks v. Bur. & S. W. Ry. Co., - - -	1057	Clifton, Jones, Assignee, v. - - -	908
Brownsville v. Cavazos, Exr., - - -	574	Cockrem, Receiver, Fleitas v. - - -	954
Buchtel, Mason Lumber Co. v. - - -	1072	Coe, Bates v. - - -	68
Buckley, Ketchum v. - - -	473	Colby, Exr., v. Reed, - - -	484
Buerk, Imhaeuser v. - - -	945	Colgrove, Dickerson v. - - -	618
Burbank v. Semmes, - - -	315	Collins, Admr., v. The Florida, - - -	898
Burbank, Vance v. - - -	929	Colorado Cent. R. R. Co. v. White, Admr., - - -	860
Burkhardt, First Nat. Bk. of Cin. v. - - -	766	Colorado Springs Co., Cowell v. - - -	547
Burlington & Mo. Riv. R. R. Co., U. S. v. - - -	198	Comly, Coll., Powers v. - - -	805
Burlington & S. W. Ry. Co., Brooks v. - - -	1057	Commercial Nat. Bk. of Cleveland, Pel-	
Burns v. Meyer, - - -	738	ton, Treas., v. - - -	901
Burr v. Myers, - - -	976	Comrs. of Bourbon Co. v. Block, - - -	491
Burt v. Panjaud, - - -	451	Comrs. of Dodge Co., Union Pacific R.	
Butterfield v. Smith, Admr., - - -	868	R. Co. v. - - -	196
C.		Comrs. of Leavenworth Co. v. Sellow, - - -	333
Cain, Stringfellow, Exr., v. - - -	421	Comrs. of Mahoning Co., Newton v. - - -	710
Calhoun County, Suprs. of, v. Galbraith, - - -	410	"Comrs., Railroad Company v." - - -	196
California Powder Works, Giant Powder		Congress & Emp. Spring Co. v. Edgar - - -	487
Co. v. - - -	77	Connecticut Mut. L. Ins. Co., Sea v. - - -	772
Campbell v. Rankin, - - -	435	Construction Co., Del. R. R. v. Meyer,	
Canal Bank of N. O. v. Partee, - - -	390	Trustee, - - -	593
Canal & Banking Co., N. O. v. New Or-		Continental Bk., Biebinge, Assignee v. - - -	271
leans, - - -	409	Cook, Whitney v. - - -	446
Canal Co., Chesapeake & Ohio, v. Ray, - - -	792	Cooper, Admr., Transportation Line v. - - -	382
Cannon, Exr., v. Pratt, - - -	446	Cooper Union, Inhabitants of Pompton v. - - -	803
Cañon City & S. J. Ry. Co., D. & R. G.		County Court, Knox Co. v. United States, - - -	191
Ry. Co. v. - - -	438	County Court of Macon Co. v. Huideko-	
Carpenter, Mercantile Nat. Bk., v. - - -	815	per, - - -	333
Carpenter, Wood v. - - -	807	County Court of Macon Co., U. S. <i>ex rel.</i> , v. - - -	331
Carr v. United States, - - -	209	County of Adams, Am. Emigrant Co. v. - - -	563
Carraher, Gage v. - - -	989	County of Cass v. Gillett, - - -	585
Carroll, Exrx., Gunton, Trustee, v. - - -	985	County of Daviess v. Huidekoper, - - -	112
Carson, McBurney v. - - -	378	County of Gallatin, Fairfield v. - - -	544
Carson, Exr., v. Ober, - - -	157	County of Hamilton, Litchfield v. - - -	928
"Case v. Beauregard," - - -	1004	County of Jackson, Darlington v. - - -	972
Case, Receiver, v. Beauregard, - - -	370	County of Jasper, Anthony v. - - -	1005
Case, Receiver, v. Citizens' Bk., - - -	695	County of Livingston v. Darlington, - - -	1015
Case, Receiver, Germania Nat. Bk. of N.		County of Pike, Foote v. - - -	972
O. v. - - -	448	County of Schuyler v. Thomas, - - -	88
Case, Receiver, v. N. O. & Car. R. R. Co., - - -	1004	County of Webster, Litchfield v. - - -	925
Cass County v. Gillett, - - -	585	County of Yankton, First Nat. Bk. v. - - -	1046
Cavazos, Exr., City of Brownsville v. - - -	574	Cornell, Exr., Town of Mt. Pleasant v. - - -	699
Central Pacific R. R. Co. v. Gallatin, - - -	504	Corwine, Exrx., Meguire v. - - -	899
Central Pacific R. R. Co., Ryan v. - - -	305	Cowdrey v. Vandenburgh, - - -	923
Central Pacific R. R. Co., United States v. - - -	287	Cowell v. Col. Springs Co., - - -	547
Central R. R. Co. of Iowa, Sage v. - - -	394	Cox v. Nat. Bank of N. Y. - - -	739
Central Trust Co. of N. Y. v. First Nat.		Craig v. Smith, - - -	577
Bk. of Wyandotte, - - -	876	Crampton v. Zabriskie, - - -	1070
Chapman, Wolsey v. - - -	915	Crane, Exr. v. Kansas Pacific Ry. Co. - - -	782
Chase, Bowen v. - - -	47	Creswell, Comr., Kennedy, Exr., v. - - -	1075
Chesapeake & O. Can. Co. v. Ray, - - -	792	Creswell, Comr., v. Lanahan, - - -	853
		Creswell, Com., Nat. Sav. Bk. of D. C. v. - - -	713

C.

Cummings, Grafton v. - - - -	366
Cummings, Treas., v. Merch. Nat. Bk. of Toledo, - - - -	903
Curtis v. United States, - - - -	571

D.

Dallas Co. v. Davol, - - - -	974
Dallas Co. v. Huidekoper, - - - -	374
Dana, Hatch v. - - - -	885
Daniels, Lansdale v. - - - -	587
Darlington v. Jackson County, - - - -	972
Darlington, Livingston County v. - - - -	1015
Darlington, Township of Empire v. - - - -	878
D'Auterive v. United States, - - - -	869
"Dauterive v. United States," - - - -	869
Daviess County v. Huidekoper, - - - -	112
Davis, Lovell v. - - - -	944
Davis, Tennessee v. - - - -	648
Davol, Dallas Co. v. - - - -	974
Dawson, United States v. - - - -	791
Delaware R. R. Construction Co. v. Meyer, Trustee, - - - -	593
De Liano v. Gaines, - - - -	928
Denver Pacific Ry. & T. Co., U. S. v. - - - -	291
Denver & R. G. Ry. Co. v. Alling, - - - -	438
Denver & R. G. Ry. Co. v. C. C. & S. J. Ry. Co., - - - -	438
Denver & R. G. Ry. Co., <i>Ex Parte</i> , - - - -	872
Denver v. Roane, Exr., - - - -	476
Des Moines Valley R. R. Co., Dumont v. - - - -	520
Desper, Union Water-Meter Co. v. - - - -	1024
DeTreville v. Smalls, - - - -	174
Dickerson v. Colgrove, - - - -	618
Distilled Spirits, 50 Barrels, U. S. v. - - - -	399
Distilled Spirits, 400 Barrels, U. S. v. - - - -	399
Distilled Spirits, 400 Packages, U. S. v. - - - -	399
Dodge, Arthur, Coll., v. - - - -	948
Dodge Co., Comrs. of, Union Pacific R. Co. v. - - - -	196
Doggett, Receiver, v. Florida R. R. Co. - - - -	301
Dosier, Garnau v. - - - -	536
Douglass v. Pike County, - - - -	968
Dow v. Johnson, - - - -	632
Dubuque, Amy v. - - - -	228
Dumont v. Des Moines Valley R. R. Co. - - - -	520
Dumont v. United States, - - - -	65
Duncan v. Gegan, - - - -	875
"Durant v. Essex Co." - - - -	961
Durant v. Storrow, - - - -	961

E.

Eastern Kentucky Ry. Co. v. Slack, Coll., - - - -	611
East Pa. R. R. Co., Elliott, Coll., v. - - - -	292
Eaton, Comr., Clark, Trustee, v. - - - -	573
Edgar, Cong. & Emp. Spring Co. v. - - - -	487
Edrington, O'Reilly, Assignee, v. - - - -	1009
Edwards, Trustee, Rice v. - - - -	976
Egbert, Admr., Meyer, Trustee v. - - - -	1078
Elcox v. Hill, Admr., - - - -	103
Electro-Magnetic Gas-Light Co., Vansant, Trustee, v. - - - -	265
Elliott, Coll., v. East Pa. R. R. Co. - - - -	292
Ellsworth, United States v. - - - -	862
Embry v. United States, - - - -	772
Emigrant Co., Am., v. County of Adams, - - - -	563
Empire Township v. Darlington, - - - -	878
"Essex Co., Durant v." - - - -	961
<i>Ex Parte</i> Clarke, - - - -	715
<i>Ex Parte</i> Denver & R. G. Ry. Co., - - - -	872
<i>Ex Parte</i> French, - - - -	529
<i>Ex Parte</i> Phillips, - - - -	781
<i>Ex Parte</i> Reed, - - - -	538

E.

<i>Ex Parte</i> Schwab, - - - -	105
<i>Ex Parte</i> Siebold, - - - -	717
<i>Ex Parte</i> Virginia, - - - -	667, 676
Express Co., Southern, v. West. N. C. R. Co. - - - -	319
Evanston v. Gunn, - - - -	306

F.

Factors' & Traders' Ins. Co., Wheeler v. - - - -	1055
Fairfield v. County of Gallatin, - - - -	544
Farden, United States v. - - - -	267
Farrell v. United States, - - - -	321
"Finn, Babbitt v." - - - -	320
First Nat. Bk. of Brunswick v. Co. of Yankton, - - - -	1046
First Nat. Bk. of Cincinnati v. Burkhardt, - - - -	766
First Nat. Bk. of Montgomery, Oates v. - - - -	580
First Nat. Bk. of Mt. Pleasant, Tinstman v. - - - -	530
First Nat. Bk. of Quincy v. Hall, - - - -	822
First Nat. Bk. of Wyandotte, Cent. Trust Co. of N. Y. v. - - - -	876
Flagstaff Silver M. Co. v. Tarbet, - - - -	253
Fleitas v. Cockrem, Receiver, - - - -	954
Flint, Admr., Hollingsworth v. - - - -	1028
Florida Cent. R. R. Co. v. Schulte, - - - -	605
Florida R. R. Co., Doggett, Receiver, v. - - - -	301
"Florida, The," - - - -	898
Florida, The, Collins, Admr., v. - - - -	898
Flournoy v. Lastrapes, - - - -	406
Follansbee v. Ballard Paving Co. - - - -	802
Foote v. County of Pike, - - - -	972
Ford, United States v. - - - -	399
Fort Scott, H. & W. R. R. Co., Smith v. - - - -	437
Fort Scott, Mayor, etc., of, U. S., <i>ex rel.</i> v. - - - -	348
Fosdick v. Schall, - - - -	339
Fosdick v. Southwestern Car Co., - - - -	344
Foster v. Mora, - - - -	191
Fraloff, N. Y. C. & H. R. R. R. Co. v. - - - -	531
Freedman's Sav. & Trust Co., Holden v. - - - -	567
French, <i>Ex Parte</i> , - - - -	529
Frisbie, Marquez v. - - - -	800
Frost, Trustee, Hale v. - - - -	419

G.

Gage v. Carraher, - - - -	989
Gage, Howe Machine Co. v. - - - -	754
Gaillard, Treas., South Carolina, <i>ex rel.</i> v. - - - -	937
Gaines, Comptroller, U. S., <i>ex rel.</i> v. - - - -	733
Gaines, De Liano v. - - - -	928
Galbraith, Suprs. of Calhoun County v. - - - -	410
Gallatin, Cent. Pacific R. R. Co. v. - - - -	504
Gallatin County, Fairfield v. - - - -	544
Garnau v. Dosier, - - - -	536
Garratt v. Seibert, - - - -	84
Gas-Light Co., E. M., Vansant, Trustee, v. - - - -	265
Gates v. Goodloe, Exr., - - - -	895
Gay v. Parpart, - - - -	841
Gegan, Duncan v. - - - -	875
Georgia, Atl. & Gulf R. R. Co. v. - - - -	185
Georgia, Railroad Company v. - - - -	188
Germaine, United States v. - - - -	482
Germania Nat. Bk. of N. O. v. Case, Receiver, - - - -	448
Giant Powder Co. v. Cal. Powder Works, - - - -	77
Gibboney, Exrx., Kain, Bishop, v. - - - -	813
Giblin, McIntyre v. - - - -	572
Gifford, Admr., v. Helms, Admr., - - - -	57
Gilbert, Phillips v. - - - -	833
Gilfoil, Gordon v. - - - -	383
Gillet, Cass County v. - - - -	585

G.		H.	
Gilman, C. & S. R. R. Co., Hinckley, Receiver, v.	591	Huidekoper, Dallas Co. v.	374
Glab, United States v.	273	Huidekoper v. Hinckley Locomotive Works,	344
Glendale Elastic Fabric Co. v. Smith,	547	Humphrey, Baker v.	1065
Glenn, Exr., Slaughter v.	122	Hunton, Barrow, Admr., v.	407
Glenny v. Langdon,	43	Hurt v. Hollingsworth,	569
"Goddard v. Ordway,"	1040	Hussey v. Smith,	314, 315
Godden v. Kimmell, Admr.,	431	Hutton, Iverson v.	66
Goodloe, Exr., Gates v.	895	Hyde, Harkness v.	237
Goodrich, Assignee, Wilson v.	111	I.	
Goodrich, Greenleaf v.	845	Imhaeuser v. Buerk,	945
Gordon v. Gilfoil,	383	Improvement Co., Ky., v. Slack, Coll.,	609
Grafton v. Cummings,	366	Inhabitants of Pompton v. Cooper Union,	803
Graham, First Nat. Bk. of Carlisle v.	750	Ins. Co., Aetna L., Town of Brooklyn v.	416
Grand Lodge of F. & A. M., Second Nat. Bk. of St. Louis v.	75	Ins. Co., Am. L., Moulton v.	1077
Grand Trunk Ry. Co. v. Walker,	977	Ins. Co., Atl. F. & M., Snell v.	52
Grant, Balt. & P. R. R. Co. v.	231	Ins. Co., Citizens', Marsh v.	90
Greenleaf v. Goodrich,	845	Ins. Co., Cleveland, v. Globe Ins. Co.,	201
Gridley, N. W. Mut. L. Ins. Co. v.	746	Ins. Co., Conn. Mut. L., Sea v.	772
Grigsby, Admr., v. Purcell,	354	Ins. Co., Factors' & Traders', Wheeler v.	1005
Grove, American Bible Society v.	847	Ins. Co., Globe, Cleveland Ins. Co. v.	201
Guaranty & Indemnity Co., N. Y., Jones, Assignee, v.	1030	Ins. Co., John Hancock Mut. L., Manning v.	761
Gunn, Evanston v.	306	Ins. Co., Knickerbocker L., v. Schneider, Admr.,	694
Guntton, Trustee, v. Carroll, Exrx.,	985	Ins. Co., N. W. Mut. L., v. Gridley,	746
Guy v. Mayor, etc., of Baltimore,	743	Ins. Co., St. J. F. & M., School Dist. No. 56 v.	868
H.		Ins. Co., U. S., St. L. Nat. Bank v.	547
<i>Habeas Corpus</i> Cases,	715, 717	International Bank v. Sherman, Assignee,	866
Hackett, Exr., v. Ottawa,	363	Irvine, United States v.	193
Hagood, Williams v.	51	Iverson v. Hutton,	66
Hale v. Frost, Trustee,	419	J.	
Hall, First Nat. Bk. of Quincy v.	822	Jasper County, Anthony v.	1005
Hall v. Russell,	829	Jackson County, Darlington v.	972
Hall, United States v.	180	"Jackson v. Ludeling,"	460
Halliday, The Louisville v.	771	Jackson, Parsons v.	457
Hamilton Co., Litchfield v.	928	Jackson v. Vicksburg, S. & T. R. R. Co.,	460
Harkness v. Hyde,	237	Jeffrey, Admr., v. Moran, Trustee,	785
Harris v. McGovern,	317	Jennison, Exr., v. Kirk,	240
Harris, Phelps v.	855	John Hancock Mut. L. Ins. Co., Manning v.	761
Hartell v. Tilghman,	357	Johnson, Dow v.	632
Hartman v. Bean, Coll.,	455	Johnson, Kidd v.	769
Hatch v. Dana,	885	Johnson, The Abbotsford v.	168
Hatch v. Standard Oil Co. of Cleveland,	554	Johnson, United States v.	550
Hauenstein v. Lynham,	628	Jones, Exrx., v. Blackwell,	752
Hawkins, Assignee, Blake v.	139	Jones, Assignee, v. Clifton,	908
Helms, Admr., Gifford, Admr., v.	57	Jones, Assignee, v. N. Y. Guaranty & I. Co.,	1030
Hendrie v. Sayles,	176	K.	
Hernandez, Lyon v.	267	Kain, Bishop, v. Gibboney, Exrx.,	813
Herold, Arthur, Coll., v.	568	Kansas Pacific Ry. Co., Crane, Exr., v.	782
Hexamer, Perris, Admr., v.	306	Kansas Pacific Ry. Co., United States v.	289
Hickling v. Sherman, Assignee,	866	Keely v. Sanders,	327
Hill, Admr., Elcox v.	103	Keith, Woodbury Planing-Machine Co. v.	939
Hinckley Loco. Works, Huidekoper v.	344	Kennedy, Exr., v. Creswell, Comr.,	1075
Hinckley, Receiver, v. Gilman, C. & S. R. R. Co.,	591	Kentucky Improvement Co. v. Slack, Coll.,	609
Hirsch, United States v.	539	Kesner v. Trigg, Assignee,	83
Hoffman, Washington Market Co. v.	782	Ketchum v. Buckley,	473
Hoge, Comp. Gen. v. Rich. & D. R. R. Co.,	303	Ketchum, Pacific R. R. Co. of Missouri v.	932
Holden v. Freedman's Sav. & Trust Co.,	567	Ketchum v. St. Louis,	999
Hollingsworth v. Flint, Admr.,	1038	Kidd v. Johnson,	769
Hollingsworth, Hurt v.	569	Kimball, Admr., United States v.	835
Hooper v. Robinson,	219	Kimmell, Admr., Godden v.	431
Hotchkiss, Kirtland v.	558	King v. United States,	373
Hough v. Texas & Pacific R. R. Co.,	612	Kinney, Leavenworth v.	336
Howard v. Mil. & St. P. Ry. Co.,	1081	Kirk, Jennison, Exr., v.	240
Howe Machine Co. v. Gage,	754	Kirtland v. Hotchkiss,	558
Hubbard, Prov. Steam Engine Co. v.	786	Klein v. New Orleans,	430
Huidekoper, County Court of Macon Co. v.	333		
Huidekoper, Daviess County v.	112		

K.

Knickerbocker L. Ins. Co. v. Schneider, Admr.,	694
Knox Co. Court v. United States,	191
L.	
Lammers v. Nissen,	562
Lanahan, Creswell, Comr., v.	853
Langdon, Glenny v.	43
Langdon, Pence v.	420
Lange v. Benedict,	469
Langford v. United States,	1010
Lansdale v. Daniels,	587
Lastrapes, Flournoy v.	406
Lawson, United States v.	860
Leavenworth Co., Comrs. of, v. Sellow,	333
Leavenworth v. Kinney,	336
Leggett v. Avery,	865
Lewis, Bowman v.	989
"Lewis, Missouri" v.	989
Lippitt, United States v.	747
Litchfield v. County of Hamilton,	928
Litchfield v. Webster County,	925
Little Rock & Ft. Smith Ry. Co., Shaw v.	757
Little Rock v. Merch. Nat. Bk.,	108
Little, Terry v.	864
Livingston County v. Darlington,	1015
Locomotive Works, Huidekoper v.	344
Loffin, St. L., I. M. & S. Ry. Co. v.	222
Louisville, The, v. Halliday,	771
Louisiana, ex rel., v. Board of Liquidation,	114
Lovell v. Davis,	944
Low, Palmer v.	60
"Ludeling, Jackson v."	460
Lumber Co., Mason, v. Buchtel,	1072
Lynham, Hauenstein v.	628
Lyon v. Hernandez,	267
Lyon v. Pollock,	265
Lyons, Town of, v. Munson,	451

M.

McBurney v. Carson,	378
McDonald, North, Assignee, v.	535
McDonald, Phelps, Assignee, v.	473
McDonough's Legatees, United States v.	167
McGovern, Harris v.	317
McIntyre v. Giblin,	572
McIntyre, Assignee, Reed v.	171
McKinley, Chicago & N. W. Ry. Co. v.	272
McKinley, Exr., Sherry v.	330
McKnight v. United States,	115
McVeigh, Bank of the Old Dominion v.	110
Macon County Court v. Huidekoper,	333
Macon Co. Court, United States, ex rel., v.	331
Mahoning Co., Comrs. of, Newton v.	710
Manierre, Mohr v.	1052
Manning v. John Hancock Mut. L. Ins. Co.	761
Manufacturers' Nat. Bk. of Chicago, People's Bk., v.	907
Manufacturing Co., Amoskeag v. Trainer,	993
Marquez v. Frisbie,	800
Marsh v. Citizens' Ins. Co.,	90
Mason Lumber Co. v. Buchtel,	1072
Mason, Worthington, Admr., v.	848
Massieu, Airhart v.	213
Mathews, Union Nat. Bk. of St. L. v.	188
May, Exr., v. Rice, Assignee,	797
"May v. Sloan,"	797
Mayflower, The, v. The Sabine,	982
Mayor, etc., of Baltimore, Guy v.	743
Mayor, etc., of Fort Scott, U. S., ex rel., v.	348
Meeks v. Olpherts,	735

M.

Meguire v. Corwine, Exrx.,	899
Memphis & Charleston R. R. Co. v. Tennessee	960
Mercantile Nat. Bk. v. Carpenter,	815
Merch. Nat. Bk., City of Little Rock v.	108
Merch. Nat. Bk. of Little Rock v. U. S.,	979
Merch. Nat. Bk. of St. Louis, Shaw v.	892
Merch. Nat. Bk. of Toledo, Cummings,	
Treas., v.	903
Meyer, Burns v.	738
Meyer, Trustee, v. Delaware R. R. Const. Co.,	593
Meyer, Trustee, v. Egbert, Admr.,	1078
Mich. Cent. R. R. Co. v. Slack, Coll.,	647
Miller, Nat. Bank of Republic v.	529
Mills, Admr., v. Scott,	294
Mining Co., Flagstaff Silver, v. Tarbet,	253
Mining Co., Union Consol. Silver, v. Taylor,	541
Mississippi & R. R. Boom Co. v. Patterson,	206
Mississippi, State of, ex rel., Stone v.	1079
Milwaukee & St. P. Ry. Co., Howard v.	1081
Mohr v. Manierre,	1052
"Missouri v. Lewis,"	989
Montgomery v. Samory,	375
Montgomery v. Sawyer,	692
Moore, Phillips v.	603
Moore v. Simonds, Admr.,	590
Mora, Foster v.	191
Moran, Trustee, Jeffrey, Admr. v.	785
Morgan, United States v.	519
Morton, Van Norden v.	453
Moulou v. Am. L. Ins. Co.,	1077
Mount Pleasant, Town of, v. Beckwith,	699
Mount Pleasant, Town of, v. Cornell, Exr.,	699
Mugridge, Betts v.	157
Muirhead, Assignee, Aldridge, v.	1013
Mulford, Ballard Paving Co., v.	591
Muncie Nat. Bk., Barnet, Assignee v.	212
Munson, Town of Lyons v.	451
Murray, United States v.	756
Myers, Burr v.	976
Myrick v. Thompson,	324

N.

Nagle v. Rutledge,	772
Nagle, Wright v.	921
Nashville & C. Ry. Co. v. United States,	1074
"National Bank, Clardy v."	739
National Bk. in N. Y., Nat. Bk. in St. L. v.	362
National Bk. in St. L. v. Nat. Bk. in N. Y.	362
National Bank, First, of Ashland, Bast v.	794
National Bank of Carlisle v. Graham,	750
National Bank of N. Y., Cox v.	739
National Bk. of Republic v. Miller,	529
"National Bk., Tintsman v."	530
National Sav. Bk. of D. C. v. Creswell, Com.	713
National Sav. Bk. of D. C. v. Ward,	621
Natoma Water & Mining Co., Broder v.	790
New Jersey R. R. & Trans. Co., Pollard v.	840
New Orleans Can. & Banking Co. v. New Orleans,	409
New Orleans & Car. R. R. Co., Case, Receiver, v.	1004
New Orleans, Klein v.	430
New Orleans, N. O. Can. & Banking Co. v.	409
New Orleans, United States, v.	225, 227, 228
Newton v. Comrs. of Mahoning County,	710
New York, People of, ex rel., v. Weaver,	705
Nissen, Lammers v.	562
North, Assignee, v. McDonald,	535
Northern Trans. Co. of Ohio v. Chicago,	336
Northwestern Mut. L. Ins. Co. v. Gridley,	746
Northwestern Union Packet Co. v. St. Louis,	688
Northwestern University v. People, ex rel.,	387

N.		Q.	
Nougue v. Clapp, - - - -	1026	Quinn, Admr., v. United States, - -	269
N. Y. C. & H. R. R. Co. v. Fraloff, - -	531	R.	
N. Y. Guaranty & In. Co., Jones, Assignee, v.	1030	R. R. Co., Atl. & Gulf, v. Georgia, -	185
O.		R. R. Co., Balt. & P., v. Grant, - -	231
Oates v. First Nat. Bk. of Montgomery, -	580	R. R. Co., Balt. & P., v. Trook, - -	571
Ober, Carson, Exr., v. - - - -	157	R. R. Co., Burlington & Mo. Riv., U. S. v.	189
Olpherts, Meeks v. - - - -	735	R. R. Co., Chicago & Alton, v. Turrill, -	1009
"Ordway, Goddard v." - - - -	1040	R. R. Co., Chicago, B. & Q., v. Turrill, -	1009
Ordway, Phillips, Admr., v. - - - -	1040	R. R. Co., Chicago & Pacific, v. Blair, -	587
O'Reilly, Assignee, v. Edrington, Admr., -	1009	R. R. Co., Central of Iowa, Sage v. -	394
Orleans, Town of, v. Platt, - - - -	404	R. R. Co., Cent. Pacific, v. Gallatin, -	504
Orvis v. Powell, - - - -	238	R. R. Co., Central Pacific, Ryan v. -	305
Ottawa, Hackett, Exr., v. - - - -	363	R. R. Co., Central Pacific, United States v.	287
P.		R. R. Co., Col. Cent., v. White, Admr., -	860
Pacific R. R. Co. of Missouri v. Ketchum, -	932	R. R. Co., Des Moines Valley, Dumont v.	520
Packet Co., N. W. Union, v. St. Louis, -	688	R. R. Co., East Pa., Elliott, Coll., v. -	292
Palmer v. Low, - - - -	60	R. R. Co., Florida Cent., v. Schulte, -	605
"Panama, The City of," Phelps v. - - -	1061	R. R. Co., Florida, Doggett, Receiver, v.	301
Panjaud, Burt v. - - - -	451	R. R. Co., Fort Scott, H. & W., Smith v.	437
Parish v. United States, - - - -	763	R. R. Co. v. Georgia, - - - -	188
Parpart, Gay v. - - - -	841	R. R. Co., Gilman, C. & S., Hinckley,	591
Parsons v. Jackson, - - - -	457	Receiver, v. - - - -	591
Partee, Canal Bank of N. O. v. - - - -	390	R. R. Co., Memphis & Ch., v. Tennessee, -	960
Patterson, Miss. & R. R. Boom Co. v. - -	206	R. R. Co., Mich. Cent., v. Slack, Coll., -	647
Paving Co., Ballard, Follansbee v. - - -	802	R. R. Co. of Missouri, Pacific, v. Ketchum, -	832
Paving Co., Ballard, v. Mulford, - - -	591	R. R. Co., N. O. & Car., Case, Receiver, v.	1004
Pelton, Treas., v. Com. Nat. Bk. of Cleve-	901	R. R. Co., N. Y. C. & H. R., v. Fraloff, -	531
land, - - - -	420	R. R. Co., Richmond & D., Hoge, Comp.	303
Pence v. Langdon, - - - -	387	Gen., v. - - - -	892
People, <i>ex rel.</i> , Northwestern University v.	907	"R. R. Co. v. Shaw v." - - - -	605
People's Bank of Belleville v. Mfrs. Nat. Bk.	705	"R. R. Co. v. Shutte," - - - -	292
People of N. Y., <i>ex rel.</i> , v. Weaver, - -	345	R. R. Co., Sioux City & Pac., United	292
People of U. S. in Utah, Wilkerson v. - -	251	States v. - - - -	973
Perot, United States v. - - - -	308	R. R. Co., South & Nor. Alabama, v. State	612
Perris, Admr., v. Hexamer, - - - -	645	of Alabama, - - - -	196
Perryman, United States v. - - - -	91	R. R. Co., Texas & Pacific, Hough v. -	424
Peters v. Bowman, Admr., - - - -	855	R. R. Co., Union Pacific, v. Comrs. of	143
Phelps v. Harris, - - - -	473	Dodge Co., - - - -	274
Phelps, Assignee, v. McDonald, - - - -	1061	R. R. Co., Union Pacific, Platt v. - -	496
Phelps, The City of Panama v. - - - -	912	R. R. Co., Union Pacific, United States v.	460
Philadelphia, Union Passenger Ry. Co. v.	781	R. R. Co., Vicksburg, S. & T., v. Jackson, -	233
Phillips, <i>Ex Parte</i> , - - - -	833	R. R. Co., Washington & G., v. Varnell, -	319
Phillips v. Gilbert, - - - -	603	R. R. Co., Western N. C., Southern Exp.	950
Phillips v. Moore, - - - -	293	Co. v. - - - -	1068
Phillips, Terhune v. - - - -	1040	R. R. Co., West Jersey, Thomas v. - -	1057
Phillips, Admr., v. Ordway, - - - -	735	Ry. Co., Bur. & S. W., Brooks v. - -	438
Pierce v. Tough, - - - -	735	Ry. Co., Cañon City & S. J., D. & R. G.	272
Pierce v. Wade, - - - -	968	Ry. Co. v. - - - -	438
Pike County, Douglass v. - - - -	972	Ry. Co., Chicago & N. W., v. McKinley, -	438
Pike County, Foote v. - - - -	789	Ry. Co., Denver & R. G., v. Alling, - -	438
Pittsburgh, City of, Pittsburgh Gas Co. v.	789	Ry. Co., Denver & R. G., v. C. C. & S.	438
Pittsburgh Gas Co. v. Pittsburgh, - - -	816	J. Ry. Co., - - - -	872
Platt, Assignee, Stewart v. - - - -	404	Ry. Co., Denver & R. G., <i>Ex Parte</i> , - -	611
Platt, Town of Orleans v. - - - -	424	Ry. Co., Eastern Kentucky, v. Slack, Coll., -	782
Platt v. Union Pacific R. R. Co., - - -	840	Ry. Co., Grand Trunk, v. Walker, - -	550
Pollard v. N. J. R. R. & Trans. Co., - -	265	Ry. Co., Kansas Pacific, Crane, Exr., v. -	289
Pollock, Lyon v. - - - -	803	Ry. Co., Kansas Pacific, v. Twombly,	757
Pompton, Inhabitants of, v. Cooper Union,	77	Admr., - - - -	1081
Powder Co., Giant, v. Cal. Powder Works,	77	Ry. Co., Kan. Pacific, United States v. -	1074
"Powder Co. v. Powder Works," - - -	238	Ry. Co., Little Rock & Ft. Smith, Shaw v.	223
Powell, Orvis v. - - - -	527	Ry. Co., Mil. & St. P., Howard v. - -	912
Powell, Ricker v. - - - -	805	Ry. Co., Nashville & C., v. U. S., - -	291
Powers v. Comly, Coll., - - - -	446	Ry. Co., St. L., I. M. & S., v. Loftin, -	435
Pratt, Cannon, Exr., v. - - - -	786	Ry. Co., Union Passenger, v. Pa., - -	792
Providence Steam Engine Co. v. Hubbard,	322	Ry. & T. Co., Denver Pacific, U. S. v. -	158
Pugh, United States v. - - - -	354	Rankin, Campbell v. - - - -	
Purcell, Grigsby, Admr., v. - - - -	355	Ray, Chesapeake & Ohio Can. Co. v. -	
Purcell, Thomas v. - - - -		Redfield, Exrx., Andreae v. - - - -	

R.

Reed, Colby, Exr., v. - - - - -	484
Reed, <i>Ex Parte</i> , - - - - -	538
Reed v. McIntyre, Assignee, - - - - -	171
"Removal Cases," - - - - -	593
Reynolds v. United States, - - - - -	244
Rice, Assignee, May, Exr., v. - - - - -	797
Rice v. Edwards, Trustee, - - - - -	976
Richmond & D. R. R. Co., Hoge, Comp. Gen., v. - - - - -	303
Ricker v. Powell, - - - - -	527
"Rives, Virginia v." - - - - -	667
Roane, Exr., Denver v. - - - - -	476
Roberts, Town of, v. Bolles, - - - - -	880
Robinson, Hooper v. - - - - -	219
Russell, Hall v. - - - - -	829
Russell, Coll., Wills v. - - - - -	607
Rutledge, Nagle v. - - - - -	772
Ryan v. Central Pacific R. R. Co - - - - -	305

S.

"Sabine, The," The Mayflower v. - - - - -	982
Sage v. Central R. R. Co. of Iowa, - - - - -	394
St. Joseph F. & M. Ins. Co., School Dist. No. 56 v. - - - - -	868
St. Louis, I. M. & S. Ry. Co. v. Loftin, - - - - -	222
St. Louis, Ketchum v. - - - - -	999
St. Louis Nat. Bank v. U. S. Ins. Co., - - - - -	547
St. Louis, N. W. Union Packet Co. v. - - - - -	688
Salamanca Township, Wilson v. - - - - -	330
Samory, Montgomery v. - - - - -	375
Sanders, Keely v. - - - - -	327
San Francisco, City and Co. of, Trenouth v. - - - - -	626
Savings, etc., Co., Freedman's, Holden v. - - - - -	567
Sawyer, Montgomery v. - - - - -	692
Sayles, Hendrie v. - - - - -	176
Schall, Fosdick v. - - - - -	349
Schneider, Admr., Knick. L. Ins. Co. v. - - - - -	694
School Dist. No. 56 v. St. J. F. & M. Ins. Co., - - - - -	868
Schulte, Florida Cent. R. R. Co. v. - - - - -	605
Schuyler County v. Thomas, - - - - -	88
Schwab, <i>Ex Parte</i> , - - - - -	105
Scipio, Town of, v. Wright, - - - - -	1037
Scott, Mills, Admr., v. - - - - -	294
Scull v. United States, - - - - -	164
Sea v. Conn. Mut. L. Ins. Co., - - - - -	772
Second Nat. Bk. of St. Louis v. Grand Lodge of F. & A. M., - - - - -	75
Seibert, Garratt v. - - - - -	84
Selden, Baker v. - - - - -	841
Sellew, Leavenworth Co. Comrs. v. - - - - -	333
Semmes, Burbank v. - - - - -	315
Shaw v. Little Rock & Ft. Smith Ry. Co. - - - - -	757
Shaw v. Merch. Nat. Bk. of St. Louis, - - - - -	892
"Shaw v. R. R. Co.," - - - - -	892
Sherman, Assignee, Hickling v. - - - - -	866
Sherman, Assignee, International Bank v. - - - - -	866
Sherman, Secy. of Treas., U. S., <i>ex rel</i> , v. - - - - -	235
Sherry v. McKinley, Exr., - - - - -	330
Shields, Babbitt, Assignee, v. - - - - -	820
"Shutte, Railroad Co. v." - - - - -	605
Sickles, Snyder v. - - - - -	97
Siebold, <i>Ex Parte</i> , - - - - -	717
Silliman v. United States, - - - - -	987
Simmons v. Wagner, - - - - -	910
Simonds, Admr., Moore v. - - - - -	590
"Sinking Fund Cases," - - - - -	504
Sioux City & Pac. R. R. Co., U. S. v. - - - - -	292
Skinner, Walden, Exr., v. - - - - -	963
Slack, Coll., Eastern Kentucky Ry. Co. v. - - - - -	611
Slack, Coll., Kentucky Improvement Co. v. - - - - -	609

S.

Slack, Coll., Mich. Cent. R. R. Co. v. - - - - -	647
Slaughter v. Glenn, Exr., - - - - -	122
"Sloan, May v." - - - - -	797
Smalls, De Treville v. - - - - -	174
Smith, Admr., v. Ayer, - - - - -	955
Smith, Admr., Butterfield v. - - - - -	868
Smith, Craig v. - - - - -	577
Smith, Admr., v. First Nat. Bk. of West-boro, - - - - -	955
Smith v. Ft. Scott, H. & W. R. R. Co. - - - - -	437
Smith, Glendale Elastic Fabric Co. v. - - - - -	547
Smith, Hussey v. - - - - -	314, 315
Smith, West v. - - - - -	809
Snell v. Atl. F. & M. Ins. Co., - - - - -	52
Snyder v. Sickles, - - - - -	97
Sonneborn, Stewart v. - - - - -	116
Soule v. United States, - - - - -	536
South Carolina, <i>ex rel</i> , v. Gaillard, Treas., - - - - -	837
Southern Express Co. v. West. N. C. R. R. Co., - - - - -	319
South & N. Ala R. R. Co. v. Alabama, - - - - -	973
Southwestern Car Co., Fosdick v. - - - - -	344
Spring Co., Cong. & Emp., v. Edgar, - - - - -	487
Standard Oil Co. of Cleveland, Hatch v. - - - - -	554
Starke, Watt v. - - - - -	826
Steam Engine Co., Prov., v. Hubbard, - - - - -	786
Steffens, United States v. - - - - -	550
Stewart v. Platt, Assignee, - - - - -	816
Stewart v. Sonneborn, - - - - -	116
Stewart, Trenier, Admr., v. - - - - -	1021
Still and Other Property, United States v. - - - - -	399
Stix, Wolf v. - - - - -	309
Stone v. State of Miss. <i>ex rel</i> , - - - - -	1079
Storror, Durant v. - - - - -	961
Strauder v. West Virginia, - - - - -	664
Stringfellow, Exr., v. Cain, - - - - -	421
Supervisors of Calhoun Co. v. Galbraith, - - - - -	410

T.

Tarbet, Flagstaff Silver Min. Co., v. - - - - -	253
Taylor, Union Consol. Silver Min. Co. v. - - - - -	541
Tennessee v. Davis, - - - - -	648
Tennessee, Memphis & Ch. R. R. Co. v. - - - - -	960
Terhune v. Phillips, - - - - -	293
Terry v. Little, - - - - -	864
Texas & Pacific R. R. Co., Hough v. - - - - -	612
"The Abbottsford," - - - - -	168
The Abbottsford v. Johnson, - - - - -	168
"The Florida," - - - - -	893
The Louisville v. Halliday, - - - - -	771
Thomas v. Purcell, - - - - -	355
Thomas, Schuyler Co. v. - - - - -	88
Thomas v. West Jersey R. R. Co., - - - - -	950
Thompson, Myrick v. - - - - -	324
Thompson, United States v. - - - - -	194
Throckmorton, United States v. - - - - -	93
Tice, Admr., v. United States, - - - - -	352
Tilghman, Hartell v. - - - - -	357
Tillson v. United States, - - - - -	543
Tinstman v. First Nat. Bk. of Mt. Pleasant, - - - - -	530
"Tintsman v. Nat. Bk.," - - - - -	530
Tobin, Mayor, etc., of Vicksburg v. - - - - -	690
Tough, Pierce v. - - - - -	735
Town of Brooklyn v. Ætna L. Ins. Co., - - - - -	416
Town of Lyons v. Munson, - - - - -	451
Town of Mt. Pleasant v. Beckwith, - - - - -	699
Town of Mt. Pleasant v. Cornell, Exr., - - - - -	699
Town of Orleans v. Platt, - - - - -	404
Town of Roberts v. Bolles, - - - - -	880
Town of Scipio v. Wright, - - - - -	1037
Town of Weyauwega v. Ayling, - - - - -	470

T.		U.	
Township of Empire v. Darlington,	878	United States, Langford v.	1010
"Trade-Mark Cases,"	550	United States v. Lawson,	860
Trainer, Amoskeag Mfg. Co., v.	993	United States v. Lippitt,	747
Transportation Co. v. Chicago,	336	United States v. McDonough's Legatees,	167
Transportation Co., N. J. R. R., Pollard v.	840	United States v. McKnight,	115
Transportation Co. v. Wheeling,	412	United States, <i>ex rel.</i> , v. Mayor, etc. of Fort	
Transportation Line v. Cooper, Admr.,	382	Scott,	348
Trenier, Admr., v. Stewart,	1021	United States, Merch. Nat. Bk. of Little	
Trenouth v. City and Co. of San Francisco,	626	Rock v.	979
Trigg, Assignee, Kesner v.	83	United States v. Morgan,	519
Trook, Balt. & P. R. R. Co., v.	571	United States v. Murray,	756
"Trust Co., Clark v."	573	United States v. New Orleans,	225, 227, 228
Trust Co. of N. Y. Central, v. First Nat.		United States, Nashville & C. Ry. Co. v.	1074
Bk. of Wyandotte,	876	United States v. 150 Barrels of Whisky,	399
Turrill, Chicago & Alton R. R. Co. v.	1009	United States v. One Still and Other Prop-	
Turrill, Chicago, B. & Q. R. R. Co. v.	1009	erty,	399
Twombly, Admr., Kan. Pac. Ry. Co. v.	550	United States, Parish v.	763
U.		United States v. Perot,	251
Union Consol. Silver Min. Co. v. Taylor,	541	United States v. Perryman,	645
Union Nat. Bk. of St. L. v. Matthews,	188	United States v. Pugh,	322
Union Pac. R. R. Co. v. Comrs. of Dodge Co.,	196	United States, Quinn, Admr., v.	269
Union Pacific R. R. Co., Platt v.	424	United States, Reynolds v.	244
Union Pacific R. R. Co. v. United States,	274	United States, Scull v.	164
Union Pacific R. R. Co. v. United States,	496	United States v. Silliman,	987
Union Pacific R. R. Co., United States v.	143	United States v. Sioux City & Pac. R. R.	
Union Passenger Ry. Co. v. Philadelphia,	912	Co.,	292
United Water-Meter Co. v. Desper,	1024	United States, Soule v.	536
United States, Alvord v.	399	United States v. Steffens,	550
United States v. Ames, Exr.,	295	United States v. Thompson,	194
"United States v. Baltimore,"	167	United States v. 319 Barrels of Whisky,	399
United States, Bechtel v.	1019	United States v. Throckmorton,	93
United States v. Benecke,	192	United States, Tice, Admr., v.	352
United States v. Bowen,	631	United States, Tillson v.	543
United States, Bradley v.	105	United States, Union Pac. R. R. Co. v.	274, 496
United States, Branch, Admr., v.	759	United States v. Union Pacific R. R. Co.,	143
United States v. Burlington & Mo. Riv. R.		United States, West. V. R. R. Co. v.	1068
R. Co.,	198	United States, Williams, Admr., v.	309
United States, Carr v.	209	United States v. Winchester, Exr.,	479
United States v. Central Pacific R. R. Co.,	287	United States v. Wittemann,	550
United States v. Clamorgan,	886	"Utah, Wilkerson v."	345
United States, Clark v.	481	V.	
United States v. Curtis,	571	Vance v. Burbank,	929
United States, D'Auterieve v.	869	Vandenburgh, Cowdrey v.	923
"United States v. Dautrive,"	869	Van Norden v. Morton,	453
United States v. Dawson,	791	Vansant, Trustee v. Electro-Magnetic Gas-	
United States v. Denver Pacific Ry. & T. Co.	291	Light Co.	265
United States, Dumont v.	65	Varnell, Wash. & G. R. R. Co. v.	233
United States v. Ellsworth,	862	Vicksburg, Mayor, etc., v. Tobin,	690
United States, Embry v.	772	Vicksburg, S. & T. R. R. Co. v. Jackson,	460
United States, <i>ex rel.</i> , v. Co. Ct. of Macon Co.,	331	Virginia, <i>Ex Parte</i> ,	667, 676
United States, <i>ex rel.</i> , v. Gaines, Comptroller,	733	"Virginia v. Rives,"	667
United States, <i>ex rel.</i> , v. Sherman, Secy. of		Vose, Yulee v.	355
Treas.,	235	W.	
United States v. Farden,	267	Wade, Pierce v.	735
United States, Farrell v.	321	Wagner, Simmons v.	910
United States v. 50 Barrels Distilled Spirits,	399	Walden v. Skinner, Exr.,	963
United States v. Ford,	399	Walker, Grand Trunk Ry. Co. v.	977
United States v. 400 Barrels Distilled Spirits,	399	Ward, Nat. Sav. Bank of D. C. v.	621
United States v. 400 Packages Distilled		Washington & G. R. R. Co. v. Varnell,	233
Spirits,	399	Washington Market Co. v. Hoffman,	782
United States v. Germaine,	482	Water & Mining Co., Natoma Broder v.	790
United States v. Glab,	273	Watt v. Starke,	826
United States v. Hall,	180	Weatherly v. Bowie,	606
United States v. Hirsch,	539	Weaver, People of N. Y., <i>ex rel.</i> , v.	705
United States Ins. Co., St. L. Nat. Bank v.	547	Weaver, Williams v.	708
United States v. Irvine,	193	Webster Co. v. Litchfield v.	925
United States v. Johnson,	550	Weems, Exrx., Atwood v.	471
United States v. Kan. Pacific Ry. Co.,	289	West v. Smith,	860
United States v. Kimball, Admr.,	835	Western N. C. R. R. Co., Southern Ex. Co. v.	319
United States, King v.	373	West Jersey R. R. Co., Thomas v.	950
United States, Knox Co. Court v.	191		

W.

West Virginia, <i>Strauder v.</i>	664
West. W. R. R. Co. <i>v.</i> United States,	1068
Weyauwega, Town of, <i>v.</i> Ayling,	470
Wheeler <i>v.</i> Factors' & Traders' Ins. Co.,	1055
Wheeling, P. & C. Trans. Co. <i>v.</i> Wheeling,	412
Wheeling, W. P. & C. Trans. Co. <i>v.</i>	412
"Whisky Cases,"	399
Whisky, 150 Barrels, United States <i>v.</i>	399
Whisky, 319 Barrels, United States <i>v.</i>	399
White, Admr., Col. Cent. R. R. Co. <i>v.</i>	860
Whitney <i>v.</i> Cook,	446
Whitney <i>v.</i> Wyman,	1050
Wilkerson <i>v.</i> People of U. S. in Utah,	345
"Wilkerson <i>v.</i> Utah,"	345
Williams, Admr., <i>v.</i> United States,	309
Williams <i>v.</i> Hagood,	51
Williams <i>v.</i> Weaver,	708
Wills <i>v.</i> Russell, Coll.,	607
Wilson <i>v.</i> Goodrich, Assignee,	111
Wilson <i>v.</i> Salamanca Township,	330
Winchester, Exr., United States <i>v.</i>	479

W.

Wirth <i>v.</i> Branson,	86
Wittmann, United States <i>v.</i>	550
Wolf <i>v.</i> Stix,	309
Wolsey <i>v.</i> Chapman,	915
Woodbury Planing Mach. Co. <i>v.</i> Keith,	939
Wood <i>v.</i> Carpenter,	807
Worthington, Admr., <i>v.</i> Mason,	848
Wright <i>v.</i> Blakeslee, Coll.,	1048
Wright <i>v.</i> Nagle,	921
Wright, Town of Scipio <i>v.</i>	1037
Wyman, Whitney <i>v.</i>	1050

Y.

Yankton Co., First Nat. Bk. of Yankton <i>v.</i>	1046
Young <i>v.</i> Bradley,	1044
Yount, Amer. & For. Christian Union <i>v.</i>	888
Yulee <i>v.</i> Vose,	355

Z.

Zabriskie, Crampton <i>v.</i>	1070
-------------------------------	------

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

CASES CITED.

A.		A.	
Abbotsford, The, 98 U. S. 440.	911	Appleby v. Johnson, L. R. 9 C. P. 158. .	825
Abbott v. Allen, 2 Johns. Ch. 519.	92	Arapahoe Co. v. Kan. & P. R. R. 4 Dill.	
Abell v. Heathcote, 4 Bro. Ch. 278; 2 Ves.		277-283.	968
Jr. 98.	857, 858, 859	Armistead's Case, 11 Leigh, 659.	246
Ableman v. Booth, 21 How. 506-516.		Armour v. Alexander, 10 Paige, 571.	314
(XVI., 169-173).	655, 718	Armstrong v. Comr's. 4 Blackf. 208.	711
Ackley v. Finch, 7 Cow. 290.	819	Armstrong v. Treas. of Athens Co., 16	
Adams v. Co. of Logan, 11 Ill. 336.	712	Pet. 285.	607
Adams v. Goddard, 48 Me. 212.	769	Armstrong's Foundry, 6 Wall. 766 (XVIII.,	
Adams v. Jones, 12 Pet. 207.	825	882).	204, 205
Adams v. Jones, 1 Fish. P. C. 527.	941	Arrington v. Liscom, 34 Cal. 365, 366.	64
Adams v. The Island City, 1 Cliff. 210. .	983	Arrowsmith v. Durell, 21 La. Ann. 295. .	378
Adderly v. Storm, 6 Hill, 624.	449	Ashburn v. Poulter, 35 Conn. 553.	487
Adela, The, 6 Wall. 266.	899	Ashbury R. C. & I. Co. v. Riche, L. R. 7	
Adeline, The, 9 Cr. 244.	300	H. L. 653.	951
Adkins v. Thornton, 19 Ga. 325.	295	Ashby v. Sharp, 1 Litt. (Ky.) 156.	821
Admiral, The, 3 Wall. 603, 609, 612 (XVIII.,		Assessors v. Osbornes, 9 Wall. 567-573	
58, 59).	297, 1063	(XIX., 748-750).	159, 232, 660
Ainsworth v. Walmesley, 35 L. J. Eq.		Aston v. Heaven, 2 Esp. 533.	1064
(N. S.) 352-5.	771	Austin v. Cambridgeport, 21 Pick. 215. .	549
Alderson, <i>Ex parte</i> , 1 Madd. 53.	1003	Atchison v. Peterson, 20 Wall. 507 (XXII.,	
Aldrich v. Cooper, 8 Ves. 352.	714	414.	791
Aldrich v. Cooper, Lead. Cas. Eq. Vol. 2,		Atkyns v. Horde, 1 Burr. 119.	620
p. 1, 291 (Ed. 1877).	715	Atlantic, The, v. The Ogdensburgh, 1	
Aldridge v. Johnson, 7 El. & Bl. 885. .	558	Newb. 139.	984
Alexander v. Herr, 11 Pa. 537.	120	Atlee v. Packet Co., 21 Wall. 389 (XXII.,	
Allen v. Armstrong, 16 Ia. 508.	176	619).	208
Allen v. Cent. Val. Co., 21 Conn. 130-372,	373	Atwood v. Fricot, 17 Cal. 37.	436
Allen v. Cerro Gordo Co., 34 Ia. 54.	567	Atty-Gen. v. Hamilton, 1 Madd. 214.	858
Allen v. Mille, 17 Wend. 204.	163	Audubon Co. v. Emigrant Co., 40 Ia. 460	567
Alligator, The, 1 Gall. 145.	299	Averall v. Wade, Ll. & G. (252) 10 Cond.	
Allis v. Ins. Co., 97 U. S. 144, 145.	977, 1043	Ch. 498.	714
Almy v. California, 24 How. 169. (XVI.,		Ayres v. Carver, 17 How. 591 (XV., 179)	840
644).	552	Ayres v. Chicago, 101 U. S. 184 (XXV.,	
Alviso v. U. S. 8 Wall. 337-9, (XIX.,		838).	1075
305).	1023	Ayres v. Pease, 12 Wend. 393.	485
Amer. Bg. Co. v. Heidelbach, 94 U. S. 798			
(XXIV., 144).	343	B.	
Amer. Ins. Co. v. Canter, 1 Pet. 511. 246,	1063	Badger v. Badger, 2 Cliff. 154. .	431, 433, 434
Amer. Print Works v. Lawrence, 1 Zab. 248	981	Badger v. Badger, 2 Wall. 87, 95 (XVII.,	
Amey v. Allegheny, 24 How. 364 (XVI.,		836, 838).	435, 808
614).	227	Bahr v. Arndt, 9 Ia. 39.	229
Amory v. Lawrence, 3 Cliff. 535.	47	Bailey v. Glover, 21 Wall. 346 (XXII.,	
Amoskeag Man. Co. v. Spear, 2 Sand.		638).	59
599-605.	994, 997, 999	Baird v. Bank of Wash., 11 S. & R., 411.	190
Anderson v. Levan, 1 Watts. & S. 334. .	501	Baker's Appeal, 21 Pa. 76.	372
Anderson v. Reeves, .	312	Baker v. Johnson Co., 33 Ia. 151, 186. .	825
Anderson v. Sloan, 1 Col. 33, 484.	822	Baker v. Peterson, 4 Dill. 562.	599
Andrews v. Essex Ins. Co., 3 Mas. 10. .	68	Baker v. Ray, 2 Russ. 75.	827
Andrews v. Garrett, 2 Cent. L. J., 797. .	599	Baldwin v. Mildeberger, 2 Hall. 176.	825
Andrews v. Pond, 13 Pet. 65.	460	Baldwin v. Walker, 21 Conn. 168-180. .	811
Andrews v. Spear, 48 Tex. 587. .	215, 216	Bank of Columbia v. Okely, 4 Wheat. 235	
Ann Caroline, The, 2 Wall. 538 (XVII.,		134, 151	
833).	299	Bank of La. v. Williams, 46 Miss. 629. .	393
Anne, The, 3 Wheat. 435.	899;	Bank of Ogdensburgh v. Arnold, 5 Paige.	
Anspach v. Bast, 52 Pa. 356.	796	38.	285
Appeal of York Co. Bank, 32 Pa. 446. .	372	Bank of Republic v. Millard, 10 Wall. 157	
Applebee v. Percy, L. R. 9 C. 647.	490	(XIX., 899).	529

B.		B.	
Bank of U. S. v. Dandridge, 12 Wheat. 64	329, 788	Berks & D. T. Co. v. Myers, 6 Serg. & R.	307
Bank of U. S. v. Smith, 11 Wheat. 171-5	742	12.....	490
Bank of Vergennes v. Warren, 7 Hill, 91	698	Besozzi v. Harris, 1 Fos. & Fin. 92.....	119
Banks v. Evans, 10 Sm. & M. 35.....	857	Besson v. Southard, 10 N. Y. 236.....	119
Banks, The, v. Poitiaux, 3 Rand. 136....	190	Bethell v. Demaret, 10 Wall. 537 (XIX.,	111
Bap. Asso. v. Hart, 4 Wheat. 1.....	814	1007.....	718
Bargate v. Shortridge, 5 H. of L. Cas. 297	411	Bethell's Case, 1 Salk. 348.....	718
Barker v. Hodgson, 3 Mau. & Sel. 267...	898	Biesenenthal, Matter of, 15 N. B. Reg. 228.	173
Barnard v. Kellogg, 10 Wall. 390.....	769	Bilbie v. Lumley, 2 East, 469.....	301
Barnes v. The Railroads, 17 Wall. 294-299,	309 (XXI., 544, 548).....	Bird v. Hayden, 1 Rob. (N. Y.) 383.....	788
309 (XXI., 544, 548).....	610, 1070	Bish. of Durham v. Liddell, 2 Bro. P. C.	528
Barnes v. Williams, 11 Wheat. 415.....	204	63.....	528
Barn v. Barrow, 61 N. Y. 39.....	825	Bissell v. Jeffersonville, 24 How. 287	366
Barnet v. Nat. Bank, 98 U. S. 555 (XXV.,	212).....	(XVI., 664).....	101, 102
212).....	585	Bissell v. Penrose, 8 How. 334, 341.....	102
Barney v. Dolph, 97 U. S. 652 (XXIV.,	1063).....	Black v. Del. & R. Can. Co., 22 N. J. Eq.	953
1063).....	831, 911	130.....	953
Barney v. Watson, 92 U. S. 449 (XXIII.,	730).....	Blackwell, The, 10 Wall. 1-12 (XIX.,	983
730).....	1050	870-874.....	983
Barnhart v. Riddle, 29 Pa. 96.....	796	Blackwell v. Wright, 73 N. C. 310-313...	996
Barr v. Gratz, 4 Wheat. 213.....	550	Blair v. Miller, 4 Dall. 21.....	354
Barr v. Lapsley, 1 Wheat. 151.....	321	Blanc v. Hertzog, 23 La. Ann. 199.....	696
Barreda v. Silsbe, 21 How. 146-167 (XVI.,	86-93).....	Blanchard v. Bissell, 11 Ohio St. 96.....	704
86-93).....	421, 539, 812	Blanchard v. Putnam, 8 Wall. 420 (XIX.,	74
Barrett v. Kelly, 31 Tex. 476.....	603	433.....	360
Barringer's Case, 3 Ct. of Cl. 358.....	322, 323	Blanchard v. Sprague, 1 Cliff. 288.....	360
Barstow v. Union C. Sil. Min. Co. 10 Nev.	386.....	Bleeker v. Hyde, 3 McLean, 279.....	825
386.....	542	Bliven v. N. E. Screw Co., 23 How. 433	769
Barth v. Clise, 12 Wall. 400 (XX., 393) 901,	1052	(XVI., 514).....	539
Bartlett v. Drew, 57 N. Y. 587.....	887	Bogart, <i>in re</i> , 2 Sawy., 396.....	539
Barton's Hill Coal Co. v. McGuire, 3 Macq.	H. L. Cas. 307.....	Bollman, <i>ex parte</i> , 4 Cr. 75-101.....	656, 718
313, 616		Bond v. Brown, 12 How. 256.....	169
Barton's Hill Coal Co. v. Reid, 3 Macq.	H. L. Cas. 266.....	Bond v. Clark, 6 Allen, 361-3.....	789
616, 617		Boone v. Chiles, 10 Pet. 177.....	589
Basey v. Gallagher, 20 Wall. 670, 680	(XXII., 452, 453).....	Boot v. Franklin, 3 Johns. 208.....	742
455, 791, 827		Bootle v. Blundell, 19 Ves. 500.....	827
Bass v. Fontleroy, 11 Tex. 698.....	712	Bor. of Dunmore's Appeal, 52 Pa. 374...	703
Bassett v. U. S. 9 Wall. 38 (XIX., 548) 169,	1043	Borland v. Thornton, 12 Cal. 440.....	96
Bateman v. Willoe, 1 Sch. & Lef. 201...	95	Boston Bank v. Reed, 8 Pick., 459.....	285
Bates v. Coe, 98 U. S. 31-48.....	947	Boston, The, 1 Sum. 328-341.....	984
Bayley v. Taber, 5 Mass. 286.....	1008	Botsford v. Beers, 11 Conn. 369.....	1005
Bean v. Beckwith, 18 Wall. 510, 515	(XXI., 849, 850).....	Botts v. Williams, 17 B. Mon. 687.....	129
127, 131, 133		Boughton v. Otis, 21 N. Y. 261.....	788
Beard v. Morancy, 2 La. Ann. 347.....	464	Boulton v. Crowther, 2 B. & C. 703.....	338
Beatty v. Wray, 19 Pa. 516.....	478	Bowen v. Chase, 94 U. S., 812 (XXIV., 184)	47
Beaubien v. Beaubien, 23 How. 190 (XVI.,	484).....	Bowlin v. Com'th, 2 Bush. 15.....	685
808		Bowman v. Tallman, 27 How. Pr. 212...	622
Beaver v. Taylor, 93 U. S. 46 (XXIII., 797) 131,	849	Boyd v. Alabama, 94 U. S. 645 (XXIV.,	302).....
Becker v. Van Valkenburgh, 29 Barb. 319	319	302).....	972, 1079
Beckett v. Selover, 7 Cal. 215.....	737	Boyd v. Boyd, 27 Ind. 429.....	809
Beckford v. Wade, 17 Ves. 96.....	434	Boyle v. Zacharie, 6 Pet. 648.....	438
Beckham v. Drake, 9 M. & W. 79.....	301	Brabbitts v. R. W. Co., 38 Mo. 289.....	618
Beckwith v. Racine, 7 Biss. 142-149.....	704	Brabston v. Gibson, 9 How. 263.....	411
Beckwith v. Talbot, 95 U. S. 289 (XXIV.,	496).....	Braden v. La. St. Ins. Co., 1 La. 220...	1057
369		Bradford v. Union Bk. of Tenn., 13 How.	57.....
Bee, The, 1 Ware, 332-344.....	983	57.....	54
Beebe v. Swartwout, 8 Ill. (3 Gilm.) 162...	92	Bradley, <i>Ex parte</i> , 7 Wall., 364 (XIX., 214)	671, 673
Beer Co. v. Mass. 97 U. S. 25 (XXIV.,	989).....	Bradley v. Ballard, 55 Ill. 413.....	854
1079		Bradshaw v. Fane, 2 Jur. (N. S.) 247...	858
Belfast, The, 7 Wall. 624 (XIX., 266)...	300	Branson v. Wirth, 17 Wall. 43 (XXI., 570)	87
Bell v. Percy, 11 Ired. (N. C.) 233.....	119	Brashear v. West, 7 Pet. 608.....	172
Bellmont's Case, 2 Salk. 625.....	643	Brassey v. Chalmers, 16 Beav. 223. 4	DeG. M. & G. 528. 31 Eng. L. &
Beltzhoover v. Com'th, 1 Watts. 126....	301	Eq. 115.....	858
Beman v. Rufford, 1 Sim. N. S. 550.....	953	Brent v. Bk. of Metrop., 1 Pet. 89-92..	741
Benbow v. Iowa City, 7 Wall. 313 (XIX.,	79).....	Brewer v. Brougher, 14 Pet. 178.....	784
227		Brewster v. Wakefield, 22 How. 118 (XVI.,	301).....
Bend v. Hoyt, 13 Pet. 266.....	197	301).....	568
Benfield v. Solomons, 9 Ves. 85.....	46	Bridge Prop. v. Hoboken Co., 1 Wall.	144 (XVII., 576).....
Benner v. Porter, 9 How. 235.....	246	144 (XVII., 576).....	389
Bennett v. Butterworth, 11 How. 669.....	455	Briggs v. Calverly, 8 Term, 629.....	485
Bennett v. Hunter, 9 Wall. 326 (XIX., 672)	472		

B.

Brine v. Ins. Co., 96 U. S., 627 (XXIV., 858)	239
Brinkerhoff v. Marvin, 5 Johns. Ch. 320.	1034
Brisy v. Hogan, 53 Me 554.	1005
Briscoe v. Allison, 43 Ill. 291, 293.	1017
Bristol v. New Chester, 3 N. H., 524.	701
Brockenbrough v. Spindle, 17 Gratt. 22.	829
Brockett v. Brockett, 3 How. 691.	702, 828
Brooke v. Shacklett, 13 Gratt. 301.	815
Brooklyn v. Ins. Co., 99 U. S., 362 (XXV., 416).	880, 884, 1018
Brooklyn Park Comrs. v. Armstrong, 45 N. Y., 234, 247.	704
Brooks v. Fiske, 15 How. 215.	71
Brooks v. Railroad Co., 101 U. S., 443 (<i>infra</i> , 1057).	1078
Brooks v. Stolley, 3 McLean, 523.	360, 861
Broughton v. Pensacola, 93 U. S., 266-269 (XXIII., 896, 897).	702
Brown v. Atwell, 92 U. S., 327 (XXIII., 511).	115
Brown v. Buena Vista Co., 95 U. S., 157, 161 (XXIV., 422, 423).	435, 816
Brown v. Hall, 3 Fish, 531.	944
Brown v. Heathcote, 1 Atk. 160.	818
Brown v. Lunt, 37 Me. 423.	315
Brown v. Maryland, 12 Wheat. 419.	414, 744, 746, 755
Brown v. McFarland, 41 Pa. 129.	478
Brown v. Pendleton, 60 Pa. 419.	1015
Brown v. Piper, 91 U. S., 37 (XXIII., 200).	294, 321
Brown v. Thorndike, 15 Pick. 388.	141
Brown v. Toell, 5 Rand. 543.	83
Brown v. Tucker, 47 Geo. 485.	968
Brown v. Wheeler, 17 Conn. 353.	620, 1067
Browne v. Hare, 3 Hurl. & N. 484; 4 Hurl. & N. 821.	558
Browne v. Strobe, 5 Cr. 303.	968
Brownsville v. Cavazos, 2 Woods, 293.	576
Brownsword v. Edwards, 2 Ves. 243.	1076
Bruce v. U. S., 17 How. 439 (XV., 130).	537
Buchanan v. Smith, 16 Wall. 277 (XXI., 280).	120, 173
Buck v. Ches. Ins. Co., 1 Pet. 151.	221
Buckner v. Calcote, 28 Miss. 432.	809
Budd's Case 3 DeG. F. & J. 297.	450
Buerk v. Imhaeuser, 14 Blatch. 19.	948
Buerk v. Valentine, 9 Blatch. 479.	946
Bullard v. Briggs, 7 Pick. 533.	84
Bulkley v. Andrews, 39 Conn. 523, 525.	811
Bulkley v. U. S., 19 Wall. 37 (XXII., 62).	765
Bundy v. K. & D. M. R. Co., 49 Ia. 207.	1059
Burdick v. McVanner, 2 Den. 170.	819
Burford, <i>Ex parte</i> , 3 Cr. 448.	678, 718
Burhans v. Sanford, 19 Wend. 417.	119
Burnhisel v. Firman, 22 Wall. 170 (XXII., 766).	568
Burr v. Carbondale, 76 Ill. 455.	365, 883, 1018, 1019
Burr v. Duryee, 1 Wall. 575 (XVII., 659).	82
Burr v. Gregory, 2 Payne, 426.	359
Burrell v. Bull, 3 Sand. Ch. 15.	1068
Burrows v. Whittaker, 71 N. Y., 291, 296	557
Burr's Trial, 1 Burr Trial, 416.	246
Burt v. Panjaud, 99 U. S., 180 (XXV., 451).	471
Burwell v. Mandeville, 2 How. 560.	959
Bush v. Lathrop, 22 N. Y. 535.	925
Bushel's Case, 6 How. St. Tri. 999; Vaugh. 135; T. Jones, 13.	719
Buster v. Newkirk, 20 Johns. 75.	490
Butler v. Dunham, 27 Ill. 474.	1017

B.

Butler v. Pa., 10 How. 402.	711
Butz v. Muscatine, 8 Wall. 575-583 (XIX., 490-493).	227, 336, 704
Buxendin v. Sharp, 2 Salk. 662.	489
Byrne v. Fagan, 16 Tex. 391.	218

C.

Cabot, The, 1 Abb. Adm. 150.	221
Cadogan v. Kennett, Cowp. 432-434.	172
Cahoon v. Ring, 1 Cliff. 620.	72
Calcutta Co. v. De Mattos, 33 L. J. (N. S.) Q. B. 214, 322-338.	557
Calcutta Co. v. De Mattos 11 W. R., 1024-1027.	557
Calder v. Bull, 3 Dall. 388.	518
Caldwell v. Cassidy, 8 Cow. 271.	742
Caldwell v. Leiber, 7 Paige, 483.	478
Call v. Lothrop, 39 Me. 434.	487
Callanan v. Madison Co., 45 Ia. 561.	230
Callaway Co. v. Foster, 93 U. S., 567 (XXIII., 911).	89, 412, 805
Callendar v. Marsh, 1 Pick. 418.	338
Camarache, The, 8 Wall. 448-477 (XIX., 397).	984
Cambden v. Home, 4 T. R., 382.	300
Campbell v. Miltenberger, 26 La. Ann. 73.	696
Canal Co. v. Clark, 13 Wall. 311, 322 (XX., 581, 583).	994, 996
Canal Co. v. Gordon, 6 Wall. 561 (XVIII., 894).	1059, 1061
Canedy v. Marcy, 13 Gray, 377.	68
Cannon v. N. O., 20 Wall. 577 (XXII., 417).	690
Cannon v. New Orleans, 20 Wall. 577 (XXII., 417).	415
Cannon v. White, 16 La. Ann. 91.	465
Canter v. Am. & O. Ins. Cos., 3 Pet. 307.	547
Card v. Case, 5 C. B. 632.	489
Carlisle v. Hill, 16 Ala. 406.	584
Carlisle v. U. S., 16 Wall. 147 (XXI., 426).	476
Carnan v. Bowles, 2 Bro. Ch. 84.	179
Carnal v. Banks, 10 Wheat. 181.	630
Caroline, The, v. U. S., 7 Cr. 496.	204, 205
Carpenter v. Buller, 8 Mee. & W. 209-213.	853
Carpenter v. Hale, 8 Gray, 157.	556
Carpenter v. Prov. & W. Ins. Co., 16 Pet. 495.	583
Carr v. Hilton, 1 Curt. 234, 390.	46, 809
Carroll v. Dorsey, 20 How. 207 (XV., 804).	772
Carroll v. E. St. Louis, 67 Ill. 568.	890, 891
Carter v. Rockett, 8 Paige, 437.	1057
Carter v. Smith, 9 Cush. 321.	743
Carver v. Jackson, 4 Pet. 1.	492
Cary v. Dixon, 51 Miss. 593.	393
Case v. Carroll, 35 N. Y. 385.	1068
Case of King's Prerog. in Saltpetre, 12 Coke, 13.	981
Case of State Freight Tax, 15 Wall., 232 (XXI., 146).	755
Cass v. Dillon, 2 Ohio St. 607.	412
Cass Co. v. Johnson, 95 U. S. 360 (XXIV., 416).	114, 227, 969
Castle v. Bullard, 23 How. 172 (XVI., 426).	491
Castro v. U. S., 3 Wall. 47 (XVIII., 163).	354
Catharina Maria, The, L. R. 1 Adm. & Eccl. 53.	307
Cathcart v. Robinson 5 Pet. 264.	966
Cent. R. R. Co. v. Georgia, 54 Ga. 401; 92 U. S., 665.	186, 187
Chambers v. Fisk, 22 Tex. 504.	218
Champlain v. Valentine, 19 Barb. 485-8.	853
Champlin v. Laytin, 18 Wend. 407.	163

C.		C.	
Chandler v. Bekden, 18 Johns. 157.....	221	Cloon v. Gerry, 13 Gray, 201.....	119
Chandler v. Boston, 112 Mass. 200.....	704	Clopton v. Matheny, 48 Miss. 286-295...	852
Chandler v. Bunn, H. & D. Supp. (N. Y.)		Clowes v. Dickinson, 5 Johns. Ch. 235..	714
167.....	817	Clum v. Brewer, 2 Curt. 520.....	179
Chapman v. Shepard, 39 Conn. 413-419.	557	Coal Co. v. Blatchford, 11 Wall. 174 (XX.,	
Chas. Riv. B'g v. Warren B'g 11 Pet. 420 712,	919	180).....	589, 968
Chase v. Heaney, 70 Ill. 268.....	625	Coats v. Holbrook, 2 Sand. Ch. 586-626.	998
Chattahoochee N. Bk. v. Schley, 58 Ga.		Cobbett v. Woodward, L. R. 14 Eq. 407.	844
369.....	751	Cochrane v. Willis, 34 Beav. 359-366....	967
Cherokee Tobacco, The, 11 Wall. 616		Cockerham v. Nixon, 11 Fred. (N. C.) 269	489
(XX., 227).....	631	Coddington v. Richardson, 10 Wall., 516	
Cheslyn v. Dalby, 2 You. & Col. 170 (Exch.		(XIX., 981).....	109
Ch.).....	986	Cofield v. McClelland, 16 Wall. 331 (XXI..	
Chester v. Bank of Kingston, 16 N. Y.		339).....	423
336.....	1036	Cohens v. Virginia, 6 Wheat. 264, 275, 379	
Chic. B. & Q. R. R. v. Iowa, 94 U. S. 155	501	650, 652, 658	
Chic. G. & E. R. R. v. Dane, 43 N. Y. 240	825	Coit v. Robinson, 19 Wall. 274 (XXI., 152)	205
Chic. & A. R. R. v. Morgan, 69 Ill. 492.	307	Colby v. Dennis, 36 Me. 1.....	152
Chic. & I. R. R. v. Pinckney, 74 Ill. 277		Colchester v. Seaber, 3 Burr. 1866.....	703
.....	545, 1018	Cole v. McGlathry, 9 Me. 181.....	809
Chicago v. Rumsey, 10 Chic. L. News, 333		Coleman v. Tennessee, 97 U. S. 509....	635, 636
87 Ill. 348.....	338	Coleman v. Walker, 3 Met. (Ky.) 65....	738
Chic. D. & V. R. R. v. Smith, 62 Ill. 268,		Coles v. Bowne, 10 Paige, 526.....	825
365, 1017, 1018,	1019	Collector v. Day, 11 Wall., 113, 124, 126	
Chinn v. Morris, 1 Ry. & M. 424 (2 Car.		XX., 122, 126).....	680, 683, 684, 685
& P. 361.).....	128	Collector v. Hubbard, 12 Wall. 1, 13,	
Chinnock's Case, 1 Johns. (Eng.) Ch. 714	450	(XX., 272, 276).....	197, 1050
Chirac v. Chirac, 2 Wheat. 259.....	630, 730	Collender v. Dinsmore, 55 N. Y. 200	769
Choppin v. Harmon, 46 Miss. 307.....	393	Collett v. Morrison, 12 E. L. & E. 171....	68
Christ Ch. v. Phila., 24 How. 300 (XVI.,		Collins Co. v. Brown, 3 Kay & J. 423....	997
602).....	712	Collis v. Selden L. R. 3 C. P. 496.....	624
Chris. Univer. v. Jordan, 29 Mo. 68.....	855	Colman v. Crump, 70 N. Y. 573-578....	998
Christmas v. Russell, 5 Wall. 290 (XVIII.,		Coloma v. Eaves, 92 U. S. 484-491 (XXIII.,	
475).....	377, 642	579-581).....	114
Christmas v. Russell, 14 Wall. 69 (XX., 762)	600	Colt v. Lasnier, 9 Cow. 320.....	958
Church Ward. v. Queen, L. R. 1 Q. B. 199	108	Comegys v. Vasse, 1 Pet. 195.....	474, 476
Cincinnati v. White, 6 Pet. 431.....	1067	Com. Bk. of Buff. v. Kortright, 22 Wend.	
Citizens' Bank v. Dixey, 21 La. Ann. 32.	385	348-350.....	698
Citizens' Bk. v. Dugue & L. S. Bk. 5 La.		Comstock v. Crawford, 3 Wall. 396	
Ann. 12.....	1057	(XVIII., 34).....	1055
Citizens' Bank v. Knapp, 22 La. Ann. 117	696	Comrs. of Douglas Co. v. Bolles, 94 U. S.	
City, The, v. Lamson, 9 Wall. 477 (XIX.,		104 (XXIV., 46).....	114
725).....	230	Comrs. of Johnson Co. v. Thayer, 94 U.	
Clafin v. Houseman, 93 U. S. 143 (XXIII.,		S. 631 (XXIV., 133).....	114, 495
840).....	111	Comrs. of Leavenworth v. Sellow, 99 U.	
Clark v. Clark, 17 How. 315 (XV., 77) ..		S., 624 (XXV., 333).....	386
44, 475, 476		Com'th v. Alger, 7 Cush. 53-85.....	427, 663
Clark v. Hackett, 1 Cliff. 280.....	59	Com'th v. Allegheny Co. 40 Pa. 348....	227
Clark v. Iowa City, 20 Wall. 583 (XXII.,		Com'th v. Artman, 3 Grant's Cas. 436....	653
427).....		Com'th v. Casey, 12 Allen, 214-217.....	661
Clark v. Iselin, 21 Wall. 360 (XXII., 568)	819	Com'th v. Com. of Allegheny, 37 Pa. 277	226
Clark v. Mauran, 3 Paige, 373.....	221	Com'th v. Dennison, 24 How. 66 (XVI.,	
Clark v. Smith, 13 Pet. 195.....	438	717).....	673
Clark v. Van Riemsdyk, 9 Cr. 153.....	433	Com'th v. Essex Co., 13 Gray. 239....	510, 515
Clarke v. Bazadone, 1 Cr. 212.....	659	Com'th v. Hitchings, 5 Gray, 482.....	553
Clarke v. Hackett, 1 Black, 77; 1 Cliff. 273	44	Com'th v. Knapp, 10 Pick. 477.....	403
Clarke v. Holmes, 7 H. & N. 937....	617, 618	Com'th v. Palmer, 2 Bush. 570.....	643
Clarke v. Reeder, 1 Speers, 407.....	163	Com'th v. Perkins, 43 Pa. 400.....	227
Clay v. Clay, 26 Tex. 24.....	603	Com'th v. Pittsburgh, 34 Pa. 496.....	227
Clayton v. Frazier, 33 Tex. 91.....	124	Com'th v. Prop. N. Bedford Bridge, 2	
Clayton v. Stone, 2 Paine, 392.....	844	Gray, 350.....	516
Cleavinger v. Reimar, 3 Watts. & S. 486.	1068	Concord v. Portsmouth Sav. Bk., 92 U. S.	
Clearwater v. Meredith, 1 Wall. 40 (XVII.,		625 (XXIII., 628).....	545, 546
608).....	187	Confiscation Cases, 7 Wall. 454 (XIX.,	
Cleeve v. Gascoigne, 1 Amb. 323.....	828	196), 20 Wall. 92 (XXII., 320) ..	
Clements v. Moore, 6 Wall. 299 (XVIII.,		204, 400, 480, 662	
786).....	1067	Conrad v. Shomo, 44 Pa. 193.....	1015
Cleveland v. Boerum, 24 N. Y. 615.....	59	Conrad v. Waples, 96 U. S. 279 (XXIV.,	
Clinton v. Englebrecht, 13 Wall. 484 (XX.,		721).....	215
659).....	246, 315	Conroy v. Vulcan Iron Works, 62 Mo. 35	618
Cliquot's Champagne, 3 Wall. 114 (XVIII.,		Cook v. Champlain Trans. Co., 1 Den. 91	104
116).....	307	Cook v. Fountain, 3 Swanst. 585-592....	963

C.

Cook v. Ligon, 54 Miss. 368-373.....	852
Cook v. Mut. Ins. Co., 53 Ala. 37.....	582
Cook v. Moffat, 5 How. 295.....	411
Cook v. Pennsylvania, 97 U. S. 566 (XXIV., 1015).....	755
Cook v. Tullis, 18 Wall. 332.....	818, 819
Cooke v. Crawford, 1 Tex. 9.....	821
Cooley v. Portwardens, 12 How. 299.....	722
Cooley v. O'Connor 12 Wall. 391 (XX., 446).....	175
Coolidge v. Guthrie, 8 Amer. L. Reg. (N. S.) 22.....	636
Cooper v. Galbraith, 3 Wash. 546.....	574
Cooper v. Phibbs, L. R. 2 H. L. 149-186.	967
Cooper v. Utterbach, 37 Md. 282.....	120
Coover's Appeal, 29 Pa. 9.....	373
Copeland v. Stephens, 1 B. & Ald. 604..	47
Copelin v. Ins. Co., 9 Wall. 461 (XIX., 739).....	169
Coppell v. Hall, 7 Wall. 542 (XIX., 244).	901
Cork & Y. R. Co., <i>In re</i> , L. R. 4 Ch. Ap 748.....	1035
Cornelius v. Ivins, 2 Dutch. 376.....	549
Cornell v. Radway, 22 Wis. 260.....	1005
Cornett v. Williams, 20 Wall. 226 (XXII., 254).....	539
Corning v. Smith, 6 N. Y. 82.....	92
Corwin v. Benham, 2 Ohio St. 36.....	786
Coster v. Murray, 5 Johns. Ch. 522.....	163
Cottle v. Cole, 20 Ia. 482.....	96
Cotton v. Huidekoper, 2 Pa. 149.....	119
Couch v. Couch, 9 B. Mon. 160.....	737
Cousin v. Labatut, 19 How. 207.....	607
Coutts v. Acworth, L. R. 8 Eq. 558.....	910
Cowell v. Springs Co. 100 U. S. 55.....	890
Cowley v. Patch, 120 Mass. 137.....	301
Cox v. Burbridge, 13 C. B. (N. S.) 430..	489
Cox v. U. S., 6 Pet. 172.....	537
Crafton v. Beal, 1 Geo. 322.....	968
Craig v. Flanagan, 21 Ark. 319.....	328
Crane v. Reeder, 15 Abb. L. J. 103.....	599
Cravens v. Duncan, 55 Ind. 347.....	808
Craw v. Easterly, 4 Lans. 513-521.....	789
Crawford v. Burrell Town, 53 Pa. 219..	914
Crawford v. Crawford, 4 Dessau. 176..	95
Crease v. Babcock, 10 Met. 525.....	449
Cremer v. Higginson, 1 Mass. 323.....	826
Crofoot v. Bennett, 2 N. Y. 258.....	557
Cromwell v. Co. of Sac, 94 U. S. 351 (XXIV., 195).....	436, 568, 1074
Crosby v. Huston, 1 Tex. 203.....	218
Cross v. De Valle, 1 Wall. 5 (XVII., 515)	1075
Cross v. Harrison, 16 How. 164.....	641
Cross v. U. S., 1 Gall. 26.....	204
Croxall v. Shererd, 5 Wall. 268 (XVIII., 572).....	738
Cummings v. Nat. Bk., 101 U. S. 153 (XXV., 903).....	903
Cunningham v. Ashley, 45 Cal. 485.....	738
Curley v. Com'th, 84 Pa. 151.....	246
Curran v. Arkansas, 15 How. 304.....	710
Currie, <i>Ex parte</i> , 7 Law Times (N. S.), 486.....	59
Currier v. Gale, 3 Allen. 328.....	319
Curtis v. Roch. & S. R. R. Co., 18 N. Y. 534-543.....	1065
Cutler v. The Columbia, 1 Oreg. 101....	1064
Cutts v. Guild, 57 N. Y. 229.....	925
Dallas Co. v. Huidekoper, 101 U. S. 974 (XXV., 974).....	976
Dalton, etc., R. R. v. McDaniel, 56 Ga. 191.....	888

D.

Dalton v. Rust, 22 Tex. 133.....	124
Daniel v. Mitchell, 1 Story, 172, 188....	67, 433
Daniels v. Lansdale, 43 Cal. 41.....	589
Darling v. Bowen, 10 Vt. 148, 151.....	643
D'Armand v. Pullin, 16 La. Ann. 243....	465
Darnall v. Adams, 13 B. Mon. 273.....	737, 738
Dart. Coll. v. Woodward, 4 Wheat. 518, 644, 675, 708-712.....	135, 512, 518, 710, 914
David v. Cabouret, 1 La. Ann. 171.....	408
Davie v. Briggs, 97 U. S. 628 (XXIV., 1086).....	229
Davies v. Arthur, 96 U. S. 148 (XXIV., 758).....	950, 1050
Davis, The, 10 Wall. 15 (XIX., 875)....	211
Davis v. Braden, 10 Pet. 286.....	638
Davis v. Brown, 94 U. S. 423 (XXIV., 204)	436
Davis v. Gray, 16 Wall. 203 (XXI., 447)
.....	320, 710, 711
Davis v. Smith, 43 Vt. 269.....	1067
Day v. Buffington, 3 Cliff. 387.....	415
Day v. Washburn, 24 How. 352 (XVI., 712).....	1005
Day v. Woodworth, 13 How. 363.....	128
Dayton v. Lash, 94 U. S. 112 (XXIV., 33)	362, 587
Dean v. Bates, 2 Wood. & M. 87.....	984
Dearborn v. Brookline, 97 Mass. 466....	427
Dearborn v. Cross, 7 Cow. 48.....	794
De Armond v. Neasmith, 32 Mich. 231...	307
Dearth v. Baker, 22 Wis. 73.....	489
Decker v. Gammon, 44 Me. 322.....	489
De Groff v. Amer. L. & T. Co., 21 N. Y. 124.....	854
De Groot v. U. S., 5 Wall. 419 (XVIII., 700).....	169
De lafield v. Illinois, 2 Hill. 159.....	405
Delegal v. Highley, 3 Bing. (N. C.) 950..	136
Del. & C. T. B. Co. v. Starrs, 69 Pa. 36..	490
Del. & H. Can. Co. v. Com'th, 43 Pa. 227.	152
De Lizardi v. N. O. Can. & B. Co. 25 La. Ann. 414.....	697
Delmas v. Ins. Co., 14 Wall. 661, 668 (XX., 757, 759).....	111, 389
De Louis v. Meek, 2 Green (Ia.), 55.....
Depere v. Bellevue, 31 Wis. 120, 125....	702
Derrickson v. Smith, 3 Dutch. 166.....	788
Desmare v. U. S., 93 U. S. 605 (XXIII., 959).....	482
De Treville v. Smalls, 98 U. S. 517 (XXV., 174).....	327, 328, 330
De Wolf v. Johnson, 10 Wheat. 367.....	584
Dial v. Reynolds, 96 U. S. 340 (XXIV., 644).....
Dick v. Gilmer, 4 La. Ann. 520.....	954
Dickerson v. Colgrove, 100 U. S. 578, (XXV., 618).....	1067
Dickson v. McCoy, 39 N. Y. 400.....	490
D'ile Roupe v. Carradine, 20 La. Ann. 244.....	385
Dillon v. Barnard, 21 Wall. 430 (XXII., 673).....	301
Dinham v. Bradford, L. R., 5 Ch. App. 519.....	987
Dixon v. Clark, 5 Man. G. & S. 377.....	485
Dixon v. Graham, 16 Ia. 310.....	96
Dixon v. Moyer, 4 Wash. 72.....	178
Dixon v. Yates, 5 B. & Ad. 313-340....	556
Dobbin's Distillery v. U. S., 96 U. S. 401 (XXIV., 638).....	457
Dodd v. Crain, 6 Rob. (La.) 60.....	385
Dodge v. Sheldon, 6 Hill. 9.....	173

D.		E.	
Doe v. Considine, 6 Wall. 458 (XVIII., 869).....	1045	Elting v. Bank of U. S., 11 Wheat. 59,...	421
Doe v. Keeling, 1 Mau. & S. 95.....	549	Elwell v. Tucker, 1 Blackf. 285.....	711
Doe v. Rosser, 3 East, 15.....	620, 1007	Emblem, The, 2 Ware (Daves), 61.....	984
Doe v. Spencer, 2 Exch. 752.....	858	Emerson v. White, 10 Gray, 351.....	486
Doggett v. R. R. Co., 99 U. S. 72 (XXV., 301).....	320	Emigrant Co. v. Co. of Wright, 97 U. S. 339 (XXIV., 912).....	564, 565
Dolby v. Jones, 2 Dev. (N. C.) 109.....	821	Emmons v. Sladden, 9 Off. Gaz. 354.....	179
Dollar Sav. Bk. v. U. S., 19 Wall. 227 (XXII., 80).....	375	Empire v. Darlington, 101 U. S. 87 (XXV. 878).....	1018
Donaldson v. Farwell, 93 U. S. 631 (XXIII., 993).....	818	Emp. City Bank, Matter of, 18 N. Y. 199	449
Donner v. Palmer, 31 Cal. 500.....	63, 64	English v. Johnson, 17 Cal. 107.....	436
Dorr v. Wainwright, 13 Pick. 328.....	382	Equit. L. Ins. Co. v. Slye, 45 Ia. 615.....	1061
Dorrance v. Scott, 3 Wheat. 309.....	393	Erskine v. Mil. & St. P. R. R., 94 U. S. 619 (XXIV., 133).....	293
Doss v. Tyack, 14 How. 297.....	1043	Erskine v. Van Arsdale, 15 Wall. 75.....	197
Douglas v. Fulda, 45 Cal. 592.....	211	Erwin v. U. S., 97 U. S. 392 (XXIV., 1065).....	475
Douglas v. Co. of Pike, 101 U. S. 677 (XXV., 968).....	973, 1007	Esposito v. Bowden, 7 El. & Bl. 763.....	898
Douglass v. Curtis, 5 Mart. (N. S.) 112.....	694	Etting v. Com. Bk. of N. O., 7 Rob. (La.) 459.....	698
Douglass v. Mitchell, 35 Pa. 440.....	763	Etting v. U. S. Bank, 11 Wheat. 59.....	812
Downer v. Smith, 24 Cal. 114.....	63	Evans v. Greenhow, 15 Gratt. 156.....	83
Dows v. Greene, 24 N. Y. 638.....	221	Evans v. St. John, 9 Port. 186-193.....	742
Dows v. McMichael, 2 Paige, 345.....	1076	Evans v. Snyder, 64 Mo. 516.....	620
Drayton v. Wells, 1 Nott. & M. 409.....	247	Everett v. Stone, 3 Story, 446.....	173
Dred Scott Case, 19 How. 393.....	686	Everitt v. Everitt, L. R., 10 Eq. 405.....	910
Droit d'Aubaine, 8 Opin. Atty. Gen. 417	630	Ewbank, The, 1 Sum. 400.....	983
Drury v. Ewing, 1 Bond. 540.....	844	Ewing v. Burnett, 11 Pet. 41.....	319
Dubuque & P. R. R. v. Litchfield, 23 How. 66.....	918, 926	Exchange, The, 7 Cr. 116.....	635
Duchesse, The, Swab. 264.....	299	Exch. Bk. of Colum. v. Hines, 3 Ohio St. 15.....	905
Dugan v. U. S., 3 Wheat. 172.....	538	Exp. Co. v. Kountze, 8 Wall. 342 (XIX., 457).....	320
Duncan v. Lyon, 3 Johns. Ch. 351.....	816		
Dunlop v. Lambert, 6 Cl. & Fin. 600.....	557		
Durant v. Essex Co., 7 Wall. 107 (XIX., 154).....	963		
Duroure v. Jones, 4 T. R. 301.....	319		
Durousseau v. U. S., 6 Cr. 307-314.....	232, 659		
Duvall v. Craig, 2 Wheat. 45.....	92		
Dyer v. Libby, 61 Me. 45.....	557		
Dykens v. Allen, 7 Hill, 497.....	769		
Dynes v. Hoover, 20 How. 65 (XV., 888).....	538		
E.		F.	
Eagle v. Kohn, 84 Ill. 292.....	882	Fairfax v. Hunter, 7 Cr. 603.....	190, 629, 630
East Ang. R. Co. v. E. Coun. R. Co., 11 C. B. 775.....	952	Fairfield v. Gallatin Co., 100 U. S. 47 (XXV., 544).....	971
East Hartford v. Hart. Bg. Co., 10 How. 511.....	711	Faris v. Starke, 3 B. Mon. 4-6.....	119
Eastern Co's R. Co. v. Hawkes, 5 H. L. Cas. 331.....	952	Farmer v. Darling, 4 Burr. 1971.....	119
Eaton v. B. C. & M. R. R., 51 N. H. 504.....	338	Farmer v. Lewis, 1 Bush. 66.....	637
Eckert v. McKee, 9 Bush. 355.....	184	Far. & Mech. Nat. Bk. v. Dearing, 91 U. S. 29.....	195, 213, 585
Edelsten v. Edelsten, 1 DeG. J. & S. 185.....	997	Farnam v. Brooke, 9 Pick. 243.....	434
Edmonson v. Bloomshire, 7 Wall. 306 (XIX., 91).....	354	Farwell v. Bos. & W. R. Co., 4 Met. 49.....	614
Edwards v. Chapman, 1 M. & W. 231.....	164	Fashnacht v. Frank, 23 Wall. 416 (XXIII., 81).....	607
Edwards v. Darby, 12 Wheat. 210.....	323	Faxton v. Faxon, 28 Mich. 159.....	619
Edwards v. Ross, 58 Ga. 147.....	295	Fee v. Fee, 10 Ohio, 469.....	163
Edwards v. Woolfolk, 17 B. Mon. 376.....	738	Fenouille v. Hamilton, 35 Ala. 319.....	583
Ehle v. Brown, 31 Wis. 405-412.....	1081	Fertilizing Co. v. Hyde Park, 97 U. S. 659 (XXIV., 1036).....	712
Eichelberger v. Pike, 22 La. Ann. 142.....	697	Fetridge v. Wells, 13 How. Pr. 386.....	999
Elgee Cotton Cases, 22 Wall. 180 (XXII., 863).....	558	Field v. Schieffelin, 7 Johns. Ch. 150.....	382, 959
Eliz. & Jane, The, 1 Ware, 35.....	983	Field v. U. S., 9 Pet. 182.....	195
Elliott v. Swartwout, 10 Pet. 137.....	197	Filley v. Fassett, 44 Mo., 168-178.....	998
Elmendorf v. Taylor, 10 Wheat. 152.....	546	Finley v. Brown, 22 Ia. 538.....	328
Elmwood v. Marcy, 92 U. S. 289 (XXIII., 710).....	884	Finley v. Lynn, 6 Cr. 249.....	68
Elphinstone v. Bedreechund, 1 Knapp, 316	636	First Nat. Bk. of Ft. Dodge v. Haire, 36 Ia. 443.....	189
Elsineur, The, 1 Wheat. 439.....	579	First Nat. Bk. v. Graham, 79 Pa. 106.....	75
		First Nat. Bk. v. Price, 33 Md. 487.....	788
		Fish v. Kelly, 17 C. B. (N. S.) 194.....	623
		Fisher v. Prince, 3 Burr. 1363.....	487
		Fisk v. Union Pacif. R. R., 6 Blatchf. 362, 8 Blatchf. 243.....	661
		Fitch v. Baldwin, 17 Johns. 161.....	550
		Fitchburg Cot. Man. Corp. v. Melvin, 15 Mass. 268.....	285
		Fitton v. Macclesfield, 1 Vern. 264.....	528
		Fix v. Dierker, 30 La. Ann. 175.....	378

F.

Flack v. Charron, 29 Md. 311.....	373
Fleming v. Gilbert, 3 Johns 527.....	794
Fleming v. Griswold, 3 Hill, 85.....	319
Fletcher v. Peck, 6 Cr. 128.....	1017
Flippin, <i>Ex parte</i> , 94 U. S. 350 (XXIV., 195).....	105
Flora, The, L. R., 1 Adm. & Eccl. 45.....	299
Foden v. Sharp, 4 Johns. 133.....	741
Fogg v. Perkins, 19 N. H. 101.....	185
Follett v. Hall, 16 Ohio, 111.....	768
Foote v. Johnson Co., 6 Ven. L. J. 346.....	969
Forbes v. Gracey, 94 U. S. 762 (XXIV., 313).....	791
Ford v. Fitchburg R. R. Co., 110 Mass. 240, 241, 261.....	615, 618
Ford v. Peering, 1 Ves. Jr. 72.....	301
Ford v. Surget, 97 U. S. 594 (XXIV., 1018).....	636
Ford v. Tilden, 7 La. Ann. 533.....	694
Fortier v. Zimpel, 6 La. Ann. 53, 51, 385, 386.....	344
Fosdick v. Chic. D. & V. R. R.....	344
Fosdick v. Perrysburg, 14 Ohio St. 472.....	227
Fosdick v. Schall, 99 U. S. 235 (XXV., 339).....	344, 345, 398, 419
Foshay v. Ferguson, 2 Den. 617.....	119, 137
Foster v. Dawber, 6 Exch. 839.....	164
Foster v. Essex Bank, 17 Mass. 479 (<i>supra</i>).....	751
Foster v. Neilson, 2 Pet. 253.....	631
Fourniquet v. Perkins, 7 How. 160, 169.....	641
Fowler v. Brantly, 14 Pet. 318.....	460
Fowler v. Down, 1 B. & P. 44.....	47
Fox v. Cooper, 6 Jur. 128.....	1067
Fox v. Cooper, 2 Q. B. 827-937.....	1067
Fox v. Ohio, 5 How. 410.....	655, 724
Frankford R. R. v. Phila., 58 Pa. 119-124.....	914
Franklin Bk. v. Steward, 37 Me. 519, 522.....	698
Franklyn v. Fern, 2 Eq. Cas. Abr. 103.....	46
Franks v. Weaver, 10 Beav. 297.....	998
Freeman v. Cooke, 2 Exch. 654.....	164
Freese v. Browne, 35 N. J. L. 285.....	743
Fremont v. U. S., 17 How. 542-557.....	252, 832
Fretz v. Stover, 22 Wall. 198 (XXII., 769).....	382
Friskie v. Whitney, 9 Wall. 187 (XIX., 668).....	911
Frith, etc., <i>In re</i> , L. R. 3 Ch. Div. 618.....	858, 859
Frost v. McLeod, 19 La. Ann. 69.....	378
Fuller v. Bean, 34 N. H. 290-300.....	557
Furman v. Nichol, 8 Wall. 44-62 (XIX., 370-377).....	704
Furman St., Matter of, 17 Wend. 669.....	209

G.

Gaines v. Fuentes, 92 U. S. 10, 20 (XXIII., 524, 528).....	208, 408
Gaines v. Thompson, 7 Wall. 347 (XIX., 62).....	801
Gaither v. Far. & Mech. Bk., 1 Pet. 37.....	584
Galbraith v. Elder, 8 Watts, 81.....	1067
Gallego v. Atty Gen., 3 Leigh, 450.....	814, 815
Galt v. Galloway, 4 Pet. 332.....	307
Galveston R. R. v. Cowdry, 11 Wall. 459 (XX., 199).....	343
Gardiner v. Miller, 47 Cal. 576.....	64
Gardner v. Barney, 24 How. Pr. 467-469.....	821
Gardner v. Graham, 7 Vin. Abr. 52, pl. 3 1034.....	
Garland, <i>Ex parte</i> , 4 Wall. 333, 378 (XVIII., 366, 370).....	622
Garland, <i>Ex parte</i> , 10 Ves. 109.....	959
Garrison v. Howe, 17 N. Y. 458.....	788, 789
Garrison v. Memphis Ins. Co., 19 How. 312.....	221

G.

Gates v. Salmon, 35 Cal. 576.....	427
Gayler v. Wilder, 10 How. 477.....	177, 178, 179
Gegan v. Bowman.....	876
Gelpcke v. Dubuque, 1 Wall. 175 (XVII., 520).....	230
Genoa v. Woodruff, 92 U. S. 502 (XXIII., 586).....	230
George v. Skivington, L. R. 5 Exch. 1.....	624
Gerrish v. Sweetser, 4 Pick. 374.....	813
Gibbons v. Ogden, 9 Wheat. 201, 203.....	415, 416, 663
Gibbons v. U. S., 8 Wall. 269 (XIX., 453).....	1012
Giblin v. McMullen, L. R., 2 P. C. 335.....	981
Gibson v. Chouteau, 13 Wall. 92 (XX., 534).....	195
Gibson v. D'Este, 2 You. & Col. 542.....	469
Gibson v. Hutchins, 12 La. Ann. 545.....	465
Gibson v. Stevens, 8 How. 384-399.....	555
Gibson v. Warden, 14 Wall. 244 (XX., 797).....	818, 855
Giddings v. Eastman, 5 Paige, 561.....	1068
Gilbert v. Thompson, 14 Minn. 544.....	326
Gill v. Fauntleroy, 8 B. Mon. 185.....	550
Gill v. Pinney, 12 Ohio St. 38.....	1036
Gill v. Wells, 22 Wall. 1-28, 24, 27 (XXII., 699-711, 710, 711).....	71, 946
Gillespie v. Moon, 2 Johns. Ch. 585-596, 593.....	54, 67, 966
Gillette v. Bullard, 20 Wall. 571-575 (XXII., 387, 388).....	822
Gilliam v. Reddick, 4 Ired. 368.....	315
Gillott v. Esterbrook, 48 N. Y. 374.....	997
Gilman v. Ill. & M. Tel. Co., 91 U. S. 603.....	343
Gilman v. Sheboygan, 2 Black. 510.....	712
Gilmour v. Supple, 11 Moo. P. C. 551.....	557
Gladwell v. Steggall, 5 Bing. (N. C.) 733.....	624
Glass v. The Betsey, 3 Dall. 6, 16.....	297, 1063
Glenny v. Smith, 11 Jur. (N. S.) 964.....	998
Gold Min. Co. v. Nat. Bk., 96 U. S. 640 (XXIV., 648).....	190
Golding v. Jennings, 1 Utah, 185.....	447
Good v. Mylin, 8 Pa. 51.....	120
Goodin v. Cin. & W. Can. Co., 18 Ohio St. 169.....	209
Goodman v. Harvey, 4 A. D. & E. 870.....	894, 895
Goodman v. Simonds, 20 How. 343 (XV., 934).....	583, 584, 894, 895
Goodrich v. Beaman, 37 Ia. 563.....	926
Goodyear v. Day, 2 Wall. Jr. 283.....	81
Goodyear v. Ind. Rub. Co., 4 Blatchf. 63.....	359
Goodyear v. Railroad, 2 Wall. Jr. 356.....	
Gordon v. Gilfoil, 27 La. Ann. 265.....	384
Gordon v. Lewis, 2 Sum. 143.....	702
Gordon v. Longest, 16 Pet. 97.....	669
Gordon v. Preston, 1 Watts, 385.....	1035, 1036
Gordon v. U. S., 2 Wall. 561 (XVII., 92).....	1012
Gorham Co. v. White, 14 Wall. 511 (XX., 731).....	997
Gorton v. Massey, 12 Minn. 147.....	428
Gosden v. Tucker, 6 Munf. 1.....	84
Gould v. Oneonta, 71 N. Y. 298.....	1040
Gould v. Sterling, 23 N. Y. 456.....	1039, 1040
Goundie v. Northampton W. Co., 7 Pa. 233.....	190
Gov., etc., of Cast Plate Co. v. Meredith, 4 T. R. 794.....	338, 981
Gowen v. Penobscot R. R. Co., 44 Me. 140.....	152
Graff v. Fitch, 58 Ill. 373.....	558
Graham v. Bayne, 18 How. 60 (XV., 265).....	204
Graham v. Burckhalter, 2 La. Ann. 415.....	955
Graham v. Dickinson, 3 Barb. Ch. 169.....	84

G.		H.	
Graham v. Mason, 5 Fish. 6.....	944	Harper v. Perry, 28 Wis. 57.....	1068
Grand Gulf Bank v. Archer, 8 Sm. & M. 75 (16 Miss.).....	190	Harris v. Barnett, 3 Gratt. 339.....	84
Grant v. Naylor, 4 Cr. 224.....	825	Harris v. Runnels, 12 How. 79.....	190
Gratiot v. U. S., 4 How. 80.....	539	Harris v. Shaw, 13 Ill. 463.....	712
Gratiot v. U. S., 15 Pet. 336.....	116	Harrisburg Bk. v. Com'th, 26 Pa. 451....	789
Graves v. Bos. Mar. Ins. Co., 2 Cr. 419..	54	Harrison's Case, 12 How. St. Tr. 851....	247
Gray v. Blanchard, 8 Pick. 284, 97 U. S. 564.....	530, 549	Harrison v. Myer, 92 U. S., 111 (XXIII., 606).....	896
Green v. Liler, 8 Cr. 229.....	319	Harrod v. Voorhies, 16 La. 254.....	385, 386
Green v. Lond. Omnibus Co., 7 C. B. (N. S.) 290.....	406	Harshman v. Bates Co., 92 U. S. 569 (XXIII., 747).....	331, 969
Green v. Neal, 6 Pet. 291....162, 229, 546,	547	Hart v. Skinner, 16 Vt. 138.....	487
Green v. Reading, 9 Watts, 382.....	338	Hart Bg. Co. v. E. Hartford, 16 Conn. 149-171.....	704
Green v. Van Buskirk, 5 Wall. 307 (XVIII., 599).....	342	Hart Br. Co. v. Granger, 4 Conn. 142-148	813
Greenby v. Wilcocks, 2 Johns. 1.....	92	Hartung v. People, 22 N. Y. 95; 26 N. Y. 154; 28 N. Y. 400.....	348
Greene v. Greene, 2 Gray, 361.....	96	Harvey v. R. I. Loc. Works, 93 U. S. 664 (XXIII., 1003).....	342
Greenway v. Thomas, 14 Ill. 271.....	438	Harwood v. St. C. & M. L. D. Co., 51 Ill. 130.....	1017
Gregory v. McPherson, 13 Cal. 562.....	62	Hasbrouck v. Milwaukee, 25 Wis. 122, 133.....	227, 704
Griffin v. Nichols, 1 Wash. T. 375.....	1064	Hawkins v. Barney, 5 Pet. 457.....	229
Griffin v. Wilcox, 21 Ind. 370.....	643	Hawthorn v. Shedden, 3 Sm. & Gif. 293.	142
Griffith v. Clarke, 18 Md. 457.....	393	Haynes v. Brown, 36 N. H. 545-563.....	788
Griggs v. Gear, 8 Ill. (3 Gilm.) 2.....	528	Hays v. Pacific M. S. S. Co., 17 How. 596 (XV., 254).....	415
Grignon v. Astor, 2 How. 319.....1054, 1055		Hearne v. Marine Ins. Co., 20 Wall. 490 (XXII., 396).....	54, 67
Grisar v. McDowell, 6 Wall. 363, 373, 379, (XVIII., 863, 865, 867) .64, 575, 626,	627	Heath v. Chadwick, 2 Phil. 649.....	46
Groff v. Belche, 62 Mo. 400-402.....	557	Hebert v. Chastant, 22 La. Ann. 152.....	385
Groves v. Slaughter, 15 Pet. 449.....	546	Hedrick v. Hughes, 15 Wall. 123 (XXI., 52).....	63
Grubbs v. Collins, 54 Miss. 485-489.....	852	Hegeman v. West. R. R. Co. 13 N. Y. 9. 1064	
Grumbles v. Sneed, 22 Tex. 565.....	218	Hegueras v. U. S., 5 Wall. 827-834 (XVIII., 469-471).....	1022
Guilbeau v. Mays, 15 Tex. 410.....	218	Henderson v. Lagow, 42 Ill. 360-361....	1017
Gurney v. Howe, 9 Gray, 404.....	307	Henderson v. Mayor of N. Y., 92 U. S. 259	755
Gustaf, The, 1 Lush. 506.....	984	Hendricks v. Robinson, 2 Johns. Ch. 296	438
Guy v. Baltimore, 100 U. S., 434 (XXV., 743).....	756	Henkle v. Roy. Exch. Ins. Co., 1 Ves. 317, 318.....	54
Gwynne v. Neiswanger, 18 Ohio, 400....	176	Henner, <i>Ex parte</i> , 13 Pet. 258.....	726
H.		Henry, Co. of, v. Nicolay, 95 U. S. 619 (XXVI., 394).....	412, 585, 586, 879
Hacker v. Nat. Oil R. Co., 73 Pa. 93 ...	796	Henry v. Raiman, 25 Pa. 354.....	1067
Hadden v. Collector, 5 Wall. 107 (XVIII., 518).....	806	Henry v. V. & A. R. R. Co., 17 Ohio, 187	887
Hale v. Walker, 31 Ia. 344.....	449	Henshaw v. Bissell, 18 Wall. 255 (XXI., 835).....	64
Hall v. Barrows, 12 W. Rep. 322-323. 4 De G. J. & S. 150.....	996	Hensley v. People, 84 Ill. 544.....1018, 1019	
Hall v. Barrows, 10 Jur. (N. S.) 55.....	771	Hepburn v. Griswold, 8 Wall. 623 (XIX., 526).....	517
Hall v. Eq. 365.....	910	Herbert's Case, 3 Co. 11.....	714
Hall v. Russell, 101 U. S., 503 (XXV., 829).....	929, 931	Herbert v. Adams, 4 Mas. 15.....	178, 179
Hall v. Sampson, 35 N. Y. 274.....	819	Herman v. Perkins, 52 Miss. 813.....	852
Hallett v. Collins, 10 How. 187.....	163	Hern v. Nichols, 1 Salk. 289.....	405, 805
Halliburton v. U. S., 13 Wall. 63 (XX., 533).	1069	Hero, The, Brown & Lush, 447.....	299
Halliday v. Holgate, L. R. 3 Exch. 301..	487	Hershey v. Hershey, 18 Ia. 25.....	229
Halsey v. McLean, 12 Allen, 438.....	788	Hess v. Winder, 30 Cal. 355.....	436
Halstead v. Skelton, 5 Q. B. 86.....	742	Hicks v. Foster, 13 Barb. 663.....	120
Hamilton v. Dillin, 21 Wall. 73 (XXII., 528).....	538	Higuera v. U. S., 5 Wall. 827 (XVIII., 469).....	102
Hamilton v. Moore, 3 Dall 321.....	354	Hilborn v. Artus, 4 Ill. (3 Scam.) 344....	882
Hamilton v. Wilson, 4 Johns. 72.....	92	Hill v. Butler, 6 Ohio St., 207.....	92
Hamlin v. Jones, 20 Wis. 536.....	84	Hill v. Simpson, 7 Ves. 153.....	382
Hammond v. Attwood, 3 Madd. 158.....	46	Hill v. Thompson, 94 U. S. 322 (XXIV., 193).....	202, 205, 206
Hancock v. McKinney, 7 Tex. 384.....	216	Hill v. U. S., 9 How. 386.....	195
Hancox v. Fishing Ins. Co., 3 Sum. 132..	221	Hill v. Whitcomb, 1 Holmes, 317.....	360
Hannibal R. R. v. Swift, 12 Wall. 272 (XX., 428).....	534	Higgs v. Wilson, 3 Met. (Ky.) 337.....	129
Harding v. Handy, 11 Wheat. 103.....	702	Hilliard v. Goolld, 34 N. H. 230.....	855
Harkness v. Toulmin, 25 Mich. 80, 620..	620	Hills v. Place, 48 N. Y. 520.....	742
Harlan v. Peck, 33 Cal. 515.....	737		
Harmony v. Mitchell, 1 Blatchf. 599.....	637		
Harnsberger v. Kinney, 6 Gratt. 287.....	83		
Harpending v. Dutch Ch., 16 Pet. 455..162, 229			

H.

Hinckley v. Kreitz, 58 N. Y. 583-587...	822
Hine v. Allely, 1 Nev. & M. 433.....	742
Hinson v. Lott, 8 Wall. 148 (XIX., 387)...	744, 755, 756
Hipp v. Babin, 19 How. 274 (XV., 633)...	68
Hiram, The, 1 Wheat. 440-444.....	966
Hirst v. Denham, L. R. 14 Eq 542-552...	998
Hitchcock v. Galveston, 96 U. S. 341 (XXIV., 659).....	110, 351
Hoadley v. San Francisco, 3 Sawy. 553.	599
Hobday v. Peters, 6 Jur. (N. S.) 794....	1068
Hockenbury v. Carlisle, 5 Watts. & S. 348	1068
Hogan v. Del. Ins. Co. 1 Wash. C.C. 419- 422.....	966
Hoke v. Henderson, 4 Dev. (N. C.) 15-27	508
Holbrook v. Harrington, 16 Gray 102....	382
Holbrook v. Wight, 24 Wend. 169.....	221
Holliman v. Peebles, 1 Tex. 673.....	215, 603
Hollister v. Hollister, 35 Conn. 241 ..	811
Hollon v. Sapp, 4 La. Ann. 519.....	465
Holmes v. Nuncaster, 12 Johns. 395....	114
Holmes v. Worthington, 2 Fos. & Fin. 533	618
Holmes v. Clarke, 6 H. & N. 349.....	618
Holt v. Bancroft, 30 Ala. 193.....	1005
Holyoke Bank v. Burnham, 11 Cush. 183	449
Holyoke v. Haskins, 9 Pick. 259.....	381
Holyoke Co. v. Lyman, 15 Wall. 500, 511, 519 (XXI., 133, 137, 139).....	501, 510, 515, 915
Hope, The, 3 C. Rob. 215.....	984
Hope, The, 1 W. Rob. 155.....	299
Homestead Co. v. Valley R. R., 17 Wall. 153 (XXI., 622).....	919, 926, 927
Hoopes v. Burnett, 26 Miss. 428.....	1067
Horn v. Keteltas, 46 N. Y. 605.....	1036
Horn v. Lockhart, 17 Wall. 570 (XXI., 657).....	382, 473
Hornbuckle v. Toombs, 18 Wall. 648 (XXI., 966).....	246, 571
Hornthall v. Collector, 9 Wall. 560-566 (XIX., 560-562).....	159, 660
Horton v. Thompson, 71 N. Y. 513.....	1040
Houghton v. Jones, 1 Wall. 702-706 (XVII., 503-505).....	608
Houseman v. Girard Asso., 81 Pa. 256...	625
Houseman v. The N. Car., 15 Pet. 40....	300
Hovenden v. Annesley, 2 Sch. & Lef. 607	163
Howard v. Minor, 20 Me. 325-330.....	557
Howland v. Couch, 43 Conn. 47-50....	811
Howell v. State of Md., 3 Gill. 14.....	416
Hoyt, <i>Ex parte</i> , 13 Pet. 279.....	875
Hoyt v. U. S., 10 How. 109.....	537
Hubbard v. N. Y. & H. R. R., 36 Barb. 286.....	411
Hubbard v. Jarrell, 23 Md. 66.....	574
Huckle v. Money, 2 Wils. 205.....	188
Hudson v. Roberts, 6 Exch. 697.....	489
Huftalin v. Misner, 70 Ill. 55.....	37
Hughes v. Blake, 6 Wheat. 453.....	433
Hughes v. Edwards, 9 Wheat. 489, 490...	257, 630, 714
Huguenin v. Basely, 14 Ves. 273.....	910
Hull of a New Ship, The, 2 Ware (Daveis) 203.....	221
Humbert v. Rector, etc., 7 Paige, 195...	434

H.

Humble v. Hunter, 12 Q. B. 315.....	501
Humphries v. Brown, 19 La. Ann. 153..	385
Hunt v. Amidon, 4 Hill, 345.....	92
Hunt v. Rousmaniere, 2 Mas. 366.....	301
Hunt v. Rousmaniere, 8 Wheat. 174-211. 67,	966

H.

Hunt v. Rousmaniere, 1 Pet. 1, 13. 55, 301, 966	
Hunt v. Smith, 17 Wend. 179.....	825
Huntington v. Allen, 44 Miss. 654....	856, 857
Hurd v. Robinson, 11 Ohio St. 232.....	1036
Hurley v. Jones, 97 U. S. 318 (XXIV., 1008).....	399
Hurlstone v. Ashton, 11 Jur. (N. S.) 725.	142
Hussey v. Smith, 99 U. S., 20 (XXV., 314)	423
Hutchinson v. Perley, 4 Cal. 33.....	453
Hyam's Case, 1 DeG. F. & J. 75.....	450
Hyatt v. Taylor, 42 N. Y. 258.....	104
Hyde v. Lathrop, 3 Keyes, 597.....	557

I.

Iasigi v. Brown, 17 How. 183-196 (XV., 203-213).....	812
Iglehart v. Crane, 42 Ill. 261.....	239
Illinois v. Delafield, 8 Paige, 527.....	405
Ill. Cent. R. R. v. Turrill, 94 U. S. 695 (XXIV., 238).....	1009
Imper. Gas Co. v. Lond. Gas Co., 10 Exch. 39	163
Improvement Co. v. Munson, 14 Wall. 442-448 (XX., 867-872).....	981, 1083
Improvement Co. v. Slack, 100 U. S., 648 (XXV., 609).....	587
Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291 (XXIII., 898).....	213, 411
Ind. & St. L. R. R. v. Horst, 93 U. S. 291 (XXIII., 898).....	618
Ingraham v. Disborough, 47 N. Y. 421..	925
Ins. Co. v. Bailey, 13 Wall. 621 (XX., 503)	68
Ins. Co. v. Baring, 20 Wall. 163 (XXII., 252)	221
Ins. Co. v. Boon, 95 U. S. 117 (XXIV., 395).....	850
Ins. Co. v. Comstock, 16 Wall. 258, 259 (XXI., 493).....	202, 205
Ins. Co. v. Dunn, 19 Wall. 214 (XXII., 68) 273, 600, 669	
Ins. Co. v. Folsom, 18 Wall. 249 (XXI., 833)	169, 539
Ins. Co. v. Pechner, 95 U. S. 183 (XXIV., 427).....	357
Ins. Co. v. Ritchie, 5 Wall. 541 (XVIII., 540).....	232
Ins. Co. v. Sea, 21 Wall. 158, 159 (XXII., 511).....	158, 169
Ins. Co. v. Tweed, 7 Wall. 51 (XIX., 66).	850
Ins. Co. v. Wilkinson, 13 Wall., 231 (XX., 621).....	54
Intermingled Cotton Cases, 92 U. S. 651 (XXIII., 756).....	323, 324
Ia. Falls & S. C. R. R. v. Cherokee Co., 37 Ia. 483.....	926
Ia. F. & S. C. R. R. v. Woodbury Co. 38 Ia. 498	926
Irvine v. McKeon, 23 Cal. 472.....	788

J.

Jackson, <i>Ex parte</i> , 96 U. S. 727 (XXIV., 877).....	678
Jackson v. Howe, 14 Johns. 405.....	319
Jackson v. Litch, 62 Pa. 451-455.....	608
Jackson v. Ludling, 21 Wall. 616 (XXII., 492).....	453, 461
Jackson v. Moore, 13 Johns. 513	319
Jackson v. Robins, 15 Johns. 169, 16 Johns. 537.....	319
Jackson v. Smithson, 15 Mee. & W. 563. 488, 489	
Jackson v. Vanderheyden, 17 Johns. 167..	853
Jackson v. Warwick, 17 La. 436.	955

J.		K.	
Jackson v. Wheat, 18 Johns. 40.	319	Kilpatrick v. Sisneros, 23 Tex. 130-134. .	215
James v. Railroad Co., 6 Wall. 752 (XVIII., 885).....	1084	Kimball v. Thompson, 13 Met. 283. . .	372, 373
Jefferson Br. Bk. v. Skelly, 1 Black, 436 (XVII., 173).....	389, 922	King v. Birmingham, 8 B. & C. 29.	190
Jenkins v. Gibson, 3 La. Ann. 203.	465	King v. Hoare, 13 Mees. & W. 494. . . .	300
Jenkins v. Pye, 12 Pet. 241.	484	King v. Katharine Dock Co. 4 B. & Ad. 360.	888
Jenness v. Mt. Hope Iron Co., 53 Me. 20. .	825	King v. Kerr, 5 Ohio, 154.	92
Jennings v. Carson, 1 Pet. Adm. 7.	297	Kind v. Suddis, 1 East, 306.	719
Jennison v. Kirk, 98 U. S. 453.	791	Kinard v. Young, 2 Rich. Eq. 247. . . .	143
Jennison v. Leonard, 21 Wall. 302 (XXII., 539).....	169	Kinnaird v. Miller, 25 Gratt. 107.	815
Jerome v. McCarter, 21 Wall. 17 (XXII., 515), 94 U. S. 734 (XXIV., 136).....	530, 605, 818	Kintrea, <i>Ex parte</i> , L. R. 5 Ch. App. 95. .	450
Jett v. Hempstead, 25 Ark. 462. . . .	1067, 1068	Klinger v. Missouri, 13 Wall. 257 (XX., 635).....	115
Johnson v. Campbell, 49 Ill. 317.	365, 1017	Knight v. Cheney, 5 N. B. Reg. 305. 46, 58, 203	
Johnson v. Chambers, 10 Ired. 287.	192	Knight v. N. Eng. W. Co., 2 Cush. 271-283.	812
Johnson v. Co. of Stark, 24 Ill. 75.	882, 1017	Knight v. Old Nat. Bank, 3 Cliff. 429-431	695
Johnson v. Drummond, 20 Gratt. 419. . .	415	Knox Co. v. Aspinwall, 21 How. 539 (XVI., 208), 24 How. 376 (XVI., 735).....	227, 406, 411, 451, 805
Johnson v. Farwell, 7 Me. 370.	137	Knox v. Exch. Bank, 12 Wall. 379 (XX., 414).....	388
Johnson v. Laflin, 6 Cent. L. J. 131.	450	Kortright v. Buff. Com. Bk., 20 Wend. 91	698
Johnson v. Harmon, 94 U. S. 371 (XXIV., 271).....	827, 829	Kortright v. Cady, 21 N. Y. 343.	1036
Johnson v. Hartshorne, 52 N. Y. 173.	478	L.	
Johnson v. The Lehigh, 13 Mo. 539.	821	Laber v. Cooper, 7 Wall. 565 (XIX., 151)	419
Johnson v. Towsley, 13 Wall. 72 (XX., 485).....	589, 801, 931	Ladd v. Griswold, 9 Ill. (4 Gilin.) 25	372
Johnston v. Smith, 21 Tex. 722.	216	La Grange v. S. W. Tel. Co., 25 La. Ann. 383.	697
Jones v. Conoway, 4 Yeates, 109.	163	Lamar v. Browne, 92 U. S. 187 (XXIII., 650).....	636
Jones v. Lackland, 2 Gratt. 81.	84	Lamb v. Davenport, 18 Wall. 307 (XXI., 759).....	831
Jones v. McMasters, 20 How. 8 (XV., 805).....	214, 215, 216, 455	Lambert v. Conrad, 18 La. Ann. 145. . .	376
Jones v. Perry, 10 Yerg. 59.	516	Lambert v. Heath, 15 Mee. & W. 486. . .	405
Jones v. Wheelis, 4 La. Ann. 541.	465	Lamborn v. Co. Comrs., 97 U. S. 181 (XXIV., 926).....	197
Jordan v. Agawam W. Co., 106 Mass. 571	822	Lamoureux v. Hewit, 5 Wend. 307.	877
Juniata Bank v. Hale, 16 Serg. & R. 157.	741	Lancaster Co. Nat. Bk. v. Smith, 62 Pa. 47	751
Justices, The, v. Murray, 9 Wall. 274 (XIX., 658).....	661	Landes v. Brant, 10 How. 370.	101
Jus. of Pike Co., The, v. Griffin & W. Pl. R. Co., 11 Ga. 246.	922	Lane v. Dorman, 4 Ill. (3 Scam.) 238. .	516, 1017
K.		Lane, <i>Ex parte</i> , 3 Met. 213.	381
Kahl v. Love, 37 N. J. L. 5-8.	624	Lane v. Lutz, 1 Keyes, 213.	818
Kaine, <i>In re</i> , 14 How. 103.	678, 716	Lane v. Morris, 8 Ga. 468.	295
Kalamazoo, The, 9 Eng. L. & E. 557. . .	299	Langdon v. Buel, 9 Wend. 80.	221, 819
Kalamazoo, The, 15 Jur. 885.	299	Lange, <i>Ex parte</i> , 18 Wall. 163, 166 (XXI., 872, 875).....	470, 678, 681, 719, 1043
Kaley v. Shed, 10 Met. 317.	487	Langridge v. Levy, 2 Mees. & W., 519-530	625
Karthauss v. Owings, 6 Har. & J. 134-139	821	Langton v. Higgins, 4 Hurl. & N. 400. . .	557
Kearney, <i>Ex parte</i> , 7 Wheat. 38.	539, 657	Lauing v. N. Y. Cent. R. R., 49 N. Y. 521	618
Kearney v. Case, 12 Wall. 281 (XX., 396)	604	Lanoy v. Duke of Athol, 2 Atk. 444. . .	714
Keely v. Sanders, 99 U. S., 441 (XXV., 327).....	380	Lansing v. Co. Treas., 1 Dill. 522, 528. .	704
Keisselbrack v. Livingston, 4 Johns. Ch. 144	966	Laramie Co. v. Albany Co., 92 U. S. 307 (XXIII., 552).....	701
Keithsburg v. Frick, 34 Ill. 405. 883, 1017, 1019		Lasala v. Holbrook, 4 Paige, 169.	389
Kellar v. Blanchard 21 La. Ann. 41.	406	La Amistad de Rues, 5 Wheat. 385.	899
Kellogg v. Waite, 12 Allen, 530.	184	Latham v. Morgan, 1 Sm. & M. Ch. 611. .	92
Kellogg v. Wood, 4 Paige, 578.	123	Lathrop v. Com. Bank, etc., 8 Dana, 114	889
Kelly v. Harrison, 2 Johns. Cas. 29.	215	Lathrop v. Drake, 91 U. S. 516 (XXIII., 414).....	45
Kelly v. Love, 20 Gratt. 124.	815	Lauman v. Leb. Val. R. R., 30 Pa. 42. .	187
Kelsey v. Nat. Bk. Crawford Co., 69 Pa. 426.	855, 908	Lawrence v. Tucker, 23 How. 14 (XVI., 474).....	1034
Kendall v. Winsor, 21 How. 322 (XVI., 165).....	941	Lawson v. Lawson, 3 Bro. Ch. 272.	141
Kendig v. Dean, 97 U. S. 423 (XXIV., 1061).....	455	Layton v. New Orleans, 12 La. Ann. 515	704
Kennedy v. Green, 3 Myl. & K. 722.	809	Lea v. Robeson, 12 Gray. 280.	301
Kent v. Ricards, 3 Md. Ch. 392.	95	Leach v. House, 1 Bai. (S. C.) 42.	143
Kent v. Walton, 7 Wend. 256.	110	Leather Cloth Co. v. Amer. L. C. Co., 11 Jur. (N. S.) 513.	771
Kentucky v. Dennison, 24 How. 66-107 (XVI., 717-729).....	724, 729, 680, 684	Leavenworth Co. v. Barnes, 94 U. S. 70 (XXIV., 63).....	114
Kieffer v. Ehler, 18 Pa. 388.	406		

L.		L.	
Leavenworth L. & G. R. R. v. U. S., 92	832	165).....	105
U. S. 733 (XXIII., 634).....	443, 791,	Losee v. Clute, 51 N. Y. 494-496.....	625
Leazure v. Hillegas, 7 S. & R. (Pa.) 313	190	Lowell v. Boston, 111 Mass. 460.....	226
Le Caux v. Eden, 2 Doug. 594.....	636	Lowell v. Daniels, 2 Gray, 161-169.....	853
Le Clair v. First Div. St. P. & P. R. R.,		Lucena v. Craufurd, 3 B. & P. 75; 5 B. &	
20 Minn. 9.....	618	P. 269.....	221
Lecompte v. U. S., 11 How. 115-127....	871	Lucht v. Behrens, 28 Ohio, 231.....	959
Lee Co. v. Rogers, 7 Wall. 181-184 (XIX.,		Lucille, The, 19 Wall. 74 (XXII., 64).....	771
160, 161).....	704	Ludlow v. Ramsey, 11 Wall. 581 (XX., 216)	377
Lee v. Haley, L. R. 5 Ch. App. 155.....	996	Luter v. Mayfield, 26 Tex. 325.....	216
Lees v. Manchester & A. Can. Co., 11 East,		Luther v. Borden, 7 How. 1-46.....	637
645.....	915	Lynch v. Bernal, 9 Wall. 316 (XIX., 714)	318
LeFevre v. LeFevre, 4 Serg. & R. 291....	794	Lynde v. The County, 16 Wall. 6 (XXI.,	
Lettingwell v. Warren, 2 Black 599 (XVII.,		272).....	406, 451
261).....	229, 546, 620,	Lytle v. Arkansas, 9 How. 314.....	911
Legal Tender Cases, 12 Wall. 457, 663			
(XX., 287, 348).....	511, 517	M.	
Legard v. Hodges, 3 Bro. Ch. 531; 4 Bro.		McAndrew v. Bassett, 4 De G. J. & S. 380	997
Ch. 422; 1 Ves. Jr. 478.....	1003	McArdle v. Iodine Co., 15 Ir. C. L. 146.	301
Leitch v. Wells, 48 N. Y. 585.....	406	McCabe v. Worthington, 16 How. 86.....	1024
Leon v. Galceran, 11 Wall. 185 (XX., 74).	300	McCall v. McDowell, Deady, 233.....	129
Leonard v. Davis, 1 Black, 476-483 (XVII.,		McCardle, <i>Ex Parte</i> , 7 Wall. 514 (XIX.,	
222-225).....	555	264).....	232
Leonard v. Pitney, 5 Wend. 30.....	163	McClane v. Fitch, 4 B. Mon. 599.....	742
Lessieur v. Price, 12 How. 59.....	832	McClaren v. Franciscus, 43 Mo. 452.....	450
Lett v. Morris, 4 Sim. 607.....	1003	McCullum v. Cushing, 22 Ark. 540.....	825
Levy v. Gadsby, 3 Cr. 180.....	584	M'Cormick v. Sisson, 7 Cow. 715.....	119
Levy v. Langridge, 4 Mees. & W. 337....	625	McCulloch v. Maryland, 4 Wheat. 316, 428	
Lewellen v. Mackworth, 2 Eq. Cas. Abr.		429.....	414, 415, 561,
579.....	737	McCullough v. Md.,.....	730
Lewis v. Com. of Bourbon Co. 12 Kan. 186..	495	McDowell v. Young, 12 Serg. & R. 128..	163
Lewis v. Hillman, 3 H. L. Cas. 607.....	1068	McElmoyle v. Cohen, 13 Pet. 312.....	229
Lewis v. Lyons, 13 Ill. 117.....	1085	McGarrahan v. Mining Co., 96 U. S. 316	
Lexington v. Butler, 14 Wall. 282 (XX.,		(XXIV., 630).....	1008
809).....	230	Macgregor v. Deal, & D. R. Co., 2 L. J.	
Life & F. Ins. Co. v. Mech. Ins. Co., 7		(N. S.) Q. B. 69.....	952
Wend. 31.....	406	McGregor & M. R. R. v. Brown, 39 Ia. 655	926
Life & F. Ins. Co. v. Wilson, 3 Pet. 291.	875	McIndoe v. St. Louis, 10 Mo. 577.....	190
Lincoln v. Claflin, 7 Wall. 132 (XIX., 106)	131	McKee v. Rains, 10 Wall. 22-25 (XIX.,	
Lindsay v. Miller, 6 Pet. 166.....	195	860, 861).....	661
Linford v. Lake, 3 H. & N. 276.....	128, 129	McKim v. Moody, 1 Rand. 58.....	469
Lingham v. Eggleston, 27 Mich. 324-328	557	McKinney v. Saviego, 18 How. 235 (XV.,	
Lippincott v. Pana, 92 Ill. 24.....	545, 1018	365).....	215
Literary Fund v. Dawson, 10 Leigh, 147		McKnight v. Taylor, 1 How. 168.....	435
1 Rob. (Va.) 402.....	815	McKown v. Whitmore, 31 Me. 448.....	809
Litchfield v. Hamilton Co., 40 Ia. 66.....	928	McLaughlin v. Green, 50 Miss. 453-462..	643
Litchfield v. Register, etc., 9 Wall. 575		McLean v. Fleming, 96 U. S. 245-256	
(XIX., 681).....	801	(XXIV., 828-832).....	998
Litchfield v. Webster Co., <i>infra</i> , 925.....	928	McLellan v. U. S., 1 Gall. 227.....	299
Littlefield v. Perry, 21 Wall. 205 (XXII.,		McMahon v. Morrison, 16 Ind. 172.....	187
577).....	359	McMicken v. Perin, 18 How. 507 (XV., 504)	702
Livingston v. Livingston, 2 Johns. Ch.		McMicken v. Smith, 5 Mart. (N. S.) 431.	694
537.....	84	McNeil v. Tenth Nat. Bk., 46 N. Y. 325.	925
Livingston Co. v. Weide, 64 Ill. 427 1018,	1019	McNeil, <i>Ex parte</i> , 13 Wall. 236 (XX., 624)	438
Lloyd v. Alexander, 1 Cr. 365.....	362	McNitt v. Turner, 16 Wall. 362 (XXI., 346)	131
Lloyd v. Fulton, 91 U. S. 485 (XXIII., 365)	910	McNulty v. Batty, 10 How. 72.....	232
Lloyd v. W. Br. Bank, 15 Pa. 172.....	698	McNutt v. Bland, 2 How. 9-15.....	968
Loan Asso. v. Topeka, 20 Wall. 660		McNutt v. Strayhorn, 39 Pa. 269.....	372
(XXII., 460).....	226, 332	Macomber v. Parker, 13 Pick. 175, 183..	557
Locke v. U. S. 2 Cliff. 574.....	491	McQueen v. Farquhar, 11 Ves. 467.....	858
Lofts v. Hudson, 2 Man. & Ry. 481-484.	813	Macrow v. Great W. R. Co., L. R. 6 Q. B.	
Logan v. Le Mesurier, 6 Moore P. C. 116	557	612.....	534
Long v. Converse, 91 U. S. 112 (XXIII.,		McWaters v. Smith, 25 La. Ann. 515.....	378
234).....	157	Macon Co. v. Shores, 97 U. S. 272, 276	
Longley v. Swayne, 4 Heisk. (Tenn.) 506,		(XXIV., 889).....	412, 974
<i>note</i>	312	Maddox v. Graham, 2 Met. (Ky.) 56.....	335
Longmeid v. Holliday, 6 Exch. 761-767..	624	Mader v. Fox, 15 La. 132.....	386
Loop v. Litchfield, 42 N. Y. 351-358....	624	Magdalena S. N. Co., <i>In re</i> , Johns. [V. C.]	
Lorain v. Smith, 37 Ia. 67.....	330	691.....	1035
Lord Morley's Case, 6 How. St. Tr. 770.		Magniac v. Thompson, 7 Pet. 348.....	491
247, 248		Magruder v. Colston, 44 Md. 349.....	449
Loring, <i>Ex parte</i> , 94 U. S. 418 (XXIV.,		Magruder v. Union Bk., etc., 3 Pet. 87-90	741

M.		M.	
Magwire v. Tyler, 8 Wall. 661 (XIX., 323), 1 Black, 195 (XVII., 137).....	101, 102	Metzger, Matter of, 5 How. 176.....	677
Mail Co. v. Flanders, 12 Wall. 130 (XX., 249).....	204, 205	Meyer v. Construction Co., 100 U. S. 457	989
Maillard v. Lawrence, 16 How. 251.....	847	Meyer v. Muscatine, 1 Wall. 384 (XVII., 564).....	411
Major v. Aukland, 3 Hare, 77.....	46	Mich. Bank v. Eldred, 9 Wall. 544 (XIX., 763).....	900
Mallett v. Parham, 52 Miss. 921.....	393	Michoud v. Girod, 4 How. 561.....	163, 431
Mallory v. Merritt, 17 Conn. 178.....	643	Middleport v. Aetna Ins. Co., 82 Ill., 562	545, 1018
Mann v. Cross, 9 Ia. 327.....	229	Miles v. Caldwell, 2 Wall., 35 (XVII., 755).....	436
Manro v. Almeida, 10 Wheat. 473.....	297	Milford v. Worcester, 7 Mass. 48.....	190
Many, <i>Ex parte</i> , 14 How. 24.....	875	Mill v. Hill, 3 H. of L. Cas. 828.....	469
Many v. Jagger, 1 Blatchf. 376.....	944	Miller v. Gaston, 2 Hill. (N. Y.) 188.....	878
Marbury v. Madison, 1 Cr. 137, 672, 676, 677, 728		Miller v. Hull, 4 T. R. 144.....	110
Marcy v. Clark, 17 Mass. 330.....	450	Miller v. Ins. Co., 12 Wall. 295 (XX., 400)	169
Marcy v. Town of Oswego, 92 U. S. 637 (XXIII., 748).....	331	Miller v. Race, 1 Burr. 452.....	894
Marine Ins. Co. v. Young, 5 Cr. 187.....	550	Miller v. Shackleford, 4 Dana, 287, 288..	550
Marquez v. Frisbie, 101 U. S., 473 (XXV., 800).....	931	Miller v. Sherry, 2 Wall. 249 (XVII., 830)	479
Marsh v. Burroughs, 1 Woods. 468.....	887	Miller v. State, 15 Wall. 478, 498 (XXI., 98, 104).....	501, 510, 515
Marsh v. Whitmore, 21 Wall. 185 (XXII., 485).....	435	Miller v. Williamson, 5 Md. 219.....	958
Marshall v. Balt. & O. R. R. Co., 16 How. 314.....	901	Milligan, <i>Ex parte</i> , 4 Wall. (XVIII., 281)..	539
Marshall v. Silliman, 61 Ill. 218.....	883, 1019	Mills v. Duryee, 7 Cr. 483.....	642
Marshall v. Vicksburg, 15 Wall. 146 (XXI., 121).....	1035	Milnor v. Metz, 16 Pet. 221.....	475
Marston v. Hobbs, 2 Mass. 433.....	92	Mims v. West, 38 Ga. 18.....	406
Martin v. Berens, 67 Pa. 463.....	796	Minor v. Mech. Bank, 1 Pet. 46.....	698
Martin v. Dortch, 1 Stew. (Ala.) 479.....	821	Minor's Case, Mrs., 6 Ct. of Cl., 393.....	323
Martin v. Hunter, 1 Wheat. 304-349, 363, 349, 650, 652, 655, 660, 661.....	662	Misner v. Bullard, 43 Ill. 270.....	865, 1017
Martin v. Smith, 1 Dill. 85.....	809	Mo. K. & T. R. R. v. K. & P. R. R., 97 U. S. 491.....	443, 832
Martineau v. Kitching, L. R. 7 Q. B. 436, 449.	556	Missouri v. Macon Co. Ct., 41 Mo. 453..	412
Maryland v. N. Cent. R. R. Co., 18 Md. 193	152	Mitchell v. Lunt, 4 Mass. 654.....	143
Mason v. Eldred, 6 Wall. 231 (XVIII., 783)	301	Mitchell v. Green, 10 Met. 101.....	328
Mason v. Keeling, 12 Mod. 332.....	489	Mitchell v. Harmony, 13 How. 115.....	137, 636, 637
Matthews v. Poythress, 4 Ga. 287.....	894	Mitchell v. Jenkins, 5 B. & Ad. 588....	119
Maxwell v. Kennedy, 8 How. 210.....	816	Mitchell v. Winslow, 2 Story, 630....	818
May v. Burdett, 9 Q. B. 100.....	488	Mizell v. Herbert, 12 Sm. & M. (Miss.) 550.....	438
May v. LeClaire, 11 Wall. 217.....		Moffatt v. Van Doren, 4 Bosw. 610.....	184
(XX., 50).....	123, 621, 1067	Mohr v. Tulip, 40 Wis. 66.....	1054, 1055
Mayor, etc., of Albany v. Cunliff, 2 N. Y. 165-174.....	624	Moies v. Sprague, 9 R. I. 541.....	788
Mayor of Baltimore v. State, 15 Md. 376	703	Montgomery v. Anderson, 21 How. 386, 388 (XVI., 160, 161).....	204, 771
Mayor v. Cooper, 6 Wall. 247 (XVIII., 851)	652	Montgomery v. Bevans, 1 Sawy. 653....	64, 318
Mayor v. Hellman, 91 U. S. 496 (XXIII., 377).....	172	Mooney v. State, 2 Yerg. 578.....	734
Mayor, The, v. Ray, 19 Wall. 468 (XXII., 164).....	110	Moore v. Bracken, 27 Ill. 23.....	1068
Mead v. Ballard, 7 Wall. 290 (XIX., 190)	712	Moore v. Greene, 2 Curt. 202, 19 How. 69-72 (XV., 533, 534).....	434, 808
Meigs v. The Northerner, 1 Wash. T. 91	1064	Moore v. Illinois, 14 How. 13.....	655, 724
Meloy v. Dougherty, 16 Wis. 269.....	857	Moore v. Mississippi, 21 Wall. 636 (XXII., 653).....	115
Melville v. DeWolf, 4 El. & Bl. 844....	897	Moore v. Robbins, 96 U. S. 530, 535 (XXIV., 848-850).....	589, 801, 931
Mercer Co. v. Hacket, 1 Wall., 83 (XVII., 548).....	406, 451, 805	Moore's Case, Miss. 10 Ct. of Cl. 375....	323
Merch. Bk. v. State Bk., 10 Wall. 604- 637 (XIX., 1008-1015).....	404, 405, 751, 805	Moore v. Boughton, 1 Stark, 487.....	769
Merch. M. Nat. Bk. v. Wheeler, 13 Blatchf. 218.....	599	Moran v. Comrs. of Miami Co., 2 Black, 722 (XVII., 342).....	406, 411, 805
Merch. Nat. Bk. v. State Nat. Bk., 3 Cliff. 205, 10 Wall. 655 (XIX., 1021)...	490	Moravia Sem. v. Atwood, 50 Ga. 382....	295
Merle v. Mathews, 26 Cal. 456.....	604	Mordecai v. Lindsay, 19 How. 199 (XV. 624)	204
Merriam v. Langdon, 10 Conn. 460-472..	811	Morgan v. Beloit, 7 Wall. 613-617 (XIX., 203, 204).....	702
Merryman v. Bourne, 9 Wall. 592 (XIX., 683).....	64	Morgan v. Curtenius, 20 How. 1 (XV., 823).....	884
Merserole v. Union Paper Col. Co., 6 Blatchf. 356.....	360	Morgan v. Thornhill, 11 Wall. 65, 74, 75 (XX., 60, 63).....	44, 46, 58, 203
Mesa v. U. S., 2 Black, 721 (XVII., 350)	854	Morris v. Comrs. of Morris Co., 7 Kan. 576	495
Metrop. B. of Excise, v. Barrie, 34 N. Y. 657.....	1079	Morris' Cotton, 8 Wall. 507.....	204, 205
		Morrison v. Robinson, 31 Pa. 456.....	469
		Morrow v. Whitney, 95 U. S. 551 (XXIV., 456).....	64

M.	N.
Morse v. Sherman, 106 Mass. 430, 433. 557	(XXIV., 521, 522)..... 704
Morse v. Toppan, 3 Gray, 411..... 393	N. Orl. & C. R. R. v. Bosworth, 8 La. Ann. 80..... 694
Mostyn v. Fabrigas, 1 Cowp. 161, 180, 1 Sm. L. Cas. (7 Ecl.) 1035..... 138, 643	New O. & Car. R. R. v. Munic. No. 1-7 La. Ann. 148..... 431
Mott v. U. S. Trust Co., 19 Barb. 568. 190	N. Y. v. Miln, 11 Pet. 162..... 755
Motteux v. Lond. Assur. Co. 1 Atk. 545 68	N. Y. Life Ins. Co. v. Hendren, 92 U. S. 287 (XXIII., 710)..... 111
Moultrie Co. v. Sav. Bank, 92 U. S. 631 (XXIII., 631)..... 406, 587, 805	Niagara, The, v. Cordes, 21 How. 23 (XVI., 46)..... 233
Mouse's Case, 12 Coke, 63..... 981	Nichols v. Baxter, 5 R. I. 491..... 1057
Mucklow v. Fuller, Jacob, 198..... 382	Nichols v. Morse, 100 Mass. 523..... 557
Mulhall v. Keenan, 18 Wall. 342 (XXI., 808)..... 550	Nichols v. U. S., 7 Wall. 122 (XIX., 125) 1012
Mulhallen v. Marum, 3 Dru. & W., 317.. 469	Nicholson v. Coghill, 4 B. & C. 21..... 119
Mullarky v. Cedar Falls, 19 Ia. 24..... 110	Nicholson v. Horton, 23 Tex. 47..... 218
Muller v. Dows, 94 U. S. 277 (XXIV., 76)..... 922	Nicolson Pave. Co. v. Jenkins, 14 Wall. 452 (XX., 777)..... 179
Munn v. Illinois, 94 U. S., 113 (XXIV., 77)..... 511	Noble v. Andrews, 37 Conn. 346..... 1045
Murch v. Wright, 46 Ill. 488..... 342	Noonan v. Lee, 2 Black, 499 (XVII., 278) 92
Murdock v. Memphis, 20 Wall., 590-636 (XXII., 429-444), 115, 327, 607, 657, 658	Norris v. Crocker, 13 How., 429..... 232
Murphy v. Phillips, 35 L. Times (N. S.) 477..... 617	Norris v. Jackson, 9 Wall. 125, 128 (XIX., 608, 609)..... 158, 169
Murray v. Clarendon, L. R. 9 Eq. 17.... 301	Norris v. The Island City, 1 Cliff. 219.... 983
Murray v. Hoboken Co., 18 How. 272 (XV., 372)..... 508	Northerner, The, v. The Resolute (Not Rep.)..... 1064
Murray v. Lardner, 2 Wall. 110..... 895	Norton v. Jamison, 23 La. Ann. 102.... 694
(XVII., 857)..... 406, 805, 894, 895	Norton v. Meader, 4 Sawy. 620-624..... 393
Murray v. Long, 1 Wend. 140..... 119	Note v. The Sabine, 2 Woods, 211..... 984
Murray v. Lyburn, 2 Johns. Ch. 441.... 406	Nudd v. Hamblin, 8 Allen, 130..... 809
Murray v. Patrie, 5 Blatchf. 343..... 661	O.
Musquis v. Blake, 24 Tex. 461..... 218	Oakes v. Spaulding, 40 Vt. 347..... 490
Musselman v. Kent, 33 Ind. 453..... 808	Oatman v. Green, 26 Mich. 209-212.... 557
Mussina v. Cavazos, 6 Wall. 355 (XVIII., 810)..... 354	O'Brien v. Witherell, 14 Kan. 616.... 549
N.	O'Connor v. Pittsburgh, 18 Pa. 187.... 388
Nagle v. Macy, 9 Cal. 426..... 453	Octavia, The, 1 Mas. 150..... 299
Nagle v. Stagg, 15 Abb. (N. S.) 348.... 184	Oddie v. Nat. City Bk. N. Y., 45 N. Y. 735 768
Nailor v. Williams, 8 Wall. 107 (XIX., 348)..... 945	Ogden v. Parsons, 23 How. 167 (XVI., 410) 490
Nash v. Adams, 24 Conn. 33..... 810	Ogg v. Shuter, L. R. 10 C. P. 159-162.. 557
Nathan v. Louisiana, 8 How., 73.. 414, 552, 562	Ogilvie v. Knox Ins. Co., 22 How. 380 (XVI., 349)..... 886, 887
Nathan v. Whitlock, 9 Paige, 152..... 450	Ogle v. Lee, 2 Cr. 33..... 638
Nat. Bank v. Com'th, 9 Wall. 353 (XIX., 701)..... 904	Ohio L. & T. Co. v. Debolt, 16 How. 416 971
Nat. Bk. of Com. v. Mech. Nat. Bk., 94 U. S. 437 (XXIV., 176)..... 568	Olcott v. Bynum, 17 Wall. 44 (XXI., 570) 123, 786
Nat. Bank v. Ins. Co., 95 U. S. 673 (XXIV., 563)..... 747	Olcott v. Supervisors, 16 Wall. 678 (XXI., 382)..... 546
Nat. Bank v. Matthews, 98 U. S. 621.... 1052	Oliver v. Alexander, 6 Pet. 143..... 591
Natoma Wat. & Min. Co. v. Clarkin, 14 Cal. 552..... 550	Oliver v. Mut. C. Ins. Co., 2 Curt., 295.. 68
Neal v. Clark, 95 U. S. 704 (XXIV., 586) 312	Oliver v. Piatt, 3 How. 333..... 123, 621
Neely v. People, 13 Ill. 685..... 246	Olmstead v. Partridge, 16 Gray, 381.... 120
Neilson v. Ia. E. R. R. Co., 44 Ia. 71.. 1059, 1061	Olney v. Harvey, 50 Ill. 453..... 703
Nelson v. U. S., 1 Pet. C. C. 235..... 299	Opinion of Justices, etc., 6 Cush. 580.... 704
Nesbitt v. Berridge, 8 L. T. (N. S.) 76.. 301	O'Reilly v. Edrington, 96 U. S. 726 (XXIV., 659)..... 191
Nesmith v. Sheldon, 7 How. 812..... 546	Orleans v. Platt, 99 U. S. 676 (XXV., 404) 451, 805
Newcomb v. Reed, 12 Allen, 362..... 788	Orr v. Hodgson, 4 Wheat. 453..... 630
Newcomb v. Williams, 9 Met. 525..... 382	Orton v. Smith, 18 How. 263 (XV., 393) 856
Newell v. Downs, 8 Blackf., 523..... 119	Orvis v. Powell, 98 U. S., 176 (XXV., 238) 714
Newhall v. Sanger, 92 U. S. 761 (XXIII., 769)..... 305, 306	Osborn v. Bank of U. S., 9 Wheat. 738-823..... 650, 706, 711
Newman, <i>Ex parte</i> , 14 Wall. 152 (XX., 877)..... 875	Osgood v. Allen, 1 Holmes, 185..... 997
Newman v. Alvord, 51 N. Y. 189-196.... 996	Otis v. Cullum, 92 U. S. 447 (XXIII., 496) 405
N. Hempstead v. Hempstead, 2 Wend. 109 704	Otsego Co. Bk. v. Warren, 18 Barb. 290-293 742
New H. Del. B. Co. v. Perry, 11 Ill., 467 882	Overing v. Foote, 43 N. Y. 290..... 857
New Orleans v. Clark, 95 U. S. 644-654	P.
	Pacif. Iron Works v. L. J. R. R. Co., 62 N. Y. 272-274..... 557
	Pacific R. R. v. Ketchum, 101 U. S., 289 (XXV., 932)..... 1001

P.		P.	
Packer v. Nixon, 10 Pet. 408.....	638	People v. Marshall, 6 Ill. (1 Gilm.) 672...	1017
Packet Co. v. Keokuk, 95 U. S., 80 (XXIV., 377)....	746, 690, 691	People v. Mead, 24 N. Y. 114	1040
Packet Co. v. St. Louis, 100 U. S., 423 (XXV., 688).....	746, 691	People v. Mitchell, 35 N. Y. 555.	405
Page v. Parker, 40 N. H. 48.....	490	People v. Mortimer, 46 Cal. 114.....	381
Page v. Wisden, 20 L. T. (N. S.) 435.....	844	People v. Sawyer, 52 N. Y. 296.....	405
Page Co. v. Emigrant Co., 41 Ia. 115....	567	People v. Utica Ins. Co. 15 Johns. 258, 357, 358-380.	583, 747, 1034
Palmer v. Cross, 1 Sm. & M. (Miss.) 48..	853	People v. Weaver, 100 U. S., 539 (XXV., 705).....	902
Palmyra, The, 12 Wheat. 1.....	298	People v. Whipple, 9 Cow. 707.....	402, 403
Parish v. Wheeler, 22 N. Y. 494.....	854, 953	Pepin v. Lachenmeyer, 45 N. Y. 27-33..	641
Parks, <i>Ex parte</i> , 93 U. S. 18 (XXIII., 787)	719	Pequawkett Bridge v. Mathes, 7 N. H. 230	821
Parks v. Ross, 11 How. 372	533	Percy v. White, 7 Rob. (La.) 513	697
Parsons, <i>Ex parte</i> , 1 Hughes, 282.....	227	Perkins v. Towle, 43 N. H. 220.....	137
Parsons v. Bedford, 3 Pet. 433-446, 448..	170, 539, 1023	Perkins v. Lewis, 24 Ill. 208.....	1017
Parsons v. Jackson, 99 U. S., 434 (XXV., 457).....	461	Perry v. Brown, 4 Rid. P. C. 462.....	469
Parton v. Herbey, 1 Gray, 119	190	Perry v. Simpson W. M. Co., 40 Conn. 313-317.....	812
Partridge v. Menck, 2 Barb. Ch. 101....	997	Perrys v. Torrence, 8 Ohio. 522.....	416
Passenger Cases, 7 How. 283-479.	414, 415, 755	Petrie v. Clark, 11 Serg. & R. 377.....	959
Patchin v. Pierce, 12 Wend. 61.....	819	Peugh v. Davis, 96 U. S. 336 (XXIV., 776)	256
Patterson v. Kentucky, 97 U. S. 501 (XXIV., 1115).....	1079	Phalen v. Virginia, 8 How. 163.....	1079
Patterson v. Pitts. & C. R. R., 76 Pa. 359	618	Phelan v. Moss, 67 Pa. 59	895
Patterson v. Syr. Nat. Bk. 80 N. Y. 82..	752	Phelps v. Harris, 51 Miss. 789, 793.....	857
Patterson v. Tatum, 3 Sawy. 164.....	101	Phelps v. Lond. & N. W. R. Co. 19 C. B. (N. S.) 321	534
Patterson v. Wallace, 1 Macq. H. L. Cas. 748.....	616	Phelps v. The Panama, 1 Wash. T. 320.	1064
Pattison v. Hull, 9 Cow. 747	221	Phila. Collector, 5 Wall. 720, 728, 730 (XVIII., 614, 615, 616)....	197, 660, 1050
Patton v. Taylor, 7 How. 159.....	92	Phil. & R. R. R. Co. v. Derby, 14 How. 468-484-486....	624, 1064
Paul v. Virginia, 8 Wall. 168, 177 (XIX., 357, 359).....	208, 552	Phil. & T. R. R. v. Stimpson, 14 Pet. 448-459.....	608
Payne's Case, L. R. 9 Eq. 223.....	450	Phil. W. & B. R. R. v. Quigley, 21 How. 209 (XVI., 75).....	406, 751
Payne v. Sheldon, 63 Barb., 169.....	1005	Phillips v. Mullings, L. R. 7 Ch. App. 244	910
Payne v. Woodhull, 6 Duer, 169.....	184	Phillips v. Page, 24 How. 164 (XVI., 639)	944
Peacock v. Rhodes, 2 Doug. 633	894	Phillips v. Payne, 92 U. S., 130 (XXIII., 649).....	899
Pearce v. Frantum, 16 La. 414, 431....	464, 465	Phoenix, The, 5 C. Rob. 21, 3 Rob. Adm. 373.....	879
Pearce v. Olney, 20 Conn. 544	95	Phyfe v. Wardell, 5 Paige, 268.....	314
Pease v. Peck, 18 How. 599 (XV., 520)...	884	Platt v. Vattier, 9 Pet. 416.....	435
Peer v. Humphrey, 2 Ad. & E. 495.....	178	Pickard v. Sears, 6 Ad. & E., 474	164, 702
Peerce v. Robinson, 13 Cal. 116.....	257	Pickering v. Truste, 7 T. R. 54.....	437
Peete v. Morgan, 19 Wall. 581 (XXII., 201).....	415, 755	Pickstock v. Lyster, 3 Mau. & S. 371	172
Peggy, The, 4 C. Rob. 305.....	299	Picquet v. Curtis, 1 Sum. 478.....	741
Pegram v. Comrs. Cleaveland Co., 65 N. C. 114.....	335	Pierce v. Milwaukee Con. Co. 38 Wis. 253	887
Pelham v. Rose, 9 Wall. 103 (XIX., 602)	480	Pierson v. Eagle Screw Co., 3 Story, 405	73
Pelton v. Nat. Bk. 101 U. S., 143 (XXV., 901).....	904	Pinch v. Anthony, 8 Allen, 536.....	1003
Pendleton v. Kinsley, 3 Cliff, 416, 421, 233.	1065	Pippin v. Sheppard, 11 Price, 400.....	624
Pennock v. Dialogue, 2 Pet. 19.....	73	Pitcher v. Bailey, 8 East 171.....	485
Pennoyers v. Neff, 95 U. S. 714, 744 (XXIV., 565, 576).....	238, 418, 1018, 1054	Pitkin v. Pitkin, 7 Conn. 307.....	959
Penny v. Martin, 4 Johns. Ch. 566	301	Planters Bank v. Sharp, 4 Sm. & M. (12 Miss.) 75.....	190
Penn. Coll. Cases, 13 Wall. 190, 218 (XX., 550, 554)....	188, 915	Planters Bk. v. Union Bk. 16 Wall. 483, 495 (XXI., 473, 478).....	641, 643, 897
Penn. v. Ld. Baltimore, 1 Ves. 444	476	Platt v. Gilchrist, 3 Sandf. 118	92
Penn. v. Wheeling Bg. Co. 13 How. 518-563.....	656	Pleasants v. Fant, 22 Wall. 116, 121 (XXII., 780, 782).....	533, 981
People v. Banker, 8 How. Pr. 258.	486	Plumb v. Tubbs, 41 N. Y. 442	549
People v. Burns, 5 Mich. 114.....	427	Police Jury v. Britton, 15 Wall. 566 (XXI., 251).....	110
People v. Collins, 19 Wend. 56	336	Police Jury v. Duralde, 22 La. Ann. 107.	696
People v. Commissioners, 4 Wall. 244 (XVIII., 344).....	707	Polk v. Wendal, 9 Cr. 87.....	546
People v. Dolan, 36 N. Y., 59.....	706	Pollard v. Bailey, 20 Wall. 520 (XXII., 376).....	295, 865, 887
People v. Dupuyt, 71 Ill. 651.....	365	Pomeroy v. Bank of Ind., 1 Wall. 592 (XVII., 638).....	170
People v. Gerke, 5 Cal. 381.....	631	Pontchartrain R. R. v. Heirne, 2 La. Ann. 129.....	698
People v. Gilbert, 18 John. 227.....	195	Popplewell v. Pierce, 10 Cush. 509.....	488
People v. Hartung, 23 How. Pr. 314....	348		
People v. Ingersoll, 58 N. Y. 1.....	156		

P.

Porterfield v. Clark, 2 How. 125.....	162
Postlethwaite's Appeal, 68 Pa. 477.....	141
Postlewait v. Howes, 3 Ia. 365.....	1005
Potter v. Duffield, L. R. 18 Eq. 4.....	369
Powell v. Jennings, 3 Jones (N. C.) 547..	184
Preston v. Boston, 12 Pick. 14.....	197
Preston v. Walker, 26 Ia. 205.....	230
Price v. Frankel, 1 Wash. T. 43.....	1064
Priestley v. Fowler (<i>supra</i>).....	617
Priestley v. Fowler, 3 Mees. & W. 1.....	616, 617
Prigg v. Penn. 16 Pet. 539.....	666, 732
Prior v. Talbot, 10 Cush. 1.....	382
Prop. of Ken. Pur. v. Springer, 4 Mass. 416.....	319
Protector, The, 11 Wall. 82 (XX., 47).....	590
Providence Bank v. Billings, 4 Pet. 514, 563.....	414, 562, 571
Pueblo Case, The, 4 Sawy. 563.....	575
Pullman v. Upton, 96 U. S., 328 (XXIV., 818).....	449
Pumpelly v. Green Bay Co. 13 Wall. 166 (XX., 557).....	338
Purvis v. Coleman, 21 N. Y. 111.....	104
Putnam v. Ritchie, 6 Paige, 390.....	469

Q.

Quackenboss v. Lansing, 6 Johns. 49....	106
Queen v. Ledgard, 1 Ad. & E. (N. S.) 614	888
Queen v. The Victoria P. Co., 1 Ad. & E. (N. S.) 544.....	888
Quincy, M. & P. R. R. v. Morris, 84 Ill. 410, 411.....	884, 1019

R.

Rader v. South E. Road, 36 N. J. L. 273	381
Raggett v. Findlater, L. R., 17 Eq. 29....	994
Railway Co. v. Ailing, 99 U. S. 463 (XXV., 438).....	872
Railroad Co. v. Barron, 5 Wall. 90-105 (XVIII., 591-594).....	1065
Railroad Co. v. Chamberlain, 6 Wall. 748 (XVIII., 859).....	1084
Railroad Co. v. Collector, 100 U. S. 595 (XXV., 647).....	1070
Railroad Co., <i>Ex parte</i> , 95 U. S. 221 (XXIV., 355).....	840
Railroad Co. v. Fort, 17 Wall. 553-557 (XXI., 739-740).....	615
Railroad Cos v. Gaines, 97 U. S. 697 (XXIV., 1091).....	224
Railroad Co. v. Gladmon, 15 Wall. 401 (XXI., 114).....	618
Railroad Co. v. Grant, 98 U. S. 398 (XXV., 231).....	231, 529, 571, 939
Railroad Co. v. Howard, 7 Wall. 392 (XIX., 117).....	908
Railroad Co. v. James, 6 Wall., 750 (XVIII., 854).....	1084
Railroad Co. v. McClure, 10 Wall. 511 (XIX., 997).....	388
Railroad Co. v. Maine, 96 U. S. 499, 510 (XXIV., 836, 840).....	187, 304, 502, 515
Railroad Co. v. Neal, 1 Wood, 353.....	96
Railroad Co. v. Peniston, 18 Wall. 5 (XXI., 787).....	156
Railroad Co. v. Rock, 4 Wall. 177 (XVII., 381).....	388
Railroad Co. v. Rose, 95 U. S. 78 (XXIV., 376).....	1070
Railroad Co. v. Smith, 9 Wall. 95 (XIX., 599).....	443
Railroad Co. v. Soutter, 13 Wall. 517	

R.

(XX., 543).....	469
Railroad Co. v. Tennessee, 101 U. S., 337 (XXV., 960).....	973
Railroad Co. v. Trimble, 10 Wall. 367 (XIX., 948).....	179
Railway Co. v. McShane, 22 Wall. 444 (XXII., 747).....	198
Railway Co. v. Prescott, 16 Wall. 603 (XXI., 373).....	515
Railway Co. v. Whitton, 13 Wall. 270 (XX., 571).....	651, 676
Randall v. Howard, 2 Black, 585 (XVII., 269).....	1027
Randolph Co. v. Post, 93 U. S. 502 (XXIII., 957).....	114
Rankin v. Campbell, 1 Mont. 300.....	436
Rathbone v. Orr, 5 McLean, 131.....	178
Raulston v. Jackson, 1 Sneed, 128.....	119
Ravenga v. Mackintosh, 2 B. & C. 693.....	120
Ray Co. v. Vancycle, 96 U. S. 675 (XXIV., 800).....	405, 805
Read v. Sowerby, 3 Mau. & S. 78.....	130
Redmond v. Dickerson, 1 Stockt., 507....	301
Reed v. Norris, 2 Myl. & Cr., 361.....	1068
Reedsides v. Walker, 11 How. 272.....	195
Reform, The, 3 Wall. 628 (XVIII., 109).....	640
Regents of Univ. Md. v. Williams, 9 Gill. & J. 365.....	711
Reg. v. Scaife, 17 Ad. & E. (N. S.) 242....	247
Reg. v. Wagstaffe, 10 Cox Cr. Cas. 531....	250
Removal Cases, 100 U. S. 457 (XXV., 593).....	840, 848, 936
Respublica v. Sparhawk, 1 Dall. 357-362	981
Rex v. Foxcroft, 2 Burr. 1017.....	971
Rex v. Garside, 2 Ad. & E. 275.....	402
Rex v. Huggins, 2 Ld. Raym. 1574.....	489
Rex v. Lee, Russ. & Ry. 361.....	402
Rex v. Rudd, 1 Cowp. 332.....	400, 401
Rex v. Rudd, 1 Leach. C. C. 115, 125....	401, 402
Rex v. Brunton, Russ. & Ry. 454.....	402
Reynolds v. Comrs. Stark Co., 5 Ohio, 204	1034
Rhea v. Taylor, 8 La. Ann. 23.....	385
Rhode Island v. Mass., 15 Pet. 233, 27. 167,	816
Rice v. Barnard, 20 Vt. 479.....	372
Rice v. Cunningham, 29 Cal. 492.....	63
Rice v. Edwards, 101 U. S. 976 (XXV., 976).....	1043
Rice v. Railroad Co., 1 Black, 358 (XVII., 147).....	915
Rich v. Lambert, 12 How. 347.....	591
Rich v. Lippencott, 2 Fish. 1.....	178
Richardson, <i>Ex parte</i> , 3 Madd. 138.....	959
Richardson v. Boston, 19 How. 269 (XV., 642).....	533
Riche v. Asbury R. C. & I. Co., L. R. 9 Exch. 224.....	952
Riddell v. Ebinger, 6 La. Ann. 407.....	386
Riddle v. Baker, 13 Cal. 295.....	96
Riddle v. Varnum, 20 Pick. 280-283.....	557
Bidgway v. Wharton, 6 H. of L. Cas. 238	986
Riggin v. Magwire, 15 Wall. 549 (XXI., 232)	313
Riggs v. Murray, 2 Johns. Ch. 565.....	910
Riggs v. State, 3 Cold. 87.....	643
Riggs v. White, 4 Heisk. (Tenn.) 503....	312
Riley v. Wells, 76 U. S. (XIX., 648).....	919, 920, 926, 929
Ringgold Co. v. Allen, 42 Ia. 697.....	567
Robb v. Mudge, 14 Gray, 534.....	372
Roberts, <i>Ex parte</i> , 15 Wall. 384 (XXI., 131).....	1043
Roberts v. Bolles, 101 U. S., 119 (XXV., 880).....	1019

R.		S.	
Roberts v. Tunstall, 4 Hare, 269.....	434	Sanderson v. Stockdale, 11 Md. 563.....	1005
Robertson v. Carson, 19 Wall. 94 (XXIII., 178).....	380	Sandusky v. Nat. Bank, 23 Wall. 289 (XXIII., 155).....	202
Robertson v. Fleming, 4 Macq. H. of L. Cas. 167-169.....	624	Sanford v. McLean, 3 Paige, 117.....	221
Robertson v. Smith, 18 Johns. 459.....	301	Santissima Trinidad, The, 7 Wheat. 283, 496.....	899
Robinson, <i>Ex parte</i> , 19 Wall. 505 (XXII., 205).....	673	Sarah, The, 8 Wheat. 391.....	204, 205, 480
Robinson v. Campbell, 3 Wheat. 212.....	455	Sarah Ann, The, 2 Sum. 211.....	555
Robinson v. Imp. Sil. Min. Co., 5 Nev. 44	542	Sarch v. Blackburn, 1 Moo. & M. 505, 4 Car. & P. 297.....	490
Robinson v. Plimpton, 25 N. Y. 484.....	821	Savage Man. Co. v. Armstrong, 19 Me. 147	557
Robinson v. Powell (Miss. MS. Rep.).....	852	Sawyer v. Turpin, 91 U. S. 114 (XXIII., 235).....	819
Rockhold v. Rockhold, 92 U. S. 129 (XXIII., 507).....	111	Schmidt v. Braunn, 10 La. Ann. 26.....	954
Rock Riv. Bank v. Sherwood, 10 Wis. 230	190	Schofield v. Ferrers, 47 Pa. 194.....	119
Roemer v. Simon, 95 U. S. 214-220 (XXIV., 384-387).....	944	Schuchardt v. Allens, 1 Wall. 369 (XVII., 646).....	533
Rogers v. Dutt, 13 Moo. P. C. C. 209-236	643	Schulenberg v. Harriman, 21 Wall. 44 (XXII., 551).....	443, 832
Rohde v. Thwaites, 6 B. & C. 388.....	558	Schuyler County v. Thomas, 98 U. S. 169 (XXV., 88).....	586, 805
Roosa v. Crist, 17 Ill. 450.....	882	Scotland Co. v. Thomas, 94 U. S. 682.....	
Rosevelt v. Brown, 11 N. Y. 148.....	449	(XXIV., 229).....	89, 90, 331, 412, 805, 879
Ross v. U. S., 11 Ct. of Cl. 344 (<i>note</i>).....	323	Scott v. Nat. Bk. Ches. Val., 72 Pa. 471.....	751
Ross' Case, 12 Ct. of Cl. 565.....	323	Scull v. U. S., 98 U. S. 410-418, 167, 836, 837, 871	
Rosson v. Anderson, 9 B. Mon. 423.....	787	Seaburn v. Seaburn, 15 Gratt. 423.....	814, 815
Roth v. Smith, 54 Ill. 432.....	128	Seaman v. Stoughton, 3 Barb. Ch. 348.....	173
Rouse v. Southard, 39 Me. 404.....	809	Seaver v. Bigelows, 5 Wall. 208 (XVIII., 595).....	591
Rowan v. Runnels, 5 How. 134.....	546, 971	Secretary v. McGarrahan, 9 Wall. 298 (XIX., 579).....	801
Rowe v. Young, 2 Bligh 391-395; 2 Brod. & B. 165.....	741, 742	Sedam v. Williams, 4 McLean, 51.....	301
Royal Brit. Bk. v. Turquand, 6 El. & Bl. 327.....	406, 805	Seixo v. Provezende, L. R. 1. Ch. App. 192-196.....	998
Rubber Co. v. Goodyear, 9 Wall. 788, 805 (XIX., 566, 828).....	528, 1075	Sellards v. Zomes, 5 Bush. 90.....	642
Rubey v. Shain, 54 Mo. 207.....	114	Semmes v. Burbank, 28 La. Ann. 694.....	317
Ruch v. Rock Island, 97 U. S. 693 (XXIV., 1102).....	549	Semmes v. U. S., 91 U. S. 21 (XXIII., 193).....	316
Ruffin, <i>Ex parte</i> , 6 Ves. 119.....	372	Sere v. Pitot, 6 Cr. 332.....	438
Ruggles v. Nantucket, 11 Cush. 433.....	981	Sessions v. Johnson, 95 U. S. 347 (XXIV., 596).....	300, 301
Runyan v. Coster, 14 Pet. 122.....	190, 889	Settgest v. Scrimpf, 35 Tex. 323.....	216
Russell v. Blake, 2 Pick. 505.....	469	Sexton v. Wheaton, 1 Amer. L. Cas. 59 (8 Wheat. 229).....	438
Russell v. Carrington, 42 N. Y. 118-125	553	Sexton v. Wheaton, 8 Wheat. 229.....	909
Russell v. Mallon, 38 Cal. 259.....	211	Seymour v. Osborne, 11 Wall. 516, 538.....	
Russell v. Mayor, etc., N. Y., 2 Den. 461	981	542, 546, 555 (XX., 33, 36, 38, 39, 42)	71
Russell v. Perkins, 1 Mas. 368.....	826	Shaler & H. Quar. Co. v. Bliss, 27 N. Y. 297	789
Russell v. Southard, 12 How. 139.....	257	Shanks v. Dupont, 3 Pet., 242.....	630, 631
Rutherford v. Green, 2 Wheat. 196.....	832	Shapley v. Abbott, 42 N. Y. 443.....	164
Rutland & W. R. R. v. Middlebury Bk., 32 Vt. 639.....	487	Shaw v. Cooper, 7 Pet. 292.....	941
Ryan v. Carter, 93 U. S. 78 (XXIII., 807)	64	Shearman v. Bingham, 7 N. B. Reg. 493	44
Ryan v. Goodwin, 3 Sumn. 518.....	981, 1083	Shepley v. Cowan, 91 U. S. 330 (XXIII., 424).....	589, 801, 931
Ryder v. Wombwell, L. R. 4 Exch. 32.....	46	Sherburne v. Shaw, 1 N. H. 157.....	369
Ryland, <i>Ex parte</i> , 2 Dea. & Chit. 393.....		Sherman v. Fitch, 98 Mass. 59.....	855
S.		Sherwood v. Sutton, 5 Mas. 149.....	163
Sabriezo v. White, 30 Tex. 576, 581-584.....	215, 216	Shields v. Ohio, 95 U. S. 319, 324 (XXIV., 357, 359).....	502, 515
Sage v. Dillard, 15 B. Mon. 349.....	510, 515	Shirras v. Caig, 7 Cr. 34.....	1036
St. Louis v. Ferry Co., 11 Wall. 423 (XX., 192).....	562	Shorter v. Smith, 9 Ga. 517.....	923
St. Louis v. Shields, 62 Mo. 247.....	114	Siebold, <i>Ex parte</i> , 100 U. S. 371-381 (XXV., 717-721).....	716
Sale v. Lambert, L. R. 18 Eq. 1.....	369	Sigler v. Knox Co. Bank, 8 Ohio Stat. 511	372
Salmon Falls Man. Co. v. Goddard, 14 How. 446.....	369	Sill v. Corning, 15 N. Y. 297.....	703
Salamon v. U. S., 19 Wall. 17 (XXII., 46)	1070	Silver Lake Bk. v. North, 4 Johns. Ch. 370	189, 190, 1035
Salter v. Hite, 7 Bro. P. C. 189.....	828	Simmons v. Swift, 5 B. & C., 857.....	556
Saltmarsh v. P. & M. Bank, 14 Ala. 668.	584	Simpson v. McCaffrey, 13 Ohio, 508.....	128
Saltmarsh v. Tuthill, 13 Ala. 410.....	584	Simpson v. Vaughan, 2 Atk. 33.....	54
Samory v. Montgomery, 19 La. Ann. 333		Singer Man. Co. v. Wilson, L. R. 2 Ch. Div. 434, 443.....	997, 998
27 La. Ann. 50.....	377, 378		
San Antonio v. Mehaffy, 96 U. S. 312 (XXIV., 816).....	406, 805		

S.		S.	
Sinnott v. Davenport, 22 How. 227 (XVI., 307).....	415	State v. Greene Co., 54 Mo. 540.....	412
Siren, The, 7 Wall., 152 (XIX., 129).....	211	State v. Haskins, 77 N. C. 530-546.....	653, 662
Sir Wm. Peel, The, 5 Wall. 517 (XVIII., 696).....	899	State v. Linn. Co. 44 Mo. 504.....	969, 971
Skeele v. Stanwood, 33 Me. 309.....	438	State R. R. Tax Cases, 92 U. S. 575 (XXIII., 663).....	546
Slaughter House Cases, 16 Wall. 36.....	686	State v. St. Joseph, 37 Mo. 270.....	970, 971
(XXI., 394).....	665, 666, 679, 686	State v. Sutterfield, 54 Mo. 391.....	969, 970
Slauson v. Racine, 13 Wis. 398.....	700	State Tax on Foreign Held Bonds, 15 Wall. 300, 320 (XXI., 179, 187).....	562
Smart v. Wolfe, 3 Term, 340.....	300	State Tonnage Tax Cases, 12 Wall. 204.....	413, 415, 755
Smilie v. Biffle, 2 Pa. Stat. 52.....	737	(XX., 370).....	970
Smith v. Acker, 23 Wend. 653.....	818	State v. Winkelmeier, 35 Mo. 103.....	246
Smith v. Bell, 6 Pet. 68.....	141	Staup v. Com'th, 74 Pa. 458.....	522
Smith v. Bishop, 9 Vt. 110.....	163	Steamboat Co. v. Chase, 16 Wall. 522 (XXI., 369).....	300
Smith v. Black, 9 Serg. & R., 142.....	301	Steamboat Co. v. McCutcheon, 13 Pa. 134.....	854, 908
Smith v. Brotherline, 62 Pa. 461.....	1067	Steamship Co. v. Portwardens, 6 Wall. 31.....	755
Smith v. Clay, 2 Amb. 645.....	435	Stearns v. Page, 7 How. 819-829. 431, 434, 808	
Smith v. Corp. of Washington, 20 How. 135 (XV., 858).....	338	Stephen Morgan, The, 94 U. S. 599 (XXIV., 266).....	702
Smith v. Clark Co., 54 Mo. 58-81.....	90, 114, 586, 974	Stewart v. Parsons, 24 Wis., 241.....	104
Smith v. Crouse, 24 Barb. 433.....	821	Stewart v. Slater, 6 Duer, 83.....	819
Smith v. Edwards, 7 Humph. 106.....	372	Stewart v. Trenier, 49 Ala. 492.....	1021
Smith v. Falconer, 11 Hun, 481.....	821	Stickney v. Wilt, 23 Wall. 150 (XXIII., 50).....	202
Smith v. First Nat. Bk., etc., 99 Mass. 605	751	Stiles v. Cardiff S. Nav. Co. 33 L. J. (N. S.) 311.....	490
Smith v. Goodyear D. V. Co. 93 U. S. 486 (XXIII., 952).....	942	Stockdale v. Ins. Cos., 20 Wall. 323 (XXII., 348).....	1070
Smith v. Gordon, 6 Law Rep. 317.....	47	Stoddard v. Chambers, 2 How. 284.....	620
Smith v. Hill, 1 Wils. 134.....	319	Stokes v. Saltonstall, 13 Pet. 181.....	1065
Smith v. Little, 1 Am. L. Cas. (5 Ed.) 454; 10 N. H. 526-530.....	742	Stone v. Elliott, 11 Ohio, 252.....	406
Smith v. Lowry, 1 Johns. Ch. 320.....	95	Stone v. Mayor of N. Y. 25 Wend. 173.....	981
Smith v. McNamara, 4 Lans. 169.....	491	Stoops v. Smith, 100 Mass. 63-66.....	813
Smith v. Mason, 14 Wall. 419, 431.....	203	Stopp v. Smith, 71 Pa. 285.....	120
(XX., 748, 752).....	44, 58, 698	Storer v. Great W. R. R., 2 You. & Cl. 43.....	321
Smith v. Northampton Bank, 4 Cush. 1, 11	822	Storrs v. Barker, 6 Johns. Ch. 166.....	163
Smith v. Ramsay, 6 Serg. & R., 573.....	1073	Story v. Livingston, 13 Pet. 359.....	702
Smith v. Richards, 13 Pet. 26.....	537, 871	Stoughton v. Baker, 4 Mass. 522.....	195
Smith v. U. S., 5 Pet. 292; 10 Pet. 326-334	486	Stover, Matter of, 1 Curt., 201.....	300
Smith v. Young, 2 Dev. & B. 26.....	877	Stuart v. Corning, 32 Conn., 105, 108.....	811
Smnevly v. Ekel, 1 Watts. & S. 203.....	120	Sturges v. Burton, 8 Ohio St. 215.....	788
Snow v. Allen, 1 Stark. 502.....	320	Sturges v. Collector, 12 Wall. 19 (XX., 255).....	806
Soc. for Prop. Gos. v. Pawlet, 4 Pet. 480	414	Stuyvesant v. Mayor of N. Y. 11 Paige, 414, 331	
Soc. for Savings v. Coite, 6 Wall. 604 (XVIII., 902).....	412	Stranahan v. E. Haddam, 11 Conn. 507-513.....	813
Soc. for Sav. v. N. London, 29 Conn. 174	381	Stratton v. Jarvis, 8 Pet. 4.....	591
Southwick v. Southwick, 49 N. Y. 510.....	381	Strand Music Hall Co. <i>In re</i> , 3 De G. J. & S. 147.....	1003
Soutter v. Madison, 15 Wis. 30.....	335, 704	Strauder v. W. Va., 100 U. S. 303 (XXV., 664).....	670, 679
Spencer v. Howe, 26 Conn. 200.....	811	Stringfellow v. Cain, 99 U. S. 610 (XXV., 421).....	447, 448
Spofford v. Kirk, 97 U. S. 484 (XXIV., 1032).....	116	Stryker v. Polk Co. 22 Ia. 137.....	928
Sprigg v. Bk. of Mt. Pleasant, 14 Pet. 201	301	Subsidies of Union Pacific R. R. 12 Opinion Atty-Gen.....	477, 288
Sprott v. U. S., 20 Wall. 459 (XXII., 371)	473	Succession of Ludewing, 3 Rob. (La.) 92.....	954
Stanbrough v. McCall, 4 La. Ann. 322-327	385, 386	Suckley v. Furse, 15 Johns. 338.....	583
Stanbrough v. Wilson, 13 La. Ann. 494.....	465	Suffolk Bk. v. Worcester Bk., 5 Pick. 106.....	485
Stanford v. Taylor, 18 How. 409 (XV., 113).....	101, 102	Sumner v. Hicks, 2 Black, 532 (XVII., 804)	
Stanley v. Stanton, 36 Ind. 445.....	809	Supervisors v. Durant, 9 Wall. 415 (XIX., 732).....	227
Stanton v. Camp, 4 Barb. 274.....	1052	Supervis. of Gen. Land Off., 3 Opin. Atty-Gen. 137.....	101
Starin v. Genoa, 23 N. Y. 439.....	1040	Supervisors of Mercer County v. Hubbard, 45 Ill., 139.....	882
Stark v. Starr, 94 U. S. 477 (XXIV., 276)	856	Supervisors v. Rogers, 7 Wall. 175 (XIX., 162).....	227
6 Wall. 402 (XVIII., 925) 211, 831, 856		Supervisors v. Schenck. 5 Wall. 772 (XVIII., 556).....	366
Starkweather v. Amer. Bible Soc., 72 Ill. 50	890, 891	Supervisors v. U. S., 18 Wall. 71 (XXI., 771)	971
State v. Brassfield, 67 Mo. 331.....	969, 970		
State v. Benton, 2 Dev. & B., 196.....	246		
State v. Binder, 38 Mo. 450.....	970, 971		
State v. Delap, Peck. 91.....	735		
State v. Elder, 54 Me. 381.....	661		
State v. Garoute, Cent. Law Jour.....	90		

S.		T.	
Sutton v. Clarke, 6 Taunt. 29.....	338, 339	Ticonic Bank v. Harvey, 16 Ia. 141.....	1005
Sutton v. Johnstone, 1 T. R. 493.....	119	Tilton v. Coffield, 93 U. S. 163 (XXIII., 858)	867
Sutton v. Louisville, 5 Dana, 28-31.....	914	Tilton v. Swift, 40 Ia. 78.....	381
Suydam v. Clark, 2 Sandf. 133.....	825	Tissot v. Darling, 9 Cal. 278-281.....	822
Suydam v. Williamson, 20 How., 427 (XV., 978).....	204, 547	Todd v. Fairfield Ct. C. P., 15 Ohio St. 377, 387.....	661
Swain v. Seamans, 9 Wall. 254-274 (XIX., 554-560).....	164, 702	Toker v. Toker, 3 DeG. J. & S. 487.....	910
Swain v. Seamens, 12 Blatchf. 419.....	164	Tome v. Dubois, 6 Wall. 548-554 (XVIII., 943-946).....	556
Swain v. Stafford, 4 Ired. (N. C.) 392....	119	Tomlinson v. Jessup, 15 Wall. 454-459 (XXI., 294-206).....	304, 501, 515
Swift v. Herrera, 9 Tex. 263.....	216	Tool Co. v. Norris, 2 Wall. 45 (XVII., 868).....	901
Swift v. Tyson, 16 Pet. 1.....	583	Tovey v. Young, Prec. in Ch. 193.....	95
Sykes v. Lafferry, 27 Ark. 407.....	110	Towan, The, 8 Jur. 223.....	298
T.			
Table Moun. Tun. Co. v. Stranahan, 20 Cal. 198.....	543	Town of Rock Creek v. Strong, 96 U. S. 271 (XXIV., 815).....	406, 411, 451
Tacey v. Irwin, 18 Wall. 549 (XXI., 786).	472	Towne v. Ammidown, 20 Pick. 535.....	382
Tappan v. Evans, 11 N. H. 311.....	1005	Townsend v. Greeley, 5 Wall. 326 (XVIII., 547).....	64, 575, 627
Tarleton v. Hornby, 1 You. & Col. 193....	46	Transportation Line v. Hope, 95 U. S. 301 (XXIV., 479).....	849
Tarver v. Keach, 15 Wall. 67 (XXI., 82).	111	Tregelles v. Sewell, 7 Hurl. & N. 573....	558
Tatham v. Wright, 2 Russ. & M. 1.....	828	Trelawney, The, 3 C. Rob. 216, <i>note</i>	984
Tax-payers of Greece, Matter of, 38 How. Pr. 515.....	405	Trenier v. Stewart, 55 Ala. 458.....	1024
Taylor, <i>Ex parte</i> , 14 How. 3.....	875	Trist v. Child, 21 Wall. 441 (XXII., 623)	901
Taylor v. Blacklow, 3 Bing. (N. C.) 235....	1067	Tritonia, The, 5 No. of Cas. 111.....	298
Taylor v. Carpenter, 2 Sandf. Ch. 603....	996	Troup v. Smith, 20 Johns. 44.....	162
Taylor v. Graham, 15 La. Ann. 418.....	697	Truesdail v. Ward, 24 Mich. 117.....	620
Taylor v. Luther, 2 Sumn. 228.....	257	Tucker v. Ferguson, 22 Wall. 527 (XXII., 805).....	224, 712
Taylor v. McClung, 2 Houst. (Del.) 24....	825	Tucker v. Mass. Cen. R. R., 118 Mass. 546	490
Taylor v. Plymouth, 8 Met. 465.....	981	Turley v. Bates, 2 Hurl. & C. 200-8.....	557
Taylor v. Thompson, 42 Ill. 14-19.....	1019	Turner v. Adams, 46 Mo. 95.....	1005
365, 1017, 1018, 1019.....	825	Turner v. Holleran, 11 Minn. 253.....	208
Taylor v. Wetmore, 10 Ohio, 490.....	825	Turner v. Nat. Bk. of Keokuk, 26 Ia. 562	751
Taylor v. Willans, 2 B. & Ad. 845.....	119	Turner v. Smith, 14 Wall. 553 (XX., 724).	328
Temiscouata, The, 2 Spinks. 211.....	299	Twitchell v. Com'th, 7 Wall. 321 (XIX., 223)	657
Tennessee v. Davis, 100 U. S., 257 (XXV., 648).....	667, 679	U.	
Tennessee v. Sneed, 96 U. S. 69 (XXIV., 610).....	939	Undaunted, The, 1 Lush. 90.....	984
Terrell v. Allison, 21 Wall. 289-292 (XXII., 634-636).....	1084	Union Ins. Co. v. U. S., 6 Wall. 759 (XVIII., 879).....	204
Terry v. Anderson, 95 U. S. 628 (XXIV., 365).....	59, 294	Union Pacific R. R. Co. v. U. S., 99 U. S., 402 (XXV., 274).....	288, 289, 292
Terry & Carnes' Case, 8 Ct. of Cl. 277....	323	Union, The, 4 Blatchf. 90.....	299
Terry v. Tubman, 92 U. S. 156 (XXIII., 537).....	295	U. S. v. Amy, 14 Md. 149 (<i>note</i>).....	655
Terry v. Wheeler, 25 N. Y. 520-525.....	558	U. S. v. Arredondo, 6 Pet. 691.....	832
Texas v. Gaines, 2 Woods, 344.....	674	U. S. v. Babbit, 1 Black, 55 (XVII., 94).. 752, 804, 1034	
Texas v. White, 7 Wall. 700-725 (XIX., 227-237).....	473, 683, 684	U. S. v. Benecke, 98 U. S., 447 (XXV., 192).....	193
Thales, The, 10 Blatchf. 203.....	299	U. S. v. Bennett, 12 Blatchf. 352.....	184
Tharp v. Hart, 2 Sneed, 569.....	176	U. S. v. Bevans, 3 Wheat. 336-391.....	654, 656
Thayer v. N. Eng. Lith. Co., 108 Mass. 523.....	788	U. S. v. Bogart, 3 Ben. 257.....	539
Thomas v. Harvie, 10 Wheat. 146.....	528	U. S. v. Boisdoré, 8 How. 113; 11 How. 63-96.....	232, 871
Thomas v. Vonkapff, 6 Gill. & J. 372....	1057	U. S. v. Booth, 21 How. 506 (XVI., 169).	355
Thomas v. Winchester, 6 N. Y. 397-410....	624	U. S. v. Boutwell, 17 Wall. 604 (XXI., 721).	335
Thomasson v. Brown, 43 Ind. 203.....	959	U. S. v. Bowen, 100 U. S. 508 (XXV., 631)	949
Thompson v. Abbott, 61 Mo. 176-177....	702	U. S. v. Boyd, 5 How. 29.....	195
Thompson v. Brown, 4 Johns. Ch. 619....	1076	U. S. v. Buford, 3 Pet. 12.....	195
Thompson v. Myrick, 20 Minn. 207.....	326	U. S. v. Cambuston, 20 How. 59 (XV., 828)	204
Thompson v. N. Y. & H. R. R., 3 Sand. Ch. 625.....	1034	U. S. v. Cent. Pacif. R. R., 99 U. S., 449 (XXV., 287).....	289
Thompson v. Railroad Cos., 6 Wall. 134 (XVIII., 765).....	454, 571	U. S. v. Clarke, 8 Pet. 436.....	195
Thompson v. Riggs, 5 Wall. 663-679 (XVIII., 707-707).....	625, 769	U. S. v. Coolidge, 1 Wheat. 415.....	181, 654
Thoroughgood's Case, 2 Co. 5.....	966	U. S. v. Co. of Clark, 96 U. S. 211 (XXIV., 628).....	332
Thorpe v. R. & B. R. Co., 27 Vt. 140-147	663	U. S. v. Cransell, 14 Wall. 1 (XX., 821)..<	324
Thregill v. Pintard, 12 How. 24.....	314	U. S. v. Cruikshank, 92 U. S. 542, 558- 568 (XXIII., 588, 593-597).....	681, 724
Thurmond v. Reese, 3 Ga. 449.....	1005		

U.

U. S. v. Davenport, 15 How. 1	252
U. S. v. D'Auterive, 15 How. 14-23.	869, 870
U. S. v. Dewitt, 9 Wall. 41-45 (XIX., 593, 594)	663
U. S. v. Eckford, 1 How. 250	537
U. S. v. Fairchilds, 7 Am. Law Reg. (N. S.) 306; 1 Abb. (U. S.) 74	184
U. S. v. Ferrary, 93 U. S. 625 (XXIII., 832)	375
U. S. v. Fisher, 2 Cr. 386	303
U. S. v. Forbes, 15 Pet. 173-184	871
U. S. v. Fox, 95 U. S., 670 (XXIV., 538)	185
U. S. v. Galbraith, 22 How. 89 (XVI., 246)	204
U. S. v. Giles, 9 Cr. 212	1069
U. S. v. Gleason, 1 Woolw. 75, 128	656
U. S. v. Gomez, 3 Wall. 752 (XVIII., 212)	354, 355
U. S. v. Hamilton, 3 Dall. 17	678
U. S. v. Hart, 6 Wall. 772 (XIX., 914)	204
U. S. v. Hartwell, 6 Wall. 385 (XIX., 830)	483
U. S. v. Hoar, 2 Mas. 311 (<i>supra</i>)	195
U. S. v. Huckabee, 16 Wall. 414 (XXI., 457)	205
U. S. v. Hudson, 7 Cr. 32	181, 654
U. S. v. Kansas & Pacif. R. R., 99 U. S., 455 (XXV., 289)	291
U. S. v. King, 3 How. 773-787; 7 How. 833-849	169, 871
U. S. v. Kirby, 7 Wall. 482 (XIX., 278)	582
U. S. v. Kirkpatrick, 9 Wheat. 720	195, 538
U. S. v. Lawrence, 3 Dall. 42	875
U. S. v. Lawson, 101 U. S., 164 (XXV., 860)	863
U. S. v. Lee, 2 Cr. C. C. 462	1021
U. S. v. Lee, 4 McLean, 103	403
U. S. v. Lent, 1 Paine, 417	1021
U. S. v. Lynde, 11 Wall. 632 (XX., 230)	164
U. S. v. Macdonald, 5 Wall. 647, 659 (XVIII., 512, 517); 2 Cliff. 270-282	861, 863
U. S. v. McLean, 95 U. S. 750 (XXIV., 579)	773
U. S. v. Marigold, 9 How. 560, 569	655, 724
U. S. v. Marks, 2 Abb. (U. S.) 534; 10 Int. Rev. Rec. 42	184
U. S. v. More, 3 Cr. 159-170	657, 659
U. S. v. N. Orleans R. R., 12 Wall. 362 (XX., 434)	342
U. S. v. O'Keefe, 11 Wall. 178 (XX., 131)	476
U. S. v. Percheman, 7 Pet. 51-88	215, 871
U. S. v. Phisterer, 94 U. S. 219 (XXIV., 116)	749
U. S. v. Powell, 14 Wall. 493-502 (XX., 726-728)	537
U. S. v. Reese, 92 U. S. 214 (XXIII., 563)	553, 666
U. S. v. Reid, 12 How. 361-365	662
U. S. v. Rice, 4 Wheat. 246	641
U. S. v. Ross, 92 U. S. 281, 284 (XXIII., 707, 708)	323, 324, 637
U. S. v. Russell, 13 Wall. 623 (XX., 474)	637
U. S. v. Singer, 15 Wall. 111-121 (XXI., 49)	537
U. S. v. Six Lots of Ground, 1 Wood, 234	316
U. S. v. State Bank, 96 U. S. 33 (XXIV., 647)	908
U. S. v. The Betsey, 4 Cr. 443	480
U. S. v. Throckmorton, 98 U. S. 61. (XXV., 93)	802, 931
U. S. v. Tynen, 11 Wall. 88 (XX., 153)	232
U. S. v. Union Pacif. R. R., 91 U. S. 72 (XXIII., 224)	154, 156, 277; 428, 501
U. S. v. Union Pacif. R. R., 98 U. S. 569 (XXV., 143)	503
U. S. v. Walker, 22 How. 299-308 (XVI., 382-385)	861

U.

U. S. v. Ward, 1 Woolw. 17-20	656
U. S. v. White, 2 Hill (N. Y.) 59	195
U. S. v. Wiggins, 14 Pet. 334-349, 350, 98	871
U. S. v. Williams, 5 McLean, 133	195
U. S. v. Williamson, 23 Wall. 411 (XXIII., 89)	749
U. S. v. Wiltberger, 5 Wheat. 76-96	655, 656
U. S. v. Worrall, 2 Dall. 384-393	656
University v. Finch, 18 Wall. 106 (XXI., 818)	377
Ursuline Nuns v. Depassau, 7 Mart. (N. S.) 646	386
Utley v. Donaldson	
Utley v. Donaldson, 94 U. S. 29 (XXIV., 54)	825, 1052

V.

Valentine v. Mahoney, 37 Cal. 389	211
Van Horne v. Fonda, 5 Johns. Ch. 388-416	469, 1068
Van Leuven v. Lyke, 1 N. Y. 515	489
Vannvar v. Bryant, 21 Wall. 41 (XXII., 476)	273
Van Norden v. Morton, 99 U. S. 378 (XXV., 453)	904
Van Valkenburg v. Huff, 1 Nev. 142	542
Van Voorhes v. Leonard, 1 N. Y. Sup. Ct. (T. & C.) 148	119
Veazie Bank v. Fenko, 8 Wall. 533-549 (XIX., 482-483)	979
Venice, The, 2 Wall. 258-274 (XVII., 866, 867)	482, 640, 641
Vicksburg v. Lombard, 51 Miss. 111	411
Vicksburg v. Tobin, 100 U. S., 430 (XXV., 690)	746
Vidal v. Girard, 2 How. 127	814
Virginia, The, v. West, 19 How. 182 (XV., 594)	354
Virgo, The, 13 Blatchf. 255	299
Von Hoffman v. Quincy, 4 Wall. 535-554 (XVIII., 403-409)	227, 336, 704
Voorhes v. Bonesteel, 16 Wall. 16 (XVI., 268)	1014
Vrooman v. Lawyer, 13 Johns. 339	489

W.

Wabausee Co. v. Walker, 8 Kan. 431	197
Wagner v. Baird, 7 How. 234	434
Wain v. Warlerts, 5 East, 10	369
Wake v. Harrop, 1 Hurl. & C. 202	68
Walker v. Hays, 23 La. Ann. 176	378
Walker v. Lee, 20 La. Ann. 192	385
Walker v. State Har. Com., 17 Wall. 648 (XXI., 744)	546
Walker v. Whitehead, 16 Wall. 314 (XXI., 357)	939
Wallace v. McConnell, 13 Pet. 136-150	742
Wallace v. Rippon, 2 Bay, 112	393
Walter v. Sample, 25 Pa. 275	120
Walton v. Cotton, 19 How. 357 (XV., 660)	185
Walton v. Crowley, 3 Blatchf. 440-447	999
Wanata, The, 95 U. S. 611 (XXIV., 464)	298, 299, 300
Ward v. Chamberlain, 2 Black, 430-444 (XVII., 319-326)	638, 856
Ward v. Gris. Man. Co., 16 Conn. 593	888
Ward v. Johnson, 13 Mass. 148	301
Ward v. Maryland, 12 Wall. 163-418 (XX., 260, 449)	744, 755, 756
Ward v. Smith, 7 Wall. 451 (XIX., 210)	382
Ward v. Tunstall, 58 Tenn. (2 Bax.) 319	312

W.

Wardell v. Union Pacific R. R., 4 Dill. 330	153
Warden v. Bailey, 4 Taun. 67-87	643
Ware v. Barataria Co., 15 La. 169	698
Ware v. Hylton, 3 Dall. 199-242	630
Waring v. Mayor, 8 Wall. 110 (XIX., 342)	755
Warren County v. Mercy, 97 U. S. 96, 107 (XXIV., 977, 981)	406, 586
Warren v. Van Brunt, 19 Wall. 646 (XXII., 219)	931
Washburn v. Franklin, 13 Abb. Pr. 140; 35 Barb. 599	110
Wash. A. & G. Packet Co. v. Sickles, 24 How. 333 (XVI., 650)	436
Watkins v. Carlton, 10 Leigh, 560	828
Watkins, <i>Ex parte</i> , 3 Pet. 193, 202; 7 Pet. 568	539, 657, 718
Watson v. Sutherland, 5 Wall. 74 (XVIII., 580)	454
Watson v. Tarpley, 18 How. 517 (XV., 509)	583
Watson v. Wellington, 1 Russ. & Myl. 602	1003
Wayman v. Southard, 10 Wheat. 1, 50	638
Webb, The, 14 Wall. 406 (XX., 774)	298
Webb v. Fox, 7 T. R., 397	47
Webb v. Hill, 3 Carr. & P. 485	119
Webb v. Lafayette Co., 67 Mo. 353	969, 970
Webster v. Reid, 11 How. 437	377
Weeks v. Flower, 9 La. 385	954
Welden v. Gratz, 1 Wheat. 292	319
Wells, <i>Ex parte</i> , 18 How. 307-328 (XV., 421-431)	402, 718
Welsh v. Mandeville, 5 Cr. 321	362
Welton v. Missouri, 91 U. S. 275 (XXIII., 347)	744, 755, 756
Westcott v. Gunn, 4 Duer, 107	818
West v. Cochran, 17 How. 414 (XV., 115)	101, 102
West v. Schnebly, 54 Ill. 523	856
Westerman v. C. Girardeau Co., 7 Cen. L. J. 354	969
Weston v. Charleston, 2 Pet. 449	414, 706
Weston v. Gravlin, 49 Vt. 507	137
Westray v. U. S., 18 Wall. 322 (XXI., 763)	1050
West Sav. F. Soc. v. Phila., 31 Pa. 175-185	704
Wey v. Yally, 6 Mod. 195	643
Weyauwega v. Ayling, 99 U. S. 112 (XXV., 370)	1009
Wheeler v. Nesbitt, 24 How. 545 (XVI., 765)	119
Wheeler v. Smith, 9 How. 55	55, 814
Wheeler v. Willard, 44 Vt. 641	1067
Wheelock v. Kost, 77 Ill. 296	449
White v. Cannon, 6 Wall. 443-450 (XVIII., 923-925)	641
White v. Corlies, 46 N. Y. 467	825
White v. Franklin Bk., 22 Pick. 181	751
White v. McLean, 57 N. Y. 670	491
White v. Parnter, 1 Knapp, 227	435
White v. Sabriego, 23 Tex. 243	216
Whitehead v. Dugan, 25 La. Ann. 409	697
White Squall, The, 4 Blatchf. 103	299
White W. Can. Co. v. Vilette, 21 How. 414 (XVI., 154)	1034
White v. Whitney, 3 Met. 81	92
Whiting v. Emmett, Bald. 310	73
Whitney, <i>Ex parte</i> , 13 Pet. 404	835
Whitney v. First N. B. Bratt, 50 Vt. 389	751
Wickham v. Martin, 13 Gratt, 427	88
Wierich v. De Zoya, 7 Ill. (2 Gilm.) 385	95
Wiggins v. Armstrong, 2 Johns. Ch. 144	438
Wilcox v. Jackson, 13 Pet. 498	269

W.

Wilcox v. Kellogg, 11 Ohio, 394	372
Wilcox v. Plummer, 4 Pet. 172	230
Wilcox v. Smith, 5 Wend. 231	315
Wild v. Bank of Pass., 3 Mas. 505	698
Wilday v. Barnett, L. R. 6 Eq. 196	142
Wild Range, The, Brown & Lush. 671; Lush. 553	299
Wiley v. First Nat. Bk. etc., 47 Vt. 546	751
Wilkins v. Fry, 1 Meriv. 244	47
Wilkinson v. Holiday, 33 Mich. 386-388	557
Wilkinson v. Leland, 2 Pet. 627	582
Wm. Bagaley, The, 5 Wall. 377 (XVIII., 583)	897
Williams v. Baker, 17 Wall. 144	791, 919, 926
Williams v. Barrow, 3 La. 57, 59	955
Williams v. Bruffy, 96 U. S. 176 (XXIV., 716)	473
Williams v. Byrnes, 9 Jur. (N. S.) 363	369
Williams' Case, L. R. 9 Eq. 225	450
Williams v. Douglas, 23 La. Ann. 687	385
Williams v. Mellish, 1 Vern. 117	528
Williams v. Norris, 12 Wheat. 117	657
Williams v. Oliver, 12 How. 125	115
Williams v. Roberts, 88 Ill. 1	884
Williams v. State, 19 Ga. 403	247
Williams v. Winchester, 7 Mart. (N. S.) 22	1057
Williamson v. Moriarty, 19 W. R. 818	1067
Willis v. Nicholson, 24 La. Ann. 545	378
Wilson v. Benjamin, 26 La. Ann. 527	466
Wilson v. Blackbird Cr. M. Co., 2 Pet. 250	388
Wilson v. Franklin, 63 N. C. 259	643
Wilson v. Furness R. Co., L. R. 9 Eq. 28	321
Wilson v. Johnstone, 16 Eq. Cas. Abr. 606	478
Wilson v. Sandford, 10 How. 99	359, 361
Wilson v. Williams, 25 Tex. 54	218
Wilton v. Railroads, 1 Wall. Jr. 195	944
Winans v. N. Y. & E. R. R., 21 How. 88 (XVI., 68)	490
Winch v. B. & L. etc. R. R. Co., 13 L. J. & Eq. 506	953
Winsor v. McLellan, 2 Story, 492	818
Windsor v. McVeigh, 93 U. S. 274 (XXIII., 214)	539
Winterbottom v. Wright, 10 Mees. & W. 109-115	624
Wirth v. Branson, 98 U. S. 118 (XXV., 86)	911
Wiscart v. Dauchy, 3 Dall. 321-327	169, 659
Wiser v. Blachly, 2 Johns. Ch. 488	528
Wise v. Withers, 3 Cr. 331	643
Wiswall v. Campbell, 93 U. S. 347, 348 (XXIII., 923)	205, 206
Wolf v. Stix, 96 U. S. 541 (XXIV., 640)	312
Wolfe v. Barnett, 24 La. Ann. 97	996
Wolliston v. Tribe, L. R. 9 Eq. 44	910
Womack v. Womack, 8 Tex. 397	123, 124
Wood v. Carpenter, 101 U. S. 135 (XXV., 807)	815
Wood v. Dummer, 3 Mas. 308	887
Wood v. Lide, 4 Cr. 180	355
Wood v. Mann, 2 Sumn. 334	580
Wood v. Matthews, 2 Blatchf. 370	661
Wood v. Strickland, 2 Ves. & B. 150	1076
Wood v. Wier, 5 B. Mon. 544	119
Woodgate v. Field, 2 Hare, 211	1076
Wood Paper Patent, The, 23 Wall. 566 (XXIII., 31)	82
Woodruff v. Parham, 8 Wall. 123 (XIX., 382)	744, 755, 756
Woolcott v. Des Moines Co., 5 Wall. 681 (XVIII., 689)	791, 919, 926, 927

W.		Y.	
Woolcott v. VanSandtvoord, 17 Johns. 248	741	Yates v. Iams, 10 Tex. 168.....	215
Woolsey v. Chapman, 101 U. S. 755 (XXV. 915).....	926, 927	Yeates v. Groves, 1 Ves. Jr. 280.....	1003
Wormeley v. Com'th, 10 Gratt. 658.....	246	Yeatman v. Sav. Inst. 95 U. S. 764. (XXIV., 589).....	818
Worrall v. Grayson, 1 Mees. & W. 168...	66	Yeaton v. Lenox, 7 Pet. 220.....	362
Worth v. Gilling, L. R. 2 C. P. 3.....	489	Yeaton v. U. S. 5 Cranch, 283.....	771
Worthington v. Bearse, 12 Allen, 382....	221	Yerger. <i>Ex parte</i> , 8 Wall. 85-98 (XIX., 332-337).....	678, 681, 718
Wotherspoon v. Currie, 27 L. T. (N. S.) 393.....	998	Yewens v. Robinson, 11 Sim. 105.....	46
Wotherspoon v. Currie, L. R. 5 Eng. & Ir. App. 508, 519.....	998	York & M. L. R. R. v. Winans, 17 How. 30.....	952
Wright v. Compton, 53 Ind. 837.....	1065	Yosemite Val. Case, 15 Wall. 77 (XXI., 82).....	87
Wright v. Hays, 10 Tex. 130.....	124	Young v. Bank of Alexandria, 4 Cr. 397	152
Wright v. Hughes, 13 Ind. 109.....	110	Young v. Mathews, L. R. 2 C.P. 127-129	557
Wright v. Walton, 56 Miss. 1.....	853	Young v. Harrison, 6 Ga. 130; 17 Ga. 30.	209, 922
Wyatt v. Harrison, 3 B. & Ad. 871.....	339	Yulee v. Vose, 99 U. S. 539 (XXV., 355)	600
Wyeth v. Stone, 1 Story, 281.....	73	Zabriskie v. C. C. & C. R. R. 23 How. 381 (XVI., 488).....	366
Wynne v. Cornelison, 52 Ind. 312.....	808, 809		
Xenia Br. Bank v. Lee, 2 Bosw. 694....	213		
Y.			
Yale v. Saunders, 16 Vt. 243.....	487		

ACTS, TREATIES AND PROCLAMATIONS CITED.

Treaty of Paris of Sept. 3, 1788 (8 Stat. 80)	688	Act of March 2, 1805, ch. 26 (2 Stat. 326)	98
Ordinance of July 13, 1787, 1 Stat. 51 (note.).....	688	Act of April 10, 1806, ch. 25 (2 Stat. 376)	182
Act of July 31, 1789, ch. 5 (1 Stat. 33)...	862	Act of March 3, 1807, ch. 36 (2 Stat. 441)	98, 99, 102
Act of Aug. 7, 1789, ch. 8 (1 Stat. 50)...	1047	Act of April 25, 1812, ch. 68 (2 Stat. 716)	100
Act of Aug. 7, 1789 ch. 9 (1 Stat. 53).....	722	Act of June 26, 1812, ch. 107 (2 Stat. 761, sec. 6).....	297
Act of Sept. 1, 1789, ch. 11 (1 Stat. 64)...	860	Act of Feb. 4, 1815, ch. 31 (3 Stat. 198)	652, 660
Judiciary Act, Sept. 24, 1789, ch. 20 (1 Stat. 85).....	657	Act of March 3, 1815, ch. 94 (3 Stat. 233)	652
Judiciary Act, Sept. 24, 1789, ch. 20 (1 Stat. 73-92).....	45, 162, 169, 181, 195, 279, 300, 354, 355, 362, 602, 604, 630, 638, 651, 654, 657, 660, 672, 678, 1062.	Act of April 29, 1816, ch. 151 (3 Stat. 325)	102
Act of Sept. 29, 1789, ch. 24 (1 Stat. 95)...	181	Act of March 3, 1817, ch. 109 (3 Stat. 396)	652
Act of April 30, 1790, ch. 9 (1 Stat. 114)...	347	Act of May 1, 1820, ch. 53 (3 Stat. 569)...	185
Act of July 16, 1790, ch. 27 (1 Stat. 129)...	181	Act of May 7, 1822 ch. 107 (3 Stat. 695)...	861
Act of March 23, 1792, ch. 11 (1 Stat. 243-245).....	181, 182, 726	Act of May 8, 1822, ch. 128 (3 Stat. 707)...	1022
Act of May 8, 1792, ch. 36 (1 Stat. 276)	297, 570	Act of May 26, 1824, ch. 181 (4 Stat. 62)...	169
Act of Dec. 31, 1792, ch. 1 (1 Stat. 287)...	414	Act of March 3, 1825, ch. 65 (4 Stat. 118)	483
Act of Feb. 12, 1793, ch. 7 (1 Stat. 302)	724, 729	Act of March 3, 1827, ch. 78 (4 Stat. 240)	1021
Act of Feb. 18, 1793, ch. 8 (1 Stat. 316)...	860	Act of May 15, 1828, ch. 53 (4 Stat. 270)...	183
Act of Feb. 28, 1793, ch. 17 (1 Stat. 324)...	182	Act of March 2, 1829, ch. 28 (4 Stat. 350)	183, 185
Brit. Treat. of Nov. 19, 1794 (8 Stat. 116)	630	Act of March 2, 1829, ch. 40 (4 Stat. 358)	1021, 1022
Treaty of Spain, Oct. 27, 1795 (8 Stat. 138)	688	Copyright Act, Feb. 3, 1831, ch. 16 (4 Stat. 436).....	843
Act of May 19, 1796, ch. 30 (1 Stat. 469)...	646	Res. of June 28, 1832 (4 Stat. 605).....	183
Act of March 3, 1797, ch. 20 (1 Stat. 512)	1020	Act of June 4, 1832, ch. 126 (4 Stat. 529)	183
Act of March 2, 1799 (1 Stat. 706-708)....	862	Act of March 2, 1833, ch. 57 (4 Stat. 632)	652, 660
Act of March 2, 1799, ch. 22 (1 Stat. 696, sec. 89).....	299	Act of June 30, 1834, ch. 16 (4 Stat. 731)	646
Act of March 2, 1799, ch. 23 (1 Stat. 704)	860	Act of July 4, 1836, ch. 290 (5 Stat. 107)	100
Act of March 3, 1799 (1 Stat. 743).....	646	Act of July 4, 1836, ch. 362 (5 Stat. 128)	183
Act of March 3, 1799, ch. 22 (1 Stat. 627)	860	Act of July 4, 1836, ch. 357 (5 Stat. 117)	82
Act of April 4, 1800 ch. 19 (2 Stat. 19)...	474	Act of July 4, 1836, ch. 357 (5 Stat. 123)	73
Act of May 10, 1800, ch. 55 (2 Stat. 76)...	911	Act of July 4, 1836, ch. 357 (5 Stat. 117)	359
Act of March 30, 1802, ch. 13 (2 Stat. 139)	646	Act of March 2, 1837, ch. 22 (5 Stat. 153)	722
Act of April 29, 1802, ch. 31 (2 Stat. 156)	639	Act of June 12, 1838, ch. 96 (5 Stat. 235)	916
Act of April 30, 1802, ch. 37 (2 Stat. 172)	861	Act of July 7, 1838, ch. 189 (5 Stat. 303)	183
Act of March 3, 1803, ch. 40 (2 Stat. 244)	169, 182, 354, 579, 683	Act of March 3, 1839, ch. 88 (5 Stat. 354)	73
Treaty with Fr. of April 30, 1803 (8 Stat. 202).....	98	Act of March 3, 1841, ch. 35 (5 Stat. 432)	861, 863
Act of March 26, 1804, ch. 38 (2 Stat. 283)	98	Bank'cy Act of Aug. 19, 1841, ch. 9 (5 Stat. 440).....	313
		Act of Sept. 4, 1841, ch. 16 (5 Stat. 453)...	915, 926
		Act of June 25, 1842, ch. 47 (5 Stat. 491)	722

ACTS, TREATIES AND PROCLAMATIONS CITED, CON.

Act of Aug. 23, 1842, ch. 188 (5 Stat. 517) 571, 983, 1062	Act of March 3, 1863, ch. 76 (12 Stat. 737-735) 127, 540
Act of Feb. 26, 1845, ch. 22 (5 Stat. 727) 159, 160	Act of March 3, 1863, ch. 76 (12 Stat. 741) 161, 235, 236
Act of July 30, 1846, ch. 74 (9 Stat. 42) . . . 847	Act of March 3, 1863, ch. 81 (12 Stat. 755, 756) 130, 133, 642, 652, 661
Act of Aug. 6, 1846, ch. 90 (9 Stat. 59) . . . 483	Act of March 3, 1863, ch. 92 (12 Stat. 765) 481, 748
Act of Aug. 8, 1846, ch. 103 (9 Stat. 77) 915, 916, 926	Act of March 3, 1863, ch. 116 (12 Stat. 808) 237, 801
Act of Dec. 28, 1846, ch. 1 (9 Stat. 117) . . . 916	Act of March 3, 1863, ch. 120 (12 Stat. 820) 481
Act of March 3, 1847, ch. 55 (9 Stat. 181) 300	Act of March 12, 1863, ch. 120 (12 Stat. 820) 236, 479, 480
Conven. with Swiss Confed. May 18, 1847 (9 Stat. 902) 629	Act of Feb. 24, 1864, ch. 13 (13 Stat. 8) 656
Act of July 29, 1848, ch. 120 (9 Stat. 266) 183, 184	Act of June 3, 1864, ch. 106 (13 Stat. 99-101), 189, 212, 695, 751, 901, 907
Treaty with Mexico of May 30, 1848 (9 Stat. 922) 576	Act of June 30, 1864, ch. 171 (13 Stat. 214) 159, 1050
Act of March 2, 1849, ch. 78 (9 Stat. 349) 916	Act of June 30, 1864, ch. 174 (13 Stat. 223-226) 536, 537, 1048, 1069
Act of March 3, 1849, ch. 129 (9 Stat. 414) 727	Act of June 30, 1864, ch. 173 (13 Stat. 294) 1020, 1021
Act of March 3, 1849, ch. 108 (9 Stat. 395) 100, 101	Act of June 30, 1864, ch. 174 (13 Stat. 283-287) 293, 1049
Act of Sept. 9, 1850, ch. 51 (9 Stat. 454) . . . 346	Act of June 30, 1864, ch. 173 (13 Stat. 241-248) 274, 660
Act of Sept. 28, 1850, ch. 84 (9 Stat. 519) 564, 565	Act of June 30, 1864, ch. 174 (13 Stat. 306) 579
Act of Sept. 27, 1850 (9 Stat. 496) 830, 929	Act of June 30, 1864, ch. 173 (13 Stat. 231) 268
Treaty with Swiss Confed. Nov. 25, 1850 (11 Stat. 587) 629	Act of June 30, 1864, ch. 173 (13 Stat. 264) 789
Act of March 3, 1851, ch. 41 (9 Stat. 631) . 65, 627	Act of July 1, 1864, ch. 194 (13 Stat. 332, 333) 65, 318, 627, 737
Act of Feb. 9, 1853 (10 Stat. 155) 757	Act of July 2, 1864, ch. 217 (13 Stat. 365) 278
Act of March 2, 1853, ch. 90 (10 Stat. 175) 1062	Act of July 2, 1864, ch. 225 (13 Stat. 375) 236, 322, 323
Act of March 3, 1853, ch. 145 (10 Stat. 244) 588	Act of July 2, 1864, ch. 216 (13 Stat. 356-358), . . . 198, 426, 427, 501, 506, 513, 790, 791
Act of July 17, 1854, ch. 83 (10 Stat. 304) 325	Act of July 4, 1864, ch. 247 (13 Stat. 389) 192, 193, 183, 184
Act of Feb. 24, 1855, ch. 132 (10 Stat. 612) 748	Act of March 3, 1865, ch. 86 (13 Stat. 501) 169
Treat. with Persia, Dec. 13, 1856 (11 Stat. 709) 806	Act of March 3, 1865, ch. 88 (13 Stat. 504) 505
Act of May 15, 1856, ch. 28 (11 Stat. 9) 918, 926	Act of March 3, 1865, ch. 92 (13 Stat. 510) 854
Act of Feb. 2, 1859, ch. 17 (11 Stat. 376) . . . 834	Act of March 8, 1866, ch. 13 (14 Stat. 4) 65, 627
Act of March 3, 1859, ch. 83 (11 Stat. 431) 632	Act of May 11, 1866, ch. 80 (14 Stat. 46) . . . 652
Act of June 22, 1860, ch. 188 (12 Stat. 85) 164, 167, 836, 869	Act of June 6, 1866, ch. 106 (14 Stat. 56) . . . 183, 184
Act of March 2, 1861, ch. 84 (12 Stat. 220) 107	Act of July 13, 1866, ch. 184 (14 Stat. 98) 1049
Joint Res. March 2, 1861, No. 11 (12 Stat. 251) 918, 926, 927	Act of July 13, 1866, ch. 184 (14 Stat. 128) 790
Act of March 2, 1861, ch. 68 (12 Stat. 188-196) 607, 845	Act of July 13, 1866, ch. 184 (14 Stat. 150-152) 293, 1050
Act of March 2, 1861, ch. 86 (12 Stat. 239) 1046	Act of July 13, 1866, ch. 184 (14 Stat. 171, 172) 652, 660, 661
Act. of July 13, 1861, ch. 3 (12 Stat. 255-256) 479, 640	Act of July 13, 1866, ch. 184 (14 Stat. 113) 273, 274
Act of Aug 5, 1861, ch. 45 (12 Stat. 292) 174, 176, 845	Act of July 13, 1866, ch. 184 (14 Stat. 106) 293
Proc. of Pres. Aug. 16, 1861 (12 Stat. 1262) 479, 641	Act of July 13, 1866, ch. 184 (14 Stat. 135-139), 293, 609, 610, 611, 647, 1069
Act of May 30, 1862, ch. 86 (12 Stat. 410) 588	Act of July 18, 1866, ch. 201 (14 Stat. 187, 188) 862, 863, 864
Act of June 2, 1862, ch. 90 (12 Stat. 410) 100	Act of July 20, 1866, ch. 186 (15 Stat. 152) 752
Act of June 7, 1862, ch. 98 (12 Stat. 422) 174, 176, 327, 329	Act of July 25, 1866, ch. 242 (14 Stat. 239) 305
Act of July 1, 1862 (12 Stat. 465) 157	Act of July 26, 1866, ch. 262 (14 Stat. 25-27) 242, 254, 790
Act of July 1, 1862, ch. 120 (12 Stat. 489) 196, 198, 277, 287, 289, 292, 426, 427, 501, 506, 513, 790	Act of July 27, 1866, ch. 288 (14 Stat. 306) 355, 356
Act of July 1, 1862, ch. 126 (12 Stat. 501) 251	Act of July 28, 1866, ch. 298 (14 Stat. 328-329) 236
Act of July 12, 1862, ch. 161 (12 Stat. 543) 918	Act of Feb. 5, 1867, ch. 28 (14 Stat. 386) 657, 658
Act of July 14, 1862, ch. 163 (12 Stat. 553-554) 607, 845	Act of Feb. 23, 1867, ch. 64 (14 Stat. 403) 884
Act of July 14, 1862, ch. 164 (12 Stat. 565-568) 183, 192, 539	
Act of July 17, 1862, ch. 195 (12 Stat. 589-590) 316, 322, 323, 480	
Act of Feb. 6, 1863, ch. 21 (12 Stat. 640) 174, 176, 327, 329	

ACTS, TREATIES AND PROCLAMATIONS CITED, CON.

Act of Feb. 25, 1867, ch. 81 (14 Stat. 410)	862	Act of May 27, 1872, ch. 218 (17 Stat. 162)	322
Act of March 2, 1867, ch. 150 (14 Stat. 426)	549	Act of May 27, 1872, ch. 220 (17 Stat. 162)	
Act of March 2, 1867, ch. 154 (14 Stat. 430)	772	Act of June 1, 1872, ch. 255 (17 Stat. 196-198)	381, 590, 634, 638, 639, 640, 810
Act of March 2, 1867, ch. 155 (14 Stat. 432)	130, 133	Act of June 2, 1872, ch. 354 (17 Stat. 339)	875
Act of March 2, 1867, ch. 169 (14 Stat. 471-484)	161, 293, 352, 540, 1049	Act of June 6, 1872, ch. 315 (17 Stat. 249-257)	752, 1050
Bank'cy Act of March, 1867, ch. 176 (14 Stat. 517-525)	43, 45, 59, 203, 313, 523	Act of June 6, 1872, ch. 315 (17 Stat. 231, 232)	806, 949
Act of March 2, 1867, ch. 177 (14 Stat. 541)	314, 422, 423, 447	Act of June 8, 1872, ch. 354 (17 Stat. 339)	440, 443, 873
Act of March 2, 1867, ch. 196 (14 Stat. 558)	273, 848	Act of June 8, 1872, ch. 336 (17 Stat. 330)	536
Joint Res. of Feb. 3, 1868, No. 9 (15 Stat. 246)	352	Act of June 8, 1872, ch. 374 (17 Stat. 339)	444
Act of June 25, 1868, ch. 71 (15 Stat. 75)	749	Act of June 10, 1872, ch. 421 (17 Stat. 378)	836
Treaty of July 3, 1868 (15 Stat. 674)	237	Act of March 3, 1873, ch. 226 (17 Stat. 508)	149, 154
Act of July 20, 1868, ch. 186 (15 Stat. 125)	352, 353	Act of March 3, 1873, ch. 234 (17 Stat. 566-572)	192, 482
Act of July 20, 1868, ch. 186 (15 Stat. 135-147)	321, 537	Act of Dec. 1, 1873, Rev. Stat. p. 1	727
Act of March 1, 1869, ch. 57 (15 Stat. 282)	268, 269	Act of April 7, 1874, ch. 80 (18 Stat. 27)	422
Act of March 3, 1869, ch. 121 (15 Stat. 300)	1046	Act of June 6, 1874, ch. 223 (18 Stat. 62)	99, 1102
Act of March 3, 1869, ch. 127 (15 Stat. 324)	290	Act of June 20, 1874, ch. 238 (18 Stat. 107)	108
Act of April 5, 1869, ch. 10 (16 Stat. 6)	773	Act of June 20, 1874, ch. 388 (18 Stat. 144)	108
Res. of April 10, 1869, No. 19 (16 Stat. 56)	196, 289	Res. of June 23, 1874, No. 16 (18 Stat. 289)	756
Act of May 20, 1870, ch. 108 (16 Stat. 124)	783	Act of June 23, 1874, ch. 469 (18 Stat. 253, 254)	245, 346
Act of May 31, 1870, ch. 114 (16 Stat. 140)	721	Act of June 23, 1874, ch. 515 (18 Stat. 614)	543
Act of July 1, 1870, ch. 187 (16 Stat. 179)	269	Act of Feb. 16, 1875, ch. 77 (18 Stat. 315, 316)	168, 634, 638, 639, 827, 1064
Act of July 8, 1870, ch. 225 (16 Stat. 195)	184, 193	Act of March 1, 1875, ch. 114 (18 Stat. 335, 336)	670, 678, 680, 681
Act of July 8, 1870, ch. 230 (16 Stat. 198)		Act of March 3, 1875, ch. 128 (18 Stat. 367)	108
Act of July 8, 1870, ch. 230 (16 Stat. 198-207)	85, 177, 358, 551, 940	Act of March 3, 1875, ch. 137 (18 Stat. 470-472)	208, 273, 589
Act of July 9, 1870, ch. 235 (16 Stat. 217)	243	Act of March 3, 1875, ch. 152 (18 Stat. 482)	601, 604, 638, 842, 848, 936
Act of July 12, 1870, ch. 251 (16 Stat. 251)	107	Act of March 3, 1875, ch. 189 (18 Stat. 516)	440, 445, 873
Act of July 14, 1870, ch. 255 (16 Stat. 260-264)	293, 608, 611, 1070		440, 444
Act of Feb. 28, 1871, ch. 99 (16 Stat. 433)	721, 727	Act of July 12, 1876, ch. 186 (19 Stat. 90)	1079
Act of March 3, 1871, ch. 116 (16 Stat. 525)	285	Act of Aug. 14, 1876, ch. 274 (19 Stat. 141)	551
Act of March 3, 1871, ch. 129 (16 Stat. 582)	919	Act of March 3, 1877, ch. 126 (19 Stat. 405)	875
Act of May 10, 1872, ch. 152 (17 Stat. 91, 92)	243, 254, 437	Act of May 7, 1878, ch. 96 (20 Stat. 56)	285, 501, 506, 510, 514
		Act of March 3, 1879, ch. 176 (20 Stat. 354)	678

UNITED STATES REV. STAT. CITED.

Rev. Stat., secs. 221 & 222, p. 35	307	Rev. Stat., secs. 650-652, p. 117-118	639-860
Rev. Stat., sec. 277, p. 46	537	Rev. Stat., secs. 650-652-693	634
Rev. Stat., secs. 558, 624, 678, pp. 93, 108-125	536	Rev. Stat., sec. 652, p. 118	638
Rev. Stat., sec. 568, p. 96	1062	Rev. Stat., sec. 691, p. 128	639
Rev. Stat., sec. 629, p. 109	638	Rev. Stat., sec. 698, p. 130	579
Rev. Stat., sec. 629, p. 112	181	Rev. Stat., sec. 709, p. 132	115-657
Rev. Stat., sec. 629	358	Rev. Stat., sec. 720, p. 136	105
Rev. Stat., sec. 629, art. 9, p. 111	361	Rev. Stat., sec. 721, p. 136	162
Rev. Stat., sec. 629, p. 109	1062	Rev. Stat., sec. 722, p. 136	662
Rev. Stat., sec. 639, p. 113	848	Rev. Stat., sec. 808, p. 150	246
Rev. Stat., sec. 641, p. 114	666-667-670-674	Rev. Stat., sec. 819, p. 152	247-662
Rev. Stat., sec. 643, p. 115	649-652-653-654-661	Rev. Stat., sec. 820, p. 152	471
Rev. Stat., sec. 649, p. 117	604	Rev. Stat., sec. 821, p. 152	471
Rev. Stat., secs. 649-700, p. 117-130	169	Rev. Stat., sec. 825, p. 154	375
		Rev. Stat., sec. 886, p. 167	537

UNITED STATES REV. STAT. CON.

Rev. Stat., sec. 886, p. 167	1020	Rev. Stat., sec. 3241, p. 625	274
Rev. Stat., sec. 913, p. 173	570	Rev. Stat., sec. 3251-3, p. 630	455
Rev. Stat., sec. 914, p. 173	810	Rev. Stat., sec. 3307-9, p. 644-5	456
Rev. Stat., sec. 917, p. 174	983	Rev. Stat., sec. 3309, p. 644	456-457
Rev. Stat., sec. 921, p. 175	151	Rev. Stat., sec. 3413, p. 674	979
Rev. Stat., sec. 938, p. 177	299	Rev. Stat., sec. 3425, p. 677	1020-1021
Rev. Stat., secs. 940-941, p. 178	299	Rev. Stat., sec. 3617, p. 717	864
Rev. Stat., sec. 941, p. 178	500	Rev. Stat., sec. 3619, p. 718	862-863-864
Rev. Stat., sec. 951, p. 179	886-1069	Rev. Stat., sec. 3679, p. 728	107
Rev. Stat., sec. 989, p. 185	161	Rev. Stat., sec. 3732, p. 742	107
Rev. Stat., sec. 997, p. 186	354	Rev. Stat., sec. 3894, p. 763	1079
Rev. Stat., sec. 999, p. 186	362	Rev. Stat., secs. 4192-3 p. 813-814	591
Rev. Stat., sec. 1000, p. 187	530-821-841	Rev. Stat., sec. 4281, p. 831	535
Rev. Stat., sec. 1005, p. 187	362-590	Rev. Stat., sec. 4492, p. 874	383
Rev. Stat., sec. 1009, p. 188	482	Rev. Stat., secs. 2426, 4695 pp. 447, 921	539
Rev. Stat., sec. 1012, p. 188	354	Rev. Stat., sec. 4777, p. 936	482
Rev. Stat., sec. 1044, p. 193	194	Rev. Stat., sec. 4783, p. 936	180
Rev. Stat., secs. 1044-1046	540	Rev. Stat., sec. 4820, p. 943	631
Rev. Stat., sec. 1059, p. 195	116-1011	Rev. Stat., secs. 4895-6, p. 955	177
Rev. Stat., sec. 1091, p. 200	544	Rev. Stat., sec. 4916, p. 959	82
Rev. Stat., sec. 1547, p. 263	539	Rev. Stat., sec. 4918, p. 959	85
Rev. Stat., sec. 1624, art. 4-14	539	Rev. Stat., secs. 4919-4921, p. 960	361
Rev. Stat., sec. 1624, art. 51-53, p. 283-4	539	Rev. Stat., sec. 4920, p. 960 69-74-580-943-947	
Rev. Stat., sec. 1851, p. 329	346	Rev. Stat., sec. 4922, p. 961	547
Rev. Stat., secs. 1910-1911, p. 337-8	246-1062	Rev. Stat., secs. 4937-4947, p. 963-5	551
Rev. Stat., secs. 1977-1978, p. 348	667-669	Rev. Stat., sec. 4939, p. 964	553
Rev. Stat., sec. 2012, p. 355	719	Rev. Stat., sec. 4972, p. 969	43-203
Rev. Stat., secs. 2011-2012-2016, p. 354-5	720	Rev. Stat., sec. 4972, p. 977	202
Rev. Stat., secs. 2017-2021-2022, p. 355-7	720	Rev. Stat., sec. 4986, p. 971	202
Rev. Stat., secs. 20-21	719	Rev. Stat., sec. 5039, p. 980	46
Rev. Stat., sec. 2022, p. 357	720	Rev. Stat., sec. 5044, p. 980	43-474-867
Rev. Stat., sec. 2154-2155, p. 377	645	Rev. Stat., sec. 5046, p. 981	43
Rev. Stat., sec. 2339, p. 432	242	Rev. Stat., sec. 5057, p. 982	59-475
Rev. Stat., secs. 2503-2504, p. 462-3	949	Rev. Stat., sec. 5068, p. 984	313
Rev. Stat., sec. 2504, p. 465	608	Rev. Stat., sec. 5106, p. 990	45
Rev. Stat., secs. 2639-2641, p. 526	862	Rev. Stat., sec. 5117, p. 993	312
Rev. Stat., sec. 2647, p. 527	861-863	Rev. Stat., sec. 5118, p. 993	313
Rev. Stat., sec. 2654, p. 528	862	Rev. Stat., sec. 5136, p. 999	695-907
Rev. Stat., sec. 2659, p. 529	862	Rev. Stat., secs. 5136-5137, p. 999	189
Rev. Stat., sec. 2675, p. 530	863	Rev. Stat., sec. 5219, p. 1015	706
Rev. Stat., sec. 2691, p. 532	861	Rev. Stat., sec. 5219, p. 1015	901
Rev. Stat., sec. 2931, p. 570	1050	Rev. Stat., sec. 5228, p. 1017	751
Rev. Stat., secs. 2931-3011, p. 570-583	159	Rev. Stat., sec. 5325, p. 1040	347
Rev. Stat., sec. 3142, p. 604	374	Rev. Stat., sec. 5440, p. 1060	540
Rev. Stat., sec. 3143, p. 605	374	Rev. Stat., sec. 5445, p. 1061	540
Rev. Stat., sec. 3149-3150, p. 606	268	Rev. Stat., sec. 5485, p. 1069	192
Rev. Stat., sec. 3148, p. 606	268	Rev. Stat., sec. 5514, p. 1075	720
Rev. Stat., sec. 3150, p. 606	268-269	Rev. Stat., secs. 5515-5522, p. 1075-1076	
Rev. Stat., sec. 3163	268		716-718-720
Rev. Stat., sec. 3188, p. 615	457	Rev. Stat., sec. 5522, p. 1076	719
Rev. Stat., sec. 3218, p. 621	835	Rev. Stat., secs. 5569-5571-5572	735
Rev. Stat., sec. 3220, p. 621	1069	Rev. Stat., sec. 5579	735
Rev. Stat., sec. 3227, p. 622	1050	Rev. Stat., sec. 5596, p. 1091	632-1020
Rev. Stat., sec. 3232, p. 624	273-274	Rev. Stat., sec. 5597, p. 1091	111-1020

CONSTITUTION OF THE UNITED STATES, CITED.

Const., art. 1, sec. 9	974	Amendt. Const., art. 6	150
U. S. Const., art. 1, sec. 10	710	Const., 14th Amendt.	674
U. S. Const., 1834 and 1870, art. 2, sec. 24	993	U. S. Const., 14th Amendt	667
Const., art. 3, sec. 1	150	Const., 14th Amendt.	684

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1878.

Vol. 98.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1878,

AND REPORTED HEREIN,

VOL. 98,

AS HAVE ALSO BEEN REPORTED IN

8 OTTO.

8 Otto.	Title.	Here in.	8 Otto.	Title.	Here in.
1	Palmer v. Low,	60	102-104	County of Daviess v. Huidekoper,	114
11-12	" "	62	104	Bradley v. United States,	105
12-14	" "	63	111-112	" " "	106
14-17	" "	64	112-115	" " "	107
17-19	" "	65	115-117	" " "	108
20-21	Glenny v. Langdon,	43	118-119	Wirth v. Branson,	86
21-24	" "	44	119-122	" " "	87
24-27	" "	45	122	" " "	88
27-30	" "	46	123	National Bank v. Grand Lodge,	75
30-31	" "	47	123-124	" " " "	76
31	Bates v. Coe,	68	124-125	" " " "	77
33-35	" "	69	126	Powder Co. v. Powder Works,	77
35-38	" "	70	133-134	" " " "	80
38-41	" "	71	134-137	" " " "	81
41-44	" "	72	137-139	" " " "	82
44-47	" "	73	139-140	" " " "	83
47-50	" "	74	140	Citizens' Bank v. Board of Liqui-	
50	" "	75		dation,	114
50-54	Kesner v. Trigg,	83	140-142	" " "	115
54-56	" "	84	142-143	Dumont v. United States,	65
56-58	Peters v. Bowman,	91	143-144	" " "	66
58-61	" "	92	145	Reynolds v. United States,	244
61	" "	93	153	" " "	245
61-62	United States v. Throckmorton,	93	153-156	" " "	246
62-64	" "	94	156-159	" " "	247
64-67	" "	95	159-161	" " "	248
67-70	" "	96	161-164	" " "	249
70-71	" "	97	164-167	" " "	250
72-73	Williams v. Hagood,	51	167-169	" " "	251
73-75	" "	52	169-171	County of Schuyler v. Thomas,	88
75	Garratt v. Seibert,	84	171-174	" " "	89
75-77	" "	85	174-176	" " "	90
77-79	" "	86	176-177	Orvis v. Powell,	238
79-80	Ivinson v. Hutton,	66	177-179	" " "	239
80-83	" "	67	179-185	McKnight v. United States, }	
83-85	" "	68		United States v. McKnight, }	115
85	Snell v. Insurance Company,	52	185-186	" " "	116
88-90	" "	54	187	Stewart v. Sonneborn,	116
90-93	" "	55	191-192	" " "	118
93-95	" "	56	192-195	" " "	119
95-98	" "	57	195-198	" " "	120
98-99	County of Daviess v. Huidekoper,	112	198-201	" " "	121
99-102	" "	113	201-202	" " "	122

REFERENCE TABLE.

8 Otto.	Title.	Here in.	8 Otto.	Title.	Here in.
203	Snyder v. Sickles,	97	366-368	Cleveland Ins. Co. v. Globe	201
203-205	" " " "	98		Ins. Co.,	202
205-207	" " " "	99	368-371	" " " "	203
207-210	" " " "	100	371-374	" " " "	204
210-213	" " " "	101	374-377	" " " "	205
213-216	" " " "	102	377-380	" " " "	206
216-217	" " " "	103	380-381	" " " "	225
218	Elcox v. Hill,	103	381-392	United States v. New Orleans,	226
224	" " " "	104	392-395	" " " "	227
225	Andreae v. Redfield,	158	395-398	" " " "	227
225-227	" " " "	159	398	U. S. ex rel. Parsons v. New Or-	227
227-230	" " " "	160		leans, Note,	228
230-233	" " " "	161		U. S. ex rel. Peterkin v. New Or-	228
233-236	" " " "	162		leans, Note,	228
236-238	" " " "	163		U. S. ex rel. Wadick v. New Or-	228
238-239	" " " "	164		leans, Note,	231
240-242	Ex parte Schwab,	105	398	Railroad Company v. Grant,	232
242-243	Slaughter v. Glenn,	122	403-402	" " " "	233
243-246	" " " "	123	402-403	" " " "	206
246-248	" " " "	124	403	Boom Company v. Patterson,	207
248	Gifford v. Helms,	57	404-406	" " " "	208
248-251	" " " "	58	406-409	" " " "	209
251-253	" " " "	59	409-410	" " " "	164
254-256	Bowen v. Chase,	47	410-416	Scully v. United States,	165
256-259	" " " "	48	416-419	" " " "	166
259-262	" " " "	49	419-422	" " " "	167
262-265	" " " "	50	422-424	" " " "	167
265-266	" " " "	51	424-425	United States v. Baltimore,	168
266	Beckwith v. Bean,	124	425	" " " "	191
266-267	" " " "	127	425-427	Foster v. Mora,	192
267	" " " "	124	427-428	" " " "	251
267-270	" " " "	125	428-429	United States v. Perot,	252
270-273	" " " "	126	429-432	" " " "	253
273-275	" " " "	127	432	" " " "	209
275-278	" " " "	128	432-434	Carr v. United States,	210
278-281	" " " "	129	434-436	" " " "	211
281-283	" " " "	130	436-439	" " " "	212
283-286	" " " "	131	439	" " " "	168
286-289	" " " "	132	440-441	The "Abbotsford,"	169
289-292	" " " "	133	441-444	" " " "	170
292-295	" " " "	134	444-447	" " " "	192
295-297	" " " "	135	447-448	United States v. Benecke,	193
297-300	" " " "	136	448-450	" " " "	193
300-303	" " " "	137	450-451	United States v. Irvine,	194
303-306	" " " "	138	451-453	" " " "	240
306-308	" " " "	139	453	Jennison v. Kirk,	241
308	Little Rock v. National Bank,	108	454-456	" " " "	242
311-313	" " " "	109	456-458	" " " "	243
313-315	" " " "	110	458-461	" " " "	244
315	Blake v. Hawkins,	139	461-462	" " " "	253
324-327	" " " "	141	463-464	Mining Company v. Tarbet,	254
327-330	" " " "	142	464-467	" " " "	255
330-331	" " " "	143	467-470	" " " "	228
332	Bank v. McVeigh,	110	470	Amy v. Dubuque,	229
333-334	" " " "	111	470-472	" " " "	230
334-336	United States v. Burlington &	198	472-475	" " " "	231
	Mo. Riv. R. R. Co.	199	475-476	" " " "	237
336-339	" " " "	200	476-478	Harkness v. Hyde,	238
339-342	" " " "	201	478-479	" " " "	234
342	" " " "	180	479-481	Railroad Company v. Varnell,	235
343-345	United States v. Hall,	181	481-484	" " " "	194
345-348	" " " "	182	484-485	" " " "	195
348-351	" " " "	183	486-488	United States v. Thompson,	196
351-354	" " " "	184	488-491	" " " "	213
354-357	" " " "	185	491	Airhart v. Massieu,	214
357-358	" " " "	186	491-492	" " " "	215
359	Railroad Company v. Georgia,	187	492-495	" " " "	216
360-362	" " " "	188	495-498	" " " "	217
362-365	" " " "	188	498-500	" " " "	218
365-366	" " " "	188	500-503	" " " "	
366	Railroad Co v. Georgia, Note,	188	503-506	" " " "	

REFERENCE TABLE.

8 Otto.	Title.	Here in.	8 Otto.	Title.	Here in.
506	Airhart v. Massieu,	219	555	Hendrie v. Sayles,	180
507	Reed v. McIntyre,	171	555-558	Barnet v. National Bank,	212
509-511	" " "	172	558-559	" " "	213
511-513	" " "	173	559	Railway Company v. Loftin,	222
514-516	Brick v. Brick,	256	563-565	" " "	224
516-517	" " "	257	565	United States v. Sherman,	235
517-522	De Treville v. Smalls,	174	565-568	" " "	236
522-525	" " "	175	568	" " "	237
525-528	" " "	176	569	U. S. v. Union Pacific R. R. Co.,	143
528	Hooper v. Robinson,	219	601-603	" " "	150
536-537	" " "	220	603-606	" " "	151
537-540	" " "	221	606-608	" " "	152
540-541	" " "	222	608-611	" " "	153
541-542	Railroad Company v. Commis- sioners,	196	611-614	" " "	154
542-545	" " "	197	614-617	" " "	155
545-546	" " "	198	617-620	" " "	156
546	Hendrie v. Sayles,	176	620	" " "	157
548-549	" " "	177	621-624	National Bank v. Matthews,	188
549-552	" " "	178	624-627	" " "	189
552-555	" " "	179	627-630	" " "	190

CASES REPORTED IN VOLUME 98.

A.

"Abbotsford, The,"	168
Abbotsford, The, v. Johnson,	168
Airhart v. Massieu,	213
Amy v. Dubuque,	228
Andreae v. Redfield, Exrx.,	158
Atlantic F. & M. Ins. Co., Snell v.	52
Atlantic & Gulf R. R. Co. v. Georgia,	185

B.

"Baltimore, United States v."	167
Balt. & P. R. R. Co. v. Grant,	231
Bank, Merch. Nat., Little Rock v.	108
Bank, Muncie Nat., Barnet, Assignee, v.	212
Bank of the Old Dominion v. McVeigh,	110
Bank, Second Nat., of St. L., v. Grand Lodge of F. & A. M.,	75
Bank, Union Nat., of St. L., v. Matthews,	188
Barnet, Assignee, v. Muncie Nat. Bk.,	212
Bates v. Coe,	68
Bean, Beckwith v.	124
Beckwith v. Bean,	124
Benecke, United States v.	192
Betts v. Mugridge,	157
Blake v. Hawkins, Assignee,	139
Board of Liquidation, Louisiana v.	114
Bowen v. Chase,	47
Bowman, Admr., Peters v.	91
Bradley v. United States,	105
Branson, Wirth v.	86
Brick v. Brick, Exr.,	256
Burlington & Mo. Riv. R. R. Co., U. S. v.	198

C.

California Powder Works, Giant Powder Co. v.	77
Carr v. United States,	209
Carson, Exr., v. Ober,	157
Chase, Bowen v.	47
Citizens' Ins. Co., Marsh v.	90

C.

Cleveland Ins. Co. v. Globe Ins. Co.	201
Coe, Bates v.	68
Comrs. of Dodge Co., Union Pacific R. R. Co. v.	196
"Comrs., Railroad Company v."	196
County Court, Knox Co. v. United States,	191
County of Daviess v. Huidekoper,	112
County of Schuyler v. Thomas,	88

D.

Daviess County v. Huidekoper,	112
DeTreville v. Smalls,	174
Dodge Co., Comrs. of, Union Pacific R. R. Co. v.	196
Dubuque, Amy v.	228
Dumont v. United States,	65

E.

Elcox v. Hill, Admr.,	103
Ex Parte Schwab,	105

F.

Flagstaff Silver M. Co. v. Tarbet,	253
Foster v. Mora,	191

G.

Garratt v. Seibert,	84
Georgia, Atl. & Gulf R. R. Co. v.	185
Georgia, Railroad Company v.	188
Giant Powder Co. v. Cal. Powder Works,	77
Gifford, Admr., v. Helms, Admr.,	57
Glenn, Exr., Slaughter v.	122
Glenny v. Langdon,	43
Goodrich, Assignee, Wilson v.	111
Grand Lodge of F. & A. M., Second Nat. Bk. of St. Louis v.	75
Grant, Balt. & P. R. R. Co. v.	231

CASES REPORTED.

H.		R.	
Hagood, Williams v.	51	R. R. Co., Union Pacific, v. Comrs. of Dodge Co.,	196
Hall, United States v.	180	R. R. Co., Union Pacific, United States v.	143
Harkness v. Hyde,	237	R. R. Co., Washington & G., v. Varnell,	233
Hawkins, Assignee, Blake v.	139	Ry. Co., St. L., I. M. & S., v. Loftin,	222
Helms, Admr., Gifford, Admr., v.	57	Redfield, Exrx., Andrae v.	158
Hendrie v. Sayles,	176	Reed v. McIntyre, Assignee,	171
Hill, Admr., Elcox v.	103	Reynolds v. United States,	244
Hooper v. Robinson,	219	Robinson, Hooper v.	219
Huidekoper, Daviess County v.	112	S.	
Hutton, Ivins v.	66	St. Louis, I. M. & S. Ry. Co. v. Loftin,	222
Hyde, Harkness v.	237	Sayles, Hendrie v.	176
I.		Schuyler County v. Thomas,	88
Ins. Co., Atl. F. & M., Snell v.	52	Schwab, <i>Ex Parte</i> ,	105
Ins. Co., Citizens', Marsh v.	90	Scull v. United States,	164
Ins. Co., Cleveland, v. Globe Ins. Co.,	201	Second Nat. Bk. of St. Louis v. Grand	
Ins. Co., Globe, Cleveland Ins. Co. v.	201	Lodge of F. & A. M.,	75
Irvine, United States v.	193	Seibert, Garratt v.	84
Ivins v. Hutton,	66	Sherman, Secy. of Treas., U. S., <i>ex rel.</i> , v.	235
J.		Sickles, Snyder v.	97
Jennison, Exr., v. Kirk,	240	Slaughter v. Glenn, Exr.,	122
Johnson, The Abbotsford v.	168	Smalls, De Treville v.	174
K.		Snell v. Atl. F. & M. Ins. Co.,	52
Kesner v. Trigg, Assignee,	83	Snyder v. Sickles,	97
Kirk, Jennison, Exr., v.	240	Sonneborn, Stewart v.	116
Knox Co. Court v. United States,	191	Stewart v. Sonneborn,	116
L.		T.	
Langdon, Glenn v.	48	Tarbet, Flagstaff Silver Min. Co., v.	253
Little Rock v. Merch. Nat. Bk.,	108	"The Abbotsford,"	168
Loftin, St. L., I. M. & S. Ry. Co. v.	222	The Abbotsford v. Johnson,	168
Louisiana, <i>ex rel.</i> , v. Board of Liquidation,	114	Thomas, Schuyler Co. v.	88
Low, Palmer v.	60	Thompson, United States v.	194
M.		Throckmorton, United States v.	93
McDonough's Legatees, United States v.	167	Trigg, Assignee, Kesner v.	83
McIntyre, Assignee, Reed v.	171	U.	
McKnight v. United States,	115	Union Nat. Bk. of St. L. v. Matthews,	189
McVeigh, Bank of the Old Dominion v.	110	Union Pac. R. R. Co. v. Comrs. of Dodge Co.,	196
Marsh v. Citizens' Ins. Co.,	90	Union Pacific R. R. Co., United States v.	143
Massieu, Airhart v.	213	"United States v. Baltimore,"	167
Matthews, Union Nat. Bk. of St. L. v.	188	United States v. Benecke,	192
Merch. Nat. Bk., City of Little Rock v.	108	United States, Bradley v.	105
Mining Co., Flagstaff Silver, v. Tarbet,	253	United States v. Burlington & Mo. Riv. R.	
Mississippi & R. R. Boom Co. v. Patterson,	206	Co.,	198
Mora, Foster v.	191	United States, Carr v.	209
Mugridge, Betts v.	157	United States, Dumont v.	65
Muncie Nat. Bk., Barnet, Assignee v.	212	United States, <i>ex rel.</i> , v. Sherman, Secy. of	
N.		Treas.,	235
New Orleans, United States v.	225, 227, 228	United States v. Hall,	180
O.		United States v. Irvine,	193
Ober, Carson, Exr., v.	157	United States, Knox Co. Court v.	191
Orvis v. Powell,	238	United States v. McDonough's Legatees,	167
P.		United States v. McKnight,	115
Palmer v. Low,	60	United States v. New Orleans,	225, 227, 228
Patterson, Miss. & R. R. Boom Co. v.	206	United States v. Perot,	251
Perot, United States v.	251	United States, Reynolds v.	244
Peters v. Bowman, Admr.,	91	United States, Scull v.	164
Powder Co., Giant, v. Cal. Powder Works,	77	United States v. Thompson,	194
"Powder Co. v. Powder Works,"	77	United States v. Throckmorton,	93
Powell, Orvis v.	238	United States v. Union Pacific R. R. Co.,	143
R.		V.	
R. R. Co., Atl. & Gulf, v. Georgia,	185	Varnell, Wash. & G. R. R. Co. v.	233
R. R. Co., Balt. & P., v. Grant,	231	W.	
R. R. Co., Burlington & Mo. Riv., U. S. v.	189	Washington & G. R. R. Co. v. Varnell,	233
R. R. Co. v. Georgia,	188	Williams v. Hagood,	51
		Wilson v. Goodrich, Assignee,	111
		Wirth v. Branson,	86

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1878.

WILLIAM GLENNY, *Appt.*,
v.
SOLOMON LANGDON ET AL.

(See S. C., 8 Otto, 20-31.)

Bankruptcy—suit by assignees.

1. Creditors of a bankrupt can have no remedy which will reach property fraudulently conveyed by him, except through the assignee, in whom such property thus fraudulently conveyed vests, and who may recover the same.

2. If the assignee will not sue for such property, the court having jurisdiction of the matter may direct the recusant assignee to proceed or may remove him and appoint another.

[No. 7.]

Argued Oct. 17, 1878. Decided Oct. 28, 1878.

A PPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case which arose in the court below, is fully stated in the opinion of the court.

Messrs. C. D. Coffin, S. T. Crawford and J. L. Miner, for appellant.

Mr. Stanley Matthews, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

District Courts of the United States are constituted courts of bankruptcy, and as such they have original jurisdiction in all matters and proceedings in bankruptcy, with power to hear and adjudicate the same according to the provisions of the Bankrupt Act.

Jurisdiction of those courts in that regard extends as well to the collection of all the assets of the bankrupt as to all cases and controversies between the bankrupt and any of his creditors, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the bankruptcy proceedings. 14 Stat., 518; R. S., sec., 4972.

Creditors appoint the assignee; and the provision is that, as soon as he is appointed and qualified, the judge, or when there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and that such assignment shall relate back to the commencement of the proceeding. See 8 OTTO.

ceedings in bankruptcy, the express enactment being that by operation of law the title to all such property and estate, both real and personal, shall vest in such assignee. R. S., sec. 5044.

Explicit, comprehensive and unqualified as the words of that provision are, still the instrument of assignment is made even more extensively operative by what follows in the same section of the original enactment, which provides that all property conveyed by the bankrupt in fraud of his creditors * * * and all his rights of action for property or estate, real or personal, and all other causes of action arising from contract or from the taking or detention or injury to the property of the bankrupt, * * * shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. 14 Stat. at L., 523; R. S., sec. 5046.

Sufficient appears to show that certain debtors, of the complainant and other creditors, failed in business, and made, under the state law, a general assignment of their property to an assignee for the benefit of their creditors, prior to their being adjudged bankrupts. Pursuant to that assignment the assignee accepted the trust and converted all of the visible property of the insolvents surrendered to him into money, and made final distribution of the proceeds among the creditors.

Charges of fraud against the debtors are made by the complainant, to the effect that they concealed large amounts of other property from their creditors and from the assignee, as fully set forth in the bill of complainant.

On the 10th of August, 1867, one of the said debtors filed his petition in bankruptcy, and on the 11th of October following, the firm of which the first named debtor was a partner also filed their petition in bankruptcy; and the firm and each partner were duly adjudged bankrupts, the respondent, J. W. Caldwell, being subsequently appointed assignee in each case. They, the bankrupts, surrendered no property, and made oath that they had none, not excepted from the operation of the Bankrupt Act. Discovery has since been made, as the complainant alleges, that the bankrupts had fraudulently concealed a large amount of property not surrendered to the state assignee, or the assignee in bankruptcy, and that one of the firm made

large gains and profits subsequent to the assignment under the state law and prior to the time when the firm was adjudged bankrupt.

Secret and fraudulent devices, as the complainant alleges, were employed by the insolvent debtors to conceal their property from the knowledge of their creditors and the assignee; and he describes the means which led to the discovery of the property, and avers that the respondent assignee was advised of the facts set forth, and that he was requested to adopt means to recover the same, or to allow his name to be used for that purpose, but that he refused so to do.

Both the complainant and respondents are citizens of the same State; but the complainant, being a creditor of the bankrupts, instituted the suit in his own name, claiming the right to do so because the assignee refused to proceed to recover the property, or to allow his name to be used for that purpose. Service was made; and the respondents appeared, and demurred to the bill of complaint, showing, among other things, the following causes: (1) That the complainant has no capacity or right in equity to bring the suit. (2) That the complainant has never proved his claim against the estate of the bankrupts.

Beyond all doubt, the suit in this case is brought to recover property conveyed by the bankrupts in fraud of their creditors, which, by the express words of the Bankrupt Act, vested in the assignee by virtue of the instrument of assignment executed at the time the assignee was appointed.

Jurisdiction of the Circuit Court in the case cannot be sustained upon the ground of the citizenship of the parties, as the record shows that the complainant and respondents are citizens of the same State; nor can it be upheld under the provision of the Bankrupt Act, which provides that the Circuit Courts shall have concurrent jurisdiction with the District Courts of all suits at law or in equity, brought by an assignee in bankruptcy against any person claiming any adverse interest, or by such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee, for the plain reason that controversies, in order that they may be cognizable under that provision, either in the Circuit or District Court, must have respect to some property or rights of property of the bankrupt, transferable to or vested in such assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the parties described in the provision, and be against the other, as appears by the express words of the provision. *Smith v. Mason*, 14 Wall., 431 [81 U. S., XX., 752]; *Morgan v. Thornhill*, 11 Wall., 75 [78 U. S., XX., 63].

Nor is there anything in the case of *Clark v. Clark*, 17 How., 315 [58 U. S., XV., 77], inconsistent with the preceding proposition, when that case is properly understood. By the pleadings and proofs, it appears that the debtor had a large claim against Mexico pending before commissioners prior to the time he filed his petition in bankruptcy; that he was adjudged bankrupt before his claim was allowed; that the description of the claim in his schedule of assets was not such as to render it available to his creditors; that the assignee, having been empowered to sell his assets, sold the same to the sister of the bankrupt for a nominal sum, and

that she immediately reconveyed the same to her brother; that he, the brother, subsequently prosecuted the claim and recovered the same to the amount of \$69,429.04, which was paid into the National Treasury; that his brother, a judgment creditor, for himself and others, filed a bill of complaint here in the Circuit Court against the bankrupt, claiming the fund, the assignee having died before the same was recovered. Immediate steps were taken to procure the appointment of a new assignee, which appointment was made by the proper district court without delay; and the case shows that he forthwith petitioned the Circuit Court here to be admitted a party complainant in the said bill of complaint, and that he claimed the fund. Hearing was had; and the Circuit Court admitted the new assignee as a party complainant, and enjoined the Secretary of the Treasury not to pay out the fund until the further order of the court, and finally decreed that the fund belonged to the newly appointed assignee. Appeal was taken by the bankrupt, and this court affirmed the decree of the Circuit Court.

Nothing was decided in that case except that the newly appointed assignee was a proper party complainant in the bill filed by the bankrupt subsequent to the decease of the original assignee, and before his place was filled by a new appointment, and that the fund belonged to the successor as the representative of the bankrupt estate. Further litigations followed, which show to a demonstration that neither the bankrupt nor any creditor could maintain any such suit. *Clarke v. Hackett*, 1 Cliff., 273; *S. C.*, 1 Black, 77 [66 U. S., XVII., 69].

Suppose it to be true, as alleged, that the described property and rights of the bankrupts which form the subject-matter of the present controversy were transferred to and vested in the assignee, it by no means follows that the Circuit Court has jurisdiction of the case, or that the complainant can maintain the suit; as it is clear to a demonstration that the instrument of conveyance referred to did not vest the property or any right to recover the same in the complainant or his associate creditors; nor is the claim which he makes to the property in any legal sense adverse to the rights of the assignee. What the complainant claims as against the assignee is that he, the assignee, refused to institute the suit, or to allow his name to be used for the purpose. He claims no interest in the property of the bankrupt adverse to the assignee; and if he did, the claim could not be sustained for a moment, as the entire property is transferred to the assignee, to be converted into money for distribution.

Unless the assignee can collect what is due to the bankrupt, he can never perform the duty assigned to him as the representative of the bankrupt; and the 1st section of the Bankrupt Act expressly provides that the jurisdiction of the district courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy.

"Debts due" to the bankrupt, as well as all his rights of action, vest in the assignee by virtue of the adjudication in bankruptcy, and the appointment of the assignee as the representative of the bankrupt. *Shearman v. Bingham*, 7 Nat. Bk. Reg., 493.

Power and authority are also vested in the assignee by virtue of the bankruptcy, and his appointment to manage, dispose of, *sue for and recover* all his property or estate, real or personal, debts or effects, and to defend all suits at law or in equity pending against the bankrupt. 14 Stat. at L., 525.

Congress, in framing the Bankrupt Act, it is believed, intended to provide instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. State courts may, doubtless, exercise concurrent jurisdiction with the district courts in certain cases for the collection of assets not inconsistent with the Bankrupt Act; but Congress, in the judgment of the court, intended to provide the means for the execution of the law in all cases, even though the state courts should refuse to exercise jurisdiction in such cases. *Lathrop v. Drake*, 91 U. S., 516 [XXIII., 414].

Support to that proposition is found in the fact that the assignee is authorized under the order of the court to redeem or discharge any mortgage or conditional contract or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance thereof, or to sell the same, subject to such mortgage, lien or other incumbrances; the provision being that the debtor shall, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Other provisions of the Bankrupt Act forcibly confirm the same views, two of which will be mentioned: (1) That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned or intended to be assigned, real or personal, and shall sell all such as is unincumbered which comes to his hands, on such terms as he thinks most for the interest of the creditors, subject to the right of the court for cause shown to make such order concerning the time, place and manner of sale, as will, in its opinion, promote those objects. (2) That the assignee shall have the like remedy to recover all said estate, debts and effects, *in his own name*, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. 14 Stat. at L., 524.

Bankruptcy courts have original jurisdiction in their respective districts of all matters and proceedings in bankruptcy, and are authorized to hear and adjudicate upon the same, according to the provisions of the Bankrupt Act. They have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity.

Assignees are in the first instance chosen by the creditors; but they may be removed by the court, after due notice, for any cause which, in the judgment of the court, renders such removal necessary or expedient. 14 Stat. at L., 525.

Authority for a creditor to bring suit to recover the property or rights of property of the bankrupt, under any circumstances, is certainly not given in the Bankrupt Act, nor is any such pretense set up by the complainant. Instead of that, See 8 OTTO.

he admits, what cannot be denied, that the entire property of the bankrupt, except what is reserved from the operation of the Bankrupt Act, vests in the assignee by virtue of the instrument of conveyance required to be made as soon as the assignee is appointed and qualified.

Due conveyance of the kind was made in this case, nor does he attempt to controvert the proposition that the assignee is the only party designated by the Bankrupt Act as the proper claimant of the bankrupt's property and estate. The grounds of recovery, as stated in the bill of complaint, are: that, before filing the same, he made application to the assignee to proceed by bill in chancery or other proper mode, or allow his name to be used for the purpose, to subject the said property and rights of the bankrupt, fraudulently concealed and retained, and to convert the same into money, to be paid and distributed to the creditors, which he as such assignee declined and refused to do.

Viewed in the light of those allegations, the theory of the complainant is, that the assignee, inasmuch as he declined to comply with the request and refused either to bring the suit or to allow his name to be used to recover the property and rights of property of the bankrupt, was guilty of a fraud against the creditors; and that the latter, by virtue of such request and refusal, had a right to seek a remedy in their own names, not only against the bankrupt and the possessor of the concealed property and estate, but also against the assignee, who is deemed to be responsible for the concealed property. Such a remedy, it is conceded, does not grow out of or depend upon the Bankrupt Law; but the argument is, that it is founded upon the enlarged principles of equity which adapt themselves to the exigencies of the case, and enable the court to mold the decree to suit the various equities arising between the parties to the litigation.

Authorities are cited, to prove that the person for whose benefit a trust is executed, who is to be the ultimate receiver of the money, may maintain a suit in equity to have it paid to himself; and the proposition is advanced, that, where a trustee is guilty of what the law considers a breach of trust, in regard to the trust property, the *cestui que trust* may invoke the aid of equity to give him such remedy in the premises as the circumstances may require.

Grant that, and the concession shows to a demonstration that the present suit cannot be maintained, as the record shows that the complainant and respondents are citizens of the same State; and of course the Circuit Court had no jurisdiction of the case, it being conceded by the complainant that the remedy sought does not grow out of or depend upon the Bankrupt Law.

Conceded or not, it is clear that the suit in this case finds no support in the provisions of the Bankrupt Act, as sufficiently appears from the references to that Act already made; but if more be needed, it will be found in the section which provides that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined. R. S., sec. 5106.

Appellate jurisdiction, as exercised under the 22d section of the Judiciary Act, 1 Stat. at L., 73, is not conferred upon the Circuit Courts in

any case under the Bankrupt Act, where the ruling, order, decision or decree of the Circuit Court is made or rendered by that court in a summary way. All such rulings, orders, decisions or decrees must be revised, if at all, under the first clause of the 2d section of that Act, in respect to which the determination of the Circuit Court is final and conclusive. *Knight v. Cheney*, 5 Nat. Bk. Reg., 313; *Morgan v. Thornhill* [supra].

Creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: (1) Because all such property, by the express words of the Bankrupt Act, vests in the assignee by virtue of the adjudication in bankruptcy and of his appointment. (2) Because they cannot sustain any suit against the bankrupt.

Property fraudulently conveyed vests in the assignee, who may recover the same and distribute its proceeds as the Bankrupt Act requires. Such a conveyance, says Curtis, is no effectual conveyance as against the interest intended to be defrauded, which is represented by the assignee, so far as respects all creditors who prove their claims. They can have no remedy which will reach such property except through the assignee, not only for the reasons already assigned, but because their remedies are absorbed in the great and comprehensive remedy under the commission by virtue of which the assignee is to collect and distribute among them the property of their debtor, "to which they are justly and legally entitled." *Carr v. Hilton*, 1 Curt. (C. C.), 234.

Opposed to that proposition is the case of *Franklyn v. Fern*, 2 Eq. Cas. Abr., 103, in which it was held that, if the assignee refuses to bring a bill that is for the benefit of the bankrupt's estate, the creditor has the right to bring such a bill, under peril of costs.

Enough has been already remarked to show that the Bankrupt Act makes it the express and positive duty of the assignee to collect and distribute all the assets of the bankrupt, including property fraudulently conveyed prior to the decree of bankruptcy, and that authority is given to him to sue for the same under the direction and control of the court, which may, in its discretion and for good cause shown, require the assignee by a specific order, to take any proper step to secure the due administration of the Bankrupt Law, and the full and complete protection of the rights of the creditors interested in the proceedings; that ample means are placed in the hands of the creditors to enable them to inform the court of the necessity of any particular proceeding to be taken for that purpose; to which it may be added that the power of the court to compel a compliance with any such order is plenary, and beyond all doubt; or if the assignee fails to do so, to punish him for contempt, or to remove him and appoint another in his place. Bump, Bankruptcy, 10th ed., 147.

Plenary as the powers granted to the bankrupt courts are, there is no occasion for any departure from them in order to the complete execution of the duties imposed, which of itself is a sufficient reason for holding that the rule laid down in the preceding case is not applicable in our bankrupt system. R. S., sec. 5039.

Neither the assignee nor any creditor can have

any greater right under the Bankrupt Act than the Act itself confers; and if it be conceded that the remedy sought in this case does not depend upon the Bankrupt Act, then it is clear that the court below had no jurisdiction of the case, unless the proposition can be sustained that such a suit may be maintained in a circuit court, where both parties are citizens of the same State.

Nor is that the only objection to the theory advanced by the complainant; for if one creditor may sue in such a case, then all may sue; and the result might be that the proceedings in bankruptcy would be transferred not only to the Circuit Court, but to every state court within whose jurisdiction a defendant may reside.

Even if the case referred to, and others of like character, were good law in the courts of the country where they were made, still it is clear that the question before the court must be controlled by the provisions of our Bankrupt Act; but the doctrine of that case has long since been overruled, and is no longer regarded as correct, even in the jurisdiction where it was made, of which there is abundant evidence.

Creditors of an insolvent, said Lord Cottenham, cannot maintain a suit to recover the property or rights which belong to the insolvent, and the same rule applies to suits for a similar object brought by the insolvent himself. *Heath v. Chadwick*, 2 Phil., 649.

Prima facie the bankrupt is divested of the whole estate, nor have the creditors any right to sue; but if it be represented that the assignee will not sue, the court having original jurisdiction of the matter may direct the recusant assignee to proceed, or may give the bankrupt or a creditor the right to institute the suit in the name of the assignee, first indemnifying the assignee against costs. *Benfield v. Solomons*, 9 Ves., 83.

Attempt to maintain such a suit was made in *Yewens v. Robinson*, 11 Sim., 105; but the assignees demurred to the bill of complaint, and the court sustained the demurrer, holding that the true method to proceed in such a case was to apply to the court of insolvency to have the assignees removed and others appointed in their place.

Application was made to the court in the case of *Ex parte Ryland*, and the petitioning creditor was allowed by the court to sue in the name of the assignee, first giving the assignee indemnity against cost and damage. 2 Deac. & C., 393. Corresponding decision was made in the case of *Hammond v. Attwood*, 3 Madd. Ch., 158, the court holding that the proper course was to apply to the court by petition to have the assignees removed and new assignees appointed. *Major v. Aukland*, 3 Hare, 77.

Bankrupts uncertificated cannot file a bill of complaint against their assignees for an account; nor can the bankrupt obtain such relief by charging fraud and collusion between the assignees and a third party, the true remedy being a petition for relief to the court of original jurisdiction. *Tarleton v. Hornby*, 1 You. & C., 193.

Suffice it to say that the law is now well settled in the parent country, that creditors cannot maintain any such suit against the assignee, for the purpose set forth in the present bill of complaint.

Strong support to the conclusion is also derived from the fact that cases arise in bank-

ruptcy proceedings where the assignee is not bound to take possession of some particular asset which passed to him by the instrument of assignment. Examples of the kind, such as certain leasehold estates which would burden instead of benefiting the fund to be distributed, are given by *Judge Ware* in the case of *Smith v. Gordon*, 6 L. R., 317, to which reference is made as showing the principle of the rule.

Leasehold estates pass to the assignee under the English bankrupt laws; but the assignee, in certain cases, is not bound to take the lease of the estate where the rent is greater than the value of the lease, as the effect would be to burden the estate of the bankrupt, and to diminish the fund to be distributed among the creditors. *Copeland v. Stephens*, 1 B. & Ald., 604; *Amory v. Lawrence*, 3 Cliff., 535; *Fowler v. Down*, 1 Bos. & P., 44; *Webb v. Fox*, 7 T. R., 397; *Wilkins v. Fry*, 1 Meriv., 244.

It has long been a recognized principle of the Bankrupt Law, says Robson, that the assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate; and there are numerous decisions, English and American, which support the proposition; nor are the creditors without remedy in such a case, even if the assignee should erroneously or unwisely fail to take such possession, as the creditors may, by petition, apply to the court of original jurisdiction to compel him to carry out their wishes; and if the District Court should deny their petition, they would have the right to demand a review of the decision by the Circuit Court, under the first clause of the 2d section of the Bankrupt Act. Rob. 3d ed., 398.

Decree affirmed.

Cited—102 U. S., 649; 1 McCrary, 140; 16 N. W. Rep., 584.

GEORGE W. BOWEN, *Plff. in Err.*,

v.

NELSON CHASE.

(See S. C., 8 Otto, 254-266.)

Lands in New York—declarations of persons in possession—decision.

1. The effect of the several conveyances of certain lands in New York City in controversy in this action, was determined by this court in *Bowen v. Chase*, XXIV., and this court still adheres to its decision in that case.

2. Declarations of a person having the possession, seisin and control of lands, in harmony with a deed which he had executed or authorized and which was against his interest, in reference to property not conveyed or not shown to have been conveyed, are admissible on the question of title.

3. Where both parties agreed that there was no conflict of evidence in regard to the title, and that it was a matter for the court to determine, this court cannot review its decision or finding on the question of fact; and as its decision on the law of the case was in conformity with the views of this court in the former case, it is sustained.

[No. 2.]

Argued Oct. 15, 16, 1878. Decided Oct. 23, 1878.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case, which arose in the court below, is fully stated by the court.

See 8 OTTO.

Messrs. Chauncey Shaffer and Merritt E. Sawyer, for plaintiff in error.

Mr. James C. Carter, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This case was before us in an equity suit in October Term, 1876, upon the same general state of facts which is embodied in the present record. See, *Bowen v. Chase*, 94 U. S., 812 [XXIV., 184]. The bill in that case was filed after the commencement of this, for the purpose of enjoining this and all other suits brought by the plaintiff in error for the property involved in the controversy. The Circuit Court had decreed a perpetual injunction in reference to the whole property. We sustained that decree as to all the property in New York City except a tract of sixty-five acres on Harlem Heights, as to which it did not seem to us that an injunction was proper. Consequently, the present suit, which was on our docket at the time, on writ of error, was continued for argument.

The case was tried by jury in the Circuit Court, in October Term, 1872, and certain errors are alleged as to the admission and rejection of testimony, and as to the charge of the court. In order to understand the bearing of the alleged errors, it is necessary to take a general view of the facts of the case, as they are spread upon the record in the bill of exceptions.

The action is ejectment brought to recover possession of various parcels of real estate in the City of New York, viz.: first, a certain tract of ninety-four acres, situated on Harlem Heights, divided into lots numbered 6, 7, 9, 10, 11, 12, 13, 14 and 15, according to a map of the estate of Leonard Parkinson, made by Charles Loss in 1810; second, a lot of thirty-two acres at Harlem Heights, known as "The Homestead," being part of lot numbered 8 on said map; third, two houses and lots on Seventh Avenue and 41st Street, the claim to which was abandoned by the plaintiff on the trial; and, fourth, two lots at the corner of Broadway and Liberty Streets.

This property was all in possession of one Eliza B. Jumel, known as Madame Jumel, widow of Stephen Jumel, at the time of her decease in July, 1865; and has ever since been in the possession of the defendants, Nelson Chase, and his children by his wife Mary Jumel Bownes (or, as she was called, Mary Eliza Jumel), an adopted daughter of Mr. and Madame Jumel, who died in 1843. Their claim to the property is based on a family settlement made by Stephen Jumel in or about 1827, whereby a life estate was secured to Madame Jumel, with a remainder to Stephen Jumel for life, remainder in fee to the said Mary Jumel Bownes, their adopted daughter. In 1867, the present suit was brought for the recovery of the property by the plaintiff, George W. Bowen, who claims to be an illegitimate son of Madame Jumel, born in Providence in 1794, and as such her heir at law under a statute of the State of New York passed in 1855, by which illegitimate children, in default of lawful issue, are made capable of inheriting from their mother. He contends that Madame Jumel died seised of a descendible estate in the property, and that he, as lawful heir, is entitled to the possession of it. The defendants, on the trial, contested both allegations, viz.: that the plaintiff

was the son of Madame Jumel, and that she died seised of a descendible estate. Other issues were raised by the defense, which it is unnecessary now to notice.

Much of the evidence taken at the trial related to the question of the plaintiff's alleged relationship to Madame Jumel, and most of the errors assigned relate to rulings on the admission and rejection of testimony on that subject. As this branch of the case becomes immaterial, if it be shown (as found by the jury) that Madame Jumel had no descendible estate in the property we will consider the latter question first.

The marriage of Stephen and Madame Jumel took place in New York in April, 1804; and the adoption of Mary Jumel Bownes, who was a niece of Madame Jumel, took place soon after, when the said Mary was a mere child. Mr. Jumel was a French wine-merchant of considerable wealth, residing in New York, and after his marriage with Madame Jumel they lived in much style for that day in the lower part of the city.

It is conceded that the property in question all belonged to Stephen Jumel. It is so stated in the briefs of both parties, and the conveyances by which Stephen Jumel acquired the different parcels were exhibited in proof on the trial. The tract called "The Homestead" was occupied as a country-seat. The tract of sixty-five acres, which is the only one now in question, was an out-lot in the vicinity, partly covered with wood, and was part of the ninety-four acre tract at Harlem Heights first described in the complaint. This tract of sixty-five acres, with another of thirty-nine acres, was conveyed to Stephen Jumel by one Leonard B. Parkinson, by deed bearing date March 9, 1810, a certified copy of which was put in evidence without objection.

It is not pretended that Stephen Jumel parted with the title to any of the property until about the year 1825 or 1827. At or about the latter period, arrangements were made by him or under his authority, out of which arises the controversy respecting the extent of Madame Jumel's interest, and which formed the subject of examination, and the ground of decision in the equity suit. The defendants insist that they are equally decisive in this.

It appears from the evidence, that in 1815 the family, consisting of Mr. Jumel and his wife and their adopted daughter, went to France. Madame Jumel returned in the spring of 1817, but her husband and adopted daughter remained for some period longer, the latter being placed at school. The daughter returned after three or four years, and in 1821 she and Madame Jumel again went to France, and remained there for several years. The documents in the case show that Madame Jumel was still in Paris as late as the spring of 1826, residing with her husband in the Place Vendôme. She returned to this country in that or the following year. When in this country she usually resided at the family mansion or homestead on Harlem Heights. Stephen Jumel returned in the summer of 1828, and resided with his family at the mansion house until his death on the 22d of May, 1832.

The history of the property in question during this period, so far as the documentary evidence shows, is substantially as follows:

In January, 1815, before the family left for France, Mr. Jumel conveyed the homestead on

Harlem Heights, then consisting of thirty-six acres, to a trustee for the life of Madame Jumel, to hold the same in trust for himself during his own life, and after his death for the benefit of Madame Jumel during her life, and then to convey the property back to Mr. Jumel and his heirs. Nothing further seems to have been done in this direction until Madame Jumel's last visit to France. Whilst she was there, a second settlement was made of "The Homestead," by a deed dated in January, 1825, whereby it was conveyed to new trustees, for the separate use and benefit of Madame Jumel in fee. About a year later, in January, 1826, Mr. Jumel conveyed the Liberty Street property to a trustee, for the benefit of his wife during her life, subject to a mortgage of \$6,000. On the 15th of May, 1826, probably about the time of her leaving for this country, he gave her a general power of attorney, under and by virtue of which several conveyances were subsequently made in his name. By this power he made his wife his attorney, to transact and manage his affairs at New York or at any place in the State of New York, and in his name and for his use and behalf to sell and convey all or any part of his real estate, and to receive the moneys arising from such sales, and give acquittances for the same.

By virtue of this power, various conveyances were made by Madame Jumel in 1827, by which all the property before referred to, except the sixty-five acres now in question, was conveyed in fee simple absolute to Mary Jumel Bownes, the adopted daughter of Mr. and Madame Jumel. These conveyances purport to be sales for valuable consideration expressed therein. Two of them are dated on the thirtieth day of July, 1827, one for the 29 acre lot, No. 6, part of the 94 acre lot, and the other for the 39 acre lot, No. 5; and a third conveyance was executed for the Liberty Street property on the 24th of November, 1827. A fourth conveyance, of "The Homestead," 36 acres, was made on the first of January, 1828. Where the property had been conveyed to trustees, they joined in the conveyances.

After the first three conveyances had been made to her, Mary Jumel Bownes, in December, 1827, conveyed the property therein named to one Michael Werckmeister, in trust; and in May, 1828, she conveyed to him "The Homestead," also in trust. The trust declared in each case was to the effect, first, that the trustee should, during the lifetime of Madame Jumel, receive the rents and profits and pay them over to her, or at her option permit her to use, occupy and enjoy the property and receive the rents and profits thereof; second, that he should lease, sell, convey and dispose of the property as Madame Jumel should by writing, executed in the presence of two credible witnesses, order, direct, limit or appoint, and in case of an absolute sale, to pay to her the purchase money, or invest it as she should order and direct; third, upon her decease, to convey to her heirs at law such of the property as should not have been previously conveyed, and with respect to which no appointment should have been made by Madame Jumel in her lifetime.

The above conveyances to Mary Jumel Bownes, and the deeds of trust made by her to Werckmeister, were all executed before Mr. Jumel's return to this country. On the 21st of

November, 1828, after his return, Madame Jumel executed the power of appointment given to her in the trust-deeds. By this instrument, after reciting the trusts, she directed as follows:

"Now I, the said Eliza Brown Jumel, do hereby order, direct, limit and appoint, that immediately after my decease the said Michael Werckmeister, or his heirs, convey all and singular the said above described premises to such person or persons and to such uses and purposes as I, the said Eliza Brown Jumel, shall, by my last will and testament, under my hand and executed in the presence of two or more witnesses, designate and appoint, and for want thereof, then that he convey the same to my husband, Stephen Jumel, in case he be living, for and during his natural life, subject to an annuity to be charged thereon, during his said natural life, of \$600, payable to Mary Jumel Bownes, and after the death of my said husband, or in case he shall not survive me, then, immediately after my own death, to her, the said Mary Jumel Bownes, and her heirs in fee."

Thus the matter stood until after Mr. Jumel's death, and after the marriage of Madame Jumel to Aaron Burr, when in 1834, and again in 1842, she made ineffectual attempts (in the equity case we held them to be ineffectual) to defeat the appointment she had made in favor of Mary Jumel Bownes (then the wife of Mr. Chase), and to settle the property absolutely upon herself.

The effect of the different conveyances, including the appointment by Madame Jumel, as determined by us in the equity case, and as we still hold, was to create an estate to the use of Madame Jumel for life, with a power of appointment by deed or will; and with remainder on failure of such appointment to the use of Stephen Jumel for life, with a final remainder to Mary Jumel Bownes in fee. We further held, that whilst, by the terms and legal effect of this settlement, Madame Jumel had power to revoke her appointment in favor of Mary Jumel Bownes for the purpose of making a *bona fide* sale of the property, she could not revoke it for purpose of substituting another voluntary appointment.

It is evident that the arrangement as finally settled had the approbation of Mr. Jumel. The deeds executed in 1827 may have caused him some anxiety, and may have hastened his return to New York; but the appointment made by Mrs. Jumel after his return evidently had his sanction and approbation. He seems, from the testimony, to have had a sincere attachment to his adopted daughter. The terms on which the family lived during the latter years of his life, as well as after that time, are shown in the testimony of the defendant, Nelson Chase. He says: "I knew Stephen Jumel; was living at his house, and was one of his family when he died. He left no child or relation, to my knowledge, in this country. He was a Frenchman. I married one of his family. I married Mary Jumel Bownes, who was a niece of Madame's; was married on the 15th of January, 1832, at Judge Crippen's residence, in Worcester, Otsego County. My first knowledge of Madame Jumel was while I was studying law with Judge Crippen, in July, 1831. Madame came to Worcester, where I was, to see Judge Crippen, bringing with her a young lady whom she introduced as her niece. My acquaintance with the young lady continued some time, and

See 8 OTTO.

until Madame Jumel said to me, I perceive there is a friendship between you and my niece Miss Mary; she added, if I and Mary could agree, she would be happy to have me for a son-in-law; that if we got married she would expect us to come and live with herself and her husband on their place; she said that Mary was her adopted daughter, and was to be her heir. Mr. Jumel died May 22, 1832. This lady whom I married died May 5, 1843. Two children of the marriage are living; one daughter, Mrs. Eliza Jumel Pery, was born at the mansion March 25, 1836; one son, William Inglis Chase, was born August 17, 1840. I and my family and my daughter and her family, and my son and his family all live in the Jumel mansion, and we have all lived there ever since Madame Jumel's death. My wife returned to the mansion in February next after our marriage, and I followed in the next month, and from that time until the death of Mr. and Madame Jumel I and mine substantially lived with them as one family."

We have been thus explicit in setting forth the history of the Jumel family, and of the property in dispute as exhibited by the evidence in the case, because of its bearing upon certain evidence about to be noticed, and upon the final disposition of the cause by the court and jury.

On the trial the defendants contended that, although no deeds or conveyances for that purpose could be found, yet that, in fact, the sixty-five acre tract had passed through the same course of settlement as the rest of the property had done. To show this they offered to prove by one John Caryl, who had lived in service with the family for several years, a certain statement and declaration made by Stephen Jumel to the witness in the fall or winter of 1828, whilst Mrs. Jumel and her daughter were on a visit to the south. They put to the witness this question:

"At that time, did Mr. Jumel make any statement to you as to the ownership of the property whilst he was thus residing on the premises and you were there working on them under him?"

The question was objected to by the plaintiff's counsel, but the objection was overruled and an exception taken.

The witness testified as follows:

"After Madame Jumel and Mary went south, and while I was living on the place with Mr. Jumel, he stated to me that he had given Madame a power of attorney, not for the purpose that she should dispossess him or disinherit him, but in order that she should do business for him. He said that she sold all the property out of his hands under the power of attorney, and he had nothing left he could call his own; but he said that they had had a compromise or settlement, by which the estate owed him a support as long as he lived, and in the end, at his decease and Madame's, it was to go to Mary, and with that he was satisfied. In the first place, when he said the property had been sold from under him, I said, 'Mr. Jumel, I knew that fact. It was done in 1827, last year.' He then made other remarks, which I have stated. On another occasion, either Christmas Day, 1828, or New Year's, 1829, he stated to my father in my hearing that the property was sold out of his hands, but that Madame had made a settlement, or something to that effect, whereby they were to enjoy the property while they lived, and that

in the end it was to go to Mary, and with that he was satisfied."

One of the errors assigned by the plaintiff is, the admission of this testimony. As it has an important bearing upon what followed in the disposition of the cause, it is necessary to examine the question raised by this exception. The plaintiff contends that the declarations of Stephen Jumel at that time were not competent evidence in the cause; that they were not against his interest; that he was not in possession of the property; that they were not contemporaneous with the acts to which they refer; and, if otherwise admissible, they could only be used as evidence against himself, or his privies in blood or estate. But what were the clear facts of the case as they then stood upon the evidence? The entire property in question had originally belonged to Stephen Jumel. By himself or by his family, his servants in charge or his tenants, he had the undisputed possession of the whole of it, at least down to 1825. Their possession was his possession. They had no pretense of possession except through or under him. "The Homestead" had been conveyed by him in 1815 to trustees, for the benefit of himself for life, and after his death for the benefit of his wife for life. Her interest in it was subordinate to his. In 1825, he made another conveyance of "The Homestead" to trustees, for the separate use of his wife in fee. She never had any possession, even of this parcel, except through and under him by a voluntary conveyance on his part. In 1826, he conveyed the Liberty Street property to trustees, for the separate use of his wife for life, remainder to himself and his heirs in fee. All the rest of the property remained in his actual or constructive possession until the conveyances made by virtue of his power of attorney in 1827. These conveyances were all voluntary on his part; and whatever he may have thought or believed, he retained the power of defeating them at any time by a sale to a *bona fide* purchaser. He returned home in 1828, and resided with his family on the property which he had thus voluntarily subjected to their use. One tract, the sixty-five acre lot now in question, so far as any evidence had yet appeared in the cause, still remained absolutely in him. It stood as it had always stood, in his possession, seisin, and control. Surely, as to this tract, if not as to the others, he was in a position in which his declarations were admissible. It is unnecessary to refer to authorities on this subject. They are discussed in Greenl. Ev., Vol. 1, sec. 109, and in Taylor, Ev., Vol. 2, sec. 617. Declarations contrary to the tenor of the deeds or documents which he had executed or authorized would not be admissible, it is true; but declarations in entire harmony therewith, and against his interest in reference to property not conveyed, or not shown to have been conveyed, were clearly admissible. The statement testified to by Caryl was of this sort; and according to this statement, the entire property had been settled so as to go to his adopted daughter in the end. There was no conflict of evidence on this subject. On the contrary, the conveyances which Madame Jumel procured to be made, after Mr. Jumel's death, to Hamilton and Philleppon, for the purpose of defeating her own appointment made in 1828, recited the fact that the sixty-five acre tract, as well as the

others, had been conveyed by Mary Jumel Bownes to Werckmeister upon the same trusts as those were. The plaintiff put these deeds in evidence, and they corroborate Mr. Jumel's statement. The recitals in those deeds cannot be used against the defendant, it is true; but, as far as they go, they are corroborations, on the plaintiff's part, of the statement referred to.

We think the evidence was admissible, and that there was no error in receiving it.

This evidence serves to explain what took place at the close of the trial in giving the case to the jury.

After the evidence was closed, the bill of exceptions proceeds to state what occurred, as follows: "The plaintiff made no claim for the lands on Seventh Avenue, mentioned in the declaration. As to all the other lands mentioned in the declaration, the defendant's counsel insisted that, on the undisputed facts in evidence, the defendant, as a matter of law, was entitled to a verdict, even if the jury should believe that the plaintiff was the heir at law of Eliza B. Jumel. The counsel on both sides agreed that, on this branch of the defense, there was no conflict of evidence, and that it was a matter for the court to determine."

The presiding Judge then proceeded to charge the said jury, and after giving them directions as to the other issues in the cause, on the subject in question he directed them to find specially "That Eliza B. Jumel, at the time of her death, had no estate or interest in the lands claimed, which was descendible to her heirs." To this charge the plaintiff excepted, and it is assigned for error here.

Now if we lay out of view the declarations of Mr. Jumel, above referred to, there was not a particle of evidence in the case to show, as against the defendants, that the sixty-five acre lot had ever been conveyed by Mr. Jumel, or that Madame Jumel had ever acquired any interest therein, except her estate in dower as his widow. There is no evidence of any adverse possession by her under any other claim of title than that which she asserted to the rest of the property. If, therefore, the declarations of Mr. Jumel are to be laid out of view entirely, the charge of the judge was clearly right.

The evidence, however, was admitted, and went to the court and the jury together with the other evidence in the case respecting Madame Jumel's title to the land in question; and both parties agreed that, on this branch of the defense, there was no conflict of evidence, and that it was a matter for the court to determine. Now, they either meant to leave it to the Judge, on the whole evidence in the case, including the declarations of Mr. Jumel, as well as the conveyances which were produced, to determine the matter as a question of fact, whether Madame Jumel, at the time of her death, had or had not any descendible interest in the property, or they meant to leave it to him as a question of law, whether upon the whole evidence as it stood (in which they admitted there was no conflict) she had any such descendible interest. If they meant the former, the Judge did determine the question in the only manner in which, by the New York practice, he could do so, by directing the jury to find that she had not such interest. In this view of the case, the decision of the Judge, though given by way of

a peremptory direction to the jury, was in the nature of a finding of fact made at the request of the parties, which we cannot review, any more than we could review the finding of a jury on a question of fact fairly submitted to them.

But if the parties meant to leave the question to the determination of the Judge as matter of law, assuming that the declarations of Mr. Jumel were to be received as true (which must have been what they intended when they agreed that there was no conflict in the evidence on that branch of the defense), then we are still of opinion that the decision was right. If it was true, as stated by Jumel, that, under the power of attorney made by him, his wife had sold all the property, but that they had had a compromise or settlement, by which the estate owed him a support as long as he lived, and in the end, at his decease and Madame's, it was to go to Mary—if that statement was true, how could the Judge have decided otherwise than he did? That language, in a will or any other document, could never be construed to give Madame Jumel a descendible interest. It is in exact conformity with the known facts of the case as evinced by the documents themselves, so far as the documents go.

But there is another aspect of the case as to what the parties meant in their conference with the court, which leads to the same conclusion. It is to be remembered that at the trial of the cause the entire property was in controversy, and as to most of the parcels there was no question as to the deeds and conveyances which had passed. The parties undoubtedly desired the opinion of the court upon the legal effect of these conveyances, and it is quite apparent (though not expressly so stated) that when both sides made the concession or agreement referred to, and requested the court to determine the question, they assumed or intended to assume that all the property had been limited upon the like trusts and appointments. If this was so, the decision called for from the Judge was really as to the effect of the trust-deed executed to Werckmeister, and of the several appointments made thereunder by Madame Jumel. As in this view of the matter the decision was in conformity with the views of this court in the former case, we hold it to be correct.

In every aspect, therefore, in which this branch of the case may be viewed, we think that no error was committed by the court below.

The disposal of this question determines the cause. The other errors assigned become entirely immaterial, if Madame Jumel had no descendible interest in the property for the plaintiff to inherit.

Judgment affirmed.

AMOS D. WILLIAMS, *Appt.*,

v.

JOHNSON HAGOOD, Substituted for THOMAS C. DUNN, COMPTROLLER-GENERAL OF SOUTH CAROLINA, WILLIAM GURNEY, COUNTY TREASURER OF CHARLESTON COUNTY, ET AL.

(See S. C., 8 Otto, 72-75.)

Want of equity.

See 8 OTTO.

Where the question presented to the court by a bill in equity is merely an abstract one, and the bill shows no equity in the complainant, it must be dismissed.

[No. 26.]

Argued Oct. 21, 22, 1878. Decided Nov. 4, 1878.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The case, which arose in the court below, is fully stated in the opinion.

Messrs. Dennis McMahon, A. G. Magrath, D. T. Corbin, Jas. Lowndes and J. K. Herbert, for appellant.

Messrs. Leroy F. Youmans, Atty-Gen., of S. C., and James Conner, for appellees.

Mr. Justice Strong delivered the opinion of the court:

This is a bill in equity against the Comptroller-General of the State of South Carolina, the County Treasurer of Charleston County, in said State, and the assignees in bankruptcy of the Blue Ridge Railroad Company, in which the relief sought is an injunction commanding the Comptroller "to cease from refusing to levy a tax for retiring" certain certificates of the state indebtedness, and commanding the County Treasurer "to cease from refusing to receive the same for taxes and dues to the State, except to pay interest on the public debt."

The facts of the case, so far as they are exhibited by the bill and so far as they are material for present consideration, are as follows:

By an Act of the Legislature of the State, enacted March 2, 1872, reciting in its preamble that, in pursuance of a former Act, the guaranty of the faith and credit of the State had been indorsed on \$4,000,000 of bonds issued by the Blue Ridge Railroad Company, and that it was desired to recover and destroy the bonds issued, and relieve the State from the liability incurred by its indorsement and guaranty thereof, the State Treasurer was directed, with the written consent of the railroad company, to require the financial agent of the State to deliver to him for cancellation all the bonds of the company indorsed and guarantied as aforesaid, then in the agent's possession and held by him as collateral security for advances.

The 2d section of the Act enacted that, upon the surrender by the company to the State Treasury of the balance of the said \$4,000,000 of bonds thus guarantied by the State, the State Treasurer should be authorized and required to deliver to the president of the railroad company treasury certificates of indebtedness (styled revenue bond scrip) to the amount of \$1,800,000, executed in a manner directed afterwards in the Act. And if the company should not be able to deliver all of said bonds at one time, the Act required the treasurer to deliver to the said president such amount of the treasury certificates as should be proportioned to the amount of bonds delivered.

The 3d section made it the duty of the State Treasurer, in order to carry out the purposes of the Act, to have treasury certificates of indebtedness prepared, to be known and designated as "Revenue Bond Scrip of the State of South Carolina," which should be signed by the Treasurer, and which should express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof, and that the

same would be received in payment of taxes and all other dues to the State, except special tax levied to pay interest on the public debt.

The 4th section pledged the faith and funds of the State for the ultimate redemption of the scrip, and required county treasurers to receive it in payment of all taxes levied by the State, except in payment of special tax levied to pay interest on the public debt. It also required the State Treasurer and all other public officers to receive the same in payment of all dues to the State; and, still further to provide for its redemption, the section levied an annual tax of three mills on the dollar in addition to all other taxes on the assessed value of all taxable property in the State, to be collected in the same manner and at the same time as might be provided by law for the levy and collection of the regular annual taxes of the State. And the State Treasurer was required to retire, at the end of each year from their date, one fourth of the amount of the treasury scrip authorized to be issued, and to apply to such purpose exclusively the taxes by the Act required to be levied.

The 6th section required the guarantied bonds to be canceled and destroyed on their delivery to the treasurer.

In obedience to this Act, the revenue bond scrip was prepared and signed by the State Treasurer. When this was done, a large part of the \$4,000,000 of bonds of the railroad company, indorsed and guarantied by the State, had been sold or were pledged as securities for money borrowed by the company. The complainant was a purchaser for value of \$417,000 thereof, and he was the *bona fide* owner and holder of them when the Act of March 2, 1872, was passed. Relying upon the faith of the State as pledged in the said Act of its Legislature, and in the said certificates of indebtedness, he consented to exchange the bonds, amounting to \$417,000, for said treasury certificates, amounting to \$166,000; and the exchange was made. His bonds, guarantied as above stated, were delivered to the State Treasurer, and they have been canceled. The railroad company and the State have thus been discharged from all obligation to pay the bonds, and the complainant holds in lieu thereof only the certificates of indebtedness to the extent of \$166,000.

After this exchange had been effected, the bill charges, and it appears, that the State, in various ways, legislated in such a manner as practically to deny the obligation apparently assumed in the certificates of indebtedness, or revenue bond scrip. By an Act approved October 22, 1873, the Legislature repealed the 4th section of the Act of March 2, 1872, by which a tax was levied for the redemption of the scrip, and forbade the Comptroller-General to levy any tax, for any purpose, unless expressly thereafter authorized therefor. By another Act, approved December 22, 1873, the county auditors and county treasurers of the State were forbidden to collect, or cause to be collected, any tax other than such as were levied by that Act, unless expressly authorized thereafter so to do. The legislation was manifestly inconsistent with the undertaking of the State expressed in the Act of March 2, 1872, and in the revenue bond scrip issued thereunder, and its constitutionality and obligatory force would be a legitimate subject for consideration if the complainant had placed

himself in a position to invoke our judgment. But he has not. His bill does not aver that he has been injured, or will be injured, by this legislation, or by any act or neglect of the Comptroller-General or the County Treasurer. It does not aver that the Comptroller-General has neglected or refused to perform every duty imposed upon him by the statute under which the revenue bond scrip was issued, nor even that he threatens such neglect or refusal. It does not aver that the County Treasurer has refused, or even threatened to refuse, receiving the complainant's scrip, or any scrip, in payment of taxes or dues to the State, other than taxes levied to pay the interest on the state debt. It does not aver any demand from the state treasury, or any tender to the County Treasurer. Its object is plainly to obtain from this court a declaration that the legislative Acts of October 22 and December 22, 1873, are unconstitutional, because impairing the obligation of the contract made by the Act of 1872, and the certificates thereby authorized and thereunder issued, and this without any averment that the complainant will be injured by them. The question presented to the court is, therefore, merely an abstract one; such an one as no court can be called upon to decide, and the bill shows no equity in the complainant. Hence it was properly dismissed in the court below, and it must be dismissed here, but without prejudice to the complainant's right to bring and prosecute another suit, when he shall be in a condition to exhibit any equity in himself.

It is so ordered.

THOMAS SNELL, SAMUEL L. KEITH AND
ABNER TAYLOR, Partners as SNELL,
TAYLOR & Co., *Appls.*

v.

THE ATLANTIC FIRE AND MARINE
INSURANCE COMPANY OF PROVIDENCE,
RHODE ISLAND.

(See S. C., 8 Otto, 85-98.)

Reformation of contract—parol proof—laches—mistake of law—duty of insured.

1. A bill may be maintained to reform a written policy, after loss has actually happened, upon the ground that it does not express the intent of the contracting parties.
2. Parol proof in such cases should never be made the foundation of a decree, variant from the written contracts, except it be of the clearest and most satisfactory character.
3. Relief should not be granted where the party seeking it has unreasonably delayed bringing suit, nor where he acquiesced in the written agreement after becoming aware of the mistake.
4. A mere mistake of law, without other circumstances, constitutes no ground for the reformation of written contracts.
5. It is only when the change in the surrounding circumstances increases the hazard that the assured is under an obligation to inform the company thereof.

[No. 24.]

Argued Oct. 21, 1878. Decided Nov. 4, 1878.

APPPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. Leonard Swett, H. H. Blackburn & W. H. Lamon, for appellants:

In the case of *Ells v. Tousley*, 1 Paige, Ch., 280, it was decided that a court of equity will correct mistakes in policies; and the acceptance of an erroneous policy by a party does not preclude him from having the error corrected.

In the case of the *F. Ins. Co. v. Hewitt*, 3 B. Mon., 231, the following is the syllabus of the case:

"Where the policy delivered to assured differed in its terms from the agreement for insurance, and it appeared that the clerk received the policy, placed it in the safe without any examination on the part of the assured then or afterwards, until the occurrence of the loss: held, that there was no such acceptance of the policy by the assured as would prove that they had waived the original contract or taken this policy as a confirmation of it; and as they still held the original agreement in writing, they might enforce it in equity."

In the case of *Harris v. Ins. Co.*, 18 Ohio, 121, the court says:

"Harris applies to the agent of the company to effect an insurance on his mill; he tells him the true situation of his title: the agent (the company having previously instructed him to that effect) informs him that he considers such property unincumbered; he writes it down as such in the application, and hands it to Harris to sign, who signs it as it has been drawn up by the agent. The application is handed over to the company, who are informed of the situation of the title, and they afterward treat the policy as valid, by making and collecting assessments on it. * * *"

And the complainant being by such mistake deprived of his remedy at law, we think he has a right to resort to a court of chancery for relief."

In the case of the *Ice Co. v. Ins. Co.*, 23 N. Y., 359, the court says: "I confess myself unable to see why the plaintiffs were not entitled to a reformation of the contract. The learned Justice who tried the case, in the opinion given by him, after referring to the evidence, observes: 'The only conclusion I can adopt on this evidence is, that there was a mutual mistake as to the description of the premises, arising from a misunderstanding of the parties in the original negotiation of the contract, and that the defendant's agent, in making the policy, made it as he intended it should be when he agreed to insure the property. The policy was made according to his description, entered by him in the books of the company,'" etc.

In the case of the *Bk. v. Ins. Co.*, 31 Conn., 526, the court says:

"It was well remarked by Ellsworth, J., 25 Conn., 427, there is great danger that injustice will be done to persons obtaining insurance, who are inexperienced in the business and place full confidence in the word of an insurance agent, accredited as he is by his public appointment. This court have therefore, by a series of decisions, held companies bound by the acts of local agents whenever it could be done consistently with the evidence and rules of law."

Beebe v. Ins. Co., 25 Conn., 51; *Bouton v. Ins. Co.*, 25 Conn., 542; *Sheldon v. Ins. Co.*, 25 Conn., 207; *Hough v. Ins. Co.*, 29 Conn.,

See 8 OTTO.

10; *Iron Works v. Ins. Co.*, 25 Conn., 465; *Stedwell v. Anderson*, 21 Conn., 139.

Messrs. L. F. S. Foster and W. J. Hadley, for appellee.

Mr. Justice Harlan delivered the opinion of the court:

This suit in equity was instituted by Thomas Snell, Saml. L. Keith and Abner Taylor, partners under the firm name of Snell, Taylor & Co., to reform a certain policy of insurance issued by the Atlantic Fire and Marine Insurance Company of Providence, and insuring Samuel L. Keith, from December 6, 1865, at noon, to January 7, 1866, at noon, against loss or damage by fire, in the sum of \$8,000 on 220 bales of cotton, described as "stored in open shed at West Point, Miss.; loss, if any, payable to Messrs. Keith, Snell & Taylor."

The material allegations in the bill are as follows: that said firm, on December 6, 1865, were the owners of 220 bales of cotton, worth more than \$50,000, stored at West Point, Miss., awaiting transportation to some northern market; that Keith applied in behalf of his firm to Holmes & Bro., general insurance agents at Chicago, representing several companies, including the defendant in error, to procure insurance upon all the cotton, for the benefit of the firm, in the sum of \$49,500, during such time as it remained at West Point, which time was uncertain, in view of the difficulties of transportation; that Holmes & Bro., the duly accredited and authorized agents, among others, of the defendant Company did agree with Keith, acting for and in behalf of his firm, to make, grant, and secure insurance in the companies by them represented on this cotton in the sum of \$49,500, while it was stored at West Point and until shipped to a northern market, and to receive a premium of one per cent. on the total amount insured, to wit, \$495, which sum Keith agreed to pay Holmes & Bro., provided the time for the insurance did not exceed one month, but to have a decreased rate if the time exceeded one month, the agreed rate to be paid by Keith when the cotton was removed from West Point, when the extent of the insurance could be definitely fixed; that on 6th December, 1865, Holmes & Bro., with intent to carry this agreement into effect, caused to be made several policies in different companies, among them the policy sued on, making an aggregate insurance of \$49,500, and after the loss occurred notified Keith to pay, and he did pay, the sum of \$495, the premium on the whole amount insured, \$80 of which was paid to and received by the defendant in error for and on account of his firm and in pursuance of the agreement with Holmes & Bro.; that the policy sued on remained in the possession of Holmes & Bro. until some time after the loss; that after the loss, and before any application to adjust the same was made, Holmes & Bro. with the intent to carry out the agreement that the cotton should be insured until its shipment from West Point filled up the policy so that by the terms thereof the insurance extended from December 6, 1865, until January 7, 1866, at noon; that Keith was assured by Holmes & Bro., when the insurance was taken, that it was not necessary that the policy should state in terms that the insurance was for and on account of Snell, Taylor & Co.,

and that the firm would be as fully protected and the loss would be as promptly paid, as if the policy had expressly stated that the insurance was for and on its account; that, relying upon those assurances, and ignorant that, by the terms and legal effect of the terms employed, no other interest in the cotton was insured except his, Keith took the policy into his possession in the full belief that it covered the entire interest of the firm; that soon thereafter, upon being advised to the contrary by his attorney, he demanded of the insurance agents that the policy be corrected so as to conform to the real contract and agreement, but Holmes & Bro. refused to correct or alter the same in any way.

The prayer of the bill is that the Company be decreed and ordered to correct and reform the policy by inserting therein the stipulation that the insurance was made for the benefit or for the account of Snell, Taylor & Co., and that the firm have a decree for the sum so intended to be insured on the cotton.

The Insurance Company filed an elaborate answer, embracing, in the form of express denials and affirmative statements, almost every defense which the ingenuity and skill of able counsel could suggest. But in view of the points to which the evidence seems to have been mainly directed, it is only necessary to consider certain grounds of defense, which will sufficiently appear in the progress of this opinion.

The bill upon final hearing was dismissed and from that final order this appeal is prosecuted.

1. We are satisfied that a valid contract of insurance was entered into, on the 6th December, 1865, between Keith, representing Snell, Taylor & Co., and Holmes & Bro., representing the defendant and other insurance companies, and we entertain no serious doubt as to its terms or scope. Although there is some conflict in the testimony as to what occurred at the time the contract was concluded, it is shown, to our entire satisfaction, not only that the agreed insurance covered the 220 bales of cotton, but that Holmes & Bro., with knowledge or information that the cotton was owned by Snell, Taylor & Co., and not by Keith individually, intended to insure and, by direct statements, induced him to believe that they were giving insurance in his name, upon the interest of the firm. He assented to the insurance being so taken in his name, because of the distinct representation and agreement that the interest of his firm in the cotton would be thereby fully protected against loss by fire so long as it remained at West Point. But according to the technical import of the words employed in the policy which the Company subsequently issued and delivered, only Keith's interest in the cotton is insured. Such is the construction which the Company now insists should be put upon the policy, in the event the court decides there was a binding contract of insurance. The fundamental inquiry, therefore, is, whether Snell, Taylor & Co. are entitled to have the policy reformed so as to cover their interest.

We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. There was a definite concluded agreement as to insurance, which, in point of time,

preceded the preparation and delivery of the policy, and this is demonstrated by legal and exact evidence, which removes all doubt as to the sense and understanding of the parties. In the attempt to embody the contract in a written agreement there has been a mutual mistake, caused chiefly by that contracting party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case, is, we think, well settled by the authorities. In *Simpson v. Vaughan*, 2 Atk., case 21, p. 33, Lord Hardwicke said that a mistake was "a head of equity on which the court always relieves." In *Henkle v. Ins. Co.*, 1 Ves., case 156, p. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties, Lord Hardwicke said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, it would be rectified." In *Gillespie v. Moon*, 2 Johns. Ch., 593, Chancellor Kent examined the question both upon principle and authority, and said: "I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake, affirmatively by bill, or as a defense." In the same case he said: "It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing." And such is the settled law of this court. *Graves v. Ins. Co.*, 2 Cranch, 443; *Ins. Co. v. Wilkinson*, 13 Wall., 231 [80 U. S., XX., 621]; *Bradford v. Bk.*, 13 How., 57; *Hearne v. Ins. Co.*, 20 Wall., 488 [87 U. S., XXII., 395]. It would be a serious defect in the jurisdiction of courts of equity if they did not have the power to grant relief against mutual mistakes or fraud in the execution of written instruments. Of course parol proof, in all such cases, is to be received with great caution and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake. Hence, in *Graves v. Ins. Co.*, 2 Cranch, 419, this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the plaintiff's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing. But no such state of case exists here. The policy in question was retained for Keith by the insurance

agents. It was not surrendered to him, and he did not see it, until after the loss had happened. Immediately upon being advised by his attorney that the policy as written did not cover the interest of the firm in the cotton but only his individual interest, Keith promptly avowed the mistake, and asked that the policy be corrected in conformity with the original agreement. There was no such acceptance by him of the written policy as would justify the inference that he had waived any rights existing under the original agreement, or had conceded that instrument to be a correct statement of the contract of insurance.

It may be said that the mistake made out was a mistake of law, and, therefore, not reformable in equity. It was said in *Hunt v. Rousmaniere*, 1 Pet., 1, to be the general rule, that a mistake of law is not a ground for reforming a deed founded on such mistake, and that the exceptions to the rule were not only few in number, but had something peculiar in their characters. The *Chief Justice*, however, was careful in that case to say that it was not the intention of the court "To lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law." He said that he had found no case in the books in which it has been decided that a plain and acknowledged mistake in law was beyond the reach of equity. In 1 Story, Eq. Jur., sec. 138, *e* and *f*, Redf. ed., the author, after stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that "The rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American." The same author says: "We trust the principle that cases may and do occur where courts of equity feel compelled to grant relief, upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference."

In the case under consideration, the alleged mistake is proven to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the Company's agent that insurance in that form would fully protect the interest of the firm in the cotton. Assuming, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the assured, it is, however, evident that Keith relied upon that representation and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of a written agreement which should correctly express the meaning of the

See 8 OTTO.

contracting parties. He is not chargeable with negligence, because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel, he discovered the mistake, and insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances, without enabling the Insurance Company to obtain an unconscionable advantage, through a mistake, for which its agents were chiefly responsible. In all such cases, there being no laches on the part of the party in discovering and alleging the mistake, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done. *Wheeler v. Smith*, 9 How., 55.

In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart, in any just sense, from the general and salutary rule, that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts.

We have not overlooked, in this connection, that portion of the evidence which shows that Holmes & Bro., when advising the Company by letter of the contract of insurance, stated, in a postscript, that the insurance would be for a few days only. The officers of the Company testify that they would not have permitted the contract to stand, but would have promptly canceled the policy, had they not supposed the insurance would last but a few days. It was, doubtless, the belief of Keith, which he expressed to the insurance agents, that the cotton would remain at West Point for a few days only. The evidence shows that he had reasonable ground for such belief. But he seems to have guarded against disappointment in that respect, by having it distinctly agreed that the insurance should last until transportation could be obtained, and the cotton shipped from West Point. That Holmes & Bro. so understood the agreement is evident from their letter of December 6, 1865, to the secretary of the defendant Company, in which they state that they had taken insurance "On 220 bales of cotton stored in open shed at West Point, Miss., said cotton to remain insured from above date *till time of shipment*." It is true that the response of the secretary shows that the Company did not approve of such character of risks. But they did not repudiate the contract or require it to be canceled, and only enjoined upon their agents to "decline such business in future." The act of the agents in filling up the blanks in the policy after the loss had occurred was manifestly in consummation of the original contract of insurance.

But independent of the issue in the pleadings as to the mistake in reducing the contract to writing, the Company defends the action, and denies its liability upon several grounds, which must now be considered.

2. The answer alleges that at the time, and prior to the alleged verbal contract of insurance, the cotton referred to in the bill was guarded, night and day, by soldiers of the United States; the shed in which the cotton was stored being

occupied by such soldiers, who were in the habit of sleeping and eating their meals upon the cotton, and smoking and otherwise using fire upon, and in its immediate vicinity; that those facts were material to the risk, and would or might have influenced Holmes & Bro., and the Company in taking the insurance, or in regard to the rate of premium to be charged; and that such facts, although well known to Keith when he applied for insurance, were not communicated by him to Holmes & Bro., or to the Company, but were concealed, whereby the contract of insurance, whether reduced to writing correctly or not, became and was void.

The evidence does not authorize a defense upon such grounds. The proof does not justify the belief that Keith, when applying for insurance, withheld any fact known to him, and material to the risk. By the terms of the policy, he was under an obligation to make a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, *so far as the same were known to him*, and were material to the risk. The same clause of the policy provides that the risk shall cease, and the policy become null and void, "If any material fact or circumstance shall not have been fairly represented." This language must, of course, be construed in connection with the preceding words of the same clause. We find no evidence in the record showing that Keith did not fairly represent every material fact known to him. Rawley, who was within hearing of the conversation between Keith and Edgar Holmes (the active manager of the business of Holmes & Bro.,) says, that while he cannot recall the language used, he is "positive that Keith explained the character of the risk. * * * I know Keith described the character of the risk fully." When Keith applied to Edgar Holmes for the insurance, the latter asked him how the cotton was stored. He replied that it was "stored in an open shed." Holmes then said to him that he did not like the manner in which it was stored; and Keith replied, "The cotton was guarded day and night." Thus were Holmes & Bro., notified of its exact condition and situation. The information that the cotton was guarded day and night indicated that there was something in the surrounding circumstances which made a guard necessary for its safety. Indeed, if it was to remain, while under insurance, in an open shed, and at a point remote from the Company's place of business, it was clearly in the interest of the insurer to have it guarded day and night. But it is said that the habits of the guard were such, at the time of the insurance, as to endanger its safety. If this were clearly proven, the evidence furnishes no ground for imputing to Keith or Snell or Taylor knowledge of any habitual carelessness or misconduct upon the part of the guard which increased the danger of the cotton being burned.

3 The answer further alleges that on the 8th December, 1865, whatever cotton there was in the shed at West Point belonging to the complainants was seized by the United States Government, or by its officers, under its orders and direction, excluding complainants thereafter from all possession and control over the cotton, and that such seizure and exclusion from pos-

session and control were maintained until the cotton was burned; that after such seizure the shed passed to the exclusive possession of soldiers of the United States, who were in the habit of using the same for military defense, of sleeping and eating therein, and of smoking and otherwise using fire upon and in its immediate vicinity; that, at the time of the alleged verbal contract of insurance large, quantities of loose cotton were lying under the flooring of the shed, which consisted of loose boards, and immediately under the cotton stored in the shed, whereby the risk of fire was greatly increased; that these facts were, each and all of them, material to the risk, and would or might have influenced the judgment of Holmes & Co., and of the Company in regard to the continuing thereof, or in regard to the rate of premium therefor; that these facts were known to Taylor on the 8th December, 1865, and in ample time before the fire to have communicated the same, and sufficiently long before to have enabled the defendant to cancel the policy and give complainants ample notice thereof; that, by reason of the concealment of these facts by Taylor, from the Company, and its agents, the policy became and was wholly void.

This defense is, doubtless, based upon that clause in the policy which declares that "If the situation or circumstances affecting the risk thereupon (the property) shall be so altered or changed, either by change of occupancy in the premises insured, or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the assured fail to notify the Company, or if the title to said property shall be in any way changed, * * * in every such case the risk thereupon shall cease and determine, and the policy be null and void."

It will be observed that no alteration or change in the occupancy of the premises containing the insured property, avoids the policy, in the absence of notice to the insurer, unless it be such alteration or change as increased the hazard. We have already seen that the Company's agents were informed, when the contract was made, that the cotton was guarded by day and by night. There was no change in the character of the guard, except that prior to December 8, 1865, it was guarded by Federal soldiers as a personal favor to Taylor, while after that date it was guarded by the same soldiers under an order from Federal officers for the seizure of the cotton. There is some evidence that the soldiers were, at times, negligent and careless; but we are not satisfied that their conduct in and about the property was such as to increase the hazard. The strong presumption is that, in view of the peculiar condition of public sentiment at West Point and in its vicinity against Taylor and others, who had been officially connected with the seizure and collection of cotton, under treasury regulations, the presence of Federal soldiers largely decreased, rather than increased, the hazard, and was therefore, for the benefit of all parties interested in its preservation. We attach no weight to its seizure, under orders of Federal officials, as, in and of itself, affecting the rights of the assured. It appears satisfactorily from the evidence that it had been purchased by Taylor, for the firm of which he was a member and with money furnished for that purpose by

the firm. It does not appear that any of the cotton claimed by him for the firm did, in fact, belong to the United States, or that it had become forfeited to the United States by reason of his violation of the laws of the United States, or of treasury regulations made in pursuance of such laws. Nor does it appear that he caused or promoted its seizure by officers of the United States. So far as the record shows, it was an unauthorized seizure of the private property of the citizen, caused by the personal hostility towards Taylor of one who had himself been suspended from his position as a treasury cotton agent through the influence or machinations, as he suspected or believed, of Taylor. If, as alleged, the cotton, upon its seizure, passed from the control of the owner to the exclusive possession and control for the time of Federal officers, such change of control and possession did not, by the terms of the policy, impose upon the insured the duty of communicating to the company the fact of such change. It was only when the change in the surrounding circumstances increased the hazard that the assured was by the terms of the policy under an obligation to inform the company thereof. If the seizure of the cotton had involved a change in the title to the property, then the Company could have elected to avoid the policy, since it contains express stipulations to that effect. But, as already said, the record furnishes no evidence of any change in title, but only a change of possession and control without the assent and perhaps beyond the power of the owner to prevent; and which does not clearly appear to have increased the hazard.

4. We come now to the only remaining question which it seems necessary to consider, viz.: the quantity of cotton in the shed belonging to Snell, Taylor & Co., at the time of the fire.

Upon this point a large amount of testimony was taken which is of a very unsatisfactory nature. Witnesses who passed and repassed the shed from time to time, and who had no special reason for making an estimate of the cotton there stored, were asked to give their best judgment as to the quantity.

If the record contained no other evidence than such opinions of witnesses, the court would have great difficulty in reaching a conclusion as to the quantity of the cotton burned. But there is other and better evidence upon which to rest the determination of this question. The officer commanding the Federal troops stationed at West Point, and who were in possession of the shed from a date prior to December 6, 1865, up to the time of the fire, states that about the time he took possession, under orders from Federal officials, he examined its general condition and counted the bales; not every bale, but made such a count as satisfied him that there were not less than 220 bales; certainly over 200 bales. He swears that none of the cotton claimed by Taylor was removed after he took possession of the shed, and he was in such possession up to the time of the fire, except for about two weeks in the latter part of December, during which time Captain Pyle guarded it under the same order. But the most important evidence upon this point comes from the witness Freel. Under the authority of the freight conductor of the Memphis and Charleston Railroad Company he contracted with Taylor for the transporta-

tion of this cotton to Memphis. He made a contract with Taylor for its shipment as soon as the conductor could get to West Point with the necessary cars. In order to ascertain the number of cars needed for the transportation, he counted the bales in the shed, claimed by Taylor, as well as it was possible for him to do. He found that the front tier contained forty-five bales, and that there were five tiers; and his calculation was that transportation was needed for 222 bales. At the time of this count, which was in the last of December, he made a memorandum for the benefit of the conductor, in a memorandum book which he produced when giving his testimony. The memorandum was, "222 bales of Taylor's cotton for you to get cars for."

The conductor expected to reach West Point with the cars by the first day of January, but he failed to do so. The cars reached West Point on the 7th, the day after the fire, for the purpose of transporting the cotton to Memphis under the contract made by Freel with Taylor. We see no escape, under the evidence, from the conclusion that there were 222 bales in the shed, belonging to Taylor's firm, at the time of the fire, unless some of it was stolen or fraudulently withheld after Freel's count. Only one witness states any fact from which it may be inferred that any portion of the cotton was stolen prior to the fire, and he only speaks of eight or nine bales being taken off with the consent of the guard, during a certain night when Taylor was absent from the shed. If that quantity be deducted, as we think it must be, there will be left 213 bales of cotton, averaging, according to the testimony, five hundred pounds per bale, and worth, at the place of its destruction, forty cents per pound.

The decree of the court below is reversed, with directions to enter a final decree in conformity with this opinion.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the opinion of the Court in the case of *Thomas Snell et al., Appts., v. The Atlantic Fire & Marine Ins. Co. of Providence, R. I.* No. 24, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said [L. S.] Supreme Court, at the City of Washington, this 7th day of May, A. D. 1885.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

Cited—108 U. S., 142.

WILLIAM H. GIFFORD, W. E. DUFFER,
Admrs. of JOSEPH G. GIFFORD, Deceased,
and W. D. GIFFORD, Minor, by R. McP.
SMITH, his Guardian *ad litem*, Appts.

v.

JOHN P. HELMS, Admr., *de bonis non* of
JAMES BANKHEAD, Deceased.

(See S. C., 8 Otto, 248-253).

Bankrupt's property—purchaser from assignee.

1. A purchaser of land, from the assignee of a bankrupt, acquires no greater rights than those possessed by his grantor.

2. As the assignee's right to sue for the property is barred by the two years' Statute of Limitations,

so the right of the purchaser from him is barred by the operation of the same Statute.

[No. 43.]

Argued Oct. 24, 1878. Decided Nov. 4, 1878.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee. The case is fully stated by the court.

Messrs. Montgomery Blair, Andrew McClain and H. H. Harrison, for appellants.

Mr. J. P. Helms, T. J. Durant & C. W. Hornor, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

District courts, though constituted courts of bankruptcy, do not possess the power under the 25th section of the Bankrupt Act to order in a summary way, the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appear that the estate in question is in the actual possession of a third person, holding the same as owner and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt, or from some former owner. *Knight v. Cheney*, 5 Bk. Reg., 305.

Courts of bankruptcy may exercise many of the powers conferred by the 1st section of the Bankrupt Act in a summary way, as well in vacation as in term time, first giving notice to the party opposed in interest to the prayer of the petition, as in a rule to show cause in an action at law or in a suit in equity without service of process; the rule being that in such a proceeding neither party is entitled to a trial by jury, and that the only remedy for error is to seek a review under the first clause of the 2d section of the same Act. *Smith v. Mason*, 14 Wall., 431 [81 U. S., XX., 752].

Power to revise cases and questions which arise in the district courts in such proceedings is conferred upon the circuit courts by that clause of section 2, but it is settled law that the power so conferred does not extend to any case where special provision for the revision of the case is otherwise made. *Morgan v. Thornhill*, 11 Wall., 74 [78 U. S., XX., 62].

Two trust-deeds were executed by the debtor of the complainant in his lifetime, one to each of the two trustees named in the bill of complaint; the first embracing several tracts of land which were conveyed to secure his creditors, and the second consisting of an interest in a tract of two hundred acres, arising from a verbal contract to purchase the same, and an advance of \$7,000 in part payment of the stipulated consideration, in respect to which the party who agreed to purchase the same, not being able to pay the balance, determined to abandon the contract and assert a lien upon the tract for the amount paid.

Twenty-nine hundred dollars of the amount paid for the tract by the debtor was the money of his wife, which she derived from the estate of her father and which, by agreement between her and her husband, made while the money was still in the hands of the executor, he was allowed to apply towards paying for the land, the stipulation between them being that, in taking title to the land, such an interest in

the same should be conveyed to her in her own separate right as would be proportionate to the amount of her money applied to the payment of the consideration.

Abundant evidence to substantiate those facts is found in the record; and it also appears that the debtor of the complainant, on the 10th of June, 1867, conveyed to his son all of his equitable interest in the several properties previously transferred to the before mentioned parties, together with whatever interest he owned in the turnpike therein described, which was not included in either of said trust-deeds. Proof of that conveyance is placed beyond doubt; but it is equally clear that the chief object of the same was to secure the repayment to his mother of the money belonging to her, which the father used and applied towards paying for the prior described tract of land, the son becoming bound to her for that amount under the agreement.

Eight months and a half later, to wit: on the 28th of February, 1868, the said debtor of the complainant filed his petition in bankruptcy, and in the month of February of the succeeding year received his discharge. On the 6th of May next, after the petition in bankruptcy was filed, the assignee of the estate was appointed, and due conveyance of all the assets of the bankrupt was made to him, as required by law. Schedules of the bankrupt's liabilities were duly filed, but they did not mention the name of the original complainant as a creditor.

Allegations to the effect that the complainant proved debts to the amount of \$4,500 are contained in the bill of complaint, and the record shows that his own deposition given in the cause affirms the allegation; but the answer of the respondents denies the fact alleged, and the deposition of the bankrupt fully supports the averment of the answer.

Service was made; and the respondents appeared and demurred to the bill of complaint, and they subsequently filed an answer setting up several defenses, including most or all of the causes shown in support of the demurrer. Hearing was had; and the court, the District Judge presiding, overruled the demurrer to the bill of complaint. Proofs were subsequently taken; and the parties having been again heard, the court, the Circuit Justice presiding, entered the final decree as to the merits in favor of the complainant, from which the respondents appealed.

Since the suit was commenced new parties have been made, in consequence of the death of the complainant and the principal respondent; but the questions to be decided are unaffected by that circumstance.

Three of the errors assigned were fully discussed at the bar. They are as follows: (1) That the court erred in holding that the conveyances made by the assignee to the complainant included any of the property sued for in the bill of complaint. (2) That the court erred in holding that the said conveyance was of any validity, even if it did include the property for which the suit is brought. (3) That the court erred in overruling the defense that the suit is barred by the Statute of Limitations.

These several assignments of error were discussed at the bar in the order herein stated; but it will be more convenient to consider the question of limitation first, for the reason that, if

that is sustained, the other assignments of error will become immaterial, as sufficiently appears from the prayers of the bill of complaint, of which the following are the most material: (1) That the conveyance from the bankrupt to his son may be decreed to be fraudulent, null and void. (2) That the equities and personal property therein described may be decreed to the complainant. (3) That if the court should be of the opinion that he, the complainant, is not entitled to all of the equities described, then that his *pro rata* in the same may be decreed to him, and that the \$4,000 paid by the son, if found to have been paid out of his own money, may be decreed to have been paid in fraud and with notice that he is not entitled to recover the amount. (4) That all debts included in the deed of trust may be decreed to be invalid as a lien on the estate of the bankrupt, and that all claims against the bankrupt which are unproven, whether secured or not, may be decreed invalid as to the estate of the bankrupt, and not entitled to be paid out of the same in whole or in part. (5) That the cloud caused upon the titles by the conveyance to the son may be removed, and that the titles to the tracts may be decreed to the complainant free from the liens created by the conveyance.

Actions at law or suits in equity may, in a proper case, be brought by the assignee against any person to recover interests of the bankrupt held adversely, or by any person against such assignee touching any property vested in such assignee; but the same section of the Bankrupt Act provides that no suit at law or in equity shall in any case be maintained by or against such assignee, or by or against such person in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. 14 Stat. at L., 518; R. S., sec. 5057.

Deeds of trust, as before explained, were executed to certain trustees, and on the 10th of June, 1867, the equities in controversy were conveyed by the debtor to the son. On the 28th of February of the next year the debtor filed his petition in bankruptcy. Due proceedings followed, and on the 6th of May, 1868, more than two years before the bill was filed, the assignee was appointed, and conveyance was duly made to him of all the assets of the bankrupt.

Speedy administration as well as equal distribution of the assets among the creditors is the policy of the Bankrupt Act, and the former is almost as necessary as the latter to accomplish the beneficent ends for which the law was passed. Impressed with that view, Congress enacted the limitations contained in the 2d section of the Bankrupt Act, which, like other Statutes of Limitation, must receive a reasonable construction. Beyond doubt, it applies to all judicial contests between the assignee and other persons touching the property or right of property of the bankrupt, transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. *Bailey v. Glover*, 21 Wall., 346 [88 U. S., XXII., 638].

Absolute title to the equities in controversy was claimed by the respondent from the moment the deed to him of the same was executed by the bankrupt; and if that conveyance was

made in fraud of creditors, as alleged by the complainant, it is clear that the equities were transferred to and vested in the assignee when he was appointed, and of course his right of action to recover the same commenced at the time the instrument of assignment was executed and delivered. Whatever remedy for the supposed fraud the assignee had, it is evident he might have pursued and enforced at any time after he acquired title to the bankrupt's estate. *Ex parte Currie*, 7 L. Times (N. S.), 486; *Cleveland v. Boerum*, 24 N. Y., 615.

Ignorance of the state of the title is not alleged, nor is there any pretense of concealment. Instead of that, the proof is clear that the assignee knew all the facts, and that he came to the conclusion that the title of the respondent was valid, and that the assignee had no just claim to the equities. *Terry v. Anderson*, 95 U. S., 632 [XXIV., 366]; *Clark v. Hackett*, 1 Cliff., 280.

Nor is there anything to benefit the complainant in the suggestion that he does not sue as assignee or creditor, as the record clearly shows that he claims as purchaser from and under the assignee.

Pending the proceedings in bankruptcy, the assignee petitioned the court for authority to make sale of the notes, judgments and accounts of the bankrupt, for the reasons set forth in the petition, not including the equities which the bankrupt had previously conveyed to his son. Enough appears to show that the reason he did not include those equities in the petition was, that he had reported to the court the day previous that the conveyance to the son was without fraud, and valid. Reasonable doubt upon that subject cannot be entertained; but the order entered by the court upon the petition is broader than the prayer of the petition, and includes the interest of the bankrupt in the property conveyed to "the son, and all other property belonging to the estate." Pursuant to that order, dated May 17, 1871, the assignee, on the 13th of June following, sold all the assets of the bankrupt for the sum of \$235 to the complainant, he being the highest bidder for the same at the public sale.

Nothing can be plainer in legal decision than the proposition that the complainant did not acquire, by the conveyance made to him under that sale, any greater rights than those possessed by the grantor. Whatever rights the assignee possessed, if any, were acquired May 6, 1868, when he was appointed and qualified as the assignee of the estate of the bankrupt. Throughout the whole period intervening between that date and the date of the purchase by the complainant, the respondent held the equities in controversy adversely to the supposed right of the assignee.

Viewed in the light of these suggestions, it is clear that the right, if any, of the assignee was barred by the Statute of Limitations before purchase of the same by the complainant.

Decree reversed, with costs, and the cause remanded, with directions to dismiss the bill of complaint.

DANIEL PALMER, *Plff. in Err.*,

v.

JOSEPH W. LOW ET AL.

(See S. C., 8 Otto, 1-19.)

Mexican grant—records as evidence—alcalde grant—grant to infant—limitations—ejectment.

1. The record of alcalde grants of the *pueblo* lands of San Francisco, kept by the alcalde, in accordance with the requirements of Mexican laws, turned over to the county recorder's office, pursuant to the statutes of California, is primary evidence of a record-eject grant.

2. A grant, by which the alcalde gives, grants and conveys unto one, "his heirs and assigns forever," etc., is a grant in fee simple.

3. A grant to an infant is voidable, not void.

4. The California Statute of Limitations did not begin to run against a Mexican title until July 1, 1864. No title could be acquired by possession from 1851 to 1867, as against a title derived from the Spanish or Mexican Government, or the authorities thereof.

5. In ejectment, where the plaintiff declared generally upon his title without setting out the particulars, and the answer of the defendant was a general denial, it was not incumbent on the defendant to state in his answer the matters on which he relied to defeat any title that might be developed upon the trial.

[No. 38.]

Argued Oct. 23, 24, 1878. Decided Nov. 11, 1878.

ERROR to the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Messrs. F. W. Hackett, A. T. Britton and Smith & Redington, for plaintiff in error.
Mr. S. O. Houghton, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This was an action of ejectment, commenced April 30, 1872, by Daniel Palmer, the plaintiff in error, to recover possession of a one hundred vara lot, No. 89, part of the *pueblo* lands of San Francisco, lying east of Larkin Street and northeast of Johnston Street. The City of San Francisco was first incorporated by the State of California, April 15, 1850, with certain defined boundaries. Acts of 1850, p. 223. The city was the successor of the Mexican *pueblo* of Yerba Buena, or San Francisco. The original charter was repealed and a new one granted, April 15, 1851. Acts of 1851, p. 357. The premises in controversy are within the boundaries of the city as defined in this last Act of incorporation, and constitute part of the lands claimed from the United States by the city, on account of its succession to the property and rights of the Mexican *pueblo*.

On the 20th June, 1855, the City Council of San Francisco passed an ordinance, known as the Van Ness Ordinance, the sections of which, material to the present controversy, are as follows:

"Sec. 2. The City of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits to the parties in actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, and to their heirs and assigns forever, excepting the property known

as the slip property, and bounded on the north by Clay Street, on the west by Davis Street, on the south by Sacramento Street, and on the east by the water-line front; and excepting also any piece or parcel of land situated south, east or north of the water-lot front of the City of San Francisco, as established by an Act of the Legislature of March 26, A. D., 1851; *Provided*, such possession has been continued up to the time of the introduction of this ordinance in the Common Council, or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in the possession of the landlord or lessor under whom they were so occupied or possessed; *Provided*, That all persons who hold title to lands within said limits by virtue of any grant made by any *ayuntamiento*, town council, alcalde or justice of the peace of the former *pueblo* of San Francisco, before the 7th day of July, 1846, or grants to lots of land lying east of Larkin Street and northeast of Johnston Street, made by any *ayuntamiento*, town council or alcalde of said *pueblo*, since that date and before the incorporation of the City of San Francisco by the State of California; and which grant or the material portion thereof was registered or recorded in a proper book of record, deposited in the office or custody or control of the recorder of the County of San Francisco, on or before the 3d day of April, A. D. 1850; or by virtue of any conveyance duly made by the commissioners of the funded debt of the City of San Francisco, and recorded on or before the first day of January, 1855, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

Sec. 3. The patent issued or any grant made by the United States to the City, shall inure to the several use, benefit and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name."

"Sec. 10. Application shall be made to the Legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands, for the uses and purposes hereinbefore specified.

Sec. 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim now pending before the United States Land Commission for *pueblo* lands, for the several use, benefit and behoof of the said possessors mentioned in section 2, as to the lands by them so possessed, and for the proper use, benefit and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors."

On the 11th March, 1858, the Legislature of the State of California passed "An Act Concerning the City of San Francisco, and to Ratify and Confirm Certain Ordinances of the Common Council of Said City," whereby this

NOTE.—Neither time nor the Statute of Limitations runs against the State. See note to Gibson v. Chouteau, 80 U. S., XX., 534.

ordinance was in all respects ratified and confirmed. Section 2 of that Act is as follows:

"Sec. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections 2 and 3 of the ordinance first above recited shall take effect as fully and completely, for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other Act shall be necessary to invest the said possessors with all the interest, title, rights, benefits and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof; *Provided*, That nothing in this Act shall be so construed as to release the City of San Francisco, or City and County of San Francisco, from the payment of any claim or claims due or to become due this State against said city, or city and county, nor to effect or release to said city and county any title this State has or may have to any lands in said City and County of San Francisco." Cal. Acts, 1858, p. 52.

Afterwards, on the first July, 1864, Congress passed "An Act to Expedite the Settlement of the Titles to Lands in the State of California," 13 Stat. at L., 332, section 5 of which is as follows:

"Sec. 5. And be it further enacted, that all the right and title of the United States to the lands within the corporate limits of the City of San Francisco, as defined in the Act incorporating said city, passed by the Legislature of the State of California on the 15th of April, 1851, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city ratified by an Act of the Legislature of the said State, approved on the 11th of March 1855, entitled 'An Act Concerning the City of San Francisco, and to Ratify and Confirm Certain Ordinances of the Common Council of Said City,' there being excepted from this relinquishment and grant all sites or other parcels of lands which have been or now are occupied by the United States for military, naval or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General Land-Office by the Surveyor-General of an approved plat of the exterior limits of San Francisco, as recognized in this section in connection with the lines of the public surveys; *And provided*, That the relinquishment and grant by this Act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

Both parties claim title under this ordinance and this legislation of the State and of Congress. A jury was waived on the trial below, and the court made and filed its finding of facts, from which it appears:

1. That the grantors of the plaintiff entered into the possession of the premises in controversy, without title, about the year 1851 or 1852, and they and the plaintiff continued in the exclusive and adverse possession thereof down to

See 8 OTTO.

the 8th of May, 1867, when the grantor of the defendant, S. O. Houghton, was placed in possession thereof by the sheriff of the City and County of San Francisco, under legal process issued in the case of *Donner v. Palmer et al.*, to which suit neither the plaintiff nor any of his grantors deriving title from any party to the suit after the commencement thereof was a party.

2. On the 19th of July, 1847, George Hyde was the duly qualified and acting alcalde of the *pueblo* of San Francisco, and, as such alcalde, on the day last mentioned granted the premises in controversy to George Donner, by a grant thereof duly made, recorded and delivered by the alcalde; and the material portion of the grant was registered and recorded in a proper book of records, deposited in the office and in the custody and control of the Recorder of the County of San Francisco, before the third day of April, 1850, and which book remained in the office and in the custody and control of the recorder until and on the third day of April, 1850, and has continued so to remain from that date.

3. That the defendant, S. O. Houghton, has, through *mesne* conveyances, acquired all the right, title and interest of Donner in the premises, and that the defendants other than Houghton were, at the time the action was commenced, in possession as tenants under him.

4. At the time of the alleged grant to him, Donner was an infant of about ten years of age.

To prove the grant to Donner, the defendants offered in evidence an entry on "Book A" of original grants, from the custody of the County Recorder of the City and County of San Francisco, which is as follows:

"LOT NO. 39.

Whereas, George Donner has presented a petition soliciting for a grant of a title to a lot of ground as therein described, therefore I, the undersigned alcalde, do hereby give, grant and convey unto the said George Donner, his heirs and assigns forever, lot number thirty-nine (39), one hundred *varas* square, in the vicinity of the Town of San Francisco, subject to all the rules and regulations governing in such cases.

In testimony whereof, I have hereunto set my hand as alcalde, this nineteenth day of July, A. D. 1847.

GEORGE HYDE, 1st Alcalde."

In connection with this offer, it was satisfactorily shown that "Book A" was part of the archives of the office of the City and County of San Francisco, and it was admitted that the book was the original "Book A" of alcalde grants in the custody of the City and County Recorder, and known in the office as one of the books turned over to the County Recorder's office in pursuance of the directions of the Statutes of California, as one of the books of the former alcalde's office. It was satisfactorily proved that the signature of George Hyde to the alcalde entry of grant or memorandum of grant is in his handwriting, and his genuine signature, and that at the date of the entry he was the acting alcalde of San Francisco.

To the introduction of this entry in "Book A" plaintiff's counsel objected, "On the ground that it was incompetent, irrelevant and immaterial; also on the ground that it is not primary evidence or the best evidence of a grant having been made to George Donner. It is but secondary evidence. That there has been no evidence

to lay the foundation for the introduction of this secondary evidence; that there has been no proof of the loss or destruction of the original instrument, of which the said entry is a mere memorandum; that the entry in 'Book A' of original grants is a mere memorandum made by the alcalde; that the grant should have been made and signed by both parties, the grantor and grantee, and should have been attested by parties as witnesses of the fact; that the whole proceeding should have been set out on that book; that if it be a mere memorandum book, it was indicative merely that there was some other instrument which had to be executed and delivered, and which is primary evidence in the case."

These objections were overruled by the court, and exception taken by counsel for plaintiff then and there.

Section 6 of an Act of the Legislature of California, "defining the time for commencing civil actions," passed April 22, 1850, is as follows:

"Sec. 6. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within five years before the commencement of such action." Acts of 1850, 344, sec. 6.

On the 11th April, 1855, this section was amended by adding the following proviso:

"Provided, however, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican Governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the Government of the United States, or its legally constituted authorities." Acts 1855, 109, sec. 1.

On the 18th of April, 1863, this proviso was repealed, and the following enacted as a substitute:

"Sec. 6. * * * And provided further, that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican Governments, or the authorities thereof, which shall not have been finally confirmed by the Government of the United States, or its legally constituted authorities, more than five years before the passage of this Act, may have five years after the passage of this Act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defense to an action founded upon the title thereto. * * *

"Sec. 7. Final confirmation, within the meaning of this Act, shall be deemed to be the patent issued by the Government of the United States, or the final determination of the official survey under the provisions of the Act of Congress, entitled 'An Act to Amend an Act entitled An Act to Define, etc.,' approved June 14, 1860.'" Cal. Acts, 1863, 327.

Upon this state of facts the court below found as conclusions of law:

"I. That defendant, S. O. Houghton, by virtue of said grant to said Donner, the said Ordinance of the City of San Francisco, and the said Acts of the Legislature of California and of Congress, and the said *mesne* conveyances from said Donner to him, is the owner of and

has the legal title to said demanded premises, and that the defendants are lawfully and rightfully in the possession thereof.

II. That the Statutes of Limitations have not run in favor of the plaintiff, by reason of his own and his grantor's possession, from 1851 or 1852 to May 8, 1867, and that such possession gives him no title as against defendants."

Judgment having been rendered in favor of the defendants in accordance with this finding, the plaintiff below sued out this writ of error, and assigns, in substance, for error the ruling of the court admitting "Book A" as primary evidence to prove the grant to Donner, and the judgment for the defendants upon the facts as found.

The questions presented for decision may be stated as follows:

1. Was the entry in original "Book A" of alcalde grants admissible as primary evidence to prove a grant to Donner?

2. Did the record show a grant sufficient in form?

3. Was the grant void because made to an infant? and,

4. Was the action barred by the Statute of Limitations?

These questions will be considered in their order:

1. As to the admissibility of the evidence.

The point of the inquiry is whether the record of alcalde grants of the *pueblo* lands of San Francisco, kept by the alcalde in accordance with the requirements of Mexican laws before the incorporation of the City of San Francisco by the State of California, in the custody of the City and County Recorder, and known as one of the books of the former alcalde's office turned over to the County Recorder's office, pursuant to the Statutes of California, can be used as primary evidence of the recorded grants, or only as secondary evidence, after sufficiently accounting for the absence of the original certificate of grant issued to the grantee.

The rank in the scale of evidence which the Mexican archives occupy has been oftentimes the subject of consideration in the courts of California. As early as 1859, in the case of *Gregory v. McPherson*, 13 Cal., 562, the question arose in reference to the admissibility of an *expediente* filed in the archives of the Mexican Government, to prove a grant under the colonization laws, a copy of which grant, signed by the Governor and countersigned by the Secretary of State, was annexed to and formed a part of the *expediente*. The *expediente* itself consisted of the petition, plat, reference, report, act of concession, approval, grant, etc. It was rejected in the court below on the ground that it was secondary evidence only, and the absence of the copy of the grant which had been issued and delivered to the grantee had not been satisfactorily accounted for; but the Supreme Court said (p. 572): "We are at a loss to know upon what grounds such a document can be denied the weight of original evidence. It was made and signed and authenticated as a record by public officers in the discharge of public duties. The papers were retained in the custody of the appropriate public officer for the purposes of proof, and the highest and most authentic proof, of their own action. The documents receive the stamp and the most satisfactory stamp of

official authenticity. The signatures are made on this as on the papers sent out by the department. We cannot see why such papers should be called copies, or why, in the scale of proofs, they should stand in any subordinate relation to the paper handed to the grantee. If not counterparts or duplicates, it would seem that the original paper is the record retained by the department as part of its public records. * * * We cannot presume that any governmental system of granting land could be so loose as that no records were preserved by the granting power. And it follows, we apprehend, as a universal rule, that wherever the acts of public officers are authenticated by their records, these records are evidence, in all courts of justice, of those acts. If by law, or usage having the force of law, a California grant was matter of record, then it would seem to follow that the record is proof of the grant, especially where, as in this case, the record is itself an exemplification of the grant, and contemporaneously signed by the same officers issuing the grant."

Following this, in 1864, was the case of *Donner v. Smith*, 24 Cal., 114, where the question arose upon the admissibility of an entry of a grant of land in the *pueblo* of San José made in the book of alcalde grants; and although it was held that a statute of the State applicable to the county in which the lands were located made the entry admissible, it was said (p. 122): "We think the court was warranted in finding that the book was one of original entries and, therefore, entitled to be admitted as evidence upon that ground." In *Rice v. Cunningham*, 29 Cal., 492, decided in 1866, it best suited the purposes of one of the parties to use the same "Book A" which is now under consideration, as secondary evidence to prove an alleged lost grant, and thus avoid the effect of an apparent cancellation of the grant which appeared upon the face of the record; but the court said, p. 497: "The argument of counsel for the appellant, in support of their exception, is grounded upon a false assumption. They lower 'Book A' to the level of a chance copy-book, and strip it of all its character and dignity as a public record of the transactions of a government official vested with the exercise of most important functions, and then seek to use it on a question not then before the court."

But in *Donner v. Palmer*, 31 Cal., 500, decided in 1867, the precise question we are now considering was presented in reference to the identical grant under which the defendants in error claim, and it was held, after full argument, and with due regard to both the written and unwritten law of Mexico, including the "Plan of Pitic," so often alluded to in the argument here, that the entry was to be received as primary evidence. In the opinion, after copying the 17th section of the "Plan of Pitic," the court proceeds as follows, p. 508: "In view of this language, there can be no doubt as to the mode in which grants of town lots were to be made. The entire proceedings were to be first entered in the official book required to be kept for that purpose, signed and attested in due form by the proper officer. A copy or summary statement of the proceedings as contained in the official book, also duly signed and attested by the proper officer, was then to be given to the grantee as evidence of his title; and in the event of its loss,

the officer in whose official custody the book might be at the time was authorized and required to give him another 'like copy' of the original proceedings. The record so kept became an official and public record of the transactions of the alcaldes in the matter of granting town lots; and, as such, primary evidence of the acts they recited, under any system of law with which we are acquainted. Entries in such a book, if made in conformity with the regulations of the 14th of November, 1789, became, under the Mexican law, what is denominated an authentic instrument; that is to say, an instrument which proves itself, and, under the common law, an official record. Under both systems such entries have always been esteemed the highest and most satisfactory evidence of the facts which they recite, because they are made by the direction of the law, and are of public concern, and because they are made under the sanction of an oath, or, at least, of official duty, and made at or about the time the acts which they recite transpired. They are retained in the custody of the functionary or department by which they are required to be kept, and are so retained for the express purpose of making them permanent and primary evidence of the transactions of the government. 1 Greenl. Ev., sec. 488, *et seq.*"

The result thus reached has never been disturbed, and it is clear that a rule of property has been established by the courts of the State, binding as well upon the courts of the United States as upon those of the State. While the precise question presented to us was only decided in *Donner v. Palmer*, all the other cases point directly to the conclusion there reached, and it needed only the occasion to make the formal declaration. Certainly, if the Mexican archives possess the character which the courts have given them, there can be no doubt of the rank they take as evidence, under our system of jurisprudence. *Hedrick v. Hughes*, 15 Wall., 123 [82 U. S., XXI., 52]. We see no error in the admission of the testimony.

2. As to the form of the grant.

There can arise here no question as to the payment of municipal fees or the delivery of the grant; for the bill of exceptions shows that the court below found as facts upon the evidence contained in the record of the grant and *other evidence submitted*, that the municipal fees were paid, and that the grant was actually delivered. Neither does any question arise as to the power of an American alcalde to make the grant; for the ordinance under which both parties claim, in terms confers the title upon grantees holding by such grants.

The only question then is as to the form of the instrument appearing in the record. It is certain that it does not meet all the requirements contained in the "Plan of Pitic;" but the counsel for the plaintiff in error, in their argument here, say it is "Beyond the reach of contradiction, and matter of history, that the 'Plan of Pitic' was not pursued by Mexican alcaldes in San Francisco. Grants were made in a very different manner, and quite repugnant to its requirements. A long established custom pursued by these alcaldes, under Mexican rule, modified and superseded the 'Plan of Pitic.'" What these modifications were we have not been informed. No authorities are cited upon the subject except those which go to show that after the

conquest the American alcaldes usually followed the American system of conveyancing and registration. *Donner v. Palmer* [supra]; *Montgomery v. Bevans*, 1 Sawy., 653. We are then left to inquire whether the language of the grant is sufficient to pass the title, if there was no statute or custom prescribing the form in which such conveyances should be made. The Government of the United States had not undertaken to regulate this subject, and the Mexican law, whatever it may have been, whether enacted by statute or established by custom, was in force; for the rule is well settled that the laws of a conquered territory, which regulate private rights, continue in force after the conquest until they are changed by the act of the conqueror. *Ins. Co. v. Canter*, 1 Pet., 511.

The language of this grant is: "I, the undersigned alcalde, do hereby give, grant and convey unto George Donner, his heirs and assigns forever," etc. These are the operative words of a present grant in fee simple, and, being found in an official public record will be presumed, in the absence of anything to the contrary, to be sufficient to accomplish the purpose the parties had in view. While the alcalde was not the sovereign, he was the officer designated by law to make distribution of this kind of property among those to whom, under the Mexican law, it belonged; and the official record of his official acts, which the law requires him to keep, carries with it the presumption that his acts were in form such as was necessary to give full effect to what he was attempting to do.

This same question was presented to the Supreme Court of California in *Donner v. Palmer* [supra], and the same conclusion reached. As the point decided is one which relates to the effect to be given the statute of the State accepting and confirming the Van Ness Ordinance, if not in fact the construction of a state statute absolutely binding upon us, it ought not to be disregarded except for imperative reasons.

3. As to the infancy of Donner.

We are not advised that the Mexican law prohibited such a grant to an infant. The distribution was to be made to "settlers," and was evidently left largely to the "wise judgment" of the "commissioner in charge." If he erred in his judgment, it might be cause for setting aside the grant in some appropriate direct proceeding for that purpose; but so long as the grant remained uncanceled and duly recorded, it would certainly be a grant within the letter of the Van Ness Ordinance, and it was so decided by the Supreme Court of California in *Donner v. Palmer* [supra]. While infants cannot make grants, they may accept them. A grant to an infant is voidable, not void. The grant in this case has never been avoided, but, on the contrary, affirmed, and that, too, long before the Van Ness Ordinance was confirmed by Congress. The title of Donner, therefore, from whom these defendants claim, was superior to that of the plaintiff under the ordinance.

4. As to the Statute of Limitations.

The nature of the title of San Francisco to her *pueblo* lands has often been the subject of consideration in this court, and was carefully stated by Mr. Justice Field in *Townsend v. Greeley*, 5 Wall., 326 [72 U. S., XVIII., 547]; and in *Grisar v. McDowell*, 6 Wall., 363 [73 U. S., XVIII., 863]. At the time of the conquest, the *pueblo*,

of which the City of San Francisco became the successor, did not have an indefeasible estate in the unconveyed portion of these lands, but only a limited right of disposition and use, subject in all particulars to the control of the government of the country. "It was a right which the government might refuse to recognize at all, or might recognize in a qualified form." *Grisar v. McDowell* [supra]. Upon the conquest, the United States succeeded to the rights and authority of the Mexican Government, subject only to their obligations under the Treaty of Guadalupe Hidalgo. As before that time the fee had not passed out of the Government of Mexico, it was transferred to the United States by the conquest and the Treaty which followed. Before, therefore, the estate of the *pueblo* could become absolute and indefeasible, some action was required on the part of the United States. It is conceded that this action was not taken until the Act of July 1, 1864. Down to that time the city held under its original imperfect Mexican title only. Afterwards it was possessed of the fee "for the uses and purposes specified" in the Van Ness Ordinance.

In *Henshaw v. Bissell*, 18 Wall., 255 [85 U. S., XXI., 835], we held in effect that the state Statute of Limitations did not begin to run against the title thus perfected until July 1, 1864; and this decision was followed by the Supreme Court of California in *Gardiner v. Miller*, 47 Cal., 576. After the Act of Congress no survey or patent was necessary for the consummation of the title. *Ryan v. Carter*, 93 U. S., 78 [XXIII., 807]; *Morrow v. Whitney*, 95 U. S., 551 [XXIII., 456]. But independent of this, and looking only to the statutes of the State, it is clear that, after 1855 until the Act of 1863, there was no Statute of Limitations in California affecting titles derived from the Spanish or the Mexican Government before the final consummation of such titles by the Government of the United States. The Act of 1863 gave a right of action upon such titles for five years after the date of its passage, and within the five years, to wit: May 8, 1867, Donner, under whom the defendants claim, was put in actual possession of the premises, and he and they have continued in possession claiming title ever since. The Statute runs only so long as the adverse possession continues. When the possession is ended the operation of the Statute ceases, except in respect to titles previously acquired under it; for in California it is held that adverse possession for the requisite length of time transfers a title to the possessor, which may be asserted affirmatively against an otherwise valid record title. *Arrington v. Liscomb*, 34 Cal., 366.

It follows, then, that Palmer acquired no title by his possession from 1851 to 1867, as against the Donner title, if that title was derived "from the Spanish or Mexican Government, or the authorities thereof;" and it seems to us clear that it was. It was so expressly decided by Mr. Justice Field in *Montgomery v. Bevans* [supra]; and the cases of *Townsend v. Greeley* [supra]; *Grisar v. McDowell* [supra]; and *Merryman v. Bourne*, 9 Wall., 592 [76 U. S., XIX., 683], evidently proceeded upon that assumption. Donner claimed under the City of San Francisco, and the city under its equitable title derived from the Mexican Government, finally ratified and confirmed by the United States. Whatever rights

the city had, under the Mexican title, it held for the use and benefit of the inhabitants; and the United States, by the Act of 1864, relinquished and granted all their right and title for the same uses and purposes. Clearly, therefore, the Act of Congress could not have been intended for the grant of a new right, but simply for the confirmation of the old one. The title of the city is the old imperfect title from Mexico, confirmed by the authoritative recognition of Congress. Previous to the passage of this Act, the city had prosecuted its claim against the United States under the Act of March 3, 1851, 9 Stat. at L., 681, to ascertain and settle private land claims in California, and that action was still pending when this confirmatory statute was passed. The original claim being for a larger quantity of land than was embraced in this relinquishment, the suit went on in the courts until March 8, 1866, when the United States, by another statute "To Quiet the Title to Certain Lands within the Corporate Limits of the City of San Francisco" 14 Stat. at L., 4, in terms confirmed the claim of the city to all the lands embraced in the decree of the Circuit Court then pending in this court on appeal. It is clear, therefore, that the case is within that part of the statute which relates to titles derived from the Mexican Government.

One other question, arising under the Statute of Limitations, remains to be considered, and this grows out of the last clause in the proviso of the Act of 1863, in which five years is given to the holder of a title derived from the Spanish or the Mexican Government "to make his defense to an action founded upon the title thereto." If we understand correctly the position taken by counsel, it is that the holder of a title under a Mexican grant will not be permitted to set up his grant as a defense to an action brought against him for the recovery of the property granted, unless he makes his defense within five years after the date of confirmation, whether the suit in which the defense is to be made was commenced within that time or not. The courts of California have had no little difficulty in giving a construction to this and other kindred portions of this statute; but whatever else it may mean, we think it clear that it cannot be what the plaintiff claims. The facts in this case present, in the strongest light, the utter absurdity of such an interpretation. The plaintiff's grantor entered into the possession of the premises in 1850 or 1851, without a shadow of title, and remained until May 8, 1867, when he was ousted. He acquired no title by his possession. The title under which he was ousted was a Mexican grant, not confirmed until July 1, 1864. 13 Stat. at L., 332. The owner of this grant remained in peaceable possession, claiming title, until April 30, 1872, when this suit was begun. This was more than five years after the date of the confirmation of the grant, but less than that time by eight days from the commencement of possession. As the possession of the owner had not ripened into a perfect title, he was driven to his defense under the grant. The plaintiff, a mere trespasser originally, having no right whatever except that of prior naked occupancy, purposely delaying his action for more than five years from the date of the confirmation of the grant, now seeks to get rid of the grant as a defense to his action, because it

See 8 OTTO.

is more than five years old. If this be the operation of the Statute, it has, in a single line, made substantially worthless as muniments of title all confirmed Mexican grants; and that, too, in a State where titles are so largely drawn from such sources. It would be monstrous to suppose the Legislature could have been guilty of such folly.

The pleadings are sufficient to enable the defendants to avail themselves of their proof. In ejectment, the plaintiff recovers upon the strength of his own title, and not upon the weakness of that of his adversary. The plaintiff declared generally upon his title, without setting out the particulars. The answer of the defendant was a general denial. The plaintiff undertook to establish his title under the Van Ness Ordinance, by proving the requisite possession. To rebut the effect of this evidence the defendants made proof of the grant, under which they claimed, to show that the title under the ordinance did not pass to the plaintiff. Until the plaintiff put in his testimony, there was nothing upon the record to show what his claim of title was. Certainly, under such circumstances, it was not incumbent on the defendant to state in his answer the matters on which he relied, to defeat any title that might be developed upon the trial.

Judgment affirmed.

Cited—111 U. S., 769; 3 McCrary, 386.

ROBERT DUMONT, Impleaded with Another, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C., 8 Otto, 142-144.)

Construction of words—ordinary sense.

1. The word "or" in an instrument is frequently construed to mean "and," and *vice versa*, in order to carry out the evident intent of the parties.

2. But where it is evident that the word "or" was intended to have its ordinary sense, it cannot be construed to mean "and."

3. A surety in a bond, is only bound by the condition of the bond. Where the condition is in the alternative, the bond is discharged as to him by the performance of one of the alternative conditions.

[No. 50.]

Argued Oct. 31, 1878. Decided Nov. 11, 1878.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case which arose in the court below, is fully stated by the court.

Messrs. W. Willoughby, Jno. S. Mosby, D. N. Cooley and H. D. Bean, for plaintiff in error.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This is an action against the surety upon an ordinary bond for duties, given at the time of importation, upon the estimated amount, before the duties were regularly liquidated. The estimated duties, based on the invoice shown by the importer, were \$425; and the condition of

the bond was, that within one year the importer should pay to the collector \$425, or the amount of the duties which should be ascertained to be due, or should within three years withdraw and export them, or transport them to a Pacific port. About a month after importation, the goods were withdrawn by the importer, upon payment of the sum named in the bond; but the duties were not regularly liquidated until about a month later. The liquidation showed that the duties payable were \$676.75, instead of the \$425 which had been paid. This suit was brought to recover the balance. The surety pleaded payment of the sum named in the bond, as a fulfillment of one of the alternate conditions. The counsel for the Government contended that the condition ought to be construed not alternatively, but as intended to secure the payment at all events of the true amount of duties, unless the goods should be exported or sent to the Pacific coast within three years. It was shown that the bond was in the form long in use, and had been approved by the Secretary of the Treasury; and it was, undoubtedly, intended to cover the full amount of the duties, whether the original estimate reached that amount or not. The word "or" is frequently construed to mean "and," and *vice versa*, in order to carry out the evident intent of the parties. But such a change cannot be made in this case; for if we make "or" to read "and," the condition would require the importer to pay the actual duties in addition to the \$425. Besides, there are two other alternate conditions dependent upon the same word "or," namely: that the bond should be void if the goods should be re-exported, or if they should be transported to the Pacific coast, within three years. This shows that the word "or" was intended to have its ordinary sense. To make the condition mean what the counsel for the Government contends it means, would require, in place of the word "or," the addition of several words, so as to make it read, "\$425, and any additional amount of duties to be ascertained to be due and owing on the goods." The court would not have been justified, in this case, in making such a change and addition, by way of construction.

Of course the importer is liable, without reference to the bond, for the entire amount of duties. But the surety is only bound by the condition of the bond. That is all the obligation which he assumes; and as it is clear, in this case that the condition is in the alternative, the bond was discharged by the performance of one of the alternative conditions.

The point was sufficiently raised on the trial to be reviewed here. It is true, the request for a nonsuit was not sufficient; because the court was not bound to grant a nonsuit. And it is also true that the defendant neglected to ask the court to direct a finding for the defendant. But, on the proofs made, the Judge assumed to direct a verdict for the plaintiff; and to this direction the defendant excepted. We think this is sufficient to enable us to take cognizance of the defense.

As this is the only point made in the assignment of errors, we make no observation upon the other points raised at the trial.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

EDWARD IVINSON, *Appl.*,

v.

CHARLES H. HUTTON.

(See S. C., 8 Otto, 79-85.)

Reformation of contract—when decreed—dismissal of complaint.

1. Power to reform written contracts for fraud or mistake, belongs to courts of equity, and cannot be exercised by common law courts.
2. Such power should be exercised only in cases where the proof is entirely satisfactory.
3. Irregularity in the proceedings seldom or never presents just cause for dismissing the bill of complaint.

[No. 64.]

Argued Nov. 8, 1878. Decided Nov. 18, 1878.

APPEAL from the Supreme Court of the Territory of Wyoming.

The case is fully stated by the court.

Messrs. Samuel Shellabarger & J. M. Wilson, for appellant:

This is a case for equitable cognizance.

10th Ed. 1 Story, Eq., secs. 442, a, 456-460 and notes; *Shepard v. Brown*, 4 Giff., 208; *Bradford v. Union Bk.*, 13 How., 66; *Henkle v. Royal Ex. Ass. Co.*, 1 Ves., Sr., 317; *Oliver v. Ins. Co.*, 2 Curt., 277; *Hogan v. Ins. Co.*, 1 Wash., C. C., 419; *Scott v. Corp. of Liverpool*, 5 Jur. N. S., 105; *Lamalere v. Caze*, 1 Wash. (C. C.), 435; *Smith v. Barrow*, 2 T. R., 478-9; *McDougall v. Cooper*, 31 N. Y., 498; *Barry v. Barry*, 3 Cranch (C. C.), 120; *Bankhead v. Alway*, 6 Cold., 56; *Adams v. Funk*, 53 Ill., 219; *Hanks v. Baber*, 53 Ill., 292; *Mickle v. Peet*, 43 Conn., 65.

Mr. W. W. Corlett, for appellee:

Where the minds of the parties have not met, there is no contract and hence none can be rectified.

Mr. Justice Clifford delivered the opinion of the court:

Except in an action of account, which is almost obsolete, it is a general rule that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. *Worrall v. Grayson*, 1 Mees. & W., 168; 1 Colly. Part., 6th ed., 339.

Owing to the ability of courts of equity not only to investigate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to restrain breaches of duty for the future, it is to them rather than courts of law that partners usually have recourse for the settlement of controversies among themselves. 2 Lind. Part., 3d ed., 933.

Sufficient appears to show that the parties to the present controversy on the sixth of September, 1872, entered into a copartnership for the purpose of raising cattle in the county where they resided; that their business transactions and accounts were large; that the complainant put into the copartnership the sum of \$51,075.66, and that he had drawn out from the same the sum of \$7,257; that on the 11th of April, 1874, the partnership was dissolved by mutual consent, upon the terms following: (1) That the respondent should pay the complainant \$5,000 and all the money the complainant had put into the partnership, less the

amount he had drawn out, and that the respondent should pay or secure all debts and liabilities due and owing by the firm. (2) That the complainant should release, assign and convey to the respondent all the interest of every description which he, the retiring partner, had in the partnership property when the partnership was dissolved.

Neither party knew what amount the complainant had put into the firm nor what amount he had drawn out; but they mutually agreed that their clerk should examine the partnership books, ascertain the amount and report the same, as the basis of their agreed settlement; and that if any error was made, that it should be corrected when discovered.

Pursuant to that arrangement, the clerk examined the books, and reported to the parties that the sum shown to be due from the respondent to the complainant was \$47,039.51. By the record it also appears that both parties supposed that the sum reported was correct, and that they made, executed and delivered, each to the other, all the papers necessary to perfect and complete the terms and conditions of the dissolution of the copartnership; that in the course of the same day the clerk discovered that he had made an error of \$4,036.12 against the complainant in making the computation.

Prompt notice of the error was given to the parties; and the complainant alleged in the original bill of complaint that the respondent then and there promised and agreed to re-examine the accounts, and that he would rectify the error or errors, if any were found to have been made, which he subsequently refused to do. Service was made, and the respondent appeared and demurred to the bill of complaint.

Leave of the court having been first obtained, the complainant amended the bill of complaint by striking out the words containing the promise to rectify the error or errors, and the respondent demurred to the amended bill of complaint. Responsive to the same demurrer, the complainant filed a motion to strike it from the files as irregular; but the court denied the motion, overruled the demurrer and directed the respondent to file an answer to the amended bill of complaint.

These preliminary matters being settled, the respondent filed an answer denying the jurisdiction of the court, and setting up several defenses. Hearing was had upon the bill of complaint and answer, and the court sent the cause to a special master to take the proofs and report the same to the court. Due report was accordingly made by the master, with his findings of fact, which substantially support all the material allegations of the amended bill of complaint. Exceptions to the report of the master were filed by the respondent, all of which were overruled by the court.

Before making that order, the parties were again heard; and the court confirmed the report of the master and entered a decree that all the papers, instruments, agreements, notes of hand and mortgages, made and executed by the parties in effecting the dissolution of their copartnership, be reformed and corrected in accordance with the findings of the master: from which decree the respondent appealed to the territorial Supreme Court, where the parties having been again heard, the appellate court

See 8 Otto.

reversed the decree of the court of original jurisdiction and dismissed the bill of complaint, holding that the complainant had a plain, adequate and complete remedy at law; and from that decree the complainant appealed to this court.

Since the appeal was entered here, the complainant assigns for error that the court erred in holding that the case was not one of equitable jurisdiction; that the complainant's remedy was at law and not in equity, and in dismissing the bill of complaint on that ground.

Courts of equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded.

Equities of the kind, whether it be for the re-execution, reform or rescission of the instrument, like the equity for specific performance of a contract, are incapable of enforcement at common law and, therefore, necessarily fall within the peculiar province of the courts invested with equitable jurisdiction.

Power to reform written contracts for fraud or mistake is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common law courts. *Hearne v. Ins. Co.*, 20 Wall., 490 [87 U. S., XXII., 396].

Relief in such a case can only be granted in a court of equity; and *Judge Story* says, if the mistake is made out of proofs entirely satisfactory, equity will reform the contract so as to make it conform to the precise intent of the parties; but if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy. 1 *Story*, Eq. Jur., 9th ed., sec. 152; *Gillespie v. Moon*, 2 Johns. Ch., 585; *R. I. v. Mass.*, 15 Pet., 271; *Daniel v. Mitchell*, 1 *Story*, 172.

Authorities which support that proposition are quite too numerous for citation, and the rule is equally well established that parol proof is admissible to prove the alleged accident or mistake which is set up as the ground of relief. *Hunt v. Roussmanier*, 8 Wheat., 174; 1 *Story*, Eq. Jur., 9th ed., sec. 156; 3 *Greenl. Ev.*, 8th ed., sec. 360; *Adams*, Eq., 6th ed., 171.

Support to the latter proposition is also found in all the standard writers upon the law of evidence. Courts of equity, says *Taylor*, will also admit parol evidence to contradict or vary a writing where, by some mistake in fact, it speaks a different language from what the parties intended, and where, consequently, it would be unconscionable or unjust to enforce it against either party, according to its terms. 2 *Taylor*, Ev., 6th ed., 1041.

Viewed in the light of these suggestions, it is evident that the ruling of the court below: that the complainant had a plain, adequate and complete remedy at law, was erroneous and utterly subversive of the complainant's rights, as

it is clear that the common law courts could not give him adequate relief. *Hipp v. Babitt*, 19 How., 274 [60 U. S., XV., 633]; *Ins. Co. v. Bailey*, 13 Wall., 621 [80 U. S., XX., 503].

Reported cases of the highest authority decide that courts of equity possess the power to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain and which are the subjects of special agreement; but the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory. *Finley v. Lynn*, 6 Cranch, 249; *Oliver v. Ins. Co.*, 2 Curt. (C. C.), 295.

Where an instrument is drawn and executed, which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfill the manifest intention of the parties, equity, if the proof is clear, will correct the mistakes, so as to produce a conformity of the written instrument to the antecedent agreement of the parties. *Hunt v. Rousmanier*, 8 Wheat., 211; *S. C.*, 1 Pet., 13.

Proof, of the most unquestionable character is exhibited in the record, that the understanding of the parties was that the respondent was to pay to the complainant the whole amount the latter paid into the firm, less the sums he had drawn out, and that the clerk designated by the parties to examine the books and compute the amount made the mistake alleged in the bill of complaint. Clear proof is also exhibited that corresponding mistakes were made in the writings executed between the parties to effect the agreed dissolution of the copartnership. Under such circumstances, equity, if the proof is clear, will reform the agreements, and correct the mistakes, as appears by many standard authorities in addition to those to which reference has already been made. *Henkle v. Ins. Co.*, 1 Ves., 317; *Motteux v. Ins. Co.*, 1 Atk., 545; *Collett v. Morrison*, 12 Eng. L. & E., 171; *Andrews v. Essex Co.*, 3 Mas., 10.

Controversies of the kind often arise in respect to policies of insurance; and the rule is: when once the contract is agreed to, the underwriters are bound to insert it in the policy, and if they omit to do it, the insured have a right to insist upon a perfect conformity to the original agreement. *Canedy v. Marcy*, 13 Gray, 377; *Wake v. Harrop*, 1 Hurls. & C., 202.

Concede that; and still it is suggested by the respondent that errors in matters of practice were committed by the court of original jurisdiction. Suppose that is so; still it cannot afford any justification for the appellate court in dismissing the bill of complaint, as the errors, if any, were amendable and might have been corrected if the appellate court had reversed the decree of the court of original jurisdiction and remanded the cause for further proceedings. Instead of that, the appellate court dismissed the bill of complaint without qualification, the effect of which, if not corrected, will be that the complainant will be barred of relief.

Irregularity in the proceedings may frequently justify a reversal of the decree and a remanding of the case, but it will seldom or never present just cause for dismissing the bill of complaint. By a reversal in such a case, the right of the complainant is not barred, and when the

cause goes down, he may, if he can, correct the errors and preserve his rights. Even if the alleged errors of practice were material, the decree could not be justified, as, if not reversed, it would forever bar the right of the complainant; but upon a careful examination of the supposed errors, it is clear that they presented no just obstacle to the rightful determination of the controversy. Nor is it correct to suppose that the alleged errors of practice constituted the cause of dismissal in this case. On the contrary, the opinion of the court shows that the bill was dismissed solely upon the ground that the complainant had a plain, adequate and complete remedy at law, which is a manifest error, as fully shown by the authorities previously cited.

Decree reversed and the cause remanded, with directions to enter a decree affirming the decree of the court of original jurisdiction.

Cited—8 N. W. Rep., 582.

HAMILTON BATES ET AL., Appts.,

v.

CHARLES W. COE.

(See S. C., 8 Otto, 31-50.)

Infringer of patent—notice of defenses—statutory defenses—original patent, as evidence—improvements—prior public use—entire invention—burden of proof.

1. Where the actual invention described in the specification is larger than the claims of the patent, the patentees in a suit for infringement must be limited to what is specified in the claims.

2. In construing patents, it is the province of the court to determine what the subject-matter is, upon the whole face of the specification and the accompanying drawings.

3. Persons seeking redress for the infringement of a re-issued patent are not obliged to introduce the surrendered patent; and if the old patent is not given in evidence by the party sued, he cannot have the benefit of the defense, that the re-issued patent is for a different invention.

4. Where the complainant introduced his re-issued patent in evidence, the burden of proof is cast upon the respondent to prove the defense, that the complainant is not the original and first inventor.

5. Inventors do not forfeit their right to a patent by keeping their invention secret, unless another in the meantime has made the invention and secured a patent therefor.

6. An appellant cannot assign for error the ruling of the court in respect to any defense not set up in his plea or answer.

7. The defending party may plead a general denial of the charge of infringement, and give notice of special matters to defeat the patent.

8. Where the thing patented is an entirety and incapable of division or separate use, defenses must be to the whole invention, and not merely to one or more of the separate claims.

[No. 30.]

Argued May 3, 1878. Decided Nov. 25, 1878.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The appellee filed a bill in the court below, for an injunction and other relief, against the infringement of a certain patent. A decree having been entered in favor of the complainant, the respondents appealed to this court.

The case further appears in the opinion of the court.

Mr. James Moore, for appellants.
Messrs. E. E. Wood and *E. Boyd*, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Persons sued as infringers in a suit in equity, if they give the required notice in their answer, may prove at the final hearing the same special matters in defense to the charge of infringement as those which the defendant, in an action at law, may set up under like conditions.

Defenses of the kind which it is important to notice in the present case are the following: (1) That the patentee is not the original and first inventor of any material and substantial part of the thing patented. (2) That the improvement had been patented or described in some printed publication prior to the supposed invention. (3) That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

Notices of the kind, when the suit is in equity, may be given in the answer or amended answer; and if the defense is previous invention, knowledge, or use of the thing patented, the respondent must state in the notice the names of the patentees, and the dates of their patents and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used. Each of these defenses, it will be seen, goes to the entire invention, and not to separate parts of the thing patented; and the provision is, that if any one or more of the special matters alleged shall be found for the defending party, the judgment or decree shall be rendered in his favor, with costs. R. S., 2d ed., sec. 4920.

Evidence to sustain the second defense is sufficient, if the patent introduced for the purpose, whether foreign or domestic, was duly issued or the complete description of the invention was published in some printed publication prior to the patented invention in suit; and the patent offered in evidence or the printed publication will be held to be prior, if it is of prior date to the patent in suit, unless the patent in suit is accompanied by the application for the same, or unless the complainant introduces parol proof to show that his invention was actually made prior to the date of the patent, or prior to the time the application was filed.

Neither the defendant in an action at law nor a respondent in an equity suit can be permitted to prove that the invention described in the prior patent, or the invention described in the printed publication, was made prior to the date of such patent or printed publication, for the reason that the patent or publication can only have the effect as evidence that is given to the same by the Act of Congress. Unlike that, the presumption in respect to the invention described in the patent in suit, if it is accompanied by the application for the same, is that it was made at the time the application was filed; and the complainant or plaintiff may, if he can, introduce proof to show that it was made at a much earlier date.

Improvements, it seems, were made by the complainant in drilling and bolt-tapping machines, called, in the introductory part of the specification, a new and improved drilling and screw-cutting machine, for which he, on the 20th of January, 1863, received letters patent in due form; and the record shows that on the

19th of February, four years later, he surrendered the same, and that a new patent, being the re-issued patent in suit, was granted to him for the same invention.

Special reference is made in the specification to the figures given in the drawings for a description of the invention; and they show, beyond doubt, what the specification alleges, that the invention relates to a novel and improved arrangement of the parts of a machine constructed and designed for the purpose of drilling and cutting screws; nor is it doubted that the allegation of the patentee is true, that it affords to the operator engaged in cutting screws considerable advantages beyond what he would obtain by the use of the ordinary hand machine.

Inventors, before they can receive a patent, are required to file in the Patent Office a written description of their invention, and of the manner and process of making and using the same, in such full, clear, concise and exact terms as to enable any person skilled in the art to make, construct and use the same.

Pursuant to that requirement, the patentee gave a particular and full description of all the operative devices of the machine, even to the minutest, and of the function performed by each, and of the mode of operation of the whole when the machine is put in motion, including the devices employed when the machine is operated by steam. The devices may be divided into two classes: (1) Those employed to do the work. (2) Those employed to operate the machine, whether by steam or by hand.

Constituted, as the machine is, of numerous devices operating as a whole, it is scarcely possible to define its operations without first taking into the account its separate parts. Of course it has a frame secured to some appropriate fixture, which constitutes, directly or indirectly, the support of all the parts of the machine. Operated, as the machine is, by power, which may be either steam or hand-power, it follows, almost necessarily, that it has a shaft, which in this machine is fitted horizontally in the upper part of the frame, with a fly wheel at one end and a bevel pinion at the other, which latter device gears into the bevel wheel shown in the drawings, the shaft of which is fitted in suitable bearings on the upper part of the frame and at right angles with the main shaft, as shown in the second figure of the drawings, the outer end of the last named shaft being provided with a crank.

Besides the pinion already mentioned, there is another, called a bevel pinion, which also gears into the same wheel, the statement being that it is fitted loosely on the shaft of the wheel in such a manner that the shaft may rise and fall independently of the wheel, and the latter be made at the same time to rotate the shaft, which is tubular at its lower end, and is provided with a set-screw, by which a drill or screw-cutting die may be secured in it.

In addition to that, there is a vertical screw, which works in a nut on the upper part of the frame, the lower end of the screw being connected by a swivel joint with the upper end of the tubular shaft. On the screw above the nut there is placed a ratchet, fitted on the screw in such a manner that, when turned it turns the screw and at the same time admits the latter to rise and fall under the action of the nut.

Speaking of the ratchet, the patentee states that it is turned by means of a pawl which is connected by a pivot to the arm, the latter being attached to the frame of the machine by a pivot. Connected with the arm is a spring, which has a tendency to keep the outer or free end of the pawl in contact with the face of the wheel, which is of such a shape as to form a cam and operate the pawl, so that the latter will turn the ratchet and cause the ratchet as it rotates, to turn the screw; the ratchet causing the same to descend as it is turned, so that the tubular shaft will be forced down and the drill fed to its work.

Such is the described mode of operation of the working devices when the motive power is steam; but the patentee states that it is easy to throw the pawl back so that it can no longer be operated by the cam, in which event the drill must be fed to its work by hand, which is done by turning the screw by means of the handle attached to the wheel on top of the screw.

Next follows the description of that feature of the machine which may be denominated the screw-cutting apparatus. Brief as the description is, it is obviously sufficient to justify the patentee in his claim that it is both new and useful. He commences by stating that the base of the frame has an oblong opening made through it vertically to receive the shanks of the jaws constituting the vise, one of which has the ends of the yoke, so called, bolted to it. Two screws are also described, one of which passes through the semicircular end of the yoke, and the other passes into the jaws of the vise. These jaws are for the purpose of clamping or holding the rods on which screws are to be cut. Such rods are clamped firmly between the jaws by turning the screw that passes through them which constitutes the vise, the screw cutting die being screwed in the lower end of the tubular shaft, and the pawl being disengaged from the ratchet. No feed movement is required in the operation, as the jaws and rod rise and fall under the action of the die, the shanks of the jaws serving as guides. When more speed is required for either drilling or screw-cutting than can be obtained by turning the bevel wheel, it is accomplished by applying additional power to the main shaft, which shows that the machine is adapted to both heavy and light work.

Service was made; and the respondents appeared and filed an answer setting up several defenses, as follows: (1) That the complainant is not the original and first inventor of the alleged improvement. (2) That the alleged improvement, in all its parts, was fully described in the several patents, printed publications and rejected applications for patents set forth in the answer, prior to the alleged invention thereof by the complainant. (3) That the improvement secured by the re-issued patent is not for the same invention as that embodied in the original patent. (4) That the alleged improvement was in public use and was known to divers persons in the United States prior to the alleged invention thereof by the patentee, more particularly set forth in the amended answer subsequently filed by leave of court. (5) That the respondents have not infringed the alleged invention, and that if they have, the complainant has not suffered any damages by such infringement.

Proofs were taken, hearing had, and the court entered a decree in favor of the complainant, and sent the cause to a master to compute the gains and profits of the infringement made by the respondents. Prompt report was made by the master, to which both parties excepted; but it is wholly unnecessary to notice the exceptions of the complainant, as he did not appeal; nor is it necessary to give much consideration to the exceptions filed by the respondents, as the assignment of errors varies materially from the exceptions taken to the master's report.

Both parties appeared, and were heard; and the court confirmed the report of the master as to the amount awarded, and entered a final decree that the complainant recover of the respondents the sum of \$290 and costs; from which decree the respondents appealed to this court.

Since the appeal was entered here the respondents have filed the following assignment of errors: (1) That the Circuit Court erred in finding that the respondents had infringed the first claim of the re-issued patent. (2) That the court erred in finding that the complainant was the original and first inventor of the improvement specified in the second claim of the patent. (3) That the court erred in finding that the respondents had infringed the second claim of the patent. (4) That the court erred in finding that the respondents had infringed the third claim of the patent. (5) That the court erred in finding that the complainant was the original and first inventor of the improvement specified in the fourth claim of the patent. (6) That the court erred in finding that the respondents had infringed the fourth claim of the patent. (7) That the court erred in adjudging that the re-issued patent is a good and valid patent. (8) That the court erred in confirming the fifth finding in the report of the master. (9) That the court erred in the construction given to the re-issued patent.

Annexed to the specification are the claims of the patent, which are as follows: (1) The arrangement of the three bevel wheels in such a manner that the tubular shaft may be revolved with more or less speed and power for the different purposes to which the machine may be adapted. (2) The automatic feed arrangement, consisting of the ratchet, pawl, spring and cam, whereby the drill is fed to its work, the arrangement being so made that it can be detached and the drill fed by hand. (3) He also claims the vise for holding the rods for making screws, in combination with the machine, the vise consisting of the described jaws and the described screw arranged in the base of the frame. (4) Finally, he claims the combination of the tubular shaft and the described vertical screw with the pinion and nut, whereby the rotary motion and the necessary feed is given to the drill, as described in the specification.

Cases arise not unfrequently, where the actual invention described in the specification is larger than the claims of the patent; and in such cases it is undoubtedly true that the patentees in a suit for infringement must be limited to what is specified in the claims annexed to the specification, but it is equally true that the claims of the patent, like other provisions in writing, must be reasonably construed, and in case of doubt or ambiguity it is proper in all cases to refer

back to the descriptive portions of the specification to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims; nor is it incorrect to say that due reference may be had to the specifications, drawings and claims of a patent, in order to ascertain its true legal construction. *Brooks v. Fisk*, 15 How., 215.

Apply that rule to the case, and it follows that there is no substantial variance between the claims of the patent and the description of the invention or inventions described in the specification.

In construing patents, it is the province of the court to determine what the subject-matter is upon the whole face of the specification and the accompanying drawings. *Curt. Pat.*, 4th ed., sec. 222.

In case of a claim for a combination, where all the elements of the invention are old, and where the invention consists entirely in the new combination of old elements or devices whereby a new and useful result is obtained, such combination is sufficiently described if the elements or devices of which it is composed are all named and their mode of operation given, and the new and useful result to be accomplished pointed out, so that those skilled in the art and the public may know the extent and nature of the claims, and what the parts are which co-operate to produce the described new and useful result. *Curtis, Pat.*, 4th ed., sec. 289 a, p. 275; *Seymour v. Osborne*, 11 Wall., 542 [78 U. S., XX., 38].

Accurate description of the invention is required by law, for several important purposes: (1) That the government may know what is granted and what will become public property when the term of the monopoly expires. (2) That licensed persons desiring to practice the invention may know, during the term, how to make, construct and use the invention. (3) That other inventors may know what part of the field of invention is unoccupied. *Gill v. Wells*, 22 Wall., 27 [89 U. S., XXII., 711].

Sufficient has already been remarked to show that the invention, in its primary feature, is an improved machine for drilling, composed of the devices pointed out in the specification, which operate and perform the functions therein described, and which by their joint operation in the manner described accomplish the patented result; that the other feature of the invention is an improved vise constructed on the same frame, consisting of the several devices already described, and which operate in the manner described to accomplish the described result.

Construed in that way, as the specification should be, it is clear that the whole invention, including the drill and the vise, is sufficiently described both in the specification and in the claims of the patent, and that the objection of the respondents in that regard must be overruled.

Re-issued letters patent must be for the same invention as that secured in the original patent; and if it appears that such a patent is for a different invention, it is clear that it is void, as no such power is vested in the Commissioner; but no such defense can be sustained in this case, as the original patent was not introduced in evidence. Persons seeking redress for the infringement of a re-issued patent are not obliged

See 8 OTTO.

to introduce the surrendered patent; and if the old patent is not given in evidence by the party sued, he cannot have the benefit of such a defense. *Seymour v. Osborne*, 11 Wall., 546 [78 U. S., XX., 39].

Power to grant patents is conferred upon the commissioner; and when that power has been duly exercised, it is, of itself, when introduced in evidence in cases like the present, *prima facie* evidence that the patentee is the original and first inventor of that which is therein described as his invention. Proof may be introduced by the respondent to overcome that presumption; but in the absence of such proof, the *prima facie* presumption is sufficient to enable the party instituting the suit to recover for the alleged violation of his rights.

Availing himself of that rule of law, the complainant in this case introduced the re-issued patents referred to in the bill of complaint, the effect of which is to cast the burden of proof upon the respondent to prove his first defense, that the complainant is not the original and first inventor of the alleged improvement. Both parol and documentary evidence is admissible to establish that defense; and, inasmuch as the same documentary evidence is sufficient to prove the second defense, the two defenses will be considered together.

Throughout, it should be borne in mind that such defenses are authorized by the Act of Congress, and that they are required to be addressed to the invention as described in the specifications and claims of the patent. None of the elements or devices of the patented machine are new, and the invention itself consists in a combination of old devices. Such a combination is an entirety, though more than one combination may be included in the same patent. *Gill v. Wells*, 22 Wall., 2-24 [89 U. S., XXII., 699, 710].

Where there is only one combination of an entire character, incapable of division or separate use, the defenses of the kind mentioned must be addressed to the invention. Exact conformity to that rule was observed by the respondents in framing their answer in this case; and, inasmuch as no parol evidence of any considerable importance was introduced to support the first defense, the two under consideration are substantially identical in respect to the proofs introduced in their support. Exhibits in great numbers were introduced by the respondents to establish those defenses, consisting of patents, printed publications and rejected specifications, of which those regarded as most material will be separately examined.

Briefly described, the invention embodied in the re-issued patent is a hand drill and screw cutter, designed for ordinary mechanical use, with five constituent or elementary parts: (1) The frame to support the operating mechanism, with a base for holding the material to be wrought or worked. (2) Bevel gearing for driving a shaft or spindle propelled by manual power, capable of running at two speeds, and arranged so that the operator who turns the crank can properly adjust and attend to the material and cause the several parts of the machine to work harmoniously. (3) Automatic and hand-feeding devices, so arranged to the machine as to be easily controlled by the operator, to give vertical motion to the spindle when used for drilling. (4) A shaft or spindle for holding the

tool for performing the work, constructed and arranged in the machine so that it may be fed automatically or by hand, or by both, and so connected by a pinion to the crank that it can receive rotary motion independent of its vertical feeding motion, by means of which it is enabled to act as a screw cutter. (5) A vise attachment for holding rods when the machine or spindle is receiving rotary motion only and is cutting screws.

Screw cutting requires the drill to be made vertical, so as to allow the vise to rise and fall under the action of the die, in which respect the invention differs from all other hand drills described in the record. Owing to the peculiar construction of the machine, it is adapted to drilling, and may be converted into a screw cutter by placing a vise in the opening of the base and detaching the feed devices. Arranged as it is, it may be propelled at two different speeds, so that it can have more or less power either to cut screws or drill holes, simply by changing the point where power is applied. When the greater power and less speed is required, the smaller gear is used; and when greater speed and less power is required, the larger gear is used as the driving pinion, the change being only in the use of pinions acting on the driving gear.

Exhibit 1, introduced by the respondents, is a wooden model of a part of a planer. Unquestionably, it shows a cam, spring, ratchet and pawl; but they are not combined so as to give vertical or lateral motion to a revolving spindle and, as separate devices, will perform no useful function. They are connected by a series of rods and levers, but they give simply an intermittent motion to the shaft. Instead of that, the device of the re-issued patent employs in connection with the spindle a swivel joint, nut and screw, to give vertical as well as rotary motion to the shaft.

Devices in one machine may be called by the same name as those contained in another, and yet they may be quite unlike, in the sense of the patent law, in a case where those in one of the machines perform different functions from those in the other. In determining about similarities and differences, courts of justice are not governed merely by the names of things; but they look at the machines and their devices in the light of what they do or what office or function they perform, and how they perform it, and find that a thing is substantially the same as another, if it performs substantially the same function or office in substantially the same way to obtain substantially the same result; and that devices are substantially different when they perform different duties in a substantially different way, or produce substantially a different result. *Cahoon v. Ring*, 1 Cliff., 620.

Reference will next be made to the patent of Amos Morgan, dated May 30, 1844, and called Exhibit 3. It is what is called a horizontal machine, and is so arranged that all parts of the operative machinery, including the feeding devices and driving machinery, move forward on ways like the carriage of a mill. Unlike the invention of the re-issued patent, it has but one speed for the spindle, which is imparted by two pinions. Two pinions are also employed to feed the spindle when the machine is to bore wood. When iron is to be drilled, two cams are employed, which are put through the driving shaft,

and made to slip out and in so as to adjust the apparatus to feed fast or slow. Suffice it to say that the claim of the patent, without entering further into the descriptive portion of the specification, shows that the two inventions are unlike in most or all of their essential features. It is not in any aspect a vertical machine, and it is without any such base for a vise as that exhibited in the re-issued patent of the complainant, and is not at all adapted to be used as a screw cutter; nor is it arranged with two speeds, nor with a cam fixed on the pinion driving the spindle, so that the automatic feed will always correspond, as in the patent in suit, with the speed of the spindle. Many other differences might be pointed out; but those given are amply sufficient to show that the exhibit has no tendency to support the defense for which it was introduced.

Next follows Exhibit number 4, which is a second patent granted to the same patentee for a small horizontal hand drill, with one motion or speed. By the specification it appears that it is fed automatically by certain described devices, which are so entirely unlike those employed in the re-issued patent, both in their combination and mode of operation, that it is not deemed necessary to waste words in their description, as it is clear that the invention, if any, secured by the patent, is in every material respect different from the patent in suit.

Nor will it be necessary to examine very fully two other exhibits introduced by the respondents, for the same reasons. They consist of two patents issued to George C. Taft, of which the first in date is for an improved drill shaft apparatus, and in the construction of the machine, so far as respects its automatic feed arrangement, it bears a pretty strong resemblance to the mechanism described in exhibit number three, already somewhat fully described; but it is not adapted to feed a drill running at different speeds, and in that respect bears no resemblance to the mechanism described in the re-issued patent in suit. Complicated as the devices of the feeding apparatus are, it is quite difficult to compare the same with the more simple mechanism found in the machine of the complainant, except by saying that they are unlike the former in almost every important particular.

Three years later, the same patentee obtained another patent, called in this case Exhibit number 5, which is also for an improved hand drill or drilling-machine of a horizontal construction. According to the specification, the invention consists in the arrangement and application of a support piece to the slide rod, together with the drill shaft, and the operating mechanism of such shaft, by the employment of which the patentee is enabled to support not only the vibrating lever of the pawl, but other parts of the drilling apparatus, and particularly to employ a driving shaft and certain gears for the purpose of increasing the speed of the drill shaft.

Evidently it is an improvement grafted upon the prior invention of the patentee, bearing very little resemblance to the invention of the complainant, except that it has automatic feed devices, by which alone the drill is fed to the work. Precisely what the feed mechanism is it is difficult to state, as the only description given of it in the specification is the following:

During the rotations of the drill shaft, the pawl mechanism will be put in action in such a manner as to turn the ratchet-gear and the tubular shaft, and thus cause the drill shaft to be moved forward regularly and gradually, in order that the drill may be fed into an article during the process of drilling the same.

Should inquiry arise as to what the mechanism is that performs those functions, it is very clear that no one can answer the question without other means than those given in the specification. Better description is given of the operating devices of the machine, in respect to which it will be sufficient to say that they are quite unlike those shown in the specification of the complainant.

Improvements in machinery for making envelopes and paper were made by E. W. Goodale, and the patents granted to him were introduced by the respondents as exhibits in the case to support the first and second defenses; but it is so obvious that they have no such tendency, that it is not necessary to give the exhibits any special examination.

Certain extracts from a printed publication were also introduced in evidence by the respondents for the same purpose, in respect to which it is only necessary to state that, in the judgment of the court, they fall far short of what is required in such a controversy to constitute satisfactory proof that the invention had been described in a printed publication prior to the invention of the complainant. *Seymour v. Osborne*, 11 Wall., 555 [78 U. S., XX., 42].

These several exhibits have been carefully examined; and the conclusion of the court is, that there is not found in any one of them a machine with a frame secured as described in the complainant's specification, to which a drill spindle is attached by means of the device called a nut, with a hand wheel and the described screw and the automatic feed devices, consisting of the ratchet carrying the drill shaft, the pawl, and the spring keeping the lever in contact with the cam mounted on the hand wheel, which is capable of being operated at two different speeds; nor is there found in any one of them the two kinds of feeding mechanism designed to be employed in the manner and for the purposes described in the complainant's specification. For these reasons, the court is of the opinion that the first and second defenses set up by the respondents in their answer and amended answer must be overruled.

Evidence of a parol character was also introduced by the respondents, having some slight tendency to prove that the complainant is not the original and first inventor of the patented improvement; but it is so slight and so manifestly insufficient to overcome the *prima facie* presumption arising in favor of the complainant, that the court does not deem it necessary to enter into the details of the evidence.

Suppose that is so; still it is insisted by the respondents that the improvement was in use in divers places in the United States, prior to any alleged invention thereof by the complainant.

Before proceeding to examine the evidence in that regard, it is proper to remark that the defense as pleaded does not state how long the invention had been in public use, nor does the answer state anything from which it can be in-

ferred when the public use commenced, except that it was prior to any alleged invention thereof by the patentee.

Authority is given by the Act of Congress to plead or set up in the answer that the invention had been in public use or on sale in this country for more than two years before the application for a patent. R. S., 2d ed., sec. 4920.

Inventors may, if they can, keep their invention secret; and if they do for any length of time, they do not forfeit their right to apply for a patent, unless another in the meantime has made the invention, and secured by patent the exclusive right to make, use and vend the patented improvement. Within that rule and subject to that condition, inventors may delay to apply for a patent; but the Patent Act provides, as before stated, that the defending party in a suit for infringement may plead the general issue, and, having given the required notice, may prove in defense that the patented invention had been in public use or on sale for more than two years before the alleged inventor filed his application for a patent, and the provision in that event is, that if the issue be found for the party setting up that defense, the judgment or decree shall be in his favor.

Different phraseology was employed in a prior Patent Act, which made it necessary for the party setting up such a defense to prove that the invention had been in public use or on sale, with the consent and allowance of the patentee, before his application for a patent was filed. 5 Stat. at L., 123. Decided cases adjudicated under that Act and certain earlier Acts show that a very limited public use or sale of the invention, if prior to the application and with the consent and allowance of the patentee, was held to be sufficient to defeat the right of the inventor to the protection of the Patent Act. *Pennock v. Dialogue*, 2 Pet., 19; *Whiting v. Emmett*, Baldw., 310; *Ryan v. Goodwin*, 3 Sumn., 518; *Wyeth v. Stone*, 1 Story, 281.

Congress, however, interfered, and provided that no patent shall be held to be invalid by means of such purchase, sale or use prior to the application of a patent, except on proof of abandonment to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application. 5 Stat. at L., 354.

Public use or sale, even under that provision, which was in the nature of an amendment to the earlier Patent Act, in order to defeat the right of the inventor to a patent, must have been for the period prescribed, with his consent and allowance. *Pierson v. Eagle Screw Co.*, 3 Story, 405.

Unlike that, the present Patent Act provides that the defending party, having given the requisite notice, may prove that the invention has been in public use or on sale in this country for more than two years before the inventor applied for a patent, and that if that special matter is found in his favor he is entitled to the judgment or decree with costs. Nothing of the kind is pleaded in the answer, nor is there anything in the record to support the proposition, if it had been well pleaded, from which it follows that the fourth defense must be overruled.

Two assignments of error, to wit: the second and the fifth, must not be passed over without comment. They are to the effect that the court

erred in holding that the patentee was the original and first inventor of the respective improvements specified in the second and fourth claims of the patent.

Two objections to those assignments of error exist, each of which is sufficient to show that they cannot be allowed: (1) That there is no such defense set up, either in the answer or amended answer. Nothing can be assigned for error which contradicts the record, nor can an appellant be allowed to assign for error the ruling of the court in respect to any defense not set up in his plea or answer. Appellate courts cannot amend the pleadings, nor can they allow that to be accomplished by an assignment of error. (2) Neither of those defenses is pleaded as required by the Act of Congress, as each is pleaded to a separate claim of the patent, and not to the invention which is embodied in the specification.

Such defenses, if well pleaded to the invention described in the Patent Act, are good defenses, as the Act of Congress provides that the defending party may plead a general denial of the charge of infringement, and, having complied with the requirement as to notice, may give such special matters in evidence to defeat the patent. Under such a pleading and notice, the respondent in an equity suit may prove that the patentee was not the original and first inventor of the alleged improvement; or that it had been patented or described in some printed publication; or that the invention had been in public use or on sale in this country for more than two years prior to the application; and the provision is, that the judgment or decree must be in favor of the defending party, if he proves any one or more of these special matters.

Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in the third one, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.

Attempts of the kind are sometimes made; but it is plain that the plea, which in the action at law is the general issue, is required to be addressed to the entire charge of the declaration, and that its effect is to cast the burden of proof upon the plaintiff to make good the charge of infringement. Infringement is the charge made by the party seeking redress; and it is competent, beyond all doubt, for the defending party to show that he does not infringe at all, or that he has infringed only a part of the claims of the patent. Authority for that proposition is found in the very nature of the issue between the parties; but the only authority for attacking the originality or validity of the patent is that given in the Act of Congress and, consequently, the attack must be made in the mode the patent Act prescribes. R. S., sec. 4920.

Defenses of the kind must, if the thing patented be an entirety and incapable of division or separate use, be addressed to the invention, and not merely to one or more of the claims of

the patent if less than the whole invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent; in which cases the several defenses may be made to each patent in suit, and to each invention included in the bill of complaint. *Gill v. Wells* [supra].

Combination patents may be mentioned as examples where more than one invention may be secured by a single patent, and in such a case the patentee may give the description of each combination in one specification. Cases of the kind often arise; and in such a case the party charged with infringement may plead and prove the statutory defenses to each invention, just as if the two combinations had been embodied in separate patents, for the reason that each combination in such a case, like what is secured in a division patent, must be regarded as a distinct invention, at least for the purpose of pleading the statutory defenses to the charge of infringement.

Ample support to that proposition is found in the language of the Patent Act and in the practice of the courts; but where the patent is an entire invention, incapable of division or separate use, the defenses authorized by the Act of Congress must be addressed to the thing patented, and the evidence to support the defense must show that the patentee was not the original and first inventor, or establish some one of the other statutory defenses.

Patentees seeking redress for the infringement of their patent must undoubtedly allege and prove that they are the original and first inventors of the alleged improvement, and that the same has been infringed by the party against whom the suit is brought. In the first place, the burden to establish both of those allegations is upon the party instituting the suit; but the law is well settled that the patent in suit, if introduced in evidence, affords to the moving party a *prima facie* presumption that the first allegation is true, the effect of which is to shift the burden of proving the defense upon the defending party. *Blanchard v. Putnam*, 8 Wall., 420 [75 U. S., XIX., 433]; *Seymour v. Osborne*, 11 Wall., 538 [78 U. S., XX., 37]. Infringement being denied, the burden of proof is upon the complainant to establish the charge.

Where the invention is embodied in a machine, manufacture or product, the question of infringement, which is a question of fact, is ordinarily best determined by a comparison of the exhibit made by the respondent with the mechanism described in the complainant's patent. Both parties gave evidence upon the subject; but the weight of the proofs, in the judgment of the court, supports the affirmative of the charge.

Strong support to that view is derived from the stipulation filed in the case, in which the respondents admit that, between the date of the patent and the filing the bill of complaint, they made and sold drilling machines with a vise attached, like complainant's Exhibit B, which is equivalent to a confession of the charge, leaving open only the question as to the extent of the infringement.

They also except to the master's report; but the exception is not well founded, and the amount of profits found being quite reasonable,

it is clear that the decree of the Circuit Court is correct.

Decree affirmed.

Cited—101 U. S., 660; 102 U. S., 104.

THE SECOND NATIONAL BANK OF ST.

LOUIS, *Plff. in Err.*,

v.

THE GRAND LODGE OF FREE AND ACCEPTED MASONS OF THE STATE OF MISSOURI.

(See S. C., 8 Otto, 123-125.)

Promise to pay debt of another.

Where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it, there being no novation, he has a right of action against the promisor for his own indemnity. The original creditor cannot sue on the promise.

[No. 47.]

Argued Oct. 29, 1878. Decided Nov. 25, 1878.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The plaintiff in error brought suit in the court below, in the nature of an action of *assumpsit*, to enforce the provisions of an alleged contract made between the defendant in error and a corporation called the "Masonic Hall Association." The Grand Lodge, at its 49th annual communication at St. Louis, Oct. 14, 1869, adopted the following resolution, viz.:

"Resolved: That this Grand Lodge assume the payment of the Two Hundred Thousand Dollars bonds, issued by the Masonic Hall Association; provided that stock is issued to the Grand Lodge by said Association to the amount of said assumption of payment by this Grand Lodge, as the said bonds are paid.

Resolved: That a fund is hereby created in this Grand Lodge, to be called 'Masonic Hall Fund,' and that the various subordinate Lodges be required to pay into the hands of the Grand Secretary, for the purpose of said fund, the sum of one dollar per year for each member of said Lodge, commencing at the next session of this Grand Lodge."

The plaintiff was the holder of certain of the bonds mentioned in these resolutions, which were still unpaid, and the evidence showed that the plaintiff purchased them supposing the Grand Lodge to be liable. It was denied, however, that the Grand Lodge, or anyone by its authority, had any participation in the negotiation of any of said bonds.

The jury upon the trial found a verdict for the defendant, by direction of the court.

Messrs. Jno. W. Noble and Jno. C. Orrick, for plaintiff in error.

First. The resolution of the defendant was, in legal effect, an agreement to pay the bonds according to their terms; and upon their negotiation thereafter, and non-payment, the defendant became liable to an action directly by the holder or holders.

The Grand Lodge was already interested as a stockholder in the Masonic Hall Association
See 8 OTTO.

and in the Free-Mason or Masonic Hall, as a building for its assemblies. The eloquent language of the orators of the Grand Lodge of different degrees, leaves no doubt upon the mind that the purpose of the defendant was to obtain by means of these resolutions, a valuable property. There was abundance of testimony to show that the purpose and effect of the action of the Grand Lodge were, as stated in the petition: to make the bonds salable; and it is in proof that the plaintiff was induced to purchase the bonds, by reason of the resolutions of the defendant.

Under these circumstances, we submit that the case falls within the principle announced in the cases of *Purman v. Nichol*, 8 Wall., 44 (75 U. S., XIX., 370); *Woodruff v. Trapnall*, 10 How., 190; *Curran v. Ark.*, 15 How., 304; *Zabriskie v. R. R. Co.*, 23 How., 381 (64 U. S., XVI., 488); *Lawrason v. Mason*, 3 Cranch, 492; and it may be safely asserted that when, after these resolutions, the bonds of the Association were sold, the resolution of the defendant was the same in legal effect as if it had been printed upon the back of each, as an express guaranty to the bearer. The course of conduct of the defendant in connection with these bonds, its relation to the Association, its interest in the property, its adoption of the resolution, the action of its officers in the publication and distribution of the circular of Masonic Hall Association, the credit given on the faith of the resolution—all go to make a case of absolute responsibility by defendant for the payment of the bonds to the bearers of them.

Opdyke v. R. R. Co., 3 Dill., 73; *Barker v. Scudder*, 56 Mo., 275.

We further submit that, under the evidence in this case, not only was the resolution in effect an agreement to pay these bonds to bearer, but that it was such as enabled the bearer of either one of the bonds to sue on the agreement, as an agreement made directly with him by the defendant.

In *Lawrason v. Mason*, *supra*, the obligation of the defendant was expressed as follows:

"Mr. James McPherson, Dear Sir: We will become your security for 180 barrels of corn, payable in twelve months." Yet Lawrason, a third party, having given credit on this, was held authorized to sue in *assumpsit*.

Lawrence v. Fox, 20 N. Y., 268.

This doctrine is discussed at large in the *American Leading Cases*, Vol. 2, 335, *et seq.*, and is there established as stated. We conclude, on this point, that this case rests upon the right of the plaintiff, as a holder for value of the bonds of the Masonic Hall Association, to sue directly the Grand Lodge, because of the resolution set forth in the petition, and the credit given thereon.

Second. The contract upon which this action is based, being the promise of the Grand Lodge to pay the bonds to the bearer, and on which the bearer may proceed, was executed on purchase of the bonds and not affected by the consideration, moving from the Masonic Hall Association to the defendant to make the promise it did.

It is apparent that there were two considerations connected with the resolution of the defendant, upon negotiation of the bonds: 1. The money the purchasers of the bond advanced

upon the faith of that resolution. 2. The stock which the Association agreed to deliver to the defendant for assuming and making their payment.

The consideration that was paid by the plaintiff, was because of the resolution of the Grand Lodge, as shown by testimony, almost entirely; as, without the guaranty of the defendant, the bonds were considered as worth no more than blank paper. As soon as this consideration was paid by the plaintiff, the contract, as between the plaintiff and the defendant, was executed; and it was not within the power of the defendant to rescind it. We submit, the charge of the Judge, in this regard, is not erroneous. It is clear from the testimony that the payment for the bonds was made upon the promise simultaneously proffered by the Grand Lodge, and it needs reference only to the most fundamental principles, as declared in the text books, to maintain that if the original debt or obligation arose upon the consideration, it will support the promise of guaranty, if the promise was simultaneous with, or prior to, the original debt.

Farnsworth v. Clark, 44 Barb., 605, 606, citing *Pars. Merc. L.*, 66; *Pars. Cont.*, 491.

And the authorities go further and hold that, where one promises to pay the debt of another, a recovery may be had on this promise, independent of the validity of the original debt.

In *Thorp v. Keokuk Coal Co.*, 48 N. Y., 257, the court announces this principle clearly as follows:

"The defendant for a sufficient consideration, passing between the defendant and Franklin, a third party, agreed to pay the amount of a mortgage debt. This the defendant agreed to do personally and absolutely, and it would not make any difference if the mortgagor had not been liable at all, the defendant having promised on a sufficient consideration to pay the debt. This suit is not primarily upon the mortgage, but upon the promise of the defendant to pay it.

See, also, *Clafin v. Ostrom*, 54 N. Y., 584; *Ins. Co. v. Ry. Co.*, 41 Barb., 9.

Messrs. John D. S. Dryden and R. E. Anderson, for defendant in error:

The plaintiff's right to recover in this case can be maintained only upon the supposition that the resolutions in the record operated as a contract between the defendant and the plaintiff. They had no such operation. The record shows that, at the time of the adoption of the resolutions, the bonds sued on, and to which the resolutions relate, were in the hands of others, and did not come to the hands of the plaintiff for a half year or more afterward.

There is nothing in the record to show that the defendant was moved to the adoption of the resolutions by any purpose to aid the negotiation of the bonds or that the defendant was aware that the Hall Association proposed to negotiate the bonds; much less that the resolutions were to be used in aid of the negotiation.

There is nothing in the case to support the theory of the plaintiff, that the resolution operated as a letter of credit by the defendant.

Laverson v. Mason, 2 Am. Lead. Cas. and notes, 220 (5th ed., 335).

Unless the defendant intended to make itself answerable to others besides the Corporation with which it was directly contracting, it is not so answerable; and, as bearing upon the ques-

tion, with whom the defendant supposed it was contracting, and making itself answerable to, it is important to observe that the undertaking of the resolutions is to pay the \$200,000 of bonds, as well the first as the second mortgage bonds, as well the \$140,000 first mortgage bonds in the hands of Daniel G. Taylor, as the \$60,000 second mortgage bonds in the hands of numberless creditors of the mortgagor, held as collateral, and that the delivery of the stock by the Hall Association is to be simultaneous with the payment of the bonds by the defendant. If the parties contemplated the simultaneous payment of money and delivery of stock, they did not contemplate payment to any other than the Hall Association.

The contract was an entirety and ought to be so held, and not to be so construed as to render defendant liable to as many different actions as there were holders of the bonds.

Mr. Justice Strong delivered the opinion of the court:

It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the Association and of the Grand Lodge; made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the Lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the Lodge should undertake to lend money to the Hall Association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of *assumpsit*. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the

promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the Hall Association and the Grand Lodge. The contract was made, as we have said, for the benefit of the Association, and if enforceable at all, is enforceable by it. That the several bond holders of the Association are not in a situation to sue upon it, is apparent on its face. Even as between the Association and the Grand Lodge, the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the Lodge was to assume the payment of the \$200,000 bonds, issued by the Hall Association, "Provided, that stock is issued to the Grand Lodge by said Association to the amount of said assumption." * * * "as said bonds are paid." Certainly the obligation of the Lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bond holders was the receipt of the stock. But the bond holders can neither deliver it nor tender it; nor can they compel the Hall Association to deliver it. If they can sue upon the contract and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the Lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the Lodge would ever have agreed. It is manifest, therefore, that the bond holders of the Hall Association are not in such privity with the Lodge and have no such interest in the contract, as to warrant their bringing suit in their own names.

Hence the present action cannot be sustained, and the Circuit Court correctly directed a verdict for the defendant.

Judgment affirmed.

Cited—109 U. S., 199; 2 McCrary, 106; 66 How. Pr., 90; 6 N. W. Rep., 127; 131 Mass., 107; 41 Am. Rep., 212.

THE GIANT POWDER COMPANY, *Appt.*,
v.
THE CALIFORNIA POWDER WORKS,
JOHN H. BAIRD, ET AL.

(See S. C., "Powder Co. v. Powder Works," 8 Otto, 126-140.)

Re-issued patent—patent for process—nitro-glycerine—Act of July 8, 1870—demurrer.

*1. A re-issued patent must be for the same invention as that which formed the subject of the original patent, or for a part thereof when divisional re-issues are granted. It must not contain anything substantially new or different.

2. An original patent for a process will not support a re-issued patent for a composition, unless the composition is the result of the process, and the in-

vention of the one involves the invention of the other.

3. A patent granted for certain processes of exploding nitro-glycerine will not support a re-issue for a composition of nitro-glycerine and gun powder or other substances, even though the original application claimed the invention of both process and compound. They are distinct inventions.

4. The last clause of section 53, Act of 1870, R. S., sec. 4916, relates merely to the evidence to which the commissioner may resort, but does not increase his power as to the invention for which a re-issue may be granted. Whether said claim relates to any other than machine patents, not considered in this case.

5. When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the regular decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged bad, and to overrule the demurrer to the residue, and direct the defendant to answer thereto.

6. The decision of the Circuit Court of California sustained, as to the validity of the two principal patents for compounds of nitro-glycerine and gun powder and other substances, in the case of the Giant Powder Co. v. The California Powder Works and others.

[No. 63.]

Argued Nov. 7, 8, 1878. Decided Nov. 25, 1878.

APPEAL from the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Messrs. Wm. Bakewell, M. A. Wheaton and George Gifford, for appellant:

In Exhibit A, page 18 of the bill, Nobel claims as his invention:

"1. The use of gunpowder or similar substances, when mixed with nitro-glycerine or analogous substances.

2. The reduction of the quickness of gunpowder, when mixed with oily explosives or non-explosive substances.

* * * * *

4. The exclusive use of nitro-glycerine, and the substances described above, or mixtures of such, as far as their application may be classed under any of the methods indicated in this memorandum."

The original patent that was granted to Nobel reads as follows, viz.:

"Whereas, Alfred Nobel, of Hamburg, has alleged that he has invented a new and useful improved substitute for gunpowder; that he does verily believe that he is the original and first inventor or discoverer of the said invention, and presented a petition to the Commissioner, signifying a desire of obtaining an exclusive property in the said invention," etc.

Now, the invention named in this patent as there named, was Nobel's whole invention; it included his whole invention of substituting nitro-glycerine for gunpowder. It, in its terms, as much covered the mixtures patented in re-issues 4818 and 4819, as it did any other part of Nobel's invention.

It was a patent on its face for the invention for which he had presented a petition. Every part of the invention covered by that petition was, in terms, covered by the patent and was a part of the patented invention, notwithstanding that a part of the patent was made inoperative and ineffectual, because it afterward falsely stated that the invention was described in the annexed specifications, when it was only partly described therein.

In the case of *Hoffheins v. Brandt*, 3 Fish., 229, the court declared that the model is a part of the patent. If the model is part of the patent, surely the whole record of the application

*Head notes by Mr. Justice BRADLEY.

See 8 Otto.

is as much so. The law does not, in terms, say that the model constituted any part of the patent. If the model is a part of the patent, it becomes so by being placed upon the public records where the public may see and know what it is. The original specifications are as much a part of the patent as the model is. The case of *Seymour v. Osborne*, 11 Wall., 545 (78 U. S., XX., 39), is the case supposed to weigh most heavily against us, and we find the same general idea in that as in the other cases when all weighed together.

It says: "Corrections may be made in the description, specification or claim, where the patentee has claimed as new more than he had a right to claim, or where the description, specification or claim is defective or insufficient; but he cannot, under such an application, make material additions to the invention which were not described in the original specification, drawings, or Patent Office model."

The other side seemed to feel a deep sympathetic alarm lest an innocent public should be liable to loss somehow or in some way not explained, because the original specifications did not issue with the patent.

But the case of *Grant v. Raymond*, 6 Pet., 220, furnishes a full answer to the argument. It was the great Chief Justice Marshall answering the great lawyer Webster. The great lawyer urged, with all the power of his mighty intellect, that, after years of use of a part of an invention by the public, which the inventor had failed to patent if he could then go back and take a re-issue of the whole invention, thereby shutting up factories and stopping machinery lawfully made, the inventor would be perpetrating a fraud upon the public which should not be allowed.

The court answered, fully showing that the inventor was, even in such a case, getting less than belonged to him. The law had promised him his invention for a certain number of years, and the sense of justice and of right which all feel, pleads strongly against depriving an inventor of the compensation thus solemnly promised, because he has committed an inadvertent or innocent mistake.

It was admitted that re-issue No. 5799, for dynamite, was without fault, on the decision of this case. The dismissal ought to have been made without prejudice to our commencing a new suit on the patent. This was not done. The mistake can only be corrected by this court.

See, *House v. Mullen*, 22 Wall., 42 (89 U. S., XXII., 838); *Story*, Eq. Pl., sec. 456.

The grant of the re-issue is *prima facie* evidence that the commissioner did his duty, and that re-issues were granted on proofs satisfactory to him that whatever new matter was introduced into the re-issues, was a part of the original invention, and was omitted from the specification which was attached to the original patent by inadvertence, accident or mistake.

It may, however, be contended on the part of the defendant that, inasmuch as there was a drawing filed with the original application for patent No. 50617, the re-issue does not come within the purview of the last clause of the 53d section of the Act of 1870.

Unless we have entirely failed in comprehending the meaning of the enactment referred to, there is certainly no force in such an argument.

The statute must mean that where there is no drawing or model of that part of the invention which has been omitted from the original, the amendment might be made on proof. Any other interpretation would make the provision a mere arbitrary enactment, without any reason for it in the nature of the case.

In the present case the matter omitted from the original patent and which forms the subject-matter of re-issue No. 4818, is found in the original specification on the records of the office; so that there is no need to go outside of the record at all; and, furthermore, no model or drawing of anything embraced in that re-issue was filed, for the reason that the invention is not susceptible of illustration in that way, being not a machine, but a combination of nitro-glycerine with gunpowder, gun-cotton or similar substances.

In the specification of the original patent we find the following clause:

"By exploding a quantity of gunpowder or other substance in contact with the liquid, the powder being confined in a water-proof tube or case, the heated gases derived from the powder, being disturbed through the mass of the liquid, raises the temperature of the latter sufficiently to decompose the same. (The liquid here referred to is nitro-glycerine.) When powder is used for this purpose, the case containing it may be immersed in the liquid, the powder being ignited by means of a fuse or an electric spark. If desirable, however, the liquid may be placed in a tube, or inserted in a mass of powder, which is then ignited in any suitable manner."

No doubt this is a very imperfect description of Nobel's invention, and that the patent is inoperative to protect the inventor in his actual invention by reason of a defective or insufficient specification, but it is just for the purpose of curing such defects, and granting to the patentee what he actually invented, that the law of re-issue was enacted.

Messrs. **Geo. Harding and C. R. Great-house**, for appellees:

The court below decided to rest its judgment upon a comparison of the original and the re-issued patents, and holds, as a matter of construction, that the latter are not on their face issued for the same invention, or any distinct or separate part thereof, and that for this reason the commissioner exceeded his authority in issuing them:

1. As to the correctness of the decision made by the court below, viz.: that the re-issued patents and the original patents were to be compared on their face to ascertain if they were made for the same invention, the appellees refer to the following authorities:

Act, 1870, R. S., 2d ed., sec. 4916, p. 950; *Seymour v. Osborne*, 11 Wall., 516 (78 U. S., XX., 33); *Dyson v. Danforth*, per Grier, J., 4 Fish., 133; *Felting Co. v. Haven*, per Treat, J., 3 Dill., 131; *Sarven v. Hall*, per Woodruff, J., 5 Fish., 415; *Sickles v. Evans*, per Clifford, J., 2 Fish., 417; *Goodyear v. Rubber Co.*, per Clifford, J., 2 Fish., 499; *Burr v. Dwyrce*, 1 Wall., 575 (68 U. S., XVII., 659); *Cathart v. Austin*, per Clifford, J., 2 Fish., 542; *Gill v. Wells*, 22 Wall., 1 (89 U. S., XXII., 699); *Wicks v. Stevens*, 2 Wood, 312; *Ball v. Wellington*, 6 Off. Gaz., 933; *Tarr v. Webb*, 10 Blatchf., 99; *Russell v. Dodge*, 93 U. S., 460 (XXIII., 973); *Collar Co.*

v. *Van Dusen*, 23 Wall., 530 (90 U. S., XXIII., 128); *Wood Paper Co. v. Fiber Co.*, 23 Wall., 568 (90 U. S., XXIII., 31).

The clause of the Act of 1870, section 73, relied upon by appellant, applies only to machine patents.

Tarr v. Webb, 10 Blatchf., 96.

The appellant's bill and exhibits show that there was a drawing annexed to the original patent, No. 50617, and, therefore, the introduction of new matter into the re-issues thereof is expressly excluded by the language of the clause of Act of 1870, relied upon, which is as follows:

"But when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner, etc."

Act, 1870, sec. 73.

"It is where a patent is inoperative or invalid by reason of a defective or insufficient description, specification or claim, and not where the device is not described or specified at all, that permission is given to re-issue the patent. Devices not described or specified may, if they are the invention of the patentee, be the subject of a patent subject to all other rules governing the inventor's rights; but it is not the office of a re-issue to embrace them. *Seymour v. Osborne* (supra).

It is true that an observation of the court in *Hussey v. Bradley*, 2 Fish. Pat. Cas., 362, 371, gives a broader scope to the right of re-issue, and an intimation in *Doughty v. West*, 2 Fish. Pat. Cas., 553, 556, is in the same direction; but in the subsequent case of *Doughty v. West*, 3 Fish., Pat. Cas., 580, and *Doughty v. West*, 6 Blatchf., 429, founded on a re-issue of the same patent, the re-issue was sustained on grounds entirely consistent with the doctrine above stated, and the rule is, in my judgment, not only clearly correct in principle, but settled by the authority of the Supreme Court, in the case first above mentioned."

Sarven v. Hall, 9 Blatchf., 526.

"Re-issued patents, in order that they may be valid, must be for the same invention as the surrendered originals."

Gill v. Wells, 22 Wall., 15 (89 U. S., XXII., 707.)

The re-issue here appears on its face to be for a different invention, and the Commissioner, therefore, exceeded his authority in issuing it.

Seymour v. Osborne, 11 Wall., 544 (78 U. S., XX., 38); *Wicks v. Stevens*, 2 Wood, 312; *Russell v. Dodge*, 93 U. S., 464 (XXIII., 974).

Mr. Justice Bradley delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court dismissing a bill in equity upon demurrer. The bill was filed by the appellant against the appellees charging them with the infringement of three certain letters patent belonging to the complainant, and praying for an injunction and a decree for damages. These patents were granted for certain alleged inventions of one Alfred Nobel, of Hamburg, in Germany, relating to the use of nitro-glycerine in the manufacture of dynamite and other explosive compounds. The patents are all re-issues of previous patents; two of them bearing date the 19th day of March, 1872, and numbered respectively 4818 and 4819; and the third bearing date the 17th day of March, 1874, and numbered 5799. Number 4818 is for the mixture of gunpowder with nitro-glycerine; Number 4819 is for the mixture of rocket powder with nitro-glycerine; and Number 5799 is for a mixture of nitro-glycerine with porous or absorbent substances, forming what is called dynamite or giant powder. The bill sets out the substance of the original and intermediate patents as well as those sued on, and of some of them makes profert. A consent order was made in the cause, that the complainant should file, as parts of the bill, copies of the several letters patent mentioned and described therein, of which profert was so made. The bill also sets forth by way of schedule a copy of the original application of Nobel filed in the Patent Office on the 16th day of September, 1865.

From the statements of the bill, and the documents thus annexed to and made part thereof, it appears that Alfred Nobel, on the day last aforesaid, by his attorney, filed in the Patent Office a paper describing certain alleged discoveries and inventions made by him in reference to the use of nitro-glycerine as an explosive agent and as a component in explosive compounds. Having in this document referred to the well known property of nitro-glycerine, and the nitrates of ethyl and methyl, nitro-mannite, etc., whereby they cannot be exploded in open space by the application of fire, he proceeds to point out how he succeeds in effecting their explosion. He says:

"A chief point of my invention consists in overcoming this difficulty. According as nitro-glycerine is to be used for fire-arms or for blasting, I adopt two different methods for promoting its explosion, viz.:

1st Method. By mixing it with gunpowder, gun-cotton, or any other substance developing a rapid heat, nitro-glycerine being an oil, fills the pores of gunpowder, and is heated by the latter to the degree of its explosion. Gunpowder treated in this way can take up from ten to fifty per cent. of nitro-glycerine, and develops a greater power with a lesser quickness of explosion. Where the only object in view is to reduce the quickness of explosion of gunpowder, I mix it with or make it absorb common non-explosive oil from one to ten per cent. of its weight.

2d Method. When nitro-glycerine is to be used for blasting, where quickness of explosion is of great importance, I submit it to the most rapid source of heat known, viz: that developed by pressure. To effect this, I make use of the pressure developed by heating a minute portion of nitro-glycerine, or by the detonation of any other violently exploding substance. Nitro-glycerine being a liquid, if it cannot escape, as for instance in a bore, receives and propagates the initial pressure through its whole mass, and is by that pressure instantaneously heated; hence the first impulse of explosion decomposes the rest. There are many means of obtaining this impulse of explosion, such as:

1. When nitro-glycerine in tubes is surrounded by gunpowder, or *vice versa*.

2. By the spark or heat developed by a strong electric current when the nitro-glycerine is inclosed on all sides, so as not to afford an escape to the gas developed.

3. By a capsule, etc., etc., six different methods of producing explosion of nitro-glycerine being pointed out, accompanied by drawings for showing the manner in which they were employed.

He then claims as his invention:

1. The use of gunpowder or similar substances, when mixed with nitro-glycerine or analogous substances.

2. The reduction of the quickness of explosion of gunpowder by mixing it with oily explosive, or non-explosive substances.

3. The effecting the detonation of nitro-glycerine or analogous substances (which can be ignited without exploding) by the heat developed by pressure, promoting an impulse of explosion which decomposes the rest.

4. The exclusive use of nitro-glycerine and the class of substances described above, or mixtures of such as far as their application may be classed under any of the methods indicated in this memorandum.

He then describes a new method of preparing or manufacturing nitro-glycerine, and claims to be the inventor of that.

The bill further states that, after filing the above application Nobel's agent (one Howson) filed certain amendments thereto, striking out a portion of the original; and on the 24th day of October, 1865, upon such amended application, letters patent were granted to Nobel for the term of seventeen years, numbered 50617; and profrat is made of the same in the bill, and they are set out in the record.

By reference to the specification of these letters, which are accompanied with drawings, they appear to be for a process, to wit: the process of using nitro-glycerine, or its equivalent, as a substitute for gunpowder, by exploding it in the manner pointed out. Having explained the nature of nitro-glycerine, nitrate of ethyl, methyl and nitro-mannite, as in the original paper, the specification then points out how nitro-glycerine may be exploded after being confined in a hole drilled in the rock when to be used for blasting, or in a case when to be used for other purposes. Four distinct modes of doing this are enumerated: first, by exploding gunpowder in contact with the liquid; second, by passing an electric spark through a fine wire immersed in it; third, by inserting in it a thin case containing lime-water; and, fourth, by a fuse. The drawings show the manner in which the wire is arranged for passing an electric spark through the fluid.

The bill then states that on the 13th of April, 1869, the above patent was surrendered, and four new divisional patents were issued for the same inventions for which the original patent was granted, numbered respectively re-issues 3377, 3378, 3379, 3380; the first, No. 3377, being for the method of exploding nitro-glycerine by detonation, the second, No. 3378, being for the application and use of percussion-caps and other exploders to create the detonation necessary to explode the nitro-glycerine; the third, No. 3379, being for the improved mode of manufacturing nitro-glycerine; and the fourth, No. 3380, being (as stated in the bill) for the new explosive compounds invented by Nobel, viz.: the mixture of gunpowder and nitro-glycerine, and the mixture of gun-cotton and nitro-glycerine, and the mixture of rocket powder and nitro-glycerine.

These four re-issued patents are not referred to by way of profrat in the bill; but the above description of their purport is sufficient for the purpose of understanding their character.

The bill then states that on the 19th day of

March, 1872, the said re-issue 3380 was surrendered, and two new divisional patents for the same inventions were issued in lieu thereof, numbered respectively re-issues 4818 and 4819; the former being for the mixture of gunpowder with nitro-glycerine, and the latter for the mixture of rocket powder with nitro-glycerine; and each patent securing to the patentee, the exclusive right of making, using, and vending the explosive compound therein described respectively. These are two of the patents on which the suit is brought; and profrat is made of them in the bill, and they are set out in the record. By reference thereto, it appears that in re-issue 4818 the patentee claims:

1. The utilization, as explosives, of nitro-glycerine and the analogous liquid substances before mentioned, nitrate of ethyl, etc., by combining therewith gunpowder, gun-cotton, or other similar substances developing a rapid heat or combustion, substantially as described.

2. The combination of gunpowder with nitro-glycerine, substantially as and for the purposes described.

3. The combination of gun-cotton with nitro-glycerine, substantially, etc.

In re-issue 4819 the claim is for the mixture of nitro-glycerine and rocket powder.

The remainder of the bill is taken up in setting forth the other patent sued on, and various assignments by which the complainant deduces its title to the patents, with the allegation of infringement and prayer for relief.

To this bill the defendant demurred, as well to the whole bill for want of equity as to the relief sought in respect of the different patents taken separately; also for multifariousness, misjoinder of defendants, etc.

The main defense relied on by the counsel of the defense, on the demurrer, is, that it is apparent that the re-issued patents numbered 4818 and 4819 are not for the same invention as that which was described in the original letters patent numbered 50617 for a portion of which they purport to be re-issues.

It is apparent, they say, that the original patent was for a process, to wit: a mode, or different modes, of exploding nitro-glycerine; whereas, the re-issues are for manufactured compounds or mixtures, namely: mixtures of nitro-glycerine with gunpowder, gun-cotton and rocket powder. It is contended that a process and a mixture are the subjects of different inventions; that a patent granted for one cannot, by its surrender, be the basis of a re-issued patent for the other. If this position is sound, and the matter can be examined on demurrer, it was not error to dismiss the bill as to all relief sought in reference to the two re-issues in question.

We have no doubt that the question may be examined on demurrer; for the bill sets forth in full both the original patent and the re-issues, so that they may be examined and compared together. If it were a case in which the identity or non-identity of the inventions in the original and re-issued patents was a complicated question, the court might require the defendants to answer, in order to have the benefit of evidence on the subject. But in ordinary cases, the court itself will compare them. Whether a patent is for a process or a composition is especially a question of construction, and is for the court to decide; and whether a patent for a

process is the same invention as a patent for a composition is certainly a mere question of law. We feel no hesitation, therefore, in approaching the consideration of the questions presented by the pleadings.

Upon due examination of the patents in question, it cannot well be doubted that the original patent, No. 50617, granted on the 24th of October, 1865, was for a process, or rather for different processes and appliances for producing the explosion of nitro-glycerine; nor can it be doubted that the re-issued patents, Nos. 4818 and 4819, granted in 1872, are for compounds and mixtures; in other words, for compositions of matter. In the specification of the original patent, the inventor says: "My invention consists in the use as a substitute for gunpowder of nitro-glycerine, or its equivalent, *substantially in the manner described hereafter*, so that the said liquid, which, when exposed, cannot be wholly decomposed and exploded, shall by confinement be subjected to heat and pressure, by which its total and immediate decomposition and explosion is effected." He then proceeds: "In order to enable others to make and use my invention, I will now proceed to describe the method of carrying it into effect. On reference to the accompanying drawing which forms a part of this specification, Fig. 1 is a view, partly in section, of one apparatus by means of which I render nitro-glycerine, or its equivalent, available as a substitute for gunpowder; and Fig. 2 is a plan view. There is a class of explosive substances comprising nitro-glycerine, the nitrates of ethyl and methyl, and nitro-mannite, which have long been known, but have never been practically applied as explosive agents." He then describes the behavior of these substances, when, being in an unconfined state, they are subjected to appliances of flame and contusion, no explosion being thereby produced; and then shows how, when they are in a confined state, their complete explosion may be produced by the processes which he describes, adding: "The chief point of my invention consists in overcoming the difficulty of suddenly igniting the entire mass of the materials mentioned, so that the same can be practically used as explosive agents." He then shows how nitro-glycerine may be best prepared and manufactured for the purposes of use as an explosive agent. Then he describes the four several methods or appliances for producing the explosion desired, which have already been referred to, concluding with this formal claim: "I claim as my invention, and desire to secure by letters patent, the use of nitro-glycerine, or its equivalent, *substantially in the manner and for the purposes described*." The only equivalents of nitro-glycerine referred to or pointed at in the specification are the cognate substances of nitrate of ethyl and methyl and nitro-mannite. It is to be presumed that these are referred to when the patentee uses the expression, "nitro-glycerine or its equivalent."

Now, in all this specification there is not a hint of any new mixture or new composition of matter having been invented by the patentee. The only thing that approaches it is the method which he describes, of preparing the pure nitro-glycerine. The whole invention set forth, described and claimed consists of methods or processes of exploding the substance so as to render it a useful exploding agent. The tech-

nical form of the claim, it is true, is in appearance a little broader, being for the use (generally) of nitro-glycerine as an exploding agent; but these general terms are properly limited by those which follow, namely: "substantially in the manner and for the purposes described." If any other method of exploding nitro-glycerine should be discovered different from the processes invented and described by the patentee, it could be employed without infringing his patent. According to our view, therefore, the patent is for those processes and methods as applied to the use of nitro-glycerine, or its equivalent, as an explosive agent.

Now, inasmuch as the re-issued patents in question, numbered 4818 and 4819, are for compounds of nitro-glycerine with various other substances, it is impossible not to say that they are for an entirely different invention from that secured or attempted to be secured by the original patent.

If the patent had been not for the mode or process of exploding nitro-glycerine, but for the process of compounding nitro-glycerine with gunpowder and other substances, inadvertently omitting to claim the exclusive use of the substances so produced, the case would have been one of very different consideration. That was the case with Goodyear's patent, which was issued in 1844, and claimed only the process of vulcanizing India rubber. In 1849 it was surrendered, and two new patents issued in lieu thereof: one for the process and the other for the composition. In 1852, the validity of these re-issues came up for consideration in the Third Circuit, in the case of *Goodyear v. Day*, which was argued by Mr. Choate, Mr. Webster and other eminent counsel. *Mr. Justice Grier* disposed of the objections as follows: "We now come to the objections which have been made to the re-issued or amended patents of 1849. The first objection is that the patents of 1844 and 1849 are not for the same invention. This objection is not founded in fact. Both patents are for precisely the same invention or discovery. They both describe, in nearly the same words, the best mode of manufacturing India rubber, by exposing it to a high degree of heat, in connection with sulphur and white lead; by which treatment the substance is endowed with new and valuable qualities which it did not possess before. The discovery is the same; the mode of manufacturing the compound is the same. The first patent had set forth the nature and extent of the invention defectively. There is no reason to doubt the *bona fides* and propriety of the re-issue. It is apparent on the face of the papers, even if the action of the Commissioner on that point was not conclusive." Again, he adds: "The fourth objection is 'that the latter patent claims more than was contained in the original.' If the latter patent is for precisely the same invention, art or discovery as that described in the first, the objection that it claims more is a mistake of fact. If the last patent differs from the first only in stating more clearly and definitely the real principles of the invention, so that those who wish to pirate it may not be allowed to escape with impunity through the imperfection of the language used in the first, there has arisen one of the cases for which it was the intention of the Act of Congress to provide, and the objection is worthless in point

of law." This case is partially reported in 2 Wall., Jr., 283, but the opinion of *Mr. Justice Grier* is not stated in full. In another case, arising on the original patent of Goodyear, [*Goodyear v. R. R. Co.*], reported in 2 Wall., Jr., 356, *Mr. Justice Grier* used this expression: "The product and the process constitute one discovery." The product in Goodyear's invention was the direct result of the process. They were parts of one invention and, except in imagination, could no more be separated from each other than the two sides of a sheet of paper, or than a shadow from the body that produces it.

The present case is entirely different. The processes which the patentee described as his invention in the original patent, No. 50617, had no connection with the compounds or mixtures which are patented in the re-issued patents. They were not processes for making those compounds, and in describing them the compounds were not mentioned. The invention of the one did not involve the invention of the other. The two inventions might have been made by different persons, and at different times.

We think, therefore, that the conclusion is irresistible, that the two re-issued patents, numbered 4818 and 4819, are for a different invention from that described or suggested in the original patent 50617, upon which they are founded and which they are intended, in part, to supersede.

These re-issues being granted in 1872, were subject to the law as it then stood, being the Act of [July 8], 1870, 16 Stat. at L., 198, the 53d section of which (reproduced in section 4916 of the Revised Statutes) relates to the matter in question. It seems to us impossible to read this section carefully without coming to the conclusion that a re-issue can only be granted for the same invention which formed the subject of the original patent of which it is a re-issue. The express words of the Act are, "A new patent for the same invention;" and these words are copied from the Act of 1836, 5 Stat at L., 117 which in this respect was substantially the same as the Act of 1870. The specification may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee; but the invention must be the same. So particular is the law on this subject, that it is declared that "No new matter shall be introduced into the specification." This prohibition is general, relating to all patents; and by "new matter" we suppose to be meant new substantive matter, such as would have the effect of changing the invention or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others, after its issue. The Legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby, in consequence of inadvertence, accident or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied

for, had been abandoned or waived. For such inventions he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the meantime. This, we think, is what the present statute means, and what, indeed, was the law before its enactment under the previous Act of 1836. If decisions can be found which present it in any different aspect, we cannot admit them to be correct expositions of the law.

The counsel for the complainant refers us to, and places special reliance on, the last clause of section 53 of the Act of 1870, where it is said: "But where there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake." But this clause relates only to the evidence which may be employed by the Commissioner in ascertaining the defects of the specification. It does not authorize him to grant a re-issue for a different invention, or to determine that one invention is the same as another and different one; or that two inventions essentially distinct constitute but one. In this case, it is not necessary for us to decide, and we express no opinion as to the precise meaning and extent of the final clause of section 53, to which we have referred; as, whether it relates to all patents or only to patents for machines. But as it relates to the matter of evidence alone, it cannot enlarge the power of the Commissioner in reference to the invention for which a re-issue may be granted. That power is restricted, by the general terms of the section, to the same invention which was originally patented. Conceding that the Commissioner had a right, in this case, by virtue of the clause in question, to examine the original application of Nobel, as it stood before it was amended, in order to ascertain what his invention really was, it would only show that he described, in that paper, two different inventions: one for a composition, and another for a process distinct from the composition. It would not prove that the two inventions were the same; and it would not authorize the Commissioner, on a re-issue, to add the one to the other, as a part thereof.

The complainant insists, however, that the present re-issues are for the same invention which was patented in the re-issued patent, No. 3380, granted in April, 1869; and that the latter re-issue was granted before the passage of the Act of 1870. But this fact does not help the complainant. The law relating to re-issues was substantially the same under the Act of 1836 as it is under the Act of 1870. As before remarked, the former Act as well as the latter restricted the power of the Commissioner, in granting re-issues, to "the same invention" which was the subject of the original patent. It has been repeatedly so held by this court, as the following cases will show: *Burr v. Duryee*, 1 Wall., 575 [68 U. S., XVII., 659]; *Seymour v. Osborne*, 11 Wall., 516 [78 U. S., XX., 33]; *Gill v. Wells*, 22 Wall., 1 [89 U. S., XXII., 699]; *The Wood Paper Patent*, 23 Wall., 566 [90 U. S., XXIII., 31].

Since, therefore, the re-issues in question are not for the same invention for which the original patent was granted, it follows that they

are void; and the bill must be dismissed so far as relates to the said re-issued patents numbered respectively 4818 and 4819.

As nothing is shown, however, in the statements of the bill, which affects the validity of the third patent sued on, the bill should not have been dismissed as a whole, but only as to the said re-issues 4818 and 4819. *For this error the decree must be reversed and the cause remanded, with directions to enter a decree in conformity with this opinion,* dismissing the bill as to all relief sought therein in respect of or in reference to or founded upon the said re-issued patents numbered respectively 4818 and 4819, and, as to the residue of the bill, overruling the demurrer and directing the defendants to answer in accordance with the rules and practice of the court.

Cited—103 U. S., 791; 104 U. S., 377, 749, 753; 105 U. S., 547; 106 U. S., 145, 147, 438; 111 U. S., 103; 112 U. S., 669; 10 Biss., 76, 407-416.

JANE B. KESNER, *Appt.*,

v.

DANIEL TRIGG, Assignee of PHILIP KESNER, JAMES C. GREENWAY, Admr. of JOHN C. GREENWAY, Deceased, W. W. ALLISON, Guardian, etc., ET AL.

(See S. C., 8 Otto, 50-56.)

Usury—trustee—wife's property—post-nuptial contract.

1. In Virginia, a party who avails himself of the defense of usury is required to pay the principal of the debt.

2. A trustee to whom lands are conveyed to secure a debt, like a mortgagee, is regarded as a purchaser; and where he has no notice of a prior claim, he must be considered a *bona fide* owner.

3. By the common law, if a husband and wife sell and convey her land, and he receives the consideration money without any reservation of rights on her part, the money belongs to him.

4. A post-nuptial contract, made upon sufficient consideration, and wholly or partly executed, will be sustained in equity.

[No. 77.]

Submitted Nov. 21, 1878. Decided Dec. 2, 1878.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

The appellant filed a bill in the court below, to enjoin the sale of her husband's estate by his assignee in bankruptcy. She claimed that a large part of the bankrupt's indebtedness was for Confederate money, not worth its face value when received; and further, that she was the equitable owner of the real estate transferred to the assignee.

The case is further stated by the court.

Mr. James H. Gilmore, for appellant.

Mr. John W. Johnston, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

The bill, so far as it relates to the debt claimed to be owing to the estate of John C. Greenway, deceased, secured by the deed of trust to Bekem,

NOTE.—*Settlement or conveyance, for benefit of wife and child; when good or void as to creditors.* See note to *Sexton v. Wheaton*, 21 U. S. (8 Wheat.), 229.

See 8 OTTO.

cannot be sustained, for several reasons. It is silent as to the objection of usury. In Virginia, a party cannot avail himself of this defense, without averring and proving it; and in such case he is required by statute to pay the principal of the debt. *Brown v. Toell*, 5 Rand., 543; *Harnsburger v. Kinney*, 6 Gratt., 287.

It is asserted that the consideration of the note was a loan of Virginia and North Carolina bank-notes; that at the time of the transaction they were largely depreciated; that the value of the consideration should be fixed by scaling this currency; and that the amount to be paid on the note should be reduced accordingly. But, upon looking into the record, we find no evidence whatever upon the subject. The depreciation may have been more or less, or there may have been none. We cannot, as is suggested, take judicial notice of the facts, whatever they may have been. We must take the record as it is, and we cannot look beyond it.

No notice of any infirmity in the title of Kesner to the premises is brought home, either to the trustee or to the *cestui que trust*, and it is denied by the latter. Like a mortgagee, they are regarded as purchasers; and, in this case, they must be considered as such, *bona fide*, and without notice of the adverse rights of the appellant, if any she have. *Wickham & Goshorn v. Martin*, 13 Gratt., 427; *Evans v. Greenhow*, 15 Gratt., 156. This part of the case may, therefore, be laid out of view. The premises in question are clearly liable for the amount secured by the deed of trust. The position of the judgment creditors is different. They were not purchasers, and they can take by virtue of the liens of their judgments only what Kesner was entitled to. 15 Gratt. [*supra*].

It remains to consider the claim of the appellant touching the premises in controversy. It is clear that she inherited from her father one third of Lyon's Gap farm, and received, as a distributee of the estate of her father and mother, several slaves; that she and Kesner bought another third of the farm from her sister, Mrs. Moffett, and took from Asbury, the attorney of her sister and her sister's husband, a bond for the execution of a deed. The purchase money was procured by the sale of slaves which came to Kesner by the appellant. On the 26th of May, 1852, the appellant and her husband, Kesner, conveyed the two thirds of the Lyon's Gap farm to Sheffy, as executor of Hull. On the 19th day of July, 1852, Dutton and wife conveyed to Kesner alone the Cedarville farm, which is the property in controversy. The transaction was an exchange of lands. \$600 was paid to Dutton, as the difference in value of the two tracts. Kesner raised the money in the same way as that before mentioned. The appellant is neither named nor referred to in the deed to her husband. On the 29th of January, 1862, Kesner alone executed the trust-deed to Bekem. It embraced the entire Cedarville property. The tract contained about a hundred and fifty acres. In his first inventory in bankruptcy Kesner gave in half of this farm, and his life interest in the other half, which was stated to belong to his wife. In an amended schedule subsequently filed, he gave in all his interest in the entire tract, which, he alleged, was conveyed to him chiefly in consideration of the deed to Sheffy of his wife's lands near Lyon's Gap. He stated

that she claimed one half of the tract, and that if her claim were sustained, then he surrendered his life interest in that half.

The whole tract must be sold to satisfy the debt secured by the deed of trust. If there should be any surplus, the appellant's rights will be the same with respect to that fund that they were as to the land. *Jones v. Lackland*, 2 Gratt., 81; *Graham v. Dickinson*, 3 Barb. Ch., 169; *Olcott v. Bynum*, 17 Wall., 44 [84 U. S., XXI., 570].

If there were no valid contract between the appellant and her husband, as claimed, the slaves, by the law of Virginia being chattels, were the absolute property of the latter, and at his death would have been assets in the hands of his personal representative. So by the common law, if the husband and wife sell and convey her land, and he receives the consideration money without any reservation of rights on her part, the money belongs to him. *Hamlin v. Jones*, 20 Wis., 536; *Jones v. Plummer*, 20 Md., 416; *Schouler*, Dom. Rel., 120. No question is raised as to the Statute of Frauds, and we need not, therefore, consider that subject. It is now well settled that a post-nuptial contract made upon sufficient consideration, and wholly or partly executed, will be sustained in equity. *Gosden v. Tucker*, 6 Munf., 1; *Livingston v. Livingston*, 2 Johns. Ch., 537; *Bullard v. Briggs*, 7 Pick., 533; 2 Kent, Com., 139; *Cord*, Married Women, secs. 36, 37. The counsel on both sides have argued the case upon the hypothesis that the contract set out in the bill, if made, was valid. The contention between them is only as to the sufficiency of the proof of its existence. Our further examination of the case will be upon this basis, and our remarks will be confined to that subject.

The alleged contract is thus set out in the bill. Speaking of her marriage to Kesner, the appellant says: "It was then agreed and has always since been agreed and understood between herself and her husband, that she was to take no interest in his property, and he was to take no interest in hers. On their marriage they settled on a farm owned by Mr. Kesner in this County of Washington, and in pursuance of this agreement she relinquished her rights in this land."

With reference to the conveyance by herself and Kesner to Sheffy, and the conveyance by Dutton and wife to Kesner, she says: "Your oratrix, being assured this was an exchange of land, and that she would thereby acquire an interest in this land exchanged for her land, assented to it. Your oratrix never would have consented to a sale of her land for money, or to any arrangement which would have deprived her of her inheritance in her land, and have her fee simple converted into a mere dower right. With this distinct understanding between her husband and herself, and believing she would have in the Cedarville land the same rights she had in her own land, she assented to this arrangement. But being a *feme covert*, and ignorant of business, she intrusted the whole management of her business to her husband."

She claims one half of the land free from her husband's tenancy by the curtesy, and the reversion of one half of the residue at her husband's death.

While Kesner, in his schedule, speaks of his wife's means as having chiefly paid for the prop-

erty in question, he is wholly silent as to any contract between them. She claims three quarters, while his concession is only to the extent of one half; and he does not put that admission upon any ground of right growing out of a contract. They seem not to have understood her claim alike. His deposition was subsequently taken, but he was asked no question upon the subject. In Dutton's deposition this question was asked: "Was the trade and exchange intended to preserve to Jane Kesner the same rights in the Cedarville land which she had in the Lyon's Gap land?" Answer: "This was my understanding of it." From whom or in what way he got his understanding is not disclosed.

James C. Porterfield, who married the sister of the appellant, was present at her marriage to Kesner, and had known them both thirty years, testified fully as to the means which came to Kesner in right of his wife. He was asked no question and said nothing as to any contract between them. Mrs. Porterfield, the sister, also testified. At the close of her deposition this question and answer are found: "After the trade for the Cedarville land, did you hear Mrs. Kesner claiming it as her land?" Answer: "I don't recollect hearing her claim it as her land."

There is no other testimony in the record bearing in anywise upon the subject. It is perhaps not a violent presumption that the appellant knew in 1852 that Dutton and wife conveyed the land to her husband alone, and that she knew he treated it as exclusively his in 1862, by conveying it, without her concurrence, to Bekem in trust to secure the debt to Greenway. It does not appear that she set up any special claim, or alleged the contract set up in her bill, until Kesner went into bankruptcy in 1873. But irrespective of those deeds, it is too clear to admit of doubt that the contract set forth in the bill is wholly unsustained by the proofs in the record. See, *Harris v. Barnett*, 3 Gratt., 339.

The decree of the Circuit Court is affirmed.

WILLIAM T. GARRATT, *Appt.*,

v.

NICHOLAS SEIBERT.

(See S. C., 8 Otto, 75-79.)

First inventor—patent as evidence.

Where the only question in a suit is, whether the plaintiff is the original and first inventor of an invention, or whether the invention was first made by the defendant, and there is nothing to rebut the presumption arising from his patent that the plaintiff was the first and original inventor, a decree in his favor will be affirmed.

[No. 81.]

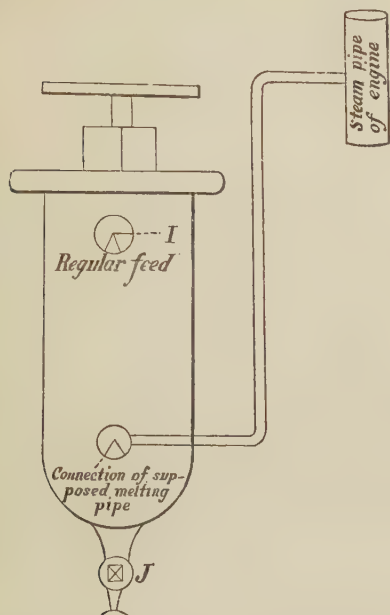
Argued Nov. 21, 1878. Decided Dec. 2, 1878.

APPEAL from the Circuit Court of the United States for the District of California.

The appellee was the complainant below. The patent upon which he claimed is the same one in issue, and fully described in the case of *Garratt v. Seibert*, 85 U. S., XXI., 956.

A cut representing the lubricator is there given. Garratt's claim to prior invention rests

upon the use of a certain attachment to a Roscoe lubricator, as outlined in the accompanying figure.



Garratt's patent, which was in controversy, need not be referred to, as he admitted it to be an infringement of Seibert's patent, unless he was himself the first inventor.

The case is further stated by the court.

Messrs. M. A. Wheaton and Robt. Ash, for appellant.

Mr. A. H. Evans, for appellee.

Mr. Justice Strong delivered the opinion of the court:

This bill is founded upon the Act of Congress of July 8, 1870, 16 Stat. at L., 207, ch. 230, sec. 58, re-enacted in the Revised Statutes, section 4918. That section enacted, "That, whenever there shall be interfering patents, any person interested in any one of such interfering patents, or in the working of the invention claimed under either of such patents, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court having cognizance thereof (as in the Act provided), on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented." The complainant charges that, on the 14th day of February, 1871, he obtained a patent for a new and useful improvement in lubricators, fully described in the letters patent for the term of seventeen years from and after the date of said letters, and that he is the sole and exclusive owner thereof. He charges further, that letters patent were issued to William T. Garratt, the defendant, on the 19th day of November, 1872, purporting to secure to him

the exclusive right to make, use and vend a new and useful improvement in lubricators, alleged to have been invented by him for the period of seventeen years. It is further charged that, in March, 1873, the defendant surrendered his said patent, and on the 18th of that month obtained a re-issue upon an amended specification, for the term of seventeen years, from November 19, 1872. And the bill further charges that the alleged invention, patented to the defendant by the said re-issued letters, is substantially the same invention made by the complainant in the month of May, 1870, and patented to him on the 14th of February, 1871, as before mentioned, and that the re-issued letters patent granted to the defendant are a direct interference with the prior letters patent granted, as aforesaid, to the complainant.

The answer of the defendant does not deny the grant of the several patents as charged in the bill, at the several dates mentioned, nor does it directly deny that the defendant's re-issued letters patent are an interference with the prior patent granted to the complainant on the 14th of February, 1871. But it avers that in the Patent Office, in the year 1872, an interference was declared between the complainant and the respondent, in order to try the question of priority of invention, that testimony was taken, and that the Commissioner of Patents decided that the respondent was the first and original inventor of the invention described in the defendant's patent, and granted him a patent therefor, which was afterwards re-issued. This averment is unsupported by proof.

In view of such pleadings, it is hardly necessary to inquire whether there is an interference. The answer does not deny it. It rather impliedly admits it. And if it did not, a comparison of the complainant's and the defendant's specifications, including the models and drawings, precludes all doubt that both patents are for the same invention, and that the arrangement of devices in each produces the same result in substantially the same way.

All that remains, therefore, is to determine whether Seibert was the first and original inventor of the invention, or whether the invention was first made by Garratt, the defendant.

Seibert's patent, as we have stated, was granted on the 14th day of February, 1871, for a new and useful improvement in lubricators. He had previously, in 1869, Sep. 14, obtained a patent for a lubricator, in which hydrostatic pressure in forcing the lubricant from its cup or reservoir, was found to act beneficially, though the patent did not claim that specifically, and the inventor seems not to have been aware at that time of its value. The model for this patent Seibert procured to be made by Garratt. Subsequently, having discovered its value in May, 1870, he caused to be made a new arrangement, by which the lubricant reservoir was made to stand vertically, instead of horizontally, as in his first invention, and hydrostatic pressure was applied near its base at the bottom of the lubricant. For this arrangement, he took out his patent of February, 1871. The principle was manifestly the same as that revealed in the earlier patent, though the arrangement for its operation was different. In the one, the lubricant and the condensed water were separated by a piston; in the other, by the difference of

their specific gravities. It is not, however, very material to determine that Seibert's invention was made before May, 1870; for we are of opinion that even if it was not made before February, 1871, there is not sufficient evidence in the case to show it was anticipated by Garratt, or by anyone. Garratt was a brass founder. In 1869, he had the agency for making the Roscoe oilers or lubricators, then covered by a patent. It is plain those lubricators were designed for the use of tallow, and tallow alone. They were arranged to admit steam into the reservoir containing the lubricant, whereby it came in contact with the surface of the tallow, melted it and caused it to mix with the steam and pass out in a volatile condition into the steam-chest. They did not work well. The steam, acting only on the surface of hard tallow, would not melt and take up enough to lubricate the engine; and Garratt, late in the fall of 1869, after Seibert's first patent was granted, as he and some other witnesses testify, undertook to remedy the defect. He put on a Roscoe lubricator, what he calls a condensing pipe, with a regulating cock. It connected the bottom of the reservoir with the steam-pipe of the engine, at a point above the top of the reservoir. Notwithstanding what he testifies, it is plain that this pipe was intended only to heat and melt the tallow. In view of the difficulty it was designed to remedy, and of the utter uselessness of a condensing pipe applied to the base of hard tallow, this cannot be doubted. The tallow needed heat, not pressure; not a column of water; and the evidence is very satisfactory that the pipe put on was a melting pipe, and used as such alone. It was soon shortened from six feet to two. Why was that done, if it was a condensing pipe? If it was a melting pipe, it is easy to see why its length was reduced; and the proof is, that it never was used for hydrostatic pressure. The cocks were kept wide open in its use, except when the reservoir was to be cleaned out or filled. Such is the testimony of the engineers who had it in charge. We think, also, the weight of the evidence is that the application of the melting pipe was not Garratt's device, even if it involved invention. It seems rather to have been suggested by Watson.

Without going minutely over the evidence, we may notice that after Garratt caused the pipe to be put on the Roscoe lubricator, and after he had made Seibert's first model, he obtained drawings of the Seibert device, and had a model made of it for himself. Not until after this was done did he apply for a patent. It is difficult to believe, in view of this evidence, that he did not obtain the idea of his alleged invention from the prior invention and patent of Seibert. There is nothing, then, to rebut the presumption arising from his patent that Seibert was the first and original inventor. It follows that the decree of the Circuit Court was right.

Decree affirmed.

JACOB WIRTH, *Plff. in Err.*,

v.

CALVIN BRANSON ET AL.

(See S. C., 8 Otto, 118-122.)

Public lands—first location.

1. When public lands have been open to private acquisition, a person who complies with all the requisites to entitle him to a patent in a particular lot, is to be regarded as the equitable owner thereof, and the land is no longer open to location.

2. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

[No. 69.]

Argued Nov. 19, 20, 1878. Decided Dec. 2, 1878.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois. The case is fully stated by the court.

The report of the decision in the case upon the former writ of error is found in 84 U. S., 32, XXI., 566.

Mr. Horatio C. Burchard, for plaintiff in error.

Mr. S. Corning Judd, for defendants in error.

Mr. Justice Bradley delivered the opinion of the court:

This case was before us in December Term, 1872. It comes before us now on a different state of facts; the original patent to Giles Egerton, which was not produced on the former trial, being produced on the trial which has taken place since our decision, and purports to be for the southeast quarter of section 18, instead of the northeast quarter in controversy. The question is, whether this fact changes the rights of the parties. A statement of the case, however, is necessary, in order to show the precise questions which are now raised by the record.

The action is ejectment, brought by the plaintiff in error to recover a quarter section of land in Fulton County, Illinois, namely: the northeast quarter of section 18, township 4 north, range 2 east, from the 4th principal meridian. On the trial, the plaintiff produced a regular patent for the lot, issued by the United States to one Edward F. Leonard, dated February 20, 1868; and a conveyance from Leonard to himself.

The defendants then offered in evidence a duly exemplified copy of a military land-warrant, No. 13,598, bearing date December 3, 1817, issued to one Giles Egerton, a sergeant in the 26th Regiment United States Infantry, and purporting to be in pursuance of the 2d section of the Act of May 6, 1812, and certifying that said Egerton was entitled to 160 acres of land, to be located agreeably to said Act on any unlocated parts of the six millions of acres appropriated for that purpose, it being conceded that the lot in question is part of said military reservation. They then proved by an exemplified record of the General Land Office at Washington, that the aforesaid land-warrant was located according to law on the 10th day of January, 1818, by Giles Egerton, on the lot in question. The defendants then gave in evidence an exemplified copy from the records of the Land Office of a patent from the United States to Giles Egerton, dated January 10, 1818, reciting that he had deposited the said land warrant, No. 13,598, in the Land Office, and granting to him the said lot. On the margin of this certified copy of the patent was written a memorandum, without date, as follows:

"This patent was issued for the S. E. $\frac{1}{4}$

98 U. S.

instead of the N. E. $\frac{1}{4}$ as recorded; sent a certificate of that fact to E. B. Clemson, at Lebanon, Ill's, see his letter of 19th May, 1826."

The plaintiff insisted that this memorandum should be read with the record of the patent. In accordance with our decision in the former case, *Branson v. Wirth*, 17 Wall., 43 [84 U. S., XXI., 570], the court refused to allow it to be read. The defendants then offered in evidence a deed from Giles Egerton to Thomas Hart, dated July 29th, 1819, for the southeast quarter of section 18, reciting that the same was granted to said Giles in consideration of his military services, as would appear by a patent dated January 10, 1818. The defendants then gave in evidence an exemplified copy of a patent from the United States to one James Durney for the said southeast quarter of section 18, dated January 7, 1818, three days prior to the date of Egerton's patent, referring to land-warrant No. 5144 as the basis of the grant. The defendants then gave in evidence a tax title for the lot in question, being a deed from the sheriff of Fulton County, Illinois, to one Timothy Gridley, dated November 14, 1843, under a judgment of June Term, 1840, for the taxes for the year 1839: and also several *mesne* conveyances from the said Gridley to the defendants in February, 1849; and they proved that they and their grantors had occupied, cultivated and had full and undisturbed possession of the land ever since November, 1843, paying the taxes thereon. The plaintiff objected to the reception of this evidence relating to the tax title and possession.

In rebuttal of this defense the plaintiff gave in evidence a deed for the southeast quarter of section 18 from Thomas Hart to Samuel F. Hunt, dated May 12, 1824; also a deed from Hunt to one Eli B. Clemson, dated April 7, 1825; and from Clemson to one John Shaw, dated October 20, 1829; also an Act of Congress, approved March 3, 1827, entitled "An Act for the Relief of the Legal Representatives of Giles Egerton," by which it was enacted that the legal representatives of Giles Egerton, late a sergeant, etc., be authorized to enter with the Register of the proper land-office, any unappropriated quarter section of land in the tract reserved, etc., in lieu of the quarter patented to said Giles on the 10th of January, 1818, which had been previously patented to James Durney. The plaintiff further proved that John Shaw, assignee of Giles Egerton, on the 6th of April, 1838, entered another quarter section in pursuance of this Act. The plaintiff then gave in evidence the original patent, dated January 10, 1818, given to Giles Egerton for the southeast quarter of section 18, purporting to be based on the warrant in his favor, numbered 13,598. All this rebutting evidence of the plaintiff was objected to by the defendants, but was received by the court.

Upon this evidence, each party asked the court for instructions; and the instructions given were: 1. That the defendants had proved that the land in controversy was granted by the United States to Giles Egerton on the 10th of January, 1818, and that Egerton had conveyed it to Thomas Hart, which constituted an outstanding title that defeated the plaintiff's right of recovery; 2. That defendants had shown that on the 10th of January, 1818, the land-warrant of Giles Egerton was duly located on

and upon the land in controversy, which location was not shown to be vacated or set aside, and therefore said land was not subject to entry by or grant to Leonard in 1868; and a verdict was thereupon given for the defendants. To these instructions the plaintiff excepted; and whether they were correct is the question now before the court.

If either of these instructions was correct in point of law, the judgment must be affirmed, for each was based upon undisputed facts, and if either was correct, the defendants had a complete defense.

We are satisfied that the second instruction, at least, correctly expressed the law of the case, and renders the production of the original patent to Egerton entirely immaterial. The land in question was shown to have been located in his favor in due form, under a regular military land-warrant, and no attempt was made to show that this location was ever vacated or set aside. While this location was in force, no other could lawfully be made on the same land. A subsequent location, though followed by a patent, would be void. Everything was done which was required to be done to entitle Egerton to a patent for the land. Being for military bounty, no price was payable therefor. The land became segregated from the public domain, and subject to private ownership, and all the incidents and liabilities thereof.

The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

This was laid down as a principle in the case of *Lyle v. Arkansas*, 9 How., 314, and has ever since been adhered to. See *Stark v. Starrs*, 6 Wall., 402 [73 U. S., XVIII., 925]. Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the cases of *Stark v. Starrs* [*supra*]; *Friskie v. Whitney*, 9 Wall., 187 [76 U. S., XIX., 668]; *Yosemite Valley Case*, 15 Wall., 77 [82 U. S., XXI., 82]; *R. Co. v. McShane*, 22 Wall., 444 [89 U. S., XXII., 747]; and *Shepley v. Cowan*, 91 U. S., 330 [XXIII., 424], that it would be supererogation to go over the subject again.

But it is said that Giles Egerton and his grantees and all other persons are estopped from any claim under his location of the northeast quarter of section 18, by his accepting a patent for the southeast quarter; and by the further fact, that his grantee, finding the southeast quarter already granted to another party, namely: to James Durney, applied to Congress for leave to make and actually made another location in lieu thereof.

This question of estoppel was fully considered by us when the case was formerly here; and the

principles which were then laid down are equally decisive of the case as it now stands. The original patent to Egerton had not then been exhibited in evidence, it is true; but we do not see that the case is materially altered by its production.

The difficulty of applying the doctrine of estoppel arises from the fact that there is no privity between the defendants and the parties who procured the Act of Congress referred to. The defendants rely and have a right to rely on the fact that the lot in question was located in due form of law, and that it thereby became exempt from further location until the first location should be set aside. The fact that a clerical error was made in the patent issued to Egerton; that his grantees, instead of claiming the northeast quarter, as they might have done, claimed the southeast quarter, which had been previously granted to another person; and that they solicited the privilege of locating another lot in lieu thereof, are all matters with which the defendants have nothing to do. Congress might have given to those parties a dozen lots without affecting the defendants, unless the latter were in some way bound by their acts. We are unable to see how they were or should be bound thereby. They do not claim under those parties, and have no privity with them whatever.

As, however, the question of estoppel was fully discussed in the previous judgment, it is unnecessary to enlarge upon the subject.

The judgment of the Circuit Court is affirmed.

Cited—101 U. S., 261; 35 Ohio St., 232.

THE COUNTY OF SCHUYLER, IN THE STATE OF MISSOURI, *Plff. in Err.*,

v.

JOSEPH T. THOMAS.

(See S. C., 8 Otto, 169-176.)

Missouri Constitution—county bonds.

1. The Missouri Constitution of 1865, which forbids any county, city or town to become a stockholder of or to loan its credit to any corporation without the assent of two thirds of its qualified voters, was prospective only in its effect, and did not take away any right already given by statute.

2. Where a county was authorized to become a stockholder of a corporation by virtue of its original charter passed before the adoption of such Constitution, no submission of the question to a popular vote was necessary.

[No. 62.]

Argued Nov. 6, 7, 1878. Decided Dec. 2, 1878.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. The case is fully stated by the court.

Messrs. Geo. W. McCrary and Edward Higbie, for plaintiff in error.

Messrs. A. J. Baker and F. T. Hughes, for defendant in error.

Mr. Justice Hunt delivered the opinion of the court:

Thomas the plaintiff below, recovered a judgment for the amount of certain bonds and coupons held by him, which were issued in the year

1871 by the County of Schuyler, in the State of Missouri. He was an honest purchaser of the bonds, without knowledge of vice or defect in their issue.

The following is a copy of one of the bonds:

"Know all men, by these presents, that the County of Schuyler, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of \$1,000, which sum the said County hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, in New York, on the first day of September, A. D. 1891, together with interest thereon from the 31st day of December, 1871, at the rate of eight per cent. per annum, which interest shall be payable annually in the City of New York, on the 31st day of December in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to orders of the County Court of said Schuyler County, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an Act of the General Assembly of the State of Missouri, entitled 'An Act to Incorporate the Alexandria and Bloomfield Railroad Company,' approved February 9, 1857.

In testimony whereof, the said County of Schuyler has executed this bond by the presiding Justice of the County Court of said County, under the order of said court, signing his name hereto, and the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court.

This done at the Town of Lancaster, in the County of Schuyler, in the State of Missouri, this first day of September, A. D. 1871.

WILLIAM CASPER.

Presiding Justice of the County Court of Schuyler County, Missouri.

Attest: D. T. TRUITT,

Clerk of the County Court of Schuyler County, Missouri.

{ SEAL SCHUYLER COUNTY }
{ COURT, MISSOURI. }

Countersigned and delivered this 17th day of May, 1872. M. BAKER, *Trustee.*"

The legality of the bonds is denied.

1. It is contended by the County of Schuyler that there was no authority in the company, as incorporated in 1857, to locate its track through or in the County of Schuyler; that as the authority to subscribe and issue bonds depended on the power to locate, there was no authority to subscribe for stock or issue the bonds of the County.

The Act to incorporate the Alexandria and Bloomfield Railroad Company, approved February 9, 1857, contained the following provisions:

"It shall be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company, * * * and issue the bonds

of said county to raise funds to pay the stock thus subscribed."

Sec. 8. Said company shall have full power to survey, locate and construct a railroad from the City of Alexandria, in the County of Clark, in the direction of Bloomfield in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said Company, and a company authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this Act, at the most practicable point on said state line, * * * and may select such route as may be deemed most advantageous."

Bloomfield, lies in a northwesterly direction from Alexandria, as we learn by the map in evidence.

Schuyler County is also in a direction from Alexandria northwesterly as to a portion of it, and more nearly northerly as to another portion of it. As a matter of fact, an inspection of the maps furnishes evidence (and they make a part of the record on which our judgment is to be formed) that there is authority to include a portion of Schuyler County in the description of a course northwesterly from Alexandria and in the direction of Bloomfield. These maps and the geography of the State inform us that this road could be so located as to reach the immediate vicinity of Bloomfield, with but little less variation from a direct course than the line through Luray and Upton, which was first adopted.

But a straight line is not required by the statute, nor a line having the fewest curves or angles, nor is the point of crossing the state line fixed or prescribed. The most practicable and advantageous line is to be adopted, depending upon all the elements entering into the economy, productiveness and local advantages which would be sought by prudent men in determining such a question.

This subject was discussed in *Callaway Co. v. Foster*, 93 U. S., 567 [XXIII., 911]. As there intimated, we are of the opinion that the Legislature, by the expression, "Any county in which any part of the route of said railroad may be," used as it was with reference to a road not yet surveyed or located, intended to give a broad latitude, and to embrace all the counties through or into which it was possible that the said road could be located. These statutes are to be construed as they were intended to be understood when they were passed, twenty years since. The after-wisdom, obtained by unfortunate results, cannot justly be applied in their interpretation. A construction may now be sought which will avoid the payment of the debts contracted for building the road. Then every inducement was presented to make subscriptions and obtain the money. Little respect would have been paid to the careful legislator or the strict interpreter of the law, who, twenty years ago, had doubted the power of these counties to make the subscription in question.

We see nothing in the law or in the necessary facts of the case, affecting the power, in the first instance, of the County of Schuyler to subscribe to the stock of the Alexandria and Bloomfield Railroad Company, and to issue its bonds to raise the funds to pay such subscriptions.

2. It is further alleged that in the year 1866 See 8 OTTO.

the Alexandria and Bloomfield road was permanently located through the Towns of Luray and Upton to the north boundary line of Missouri, and that no part of the line thus located was in or through the County of Schuyler, and that the same was continued into the State of Iowa by another company organized in that State; that the name of said Alexandria and Bloomfield road was in that year changed by an Act of the Legislature to that of Alexandria and Nebraska City Railroad, and that in its 2d section that Act provided "That said railroad company may extend said road from a point at or near Luray to Nebraska City, in Nebraska Territory, on the most practicable and direct route by way of or near Rockport, in Atchison County, Missouri; that the name was again changed to that of the Missouri, Iowa and Nebraska Railroad Company; that the road was thereupon and by virtue of said Act constructed through Schuyler County into the State of Iowa, and that this is the only line thus constructed through Schuyler County. It is then added, that when Schuyler County made its subscription and issued its bonds, as set forth in the complaint, to aid in the construction of this road, it was done without a submission of the same to a popular vote, and that the same was made without the previous assent of a majority of two thirds of the voters of the said County, and it is contended that such subscription is void.

The question on this branch of the case arises upon article 2, section 14, of the Constitution of the State of Missouri, which took effect in July, 1865, and yet remains of force. It is in these words:

"The General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

By the terms of the charter of the Alexandria and Bloomfield Railroad Company, the counties upon the route on which it might be located, and of which Schuyler is one, were authorized in the year 1857 to subscribe to its stock, and issue their bonds in payment therefor.

It has been repeatedly held by the Supreme Court of Missouri, as well as by this court, that the constitutional provision referred to was prospective only in its effect. The General Assembly was not permitted thereafter to authorize any county or city to make subscriptions and to issue its bonds, except upon the terms prescribed. But what it had previously authorized remained unaffected. The authority given to Schuyler County eight years before the Constitution took effect remained of the same force as if the Constitution had never been adopted. See, *Scotland Co. v. Thomas*, 94 U. S., 682 [XXIV., 219] and cases cited.

It is also established by the same authority that the consolidation of one railroad company with another company does not extinguish the power of a county to subscribe, or the privilege of the company to receive subscriptions; and this, although the consolidation be made by authority given after the Constitution took effect, and although the subscription be made to the stock of such newly organized company, and the bonds be issued after the same period.

These are held to be features constituting alterations merely of the charter, and not affecting the rights or powers of the companies to receive subscriptions or of counties to issue their bonds.

Much weight is given in argument to the allegation that the route of the Alexandria and Bloomfield road, as first established and partly built, did not touch any portion of the County of Schuyler. It is contended that, when the route was selected and the terminal point fixed at Upton, the power of the company was exhausted, and the line was fixed, as certainly as if it had been described in the charter. Without considering that general proposition, we are of opinion that it does not govern the present case.

The Legislature, in terms, retained the authority to alter or amend each one of these railroad charters. It did amend the charter of the Alexandria and Bloomfield road and its successors so as to authorize a location extending entirely through Schuyler County. It deemed this addition important to the interest of the public, and its exercise changed what may be termed the ordinary rule, that a location once fixed and a road partly constructed could not be changed. That this was within the reserved power of the Legislature, if assented to by the company, and that it was a legitimate exercise of the power of amendment, whereby the original charter, with its powers and privileges, was continued and extended, the cases of *Callaway* and *Scotland County* sufficiently establish.

It is said, also, that this subscription was rendered void by the Act of 1861, prohibiting such subscription. The case of *State v. Garoute* is cited from the Cent. L. Jour. to sustain this proposition.

We do not think it necessary to discuss the question. It was fully considered in *Smith v. Clark Co.*, 54 Mo., 58, and the validity of the bonds, so far as this statute affected them, was sustained. In the subsequent case of *State v. Garoute*, one Judge expressed a contrary opinion. The other Judges expressed no approbation of the doctrine, and a deliberate opinion of the court cannot thus be disturbed.

The questions in *Scotland Co. v. Thomas* [supra], arose upon the same charter of the Alexandria and Bloomfield Railroad Company, the same consolidation forming the Missouri, Iowa and Nebraska Railway Company, with the same original location through Luray and Upton, the same extension and change thereof through the Counties of Scotland and Schuyler, and the issue of the same form of bonds at about the same time to the same company to build the same extension of the road as in the case before us.

The court, in delivering its opinion in that case, says: "The amending Act, therefore, which authorized a consolidation with the Iowa Southern Railway Company, and thereby constituted the Missouri, Iowa and Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria and Bloomfield Railroad Company; and if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the County to subscribe to the stock should not continue in force."

We are of the opinion that the *Scotland County*

case and the *Callaway County* case were well decided, and that they dispose of the present case. It is neither necessary nor wise to repeat a review of the authorities there discussed. We are satisfied with the cases as they stand.

The County of Schuyler was authorized to make a subscription by virtue of its original charter, and no submission of the question to a popular vote was necessary. That it might establish a location, and change it by authority of the Legislature: that it might be authorized to build a branch or extension in furtherance of its general object as originally chartered: that this might be and was accomplished by a new organization, to which, as the transferee of the original privileges, the right to receive and of the County to make subscriptions pertained: that these powers were legitimately exercised is plain, upon the authorities cited.

The judgment of the court below was in accordance with these views; and without going through the several questions in detail, we answer them in the affirmative, and direct that the judgment of the Circuit Court be affirmed.

Dissenting, *Mr. Justice Miller, Mr. Justice Field and Mr. Justice Harlan.*

Cited—100 U. S., 592; 101 U. S., 203; 105 U. S., 458; 109 U. S., 104.

WALDO MARSH for use of JAMES REES,
ETC., *Plff. in Err.*,

v.

THE CITIZENS' INSURANCE COMPANY
OF PITTSBURGH.

Action on policy—federal question—final decision.

1. An action in a State Court upon a policy of insurance to recover for the loss by fire of a steamboat, where the defense was that the fire was caused by plaintiff's carelessness in the use of turpentine, on board as freight, to increase the steam, presents no federal question, and this court has no jurisdiction to review it.

2. The Act of Congress prohibits the transportation of turpentine as freight, on steamboats carrying passengers, except in cases of special license. In this case, however, no complaint is made of the carriage of the turpentine, but only of its use.

3. The determination, by the court below, of questions as to the effect of evidence and burden of proof, is final and cannot be reviewed here.

[No. 70.]

Submitted Nov. 20, 1878. Decided Dec. 9, 1878.

IN ERROR to the Supreme Court of Pennsylvania.

The case is stated by the court.

Messrs. Edward Lander, Charles A. Ray, Edward A. Freeman, J. W. Moore and E. A. Newman, for plaintiff in error.

Mr. A. McCallum, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This case presents no question of federal jurisdiction. Marsh, the plaintiff in error, claimed below no title, right, privilege or immunity under the Constitution, laws or treaties of the United States, and no such title, right, privilege or immunity has been denied him. He sued upon a policy of insurance, to recover for the loss of his steamboat by fire, and the defense

was that the fire was caused by his gross carelessness in the use of turpentine, on board as freight, to increase steam while racing with another boat.

An Act of Congress, 10 Stat. at L., 63, sec. 7, prohibits the transportation of turpentine, as freight, on steamboats carrying passengers, "Except in cases of special license for that purpose." No complaint was made of the carriage of the turpentine, but of its use while being carried. The court, in effect, told the jury that, under the existing laws, there could be no recovery if the loss was occasioned by the misconduct of the insured in taking a barrel of turpentine from the hold of the boat, placing it in front of the furnace, knocking out the head and pouring two thirds of a bucket full of turpentine on the coal and wood near by, so that when the furnace door was opened and the fire stirred up, during a race with another boat, the burning coals fell upon the fuel thus saturated and set fire to the boat. No complaint is made here, by the assignment of errors, of the charge as given. The errors assigned relate only to the refusal of the requests to charge made by Marsh, and these presented only questions as to the effect of evidence and burden of proof; that is to say, whether, if a steamboat was burned while carrying turpentine as freight, the owner, in an action on a policy of insurance, must show affirmatively his license to carry the turpentine, or whether the law would presume a license until the contrary was shown. The determination of such questions by the court below, even if necessary to the decision of the case, is final and cannot be re-examined here.

The suit is, consequently, dismissed for want of jurisdiction.

GEORGE B. PETERS, *Appt.*,
v.

DRURY W. BOWMAN AND WILLIAM Y.
ELLIOTT, Admsrs. of JONATHAN BOSTICK,
Deceased.

(See S. C., 8 Otto, 56-61.)

*Covenants in deed—of warranty—foreclosure—
action on covenant.*

1. The covenant of good right to convey is synonymous with the covenant of seisin; these covenants, if broken at all, are broken when they are made. They are personal and do not run with the land.

2. The covenant of warranty runs with the land, and passes by assignment. When broken, it becomes a chose in action, but a subsequent grantee may sue the warrantor in the name of the holder. There can be but one satisfaction. A sheriff's or a quitclaim deed will carry the covenant, before its breach, to the grantee.

3. Upon a bill of foreclosure, or a bill to enforce a lien for the purchase money, where there has been no fraud and no eviction actual or constructive, the vendee or a party in possession under him, cannot controvert the title of the vendor; and no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit.

4. In such cases, the vendee and those claiming under him must rely upon the covenants of title in the deed of the vendor; and if there are no such covenants, in the absence of fraud, can have no redress.

[No. 74.]

Submitted Nov. 27, 1878. Decided Dec. 9, 1878.

NOTE.—*Lien for purchase money.* See note to Bayley v. Greenleaf, 20 U. S. (7 Wheat.), 46.
See 8 Otto.

APPEAL from the District Court of the United States for the Northern District of Mississippi.

The case, which arose in the court below, fully appears in the opinion.

Messrs. James R. Chalmers, Mike L. Woods, Casey Young and Henry Craft, for appellants.

Mr. Henry T. Ellett, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This is a bill to enforce a lien upon real estate situate in Tunica County, in the State of Mississippi. Bowman owned the premises in fee simple, and sold the undivided half to Bostick, and gave him a written contract, valid in equity, but not sufficient to pass the legal title.

Bostick died in 1868, possessed of property in Mississippi and Tennessee, and leaving a last will and testament.

By one of the clauses he appointed Gwinn his executor in Mississippi, and the appellee, Elliott, his executor in Tennessee.

By another clause he authorized the Mississippi executor to lease or cultivate the premises in question with Bowman, and finally, under the circumstances named, "To join the said Bowman in making sale and title to the purchasers."

By another clause, after the payment of all legacies, debts and expenses of administration, he gave to three persons, whom he named, and their successors, as trustees, the entire residue of his estate, "To be invested by them in a suitable site and buildings for a female academy" in Tennessee, and to be otherwise devoted to that institution.

Gwinn died in the lifetime of the testator.

On the 11th of January, 1869, the Probate Court of Tunica County granted "*letters testamentary of the said last will and testament*" to Elliott.

On the 25th of January, 1869, Elliott, describing himself as "Executor of the last will and testament of J. Bostick, acting under the powers conferred by said will," and Bowman, united in a conveyance with full covenants to the four brothers, Jaquess, for the consideration of \$4,000, paid in cash, and the further sum of \$24,000, for which four notes were given by the vendees, each for the sum of \$6,000, and payable respectively on the first day of January in the years 1870, 1871, 1872 and 1873, with interest at the rate of six per cent. per annum.

In reference to these notes the deed contains the following provision: "And to secure the payment of each and all of which said notes and interest an express lien is hereby retained by the parties of the first part upon the real estate and premises" in question.

The note maturing on the first of January, 1870, was paid by the Jaquess Brothers.

On the 26th of January, 1870, they sold and conveyed the premises to the appellant, Peters, for the consideration expressed in the deed of the sum of \$11,920 cash in hand, "And the assumption by the said Peters of the payment of three promissory notes for \$6,000, made by the first parties (Jaquess Brothers), and payable to Elliott and Bowman, for the same land herein conveyed."

This deed contains a covenant of the right to convey, of seisin, and of general warranty.

The covenant of good right to convey is synonymous with the covenant of seisin. The actual seisin of the grantor will support both, irrespective of his having an indefeasible title.

These covenants, if broken at all, are broken when they are made. They are personal, and do not run with the land. *Marston v. Hobbs*, 2 Mass., 433; *Greenby v. Wilcocks*, 2 Johns., 1; *Hamilton v. Wilson*, 4 Johns., 72.

Peters put his co-defendants, General Chalmers and wife, in possession of the premises, under an arrangement whereby, when they should pay the balance of the purchase money, he would convey to Mrs. Chalmers. Their possession has since continued, and has been undisturbed.

On the 8th of November, 1869, the same Probate Court granted letters of administration "Upon the estate of J. Bostick, deceased, *with the will of said Bostick annexed*," to Elliott, upon his giving a sufficient bond and taking the oath prescribed by law, both of which were then done.

The original bill was filed on the 28th of February, 1873, to enforce the lien reserved in the deed of Elliott and Bowman to Jaquess Brothers, to secure the notes given for the purchase money, the three last of which are wholly unpaid.

On the 31st of July, 1874, Elliott, to obviate objections made to the prior deed, executed a second deed to the Jaquess Brothers for the same premises. In this deed he describes himself as "Administrator with the will annexed of said Bostick," etc.

The deposition of Elliott shows that Bostick never had any title to the premises but what he derived from his contract with Bowman; that Bowman, after Bostick's death, insisted upon selling, and hence the sale to the Jaquess Brothers.

The court below decreed in favor of the complainants. Peters brought the case here for review.

There is no controversy about the leading facts of this case. The questions presented are all questions of law. Bowman had the legal title to the entire premises, and that title he conveyed to Jaquess Brothers, and they conveyed it to Peters. The deed of Elliott and Bowman contained all the usual covenants of title. The covenant of warranty ran with the land, and passed by assignment to Peters. The deed of the Jaquess Brothers produced that result. In the event of a failure of title, Peters can sue upon this covenant in either deed. *King v. Kerr*, 5 Ohio, 154. When broken, it becomes a chose in action, but a subsequent grantee may sue the warrantor in the name of the holder. There can be but one satisfaction. *Id.* A sheriff's or a quitclaim deed will carry the covenant before its breach to the grantee. *White v. Whitney*, 3 Met., 81; *Hunt v. Amidon*, 4 Hill, 345.

Where at the time of the conveyance with warranty there is adverse possession under a paramount title, such possession is regarded as eviction and involves a breach of this covenant. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction, actual or constructive, and no action will lie. *Noonan v. Lee*, 2 Black, 499 [67 U. S., XVII., 278]; *Duwall v. Craig*, 2 Wheat., 45. Here there is no adverse possession, and no eviction, actual or constructive; nor does it appear that suit has been threatened, or that an adverse

claim has been set up by anyone. The possession and enjoyment of the property by General Chalmers and his wife have been the same as if their title were indisputable. It is insisted that the first deed of Elliott was fatally defective, because the letters from the Probate Court, under which he acted in making it, were issued to him as executor, and that both deeds were void, because under the will and the circumstances there was no authority to sell; and, lastly, because the residuum of the estate of the testator, including proceeds of the premises in question, was disposed of in a way forbidden by a law of the State of Mississippi.

We prefer to rest our judgment upon a ground independent of all these points, and which renders it unnecessary to examine them.

It is the settled law of this court that upon a bill of foreclosure, or, as in this case, a bill to enforce a lien for the purchase money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor; and that no one claiming an adverse title can be permitted to bring it forward, and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties. *Noonan v. Lee* [*supra*]; *Dial v. Reynolds*, 96 U. S., 340 [XXIV., 644]. In such cases, the vendee and those claiming under him must rely upon the covenants of title in the deed of the vendor. They measure the rights and the remedy of the vendee; and if there are no such covenants, in the absence of fraud, he can have no redress. This doctrine was distinctly laid down in *Patton v. Taylor*, 7 How., 159, and was re-examined and affirmed in *Noonan v. Lee*. See, also, *Abbott v. Allen*, 2 Johns. Ch., 519; *Corning v. Smith*, 6 N. Y., 82; *Beebe v. Swartwout*, 8 Ill. (3 Gilm.), 162. That the vendor is insolvent or absent from the State, or that an adverse suit is pending which involves the title, does not withdraw the case from the operation of this principle. *Hill v. Butler*, 6 Ohio St., 207; *Platt v. Gilchrist*, 3 Sandf., 118; *Latham v. Morgan*, 1 Smed. & M. Ch., 611.

The rule is founded in reason and justice. A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such cases the vendor, by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants, he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property. Here it is neither expressed nor implied that he may refuse to pay and remain in possession of the premises, nor that the vendor shall be liable otherwise than according to his contract.

Where an adverse title is claimed, it cannot be litigated with binding effect, unless the claimant is before the court. We have shown that he cannot be made a party. One suit cannot thus be injected into another. Without his presence, the judgment or decree as to him would be a nullity. The law never does or permits a vain thing.

A title which cannot be made good otherwise may be made so by the lapse of time or the Statute of Limitations. Is the vendor to wait until this shall occur? And, in the meantime, can the

vendee, or those claiming under him, remain in possession and enjoy all the fruits of the contract, and pay neither principal nor interest to the vendor?

Chancellor Kent well says, "It would lead to the greatest inconvenience and perhaps abuse, if a purchaser in the actual possession of land, and when no third person asserts or takes any measures to assert a hostile claim, can be permitted, on a suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money, and of all proceedings at law to recover it." *Abbott v. Allen* [*supra*].

Decree affirmed.

Cited—11 N. W. Rep., 275.

UNITED STATES, *Appt.*,

v.

SAMUEL R. THROCKMORTON ET AL.

(See S. C., 8 Otto, 61-71.)

Bill by U. S. to set aside confirmation of Mexican grant—frauds—relief when granted—jurisdiction to reform surveys.

*1. It is essential to a bill in chancery, on behalf of the Government, to set aside a patent or a confirmation of land title under a Mexican grant, after it has become final, that it shall appear in some way, without regard to the special form, that the Attorney-General has brought it himself, or given such authority for it as will make him officially responsible and show his control of the cause through all stages of its presentation.

2. The frauds for which a bill in chancery will be sustained, to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court and not a fraud which was in issue in that suit.

3. The cases in which such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

4. The Circuit Court of the United States has no original jurisdiction now to reform surveys, made by the land department, of confirmed Mexican grants in California.

[No. 207.]

Submitted Nov. 11, 1878. Decided Dec. 9, 1878.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The case is fully stated by the court.

Mr. Walter Van Dyke, Special Asst. U. S. Atty., for appellant:

In the opinion of the court below, it is said "That the alleged frauds are not such extrinsic collateral acts as would justify the interference of equity with the decrees of confirmation;" and the court mentions what it understands by such extrinsic collateral acts, to wit: keeping the adversary's witnesses from court; secreting or purloining his testimony;" or, if the citation to him be given under such circumstances as to defeat its purpose, the court says: "Any conduct of the kind mentioned would tend to prevent a fair trial on the merits, and thus to deprive the innocent party of his rights. So, if a judge sit, when disqualified from interest or consanguinity; if the litigation be collusive; if the parties be fictitious; if real parties affected

are falsely stated to be before the court; the judgment recovered may be set aside, or its enforcement restrained," etc.

The question is: do no other fraudulent acts than such as are here enumerated justify a court of equity in setting aside a judgment or restraining its execution? We respectfully submit that the court below, in this respect, restricted the list of such fraudulent acts within too narrow limits, and it only illustrates the danger of attempting to define fraud. It may assume a thousand different shapes, and be perpetrated in as many different ways.

Story, Eq. Jur., sec. 186.

Lord Hardwicke said, in 1859: "Fraud is infinite, and were courts of equity once to lay down rules how far they would go and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive."

Parke, Hist. Ch., p. 508.

Pothier says that the term "fraud" is applied to every artifice made use of by one person for the purpose of deceiving another.

Laboe defines fraud to be any cunning deception or artifice used to circumvent or deceive another.

The law is a practical science, and courts are instituted and designed for practical uses.

There can be no practical difference, whether a party be defrauded out of a judgment by the collusion of his attorney, by having his testimony stolen, or witnesses kept from court, or whether by any other device, artifice or fraudulent scheme of the opposite party or attorney, which ordinary prudence and foresight could not guard against, he is prevented from presenting his cause or defense and is, therefore, tricked out of a judgment.

Shedden v. Patrick, 1 Macqueen, 535.

That case, on principle, is an authority in these cases. Here, as there, it is charged that one side to the former litigation was possessed of facts which, if known to the other side or court, would have produced a different result, but which were fraudulently concealed. There the case was not dismissed on the objection of *res judicata*, and for the same reason the demurrers here ought not to have been sustained.

Lord Brougham, in *Bandon v. Becker*, 3 Cl. & F., 510, said: "That you may, at all times in a court of competent jurisdiction—competent as to the subject-matter of the suit itself—where you appear as an actor, object to a decree made in another court upon which decree your adversary relies, and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit."

Mr. Delos Lake, for appellees.

Mr. Justice Miller delivered the opinion of the court:

In this case a bill in chancery is brought in the Circuit Court of the United States for the District of California, to use the language of the bill itself, "By Walter Van Dyke, United States Attorney for that district on behalf of the United States of America," against Throckmorton, Howard, Goold and Haggin,

*Head notes by *Mr. Justice MILLER*

The object of the bill is to have a decree of the court, setting aside and declaring to be null and void a confirmation of the claim of W. A. Richardson under a Mexican grant, to certain lands, made by the Board of Commissioners of Private Land Claims in California on the 27th day of December, 1853; and the decree of the District Court of the United States, made February 11, 1856, affirming the decree of the commissioners, and again confirming Richardson's claim. The general ground on which this relief is asked is, that both these decrees were obtained by fraud.

The specific act of fraud which is mainly relied on to support the bill is, that after Richardson had filed his petition before the commissioners, with a statement of his claim and the documentary evidence of its validity, March 16, 1852, he became satisfied that he had no sufficient evidence of an actual grant or concession to sustain his claim, and with a view to supply this defect, he made a visit to Mexico, and obtained from Micheltorena, former political chief of California, his signature, on or about the first day of July, 1852, to a grant which was falsely and fraudulently antedated, so as to impose on the court the belief that it was made at a time when Micheltorena had power to make such grants in California; and it is alleged that in support of this simulated and false document he also procured and filed with the Board of Commissioners perjured depositions along with the fraudulent grant.

There is much verbiage and repetition, and argumentative matter in the bill; and no allegation whatever that any of the attorneys, agents or other officers of the Government were false in their duty to the Government, or assisted or connived at the fraud, unless a single allegation on that subject sufficiently states such charge, which will be hereafter considered. For the present, it will be assumed that no such charge is made.

While the bill is elaborate in its statement of matters which are supposed to impeach the decree, and is correspondingly silent as to anything tending to its support, there are important facts which cannot escape attention, that could not be omitted. Among these is, that, in attempting to negative the idea that juridical possession of the land was ever delivered to Richardson by the Mexican authorities, it is incidentally admitted that at the time the transaction occurred on which his claim is founded, he was in actual possession and residing on part, if not all the land in controversy. So, also, it is tacitly admitted that the archives of the Mexican Government, turned over to the office of the United States Surveyor-General, and original documents produced by Richardson, showed an *espediente* which was sufficient to establish the claim, except for the want of the final concession. It is, therefore, to be taken as true that Richardson, being on the land prior to 1838, made his petition to the Governor for a grant of this land, that the proper reference for information was made, and the proper report was had that there was no objection to the grant. According to Mexican law, but two things remained to perfect the title, namely: a grant or concession by the Governor, and the delivery of juridical possession. The latter has never been held by this court as indispensable

to a confirmation of the grant, and least of all when the party was already in by possession of many years' standing. It is also important to observe that the original petition was filed before the Board March 16, 1852, and its decree was rendered December 27, 1853; that an appeal was taken to the district court, where the case remained until February 11, 1856, when it was affirmed; that an appeal was again taken to the Supreme Court of the United States, which was dismissed by order of the Attorney-General on the 2d day of April, 1857. The case was pending in litigation, therefore, more than five years before the decree became final, and more than four years before the alleged fraudulent grant by Micheltorena was filed in the case. It is also to be observed that the necessity of such a paper to the support of Richardson's claim had been made obvious to the Board of Commissioners, to the claimant himself, and to the attorneys representing the Government, by the report of the Surveyor-General, that while everything else seemed right in his office, the important final decree of concession was not there. The attention, therefore, of all the parties and of the court must have been drawn to a close scrutiny of any proceeding to supply this important document.

There was also ample time to make all necessary inquiries and produce the necessary proof, if it existed, of the fraud. The allegation of the bill is that this simulated concession was filed with the Board of Commissioners in January, 1853, and the decree rendered on December 27, thereafter. The appeal was pending after this in the district court over two years; and after the final decree in that court it remained under the consideration of the Attorney-General another year, when he authorized the dismissal of the appeal. The case, then, unless these officers neglected their duties, underwent the scrutiny of two judicial tribunals and of the Attorney-General of the United States, as well as of his subordinate in the State of California, and it was before them for a period of five years of litigation.

The bill in this case is filed May 13, 1876, more than twenty years after the rendition of the decree which it seeks to annul. During that time Richardson, the claimant, and the man who is personally charged with the guilt of the fraud, has died; his heirs, who with himself were claimants in the suit, are not made parties and the land has passed from his ownership to that of the present defendants by purchase and conveyance.

It is true that the defendants are charged, in general terms, with being purchasers with notice.

It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief, in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest.

Let us inquire if this has been done.

There is no question of the general doctrine

that fraud vitiates the most solemn contracts, documents and even judgments. There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law—no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a court deciding between parties before the court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and where they have received the consideration of the court.

There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy," namely: "*Interest reipublicæ, ut sit finis litium*, and *Nemo bis vexari pro una et eadem causa*."

If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See, Wells, *Res Adjudicata*, sec. 499; *Pearce v. Olney*, 20 Conn., 544; *Wierich v. De Zoya*, 7 Ill., (2 Gilm.) 385; *Kent v. Richards*, 3 Md. Ch., 396; *Smith v. Lowry*, 1 Johns. Ch., 320; *De Louis v. Meek*, 2 Green (Iowa), 55.

In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the

judgment or decree, that party has been prevented from presenting all of his case to the court.

On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed. Mr. Wells, in his very useful work on *Res Adjudicata*, says, sec. 499: "Fraud vitiates everything, and a judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the Fraud. *

* * Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action. There is an old case in South Carolina to the effect that fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone, and has no weight as a precedent." The case he refers to is *Crawford v. Crawford*, 4 Desau. 176, See, also, Big. Fraud, 170-172.

The principle and the distinction here taken was laid down as long ago as the year 1702 by the Lord Keeper in the High Court of Chancery, in the case of *Tovey v. Young*, Prec. in Ch., 193.

This was a bill in chancery brought by an unsuccessful party to a suit at law, for a new trial, which was at that time a very common mode of obtaining a new trial. One of the grounds of the bill was, that complainant had discovered since the trial was had that the principal witness against him was a partner in interest with the other side. The Lord Keeper said: "New matter may in some cases be ground for relief; but it must not be what was tried before; nor, when it consists in swearing only, will I ever grant a new trial, unless it appears by deed, or writing, or that a witness, on whose testimony the verdict was given, were convict of perjury, or the jury attainted." The case seems to have been well considered, for the decree was a confirmation of one made by the Master of the Rolls.

The case of *Smith v. Lowry* [*supra*] was also a bill for a new trial, on the ground that the witness, on whose testimony the amount of damages was fixed, was suborned by the plaintiff; and that complainant had learned since the trial that a fictitious sale of salt had been made, for the purpose of enabling this witness to testify to the market-price. Chancellor Kent said that complainant must have known, or he was bound to know, that the price of salt at the place of delivery would be a matter of inquiry at the trial; and he dismissed the bill for want of equity, citing the case of *Tovey v. Young* with approval. And he cites a number of cases to show that chancery will not interfere though new evidence has been discovered since the trial, which, if the party could have introduced it, would have changed the result.

In *Bateman v. Willoe*, 1 Sch. & L. 201, Lord Redesdale said: "I do not know that equity ever does interfere to grant a trial of a matter

which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction." The rule must apply with equal force to a bill to set aside a decree in equity after it has become final, where the object is to retry a matter which was in issue in the first case and was matter of actual contest.

The same doctrine is asserted in *Dixon v. Graham*, 16 Iowa, 310; *Cottle v. Cole* 20 Iowa, 482; *Borland v. Thornton*, 12 Cal., 440; *Riddle v. Baker*, 13 Cal., 295; *R. R. Co., v. Neal*, 1 Wood, 353.

But perhaps the best discussion of the whole subject is to be found in the case of *Greene v. Greene*, 2 Gray, 361, by Chief Justice Shaw. That was a bill filed by a woman against her husband for a divorce. The husband had five years before obtained a decree of divorce against the wife. And in her bill she now alleges that the former decree was obtained by fraud, and collusion, and false testimony, and she prays that this may be inquired into, and that decree set aside. The court was of opinion that this allegation meant that the husband colluded or combined with other persons than complainant to obtain false testimony, or otherwise to aid him in fraudulently obtaining the decree. The Chief Justice says that the court thinks the point settled against the complainant by authority, not specifically in regard to divorce, but generally as to the conclusiveness of judgments and decrees between the same parties. He then examines the authorities, English and American, and adds: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence, and cannot be contradicted." It is otherwise, he says, with a stranger to the judgment. This is said in a case where the bill was brought for the purpose of impeaching the decree directly, and not where it was offered in evidence collaterally. We think these decisions establish the doctrine on which we decide the present case, namely: that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.

The case before us comes within this principle. The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the Board of Commissioners and the district court for four years. It was the thing and the only thing that was controverted, and it was

essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.

We have alluded to an allegation concerning the agent representing the United States before the Board of Commissioners.

The substance of it is that Howard, one of the present defendants, then the law agent of the Government before the Board, had notice, derived from the papers in some other suit, of the fraudulent character of the Micheltorena grant, and that he failed and neglected to inform the commissioners of the fact, or otherwise to defend the interest of the United States in the matter. If there had been a further allegation that Howard was then interested in the Richardson claim, or that Richardson had bribed him, or that from any corrupt motive he had betrayed the interest of the Government, the case would have come within the rule which authorizes relief. But nothing of the kind is alleged; and the statement is a mere charge of carelessness or negligence on the part of the attorney for the Government, which would not have supported a motion for a new trial in a case at law at the same term, much less a suit in chancery to set aside a decree twenty years after it had been rendered.

Nor is there any such clear statement of the notice which Howard had as is necessary to establish his negligence.

In fact, one great, if not fatal defect in the bill is the absence of any declaration of the means by which the fraud has been discovered or can be now established.

There is another objection to the bill which, though not going to the merits, is, in our opinion, equally fatal to it in its present shape.

We are of opinion that, unless by virtue of an Act of Congress, no one but the Attorney-General, or some one authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts on which such a patent is founded.

That is the case before us, and we see nothing in the bill to indicate to the court that it ever received the sanction of the Attorney-General, or was brought by his direction. The allegation in the opening of the bill already cited implies that Mr. Van Dyke, the district attorney, is plaintiff; but if, construing it liberally, we hold that the United States is plaintiff, the statement is clear that it is brought by the district attorney, and not by the Attorney-General. Leaving out of consideration all mere questions of form, there arises no presumption from the Act of Congress which gives the Department of Justice a general supervision over the district attorneys, that this suit was brought by his direction; for the district attorneys bring innumerable suits, indictments and prosecutions, in which the United States is plaintiff, without consulting the Attorney-General, and

they do this in the strict line of their duty. In the class of cases to which this belongs, however, the practice of the English courts and of the American courts also has been to require the name of the Attorney-General, as indorsing the suit, before it will be entertained. The reason of this is obvious, namely: that in so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also, have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill.

There is appended to this record, though no part of it, a bond to the United States, to save it harmless of costs in regard to this suit, given by some private citizens. If it is intended by this to show that the Attorney-General authorized the suit, it fails to prove it, though the bond recites that that officer had directed the district attorney to bring the suit.

It is not in this way that the Attorney-General should place himself on the record as responsible for such a bill. In confirmation of this view, it does not appear that that officer or his successors have ever given the slightest attention to the case. In the argument of it before us, no officer of the Government appeared in the case. It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the Government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the Government for costs, and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the name of the United States to declare the patent void. It is essential, therefore, to such a suit, that, without special regard to form but in some way in which the court can recognize, it should appear that the Attorney-General has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause.

It is unnecessary at this day to say that, as a substantive matter, standing alone, the circuit court has no jurisdiction to interfere with or relieve against a survey which, by the allegation of the bill itself, is pending before the district court.

For these reasons, we are of opinion that the decree of the Circuit Court sustaining a demurrer to the bill and dismissing it on the merits is right, and it is accordingly affirmed.

Cited—101 U. S., 479, 520; 106 U. S., 454; 107 U. S., 528; 108 U. S., 512; 111 U. S., 520; 112 U. S., 32, 365, 368; 2 McCrary, 229, 650, 651; 7 Sawy., 476; 65 How., Pr., 90; 66 How. Pr., 459.

ADELAIDE SNYDER ET AL., *Plffs. in Err.*,
v.

THEODORE SICKLES ET AL.

(See S. C., 8 Otto, 203-217.)

Spanish grant—survey—issuing patent—evidence.

1. A Spanish grant of land, which has been confirmed by the commissioners, and which is indefinite. See 8 OTTO. U. S., Book 25.

nite, uncertain and vague as to its boundaries, attaches to no particular tract, and must be surveyed and located before the party can be entitled to a patent, and before a recovery in ejectment for it can be sustained.

2. Where a survey made has been disapproved by the Secretary of the Interior, the grant remains where it stood at the date of confirmation, and the owner of the same cannot claim either a patent or patent certificate under the Confirmation Act.

3. The Act as to Issuing Patents dispenses with the necessity of issuing patents for such lands in all cases where the party interested is by law entitled to a patent, and in no other cases. The Act does not dispense with a survey made necessary by the Act under which the confirmation was decreed, in order to entitle the party to a patent.

4. Extrinsic proof of the boundaries of the land in such case cannot be admitted while the Act of Congress requiring the survey remains in full force.

[No. 83.]

Argued Nov. 22, 26, 1878. Decided Dec. 9, 1878.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case, which arose in the court below, is fully stated by the court.

Messrs. Montgomery Blair and B. A. Hill, for plaintiffs in error:

1. The question in this case is, whether the Act of 1874 completed plaintiffs' title and made the question of location a judicial question. At the December Term of 1855, in the case of *Stanford v. Taylor*, 18 How., 409 (59 U. S., XV., 453), this court decided that an action could not be maintained on this title without a survey, holding that the case of *West v. Cochran*, 17 How., 416 (58 U. S., XV., 115), controlled the case.

The Act of 1874, declares that "All the right, title and interest of the United States, in and to all of the lands of the State of Missouri, which have at any time heretofore been confirmed to any person or persons by an Act of Congress, or by any officer or officers, or Board or Boards of Commissioners, acting under and by authority of any Act of Congress, shall be and the same are hereby granted, released and relinquished by the United States in fee simple to the respective owners of the equitable title thereto, and to their respective heirs and assigns forever, as fully and completely, in every respect whatever, as could be done by patent issued therefor according to law."

2. The Act is remedial. Its declared object is, to make these confirmations complete titles in themselves. The defect in the Law of 1807, for which the Act of 1874 was the remedy, had been shown by the action of the department and the court upon this and the Brazeau confirmation, which was similar in all respects. It was in these cases that the rulings of the state court, holding such confirmations to be complete titles, had been overruled by this court; the confirmations being held to be incomplete titles, and that the power was reserved by the Act of 1807 to the Land Department, to determine the location of the grant. This construction of the Act, *Chief Justice Taney*, with whom concurred *Mr. Justice Grier*, had declared, in his dissenting opinion, *Maguire v. Tyler*, 1 Black, 203 (66 U. S., XVII., 142) invested the department with judicial power; the question of location referred to the department being a judicial question, which depends altogether upon the description in the deed and not upon the survey made by the Surveyor-General of the United States, nor upon the judgment or decision of the Land

Office; and in consequence of this construction of the Act, the litigation respecting the Brazeau grant, commenced nearly thirty years ago, after being four times before this court, had not terminated.

Moreover, after a struggle protracted for more than fifty years, Magwire had succeeded in getting the Land Department to survey and patent the land granted to Brazeau. The land in dispute being then patented to both Brazeau and Labeaume, the court had to pass upon the question of location, and the decision, *Magwire v. Tyler*, 8 Wall., 650 (75 U. S., XIX., 320), showed that it was in its nature a purely judicial question.

3. But it was not to claimants alone that this feature of the Act of 1807 was injurious. It was decided in three of Magwire's cases—*Magwire v. Tyler*, 1 Black, 199 (66 U. S., XVII., 140); 8 Wall., 650 (*supra*); *Tyler v. Magwire*, 17 Wall., 253 (84 U. S., XXI., 576)—that the refusal of one secretary to do his duty did not prevent his successor from carrying out the law, and that until a secretary could be prevailed upon to grant a survey and patent for the land confirmed, "it stood as it existed in 1810, when the commissioners confirmed it as valid."

It necessarily followed also, as decided in *Gibson v. Chouteau*, 13 Wall., 99 (80 U. S., XX., 536), that, while the owner was thus disabled from asserting his rights, no length of adverse possession would bar them. Hence, a principal object of the Act of 1874 was to render the Statute of Limitations operative by investing the confirmees at once with complete title.

Messrs. P. Phillips and Thos. T. Gantt, for defendant in error:

As to the Act of 1874.

It did not, however, cure any defect in the original title. If the title was void for want of identity before the Act, it was not made good by it. All that was done was a mere relinquishment of the interest of the United States in and to the land.

It is impliedly admitted that up to 1874, the plaintiff had no standing in court.

As was said in *U. S. v. King*, 3 How., 787, "Though the instrument contained clear words of grant, yet if the restriction of boundary is vague and indefinite, and there is no official survey to give it a certain location, it creates no right of private property ascertainable in a court of justice."

In addition, we call attention to the 2d section of the Act of 1874, not adverted to in the brief of the plaintiff in error.

By this section it is provided "That nothing contained in the 1st section of this Act shall in any manner abridge, devert, impair or prejudice any valid right, title or interest of any person in or to any portion or part of the lands mentioned in the 1st section of the Act."

Now if it be admitted that the plaintiff could not, prior to this Act, have claimed a recovery upon such evidence as was proffered on the trial, but could do so subsequent to the Act, then the title or interest of the defendant in the premises is prejudiced and impaired, and is within the protection of the 2d section.

Mr. Justice Clifford delivered the opinion of the court:

Titles to lands claimed by individuals in Louisiana, at the time the Province was ceded to the United States, were, in most cases, incomplete, as the Governor of the Province never possessed the power to grant a patent. All he could do was to issue to the donee an instrument called a concession or order of survey, which never invested the party with a fee simple title; from which it follows that the plaintiff in a suit to recover the land must prove that his claim had been confirmed under some Act of Congress.

Complete titles, of which there were a few when the jurisdiction of the Province was transferred, required no such confirmation, as they needed no other protection than that afforded by the third article of the Treaty of Cession. 8 Stat. at L., 202; *U. S. v. Wiggins*, 14 Pet., 350. Incomplete titles required confirmation, and Congress passed the Act of the second of March, 1805, to "Ascertain and Adjust Titles and Claims to Land in the Ceded Territory." 2 Stat. at L., 326.

Prior to the passage of that Act, however, the Province ceded by the Treaty had been divided into two organized Territories, and the 5th section of the Act, to ascertain and adjust titles and claims to land therein, provided for the appointment of commissioners in each of those Territories, to ascertain and adjudicate the rights of persons presenting such claims. 2 Stat. at L., 283.

Such commissioners were required by the Act providing for their appointment to lay their decisions before Congress, but a subsequent Act provided that the decision of the commissioners, when in favor of the claimant, should be final against the United States. 2 Stat. at L., 441.

Forty arpents of land in front by forty arpents in depth are claimed by the plaintiffs, and they allege that the tract is bounded on the west by the survey made for Charles Gratiot, assignee of Louis Robert, and that the tract claimed was surveyed April 10, 1865, for John F. Perry, assignee of Angelica Chauvin, under the order of the Commissioner of the General Land-Office, as directed by the Secretary of the Interior.

Service was made, and the defendants appeared and filed an answer denying that the plaintiffs are entitled to the possession of the premises described in the petition. Subsequently, the parties went to trial before the Circuit Justice and a jury, and the verdict and judgment were in favor of the defendants. Exceptions were filed by the plaintiffs, and they sued out the present writ of error and removed the cause into this court.

Possession by the defendants being impliedly admitted, the principal question is, whether the evidence introduced or offered by the plaintiffs was sufficient to prove their alleged title to the premises. Enough appears to show that John F. Perry was the assignee of the original donee of the tract under the former sovereign, and that he, Aug. 26, 1806, presented the concession for the same to the Land Commissioners for confirmation. From the concession, which bears date May 12, 1785, it appears that the acting Governor conceded to the applicant forty arpents of land in front by forty arpents in depth, lengthwise the river called Des Peres, from north to south, bounded on one side by Louis

Robert, and on the other by the royal domain. Evidence was introduced in support of the claim; but the Board rejected it, for the alleged cause that it appeared from the records in their possession that the concession had been revoked and that a new one had been issued to another party.

Five years later, the claim came up again before the Land Commissioners; and the record shows that the Board confirmed the same to the assignee of the original donee for the whole amount of the claim, and entered an order that the same be surveyed conformable to his possession and at his expense. Pursuant to the requirement of the 6th section of the Act, the commissioners also delivered to the party an instrument known as a confirmation certificate, stating the circumstances of the case and that he is entitled to a patent for the tract of land therein designated, which certificate, the same section provides, shall be filed with the proper register or recorder within twelve months after date, and the record shows that it was duly issued and filed as required. 2 Stat. at L., 441, sec. 6.

Beyond doubt, these proceedings were regular; but it is a great mistake to suppose that the confirmation certificate, without more, entitled the party to a patent. Instead of that, the next section of the Act provides that the tracts of land thus granted by the commissioners, unless previously surveyed, shall be surveyed at the expense of the parties, under the direction of the Surveyor-General or officer acting as such, and that the officer making the survey shall transmit general and particular plats of the tracts to the proper register or recorder, and shall also transmit copies of the said plats to the Secretary of the Treasury. 2 Stat. at L., 442, sec. 7. When those acts have been performed, then the closing regulation of section 6 of the same Act comes into operation, which makes it the duty of the register or recorder to "Issue a certificate in favor of the party, which certificate, being transmitted to the Secretary of the Treasury, shall entitle the party to a patent, to be issued in like manner as is provided by law for the issuing of patents for public lands lying in other territories."

Certificates signed by the Land Commissioners were issued subsequent to the confirmation, but before the survey required to be made and transmitted to the register or recorder; but the patent certificate, so-called, was required to be issued by the register or recorder, and could not lawfully be issued until the survey and plats had been made and duly transmitted to the register or recorder, as directed by the 7th section of the Act.

Suffice to say in that connection, that no such subsisting survey or plat was ever made in this case, nor was any such ever transmitted to the register or recorder, nor did the register or recorder ever issue such a certificate to the party, nor is anything of the kind pretended by the plaintiffs. They made no effort to prove anything of the sort; but what they attempted to prove was that they had acquired a fee simple title to the land by virtue of certain other proceedings under certain other Acts of Congress, which, as they contend, dispenses with the necessity on their part of showing that they ever complied with the 6th and 7th sections of the

Act of Congress under which the claim in question was confirmed.

Argument to show that the plaintiffs had no sufficient title under the provisions of that Act is unnecessary, as they admit that "No previous survey had been made by Spanish, French or American authority."

Attempt was made by the plaintiffs to supply the omission and cure the defect in the instruments of title exhibited in the proceedings which followed the decree of confirmation and the issuing of the confirmation certificate, by the evidence, documentary and parol, offered at the trial before the court and jury. Besides the concession of the Governor and the decree of confirmation already mentioned, the plaintiffs also offered in evidence to the jury the petition of the original donee, addressed to the Governor, asking for the concession, and her deed conveying the same to her assignee, together with the petition of the assignee to the Land Commissioners praying for a confirmation of the tract to him as such assignee, which was followed, as before stated, by the decree of confirmation and the confirmation certificate. Appended to the decree of confirmation is the order that the tract be surveyed conformable to his possession, and they also offered in evidence the Act obviating the necessity of issuing patents for certain private land claims, and for other purposes. 18 Stat. at L., 62.

Parol evidence was also offered by the plaintiffs tending to show that they held all the title confirmed to the assignee of the original donee; and in order to show that the land in question formed part of the land confirmed, they offered in evidence the concession to Louis Robert, by which the tract claimed by the plaintiffs is bounded on one side, and the survey of that tract by Antoine Soulard, Spanish Surveyor-General of that part of the Province before the cession, and also the concession to Charles Gratiot.

Seasonable objection to all this evidence was made by the defendants, and it was excluded from the jury by the court, and the plaintiffs excepted to the ruling.

During the trial the plaintiffs introduced in evidence the letter of the Secretary of the Interior to the Commissioner of the General Land-Office, dated March 18, 1865, directing a second survey of the tract to be made whenever the plaintiffs may request, so that it is bounded on the one side by the land of Louis Robert, which is one of the distinctive calls in the grant. In the course of the letter, the Secretary also remarked that attention should be given to calls upon the River Des Peres, as far as practicable, and added in the same connection, that if the claimant causes the survey to be made and the tract patented upon land not granted to the original donee, it will be his error and misfortune. They also offered in evidence the letter of the Commissioner of the General Land-Office, dated March 24, 1865, addressed to the Recorder of Land Titles at St. Louis, communicating those instructions; and that also was admitted in evidence without objection.

Those documents having been admitted, the plaintiffs then offered in evidence the survey returned by William H. Cozzens, on the 10th of April, 1865, in conformity with those instructions, together with the letter of the Secretary of the Interior stating that the survey was made

under the directions of the claimants, and that upon examination it is found that it does not conform to the calls of the grant required by the order of survey, and that the survey being upon land not granted, no effect will be given to it by the department. Due objection was made by the defendants to the admissibility of the evidence, and it was excluded by the court, and the plaintiffs excepted.

Failing in that, the plaintiffs then offered in evidence a survey of the tract made by the Surveyor of St. Louis County, with oral testimony to show that the survey was identical with the one previously ruled out and that the land confirmed to the assignee of the original donee was correctly located by that survey; all of which, on the objection of the defendants, was ruled out by the court, and the plaintiffs excepted to the ruling of the court.

Both parties resting, the court instructed the jury that the plaintiffs were not entitled to recover, and they excepted to the charge of the court.

Since the case was entered here, they have assigned for error the several rulings of the court excluding evidence which they offered to introduce at the trial, and the charge that the court gave to the jury that they were not entitled to recover.

Questions of difficulty remain to be examined and decided, in view of the exceptions, of which the following are the most important: (1) What would be the legal effect of the survey made under the supervision of the plaintiffs if it had never been disapproved by the Secretary of the Interior? (2) Was it competent for the Secretary of the Interior to disapprove the survey so made; and if so, to what extent did such disapproval affect the right or interest of the plaintiffs? (3) Irrespective of any survey, what is the legal operation of the concession as confirmed by the decree of the Land Commissioners? (4) Does it contain such metes and bounds that the circuit court can locate it without a survey and without the aid of parol evidence? (5) Suppose that question is determined in the negative, is it competent for the circuit court to admit parol evidence in an ejectment suit and submit the question of location in all its aspects to the determination of a jury? (6) Concede that there is no regular subsisting survey of the tract, what is the legal operation of the provision contained in the 1st section of the Act entitled "An Act Obviating the Necessity of Issuing Patents" in the private land claims included within that enactment? 18 Stat. at L., 62.

I. Remarks to show that the survey in question never was recognized or approved either by the commissioner or the Secretary of the Interior may well be omitted, as nothing of the kind appears in the record, and it is certain to a demonstration that no steps were ever taken by the Land Department to carry it into effect. Nor is it necessary to add much to what already appears to show that it does not conform to the calls of the concession, as that plainly appears by the comparison of the survey with the terms employed by the Governor in making the concession. Nor is it any proper answer to that objection to say that the survey was authorized by the Secretary of the Interior, as it clearly appears that it was made in utter disregard of his directions, and that it covers land granted to

other donees and which is not embraced in the concession granted to the assignor of the party who presented the claim for confirmation.

Surveys of such claims might at one time be made, if the party applied to have it done, under the direction of the proper officers of the government, the condition being that the applicant should pay the expense or secure the same to the satisfaction of the Secretary of the Interior before the work was performed. 12 Stat. at L., 410.

By that Act the proper executive officers, at the request of the owner of the claim, might cause it to be surveyed; but they could not pass upon the title, nor give the survey any greater effect than *prima facie* evidence of the true location of the land. Such a survey was made in this case under the direction of the Secretary of the Interior; but there is nothing in that Act to compel the Secretary of the Interior to approve the survey if he deemed it erroneous, or to give it any effect whatever if he disapproved of it for good reasons. His reasons for disapproving it have already been referred to, and need not be repeated; nor is it necessary to enter into any discussion of the reasons assigned by the officer for rejecting the same, except to say that the reasons given are, in the judgment of the court, amply sufficient to sustain his action.

II. When first established, the Land-Office was made a bureau in the Department of the Treasury. 2 Stat. at L., 716. By the Act to reorganize the Land-Office, it is enacted that the executive duties appertaining to the surveys and sale of the public lands, etc., shall be subject to the supervision and control of the General Land-Office, under the direction of the President. 5 Stat. at L., 107. Prior to the passage of that Act, appeals were always allowed from the decision of the commissioner to the Secretary of the Treasury, as the head of the Treasury Department.

Section 2 of the Act establishing the Interior Department provides that the Secretary of the Interior shall perform all the duties of supervision and appeal in relation to the Land-Office heretofore discharged by the Secretary of the Treasury. 9 Stat. at L., 395.

Assume that the power of such supervision and appeal was vested in the Secretary of the Treasury prior to the passage of that Act, and it would follow beyond controversy that the same power is now possessed by the Secretary of the Interior; but the suggestion in that regard is, that the Act reorganizing the Land-Office left the Secretary of the Treasury no such power.

Duties of the kind, it must be admitted, were rightfully performed by the Secretary of the Treasury prior to the reorganization of the Land-Office, as the original Act creating that bureau established the office in the Department of the Treasury, and placed the commissioner under the direction of the head of that department; nor does the latter Act reorganizing the office make any substantial change in that regard, as the President still acted, as before, in matters belonging to the departments, through their respective heads, which, in legal contemplation and practical effect, gave the Secretary of the Treasury the same supervision over the doings of the Commissioner as under the prior Act establishing the Land Office. *Patterson v.*

Tatum, 3 Sawy., 164. Documentary history, however, shows that the President, when the Act reorganizing the Land-Office was presented to him for approval, entertained doubts whether the Secretary of the Treasury, if it became a law and went into operation, would be authorized to exercise the accustomed supervision over the official acts of the Commissioner in respect to the public lands, and that he deemed the matter of sufficient importance to ask the opinion of the Attorney-General upon the subject.

Prompt response to the request of the President was given by the Attorney-General, and in the course of his reply he adverted to the fact that the Act creating the Land-Office made it a branch of the Treasury, and he expressed the opinion in very decided terms that the Commissioner, under the new law, would still be, as before, subject to the general superintendence of the President, acting through the head of the Treasury Department. Supervisors of Land Off., 3 Ops. Attys-Gen., 137. But he suggested as a measure of precaution, that the President should, before approving the Act, direct the Secretary of the Treasury that he should continue under its provisions to exercise the same supervisory power as theretofore over the business of the General Land-Office, which suggestion, it appears, was adopted by the President, and that the President issued such an order, bearing even date with his approval of that Act. 2 Lawr., Instructions and Ops., 104; see, also, the opinion of President Buchanan, 1 Lester, Land L., 681.

Throughout the entire period from the approval of that Act to the passage of the Act creating the Department of the Interior, the Secretary of the Treasury was accustomed to exercise that power, without question or challenge.

III. Viewed in the light of these suggestions, it is clear that the power since the passage of the last named Act is vested in the Secretary of the Interior. Conclusive support to that proposition is also found in two decisions of this court, where the precise point is distinctly ruled. *Magwire v. Tyler*, 1 Black, 195 [66 U. S., XVII., 137]; S. C., 8 Wall., 661 [75 U. S., XIX., 323].

Four points were decided in the first case, as follows: (1) That surveys under such confirmations are, in regard to their correctness, within the jurisdiction of the commissioner, and that that officer has power to adjudge the question of accuracy preliminary to the issuing of a patent. (2) That the Secretary of the Interior has the power of supervision and appeal in all matters relating to the General Land-Office, and that that power is co-extensive with the authority of the commissioner to adjudge. (3) That the Secretary, in the exercise of his supervisory powers, may lawfully set aside a survey made under a confirmed Spanish grant, and may order another to be made, and issue a patent upon it. (4) That where the construction of the Acts of Congress defining the powers of the Secretary of the Interior is drawn in question in a state court, and the decision is against the title, supported by the decision of the Secretary, this court has jurisdiction to revise the case.

Corresponding rules are adjudged to be correct in the second case, as appears from the following propositions:

1. That the judicial tribunals, in the ordinary
See 8 Otto.

administration of justice, have no jurisdiction or power to deal with these incipient indefinite claims without survey or specific boundaries, either as to survey or fixing boundaries, but that such titles, until an authorized survey is made, attach to no land, nor can a court of justice ascertain its location or boundaries, as that power is reserved to the Executive Department. *Landes v. Brant*, 10 How., 370; *West v. Cochran*, 17 How., 414 [58 U. S., XV., 114].

2. That tracts of land previously surveyed or confirmed according to the specific boundaries set forth in the concession, need no further location, as the legal effect of the confirmation is to establish the right of the donee to the designated tract.

Cases of the kind, it was there admitted, do sometimes arise; but the court held that where the claim has no certain limits, and the decree of confirmation carries along with it the condition that the land must be surveyed and severed from the public domain and the concessions of other parties, then in all such cases the title of the party attaches to no particular tract, and that the courts of justice have no power or authority in law to establish the boundaries or locate the concession, the rule being that that power is reserved to the appointed executive officers. *Stanford v. Taylor*, 18 How., 409 [59 U. S., XV., 453]; *Bissell v. Penrose*, 8 How., 334.

3. That the power to revise surveys of such claims was vested in the first instance in the Commissioner, subject to appeal, under the Act creating the Department of the Interior, to the Secretary of that department, who might lawfully set aside such a survey; and that the concession, when the survey was set aside by the Secretary, remained before the court as it existed when confirmed without survey by the Land Commissioners. 9 Stat. at L., 395.

IV. Even a few observations will be sufficient to show what the legal effect of the concession as confirmed was, without a survey to locate the tract and define its boundaries. Commissioners to adjudicate such titles were duly appointed, and they were required under the 6th section of the Act, to transmit to the Secretary of the Treasury and to the Surveyor-General of the district where the land lay, transcripts of their final decisions made in favor of each claimant, and also to deliver to the claimant the confirmation certificate, stating the circumstances of the case, and that he was entitled to a patent for the designated tract; and the further requirement was that the certificate should be filed with the recorder if the land lay in the District of Louisiana, and with the Register of the Land-Office when the land lay in the Orleans Territory.

In all cases where the tract of land confirmed by the Land Commissioners had not been previously surveyed, the 7th section of the Act declared that the same should be surveyed under the direction of the Surveyor-General, and that he should transmit general and particular plats of the tracts that were surveyed to the proper register or recorder, and also transmit copies of the same to the Secretary of the Treasury; the further enactment being that, when the confirmation certificates and plats were filed with the register or recorder, he should thereupon issue a patent certificate in favor of the claimant, which, when transmitted to the Secretary of the

Treasury, entitled the party to a patent in like manner as patents are issued for lands acquired in other lawful ways. *West v. Cochran* [supra].

Survey was made in this case, as before explained; but it was disapproved by the Secretary of the Interior, and became a nullity, and of course the patent certificate could not be issued, and the rights of the claimant were never advanced beyond what he acquired by the concession, the confirmation by the Land Commissioners, and their certificate of confirmation.

V. Cases arise where the specific boundaries of the tract are set forth in the concession given to the original donee by the foreign government, in which cases it is well settled, as conceded in the authorities already cited, that the decree of confirmation locates the tract without any necessity for a subsequent survey. *Alviso v. U. S.*, 8 Wall., 339 [75 U. S., XIX., 305]; *Higuera v. U. S.*, 5 Wall., 827 [72 U. S., XVIII., 469]; *Bissell v. Penrose*, 8 How., 341.

Nothing of the kind, however, of any practical importance, is exhibited in the record before the court, nor is it necessary to enter into any extended discussion of the question, as it has already been expressly decided by this court, in a controversy founded upon the same concession. *Stanford v. Taylor* [supra]. Stanford sued the defendant in ejectment, claiming title from the confirmer to the land in dispute under a concession granted by the Governor to Angelica Chauvin, the tract consisting of forty arpents in front by forty arpents in depth along the River Des Peres from north to south, bounded on one side by the land of Louis Robert, and on the other by the royal domain. Due confirmation was shown, as in this case, and that the commissioners ordered in the decree that the land should be surveyed conformably to the possession by virtue of the concession. Survey was made and the tract located west of the location of Louis Robert and on both sides of the River Des Peres, which location, as the plaintiff contended, was erroneous. What he insisted was that the location should have been made east of the tract of Louis Robert, and that that proposition was so plain on the face of the concession, that no survey was necessary to determine the matter, and he offered parol proof to prove his theory, but the court of original jurisdiction rejected the proof offered, and this court affirmed the judgment.

Three of the matters decided by the court in that case deserve to be noticed: (1) That when there is a specific tract of land confirmed according to ascertained boundaries, the title of the confirmer is complete. (2) That where the claim has no certain limits, the title attaches to no particular land, nor can a court of justice establish the boundaries. (3) That the uncertainty of the intended location and of the out-boundary in the case is too manifest to require discussion to show that a public survey is required to attach the concession to any land.

Indefinite and vague as the terms of the concession are, not a doubt is entertained that the court decided correctly in that case; and it is only necessary to add in this connection that the court here now adopts that conclusion, and the reasons given in its support.

Concede that; and no further argument is necessary to show that it is not competent for the circuit court in such a case to admit parol proof

to establish the boundaries of such a concession, the rule being established by repeated decisions that the concession in such case being indefinite, uncertain, and vague, attaches to no particular tract, and that it must be surveyed and located as required by the 7th section of the Act under which it was confirmed, before the party can be entitled to a patent. *Stanford v. Taylor* [supra]; *Maguire v. Tyler*, 8 Wall., 661 [75 U. S., XIX., 323].

Authority to appoint a surveyor of lands in that territory was conferred by Congress, and it was made his duty to cause to be surveyed the lands in the Territory which have been or may be hereafter confirmed, under the conditions therein provided. 3 Stat. at L., 325.

Both parties opposed the survey in the case of *Stanford v. Taylor*; and the court having instructed the jury that it did not include the land in controversy, directed the jury to return a verdict for the defendant. Neither party claims that that survey is of any validity; and the second survey having been disapproved by the Secretary of the Interior, it is clear, to a demonstration, that the concession in question is without any subsisting valid survey, and remains where it stood at the date of confirmation, having never been advanced to the condition where the owner of the same could claim either a patent or patent certificate under the confirmation Act. 2 Stat. at L., 441.

VI. Grant that; and still the inquiry arises, what is the legal effect of the more recent Act dispensing with the necessity of issuing patents in the cases to which it applies? 18 Stat. at L., 62.

Taken alone; the 1st section grants, releases and relinquishes to confirmer all of the right, title and interest of the United States in such confirmed lands, as fully and completely as could be done by patents; but the 2d section of the same Act provides that nothing contained in the 1st section shall abridge, deplete, impair, injure or prejudice any valid right, title or interest of any person or persons in any part of the lands mentioned in the 1st section. Both sections must be construed together; and when so construed, the court is of the opinion that it dispenses with the necessity of issuing patents for such lands in all cases where the party interested is by law entitled to a patent, and in no other cases.

Patents, therefore, are not required where the concession was made by specific boundaries, nor where the specific boundaries of the tract confirmed are specifically set forth in the decree of confirmation, or where the tract had been previously surveyed, as required by the decree of confirmation and the 7th section of the Act providing for such confirmation.

Ample scope for the operation of the Act in question is found in the several classes of cases mentioned, without extending its operation to cases where no right to a patent had been acquired and which could not in that manner be conferred, without holding that it repeals the standard land laws of the country, nor without doing great injustice to claimants by introducing confusion and uncertainty into the administration of the Land Department.

Nor is there a word in the Act, when the two sections are construed together, to support the theory of the plaintiffs. Instead of that, the adoption of their theory would operate as a virtual repeal of the 2d section, which was, doubt-

less, inserted to guard against any such consequences as would flow from the Act, if the theory of the plaintiffs should receive judicial sanction.

Constant pressure of business in the Land-Office occasioned great delays in issuing patents, even in cases where the applicant held regular patent certificates, as well as in cases where the muniment of title granted by the former government gave the boundaries of the concession, or where the proper location and description of the tract was made certain by the decree of confirmation; and it was to remedy that grievance that the Act under consideration was passed, for the purpose of dispensing with the necessity of issuing patents in certain cases.

Persons entitled to patents may, under that Act, possess and enjoy their right to the land by virtue of the Act without a patent; but the Act does not dispense with a survey, made necessary by the Act under which the confirmation was decreed, in order to entitle the party to a patent. Nor does it repeal the 7th section of the prior Act which creates that necessity. Nor would it ultimately benefit the plaintiffs if the Act dispensing with the issuing of patents could be construed, as they contend it should be, unless it could be held to supply monuments or boundaries where they are not given in the foreign concession, as the difficulty would still remain that the description of the tract as given in the concession is too vague, indefinite and uncertain, to afford the means of location without an authentic survey.

Even construed as they would have the Act, still the fact would remain, that the only guide for its identity is the description given in the concession, which is: that it is forty arpents of land in front by forty in depth, lengthwise the River Des Peres from north to south, bounded on one side by the land of Louis Robert and on the other by the royal domain. Nothing definite is stated to show where any of the lines begin or end. As given, one boundary is by Louis Robert, but it is not stated on which side, nor is any point of beginning given to enable the court to determine where it bounds on the royal domain; nor is anything set forth in the description to enable the court to determine where it begins or ends on the river, except what may be inferred from the phrase "from north to south."

Sufficient appears, to show that the tract cannot be located without a survey or without the aid of extrinsic proof, which certainly cannot be admitted while the Act of Congress requiring the survey remains in full force. These difficulties in the way of the plaintiffs are insuperable; nor would a patent remove them without a survey, as the concession would still be vague, indefinite and uncertain, and incapable of location until the party in some way should procure an authentic survey.

Such a survey being necessary to the location of the claim, and the antecedent surveys having been rejected, the question will doubtless arise whether a new one may or may not be ordered, which is not determined by the present opinion, and which it is the intention of the court to leave entirely open.

For these reasons, the court is of the opinion that there is no error in the record.

Judgment affirmed.

Cited—112 U. S., 56.

See 8 OTTO.

HENRY ELCOX ET AL., *Plffs. in Err.*,

v.

SARAH A. HILL, Admrx. of ROBERT HILL,
Deceased.

(See S. C., 8 Otto, 218-224.)

Innkeeper, liability of—goods of guest—servant—negligence of guest—evidence.

1. In Illinois, a hotel-keeper is exempt from liability for money, jewels and the like, lost by his guest, where a safe for the keeping of such articles is provided by him and the notice given as required by the statute, and the guest fails to take the benefit of the protection thus furnished him.

2. To this rule the statute makes one exception. If the loss occurs "by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn," the liability remains.

3. Where the loss is occasioned by the personal negligence of the guest himself, the liability of the innkeeper does not exist.

4. An admission of a servant of the inn that he had stolen the jewelry in question, is not evidence against the innkeeper.

[No. 84.]

Submitted Nov. 26, 1878. Decided Dec. 9, 1878.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. The plaintiffs in error were the plaintiffs in the court below, where the case arose.

The case is sufficiently stated by the court.

Messrs. Willett & Herring and Melville W. Fuller, for plaintiffs in error:

The liability of an innkeeper is not confined to personal baggage, but extends to all merchandise, and whatever the guest may find it convenient to carry on his journey.

Woollen Co. v. Proctor, 7 Cush., 417; *Wilkins v. Earl*, 44 N. Y., 172; *Houser v. Tulley*, 62 Pa., 92; *Piper v. Manny*, 21 Wend., 282; *Redf. Car.*, sec. 605; *Hulett v. Swift*, 33 N. Y., 571; *Needles v. Howard*, 1 E. D. Smith, 54.

"The place where goods are deposited is not the test; it is whether they are in the custody of the innkeeper, or at the risk of the guest."

Nelson, C. J., in *Piper v. Manny* (*supra*); also, *Calye's Case*, 8 Co. 32, 1 Smith, L. C., 194, and Eng. Cases in note; *Coggs v. Bernard*, St. & Am. Cas., 308; *Redf. Car.*, sec. 600; *Jones, Bail.*, 95, *Story, Bail.*, sec. 471.

The court erred in refusing the plaintiffs "To show by Isaac Hartman and George Barber, witnesses in court, that William Drum, after his return from Canada, admitted to him, said Hartman, that he stole plaintiffs' jewelry from the Matteson House."

1 Greenl., Ev., sec. 215.

As this testimony would have been proper on the trial of Drum for a criminal charge of stealing these goods, it was proper on the trial of

NOTE.—*Liability of innkeeper for goods and money of guest.*

Many cases hold that an innkeeper is liable as an insurer for the goods of his guest, and for losses by theft or fire which occur without the negligence of the innkeeper, and is only excused by the act of God, of the public enemy or of the guest. 2 Pars., Cont., 146; 2 Story, Cont., sec. 909; *Saunders, Neg.*, 212; *Hulett v. Swift*, 33 N. Y., 571 (modified by statute of 1855, ch. 471); *Mateer v. Brown*, 1 Cal., 221; *Thickstun v. Howard*, 8 Blackf., 535; *Mason v. Thompson*, 9 Pick., 280; S. C., 20 Am. Dec., 471; *Shaw v. Berry*, 31 Me., 473; *Norcross v. Norcross*, 53 Me., 163; *Manning v. Wells*, 9 Humph., 746; *Sasseen v.*

this cause, as tending to prove Drum's guilt, which, when fully proved by testimony sufficient to have convicted Drum, would have established defendant's liability beyond any question.

The defendant sets up the Statute of Illinois, limiting the common law liability of innkeepers. R. S., Ill., 1874, p. 583.

It is incumbent on him to show, therefore, a strict conformity to the requirements of this statute.

Ramaley v. Leland, 43 N. Y., 539; *Hyatt v. Taylor*, 42 N. Y., 258.

And, this strict conformity he is bound to show by a preponderance of testimony, which he has failed to do.

Messrs. A. B. Jenks and Robert Hervey, for defendant in error:

An innkeeper is responsible only for his guests' baggage, and that term includes articles for use and convenience on the journey, but not merchandise or other valuables, such as silver knives, forks and spoons.

Pettigrew v. Barnum, 11 Md., 434.

The defendant, in conformity with the statute law of the State of Illinois then in force, had provided a safe or vault for the custody of valuable articles, like those carried by Mr. Larter, and had posted notices throughout his house, as required by law, notifying guests to have their valuables placed in this vault or safe.

See, *Stewart v. Parsons*, 24 Wis., 241; *Hyatt v. Taylor*, 42 N. Y., 258; *Bendetson v. French*, 44 Barb., 31; *Purvis v. Coleman*, 21 N. Y., 111.

If admission was ever made by Drum, the testimony offered was, at best, hearsay testimony. If the plaintiffs wished to prove any such fact, they should have done so by Drum himself.

Mr. Justice Hunt delivered the opinion of the court:

Clark, 37 Ga., 242; *Burrows v. Tricker*, 21 Md., 320; *Hallenbake v. Fish*, 9 Wend., 457; S. C., 24 Am. Dec., 88; *Morgan v. Ravey*, 6 H. & N., 265; *Day v. Bather*, 2 H. & C., 14; *Sibley v. Aldrich*, 33 N. H., 553; *Houlder v. Soulbey*, 8 C. B. (N. S.), 254; *Gile v. Libbey*, 36 Barb., 70; *Cashill v. Wright*, 6 El. & B., 391; *Oppenheim v. White Lion Hotel Co.*, 6 L. R. C. P., 515; *Fuller v. Coats*, 18 Ohio St., 343; *Jalie v. Cardinal*, 35 Wis., 118. In other cases, however, the liability has been restricted, particularly in losses by fire, to cases where there is some negligence or default on the part of the innkeeper. Add. Torts, sec. 684; 2 Kent, Com., 593; *Cutter v. Bonney*, 30 Mich., 259; S. C., 18 Am. Rep., 127; *Howth v. Franklin*, 20 Tex., 789; *Woodward v. Morse*, 18 La. Ann., 156; *Kisten v. Hildebrand*, 9 B. Mon., 72; *Metcalf v. Hess*, 14 Ill., 129; *Johnson v. Richardson*, 17 Ill., 302; *McDaniels v. Robinson*, 26 Vt., 316; *Read v. Amidon*, 41 Vt., 15; *Laird v. Eichold*, 10 Ind., 212; *Dessauer v. Baker*, 1 Wils. (Ind.), 429.

The liability is in some cases held to extend only to necessary articles. *Trieber v. Burrows*, 27 Md., 130; *Maltby v. Chapman*, 25 Md., 307; *Sasseen v. Clark*, 37 Ga., 242; *Myers v. Cottrill*, 5 Biss., 465; *Simon v. Miller*, 7 La. Ann., 360.

Other cases hold his liability is not limited to articles and money necessary for traveling. *Pinkerton v. Woodward*, 33 Cal., 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush., 417; *Snider v. Geiss*, 1 Yeates, 34; *Wilkins v. Earle*, 44 N. Y., 172; S. C., 4 Am. Rep., 655.

An innkeeper is liable for all losses which might have been prevented by ordinary care. *Newson v. Axon*, 1 McCord, 509; S. C., 10 Am. Dec., 685.

The loser must be a guest at the time of the loss. *Towson v. Havre De Grace Bk.*, 6 Harr. & J., 47; S. C., 14 Am. Dec., 254.

To make an innkeeper liable in trover, there must be an actual conversion of goods intrusted to him

There can be but little doubt that the goods of the plaintiff were stolen from him while at the hotel of the defendant, in the City of Chicago. He insists, thereupon, that the loss to him shall be made good; but it does not follow, because he met with a loss, that he can recover the amount from the defendant.

The defendant contends that he is exempt from liability for money, jewels and the like, unless the loser of the goods has complied with the Statute of Illinois on that subject. Where a safe for the keeping of such articles is provided by the hotel keeper, and the notices given as required by the statute, a loser failing to take the benefit of the protection given him must bear his own loss. *Hyatt v. Taylor*, 42 N. Y., 258; *Stewart v. Parsons*, 24 Wis., 241.

To this rule the statute makes one exception. If the loss occurs "By the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn," the liability remains. The judge submitted that question to the jury, who found against the plaintiff.

It is settled by the authorities that where a loss is occasioned by the personal negligence of the guest himself, the liability of the innkeeper does not exist. *Purvis v. Coleman*, 21 N. Y., 111; *Cook v. Trans. Co.*, 1 Den., 91.

The question of personal negligence was properly submitted to the jury, and was also found against the plaintiff.

The judge refused to receive evidence that Wm. Drum had admitted that he had stolen the plaintiff's jewelry. If Drum was guilty of the offense, it should have been proved. He could prove it if true. If on trial himself, his admission would be competent, but upon no principle could he admit away the rights of another person.

Judgment affirmed.

by the guest. *Hallenbake v. Fish*, 8 Wend., 547; S. C., 24 Am. Dec., 88; *Wilkins v. Earle*, 44 N. Y., 188; *Saer v. Blain*, 44 N. Y., 449; *Needles v. Howard*, 1 E. D. Smith, 60.

The goods must be brought within the inn. 2 Kent, Com., 593; *Albin v. Presby*, 8 N. H., 408; S. C., 24 Am. Dec., 679; *Cayle's Case*, 8 Co., 32; *Sanders v. Spencer*, 3 Dyer, 266, b; *Farnsworth v. Packwood*, 1 Stark, 249; *Burgess v. Clements*, 4 Maule & S., 306; *Richmond v. Smith*, 8 Barn. & C., 9; *Jones v. Tyler*, 1 Ad. & E., 522; *Bennett v. Mellor*, 5 T. R., 273; *Packard v. Northeraft*, 2 Met. (Ky.), 439; *Norcross v. Norcross*, 53 Me., 163.

Proof of loss of goods, while in charge of the innkeeper, is sufficient *prima facie* to charge him with liability. *Hill v. Owen*, 5 Blackf., 323; S. C., 35 Am. Dec., 124; *Laird v. Eichold*, 10 Ind., 212.

Innkeeper may defend on ground of contributory negligence of guest. *Elcock v. Hill*, *supra*; *Houser v. Tully*, 62 Pa. St., 92; *Howley v. Smith*, 25 Wend., 642; *Chamberlain v. Masterton*, 26 Ala., 371; *Hadley v. Upshaw*, 27 Tex., 547; *Kelsey v. Berry*, 42 Ill., 469.

Innkeeper is liable for money deposited with bar-keeper on credit of inn. *Houser v. Tully*, 62 Pa. St., 92; S. C., 1 Am. Rep., 390.

Innkeeper is liable for money deposited by guest in safe and stolen from it. *Wilkins v. Earle*, 44 N. Y., 172; S. C., 4 Am. Rep., 655.

Innkeeper is liable for loss of baggage of guest left in his custody. *Adams v. Clem*, 41 Ga., 65; S. C., 5 Am. Rep., 524; *Giles v. Fauntleroy*, 13 Md., 126.

An innkeeper is liable for goods lost during temporary absence of guest, although it extend over several days. 2 Croke, 189; 1 Comyn, Dig., 421; *Grinnell v. Cook*, 3 Hill, 490; *McDonald v. Egerton*, 5 Barb., 560; *Baker v. Day*, 2 Hurl. & C., 14; 32 L. J. Exch., 171.

Ex parte SAMUEL SCHWAB.

(See S. C., 8 Otto, 240-242.)

Mandamus—jurisdiction of Circuit Court.

1. *Mandamus* cannot be used to perform the office of an appeal or a writ of error.

2. Where the circuit court had jurisdiction of the action and of the parties, any wrong decision by it, or any error committed by it, can only be corrected by this court on appeal after final decree below.

[No. 3 Orig.]

Argued Nov. 25, 1878. Decided Dec. 16, 1878.

APPPLICATION for an order to show cause why a writ of *mandamus* should not issue. The case is fully stated by the court.

Messrs. D. M. Dickinson and Matt. H. Carpenter, for petitioner.

No counsel appeared for respondents.

Mr. Chief Justice Waite delivered the opinion of the court:

Certain creditors of Scott & Feibish, of Detroit, instituted proceedings in bankruptcy, March 14, 1878, against the debtors in the District Court of the United States for the Eastern District of Michigan, and at the same time obtained a provisional order for the seizure of certain goods which, it was alleged, had been disposed of in fraud of the Bankrupt Law. This order was placed in the hands of Salmon S. Matthews, Marshal of the District, and he, on the 29th of March, took into his possession, as the property of the bankrupts, the goods claimed by Schwab, the petitioner herein. On the 13th of April, Scott & Feibish were in due form adjudicated bankrupts.

April 27, Schwab sued Matthews, the Marshal, and Mabley, Michaels, Rothschild and Hayes, four of the creditors of Scott & Feibish, in the Superior Court of the City of Detroit, for the value of the goods seized. May 6, Joseph L. Hudson was duly elected and appointed assignee in bankruptcy of Scott & Feibish, and the goods in question were thereupon turned over to him by the marshal. Since then, the goods have been sold by the order of the bankrupt court, and the proceeds of sale remain in the hands of the assignee to be applied as part of the estate of the bankrupts, if it shall appear that the title to the goods was in the assignee at the time of the sale.

October 5, Hudson, the assignee, Matthews, the Marshal, and the four creditors, defendants in the suit in the state court, filed a bill in equity against Schwab in the Circuit Court for the Eastern District of Michigan, wherein they pray that the sale and transfer of the goods to Schwab "May be set aside and held for naught, and decreed to be in violation of the Bankrupt Act, and that said goods and chattels may be decreed to be a part of the estate of Scott & Feibish, and that the title of said Joseph L. Hudson, said assignee, to said goods, or to the funds arising therefrom, may be quieted and decreed to be perfect." It is also further prayed that Schwab and his attorneys be enjoined "From further prosecution of said suit so pending in the Superior Court of Detroit, or from the prosecution of any other or further suit in regard to the seizure of said goods, save in this (the circuit) court or in the bankruptcy court."

NOTE.—*Mandamus, when will issue.* See note to *McCluney v. Silliman*, 15 U. S. (2 Wheat.), 369.

See 8 OTTO.

A preliminary injunction, after notice, was granted by the Judge of the District Court for the Eastern District of Michigan, Nov. 12, and Schwab now asks for an order on the judge to show cause here why a *mandamus* should not issue commanding and enjoining him to vacate and set aside such injunction.

Mandamus cannot be used to perform the office of an appeal or a writ of error. *Ex parte Loring*, 94 U. S., 418 [XXIV., 165]; *Ex parte Flippin*, 94 U. S., 350 [XXIV., 195]. The Circuit Court had jurisdiction of the action and of the parties, for the purpose of trying the title of the assignee to the goods. The injunction was granted in the course of the administration of the cause. Injunctions may be granted by the courts of the United States to stay proceedings in the courts of a State, "In cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." R. S., sec. 720. When the application was made for the allowance of the injunction, it became the duty of the court to determine whether the case was one in which that power could be exercised. The question arose in the regular progress of the cause and, if decided wrong, an error was committed, which, like other errors, may be corrected on appeal after final decree below.

The case is entirely different from what it would have been if the only object of the suit had been to enjoin Schwab from proceeding in the state court. There the question would have been as to the jurisdiction of the Circuit Court over the cause. But here is clearly jurisdiction of the cause. The assignee in bankruptcy had the undoubted right to sue Schwab in the circuit court to settle the title to the goods or the fund arising from their sale. The injunction was a mere incident to the principal relief he asked. Even if not granted, the suit could go on.

Being satisfied, by the petitioner's own showing, that the error, if any, in the court below cannot be corrected by *mandamus*, we deny the motion for an order to show cause.

Cited—102 U. S., 186; 109 U. S., 476.

ANDREW C. BRADLEY ET AL., *Appts.*,

v.

UNITED STATES.

(See S. C., 8 Otto, 104-117.)

Lease to Government—payment of rent.

1. Where one leased premises to the Government, and the lease contained the clause that the rent should not be paid until an appropriation for its payment was made by Congress, he cannot recover for rent beyond the amount appropriated by Congress.

2. If the lessor, voluntarily and without any misrepresentation or deception, enters into a lease on such terms, he must rely upon the justice of Congress.

3. Leases must receive a reasonable construction, to be derived from their language and the circumstances of their execution.

[No. 775.]

Submitted Dec. 10, 1878. Decided Dec. 23, 1878.

APPPEAL from the Court of Claims.

The claim of the appellant having been denied by the Court of Claims, he appealed to this court.

The case appears in the opinion.

Messrs. J. Hubley Ashton and Nathaniel Wilson, for appellants:

The lease contains the usual covenants. Its only peculiarity is to be found in the following clause relating to the payment of the rent:

"This lease is made subject to an appropriation by Congress for the payment of the rental herein stipulated for, and no payment shall be made on account of such rental until such appropriation shall be available and that, as soon as practicable, after such appropriation shall become available, the arrears of the rent then due shall be paid in full, and thereafter payment shall be made at the times and in the manner hereinbefore stipulated."

The construction adopted by the Court of Claims is unreasonable, in that it attributes to the lessor a manifestly irrational purpose and intent. It is incredible that any owner of valuable premises should deliberately and intentionally covenant with his tenant to give the tenant possession of his property for five years, keeping it in the meantime in good repair, and making extensive improvements, and to accept therefor whatever the tenant might think proper to pay.

The action of Congress, when fully cognizant of all the facts, in accepting the benefits of a contract, has the same legal signification and must have the same legal consequences as similar action by an individual.

Frémont v. U. S., 2 N. & H., Ct. of Cl., 461; *Story*, Ag., 8th ed., sec. 239; see *McCawley v. Brooks*, 16 Cal., 1.

In the case of *Roberts v. U. S.*, 92 U. S., 41 (XXIII., 646), it was held by this court that the general reference of a claim by Congress to the Court of Claims, although the Act did not in express terms ratify the transactions, was in effect a ratification of the agreement, which provided for such additional allowance as in the judgment of Congress might be considered equitable.

A tenant holding over after the expiration of his lease, with the consent of the landlord, becomes a tenant from year to year, subject to the terms and conditions of the original lease.

Tayl. Land. & Ten., sec. 22; *Kugler v. U. S.*, 4 N. & H., Ct. of Cl., 407; *Baker v. Root*, 4 McL., 572.

A lease void under the Statute of Frauds for want of authority of the agent who executed it, will regulate the rights of the parties during the actual existence of the tenancy.

Tayl. Land. & Ten., sec. 26; *Porter v. Bleiler*, 17 Barb., 149.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellee:

In entering into this contract the Postmaster-General, with great caution and prudence, had the clause referred to inserted for the very purpose of not involving or seeming to involve the United States in any liability beyond the will of Congress to be directly expressed thereon, and of having the payment of rent depend wholly upon appropriations therefor by the legislative branch of the Government.

No demand for the redelivery of the premises having been made, the claimants must now be held to have assented to the terms offered by Congress for the rent of the premises for the year ending June 30, 1876.

The facts do not present a case of implied con-

tract to pay the rentable value of the property for use and occupation; nor a case of hardship which might have existed if the claimants' property had been retained until the expiration of the third year before the determination of Congress to appropriate less than the lease specified was made known; for the claimants were duly and reasonably notified by a public Act, several months before the third year commenced, of the amount it had appropriated and would pay.

Mr. Justice Clifford delivered the opinion of the court:

Leases, like deeds or other written instruments, must receive a reasonable construction, as derived from the language employed, without the aid of extrinsic evidence beyond what may be necessary to identify the premises and to disclose the circumstances surrounding the transaction when the instrument was executed. *Quackenboss v. Lansing*, 6 Johns., 49; *Taylor, Land. & T.*, sec. 160, n.

Sufficient appears from the findings of the court below to show that, on the 6th of June, 1873, an indenture of lease was executed by the appellant to the United States, whereby the former, in consideration of the rents, covenants and agreements in the instrument specified, demised and leased to the United States the premises described in the petition for the term of three years from and after June 5, 1873, with the privileges to the lessees of a renewal of the term for the further period of two years, at and for the annual rent, during the said term and subsequent renewal thereof, of \$4,200, payable quarterly on the days specified in the indenture of lease exhibited in the record.

Both sides concede what the lease and record show, that the premises were leased by the United States for the convenience of the Postoffice Department, and that the Postmaster-General took immediate possession of the same, and that the premises have ever since been used for the purposes of his department.

Four other findings of the court below should be noticed in this connection: (1) That the lessor sold and conveyed the premises to Alexander R. Shepherd and assigned the lease to him, and that he, the assignee, conveyed and assigned the same to the other persons named in the petition. (2) That the premises were used by the United States for the purposes mentioned for the whole period alleged. (3) That the holders of the lease have been paid the whole rent, except for the last year, for which they have been paid nothing. (4) Adequate appropriations were made by Congress authorizing the payments which have been made, but Congress refused to appropriate more than \$1,800 for the last year.

Pursuant to those findings, the court below held that the plaintiffs could only recover the sum appropriated, and rendered judgment in their favor for that amount, from which judgment the plaintiffs appealed to this court. Since the appeal was entered here, the appellants assign for error that the court below erred in the construction given to the indenture of lease, and to the two Acts of Congress referred to in the findings of fact.

Due appropriation of the sum of \$1,800 was made by Congress to pay the rental for the last year; and the court below rendered judgment in favor of the appellants for that sum, which

exhausts the appropriation made by Congress for that purpose, the only question for decision being whether the appellants can recover in this case the balance of their claim which has never been appropriated by Congress.

Moneys not appropriated cannot be drawn from the Treasury; and it is equally clear that the parties, by the terms of the lease, understood and agreed with each other that the lease was made subject to an appropriation by Congress for the payment of the stipulated rental, and "that no payment shall be made" to the lessor "on account of such rental until such an appropriation shall become available;" that as soon as practicable after such an appropriation shall become available, the arrears of rent then due shall be paid in full, and that payment thereafter shall be made at the times and in the manner stipulated in the indenture of lease.

Prior to that time, Congress had enacted that it shall not be lawful for any department of the Government to expend in any one fiscal year any sum in excess of the appropriation made by Congress for that fiscal year, or to involve the Government in any contract for the future payment of money in excess of such appropriation; and both parties concur in the proposition that that provision was in full force and operation at the time the indenture of lease under consideration was executed. 16 Stat. at L., 251; R. S., sec. 3679.

Such contracts or purchases for the future were forbidden by the Act of the second of March, 1861, unless the same were authorized by law or were made under an appropriation adequate to their fulfillment, except for clothing, subsistence, forage, fuel, quarters or transportation, in the War or Navy Department; nor could those departments make any such contracts, even for those purposes, beyond the necessities of the current year. 12 Stat. at L., 220; R. S., sec. 3732.

Forty years earlier, Congress enacted that neither the Secretary of State, or of the Treasury, or of War or Navy Department, should thereafter make any contract other than such as were necessary for the subsistence and clothing of the army and navy, and contracts for the Quartermaster's Department, except under a law authorizing the same, or under an appropriation adequate to its fulfillment. 3 Stat. at L., 768.

Congress passed an Act directing the Secretary of the Navy to cause floating dry-docks to be constructed at three of the national navy yards, and specified appropriations were made towards constructing the several docks. Proper measures were adopted by the Secretary to ascertain what each structure would cost, from which it appeared that the appropriation for each was greatly insufficient. In view of these facts, the Secretary doubted whether he could lawfully contract to have the work done, and submitted the question to the Attorney-General, who decided that the facts as stated brought the case directly within the prohibition of the Act last named, and that the contracts could not lawfully be made. [Contracts not to exceed Appro.], 4 Ops. Attys-Gen., 600.

Cases arise, as there stated, where the authority to contract for the work is expressly given in the appropriation Act, and in such cases it is clear, as there admitted, that the power to con-

tract exists, even though the price to be paid exceeds the amount appropriated. Examples of the kind are given in that opinion, to which many more might be added; but when no such authority is given, and nothing is contained in the Act appropriating the money from which such an authority may be implied, it is clear that the head of the department cannot involve the Government in an obligation to pay anything in excess of the appropriation.

Argument, to show that money cannot be drawn from the Treasury before it is appropriated is unnecessary, as the Constitution provides that "No money shall be drawn from the Treasury but in consequence of an appropriation made by law;" nor is it necessary to enter into much discussion to show that the Act of Congress making it unlawful for the head of a department to involve the Government in any contract for the future payment of money in excess of an appropriation is a valid Act, and of binding obligation, as such regulations and prohibitions in one form or another have been in operation without question throughout nearly the whole period since the adoption of the Constitution.

Acts of Congress of the kind, it must be admitted, are both valid and salutary in their operation; and it is equally clear that the party who drafted the indenture of lease intended to incorporate into the instrument the substance of the provision which prohibits the head of a department from involving the Government in any contract for the future payment of money in excess of the appropriation made for its fulfillment. Well founded doubt upon that subject cannot be entertained, and the court is of the opinion that the words of the indenture are amply sufficient to effect the object which the person who drafted the instrument intended to accomplish.

Both parties agreed that the indenture was subject to an appropriation to be made by Congress for the payment of the rental, and that no payment should be made to the lessor on account of such rental until such an appropriation should become available. Concede that these stipulations are valid, of which there can be no doubt, and it is clear to a demonstration that the claim of the appellants in excess of the amount allowed by the court below is utterly groundless.

Even suppose that is so; still it is insisted by the appellants that Congress, by subsequent legislation, has committed the United States to the annual payment of the stipulated rental for the whole term of three years specified in the indenture of lease, and that they are entitled to judgment for the entire rental of the third year which remained unpaid when the suit was commenced, irrespective of the fact that the judgment rendered in their favor by the court below exhausts the whole amount of the money appropriated by Congress for that purpose.

Two annual appropriations were made by Congress, which, in the aggregate, were sufficient to pay the stipulated rental of the premises for the first two years; and the findings of the court below show that the payments for those two years were duly made, and that nothing more is claimed by the appellants in that regard. Of these, the first was simply an appropriation of the amount required to pay the

stipulated annual rental, without any explanation whatever beyond what was necessary to describe the premises leased, from which it is plain that nothing can be inferred from that Act to support the theory of the appellants. 18 Stat. at L., 107.

Annexed to the second appropriation, which is for the sum of \$4,488.86, is the following proviso, to wit: that hereafter no contract shall be made for the rent of any building or part of any building in Washington, not now in use by the Government, to be used for the purposes of the Government, until an appropriation therefor shall have been made in terms by Congress. 18 Stat. at L., 144.

Specific appropriations by these two Acts were made available to pay the rental of the premises leased for the first two years; but it is clear as anything in legal decision can be, that they furnish no ground whatever to support the theory that Congress entered into any legal obligation to make such an appropriation for the third year. Instead of that, the inference, if any, to be drawn from the last Act tends to negative the appellants' theory, and to show that Congress intended to adhere to the stipulations of the lease: that it was made subject to an appropriation by Congress for the payment of the rental stipulated, and that no payment should be made to the lessor on account of such rental until such an appropriation should become available.

Unsupported as that theory is by those two appropriation Acts, or by anything else exhibited in the record, it may well be dismissed as destitute of merit, without further consideration.

If the indenture of lease had been for three years without any covenant that it was made subject to an appropriation by Congress, and that no payment on account of rental should be made until such an appropriation became available, it may be that the theory of the appellants, that the contract was for three years as an entire term, might be maintained; or if not, that it might perhaps be held that Congress had ratified the instrument by appropriating money to pay the rental for the first two years. Be that as it may, it is still true that no ratification of the present indenture by any such Act would benefit the appellants in that regard, so long as it contains the covenant that no payment of the rental shall be made until an appropriation for the purpose becomes available.

Viewed in that light, as the case should be, a few observations will be sufficient to show that nothing is found in the remaining appropriation Act to warrant a judgment in favor of the appellants for any sum beyond what was allowed by the court below.

Eighteen hundred dollars were appropriated by Congress for the third year, several months before the second year expired. Appended to that appropriation is the proviso that the above sum shall not be deemed to be paid on account of any lease for years of said building, which shows conclusively that Congress intended to negative the theory of the appellants that the indenture gave them the right to recover anything of the United States beyond the sum appropriated by Congress.

Confirmation of that proposition is also derived from a second proviso annexed to the same

appropriation, by which it is enacted that at the end of the present fiscal year the Postmaster-General be directed, upon demand of the lessor, to deliver up the possession of the said premises. 18 Stat. at L., 367.

Construed as those provisions should be, in view of the subject-matter and the surrounding circumstances, it is clear that Congress intended to give seasonable notice to the lessor of the premises that no more than the sum appropriated would be paid as rental of the same for the third year, and that he might take possession of the same if he did not see fit to accept the sum appropriated for their use and occupation.

Corresponding views were expressed by the court below, and they held and well held that, inasmuch as the appellants never demanded the redelivery of the premises, it must be determined that they acquiesced in and assented to the terms of rent offered by Congress for the third year.

Public officers, in such a case, having no funds in the Treasury and being without authority to bind the United States, can only agree to pay the stipulated rental, provided the money is appropriated by Congress, and if the lessor, voluntarily and without any misrepresentation or deception, enters into a lease on those terms, he must rely upon the justice of Congress; nor do the circumstances in this case disclose any hardship, as the appellants were seasonably notified that they would not be paid for the third year any greater rent than the sum appropriated for the purpose. *Church Ward v. Queen*, L. R. 1 Q. B., 199.

For these reasons the court is of the opinion that there is no error in the record.

Judgment affirmed.

We are of opinion that the two annual appropriations expressly for the sum due for each year's rent, according to the terms of the lease, were recognitions of the validity of that contract which binds the United States and that the claimant was entitled to recover the same amount for the third year.

SAM. F. MILLER,
W. STRONG,
S. J. FIELD,
JOHN M. HARLAN.

CITY OF LITTLE ROCK, *Plff. in Err.*,
v.
THE MERCHANTS' NATIONAL BANK
OF LITTLE ROCK, ARKANSAS.

(See S. C., 8 Otto, 308-315.)

City debt—new obligations—legal contract.

1. If a city has power to bind itself by substituting a new liability for a canceled one, it may do so by any instrument of acknowledgment which affords sufficient evidence of a debt.

2. If a city issues its obligations for its debts, in an illegal form, such as bank-notes, it may bind itself by bonds issued in a legal form, to a holder of such notes in lieu thereof.

3. Where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract.

[No. 714.]

Submitted Dec. 2, 1878. Decided Dec. 23, 1878.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas. The case is fully stated by the court.
Mr. U. M. Rose, for plaintiff in error.
Messrs. John McClure and T. D. W. Yonley, for defendant in error.

Mr. Justice Hunt delivered the opinion of the court:

A recovery was had in the circuit court upon certain bonds issued by the City of Little Rock. The bond No. 1, described in the complaint, bears date of October 9, 1874, is for \$500, and is payable to the Merchants' National Bank, with interest, at one year from its date. The complaint contains one hundred and fifty-seven other counts of a similar character.

In August, 1867, the Common Council of the City of Little Rock, provided for the issuance and redemption of its city bonds, which were printed on bank-note paper. They were in the form of engraved bank-bills, having the ordinary appearance of such bills, and payable ten years after date.

Issuing this currency the city obtained the means with which it proceeded to build a city hall and school-houses; to grade streets and culverts; to purchase cemeteries; to improve public buildings; to provide fire equipments; to pay interest to several railroad companies, and pay salaries of officers and agents.

The City received the bills thus held by others in payment of taxes, and paid them out as often as its occasions required, re-issuing them from time to time. From time to time their value diminished, until it became nominal merely.

In the year 1874, arrangements were made by the City by which certain amounts of the money printed in the form of bank paper, held by the plaintiff, should be and was turned over to the City for cancellation. This consisted of sundry city bonds and certain credits received by the said Bank on the ledgers of the City.

The recovery was for the sum of \$38,640, and it is now objected that the issue of what purported to be money or bank-bills was illegal and cannot be the lawful subject of a recovery against the City.

We do not perceive in the first place that there is any difference between the right to recover for the amount issued to the bank in bonds and for that credited on the ledger account. If the debt was legally created, the holder had the right to recover the amount of the bills held by him. If it derived a new validity from the surrender of an old debt of a disputed character, it is to be observed that all of the debt was equally given up. New bonds were issued for a portion, but all of the debt was surrendered. It was the surrender of what was claimed to be a legal debt, and the creating a new obligation thereby, that is said to create the liability. If a city has power to bind itself by substituting a new liability for a canceled one, it may do so by any instrument of acknowledgment which affords sufficient evidence of a debt. We are of opinion that the two classes of obligations are governed by the same rule.

The statutes of Arkansas upon the subject of notes issued for the purposes of currency are complicated and hard to be understood.

On the 25th of November, 1837, was passed the first Act to which we are referred, entitled
See 8 OTTO.

"An Act to Prevent the Circulation of Private Notes in the State," prohibiting the circulation of all money or bank-notes by persons unauthorized by law, and of notes of a less denomination than \$5.

On the 14th of February, 1838, was passed the Act entitled "An Act to Compel the Payment of Change Tickets," which provided that the holder of any change ticket, bill or small note should have the right to sue the issuer or indorser thereof before any justice of the peace and recover the amount held by him, and providing that the Act first above mentioned should take effect from the first day of March, 1838.

The effect of the two statutes would appear to be that the general circulation of private notes was prohibited by law, but the holder of notes thus illegally circulated was authorized to recover the amount from the party issuing or indorsing the same, and to have execution without appeal or delay.

On the 8th of January, 1855, was passed "An Act to Restrain the Circulation of Change Tickets," prohibiting the circulation by *any person or persons* of notes or bills of less denomination than \$5, to pass as currency, whether first issued within this State or not, punishable by fine and imprisonment.

On the 8th of February, 1859, was passed "An Act to Prevent the People from being Defrauded with Bank Paper," and on the 18th of November, 1861, "An Act to Repeal all State Laws that Prohibit the Circulation of Bank-Bills of any Denomination." The last Act is in these words: "All Acts or parts of Acts prohibiting the circulation of bank-bills of any denomination or amount and fixing a penalty for such circulation be and the same are hereby repealed; but nothing herein contained shall be construed so as to authorize the issuance of shin-plasters, change notes, or other irresponsible paper by individuals, corporations or others."

"Shin-plasters and change notes" we may assume to be paper-money of a less denomination than \$1, intended to take the place of small pieces of coin. But what is "other irresponsible paper?"

It would seem that shin-plasters and change notes are irresponsible paper, as not only are they expressly required not to exist, but they are condemned in the company of "other irresponsible paper."

Nor can we treat this subject as paper or notes issued by those who are not solvent in their pecuniary affairs, or not able to respond to the consequences of their actions.

There is no standard known to the law to determine where responsibility or irresponsibility exists.

We apprehend this expression may have been intended to apply to fractional paper, which in its form, character and nature was considered as debased and unhealthy.

By an Act approved December 14, 1875, it was enacted "That all city warrants, scrip acceptances, or money shall be receivable for any city purposes except for interest-tax, and for all debts due the municipal corporation, by whom the same were issued, without regard to the time or date of issuance of such warrant, scrip acceptance or money, or the purpose for which they were issued."

Upon this state of the law the Judge at the

circuit was of the opinion that the original issue of its notes by the City of Little Rock was illegal. It is not necessary that we concur in this view or that we should dissent from it. We have referred to the statutes, that the actual position of the parties towards each other might be understood, and the point on which the decision in favor of the Bank was made be appreciated.

There was evidence that the bonds sued on and the ledger accounts sued on were given and allowed on the immediate consideration of the surrender of bonds of the form, character and material first issued by the City. The court charged as follows, viz.:

"That the bonds in suit issued, by the defendant in lieu of said bonds on bank-note paper—the last named bonds having been originally issued under the circumstances above stated for valid debts against the City to other creditors of the City than the plaintiff, and the plaintiff not having been connected with their issue—constitute a valid ground of action against the City, and the City is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appearance and of such a form as to be especially adapted to constitute a circulating medium, and were, in fact, used in and about the City as a local circulating medium in lieu of money.

There is also a claim against the City for the amount of certain city bonds on bank-note paper surrendered by the plaintiff to the City at its request, for which the City issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff and destroyed by the City to the credit of the plaintiff on the ledger of the City. The same principles of law apply to this claim as to the claim on the new bonds."

It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability. The first liability of the City was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of bank-notes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of non-resistance every person retains, and continues to retain. He can reconsider at any time, and confess and admit what the moment before he denied.

In 1874, the City of Little Rock did reconsider. It said: we will purge the transaction of its illegality. We had the authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by canceling the bank-notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection.

If the City had borrowed \$1,000 of the Bank upon its note at a usurious interest, but the bank had subsequently canceled the illegal note, had refunded the excessive interest, and received a new note for a lawful amount, the

new note would be valid and collectible. *Miller v. Hull*, 4 Tenn., 144; *Kent v. Walton*, 7 Wend., 256. So where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract. *Washburn v. Franklin*, 35 Barb., 599; *S. C.*, 13 Abb. Pr., 140. If the Act of December 14, 1875 [*supra*], repealed the restraining laws absolutely as to cities, which we do not decide, the notes first issued by the City were valid from that time.

We think the charge as quoted was right. *Hitchcock v. Galveston*, 96 U. S., 341 [XXIV., 659]; *The Mayor v. Ray*, 19 Wall., 468 [86 U. S., XXII., 164]; *Police Jury v. Britton*, 15 Wall., 566 [82 U. S., XXI., 251]; *Mullarky v. Cedar Falls*, 19 Iowa, 24; *Sykes v. Luffery*, 27 Ark., 407; *Wright v. Hughes*, 13 Ind., 109, are authorities to the point. See, also, the numerous cases cited in *Dillon, Mun. Corp.*, sec. 407, n.

Judgment affirmed.

Cited—5 Dill., 309; 1 McCrary., 83.

THE BANK OF THE OLD DOMINION,

Plff. in Err.,

v.

JAMES H. McVEIGH ET AL.

(See S. C., 8 Otto, 332-334.)

Review of state judgments.

A decision of a State Court, that, by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory and went to reside permanently within the Confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him, does not raise a federal question which this court can review.

[No. 634.]

Submitted Dec. 9, 1878. Decided Dec. 23, 1878.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

On motion to dismiss.

This case arose in the Corporation Court of Alexandria, Va., and was twice taken to the Supreme Court of Appeals of the State, before being brought to this court.

The case is sufficiently stated in the opinion of the court.

Messrs. P. Phillips, W. A. Maury and C. Robinson, for defendants in error:

It is not sufficient that a federal question was presented to the court; it is the determination of that question that confers the jurisdiction.

Bolling v. Lersner, 91 U. S., 594 (XXIII., 366); *Ins. Co. v. Hendren*, 92 U. S., 286 (XXIII., 709); *Moore v. Miss.*, 21 Wall., 638 (88 U. S., XXII., 653).

No other question was necessary to be decided by the Supreme Court in reversing the

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts. Power of state courts to construe their own statutes. See note to *Jackson v. Lamphire*, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; the Supreme Court will not review their decisions except when specially authorized to by statute. See note to *Commercial Bk. v. Buckingham*, 46 U. S. (5 How.), 317.

judgment of the Corporation Court, than that, on general principles of law as applicable to the circumstances of the case presented by the record, the indorser who had abandoned his residence at Alexandria, did not by so doing forfeit his right to notice; and that the holder of the notes was bound to give notice within a reasonable time after the war had terminated.

Mr. H. O. Claughton, for plaintiff in error: At least four federal questions were expressly decided by the Supreme Court of Virginia, and the decision of these questions was absolutely necessary to the judgment rendered by the court:

1. That the Proclamations of the President made in April, 1861, prohibited all intercourse between the hostile sections.

2. That all the incidents and consequences of a war *inter gentes* applied to the late conflict from the very beginning of it.

3. That the legal effect of the Proclamations of the President issued in April, 1861, was to make notices, which were given to parties who had left their homes within the Federal lines and gone into the Confederate lines, invalid, and to impose upon parties giving such notices, the obligation of giving further notice after the close of the war.

4. That the legal effect of the said Proclamations upon the contract of indorsement was to suspend it and make the protest of the notes, as well as the notice thereof, unlawful.

These questions have been decided by this honorable court to be federal questions in several cases. The cases of *Ludlow v. Ramsay*, XIX., 1007; *Delmas v. Ins. Co.*, 14 Wall., 661 [81 U. S., XX., 757]; *Turner v. Keach*, 15 Wall., 67 [82 U. S., XXI., 82]; *Rockhold v. Rockhold*, 92 U. S., 129 [XXIII., 507]; *Ins. Co. v. Hendren*, 92 U. S., 286 [XXIII., 709]. All the court below decided was, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory and went to reside permanently within the Confederate lines before the note matured, a notice of protest left at his former residence in the loyal territory was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured. It is true that, upon a former decision of the same cause, something was said in the opinion of the Court of Appeals as to the effect of the Ordinance of Secession of Virginia upon the rights of the parties, and that upon the last trial in the corporation court an effort was made by the plaintiff in error to obtain a ruling upon the constitutionality of that ordinance; but it is equally true that the corporation Court declined to rule at all upon the question, and that the Court of Appeals, in the opinion filed with the judgment brought here for review, says: "The court before refused to

give any opinion on the constitutionality of the Ordinance of Secession, as it does now, such question being irrelevant and not involved, as we think, in the decision of the cause. The decision of this court would be the same, whether it held the said Ordinance of Secession to be constitutional or unconstitutional." A careful examination of the record satisfies us of the correctness of this statement. The case was decided "upon principles of general law alone," and it nowhere appears in the record that the plaintiff in error set up or claimed any "title, right, privilege or immunity," under the Constitution or authority of the United States, which was denied him by the decision below.

Dismissed.

Cited—104 U. S., 602; 107 U. S., 435.

JOHN T. WILSON, *Plff. in Err.*,

v.

JAMES W. GOODRICH, Assignee, etc.

Assignee in bankruptcy, power to sue in State courts.

An assignee in bankruptcy, under the Bankrupt Act of 1867, had authority to bring suit in the State Courts, whenever those courts were invested with appropriate jurisdiction suited to the nature of the case.

[No. 100.]

Argued Dec. 20, 1878. Decided Dec. 23, 1878.

IN ERROR to the Superior Court of the State of Massachusetts.

The defendant in error, as assignee in bankruptcy, sued and obtained judgment in the court below. The defendant sued out this writ of error, and denies the jurisdiction of the State court.

The case is further stated in the opinion.

Mr. Edward Avery, for plaintiff in error.

Mr. N. B. Bryant, for defendant in error, was not heard, as the court declined to hear further agreement.

Mr. Chief Justice Waite delivered the opinion of the court:

In *Claflin v. Houseman*, 93 U. S., 143 [XXIII., 840], we held that an assignee in bankruptcy under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring suit in the State Courts, whenever those courts were invested with appropriate jurisdiction suited to the nature of the case. This suit was begun March 18, 1872, before the Revised Statutes were in force. Section 5597 provides that the repeal of the Acts embraced in the revision should not affect any suit or proceeding had or commenced in any civil cause before the repeal. This leaves the present case, therefore, within the rule settled in *Claflin v. Houseman*, and renders it unnecessary to consider whether the jurisdiction in this class of cases was taken away by the revision as to suits afterwards commenced.

Judgment affirmed.

COUNTY OF DAVIESS, *Plff. in Err.*,

v.

ALBERT HUIDEKOPER.

(See S. C., 8 Otto, 98-104.)

County bonds—assent by vote.

1. Bonds of a county in Missouri are not void in the hands of a *bona fide* purchaser for value, because the railroad company, to which said bonds were issued in payment for its capital stock, was not created according to law until subsequent to the favorable vote of the qualified voters and the order of subscription.

2. If assent was given to a specified aid to a railroad named, a perfecting of the corporation before the subscription is made and the bonds issued, is a compliance with the statute.

[No. 95.]

Argued Dec. 18, 1878. Decided Jan. 6, 1879.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

The case is fully stated by the court.

Mr. Willard P. Hall, for plaintiff in error:

The first of the questions on which the Judges of the Circuit Court were opposed in their opinions, has been decided by the Supreme Court of Missouri in favor of the plaintiff in error, in the case of *Rubey v. Shain*, 54 Mo., 207, *et seq.* As this is a case arising under the Constitution and laws of Missouri, the decision of the Supreme Court of Missouri, just referred to, is binding on this court.

Adams v. Nashville, 95 U. S., 21 (XXIV., 370). See, also, *Leavenworth Co. v. Barnes*, 94 U. S., 70 (XXIV., 63); *South Ottawa v. Perkins*, 94 U. S., 264 (XXIV., 156); *Stone v. Wisconsin*, 94 U. S., 181 (XXIV., 102); *Elmwood v. Marcy*, 92 U. S., 294 (XXIII., 713); *State R. R. Taxes*, 92 U. S., 575 (XXIII., 663); *Townsend v. Todd*, 91 U. S., 453 (XXIII., 413).

The second question has been decided in favor of the plaintiff in error, by this court, in the late case of *Cromwell v. Co. of Sac.*, 94 U. S., 351 (XXIV., 195).

Mr. Joseph Shippen, for defendant in error:

The laws of Missouri contain no prohibition that the vote of the People shall precede the incorporation of the company. On the contrary, they contemplate and permit it.

1 Wagn. Mo. Stat., tit. Railroad Companies, sec. 1, p. 295.

This organization is a railroad company, but not yet a corporation. This company may proceed to build and operate a railroad as a firm or partnership. If it desires to become incorporated it must proceed further.

That the vote occurred prior to incorporation is stated; but in the absence of averment in the petition as to when the subscription was made, it is presumable that it was regularly made after the corporation was incorporated, and not before.

Cass Co. v. Johnston, 95 U. S., 360 (XXIV., 416).

The defendant cannot, in this action, be heard to deny that the corporation to which the bonds were issued, was not duly organized at the date of the submission and vote.

St. Louis v. Shields, 62 Mo., 247; *Smith v. Clark Co.*, 54 Mo., 58; *Farr Etc. Ins. Co. v. Needles*, 52 Mo., 17; *Camp v. Byrne*, 41 Mo., 525; *R. R. Co. v. McPherson*, 35 Mo., 13; *State Bk. v. Merch. Bk.*, 10 Mo., 124; *Hamtramck v. Bk.* 2 Mo., 169.

Recent decisions of this court are as follows: *Town of Coloma v. Eaves*, 92 U. S., 484 (XXIII., 579); *Co. of Randolph v. Post*, 93 U. S., 502 (XXIII., 957); *Co. of Leavenworth v. Barnes*, 94 U. S., 70 (XXIV., 63); *Comrs. of Douglas Co. v. Bolles*, 94 U. S., 104 (XXIV., 46); *Comrs. of Johnson Co. v. Thayer*, 94 U. S., 631 (XXIV., 133); *Co. of Cass v. Johnston*, 95 U. S., 360 (XXIV., 416).

The decision of the Supreme Court of Missouri in the case of *Rubey v. Shain*, 54 Mo., 207, is not an authority to be relied on or followed in this case.

The judgment was reversed on the sole ground, based on principle and authority, that the collector was not liable in such an action. pp. 211, 212.

But the court went on to say that the vote and subscription were illegal, and the bonds unauthorized and void, even in the hands of *bona fide* purchasers for value, because the railroad company was not organized at the time of the vote. Clearly, all this was an *obiter dictum*.

Comrs. of Johnson Co. v. Thayer, 94 U. S., 631 (*supra*); *Co. of Cass v. Johnston*, 95 U. S., 360 (*supra*).

Mr. Justice Hunt delivered the opinion of the court:

The plaintiff below brought this suit to collect from the County of Daviess, Missouri, the amount of 44 interest coupons for \$35 each, formerly attached to bonds issued by the county to the Chillicothe and Omaha Railroad Company, to aid in the construction of its railroad. A demurrer to the amended petition was overruled, and final judgment for the amount of the coupons was rendered by the court below, which also certified a division of opinion on points presented.

The questions certified are as follows:

First. Whether the bonds, for the collection of the interest coupons of which the suit was brought, were issued without due authority of law, and are void in the hands of a *bona fide* purchaser for value, because the railroad company to which said bonds were issued, in payment of capital stock by it subscribed, was not created according to law until subsequent to the favorable vote of the qualified voters and the order of subscription.

Second. Whether the former judgment recovered by the plaintiffs in a former suit in this court against the defendant, upon interest coupons from the same bonds again set forth in this suit estops the defendant from pleading in bar to the merits herein.

The Constitution of Missouri, 1 Wagn. Stat., 62, sec. 14 of art. 11, provides as follows, viz.:

"The General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The General Statutes provide, 1 Wagn. Stat., 295, how railroad companies may be formed, and further provide (1 Wagn. Stat., 305):

Section 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city or town in, or loan the credit thereof to, any railroad company duly

organized under this or any other law of the State: *Provided*, That two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription."

Having paid his money in good faith for the bonds issued by this County, and the interest becoming payable, it is not unnatural that the holder and owner should demand payment of such interest. The subscription by the County to the railroad stock, the receipt and holding of the stock by the County, the assent by two thirds of the qualified voters of the county that such subscription should be made, the actual issuing of the bonds, and the purchase of the same by the plaintiff below, without knowledge of any objection to them, are conceded.

It is said, however, that these things were not done in their proper order; that the vote of the citizens assenting to the subscription was taken before the organization of the railroad company was complete, and that although that act was not under the control or direction of the holder of the bond, but an irregularity of the County, if it is an irregularity, the County is thereby relieved from the payment of its debts, which would otherwise be not only just and honest, but lawful. This is the point that is made in the first of the questions presented by the certificate of the Judges. The facts on which this branch of the case rests are these: the articles of incorporation of the road in question, which bear date June 18, 1867, contain the statements required by the statute, giving the length of the road, the amount of the capital stock, and the names of the directors, and were subscribed by the subscribers for the amounts indicated. The amount subscribed was not then as large as that required by the statutes of Missouri, to wit: \$1,000 per mile for the length of the road. This sum was, however, obtained as early as the 11th day of July, 1868, when the articles were filed in the office of the Secretary of State, and the incorporation became perfect. On the first of July, 1869, the county court made its subscription, issued its bonds, sold the same, received the proceeds, paid for the stock, and received the stock. The road was built through the County; and for several years the County levied and collected taxes to pay the interest of the bonds, and did pay the interest for those years.

The precise question now presented has never been decided in this court, but its determination depends upon principles which are well settled. These bonds are securities which pass from hand to hand with the immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them, the officers of the county court in this instance, are the agents of the municipal body authorizing their issue, and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail or circumstance; if they execute it in an irregular manner, it is the misfortune of the town or county, and not of the purchaser; the loss must fall on those whom they represent, and not on those who deal with them. There must, indeed, be power, which if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it. Thus, if the Constitution

See 8 Otto.

U. S., Book 25.

or the statute should peremptorily prohibit a municipal body from loaning its credit to or subscribing for stock in a railroad corporation, a subscription or a loan made subsequently to the passage of the Act would give no right against the county, although the bond should recite that there was such authority, and the purchaser should pay full value in the belief of its truth. There is no difficulty in appreciating the distinction stated; and we are now to ascertain whether the error we are considering, assuming it to be one, arises from an irregularity in the exercise of an existing power, or whether there is total want of authority to act.

The case concedes that the question of subscription to the stock of this very Company was submitted to the voters of Daviess County, that two thirds of the qualified voters of that County assented to the making of that subscription, and that the bonds, the coupons from which are here in suit, were issued pursuant to an order of the County Court of Daviess County, made under authority of the Constitution and General Statutes of the State of Missouri.

After admitting that it made a contract with this company to take its stock, and not with some other company, and that the contract with this identical company was authorized with the forms and solemnities set forth, and that it received and, so far as known, has ever since held and enjoyed; and now holds and enjoys the profits of the stock of this very company issued for such bonds; and also admitting that when the bonds were so issued and delivered by it the incorporation had been completed in form and detailed for one year, can it now be permitted to urge as a defense that such company was not a legally organized corporation when the election was held, and did not become such until after that period?

The 18th section of the Missouri Statute already quoted, pp. 303-305, shows that the municipal body, in regard to its privileges, liabilities and responsibilities as a taker and holder of railroad stock, stands like an individual subscriber. It is as follows:

"Section 18. Upon the making of such subscription by any county court, city or town as provided for in the previous section, such county, city or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted, and subject to the liabilities imposed, by this chapter or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the Board of Directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city or town to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in one year in any county, city or town shall not exceed thirty per centum of the subscription made by such county, city or town."

It shows, also, that it devolved upon the county court, subject to the question of power before stated, to determine whether a subscription had been made, and to raise money for its payment. This included a determination of the questions whether an assent had been given by the voters, and whether a subscription had in fact been made by the county court. It did determine both of these questions in the affirmative, and so certified in the bonds issued by the same authority, and which are now in suit.

Under these circumstances, the authorities in this court and in the State of Missouri hold that the decision of the voters and the action of the county court in issuing the bonds in question, and their subsequent action in receiving and retaining their benefits, gave validity to the bonds, and that they are now to be taken as valid instruments.

Among these authorities are the following: *Coloma v. Bares*, 92 U. S., 484, 491 [XXIII., 579, 581]; *Randolph Co. v. Post*, 93 U. S., 502 [XXIII., 957]; *Leavenworth Co. v. Barnes*, 94 U. S., 70 [XXIV., 63]; *Comrs. of Douglass Co. v. Bolles*, 94 U. S., 104 [XXIV., 46]; *Comrs. of Johnson Co. v. Thayer*, 94 U. S., 631 [XXIV., 133]; *Cass Co. v. Johnston*, 95 U. S., 360 [XXIV., 416]; *St. Louis v. Shields*, 62 Mo., 247; *Smith v. Clark Co.*, 54 Mo., 58, 81.

These authorities show that if the County had made a contract with the railroad company in April, 1863, it would not have been permitted, under the circumstances stated, to deny it. But here was no contract. It was a simple indication of the pleasure or wish of the voters of the County that aid should be furnished to this railroad. The statute was intended as a guard against hasty action in this respect, and makes no requisition that the corporation shall be so perfected that a *quo warranto* could not reach it. If assent is given to a specified aid to a railroad named, we are of the opinion that a perfection of the corporation before the subscription is made and the bonds issued is a compliance with the statute.

Rubey v. Shain, 54 Mo., 207, is cited to the contrary. There are several reasons why that case does not control the one we are considering.

1. The question of the legality of the subscription was never properly reached. Whether the tax which was levied to pay the county subscription for stock was legal or illegal, it was certain that the collector, who had a warrant for its collection valid on its face, and who was the defendant in that suit, was not liable for enforcing it. That an officer in such case is protected by his writ, and that to protect himself he need not even produce the evidence of a judgment, was held as long ago as in *Holmes v. Nuncaster*, 12 Johns., 395, and has been so held from that time to the present. Such, too, is the express holding of the court in *Rubey v. Shain*, and an examination of the merits of the case was unnecessary.

2. It differed from the present case in the fact that the township vote of assent, not only, but the subscription to the stock and the issuing of the bonds, all occurred before the organization of the company. The vote was taken in June, 1869, the subscription ordered and the bonds issued on the 9th of November, 1869, while the articles of association were executed on the 10th, and filed with the Secretary of State on the 12th

of the same month and year. In the present case, the election was held April 7, 1868, the articles were filed July 11, 1868, the subscription made and the bonds dated July 1, 1869. The organization was complete for a year before the subscription was made.

3. In that case, the subscription was needed to complete the organization. In this case it was not. The court, in *Rubey v. Shain*, say "That it is not intended that counties, cities or towns shall, by their subscription, form the basis on which a future corporation is to be erected, a nucleus around which aid is to be gathered from other quarters, to construct roads, but that they may, by their subscriptions or loans, aid corporations already in existence." There is a broad difference between the cases where the subscription is actually made and the bonds are issued in fact after the corporation is complete, and where these things are done while the corporation remains incomplete.

Upon the whole matter, we are of the opinion that the case was well decided, and that the judgment should be affirmed. The first question certified is answered in the affirmative, and as that disposes of the entire controversy, no attention need be given to the second question.

STATE, *ex rel.* THE CITIZENS' BANK OF LOUISIANA, *Pf. in Err.*,
v.

THE BOARD OF LIQUIDATION OF LOUISIANA, AND THE STATE OF LOUISIANA.

(See S. C., 8 Otto, 140-142.)

Jurisdiction over state judgments—federal question.

1. It is not enough to give this court jurisdiction over the judgments of a State Court, for a record to show that a federal question was argued or presented to that court for decision.

2. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it.

[No. 215.]

Submitted Dec. 23, 1878. Decided Jan. 6, 1879.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is fully stated by the court.

Messrs. **Edward Janin, Armand Pitot**, for plaintiff in error.

Messrs. **J. Q. A. Fellows, J. B. Cotton** and **A. P. Field, Atty-Gen. of La.**, for defendant in error, cited on the question of jurisdiction:

Murdock v. Memphis, 20 Wall., 590 (87 U. S., XXII., 429); *Worthy v. Comrs.*, 9 Wall., 611 (76 U. S., XIX., 565); *N. Y. Life Ins. Co. v. Hendren*, 92 U. S., 287 (XXIII., 710).

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was an application for a *mandamus* to compel the Funding Board of Louisiana to fund

NOTE.—Jurisdiction of U. S. Supreme Court where federal question arises, or where is drawn in question statute, treaty or Constitution of U. S. See note to *Matthews v. Zane*, 8 U. S. (4 Cranch), 332; note to *Martin v. Hunter*, 14 U. S. (1 Wheat.), 304; and note to *Williams v. Norris*, 25 U. S. (12 Wheat.), 117.

under the funding Act of that State, passed January 24, 1874, \$60,000 and accrued interest of the second mortgage bonds of the New Orleans, Mobile, and Chattanooga Railroad Company, guarantied by the State under the alleged authority of Act No. 26, approved February 16, 1869. The averment in the petition is "That the refusal of the Board to fund the bonds and coupons presented by the petitioners is in violation of the compact entered into between the People of the State of Louisiana and the bond holders."

In the answer, several defenses were set up, but in none was any federal question in terms presented. In one, which was separate and distinct from the others and in no manner connected with them, it was alleged "That the bonds presented in this case, and the funding of which is claimed, are not included among the obligations permitted to be funded by the Act, * * * and are not the bonds of this State."

This defense was sustained by the Supreme Court of the State because the Act only permitted the funding of "valid outstanding bonds of the State, and valid warrants drawn previous to the passage of the Act," and the bonds held by the relator were not bonds of the State, but bonds of the railroad company, on which the State was liable only as guarantor.

No federal question was involved in this decision, but it determined the cause. The relator had no contract which the funding Act impaired. The State being in debt, passed the funding law. The relator, claiming the benefit of the privileges conferred by the law, asked for a *mandamus* to compel the state officers to issue funding bonds in exchange for the obligations the relator held and offered to surrender. This was refused, because, in the opinion of the court, the Act did not provide for that class of state obligations. Over this decision we have no control. In fact, being the construction of a state statute by a State Court, it controls us. Under these circumstances, if we should take jurisdiction we would be compelled to affirm the judgment, whether we found any error in respect to questions arising under the other defenses or not. This defense is complete in itself, and sufficient to support the judgment we are asked to review.

To give us jurisdiction under section 709, R. S., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause. *Williams v. Oliver*, 12 How., 125; *Klinger v. Missouri*, 13 Wall., 257 [80 U. S., XX., 635]. As the State Court has decided as a question of state law that even if the guaranties of the bond are valid obligations of the State, they are not fundable under the Act, it matters not in this suit whether the decision arising their validity was erroneous or not. The judgment would have been the same whether the guaranties were held to be valid or invalid. No federal question having been specially raised by the pleadings, and the record showing clearly on its face that the decision of such a question was not necessarily involved, we will not go through the opinion of the court, even in Louisiana, to ascertain whether one was in fact decided. In no event could it have affected the determination of the cause. There is nothing in *Murdock v. Memphis*, 20 Wall., 590 [87 U. S., XXII., 429], to the contrary of this.

See 8 OTTO.

In that case the decision of the federal question raised was necessary. The judgment as given could not have been rendered without passing upon it. We have often since that case re-affirmed the old rule. *Moore v. Mississippi*, 21 Wall., 636 [88 U. S., XXII., 653]; *Brown v. Atwell*, 92 U. S., 327 [XXIII., 511]. In the last case, citing numerous authorities, we say, "We have often decided that it is not enough to give us jurisdiction over the judgments of the State Courts for a record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

It follows that the writ must be dismissed for want of jurisdiction.

Dismissed.

WILLIAM S. McKNIGHT ET AL., *Appts.*,

v.

UNITED STATES.

UNITED STATES, *Appt.*,

v.

WILLIAM S. McKNIGHT ET AL.

(See S. C., 8 Otto, 179-186.)

Government claim—payment to assignee—illegal assignment—set-off.

1. Where a claim against the Government was awarded and paid to assignees of the claimant, upon his receipt, the Government cannot recover the amount paid on the ground that the assignment was contrary to law and void.

2. But a payment by the Government of part of such claim to the assignees, was not a waiver of the objection, to paying the residue, that the assignment was illegal.

3. The Government can set off against a claim, the amount due it by the claimant upon another obligation.

[Nos. 707, 708.]

Submitted Dec. 16, 1878. Decided Jan. 6, 1879.

CROSS appeals from the Court of Claims.

The case is fully stated by the court.

Mr. Enoch Totten, for claimants.

Mr. Edward B. Smith, for the United States.

Mr. Justice Swayne delivered the opinion of the court:

These are cross appeals in the same case. The sum of \$30,678.68 was awarded by the proper accounting officers to McKnight and Richardson, as assignees of Simeon Hart, a government contractor, for furnishing army supplies. The assignment was made by parol, and the delivery to the assignees of a receipt signed by Hart, with a blank for the amount that might be paid by the United States, to be filled in accordingly. Upon the allowance of the claim as stated a treasury warrant was issued to McKnight and Richardson for \$21,678.68. The remaining \$9,000 was retained in the Treasury "On account of a debt due the United States from Simeon Hart, as surety on a bond given by

Lieut.-Col. Jno. B. Grayson, Com. of Subs., to await the final settlement of said Grayson's accounts." This reservation of the \$9,000 was made by order of the Second Comptroller and the Secretary of the Treasury. McKnight and Richardson sued in the Court of Claims to recover this sum. The United States thereupon set up a counter claim, and insisted upon their right to recover back the \$21,678.68 which had been paid already to the petitioners.

The Court of Claims adjudged against both parties, and both appealed to this court.

The claim of the United States cannot be sustained. According to the settled usages and practice of the department, the evidence in the record was sufficient to warrant the allowance of the amount found due to Hart. Lieut.-Col. Grayson, as a commissary of subsistence, was charged with the duty of receiving and inspecting the articles delivered, and of certifying the quantities and the prices to be paid. The voucher which he gave is explicit upon these points, and presupposes full knowledge on his part of what is set forth. His fidelity in the discharge of this duty was secured by his honor as a soldier, his commission and his bond. It does not appear that any fraud was ever suspected, or that there is the slightest ground for such an imputation. It is true the assignment was contrary to law and, therefore, a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment or improper purpose on either side. Although the petitioners had no claim against the United States, they had a valid claim against Hart. The money was received in payment of his debt, and discharged it to that extent. He is estopped by his receipt from setting up any claim against the Government. It does not appear that he has ever complained. Under the circumstances, it is quite clear that if the controversy were between private parties, there could be no recovery. 1 Story, Cont., sec. 541.

With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter.

There are also fatal objections to the case of the petitioners.

The assignment, as we have already said, was wholly void. *Spofford v. Kirk*, not yet reported [97 U. S., 484, XXIV., 1032]. It conferred no right that the United States was bound to regard. The payment of a part was not a waiver of this objection as to the residue. An agreement to that effect, express or implied, looking to the future, would have been without validity. There could have been no consideration for it, and no one had authority to make it. The statute is conclusive upon the subject. In the view of the law, the claim is as if the facts of which it is predicated were not.

It was also competent for the United States to set off the amount due to Hart under his contract, so far as was necessary to meet his liability as surety on the bond of Grayson, and the Court of Claims was bound to adjudge accordingly. R. S., 1059; *Gratiot v. U.S.*, 15 Pet., 336.

The judgment of the Court of Claims is affirmed.

ALEXANDER T. STEWART ET AL., *Plffs.*

in Err.,

v.

MEYER SONNEBORN.

(See S. C., 8 Otto, 187-202.)

Malicious prosecution—question for jury—malice—probable cause—evidence—legal advice—damages.

1. Malice is essential to the maintenance of an action for malicious prosecution. Malice, either express or implied, and the want of probable cause must both concur.

2. The existence of malice is always a question exclusively for the jury. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it.

3. Malice may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice.

4. The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.

5. In every action for malicious prosecution, it must be proved that the proceeding instituted against the plaintiff has failed; but its failure is not evidence of either malice or want of probable cause.

6. That the defendants in such a case acted *bona fide* upon legal advice, is a good defense.

7. If the jury find for the plaintiff, they cannot, in estimating the damages, consider the fees of counsel in prosecuting the case.

[No. 92.]

Argued Dec. 16, 17, 1878. Decided Jan. 6, 1879.

IN ERROR to the Circuit Court of the United States for the Middle District of Alabama.

The case fully appears in the opinion of the court.

Messrs. Roscoe Conkling, C. F. Peck, H. H. Rice and Eli S. Shorter, for plaintiffs in error:

At common law no such action could be maintained without averring and proving malice.

Benson v. McCoy, 36 Ala., 710; *McKellar v. Couch*, 34 Ala., 336; 3 Bl. Com., 100 and note (marg.), 126; *Lindsay v. Larned*, 17 Mass., 191; *McLaren v. Bradford*, 26 Ala., 616; *McCullough v. Grishobber*, 4 Watts & S., 201; *Stone v. Swift*, 4 Pick., 389; *Garrard v. Willet*, 4 J. J. Marsh., 630; *White v. Dingley*, 4 Mass., 433; *Turner v. Walker*, 3 Gill. & J., 377; *Morris v. Corson*, 7 Cow., 281; *Ives v. Bartholomew*, 9 Conn., 309; *Marshall v. Betner*, 17 Ala., 832; *Tatum v. Morris*, 19 Ala., 302; *Vanduzor v. Linderman*, 10 Johns., 106; *De Medina v. Grove*, 10 Ad. & El. (N. S.), 152, 168, 172, 177; *Churchill v. Siggers*, 3 El. & B., 937; *Olinger v. McChesney*, 6 Leigh, 660; 2 Greenl. Ev., secs. 449-453.

"The mere wrongful resort to legal process affords no ground of action."

McKellar v. Couch, *supra*; Co. Litt., 161, b, n.

It is *damnum absque injuria*, the costs being cast upon the unsuccessful party, as a satisfaction to the defendant for the inconvenience of being held to defend a groundless suit.

McKellar v. Couch, *supra*; *Robertson v. Robertson*, 58 Ala., 68, Sup. Court Ala., Dec. Term, 1877, in MS.

NOTE.—Malicious prosecution; when advice of counsel is a defense.

Where a party has communicated to his counsel all the facts bearing on the case of which he has knowledge or could ascertain, and has acted upon the advice received honestly and in good faith, want of probable cause is negatived, and action for malicious prosecution will not lie. *Ash v. Marlow*, 20

The plaintiff below understood this principle well it seems, and framed his complaint accordingly; alleging that these plaintiffs "wrongfully, maliciously, etc.," made use of the legal process against him.

As shown by the authorities above cited, the misuse of legal process must be alleged to be wrongful and malicious, but the wrong and the malice must both be proved, to sustain the action or a verdict for damages.

The whole general charge of the court ignores this essential requisite of proof of malice; while those particular portions of the charge to which plaintiffs in error excepted, are directly in conflict with the principle above stated.

Costs are the only damages allowed to successful defendants in civil suits, when there is no malice on part of plaintiff; except in those special cases in which other damages are allowed by special statutes; such as suits on attachment, injunction, detinue and other bonds. Not even can attorney's fees, incurred in defending ordinary civil suits, in absence of statutory provisions, be allowed against plaintiffs.

Oelrichs v. Spain, 15 Wall., 230 (82 U. S., XXI., 45); *Robertson v. Robertson*, 58 Ala., 68, Sup. Court Ala., Dec. Term, 1877, in MS.

To sustain an action on the case for a malicious prosecution, four points must concur, the absence of either of which will be fatal to the right of the plaintiff to recover: 1. Falsehood in the demand; 2. Want of probable cause; 3. Malice in the defendant; 4. Damage to the plaintiff. 3 Bl. Com. by Chit. (marg.), 126, note 13.

The testimony of Shorter shows that he was the attorney of A. T. Stewart & Co., and advised them, upon the facts stated, that they had a valid legal demand against Sonneborn. The suit was brought upon the advice of counsel; and, notwithstanding the verdict of the jury was against A. T. Stewart & Co., the evidence in the case clearly shows that the verdict should have been in favor of the plaintiffs in the Circuit Court of Barbour County. The verdict as rendered was against the law and evidence, and a new trial ought to have been granted by the presiding Judge. The verdict of the jury and the refusal of the court to grant a new trial, can only be attributed to local prejudice against the plaintiffs, or to worse cause.

The advice given by Shorter stated the law correctly.

Gow, Part., 249, 250; 1 Pars. Cont., 144, 145; *Graves v. Merry*, 6 Cow., 701; *Prentiss v. Sinclair*, 5 Vt., 149; *Grant v. Cole*, 8 Ala., 519.

Messrs. P. Phillips and W. Hallett Phillips, for defendant in error:

No one has the right to force another into bankruptcy, if he be not a creditor. This is not

merely a proceeding to collect a debt. A creditor for \$300 may cause to be seized the whole of a man's estate, however large.

In attachment cases, where the law allows a seizure of property, the levy must bear some just proportion to the debt claimed.

The gravity of this proceeding is understated by *Mr. Justice Bradley*, when he says: "Throwing a man into bankruptcy is a serious thing, and ought not to be resorted to as a proceeding *in terrorem* to collect a debt."

One who resorts to these extraordinary provisions of law must, therefore, do so at his peril.

The judgment rendered in favor of Sonneborn in the action instituted by Stewart & Co., is certainly conclusive on the question that they were not his creditors.

If there was no debt there was no probable cause, and the want of probable cause implies legal malice.

What constitutes probable cause is for the determination of the judge. Whether a party had reason to find probable cause in the circumstances with which he was acquainted is immaterial, if those circumstances do not amount in law to probable cause. 1 Tayl. Ev., sec 23.

Malice in fact differs from malice in law, in this: the former denotes an act done from ill-will to an individual; the latter, a wrongful act, intentionally done, without just cause.

Bromage v. Prosser, 4 Barn. & C., 247; *Watson v. Moore*, 2 Cush., 140.

The law implies malice when there is not proof to extenuate an act which has been rashly and indiscreetly done.

Long v. Rodgers, 19 Ala., 321, 332, citing 3 Stark., 389.

The consequence of this distinction between legal and actual malice is this: when the malice is only such as results from a groundless act, and there is no actual malice, none but compensatory damages are allowed:

"And this includes actual injury to property, loss of time, pecuniary expenses, counsel fees and any other loss suffered."

Opinion by *Judge Strong*, *Barnett v. Reed*, 51 Pa., 190.

In all cases of trespass, although purely unintentional, unless caused by inevitable accident, the party in default must respond in damages, and the intent is only material in aggravation or mitigation of damages.

Sedg. Dam., 660; *Tracy v. Swartwout*, 10 Pet., 80; *Bates v. Clark*, 95 U. S., 209 (XXIV., 473).

Mr. Justice Strong delivered the opinion of the court:

This was an action brought by Meyer Sonneborn, the plaintiff below, against A. T. Stewart

Ohio, 119; *Hill v. Palm*, 38 Mo., 13; *Eastman v. Keason*, 44 N. H., 519; *Walter v. Sample*, 25 Pa. St., 275; *Wicker v. Hotchkiss*, 62 Ill., 107; S. C., 14 Am. Rep., 75; *Anderson v. Friend*, 71 Ill., 475; *Davie v. Wisher*, 72 Ill., 262; *Stone v. Swift*, 4 Pick., 339; S. C., 16 Am. Dec., 349; *Whitefield v. Brooks*, 40 Miss., 311; *Laird v. Davis*, 17 Ala., 27; *Levi v. Brannan*, 39 Cal., 485; *Blunt v. Little*, 3 Mason, 102; *Sappington v. Watson*, 50 Mo., 83; *Cooper v. Utterback*, 37 Md., 232; *Glascock v. Brydges*, 15 La. Ann., 672; *Bartlett v. Brown*, 6 R. I., 37; *Davenport v. Lynch*, 6 Jones (N. C.), 545.

To repel inference of malice, from want of probable cause, party may show that he acted under advice of counsel, and it is question for jury whether he acted maliciously. *Turner v. Walker*, 3 Gill & J., 377; S. C., 22 Am. Dec., 329.

See 8 OTTO

Acting under advice of person not a lawyer is no protection. *Murphy v. Larson*, 77 Ill., 176.

Advice of a Justice of the peace does not afford protection. *Moore v. Sanborn*, 42 Mo., 494; *Brobst v. Ruff*, 100 Pa. St., 91; S. C., 45 Am. Rep., 353.

One acting under the direction of the Commonwealth's attorney, although actuated by malice, is not liable for a malicious prosecution. *Yocum v. Polly*, 1 B. Mon., 555; S. C., 36 Am. Dec., 533; *Thompson v. Lumley*, 50 How. Pr., 105.

Advice of an attorney personally interested is no protection. *White v. Carr*, 71 Me., 555; S. C., 36 Am. Rep., 353.

Malicious prosecution, action for, for causing a criminal prosecution. See note to *Wheeler v. Nesbit*, 65 U. S., XV., 765.

& Co., to recover damages for an alleged wrongful and malicious institution of proceedings in bankruptcy against him. The record shows that in the years 1865 and 1866 Sonneborn was a member of the firm of E. Leipziger & Co., in New York, and that while he was thus a member the firm bought goods on credit from A. T. Stewart & Co. Sometime in 1866 he withdrew from the firm; but no notice of his withdrawal was published, and the firm continued business in its old name without any apparent change. In the winter and spring of 1867 the defendants sold other goods on credit to E. Leipziger & Co., as they allege, without any notice that Sonneborn had previously withdrawn from the firm. On the other hand, he alleges that he did give personal notice of his withdrawal to one of the clerks in the defendants' store before the purchases of 1867 were made. No payment for these latter purchases having been made, the defendants in 1869 sued the plaintiff to recover the debt in the Circuit Court for Barbour County, Alabama, and after trial a verdict and judgment were given against them. This was at the August Term, 1871. From the verdict and judgment the defendants prosecuted an appeal to the Supreme Court of the State, where the judgment was reversed and a new trial ordered. On the 12th of May, 1873, before the case came on for a second trial, one Jonas Sonneborn, a brother of the plaintiff, brought suit against him in the Eufaula City Court, and one month afterwards recovered a judgment by default for \$6,944.43 (the present plaintiff having made no resistance), and thereupon an execution was issued and levied. This proceeding having come to the notice of A. T. Stewart & Co. (and they having been advised by legal counsel that an act of bankruptcy had thereby been committed by Sonneborn), on the 15th of August, 1873, they filed their petition in the District Court, praying that he might be declared a bankrupt, and that a warrant might issue to take possession of his estate. The petitioners represented themselves to be creditors for the sales made to E. Leipziger & Co. in 1867, of which firm they alleged Sonneborn was a member; and the act of bankruptcy alleged was that on the 12th of June, 1873, he suffered and permitted a judgment to be recovered against him by default in favor of Jonas Sonneborn, in the City Court of Eufaula, upon which an execution had issued, whereon a levy had been made. Upon this petition a rule to show cause, etc., was granted, an injunction and warrant for provisional seizure was granted, and on the 19th of August, 1873, the warrant was executed. Such was the situation when the case of the defendants against the plaintiff came on for the second trial in the Barbour County Circuit Court. The result of that trial in November, 1873, was a verdict and judgment for Sonneborn, which was subsequently affirmed by the Supreme Court of the State at its June Term, 1874. It thus having been determined that the defendants were not creditors of Sonneborn, the proceedings in bankruptcy were dismissed and the present suit was brought, alleging that they had been prosecuted maliciously and without probable cause.

The errors assigned are exclusively to the charge given by the court to the jury. The instruction given was (*inter alia*) as follows: "But

if they (the defendants) had no legal claim or demand against the complainant (Sonneborn), then, whether they had probable cause or not, they had no right to institute the proceedings (in bankruptcy). They cannot go back and allege that, though they had no legal claim against him, they thought they had; in other words, that they had probable cause to believe that they had such a demand. Unless they had a debt, they cannot allege probable cause for proceeding in bankruptcy at all. Their defense cannot stand on two probable causes, one on top of the other. * * * As it has been adjudicated by the Circuit Court of Barbour County, and affirmed by the State Supreme Court, that the defendants never had a legal claim against the plaintiff and, therefore, had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court, therefore, rules that the defense in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but it being shown by judicial determination that they had no legal claim or debt against the plaintiff and had, therefore, no right to institute bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of the damages, under the circumstances of the case. * * * We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained at all events." * * * And again: "The actual damages sustained by the complainant, that you will give him a verdict for, at all events."

This construction, we think, was erroneous, and emphatically so in view of the facts which appeared in evidence. It ignores totally the question whether the conduct of the defendants had been attended by malice, though the plaintiff's declaration charged malice, and it denied all importance to the necessary inquiry, whether they had probable cause for their action. More than this, it disregarded entirely evidence of facts which have been determined to be, in law, a perfect defense to an action for a malicious prosecution. The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest; his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill-feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the *maintenance* of any such action, and not merely (as the circuit court thought) to the

recovery of exemplary damages. Notwithstanding what has been said in some decisions, of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly, an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding. *Nicholson v. Coghill*, 4 Barn. & C., 21; *Webb v. Hill*, 3 Carr. & P., 485; *Burhans v. Sanford*, 19 Wend., 417; *Cotton v. Huidekoper*, 2 Pa., 149.

In *Farmer v. Darling*, one of the earliest reported cases, if not the earliest, 4 Burr., 1971, Lord Mansfield instructed the jury that "the foundation of the action was malice," and all the judges concurred that "malice, either express or implied, and the want of probable cause, must both concur." From 1766 to the present day, such has constantly been held to be the law, both in England and this country. See a multitude of cases collected in Vol. 8, U. S. Digest, first series, 942, pt. 95. And the existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice, from the want of probable cause, is one which the jury alone can draw. *Wheeler v. Nesbitt*, 24 How., 545 [65 U. S., XVI., 765]; *Newell v. Downs*, 8 Blackf., 523; *Johnson v. Chambers*, 10 Ired., L., 287; *Van Voorhees v. Leonard*, 1 N. Y. Sup. Ct. (T. & C.), 148; *Schofield v. Ferrers*, 47 Pa., 194. In *Mitchell v. Jenkins*, 5 B. & Ad., 588, Lord Denman said: "I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury." He added that, inasmuch as in that case the question of malice had been wholly withdrawn from the jury, there ought to be a new trial. In the case we have in hand, the question was withheld from the jury, and nothing was submitted to them but an estimate of damages.

There was also error in the charge in so far as it took away from the defendants the protection of probable cause for their instituting the proceedings in bankruptcy. The court ruled that the defense could not be sustained by proving they had probable cause for believing the plaintiffs had committed an act of bankruptcy, because, it turned out after the proceedings were commenced, that a verdict of a jury and judgment thereon had established the plaintiff was not indebted to them and, consequently, that they had no right to institute bankruptcy proceedings against him. It was further charged that "If they had no legal claim or demand against the plaintiff, then whether they had probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that though they had not a legal claim or debt against him, they thought they had; or that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all." To this we cannot assent. The existence of a want of probable cause is, as we See 8 OTTO.

have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. *Sutton v. Johnstone*, 1 T. R., 493; *Foshay v. Ferguson*, 2 Den., 617; *Murray v. Long*, 1 Wend., 140; *Wood v. Weir*, 5 B. Mon., 544. It is true that what amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton v. Johnstone*, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause is a question of law." This is the doctrine generally adopted. *McCormick v. Sisson*, 7 Cow., 715; *Besson v. Southard*, 10 N. Y., 236.

It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. *Taylor v. Willans*, 2 B. & Ad., 845. There may be, and there are, doubtless, some seeming exceptions to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove want of probable cause is involved. What their belief was is always a question for the jury.

The circuit court thought in the present case, and so charged, that the fact that after the institution of the bankruptcy proceedings a judgment was given in the Barbour Circuit Court against the defendants, thus determining that the plaintiff was not indebted to them, precluded them from setting up that they had probable cause for their action. That was giving undue effect to the judgment. The conduct of the defendants is to be weighed in view of what appeared to them when they filed their petition in the bankrupt court, not in the light of subsequently appearing facts. *Swaen v. Stafford*, 4 Ired. (N. C.), 392. Had they reasonable cause for their action when they took it? Not what the actual fact was, but what they had reason to believe it was. *Faris v. Starke*, 3 B. Mon., 4, 6; *Raulston v. Jackson*, 1 Sneed, 128.

In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed; but its failure has never been held to be evidence of either malice or want of probable cause for its institution; much less that it is conclusive of those things. *Cloon v. Gerry*, 13 Gray, 201; 1 Hill, Torts, and cases therecollected; *Bell v. Percy*, 11 Ired. (N. C.), 233. The final judgment in the Circuit Court of Barbour County did not, therefore, justify the court in charging either that there was no probable cause for the bankruptcy proceedings, or that the presence or absence of such cause was immaterial. If, when they filed their petition to have the plaintiff declared a bankrupt, the defendants believed and had reasonable cause to believe, that the plaintiff was indebted to them for the goods sold to E. Leipzeiger & Co. in

1867, and had reasonable cause to believe that he had committed an act of bankruptcy, there was probable cause for their action and the plaintiff was not entitled to recover. That they had reasonable cause to believe an act of bankruptcy had been committed, must be conceded, in view of the manner in which the judgment of Jonas Sonneborn against him had been obtained on the 12th of June, 1873, and in view of the decision of this court in *Buchanan v. Smith*, 16 Wall., 277 [83 U. S., XXI., 280]. If, therefore, they had an honest and reasonable conviction that the plaintiff was their debtor, that he was liable to them for the bills of goods sold by them in 1867 to E. Leipziger & Co., they had probable cause for instituting the proceedings in bankruptcy, and their defense was complete. The jury should have been so instructed.

We think, also, there was error in refusing to charge the jury as requested in the defendants' first point, which was as follows: "If the jury believe, from all the evidence, that A. T. Stewart & Co. acted on the advice of counsel in prosecuting their claim against Sonneborn in the Circuit Court of Barbour County, and upon such advice had an honest belief in the validity of their debt, and their right to recover in said action; and in the institution of the bankruptcy proceedings acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel; then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action." This the court refused to affirm, "except as contained and qualified in the preceding charge." An examination of the charge, however, reveals that the instruction was not contained in it nor alluded to. The defendants, we think, had a right to have it affirmed as presented. There was enough in the evidence to justify its presentation. It was proved that, before they commenced their suit in the Circuit Court of Barbour County, the defendants were advised by an eminent lawyer of Alabama, of twenty-five years' standing in the profession, respecting their legal right to recover the debt from the plaintiff, that, in his opinion, the plaintiff was liable therefor. It was further testified that the same lawyer advised them that, in his opinion, the plaintiff had rendered himself liable to involuntary bankruptcy proceedings by suffering his brother's judgment to go against him by default, and by advertising his entire stock of goods at and below New York cost. It was not until after this advice was given that the petition in bankruptcy was prepared and filed.

That the facts stated in the point proposed, if believed by the jury, were a perfect defense to the action; that they constituted in law a probable cause; and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover, is, in view of the decisions, beyond doubt. *Snow v. Allen*, 1 Stark., 502; *Ravenga v. Mackintosh*, 2 Barn. & C., 693; *Walter v. Sample*, 25 Pa., 275; *Cooper v. Utterbach*, 37 Md., 282; *Olmstead v. Partridge*, 16 Gray, 381. These cases, and many others that might be cited, show that if the defendants in such a

case as this acted *bona fide* upon legal advice, their defense is perfect.

The remaining exceptions to the charge require but brief notice. They relate to the assessment of damages, under the positive instruction to find for the plaintiff. Of these but a single one need be noticed. The court was asked to charge that the jury, if they found for the plaintiff, could not, in estimating the damages, consider the fees of counsel in prosecuting the case. The instruction was not given. It was refused, and erroneously, as we think. The fees of counsel in prosecuting this case were no part of the consequences naturally resulting from the action of the defendants in suing out the decree and warrant in bankruptcy. They were not what the defendants ought to have foreseen. That such fees are not recoverable, and why they are not, was clearly shown in *Good v. Mylin*, 8 Pa., 51; *vide*, also, *Alexander v. Herr*, 11 Pa., 537; *Stopp v. Smith*, 71 Pa., 285; *Hicks v. Foster*, 13 Barb., 663. The rule asserted in these cases we think is correct, and it should have been given to the jury in the present case. The defendants were the more injured by the refusal to give it, because evidence was given of the cost of prosecuting the suit calculated immensely to influence the damages—evidence which should not have been offered or received.

The other exceptions to the charge require no notice.

The judgment of the Circuit Court is reversed, and a venire de novo is ordered.

Mr. Justice Bradley, dissenting:

I am obliged to dissent from the judgment of the court in this case. It hardly needs any reference to authorities to establish the familiar doctrines laid down in the opinion. As applied to ordinary cases of actions for malicious prosecution and arrest, they are elementary law. It cannot be gravely supposed that when the court below instructed the jury that the question of malice and probable cause was not before them except on the question of vindictive damages, it meant to ignore or to dispute the law as laid down by the court.

The question, as viewed by the court below, was not as to what is incumbent on the plaintiff to prove in an ordinary action for malicious prosecution, but whether the defendant in this particular case stood in the category that entitled him to require such proof.

No one doubts that in an ordinary action of this kind malice must be proved, and that probable cause for the prosecution is a defense. The sole question was whether this was such an ordinary action, or not; and this question has not been met by the counsel at the bar, and I do not think it is met in the opinion of the court.

What are the grounds and reasons for the stringent rules imposed upon a plaintiff in an action for malicious prosecution? Why is he obliged to prove actual malice, and why is it that the defendant may justify by probable cause? The reason undoubtedly is, that every man in the community, if he has probable cause for prosecuting another, has a perfect right, by law, to institute such prosecution, subject only, in the case of private prosecutions, to the penalty of paying the costs if he fails in his suit. If this were not so, it would deter men from approaching the courts of justice for relief. Pros-

ecutions may fail from many causes independent of the justice of the case; and it would be very hard to visit a man with heavy damages for making a complaint, or bringing a suit, when he had probable cause for it. Hence the law gives to every man a right to complain of or sue another, if he has probable cause to believe he has ground for such complaint or suit. For the exercise of this right he cannot be made accountable in damages, except so far as the law, for the discouragement of private suits, imposes upon him the costs of the litigation. In the case of criminal charges, this right of making complaint is given to every man, for all are interested in the preservation of public order. It is not necessary that the complainant or prosecutor should show any private interest in himself. But in the case of a civil suit, the prosecutor must base his demand upon some claim due or supposed to be due to himself. Without any claim or pretense of claim, a suit brought in his own name, or in the name of another, would be of itself unlawful, malicious and without probable cause.

In short, upon probable cause, every man has a right to bring a charge against another for a public offense; and every man supposing himself to be wronged by another, may bring suit for the redress of that wrong. The law gives this right, and protects it in an action brought for malicious prosecution or malicious arrest.

But suppose that, in any class of cases, the law did not give this right; could the party then stand, for his defense, upon the question of malice and probable cause? Most assuredly not. He could not bring himself within the proper category. He would then be liable, at all events, for the actual damage caused by an unjust prosecution; just as much so as the man who should assault and wound another, or take and carry away his goods. And if an action should be brought against him for such unjust prosecution, a charge of malice, or want of probable cause, introduced in the declaration, would, at most, be regarded as surplusage; or the prosecution would, *per se*, be regarded as malicious. The allegation of malice would no more prejudice the right of recovery than did similar allegations of fraud and intent to deceive and injure in the old action of *assumpsit*. If a man does not bring himself within the category of *right to sue* given by the law, then it is clear that he cannot avail himself of the indulgence allowed by the law of showing probable cause for the suit.

That was precisely the question in this case.

The court below did not pretend to say that if Stewart & Co. had a right to institute proceedings in bankruptcy against Sonneborn, they could not, if unsuccessful, have availed themselves of all the defenses applicable in ordinary cases of actions for malicious prosecution. But, whether right or wrong in its views, it held that Stewart & Co. did not come within the category of persons having such right. It held that the bankrupt law gave such right to *creditors only*; not to those who only believed themselves to be creditors, but were not such. It held that the fact of their being creditors was a condition precedent to their right to institute bankrupt proceedings. The words of the law as found in section 39 of the Bankrupt Act are, that a person owing debts and doing certain

things enumerated in the section, "Shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of *one or more of his creditors*, the aggregate of whose debts provable under this Act amount to at least \$250." In construing this section the court held that, whilst the law did not require that a man should establish his debt by a judgment before instituting proceedings in bankruptcy, it nevertheless required that he should be, in fact, a creditor; and that, if his debt was disputed by the debtor, the responsibility was on him (the creditor) to establish it. If this were not so, then, a man prosecuting an old disputed claim against another, which the latter had always repudiated, and which was still contested in the courts, could effectually ruin his antagonist by simply swearing to his claim and throwing him into bankruptcy; and the latter, though finally successful in demonstrating to the courts the invalidity of the claim, would be without any redress except the petty satisfaction of recovering the costs of the suit. The court below held that this was not the law; and that a man who assumes the responsibility of throwing another into bankruptcy, and drawing down upon him all the consequences of breaking up his business and ruining his prospects for life, he must be prepared to show that at least he is in fact a creditor of his victim and, therefore, in the category of those who have a right to institute such proceedings.

In the present case, Stewart & Co. claimed to be creditors of Sonneborn; but the claim was disputed and in litigation when the proceedings in bankruptcy were commenced. It seems to me that the court was right in holding that the issue of the litigation of the claim was at Stewart & Co.'s risk, so far as the question of their right to institute proceedings in bankruptcy was concerned; and that, if they failed to establish their claim against him, they could not excuse themselves for the outrageous wrong of breaking up his business, and blighting his life, by showing that they had probable cause to believe that their *claim* was valid.

This position does not in the least disaffirm the right of a creditor, one who is really such, to plead or show probable cause for instituting bankruptcy proceedings against his debtor, where those proceedings are dismissed for want of sufficient ground, or for any other cause. A creditor has the right, by the law, to institute such proceedings upon probable cause. But, in my judgment, one who is not a creditor in fact has no such right. The law does not give him any such right.

The power to throw a man into bankruptcy and thus destroy his business and all hope for the future, is one of great magnitude to be given to one man over another. A wealthy man or firm, with extensive business connections, having this means of destruction in his hands, wields a tremendous power. The indiscriminate exercise of the power by many heavy capitalists throughout the country, as a means of collecting their debts, or holding it *in terrorem* over their debtors for that purpose, was one of the causes which made the late law odious to the community, and produced its repeal. In my judgment, the construction given to it by the court below, on the point in question, was

a wise and proper one, calculated to prevent or at least to moderate that reckless resort to the law which made it so odious and tyrannical in its effects. It did not trench upon any of the acknowledged principles of the law of malicious prosecution; it distinguished the case from those which came under that head of law, and simply held that one who is not, in fact, a creditor, cannot lawfully institute proceedings in bankruptcy; and if he does so to the prejudice of the alleged bankrupt, he is responsible for the damages caused to him thereby.

In the rightful prosecution of their alleged claim, whatever injury they may have caused to Sonneborn, Stewart & Co. could well have pleaded probable cause of believing their claim to be just; and Sonneborn could not have recovered damages without showing malice as well as want of probable cause. But in instituting proceedings in bankruptcy, they must at least be, in fact, creditors, as a condition precedent of their right to do so. If they had been in fact creditors, then they would have been entitled to all the privileges awarded to a defendant in an ordinary action for malicious prosecution, whatever the result of the proceedings might have been.

Putting the matter into a summary form, the result of my views is briefly this:

1. That in criminal matters every person, being interested in the public order, has a right by law, upon probable cause, to make complaint against a supposed offender.

2. That any person believing himself to have a claim against another, having probable cause for such belief, has a right, by law, to sue therefor; subject only, if his claim be adjudged false, to pay the costs of suit.

3. That any creditor of another may institute proceedings in bankruptcy against his debtor, if he have probable cause to believe that his debtor has committed an act of bankruptcy; but a condition precedent to such right is, that he be, in fact, a creditor.

Counsel, on argument, and it seems to me the court, in its opinion, takes for granted in this case the contrary of the last proposition, without considering the question itself. Assuming that a petitioning creditor is not under any condition precedent to be, in fact, a creditor, then I would agree to all that is laid down in the opinion. But that is the very question, and the only important question, in the case.

The exception in regard to allowing counsel fees in the suit by way of damages was not founded in truth. The court below expressly confined the jury to three specific grounds of damage, and this was not one of them. Hence the request to charge on the subject was not relevant, and the court did no wrong to the defendant in refusing to so charge.

I think the judgment should be affirmed.

Cited—81 N. Y., 494; 130 Mass., 445; 39 Am. Rep., 468.

M. T. SLAUGHTER ET AL., *Appts.*,

JAMES M. GLENN ET AL., *Exrs. of JOSEPH GLENN, Deceased.*

(See S. C., 8 Otto, 242-248.)

State laws, when operative—Texas law—married women.

1. In a controversy respecting the title to lands in a State, this court will administer the law of the State in all respects as if it were a court sitting there and reviewing the decree of an inferior court in that locality.

2. It is the settled law of Texas that, if an infant convey and, after coming of age choose to rescind, he must restore what he has received, before he can recover; and the same rule is applied to married women under like circumstances.

3. In that State, real property belonging to a married woman is her separate property, and she has in equity all the power to dispose of it which could be given to her by the amplest deed of settlement.

[No. 94.]

Submitted Dec. 18, 1878. Decided Jan. 6, 1879.

A PPEAL from the Circuit Court of the United States for the Western District of Texas.

The case is fully stated by the court.

Mr. W. S. Herndon, for appellants.

Messrs. Isaac C. Collins, J. W. Herron, Enoch Totten and Quinton Corwine, for appellees:

"The statute prescribing the mode of conveying separate property of married women (article 1003), does not necessarily invalidate all conveyances otherwise made. The voluntary execution by the wife may be established by proof, and a case made in which a conveyance will be sustained in equity, notwithstanding there was no private examination of the married woman."

Pasch. Dig. Tex., 681; *Womack v. Womack*, 8 *Tex.*, 414, 415; *Dalton v. Rust*, 22 *Tex.*, 152-155; *Clayton v. Frazier*, 33 *Tex.*, 99.

A verbal sale of land by the wife, with the consent of her husband, was valid in Texas, under the law in force prior to 1840.

Monroe v. Searcy, 20 *Tex.*, 348.

Previous to the passage of the Statute of Frauds in Texas, Jan. 18, 1840, a parol sale of land, accompanied by possession, passed a title as valid and legal as a written conveyance.

Briscoe v. Bronaugh, 1 *Tex.*, 331; *Paschal v. Acklin*, 27 *Tex.*, 191.

Mr. Justice Swayne delivered the opinion of the court:

There is a considerable mass of testimony in the record, but the facts are few, and we think there is nothing material about which there is any room for doubt.

In the year 1863, and for some years previous, the appellant, Mrs. Slaughter, had owned in her own right the premises in controversy in this case. She was a widow when she married Slaughter, and then possessed the property. It is situated in Marion County, in the State of Texas. The land was poor and the place very unhealthy. In the spring of that year, Dunn & Co. were desirous to put up a packing establishment, and were looking for property to buy with that view. Her agent offered the premises in question. At his request Dunn called upon her. She asked \$8,400. Dunn & Co. agreed to give it, and paid her in Confederate money. On the 21st of July, 1863, the payment was

NOTE.—*Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts. Power of state courts to construe their own statutes. See note to Jackson v. Lamphire*, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes. The Supreme Court will not review their decisions, except when specially authorized to by statute. See note to Commercial Bank v. Buckingham, 46 U. S. (5 How.), 317.

completed, and she executed a deed to the purchasers. She was the sole grantor, and the certificate of acknowledgment was silent as to any separate and privy examination. The certificate is as if she were a *feme sole*. Gray, the officer who took the acknowledgment, testified as follows:

"I witnessed and attested said deed at the request of Mrs. E. J. Slaughter, the maker thereof. I took her acknowledgment to said deed. I asked her if she acknowledged it to be her act and deed, for the uses, purposes and considerations as therein stated and expressed; she answered that she did. I cannot remember positively what other questions were propounded to her or what answers were made, but I think I asked all the questions usually asked by county clerks in taking acknowledgments, as required by the statute. She signed the deed, after an explanation of its contents made by me to her. Her husband, M. T. Slaughter, was at that time absent in the army. After the examination and explanation of the contents to her by me, she signed the deed, and acknowledged it to be her act and deed. She acknowledged it, so far as I could tell, freely and willingly.

At the time of the making the deed, M. T. Slaughter was absent. He had been absent about four months, not less than four months. He was a soldier in the Confederate army. He was absent for more than twelve months; I cannot remember positively how long."

About the time the transaction was closed she bought another tract of land situate in the neighborhood, and paid for it out of the money she had received from Dunn & Co. A deed to her was duly executed on the 3d of August following. The tract is fully described in the bill, and a copy of the deed is in evidence. The property was known as the Culbertson farm. Before selling and buying, she consulted with her friends, and they earnestly advised both as highly advantageous.

The firm of Dunn & Co. consisted of Dunn and Price. Price sold and conveyed to Dunn his share of the premises in controversy, and Dunn sold and conveyed the entire premises to Joseph Glenn, since deceased.

On the 26th of May, 1863, the appellant, M. T. Slaughter, left his home, and entered into the Confederate military service in the State of Louisiana. He lost an arm by a casualty of the war, and thereupon returned home and remained there. He was absent about a year. He had no means. His wife had considerable property. During his absence she managed and controlled everything as if she had been a *feme sole*. His ever returning depended upon the chances of the war. Upon getting back, he expressed himself as highly gratified by the sale and purchase she had made. She had constantly done the same thing. On the 3d of June, 1868, Slaughter and wife conveyed an undivided half of the premises in controversy to one of their counsel in the court below, with a special covenant against all persons claiming under them. By the same instrument it was provided that the learned gentleman should prosecute a suit for the recovery of the premises without any other compensation and that in the event of defeat he should pay all costs and damages and save his clients harmless. An action of trespass to try title was instituted in the proper state court, in the name of

See 8 OTTO.

Slaughter and wife. Glenn thereupon filed this bill to quiet his title. Upon his application, both cases were removed to the Circuit Court of the United States. That court decreed a perpetual injunction in the action at law, and the equity case has been brought here for review.

The controversy between the parties is to be decided according to the jurisprudence of Texas. We must administer the law of the case in all respects as if we were a court sitting there, and reviewing the decree of an inferior court in that locality. *Olcott v. Bynum*, 17 Wall., 44 [84 U. S., XXI., 570].

There is a look and odor about the case on the part of the appellants, that to say the least, do not commend it to the favorable consideration of a Chancellor. It wears the appearance of a conspiracy to defraud.

A court of equity must find itself hard pressed in the other direction to refuse the relief sought by the bill upon the facts disclosed in the record. We do not find ourselves embarrassed by any such considerations.

The only objections taken by the appellants to the title of the appellees' testator are that Slaughter was not a party to the deed of his wife to Dunn & Co., and that the certificate of her acknowledgment does not conform to the requirements of the statute of the State touching deeds by married women of their own property.

Before considering that subject, it is proper to advert to two other points which arise upon the record.

All the means, legal and equitable which Dunn had of protecting his title passed by assignment under his deed to Glenn. *Kellogg v. Wood*, 4 Paige, 578.

Mrs. Slaughter paid for the Culbertson farm entirely out of the proceeds of the property which she conveyed to Dunn & Co., and there was an overplus left in her hands. If we were constrained to hold that she is entitled to recover back those premises, it would then have to be considered whether she should not be regarded as a trustee *ex maleficio*, and required to convey to the appellees, as representing Glenn, the Culbertson farm, in which the money of Dunn & Co. was invested. *Oliver v. Piatt*, 3 How., 333, *May v. Le Claire*, 11 Wall., 217 [78 U. S., XX., 50].

Again; it is the settled law of Texas that if an infant convey and, after coming of age choose to rescind, he must, as a general rule, restore what he has received, before he will be permitted to recover; and the same rule is applied to married women under like circumstances. *Womack v. Womack*, 8 Tex., 397.

But it is unnecessary to pursue these views, because we find the propositions of the appellants touching the execution of the deed to Dunn & Co., wholly untenable.

The common law rights and powers of *feme covert*s have been considerably modified in Texas. There, real estate belonging to her, whether acquired by descent or purchase in the usual way, is termed, though not technically so, her "separate property," and she has in equity all the power to dispose of it which could be given to her by the amplest deed of settlement. The statute regulating conveyances to pass the legal title is not unlike those of most of the other States. It provides that the "husband and wife having signed and sealed

any deed or other writing purporting to be a conveyance of any estate or interest in any land, slaves, or other effects, the separate property of the wife, * * * if the wife appear before any judge," etc., "and being privily examined by such officer apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon such judge or notary shall certify such privy examination, acknowledgment and declaration, under his hand and seal, by a certificate annexed to said writing, to the following effect or substance, viz.:" etc. The form is then given. 1 L. of Texas, 4th ed., p. 261, art. 1003.

In the administration of this statute by the courts of the State a singular anomaly has grown up. The following adjudications will show the changes in the common law and the anomaly to which we have referred.

In *Womack v. Womack* [supra], a husband and wife conveyed a slave belonging to her, and warranted the title. There was no certificate of acknowledgment. The court said the statute which prescribed the mode of conveying did not declare void any other mode, and that it seemed, "from its terms, to have but one object in view, and that was to secure the freedom of will and action on the part of the married woman. If she was free to act, and so declared it, and that she did not retract, all the circumstances concurred which were made necessary to pass the title to the property." The deed was held to be valid.

In *Wright v. Hays*, 10 Tex., 130, the husband was from home, at a distance, for nearly six years. During his absence his wife visited him. At the end of that time he returned home and remained there. In the meantime, the wife bought land, took the title in her own name, and conveyed a part of it to her son by a former husband. After her death, suit was brought to defeat the conveyance. The same objections were made to the deed as here. The court said: "The joining of the husband in the wife's conveyance, her privy examination and declaration that she acts freely, all presupposes that a husband is present and may be exercising undue influence over her. But can these formalities be requisite in cases where the rights of the wife (and they are acknowledged by law) depend upon the supposition that *de facto* she has no husband?" The deed was sustained and judgment was given for the defendant.

In *Dalton v. Rust*, 22 Tex., 133, the vendors had given a title-bond to the vendee for a tract of land described by metes and bounds. The vendee died before making full payment. The vendors filed a petition in the county court for the sale of the premises and the payment of the balance due. A sale was accordingly made, and the amount due paid out of the proceeds. The purchaser sued to recover possession, according to the metes and bounds set forth in the bond. One of the vendors set up as a defense that she was, when she executed the bond, and had continued to be, a married woman, and that she did not acknowledge the bond according to the requirements of the statute. It was held that she was estopped by the

proceedings in the county court and the receipt of the purchase money from denying the validity of the bond, or the right of the purchaser to all the lands within the metes and bounds set forth in the original contract which she had executed. She was treated in all respects as if she had been a *feme sole* from the outset.

In *Clayton v. Frazier*, 33 Tex., 91, the plaintiff sued the heirs of a married woman for the title to land which had been her property, and for the conveyance of which, on the payment of the purchase money, she and her husband had given a bond. There had been no examination of the wife as to her voluntary execution of the bond. It was held that the case was a proper one for specific performance. *Womack v. Womack* and *Dalton v. Rust* were cited and approved. This is the latest authoritative adjudication in that State upon the subject to which our attention has been called.

These authorities require no comment. The propositions which they establish are decisive of the case before us.

The decree of the Circuit Court is affirmed.

DANIEL A. BECKWITH AND GILMAN
HENRY, *Pliffs. in Err.*,
v.
ANDREW J. BEAN.

(See S. C., 8 Otto, 266-308.)

Arrest by military officer—false imprisonment—evidence—exception.

1. Where an officer of the U. S. Army caused an arrest of a person without a warrant but under military order, for aiding and abetting enlisted soldiers to desert, and was afterward sued by the person so arrested, for false imprisonment in causing such arrest, every fact tending to show the motives of such officer in causing the arrest, or to show the existence of the grounds assigned for the arrest, is admissible in such action, in mitigation of damages, although such facts may not establish legal justification.

2. Evidence, of a reasonable suspicion and that which shows that the truth of the case, as it actually existed at the time of the arrest, sustained the belief under which the defendant acted, is admissible.

3. Evidence of an admission of the party arrested, although it was not made until after his release from custody and was unknown to the party causing the arrest until after the commencement of the action, is admissible for the same purpose.

4. A general exception to the charge to the jury which did not call the attention of the court below to the specific propositions which were objected to, cannot be regarded here.

[No. 39.]

Argued Nov. 15, 18, 19, 1878. Decided Jan. 6, 1879.

IN ERROR to the Circuit Court of the United States for the District of Vermont.

Statement of the case by Mr. Justice Harlan.

Bean, defendant in error in this action for arrest and false imprisonment was in June, 1864 a resident of Coaticoke, in the Province of Canada. His ordinary business was that of a harness-maker, but during the period hereinafter referred to he was, to some extent, engaged in the business of substitute brokerage, or in furnishing substitutes for our army. Henry and Beckwith, plaintiffs in error, were officers of the Union Army, the former being provost-marshal

and the latter assistant provost-marshal of the Second Congressional District of Vermont. They were appointed, commissioned and sworn, as required by the statute popularly known as the Conscription Act of Congress, and were subordinates of General Pitcher, who was Acting Assistant Provost-Marshal General for Vermont until October, 1864, when he was succeeded by Major William Austine. All of said officers and subordinates were subject to the authority of Major-General Dix, commanding, by appointment of President Lincoln, the department of the East, which embraced the State of Vermont.

On the 14th of June, 1864, Bean, accompanied by one Jewell and one Buckland, came from Canada to the headquarters of Captains Henry and Beckwith at Woodstock, Vermont. They were accompanied by Eldon Brown and John Guptil. Before leaving Canada, Bean had a contract with Brown that the latter should come to the United States and enlist in our army as a substitute for persons drafted under the Conscription Act. In that contract Buckland had an interest, by stipulation with Bean. While at Woodstock, these five persons occupied the same room. Bean, Buckland and Jewell proposed to or through one J. C. Stevens to enlist Brown and Guptil as substitutes; and thereupon an agreement was made, whereby Stevens was to pay Bean and his associates \$600 for Brown and Guptil each, the proposed substitutes to receive out of that sum \$200 each. Brown and Guptil, upon examination, were accepted and clothed in the uniform of soldiers, receiving \$200 each from Stevens, while Bean, Jewell and Buckland received \$800 between them, and returned the same day to Canada. For the purpose, doubtless, of guarding against immediate desertion, Brown and Guptil were required by the provost-marshal to deposit their bounty with a clerk in the office, as security for their departure, on the following evening, to the recruiting rendezvous at New Haven, Connecticut. During the next day the substitutes each obtained \$5 of their bounty money, and the same day deserted. On the 23d June, 1864, all the facts and circumstances connected with the enlistment and desertion of Brown and Guptil were verbally communicated by Captain Henry in person to General Pitcher, who directed that transportation to the northern border of Vermont be furnished to Captain Beckwith, with instructions to arrest the deserters, as well as Bean, Jewell and Buckland, and bring them to headquarters. Transportation being furnished to Beckwith in pursuance of that order, he endeavored, under written instructions from Captain H., to effect the arrest of the parties; but his efforts in that direction were fruitless, until November 11, 1864, when, meeting Bean upon the cars, he arrested him, using no more force than necessary. He informed him at the time that he had no warrant, but was acting under military order, and that the charge against him was that of aiding and abetting Brown and Guptil to desert. Upon the succeeding day, Bean was taken to Captain Henry's headquarters, and by his order was placed in the state's prison at Windsor—that being the usual place for confinement of persons charged with offenses against military law—and he remained there in custody until April, 1865, when he was dis-

charged, under the circumstances hereafter detailed.

The testimony of Bean tended to show that his confinement was prolonged unnecessarily, not only under circumstances of humiliation and severity, but against his protestation of innocence and frequent demands to be tried, by the civil courts, for the offense imputed to him. It further tended to show that such confinement without trial was procured or caused by the plaintiffs in error, and that among the results of such imprisonment was the destruction of his business in Canada, the loss of property and the expenditure of large sums of money.

Upon the part of the plaintiffs in error, the evidence tended to show that, from the circumstances and such information as they were able to obtain, they each believed, before and at the time of Bean's arrest, that the enlistment and desertion of Brown and Guptil were in pursuance of a previous plan for that purpose formed between the deserters and Bean, Jewell and Buckland, and that Bean and his associates aided and abetted in such desertion and escape; that, on 20th November, 1864, Captain Henry embodied in his regular tri-monthly report to the Provost-Marshal General at Washington a general statement of Bean's arrest upon the charge of "taking a part of the money paid for two substitutes," and then "being privy to their desertion," and that he was held for the return of the \$800; that, on the 8th December, Bean wrote to Major Austine, inquiring whether report of his case had been made to him, which letter was referred to Captain Henry for "report on the case;" that, on the 13th December, Captain Henry made such report, and had delayed a report until that date by the request of Bean; that, on December 16, Captain H., by direction of Major Austine, furnished Bean a written statement of the charges against him, and saying, "And it is claimed that you shall pay, for the use of the government, the \$800, with the expense of your arrest;" that on 20th December, he communicated to Major Austine other facts in the case; that, on 21st December, he again, by written communication, called the attention of Major Austine to the case, expressing the opinion that the evidence then in his possession was insufficient to convict Bean in the civil courts under the Enrollment Act, and suggesting that he be turned over to General Dix or the military authority, rather than to the district attorney; that on 3d January, 1865, Major Austine was officially advised, from department headquarters, that the case of Bean and his confederates was one of gross fraud upon the government, and authorizing him to collect from them, either individually or collectively, the amount received by them; to take all necessary steps for the arrest of the parties then at large, and keep them in custody until the money and expenses of their arrest were paid, and to discharge them when the money was paid over, of which order Bean was advised on 6th January, 1865; that, on 21st January, Bean addressed, through Major Austine, a communication to Gen. Dix, protesting his innocence, complaining of Major Austine, and demanding trial before the civil courts; that, on 24th January, an answer came from department headquarters, reiterating the condition of Bean's discharge as set forth in the order of January 3d, and directing Major Austine

"To cause Bean to be distinctly informed that he was arrested by orders from these headquarters" that, on 24th February, Major Austine sent all his papers to department headquarters, and they were transmitted to the Adjutant-General of the army at Washington, with an indorsement by General Dix, that "Bean was held by my (his) orders for complicity in a gross fraud against the United States;" that the papers were returned to Major Austine in April, after passing through the offices of Secretary of War, Adjutant-General, Judge Advocate-General, Provost-Marshal and Inspector-General, with directions that Bean be turned over to the civil authorities for trial; that, upon receiving the order last mentioned, Captain Henry called the attention of the district attorney to its provisions, and invited his attention to the case; that, on 26th April, 1865, Bean was taken before a justice of the peace, who discharged him upon bond for his appearance before a United States Commissioner when called upon; that, on 11th May, 1865, an examining trial was held, and Bean required to give bail for his appearance to answer any indictment before the grand jury, but that tribunal, upon investigation, failed to find an indictment against him.

It is stated in the bill of exceptions that the plaintiffs in error gave no other or further evidence, either oral or written, of any orders from the President of the United States, or their superior officers, than those just described; that the defendants and Gen. Pitcher were examined as witnesses, and did not claim that said orders were issued, known to or approved by the President.

The evidence of plaintiffs in error tended to show that, while imprisoned, Bean was treated humanely; that Beckwith, in all he did, in regard to the arrest and confinement of Bean, acted in good faith and under the command of his superior officer, Captain Henry; that the latter, in all he did, acted in good faith and in obedience to the orders of his superior officers, as hereinbefore detailed; and that from time to time he promptly communicated to Bean the orders he received from his superior officers.

During the trial, the plaintiffs in error offered in evidence the depositions of George W. Kinney and of said Jewell and Brown, to the reading of which the defendant in error objected. The objection was sustained, and plaintiffs in error excepted.

Kinney, in his deposition, details the substance of a conversation held by him with Bean after the latter's discharge. He says: "I was talking with him in regard to this matter, asking if he didn't think it rather rough to be taking those fellows over the other side to get shot, or words to that effect. He replied, he didn't calculate to have them shot; if they were smart, he should have them back in a few days." Witness says that there were a good many persons in Canada, during the war, who were generally known as deserters from the Federal Army, and he understood from Bean that his dealings, to some extent, were with that class, and that some persons enlisted by him "had been out already two or three times."

The deposition of Brown shows that in July, 1863, he enlisted in the State of Maine in the Federal Army, and within a short time thereafter deserted and went to Canada; that Bean

and others, who, as he thought, knew him to be a deserter, suggested that he should return to the United States and enlist; that, in consequence of the hard times, he concluded to adopt the suggestion; that, after advising with Jewell upon the subject, the latter told him to go on and he would overtake him upon the road; that he learned at the same time from Jewell that one Isaac Thomas would be sent along with him; that *en route* to Vermont to enlist, Buckland overtook them, and claimed him (Brown) "as his man;" that, further along in the journey, Bean joined the party and held a conversation with Jewell and Buckland apart from the witness; that there was conversation in the crowd about Thomas and himself enlisting under assumed names; that he concluded not to change his, but Thomas assumed the name of John Gup-til; that it was first determined to enlist at Lebanon, and for that purpose Bean, Jewell and Buckland went to the provost-marshal's office at that place, but failing to enlist there, they all proceeded to Woodstock, where they did enlist.

The deposition of Jewell shows that he was himself a deserter. He details the circumstances under which Bean, Buckland and himself formed the purpose to place Brown and Gup-til as substitutes in the army. It appears in his deposition that some dispute arose between Buckland and Bean about Brown. Bean insisted that Brown "belonged" to him. Their differences were compromised by an agreement "to divide the profits if they put him in." He explains why Brown and Gup-til were not enlisted at Lebanon. He says: "We all went from White River Junction to Lebanon, where the provost-marshal's office was, to see what we could get for the men. Not succeeding to our satisfaction there, we concluded to go elsewhere. The reason was they were shipping their men daily direct to Concord. Brown did not want to go to the front so soon, but wanted longer time to get away, he not designing to go to the front at all; went back to White River Junction; took dinner there. We fell in with a man by the name of Stevens. This man was buying men, and said he would give so much for them there, or something more to take them to Woodstock and put them in. We concluded the best way was to take them to Woodstock. We procured a team at the junction. * * * When we came to Woodstock, Bean, Buckland and myself went to the provost marshal's office first, and afterwards all went there, but did not enlist the men, for the reason that the men could not get their bounty till they got to camp, and they would not enlist. We drove back to White River Junction; saw Stevens again; I think he gave them some money, can't tell how much, to go back to Woodstock and enlist. After they, Brown and Thomas had received the money, they started to Woodstock, the second time with Stevens. I remained at the Junction. My being subject to the service, Bean and Buckland advised me to remain there and they would do the business of enlisting the men at Woodstock. Next day they came back and we all, Bean, Buckland and myself took the train for Canada. I had received nothing out of the bounty before that from Thomas. They said they would fix me all right when we got home. After we got home, I said something to them about it. They said they had nothing for me;

that I was lucky to get back myself * * * I knew from both Brown and Thomas, before we left Canada, they were deserters. It was distinctly understood by us all, including Brown and Buckland, that both Brown and Thomas were deserters, and that was the reason why we were selecting other names by which they were to be enlisted. At least, that was the way I understood it, and supposed all understood it so."

Upon the conclusion of the evidence, the court overruled a motion of plaintiffs in error to dismiss the action, refused to instruct the jury, as asked by them, and gave an elaborate charge upon the evidence and the law of the case.

Messrs. Charles Devens, Atty-Gen., and S. F. Phillips, Solicitor-Gen., for plaintiffs in error.

Mr. E. J. Phelps, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

This is an action by Andrew J. Bean against Beckwith and Henry, plaintiffs in error, for assault and battery and false imprisonment. It was commenced in the year 1865, in the County Court of Orange County, Vermont, and was thence removed for trial into the Circuit Court of the United States for that district. The defendants pleaded not guilty, and also filed several special pleas. The case was brought to this court upon a certificate of division in opinion between the Circuit and District Judges as to the sufficiency of some of those special pleas. We adjudged them to be defective. *Bean v. Beckwith*, 18 Wall., 515 [85 U. S., XXI., 850]. Upon a return of the case to the court below, a trial was had under the plea of not guilty and resulted in a verdict in Bean's favor for \$15,000. A judgment having been rendered against the defendants in accordance with the verdict, this writ of error is prosecuted.

Before entering upon the discussion of the legal propositions presented for our determination, it is necessary to state the leading facts out of which this litigation arose, and which the evidence before the jury tended to establish.

1. The action of the court below in excluding the depositions of Kinney, Brown and Jewell presents the first question for our consideration. Counsel for defendant in error contends that the facts stated in those depositions are inadmissible for any purpose, not even in mitigation of damages.

There can be no rational doubt that the facts detailed by those witnesses, in connection with the evidence before the jury, conduced to show that Brown and Guptil were known to Bean, Jewell and Buckland to be deserters from the Federal Army at the time of their enlistment as substitutes, and that Bean, in conjunction with his associates, enlisted them in pursuance of an understanding had before leaving Canada, that they would desert as soon as they received their bounty, and that in such desertion they would receive all the aid which Bean and his associates could render. We express no opinion as to the degree of credit to which these witnesses were entitled. Nor do we say that the jury should have reached the conclusion which their evidence conduced to establish, viz.: that Bean was, in fact, guilty of the offense for which he was arrested by Beckwith, under the written See 8 Otto.

and verbal orders of his superior officers—an offense punishable, upon conviction, by a fine not exceeding \$500, and imprisonment not exceeding two years nor less than six months. 12 Stat. at L., 735. Was the excluded evidence competent for any purpose in this case? We are of opinion that it was competent in mitigation of damages. It tended to show the state of case which plaintiffs in error testify under oath they believed in good faith existed at the time of the arrest. It conduced to show that plaintiffs in error did not act from mere personal ill-will or from corrupt motives, and were not guilty of a wanton, reckless exercise of power for the mere purpose of humiliating and oppressing one who had not become obnoxious to the laws of the land. It tended to rebut the presumption of malice which might arise from the simple arrest and imprisonment, unaccompanied by any explanation of the reasons therefor. In connection with evidence which was admitted without objection, it seems to present a case which, under the law, did not call for or admit of vindictive or punitive damages against the plaintiffs in error. In determining whether the case demanded such damages, the jury had the right to consider all the attendant facts and circumstances out of which the arrest and imprisonment arose. They could not well ignore the important fact that the arrest occurred at a period in the country's history when the intensest public anxiety for the fate of the Union pervaded all classes. The necessities of the government and the condition of the army had compelled the adoption of the most stringent and, in some respects, harrassing regulations for an increase of the national forces. The enforcement of those regulations, in some localities, was made the occasion of tumultuous assemblages which threatened to disturb the peace of the country, at a time when the utmost energy and unity of action were required for the preservation of the government against armed insurrection. Citizens drafted were required to enter the military service, or furnish acceptable substitutes. The plaintiffs in error were charged with delicate and important duties in connection with the enlistment and enrollment of substitutes for that service. It is to be presumed that, independent of the desire to discharge the obligations of their official oaths, they shared the prevailing anxiety for the safety of the government, and recognized the fact that its safety depended upon speedy additions to the army then engaged in defending it. Neither evidence or argument is needed to prove that the efforts of the government to strengthen the national forces by draft would have been seriously retarded and, perhaps, altogether thwarted, if substitute brokers could, with impunity and for purposes of private gain, impose fraudulent enlistments upon recruiting officers, and then connive at or aid and abet the desertion of the substitutes as soon as they had received their bounty money. Whether such considerations influenced, or to what extent they should have influenced, the course of plaintiffs in error was for the jury, when determining whether punishment by exemplary damages should be inflicted. Further; if Captain Henry in good faith believed that Bean was guilty of such misconduct in the enlistment of the two deserters, it was his duty to communicate the facts and circumstances to his

superior officer. If the order to Beckwith to arrest Bean was given by him in good faith, believing it to be his duty to obey the command of his superior officer, General Pitcher; if Beckwith executed the order under a like belief, and in like good faith; if the arrest was made and the imprisonment ordered from an honest purpose to guard the public interests and protect the army from the evil consequences of sham enlistments and frequent desertions, they were entitled by every consideration of justice, to stand before the jury in a more favorable light upon the question of damages than they would or should have stood had they been actuated by ill-will or sought to oppress one whose conduct had not justified the conclusion that he had violated any law. Every fact, therefore, which served to illustrate the motives which governed the plaintiffs in error in committing the trespasses complained of, and every fact which fairly conduced to prove the existence or non-existence of just grounds for imputing to Bean the fraudulent and illegal acts charged against him, and which were assigned as the cause of his arrest, were competent evidence, not in justification, but in mitigation of damages. It is the settled doctrine that "Damages are graduated by the intent of the party committing the wrong." Sedgw. Dam., 455. It is equally well settled that, in the absence of gross fraud, malice or oppression, in cases of trespass to person or estate, the jury should restrict damages to compensation or satisfaction for the actual injuries sustained. Sedgw. Dam., 39 [*Day v. Woodworth*], 13 How., 363. They may, when legal justification is not shown, consider the direct expenses incurred by the injured party, his loss of time, his bodily sufferings, under some circumstances his mental agony, his loss of reputation, the degree of indignity involved in the wrong done and the consequent public disgrace attending the injury. These and similar elements of injury may be made the basis of compensation, and such compensation cannot be diminished by reason of good motives upon the part of the wrongdoer. But when the injured party seeks, as here, to show a case of "great aggravation, cruelty and injustice," and upon that ground asks for exemplary or vindictive damages, by way of punishment, it was competent, in reduction of such vindictive damages, and for the purpose of restricting the jury to compensatory damages, to give in evidence such facts and circumstances connected with the injury complained of as might show the truth of the whole case, as it existed at the time of arrest. In *Day v. Woodworth* [*supra*], this court said that the question of smart money "Has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the peculiar circumstances of each case;" that is, "upon the degree of malice, wantonness, oppression or outrage of the defendant's conduct." Hence it has been held that, where the injury complained of was an arrest without warrant, the defendant could show, in mitigation of damages, and as explaining the arrest, that the plaintiff was justly suspected of felony. 2 Greenl. Ev., sec. 267; 3 Phil. Ev., 518. The text in Greenleaf seems to rest partly upon the authority of *Chinn v. Morris*, 1 Ry. & M., 424 [2 Car. & P., 361], and *Simpson v. McCaffrey*, 13 Ohio, 508. The first case was trespass for an assault and false im-

prisonment. The defendant had given the plaintiff in charge to a constable for felony, and he was taken by the officer to a magistrate, who dismissed the charge. The defendant admitted, on the trial, that he had not sufficient evidence to sustain the charge of felony, but proposed to show that there was reasonable ground of suspicion. Best, *C. J.*, held the evidence admissible in reduction of damages. That case was cited, with approval, in *Linford v. Lake*, 3 Hurl. & N., 276. The case in 13 Ohio was trespass for illegally entering and searching plaintiff's house, tearing up porch, ransacking house and breaking open desk, without legal authority. Certain evidence was offered in justification as well as in mitigation of damages. The court said: "The evidence ruled out by the justice of the peace, as shown by the bill of exceptions, in no sense constituted a justification of the trespass complained of. But it was competent in mitigation of damages. The principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt and malignant motive and design which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act; yet, in morals and the eye of the law, there is a vast difference between the criminality of a person acting mistakenly from a worthy motive, and one committing the same act from a wanton and malignant spirit, and with a corrupt and wicked design. Hence, when a jury are called upon to give smart money or damages, beyond compensation, to punish the party guilty of the wrongful act, any evidence which would show this difference, or rather all the facts and circumstances which tend to explain or disclose the motives and design of the party committing the wrongful act, are evidence which should go to the jury for their due consideration."

To the same effect is *Roth v. Smith*, 54 Ill., 432. That was an action to recover damages for having advised and procured, upon affidavit, the arrest and imprisonment of the plaintiff, by a federal officer, upon the charge of discouraging enlistments. Evidence was admitted, against the objection of the plaintiff, that he had, in fact, discouraged enlistments; and upon appeal to the Supreme Court of Illinois that evidence was held to be competent in reduction of damages, upon the ground that it explained the circumstances of the alleged arrest, and tended to show that the defendant was not actuated by malice. That court, speaking through Chief Justice Lawrence, said: "Admitting that, on proof of these facts the plaintiff would have been entitled to a verdict for some amount, he certainly would not have been entitled to nearly as large a sum in the way of damages, if the affidavit was true, as he should have received if it had not been true. If the affidavit was not true, and if the arrest was by procurement of defendant, the jury should presume malice, and award heavy vindictive damages. If the affidavit, in fact, was true, and the jury could see that the defendant, in making it, even though he voluntarily furnished it to the marshal and advised the arrest of the plaintiff, was acting

without malice and in the belief that the public good required the arrest of the plaintiff, and that he could be legally arrested; and that, in causing his arrest, so far as the defendant could be said to cause it, he believed himself to be in the performance of his duty as a citizen, it would clearly, in such a case, be the duty of the jury to give only compensatory and not vindictive damages."

In the case of *McCall v. McDowell*, 1 Deady, 233, which was an action for false imprisonment brought by McCall against General McDowell, it appeared in evidence that the plaintiff had, in gross and incendiary language, expressed exultation at the assassination of President Lincoln, for which conduct he was arrested and imprisoned under the orders of General McDowell. While this conduct did not, in the opinion of the learned Judge trying the case, furnish legal justification for the arrest and imprisonment, it was competent evidence, in mitigation of damages, to go to the jury to show that the arrest was without bad motive, and with the purpose of discharging what the defendant, in the execution of high and responsible public functions, conceived, in good faith, to be his duty at a critical period in the country's history.

A case in point is *Botts v. Williams*, 17 B. Mon., 687. That was an action for trespass and false imprisonment. It appeared that the defendants, without warrant and in violation of the laws of Kentucky regulating the apprehension and detention of fugitives from other States, arrested the plaintiff in that State and took him to Ohio, from which State it was alleged he was a fugitive from justice, having committed a felony there. The defendants, under the plea of not guilty, offered to prove the declarations of the plaintiff that he had committed a felony in Ohio, and that a reward had been offered for his apprehension. It was held that while such declarations did not establish justification for the apprehension and transportation of the plaintiff beyond the State, they were "Admissible in mitigation of damages, as conducing to show that the defendants, in making the arrest, were prompted by honest motives and no ill-will to the plaintiff."

The same general doctrine is announced in Mr. Mayne's treatise on the Law of Damages. That author says: "Of course, in all cases where motive may be a ground of aggravation, evidence on this score will also be admissible in reduction of damages. Hence, in an action for false imprisonment, evidence may be given of a reasonable suspicion that the plaintiff had been guilty of a felony, without any attempt at setting up a justification." Says the same author: "And if the plaintiff was given in custody for an offense not justifying an arrest, evidence may be given of the offense. It is in the nature of an apology for the defendant's conduct." Mayne, Dam., 74, 75.

Further citation of authority seems to be unnecessary. The rules announced in the authorities cited meet our approval, and we are not referred to any elementary treatise or adjudged case which states the law differently. It results that the court below erred in sustaining objections to the reading of the depositions of Kinney, Brown and Jewell. The reasons assigned for their exclusion were insufficient. The court, in excluding them, said that it did so "Upon

See 8 OTTO.

U. S., Book 25.

the ground that the guilt or innocence of said Bean was not a question for the determination of the jury, but that all the facts and circumstances which were known to the defendants, or with which they in any way became acquainted prior to the imprisonment, could be admitted for the purpose of rebutting malice and showing that they acted in good faith; but that they could not give in evidence circumstances of which they had never heard until after the commencement of this suit." It is true that the guilt or innocence of Bean was not for the determination of the jury, for the purpose of inflicting punishment for the offense imputed to him. But, as already shown, it was the right of the plaintiffs in error to prove, in mitigation of damages, that they were governed, in their whole conduct, by a sense of public duty and not by a malignant purpose to oppress and humiliate the defendant in error. It was their right to show that the truth of the case, as it actually existed at the time of arrest, sustained the belief under which they acted.

Such a right would, however, be valueless, and such proof impossible, if the jury were not allowed to inquire whether there were, in fact, just grounds to charge upon Bean the fraudulent and illegal acts which were assigned as the reason for his arrest. The existence or non-existence of such grounds might materially influence the mind of the jury in determining whether the plaintiffs in error acted from a sense of duty, or from malice and sheer wantonness. If evidence of an honest belief, upon the part of plaintiffs in error, that Bean was privy to the desertion of the substitutes was competent in mitigation of vindictive damages, proof that he was, in fact, guilty of that offense would serve to show that such belief was not recklessly or inconsiderately formed, and that "the charge was not a pure invention." *Linford v. Lake* [supra]. The fact of Bean's complicity in the desertion of Brown and Gupta was believed, in good faith, by Henry and Beckwith to exist when the arrest and imprisonment occurred. So they testify under oath. Should they be precluded from establishing such complicity by the admission of Bean himself to the witness Kinney, simply because such admission was not made until after Bean's release from custody? We think not. Had the admission been in writing, its competency could not well be doubted. That it was verbal is an objection, not to its admissibility, but to its value as evidence upon which to find a verdict. Verbal confessions or admissions, made in the presence of the witness alone, constitute, it is true, very unsatisfactory evidence, partly because of the facility with which they may be fabricated. It is, therefore, to be received with great caution; but "Where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature." 1 Greenl. Ev., sec. 200; *Botts v. Williams* [supra]; *Higgs v. Wilson*, 3 Met. (Ky.), 337. "The caution," says the Court of Appeals of Kentucky, "should be applied to the proof of the statement, and not to the statement when proved."

The same considerations apply to the evidence of Brown and Jewell. Most, if not all, of the substantial facts to which they deposed were known to defendants in error at and before the arrest. The excluded evidence was in

support and corroboration of that which was known and believed at the time of the arrest to exist. It was cumulative evidence of the same general character as that which was admitted without objection. It introduced no new issue. That plaintiffs in error may not have been advised, until after Bean's discharge, that those facts could be established by the testimony of Brown and Jewell more fully or more clearly than other witnesses could, or in corroboration of what other witnesses would state, constituted no reason for the exclusion of that evidence. Nor is the determination of this question affected by the fact that the defendant in error, upon the trial, complained more of his long confinement in prison than of the original arrest. We should regard all the circumstances attending the imprisonment, and not merely the period during which the imprisonment was continued. [*Read v. Sowerby*], 3 Maule & S., 78; 3 Stark. Ev., 1452, 1453. One of the issues before the jury, as shown by the charge of the court, was as to the responsibility of the plaintiffs in error for the prolongation of the imprisonment, and the denial to Bean of a speedy trial in the civil courts. While it is true that good faith in the original arrest and imprisonment might have been succeeded by bad faith in unnecessarily continuing the imprisonment, and in preventing a trial of Bean in the civil courts, which alone had cognizance of the specific offense charged, it was for the jury, upon all the legitimate evidence which either side could produce, to determine whether such was the fact. If the excluded evidence was competent upon the issue of good faith in the arrest and the original imprisonment, and we have held that it was, the plaintiffs in error were entitled to have it before the jury in their consideration of the whole case, since any failure or deficiency in their proof, in that respect, might have justified the jury in believing that from the very outset they were actuated by improper motives.

A less liberal rule in the admission of evidence than that indicated in this opinion would often work the grossest injustice in cases where, as here, vindictive damages are sought against mere subordinates, whose testimony, if credited by the jury, would show that they acted in good faith, from a sense of public duty and in obedience to the orders of their superior officers, who promptly assumed and upon whom justly rested the responsibility, not only for the prolongation of the imprisonment complained of, but for the denial of a speedy trial in the civil courts.

Upon this branch of this case it is proper to make one further remark. When the depositions of Kinney, Brown and Jewell were offered, the objection was that, in their substance, they were not competent evidence, but that if any part of either of them was admissible, "It was so intermingled with inadmissible statements that the whole became inadmissible." The objection was made at the moment they were offered, without calling the attention of the court to the particular portions of the depositions which were claimed to be inadmissible under any view of the case. They were not excluded upon any such ground. They were excluded upon the broad ground that the facts and circumstances detailed by those witnesses

were not heard of by the plaintiffs in error until after the commencement of this action. In this condition of the record it would be improper for this court, in view of what has been said, to sustain the ruling of the court below, simply because, in those depositions, there may be, here and there, isolated statements not affecting the substance of what the witnesses testified, and which, upon specific objections, could have been excluded as incompetent under the general rules governing the admission of testimony.

2. Upon the conclusion of the evidence before the jury, the plaintiffs in error moved, in writing, that the case be dismissed, upon the ground that "All the facts proved establish that the acts done by them, for which the plaintiff claims to recover, were done by them as military officers acting under the authority of orders of the President of the United States, during the existence of the late rebellion against the United States." This motion was properly denied, for the reason, if for no other, that there were many disputed facts in the case, disconnected from any question of authority derivable from the general orders of the President. It was the province of the jury to consider those facts in connection with such propositions of law as the court should announce for their guidance. For like reasons, the court properly refused to charge the jury as requested by plaintiffs in error. That request altogether ignored the evidence introduced by the defendant in error, who testified, substantially, that the plaintiffs in error, under circumstances of oppression and wantonness, and by improper and fraudulent representations, procured their superior officers to continue the imprisonment longer than necessary, and prevented them from having a speedy trial in the proper court for the offense charged. It was the province of the jury to consider that evidence, and if they believed it to be true, and had discredited the opposing evidence, the defendant in error would have been entitled to a verdict by reason of any oppressive or corrupt abuse of authority on the part of the plaintiffs in error in making the arrest and ordering and continuing the imprisonment.

3. In the argument of the case before us, a good deal was said in reference to that portion of the elaborate charge to the jury which discussed the right of the plaintiffs in error to take shelter under the Act of March 3, 1863, 12 Stat. at L., 755, entitled "An Act Relating to *Habeas Corpus* and Regulating Judicial Proceedings in Certain Cases," and the Act of March 2, 1867, 14 Stat. at L., 432, entitled "An Act to Declare Valid and Conclusive Certain Proclamations of the President, and Acts Done in Pursuance Thereof, or of His Orders, in the Suppression of the Late Rebellion against the United States," the former Act, it will be remembered, authorizing defense to be made by special plea, or under the general issue. They are known as the Indemnity Acts, passed by Congress for the protection of military officers and others who, between certain dates, made arrests or were connected with the imprisonment and trial, under the authority of the orders and Proclamations of the President, of persons charged with participation in the late rebellion, or with disloyal practices in aid thereof. Upon

the part of the plaintiffs in error it is insisted that the charge was so inflammatory as to prevent a dispassionate and impartial consideration of the defense relied upon. It is further insisted that the court erred in what it said as to the right of the plaintiffs in error to justify, under the provisions of the two statutes referred to. It is still further insisted that Beckwith and Henry having acted in good faith under the directions of their superior officers, both in ordering and making the arrest and in holding Bean in custody after such arrest, they could not, in any event, be liable for vindictive damages, however illegal their acts may have been. Touching these objections to the charge of the court, it is sufficient to say that they are not presented by the bill of exceptions in such form that we should consider them. The only exceptions to the charge are in these words: "To the omission of the court to charge as requested, and to the charge of the court placing a construction upon said Acts of Congress, and to so much of the charge as relates to the attempted justification of the defendants under said Act, and the evidence hereinbefore detailed, the defendants excepted."

We have already commented upon the refusal of the court to charge as requested by the plaintiffs in error. The exceptions as to the charge given are too vague and indefinite to raise the questions which were claimed in argument to arise under the Acts of 1863 and 1867. [*Lincoln v. Claffin*], 7 Wall., 132 [74 U. S., XIX., 106]; [*McNitt v. Turner*], 16 Wall., 362 [83 U. S., XXI., 346]. The exception is scarcely more definite than a general exception to the whole charge would have been. We cannot tell what specific portion of the elaborate charge construing the Acts of Congress, or to what specific portions of the charge concerning the evidence relied upon for justification under those Acts, were intended to be covered by this general exception. The exception was to a series of propositions in gross, relating to the construction and to the validity, in certain aspects, of these Acts of Congress, and to a mass of evidence introduced for the purpose of establishing the defense allowed by those Acts. Some of those propositions seem to be sound in any view of the case; but since the exception did not call the attention of the court below to the specific propositions which were objected to, it cannot be regarded here. [*Beaver v. Taylor*], 93 U. S., 46 [XXIII., 797]. For the same reasons, we cannot consider the alleged error of the court in its charge to the jury upon the question of vindictive damages. While some portion of the amount found by the jury may be attributed to the charge of the court upon the subject of vindictive damages, it is sufficient to say that no exception was taken upon that point.

We forbear, therefore, any expression of opinion as to whether the evidence before the jury authorized vindictive damages, or brings this case within the provisions of the Statutes of 1863 and 1867. We express no opinion as to the construction of those statutes, or as to the questions of constitutional law which may arise thereunder. We feel obliged to adopt this course, because counsel for defendant in error, assuming that our decision in [*Bean v. Beckwith*], 18 Wall., 515 [85 U. S., XXI., 850], as to the sufficiency of certain special pleas settled

See 8 OTTO.

all the questions under the Acts of 1863 and 1867, which could arise upon the evidence in this case under the general issue, did not, in his oral or printed argument, discuss the grave questions of statutory and constitutional law, which, perhaps, the general exceptions to the charge were designed to present for our determination. We, therefore, restrict our decision to the single point properly presented for our determination, viz.: that the court erred in excluding from the jury the depositions of Kinney, Brown and Jewell, and upon that ground the judgment is reversed, with directions for such further proceedings as may be consistent with this opinion.

Upon the whole case, we are of opinion that justice will be promoted by another trial of the case; and it is so ordered.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the statement and opinion of the court in the case of *D. A. Beckwith et al., Plffs. in Err., v. Andrew J. Bean*, No. 39, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 5th day of May, A. D. 1885.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

Mr. Justice Field, dissenting:

I am unable to concur in the judgment of the court in this case, and I will state the reasons for my dissent. The action is for an assault and battery upon the plaintiff, and his imprisonment in the state prison of Vermont for more than six months, without process of law, and under circumstances of great cruelty and oppression. The plaintiff is a citizen of the United States, though in 1864, when the grievances complained of were committed, he was temporarily a resident of Canada.

It appears from the uncontradicted evidence in the record, that on the 11th of November, 1864, whilst returning from a trip to Boston to his home in the Province of Quebec, he was arrested in a passenger car near Wells River, in the State of Vermont, by the defendant Beckwith, without any warrant or process of law, and taken to Beckwith's residence in Sutton in that State; that he was there detained during the night under the charge of keepers; that his father, who lived at the distance of about fifteen miles, and for whom he had sent, arrived during the night, but that Beckwith refused to allow them to have an interview, except in his presence; that on the following day he was forcibly taken, by order of the defendant Henry, and placed in the state prison at Windsor, where he remained until the 26th of April, 1865, a period of nearly six months, when he was admitted to bail and released from imprisonment; that, during this period, he was locked up at night, and for the first few days in the day-time, also, in a narrow and scantily furnished cell, being one in which convicts were confined at night; that after the first few days he was allowed, upon his complaint of the coldness of the cell, to spend the day in the shops where the convicts worked, but he was required to go out and to return when they did, and at no time to be out of sight of a keeper, and not to go on the corridors or in the yard for exercise; that the food offered to him was the fare served to

the convicts, which he could not eat, and that afterwards he obtained his meals from the keeper's table by paying a small sum each week; and that during this period, no complaint against him was filed with any magistrate; he was held simply upon the order of the defendants.

And what is the excuse offered for this imprisonment and treatment; for justification there could be none in a country where there were constitutional guaranties against the invasion of personal liberty, such as are found in the Constitution of Vermont and in the Constitution of the United States? What is the excuse? Simply this: that the defendants, one of whom was provost-marshal, and the other assistant provost-marshal, of a military district embracing Vermont, suspected that the plaintiff had aided or been privy to the desertion from the army, of two substitutes, who had been furnished upon a contract with one Stevens, and for whom Stevens had paid \$1,200, of which sum \$800 had been received by the plaintiff and two others. Suspecting the plaintiff, as stated, the defendants determined to hold him in the state prison until they should coerce him to the payment not merely of what he had received, but of what his supposed confederates had received also. The defendants claimed that they were acting all this time in the service of the United States; but surely this is a mere pretense, for their duties as enlisting officers did not require them to compel the return of money of which a substitute broker had been defrauded, and in which the United States had no interest, and could not have retained, had these officers succeeded in coercing its payment.

After the plaintiff had been in the state prison for a few days, the defendant Henry called upon him, and verbally informed him that he was charged with aiding or being privy to the desertion of the substitutes, but that he would be discharged on payment of the \$800, and \$25 additional for expenses. The plaintiff protested that he was innocent of the charge, and demanded a trial. He was told in reply by Henry (whose words I quote) that "he could not have a trial, and could not get one," but that his case would be reported to the Assistant General Provost-Marshal. He then requested Henry to make an immediate report, which he promised to do. Later in the day, being in great distress of mind and anxious to return to his family, and thinking that perhaps the money might be paid under protest, he telegraphed to his father to bring him the \$800, and requested Henry to withhold the report until his father arrived. On the next day but one his father arrived, and, in an interview with Henry, told him that neither he nor the plaintiff would pay a dollar, and requested him to report the case at once. The record then reads thus (I copy the words): "From that time plaintiff constantly urged that his case should be reported, or that a trial should be given him, or that he be admitted to bail, and protested his innocence, and Henry repeatedly promised to report the case, but frequently told him and his father he could not get a trial, nor be admitted to bail, and that he would be discharged at any time on payment of the \$825."

On the 20th of November following, Henry reported to his superior officers the arrest of the plaintiff, and the reasons for it, stating that

he was held for the return of the \$800; and in December, Henry informed the plaintiff in writing of the charges against him, claiming that he should pay the \$800 for the use of the government, with the expenses of his arrest. All the communications between the different officers of the military district, with reference to the plaintiff, show that he was held upon the charge of aiding or of being privy to the desertion of the substitutes, without any intention to bring him to trial for the offense, but to coerce, by his imprisonment, the repayment of the money which he, with two others, had received from the substitute broker. In one of his letters to the assistant provost-marshal, Henry stated, with reference to turning the case over to the district attorney, that he did not think that the plaintiff could be convicted under any section of the Enrollment Act, from any testimony which he then possessed, but that he had heard of additional facts, which might perhaps be sufficient for that purpose. No such additional facts, however, were obtained.

The record also shows that the plaintiff, throughout his imprisonment, made constant efforts, in various ways, to obtain a trial or a release on bail, which he was able and willing to furnish; and that eleven journeys were made by his father from the northern part of Vermont to Windsor and Brattleborough for that purpose. Among other efforts, the plaintiff appealed by letter to General Dix, the commander of the department, to order him to be brought to trial, and to give him an opportunity to prove his innocence. But no trial was allowed him; that right which belongs or ought to belong to every one, even the humblest in the land, was denied to him, a born citizen of the United States; and not until after the intercession, at Washington, of a member of Congress from Vermont in his behalf were any steps taken for his release. His father and he had pleaded in vain to the defendant Henry, urging, among other things, that his wife, who needed his support, was about to be confined. At last, on the 26th of April, 1865, he was taken before a justice of the peace and discharged on bail.

To add to the enormity of this case, the District Attorney of the United States for Vermont states in his testimony that there were many other cases in his district, during the war, of persons charged with inciting or assisting soldiers to desert, and that they were all turned over to him to be prosecuted, and that they were prosecuted by him, in the civil courts; but that he knew nothing of this case until April, 1865, and that soon afterwards the plaintiff was released on bail. The grand jury of the United States Court found no cause for his prosecution, though the defendant Henry told his story to them.

Whilst these things were being done in Vermont, and the plaintiff was, by the action of the defendants, lying in the state prison as absolutely helpless as though he had been immured in the dungeon of an Asiatic despot, there was no rebellion in that State against the laws and Government of the United States; there were no military operations carried on within its limits; there was no army there. The courts of justice, both federal and state, were open and in the full exercise of their jurisdiction; and the

plaintiff was not in the military service, or in any way connected with such service, and for the offense of which he was suspected, or for any other offense, could have been brought before them on any day of the year. By his imprisonment and the report that he was in the state prison, his business was ruined, his personal property and furniture were seized by creditors and sacrificed at sheriff's sale, and his wife was compelled to leave his home and return to her friends in Vermont.¹

On the trial of the action, the defendants relied for their defense upon the 4th section of the Act of Congress of March 3, 1863, "Relating to *habeas corpus*, and regulating judicial proceedings in certain cases," 12 Stat. at L., 756; and upon the Act of March 2, 1867, to declare valid and conclusive certain Proclamations of the President, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion; contending that under them the defendants were to be presumed to have acted by the orders of the President, and were thereby released from responsibility to the plaintiff. 14 Stat. at L., 432. And if they were not thus released from responsibility, then they sought to give in evidence in mitigation of damages the testimony of certain parties which was discovered long after the arrest and imprisonment of the plaintiff, tending to establish facts which, if known at that time, would have justified, to some extent, their suspicions as to his complicity in the escape of the substitutes. The court below held that the defendants were not released from responsibility under those Acts; and that evidence of the possible guilt of the plaintiff, discovered after the commission of the grievances complained of, was inadmissible in mitigation of damages. Its ruling upon both of these positions is assigned as error by the Attorney-General; but it is upon its ruling on the first that he chiefly relies for a reversal of the judgment. It is against that ruling that his argument is mainly directed. This court holds that the testimony offered should have been received; and it overrules the exception to the refusal of the court below to instruct the jury that the defendants were to be presumed to have acted under the orders of the President, and that the statutes in question constituted a full and complete justification for the acts complained of; not on the ground that the statutes were invalid, or that the orders, if issued, would have afforded no justification to the defendants; but on the ground that there was evidence for the consideration of the jury whether the defendants had not by fraudulent representations induced their superior officers to continue the imprisonment of the plaintiff "longer than necessary," and prevented him from having a speedy trial in the proper court for the offense charged.²

1. As the statement contained in the opinion of the majority does not give any detailed account of the "circumstances of humiliation and severity" mentioned, to which the plaintiff was subjected, an extract from the record showing them is annexed to this opinion. No adequate statement of the case can be made which does not substantially embody the entire bill of exceptions.

2. The charge to the jury, which the court was requested by the defendants to give, was that the facts which their evidence tended to establish, if believed, "Constituted, under the aforesaid Acts of Congress, a full and complete justification for each and both the defendants for the acts complained

In considering this case, I shall endeavor to show that the court below ruled correctly, as well where its ruling is pronounced erroneous as in refusing to give to the jury the instructions requested; and that its refusal in that respect should be sustained on the ground that neither the statutes mentioned nor any orders of the President under them could constitute any justification for the arrest and imprisonment of the plaintiff. And I shall examine the propositions of law presented by the rulings in the order in which they were discussed by the Attorney General.

The Act of 1863 provided that "Any order of the President, or under his authority," made during the rebellion, should "Be a defense in all courts to any action or prosecution" for any search, seizure, arrest or imprisonment under and by virtue of such order, or under color of any law of Congress.

By the Act of 1867, all Acts, Proclamations and Orders of the President, or acts done by his authority or approval, after March 4, 1861, and before July 1, 1866, respecting martial law, military trials by courts-martial, or military commissions; or the arrest, imprisonment and trial of persons charged with participation in the rebellion; or as aiders or abettors thereof; or as guilty of any disloyal practices in its aid; or of any violation of the laws or usages of war; or of affording aid and comfort to rebels, and all proceedings and acts of courts-martial or military commissions; or arrests and imprisonments in the premises by the authority of the Orders or Proclamations, or in aid thereof, are approved, legalized and declared valid, to the same extent and with the same effect as if the orders and proclamations had been issued, and the arrests, imprisonments, proceedings and acts had taken place, under the previous express authority and direction of Congress. The Act also declares that no person shall be held to answer in any civil court "For any act done or omitted to be done in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President" within the period and respecting any of the matters mentioned; and that "All officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises, shall be held *prima facie* to have been authorized by the President."

These statutes, as is apparent on their face, extend only to acts done in compliance with express Orders or Proclamations of the President. They do not cover acts done by persons upon their own will and discretion, who may have been at the time in the service of the government, simply because they were under the general direction of the President as Commander-in-Chief. They were not intended to protect against judicial inquiry and redress every act of a subordinate in the military service in suppressing or punishing what he may have regarded as a disloyal practice, no matter how flagrant the outrage he may have thus committed

of. And in the absence of all evidence to prove whether the President issued any order, general or special, for the arrest and detention of the plaintiff, the jury were not only at liberty but were bound to presume that he did; that such was the presumption of law, under the Act of March, 2, 1867, and that such presumption must prevail in this case, as there is no evidence to rebut it."

against life, liberty or property. Such was the purport of the decision of this court when this case was here before. *Bean v. Beckwith*, 18 Wall., 510 [85 U. S., XXI., 849].

It is not pretended that any proof was produced that the arrest and imprisonment of the plaintiff were made under any express Order or Proclamation of the President; but it is contended by the Attorney-General that under the last clause of the Act of 1867 it is to be presumed that their action was authorized by the President, and that they are thus relieved from accountability for it.

The court below held that, assuming the construction placed by the Attorney-General upon the statute to be correct, and that from the commission of the act the presumption arose that it was authorized by the President—the Act thus presumptively establishing its own validity—the presumption in this case was repelled, inasmuch as it appeared in evidence by whose direction the orders were issued under which the plaintiff was arrested and imprisoned. It appeared that they never originated with or had the sanction of the President.

If, however, the court below erred in this respect, there is another and a conclusive answer to the defense, one which renders futile and abortive all attempts to justify the action of the defendants under any presumed orders of the President, and that is: that it was not within the competency of the President or of Congress to authorize or approve the acts here complained of, so as to shield the perpetrators from responsibility. It is to be borne in mind, as already stated, that the plaintiff was not in the military service of the United States; that his arrest and imprisonment were in Vermont, far distant from the sphere of military operations; that there the courts of the United States and of the State were open and in the full exercise of their jurisdiction, and that the plaintiff could have been brought before them for any offense known to the laws; and that there, if anywhere in the United States, the provisions of the Constitution for the security of one's person from unlawful arrest and imprisonment were not superseded.

Persons engaged in the military service of the United States are, of course, subject to what is termed military law; that is, to those rules and regulations which Congress has provided for the government of the army and the punishment of offenses in it. Congress possesses authority under the Constitution to prescribe the tribunals as well as the manner in which offenders against the discipline of the army and the laws for the protection of its men and officers shall be summarily tried and punished, and to the jurisdiction thus created all persons in the military service are amenable. But that jurisdiction does not extend to persons not in the military service, who are citizens of States where the civil courts are open.

It may be true, also, that on the actual theater of military operations, what is termed martial law but which would be better called martial rule, for it is little else than the will of the commanding general, applies to all persons, whether in the military service, or civilians. It may be true that no one, whatever his station or occupation, can there interfere with or obstruct any of the measures deemed essential for

the success of the army, without subjecting himself to immediate arrest and summary punishment. The ordinary laws of the land are there superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted. The success of the army is the controlling consideration, and to that everything else is required to bend. To secure that success, persons may be arrested and confined and property taken and used or destroyed, at the command of the general, he being responsible only to his superiors for an abuse of his authority. His orders, from the very necessity of the case, there constitute legal justification for any action of his officers and men. This martial rule—in other words, this will of the commanding general, except in the country of the enemy occupied and dominated by the army—is limited to the field of military operations. In a country not hostile, at a distance from the movements of the army, where they cannot be immediately and directly interfered with, and the courts are open, it has no existence.

The doctrine, sometimes advanced by men with more zeal than wisdom, that whenever war exists in one part of the country the constitutional guaranties of personal liberty and of the rights of property are suspended everywhere, has no foundation in the principles of the common law, the teachings of our ancestors, or the language of the Constitution, and is at variance with every just notion of a free government. Our system of civil polity is not such a rickety and ill-jointed structure, that when one part is disturbed the whole is thrown into confusion and jostled to its foundation. The fact that rebellion existed in one portion of the country could not have the effect of superseding or suspending the laws and Constitution in a loyal portion widely separated from it. The war in the Southern States did not disturb Vermont from her constitutional propriety. She did not assent to the theory that war and disturbance elsewhere could destroy the security given by her laws and government. The same juridical institutions, and the same constitutional guaranties for the protection of the personal liberty of the citizen, with all the means for their enforcement, remained there as completely as before; and the Constitution and laws of the United States were as capable of enforcement in all their vigor in that State during the war as at any time before or since. The arrest and imprisonment of the plaintiff, even if made by direct order of the President, were, therefore, in plain violation of the Fifth constitutional Amendment, which declares that no person shall be deprived of his liberty without due process of law. No mere order or Proclamation of the President for the arrest and imprisonment of a person not in the military service, in a State removed from the scene of actual hostilities, where the courts are open and in the unobstructed exercise of their jurisdiction, can constitute due process of law, nor can it be made such by any Act of Congress. Those terms, as is known to everyone, were originally used to express what was meant by the terms "the law of the land" in *Magna Charta*, and had become synonymous with them. They were intended, as said by this court, "To secure the individual from the arbitrary exercise of the powers of government, unrestrained by

the established principles of private right and distributive justice." *Bk. v. Okely, 4 Wheat., 235.* They were designed to prevent the government from depriving any individual of his rights except by due course of legal proceedings, according to those rules and principles established in our systems of jurisprudence for the protection and enforcement of the rights of all persons.

"By the law of the land," said Mr. Webster, in his argument in the *Dartmouth College Case*, "is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society." Those words have been held in English law to have this potency since the date of *Magna Charta*.

The clauses of that instrument which declare that no freeman shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, or be passed upon except by the lawful judgment of his peers or by the law of the land, and that justice shall not be sold nor denied nor delayed to any man, are considered by English jurists and statesmen to be sufficient to protect the personal liberty and property of every freeman from arbitrary imprisonment and arbitrary spoliation.

"It is obvious," says Hallam, "that these words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's Charter, it must have been a clear principle of our Constitution, that no man can be detained in prison without trial." 2 Hallam, *Middle Ages*, ch. 8, pt. 2, p. 310. And the same writer, in his *Constitutional History of England*, mentions among the essential checks upon royal authority, established under *Magna Charta* as part of her Constitution, "That no man could be committed to prison but by a legal warrant specifying his offense," and that "The officers and servants of the Crown violating the personal liberty or other right of the subject might be sued in an action for damages, to be assessed by a jury, or in some cases were liable to criminal process; nor could they plead any warrant or command in their justification, *not even the direct order of the King.*" 1 Hallam, *Const. Hist.*, ch. 1, pt. 3.

"The glory of the English law," says Blackstone, "consists in clearly defining the times, the causes and the extent, when, wherefore and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment, the reason for which it is made, that the courts upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner." 3 Blackstone's *Com.*, 133.

As stated by counsel, the last vestige of any claim on the part of the government of England to the right of arrest, except upon such process as was authorized by the general law of the land, was overthrown in 1765, in the celebrated contest concerning the legality of general warrants. The arrests of parties by such warrants from the Secretary of State was condemned by repeated

judgments of the highest courts of England as illegal and unconstitutional, and from that day to this such warrants have never been issued. No barrister or judge in England would now have the hardihood to assert that such warrants are due process of law.

To me, therefore, it is a marvel that in this country, under a Constitution ordained by men who were conversant with the principles of *Magna Charta*, and claimed them as their birth-right—a Constitution which declares in its preamble that it is established "To secure the blessings of liberty to ourselves and posterity"—it could ever be contended that an order of the Executive, issued at his will for the arrest and imprisonment of a citizen, where the courts are open and in the full exercise of their jurisdiction, is due process of law, or could ever be made such by an Act of Congress. I certainly never supposed that such a proposition could be seriously asserted before the highest tribunal of the Republic by its chief legal officer. I had supposed that we could justly claim that in America, under our republican government, the personal liberty of the citizen was greater and better guarded than that of the subject in England. It is only the extraordinary claim made by the counsel of the government in this case which justifies any argument in support of principles so fundamental and heretofore so universally recognized. It may be necessary at times with respect to them, as it is necessary at times with respect to admitted principles of morality, to restate them, in order to rescue them from the forgetfulness caused by their universal admission.

The assertion that the power of the government to carry on the war and suppress the rebellion would have been crippled and its efficiency impaired, if it could not have authorized the arrest of persons and their detention without examination or trial, on suspicion of their complicity with the enemy or of disloyal practices, rests upon no foundation whatever so far as Vermont was concerned. There was no invasion or insurrection there, nor any disturbance which obstructed the regular administration of justice. A claim to exemption from the restraints of the law is always made in support of arbitrary power whenever unforeseen exigencies arise in the affairs of government. It is inconvenient; it causes delay; it takes time to furnish to committing magistrates evidence which, in a country where personal liberty is valued and guarded by constitutional guarantees, would justify the detention of the suspected; and therefore, in such exigencies, say the advocates of the exercise of arbitrary power, the evidence should not be required. A doctrine more dangerous than this to free institutions could not be suggested by the wit of man. The proceedings required by the general law for the arrest and detention of a party for a public offense—the charge under oath, the examination of witnesses in the presence of the accused with the privilege of cross-examination, and of producing testimony in his favor, creating the objectionable delays—constitute the shield and safeguard of the honest and loyal citizen. They were designed not merely to insure punishment to the guilty, but to insure protection to the innocent, and without them everyone would hold his liberty at the mercy

of the government. "All the ancient, honest, juridical principles and institutions of England," says Burke—and it is our glory that we inherit them—"are so many clogs to check and retard the headlong course of violence and oppression. They were invented for this one good purpose, that what was not just should not be convenient."¹ Whoever, therefore, favors their subversion or suspension, except when in the presence of actual invasion or insurrection the laws are silent, is consciously or unconsciously an enemy to the Republic.

If neither the Order of the President nor the Act of Congress could suspend, in a State where war was not actually waged, any of the guaranties of the Constitution intended for the protection of the plaintiff from unlawful arrest and imprisonment, neither could they shield the defendants from responsibility in disregarding them. Protection against the deprivation of liberty and property would be defeated if remedies for redress, where such deprivation was made, could be denied.

I pass from this subject to the second position of the defendants, that if they were not justified by the Acts of Congress, so far at least as to be exempted from responsibility for their treatment of the plaintiff, they were entitled to give in evidence testimony subsequently discovered, tending to establish the correctness of their suspicions of the complicity of the plaintiff in the desertion of the substitutes. The court below refused to admit the testimony, and this court holds that it thus erred and, for that reason, reverses its judgment. The testimony consisted of three depositions filled with hearsay, conjectures, understandings, beliefs and other irrelevant matter which rendered them inadmissible as a whole in any court on any subject; and on that ground they were objected to, and in my judgment ought to have been excluded. They were offered to show the guilt of the plaintiff in aiding the desertion of the substitutes; and though the evidence they furnished was of the vaguest and most unsatisfactory character, the court excluded them, on the ground that the guilt or innocence of the plaintiff was not a question for the determination of the jury; and that for the purpose of rebutting malice and showing good faith, they could not give in evidence circumstances of which they had never heard until after the commencement of the action. As facts not known at that time could not have influenced the conduct of the defendants, it is difficult to comprehend how proof of those facts could be received to show the motives—of malice or good faith—with which they then acted.²

1. Letter to the Sheriffs of Bristol.

2. The record reads as follows:

"The said three depositions were offered for the purpose of satisfying the jury of the guilt of Bean by evidence which was not known to or did not come to the knowledge of the defendants prior to said release.

The court excluded said depositions upon the ground that the guilt or innocence of said Bean was not a question for the determination of the jury, but that all the facts and circumstances which were known to the defendants, or with which they in any way became acquainted prior to the imprisonment, could be admitted for the purpose of rebutting malice and showing that they acted in good faith, but that they could not give in evidence circumstances of which they had never heard until after the commencement of this suit."

Independently of this consideration, it seems to me that the evidence of the guilt or innocence of the plaintiff was entirely immaterial. Assuming that he was guilty of the complicity alleged; that he had admitted his guilt to the defendants; that circumstance would not have justified their conduct in the slightest degree. They would have been equally bound upon that assumption, as they were in fact bound—no more and no less—to take the plaintiff before the proper magistrate, to be proceeded against according to law. To keep him for nearly six months in the state prison among convicts, without taking him before the proper officer to be held to bail or brought to trial, was a gross outrage upon his rights, whether he were guilty or innocent. There were magistrates in every county of the State competent to act upon the charge, and the district attorney was ready to take control of all cases against the laws of the United States and prosecute them. The defendants not only omitted this plain, imperative duty, but detained the plaintiff in prison, not with a view to punish him for the offense of which they suspected him to be guilty, but to coerce from him payment of money alleged to be due by him and others to a substitute broker. Where is the law or reason for allowing one, who by force holds another in confinement in order to extort the payment of money, to show in extenuation of his conduct that the man had been guilty of some offense against the law? The answer in all such cases should be that the law attaches the proper penalties to its violation, and appoints the ministers by whom those penalties are to be enforced; and whenever they can act, whoever usurps their authority and attempts to punish supposed offenders in any other mode than that provided by the law, is himself a criminal. For, as it was said by a distinguished statesman and jurist of England, when the laws can Act, "every other mode of punishing supposed crimes is itself an enormous crime."

The doctrine announced by the decision of the court in this case is nothing less than this: that a gross outrage upon the rights of a person may be extenuated or excused by proof that the outraged party had himself been guilty of some crime, or, at least, that the perpetrators of the outrage had reason to suspect that he had. This doctrine is pregnant with evil. I know not why, under it, the violence of mobs, excited against guilty or suspected parties, may not find extenuation. Let such a doctrine be once admitted, and a greater blow will be dealt to personal security than any given to it for a century.

If we turn to the adjudged cases, we shall find nothing to support, but everything to condemn, the doctrine. Thus in *Delega v. Highley*, 32 Eng. C. L., 398 [3 Bing. N. C., 950], which was an action brought for a malicious charge before a magistrate, the defendant pleaded that he had caused the charge to be made upon reasonable and probable cause, stating what the cause was. Upon special demurrer, the plea was held insufficient in not alleging that the defendant, at the time of the charge, had been informed of or knew the facts on which the charge was made. "If the defendant," said Chief Justice Tindal, "instead of relying on the plea of not guilty, elects to bring the facts before the court in a plea of justification, it is obvious that he must allege, as a ground of defense, that which is so

important in proof under the plea of not guilty, viz.: that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas, it is quite consistent with the allegations in this plea that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavors to support the propriety of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made."

So, also, the converse of this doctrine is true: if a defendant prove that, at the time of the arrest, he had reasonable cause to believe the plaintiff guilty, this cannot be rebutted by proof that, afterwards, he turned out to be entirely innocent. *Foshay v. Ferguson*, 2 Den., 617.

It will appear from an examination of the adjudged cases, as it must on principle, that when illegal measures have been taken to redress private wrongs, or to punish for offenses against the public, it is inadmissible to prove, in mitigation of actual or exemplary damages, that the party injured was guilty of the offense or misconduct constituting the provocation to the illegal measures, except where the provocation is of a personal character calculated to excite passion, and so recent as to create the presumption that the acts complained of were committed under the influence of the passion thus excited. Thus, in an action of trespass for destroying or injuring certain dwelling-houses, it was held by the Supreme Court of Maine incompetent for the defendant to prove in mitigation of damages that they were occupied as houses of ill-fame. *Johnson v. Farwell*, 7 Me., 370. So, in a similar action, for shooting into a house in the night-time, it was held by the Supreme Court of Illinois that the defendant could not prove, in mitigation of exemplary damages, the kidnaping and seduction of his daughter by the plaintiff and her husband, done nearly a year previous. *Huftalin v. Misner*, 70 Ill., 55. And in trespass for tearing down the plaintiff's house, evidence that it was occupied by disreputable females as a disorderly house, whereby the defendant had suffered serious injury and disturbance, was held by the Supreme Court of New Hampshire inadmissible either to rebut the presumption of malice or in answer to a claim for exemplary damages. *Perkins v. Towle*, 43 N. H., 220; see, also, *Weston v. Gravin*, 49 Vt., 507.

Many other illustrations might be adduced from the adjudications of the state courts. They are founded upon the plain principle that no one can be allowed to undertake the punishment of wrong-doers according to his own notions; that the administration of punitive justice for all offenses is confided by the law to certain public officers, and whoever assumes their functions without being authorized, usurps the prerogative of sovereign power, and becomes himself amenable to punishment. He shall not be permitted to set up the real or supposed offenses of others to justify his own wrong.

Here, the defendants, having, by a gross abuse

of their official authority, confined the plaintiff in a state prison among convicts for many months, not that he might be prosecuted for a public offense, but for the avowed purpose of coercing the payment of money, they ought not to be permitted to set up, either in mitigation of actual or exemplary damages, that the plaintiff was guilty of an offense for which the law had prescribed another and different punishment. In the whole range of adjudications in the English and American courts I can find no ruling which sanctions the admission of such testimony for any purpose.

There is nothing in the cases cited in the opinion of the majority from the English Common Pleas, or from the decisions of the courts of Ohio, Kentucky and Illinois, which has any relevancy to the question here presented, as any one may satisfy himself by their examination. The circumstances, of which evidence was there allowed, existed and were known when the grievances complained of were committed, and tended to establish probable cause for them. There is no intimation, in any of the cases, of the novel doctrine, now for the first time announced, that subsequently discovered evidence could be received in extenuation of conduct not founded upon it.

The charge of the court to the jury was, except perhaps in one particular, as favorable to the defendants as the case permitted. It gave a succinct and clear statement of the facts, and declared the law applicable to them with precision and accuracy. It told them that the arrest of the plaintiff was of little consequence as compared with his imprisonment; that had he been taken at once before a United States commissioner, the arrest without a warrant, though an illegal act, would have called for small damages; and that the importance of the case consisted in his imprisonment and the purpose of it. In adding that after the plaintiff was imprisoned it was not the purpose of the defendants to try him in the civil courts, but to hold him with a strong hand until the money was paid, the court merely stated what the uncontradicted evidence on the trial established, and what was not disputed. "For this," said the court, "he is entitled to just damages, to be recompensed for his expenses, to be paid for the suffering to body and mind from confinement in a common cell in the state prison, for the disgrace, for the separation from his family at a time when it was very important that he should not be separated from them; in brief, for the loss of his personal liberty, and for the immediate and necessary losses in his business resulting from his confinement, and to the pecuniary loss which he immediately and directly sustained." To this the court added, that if the defendant Henry was influenced in all his conduct by a determination to prevent the release of the plaintiff, and to hold him after he was ordered to be turned over to the civil authorities, and was thus guilty of malice or ill-will, the jury might give, in addition to remunerative, punitive damages; that is, such sum as would punish him for the malice exhibited, and teach him and others to refrain from similar conduct.

The case here is much stronger than that of *Mitchell v. Harmony*, reported in the 13th of Howard, 115. There the property of the plaintiff had been seized by an officer of the Army of

the United States upon the belief that he was unlawfully engaged in trading with the enemy. It turned out that he had been permitted by the Executive Department of the Government to trade with the inhabitants of neighboring Provinces of Mexico which were in the possession of the military authorities of the United States. In an action for trespass for seizing the property, the defendant, among other reasons, justified the seizure on the ground that he acted in obedience to the order of his commanding officer and, therefore, was not liable. But the court answered, *Chief Justice* Taney speaking for it, by referring to the case of Captain Gambier, mentioned by *Lord Mansfield* in his opinion in *Mostyn v. Fabrigas*, 1 Cowp., 180, and observing, that "Upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it can never justify." And in that case the court added that the defendant did not stand in the situation of an officer who merely obeys the command of his superior, for it appeared that he advised the order and volunteered to execute it, when that duty more properly belonged to an officer of an inferior grade.

Here the defendant, Henry, was especially officious in securing the arrest and in continuing the imprisonment of the plaintiff. He advised the arrest; he insisted upon the imprisonment until the payment of the \$800 was coerced, and he urged against turning the case over to the civil tribunals. The spirit which actuated him, as well as Beckwith, is shown in their telling the plaintiff at Sutton, on the day of his arrest and afterwards, when in confinement in the state prison, "That if they could not hold him as privy to the desertion, they should take him to Canada, to be prosecuted there under the foreign enlistment Acts for enlisting the men, *unless he paid over the money.*"

The case of *Captain Gambier*, mentioned by *Lord Mansfield* and referred to by *Chief Justice* Taney, was this: by order of an admiral of the English Navy he had pulled down the houses of some sutlers in Nova Scotia who were supplying the sailors with spirituous liquors, by which their health was injured. "The motive," says the *Chief Justice*, "was evidently a laudable one, and the act was done for the public service. Yet it was an invasion of the rights of private property, and without authority of law, and the officer who executed this order was held liable to an action, and the sutlers recovered against him to the value of the property destroyed." "This case," he adds, "shows how carefully the rights of private property are guarded by the laws of England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

The only criticism perhaps to which the charge is open is, that it does not distinguish between the conduct of the defendant Beckwith and that of the defendant Henry. The former does not appear from the evidence to have been as officious and persistent as the latter, in efforts to hold the plaintiff until the money was coerced from him. But no objection to the charge was made on this ground; nor does it appear that on the trial any distinc-

tion was drawn as to the extent of liability between the two defendants, or that any other than compensatory damages were allowed by the jury. They may well have supposed that the amount awarded was at best but poor compensation. Few, indeed, would consider the verdict given as sufficient for the disgrace, humiliation, and suffering wantonly inflicted upon the plaintiff. As punitive damages, the verdict was not at all excessive. On this last point I will quote from only one case, decided in 1763. It is the case of *Huckle v. Money*, 2 Wils., 205, tried before the *Chief Justice* of the Common Pleas of England. The plaintiff was a journeyman printer, and was taken into custody by the defendant, the King's messenger, upon suspicion of having printed a newspaper called the North Briton, and was kept in custody six hours; but he was used civilly, so that he suffered little or no damages. The defendant attempted to justify under a general warrant of the Secretary of State to apprehend the printers and publishers of that paper; but the justification was overruled by the *Chief Justice*, and the plaintiff recovered £300 as damages. A new trial was moved for on the ground that this amount was excessive, it being in evidence that the printer received only weekly wages of a guinea. But the motion was denied, and in giving the decision of the court the *Lord Chief Justice* said: "That if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's counsel, and saw the Solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition, a law under which no *Englishman* would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the 29th chapter of *Magna Charta*, *Nullus liber homo capiatur et imprisonetur, etc., nec super eum ibimus, etc., nisi per legale iudicium parium suorum vel per legem terre, etc.*, which is pointed against arbitrary power, was violated."

I am clearly of opinion that the judgment of the court below should be affirmed, and I am authorized to say that *Mr. Justice Clifford* concurs with me in this respect and in the views I have expressed.

The following statement of the character of the evidence given on the trial touching the treatment of the plaintiff is printed from the record in the case:

"The plaintiff's evidence tended to show that on the 11th day of November, A. D. 1864, while on his

return from a trip to Boston, to his home in Coaticook, in the Province of Quebec, he was arrested in a passenger car, near Wells River, in the State of Vermont, by deft. Beckwith, without any warrant or process of law, and taken from thence to Sutton, Vermont.

That Beckwith at first proposed to take plaintiff to St. Johnsbury jail, but afterwards decided to take him to his (Beckwith's) residence at Sutton, to which place he was then on his way, for the purpose of allowing plaintiff to see his father, who lived about fifteen miles from Sutton.

That said Beckwith kept the plaintiff there through the ensuing night, under charge of keepers; that the plaintiff's father, for whom the plaintiff sent after his arrival at Sutton, came there during the night, but Beckwith refused to allow the plaintiff to have an interview with his father except in his (Beckwith's) presence.

That, on the following day, defendant, forcibly and against the will of the plaintiff, took him, and by order of Gilman Henry, the other defendant, placed him in the state prison, at Windsor, Vermont, where he remained until on or about the 26th day of April, 1865, when he was admitted to bail, and released from said imprisonment.

That during all that time he was locked up in the night-time, and for the first few days in the daytime also, in a narrow and scantily furnished cell, being one of those in which convicts in the state prison were confined at night; that after the first few days he was allowed, upon his complaint of the coldness of the cell in the daytime, to spend the day in the shop where the convicts worked, but was required to go out and return to his cell when they did, and not at any time to be out of sight of a keeper, nor to go upon the corridors or in the yard for exercise; that the food offered him was the fare served to the convicts, and which he could not eat; and thenceforth he obtained his meals to be sent to him from the keeper's table, by paying \$3 per week, which he paid during the whole time.

The plaintiff's evidence further tended to show that he was informed, at or soon after the time of his arrest, by defendants, that he was charged with being one of three persons who had received \$800 of money paid for two men who had enlisted in the army in June previous as substitutes, and had immediately deserted, as more particularly stated hereafter, and with being privy to their desertion.

That he was imprisoned on Saturday, and saw no one but the keepers till the Monday following, when deft. Henry came to see him; that Henry told him he could be discharged on payment of the \$800, and \$25 more for expenses; that the plaintiff protested his innocence and demanded a trial; that he was told by Henry he could not have a trial, and could not get one, but that his case would be reported to Major Austine, at Brattleboro', Ass't Pro't-Marshal-Gen'l.

That plaintiff thereupon requested him to make immediate report, which he promised to do. That later in the same day the plaintiff being in much distress of mind and anxiety to return to his family, and thinking, perhaps, the money might be paid under protest, telegraphed to his father to come and bring \$800, and sent word to Henry, by the messenger who took the dispatch requesting him not to report the case till his father arrived, which he expected would be on the following day.

That his father arrived on the next day but one. That his father had an interview with Henry, and said to him that neither he nor the plaintiff would pay a dollar, and requested him to report the case at once.

He was further told by both defendants, both at Sutton and after his confinement at Windsor, that if they could not hold him as privy to the desertion they should take him to Canada to be prosecuted there under the foreign enlistment acts for enlisting the men, unless he paid over the money.

That, from that time, plaintiff constantly urged that his case should be reported, or that a trial should be given him, or that he be admitted to bail, and protested his innocence. And Henry repeatedly promised to report the case, but frequently told him and his father he could not get a trial, nor be admitted to bail, and that he would be discharged at any time on payment of the \$825.

"The plaintiff's evidence further tended to show that throughout his imprisonment he made constant efforts in various ways to obtain a trial, or a release on bail, which he was able and willing to furnish; that his father made eleven journeys from

the northern part of Vermont to Windsor, Brattleboro', etc., for that purpose; that among other efforts he addressed to Maj-Gen. Dix, then in command of that dep't, the following letter:

WINDSOR STATE'S PRISON,
 Jan'y. 21, 1865.

'Maj-Gen. J. A. DIX:

'SIR,—I am told by one Daniel Beckwith, a deputy provost-marshal here, by whom I have been committed here on a charge (of which I am entirely innocent) of aiding or being privy to the escape of two substitutes who had received \$800 paid them by one Stevens, and that you have ordered my imprisonment here till I pay the \$800 and expenses.

If I am guilty of aiding a soldier to desert, I ought to be punished, and I cannot see, sir, how (I say it respectfully) you have any right to order my imprisonment for any indefinite time without giving me an opportunity to prove my innocence.

I ask nothing but what is right, and the right of every citizen of the United States; that is, a trial.

I do not believe, sir, that you have made any such orders, but the fact is, I am kept in prison ever since Nov. 11, 1864, my family suffering and my character defamed, and a trial denied me.

I am told, sir, there is a United States Attorney in Vermont whose duty it is to investigate such matters, and I respectfully ask, sir, if the matter is within your jurisdiction, that he be directed to bring me to trial; and if the government is not ready for trial, I can find any number of respectable people who will become my bail until such time as the government is ready to try me.

Again, sir, I ask you candidly and respectfully to order a complaint to be made against me, and, if proved guilty, I must suffer the consequences.

Yours respectfully,

ANDREW J. BEAN.'

That said Bean obtained the intercession at Washington of Mr. Baxter, a member of Congress from Vermont.

His evidence further tended to show that he learned early in April of an order for his release having been sent from Washington, and made, as did his father, urgent efforts to obtain his release, as his wife was then about to be confined; that he did not succeed, though repeated applications were made to Henry, until the 26th of April, and after the confinement of his wife, when Henry brought him before a justice of the peace of Windsor, who took bail for his appearance before a United States Commissioner when called on."

Mr. Justice Miller did not hear the argument in this case or participate in its decision.

Cited—111 U. S., 338.

GRINFILL BLAKE ET AL., *Appts.*,

v.

WILLIAM J. HAWKINS AND WALTER CLARK, as Assignees in Bankruptcy of THOMAS P. DEVEREAUX, Deceased, a Bankrupt, ET AL.

(See S. C., 8 Otto, 315-331.)

Will, evidence of intention—executed power—object of will—appointment of fund—executor de son tort.

1. An expressed intention in a will may serve to explain language afterwards used, and show what its meaning is; but the intention must be found in the acts or dispositions of the testator, and not alone in any previously expressed purpose.

2. Although a will be expressed to be made in pursuance of a power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will.

3. On the other hand, if the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. The intent and its execution are to be sought for through the whole instrument.

4. In this case the will in question was held an

execution of a power, and that it appointed the whole fund to the executors of the will.

5. Held, also, that the deed of explanation mentioned in the opinion was effectual, and that its operation was to reduce an annuity charged upon the lands.

6. An executor *de son tort* is liable only for what comes into his hands.

[No. 56.]

Argued Nov. 4, 1878. Decided Jan. 6, 1879.

APPEAL from the Circuit Court of the United States for the Eastern District of North Carolina.

The bill in this case was filed in the court below by the appellants, for an account and for the distribution to them of their alleged shares in the estate of Frances Devereaux, deceased, under her last will and testament. A decree having been rendered denying the larger part of their claims, they appealed to this court.

The case further appears in the opinion.

Messrs. S. F. Phillips and E. Graham Haywood, for appellants:

The intention of Frances Devereaux, deceased, to execute her power cannot be questioned; she has declared it in the most explicit language; her intention to execute her power by that very instrument, to wit: her will, cannot be doubted.

The two paramount rules for the construction of a written instrument are: 1. That it shall, if possible, be so interpreted, *Ut res magis valeat quam pereat*; and 2. That such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties.

Broom, Leg. Max., 521.

In *Roe dem, Wilkinson v. Tranmarr*, Willes, 684, Lord Chief Justice Willes says: "In the case of *Crossing v. Scudamore*, 2 Lev., 9, which I shall mention more particularly by and by, Lord Ch. J. Hale cites the opinion of Lord Hobart in folio 277, and declares himself to be of the same opinion, that the judges ought to be curious and subtle (Lord Hobart used the word *astute*) to invent reasons and means to make acts effectual according to the just intention of the parties." Courts of law lean in favor of the execution of a power.

Warner v. Howell, 3 Wash. (C. C.), 12; *Lippett v. Hopkins*, 1 Gall., 454; *Archer v. Deneale*, 1 Pet., 585; *Bullard v. Goffe*, 20 Pick., 258.

Ever since *Perrin v. Blake*, 4 Burr., 2579; *Fearne on Rem.* by Butler, 9th ed., 156, it has been settled in our law that the intention of the testator, as gathered *ex visceribus testamenti*, was to be followed in the interpretation of devises and bequests, and was to prevail over the technical construction of law given to certain phrases.

Broom, Leg. Max., 534; *Bennett v. Aburrow*, 8 Ves., 616; *Blagge v. Miles*, 1 Sto., 445; Sugd. Pow., 6th Eng. ed., 428; *Maddison v. Andreu*, 1 Ves., Sr., 61; *Oke v. Heath*, 1 Ves., Sr., 139; *Churchill v. Dibben*, 2 Lord Keny., 2d pt., 68.

Jarman (On Wills, 3d Lond. ed., vol. 1, p. 651), says: the principle is, that an appointer who shows an intention to exercise the power over the whole subject-matter of the power, has converted the whole subject-matter into his own personal estate, citing *Lefevre v. Freeland*, 24 Beav., 403, and *Chamberlain v. Hutchinson*, 22 Beav., 444.

It has been held that where a donee, under a general power of appointment, appointed a certain sum of money to certain persons named in

trust, but declared no express trust, and she gave her personal estate to the same persons upon certain trusts, and appointed them her executors, the donees, being executors, took the gift as part of the testatrix's personal estate; and if the legacies given by the will were not sufficient to exhaust the personal estate, thus increased by the fund appointed, then, that the surplus would go to persons who were entitled to the testatrix's residuary personal estate.

1 Sugd. Pow., 6th Eng. ed., 560; *Goodere v. Lloyd*, 3 Sim., 538; 5 Cond. Eng. Rep. Ch., 238.

Now in our case, we have not only a reference to the power, an express recital in the initial clause of the will of an intention thereby to execute it, executors nominated, and pecuniary legacies given which were to be paid by the executors; but, as will appear from a careful examination of the whole context of the will, it was clearly the intention of the testatrix that none of these pecuniary legacies, amounting together to near \$28,000, save one, of which special mention will be made hereafter, should be paid by her executors, with any other part of her personal property than the \$50,000 fund, which she had appointed to them as part of her personal assets, and so a direction, by the strongest possible implication, that such pecuniary legacies were to be paid by her executors out of the \$50,000 fund which she had already appointed to them.

Hayes v. Outley, L. R., 14 Eq. Cas., 1.

In *Wilday v. Barnett*, L. R., 6 Eq. Cas., 196, Lord Romilly, M. R., in delivering his opinion, said: "I assent to Bathurst's argument, that the will must, if it operates as an execution of the power at all, operate as an appointment of the whole fund." The cases are numerous, and they amount to this: if the donee of a power to appoint a fund, either expressly or by implication appoints it to his executors, thereupon the executors take it as a part of the property of the appointer, and as in that character they do not take it beneficially, they take it in trust; that is, first to pay the creditors, and then the legatees, and if there are no legatees or the legacies do not exhaust the fund, then in trust for the next of kin of the appointer.

Chamberlain v. Hutchinson, 22 Beav., 444; *Lefevre v. Freeland*, 24 Beav., 403; *Wilday v. Barnett*, L. R., 6 Eq. Cas., 193; *Brickenden v. Williams*, L. R., 7 Eq. Cas., 310; *Wilkinson v. Schneider*, L. R., 9 Eq. Cas., 423; *In re Wilkinson*, L. R., 4 Ch. App. Cas., 587; *Atty-Gen. v. Brackenbury*, 32 L. J. (Ex.), 108; Lord St. Leonards, Powers, 8th Lond. ed., 467.

Mr. A. S. Merrimon, for appellees:

So far as it was necessary to resort to the fund to pay debts or to satisfy legacies, it is a good appointment; but beyond that, there is no appointment, defective or otherwise.

Sec. 8, ch. 119, Rev. Code (N.C.), 1855; Acts, 1844, ch. 88, sec. 5.

While equity will interfere to aid an attempted execution of a power of appointment to pay debts, and will divert a fund appointed to legatees to satisfy creditors; yet, it will not interfere in a case of non-execution.

Ad. Eq., 100; 1 Story, Eq. Jur., 175; 2 Chance, Powers, ch. 23, sec. 2; 2 Sugd. Pow., ch. 10, secs. 1-6; *Brown v. Higgs*, 8 Ves., 570.

Had Mrs. Devereaux made an appointment for the benefit of her estate generally, as to the

residue not specifically devised, she would have died intestate; but if, as to this fund, she be intestate, it is to go to Thomas P. Devereaux as a *quasi* remainder-man, under the terms of the deed itself. The deed did not give an absolute ownership.

Boyce v. Waller, 9 Dana (Ky.), 482.

Mr. Justice Strong delivered the opinion of the court:

It is a common remark, that, when interpreting a will, the attending circumstances of the testator, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. *Brown v. Thorndike*, 15 Pick., 388; *Postlethwaite's Appeal*, 68 Pa., 477; *Smith v. Bell*, 6 Pet., 68. Such a method of procedure is, we think, appropriate to the present case.

Mrs. Devereaux's will was made on the 23d day of December, 1847, about eighteen months before her death. There is no reason to believe there was any essential change in the nature or the amount of her property between the date of her making the will and her decease, and it may fairly be assumed that what she had in June, 1849, the time of her death, she had when she made her testamentary disposition. At that time her personal property consisted of her household furniture, her carriage and horses, a growing crop upon a farm she was cultivating jointly with her grandson, John Devereaux, a small sum of cash in hand, some petty debts due to her, and about sixty slaves. The slaves, as appears in a subsequent appraisement, constituted the principal part in value; very nearly, if not quite, nine tenths of the whole. In addition to this, the testatrix owned a house and lot in Chapel Hill, which she directed to be sold; and she had a power to appoint the unappropriated balance of a fund of \$50,000 then in the hands of her son, Thomas P. Devereaux. Such was the property of which she attempted to make a disposition. Her will commenced with a declaration of her intention "Thereby to execute all powers vested in (her) and enacted in any deed or deeds theretofore executed, particularly those powers created in her favor by two certain deeds settling and assuring the estate of her late brother, George Pollock, to (her) son, Thomas P. Devereaux, dated some time in the month of July, in the year of our Lord eighteen hundred and thirty-nine, and executed by her late husband and herself." This was followed by her testamentary dispositions. By the first five she gave five legacies of \$4,000 each to five several charitable institutions, to each an equal sum. By the fifth item she bequeathed \$500 to her executors for a charitable purpose. By the eighth she bequeathed \$7,500 to her son, Thomas P. Devereaux, to apply the income annually to the payment of certain annuities and charities therein specified; and by the twelfth item she bequeathed \$500 for another specified charity. The will contains no other gifts of pecuniary legacies. The aggregate of these is \$28,500. Special dispositions are made of her slaves, of her stock of horses, cattle, hogs, crops and farming utensils, and of the proceeds of the sale of her house and lot in Chapel Hill; generally, See 8 OTTO.

indeed, of all that she possessed in her own right.

Whether this will was an execution of the power reserved to her by the deed to her son, referred to in the introductory clause; whether it was an appointment of so much of the sum of \$50,000 made subject to her appointment by the deed, as remained undisposed of by her, is the most important question we have now to consider. It must be admitted that the avowal by the testatrix in the introductory clause of her will of her purpose thereby to execute the power was not itself an execution. It is important only as it may shed light upon the subsequent dispositions. A previously expressed intention may serve to explain language afterwards used, and show what its meaning is; but it is one thing to intend a future act, and quite another to carry out that intention. While it is true that whether a power has been executed or not is a question involving a consideration of the intent of the donee of the power, it is equally true the intention must be found in the acts or dispositions of the donee, and not alone in any previously expressed purpose. Prior to the English Statute of Wills, 1 Vict., ch. 26 (which, so far as it relates to appointments by will, has been enacted in North Carolina), certain things had been generally accepted as indicative of an intention to execute a power, and as sufficient indications. As expressed in repeated decisions, these were: first, some reference to the power in the will or other instrument; second, some reference to the power or subject over which the power extends; and, third, where the provisions of the will or other instrument executed by the donee of the power would be ineffectual or a mere nullity, or would have no operation if not an execution of the power. The first of these indications, however, must be understood as a reference to the power in the dispositions actually made. In *Lawson v. Lawson*, 3 Bro. Ch., 272, a will expressed to have been made in pursuance of a power which the testator had, was held by the Lord Chancellor not to have been an execution thereof, because the subsequent dispositions were apparently applicable only to his own estate. It may be remarked that Sir Edward Sugden expresses doubts of the correctness of this decision, for the reasons given by Lord Thurlow; but he still lays down the rule, that "Although a will be expressed to be made in pursuance of the power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will." Sugd. Pow., 2d Am. ed., 364. On the other hand, if the will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint carried out, and if made by will, the intent and its execution are to be sought for through the whole instrument.

Turning now to the will we have before us, two things are evident. The first is, that the testatrix did not intend that the pecuniary legacies given for charitable purposes, and to pay annuities, should be satisfied out of her own personal property; and the second is, that she did intend that those legacies should be paid. Substantially all her own property she devoted to

other uses. Her horses, cattle, hogs, etc., crops and farming utensils, her carriage, wagon and all personal property except negroes, in the possession of her grandson, John Devereux, she directed to be sold, and the proceeds applied to the payment of her debts; and she appears to have doubted whether they would be sufficient. Her house and lot in Chapel Hill she ordered to be sold, and directed the sum paid for it to be invested in some productive stock; ordering, however, a payment out of it and out of the funds arising from the sale of some negroes, to satisfy an annuity of \$150 during a life or lives. By these specific appropriations she negated any right to apply these funds to the payment of the pecuniary legacies mentioned in the 1st, 2d, 3d, 4th, 5th, 6th, 8th and 12th items in the will. Nothing of her own personal property, of any considerable value, remained, except her slaves. Six of them she specifically bequeathed. One she ordered to be sold, devoting the proceeds to the distribution of tracts and religious books, and three others were directed to be sold at private sale, and a portion of the avails, if not all, she appropriated to the payment of an annuity. The remainder of her slaves she provided might be taken at a valuation by her son-in-law and grandson, upon their giving bonds for payment of the appraised value in ten annual installments. These bonds, of course, could not be applied to the discharge of the pecuniary legacies as they fell due. Thus it appears that while she gave pecuniary legacies amounting in the aggregate to more than \$28,000 she carefully withdrew from any positive application to their payment the personal estate she owned in her own right. It seems necessarily to follow that, if she intended those legacies to be paid at all, she intended them to be paid out of the fund over which she had the power of appointment. This appears from the testamentary dispositions themselves, independent of any reference to the intention to execute her power, avowed in the introductory clause in the will. And that avowal tends to support the conclusion. It is significant, also, that after she had made a specific disposition of all her own property inconsistent with any application of it to paying those legacies, she refers to their payment again, and uses this language: "Should it appear at my decease that the bequests exceed the amount of funds left, my will is that the first five only shall be curtailed, until brought within the limits of the assets." This provision was a reasonable one, in view of the uncertainty there was in regard to the amount remaining of the funds of which she had the power of appointment. We conclude, therefore, that Mrs. Devereaux's will was an execution of the power, and an appointment of the fund to her executors. It converted the fund into her own estate, at least to the extent of \$28,500, if there was so much of it remaining.

We have considered the case thus far without reference to the North Carolina Statute of 1844-45, which is similar to the Act of 1 Vict., ch. 26, Rev. Code of N. C., ch. 85, sec. 5, for the reason that it may be doubted whether that statute is applicable to this will. Here there is no bequest of personal property described in a general manner, nor even a general residuary bequest, though there are general pecuniary legacies.

Whether, if the fund which remained in the hands of Thomas P. Devereaux at the death of the testatrix had exceeded the sum required to pay the legacies given by her will, that is to say, the sum of \$28,500, the will would have been a complete execution of the power, covering the whole fund, or only a partial appointment of so much as was needed to pay those legacies, it is unnecessary for us now to decide. In the view which we take of the other questions involved in the case, that fund had been reduced so far that there was not more than enough remaining subject to the power to pay the sums bequeathed by the will. The execution was, therefore, complete, and it appointed the whole fund to the executors of this will, who took it under the appointment as part of the personal estate of the appointor. Upon this subject see, *Wilday v. Barnett*, L. R. 6 Eq., 196; *Hurlstone v. Ashton*, 11 Jur. (N. S.), 725; *Hawthorn v. Sheden*, 3 Sm. & G., 293.

There was, therefore, error in the decree of the Circuit Court so far as it adjudged that the testatrix, Frances Devereaux, did not appoint to her executors the fund over which she had the power of appointment, "Except so far as it is necessary to resort to the same to pay off the pecuniary legacies bequeathed by her in her said will, after exhausting for that purpose what remains of her general personal assets after payment of her debts and funeral expenses, and the costs of administering her estate."

The other questions raised by the appeal require a less extended consideration. The Circuit Court decreed that the "deed of explanation" executed by Mrs. Devereaux in 1845 was effectual, and that its operation was to reduce the annuity of \$3,000 charged upon the lands in the deed of settlement of 1839, proportionably as Mrs. Devereaux reduced the \$50,000 charged by her appointments, or outlays, so as to make the annuity in each and every year equal to six per cent. interest on so much of said fund as remained unappropriated or unexpended by her in each and every year respectively. This, we think, was correct. In 1845 Mrs. Devereaux was *sui juris*. Her husband had died, and she was competent to release whatever rights she had under her deed to Thomas P. Devereaux, or to appropriate to him any portion, or even the whole, of the fund of \$50,000 then remaining. The deed of settlement gave her power to dispose of the fund, to give, grant or direct the payment, investment or application of the same at her discretion. If, therefore, there was no mistake in the deed, the subsequent paper ought to be regarded as a release *pro tanto* of her right to the annuity, and a partial disposition of the fund over which she had the power. If there was a mistake in the deed of 1839, it was quite competent for her to rectify it by agreement; and her deed of explanation was a solemn acknowledgment under her seal, of the mistake, as effective in equity, if properly obtained, as would have been the decree of a Chancellor reforming the instrument. We see not enough in the relation of the parties to each other to justify any presumption that undue influence was exerted over her. The deed of 1839 exhibits the fact that a possible benefit to her son was even then contemplated. It provided that whatever of the \$50,000 fund the mother should not dispose of should lapse for his benefit. It

was quite natural, therefore, for her to execute a declaration for his relief.

What we have said disposes of the fourth assignment of error, and shows that it is not sustained.

It is next objected by the appellants that the court erred in directing the paper dated October 20, 1846, and signed by Mrs. Devereaux, to be treated as a stated account between her and her son, conclusive of all matters of account between them previous to and including the 22d of June, 1846, respecting the \$50,000 fund and the annuity, excepting such matters as are by its express terms excepted out of it and reserved for future adjustment. The paper was, in fact, an account stated by a third person, selected by both parties, agreed to be correct by Mrs. Devereaux, except in four particulars reserved for subsequent arbitrament. It bears on its face evidence that it was carefully examined and fully understood. After such examination it was signed, and there is no evidence that Mrs. Devereaux ever afterwards questioned its correctness. On the contrary, she, in substance, ratified it and acknowledged its correctness at least twice, more than a year afterwards. It is difficult, therefore, to see why it should not be regarded as the Circuit Court directed it to be. It is urged on behalf of the appellants that because the statement was not pleaded, nor set forth in the answer, the defendants were precluded from making use of it when ordered to account. This is overlooking the fact that it was not a bar to all claim for an account. Thomas P. Devereaux's liability to account, if it existed at all, continued after the statement was made, to the extent of all subsequent transactions, and for the balance ascertained by it to be due June 22, 1846. It is not set up as a full accounting, but as a partial settlement. It would have been no answer to the complainant's bill if Thomas P. Devereaux had said, I have accounted up to June 22, 1846. He denied his liability to account at all; and it was only when that was adjudged against him that he could avail himself of the fact that he had partially accounted, and that fact he could use only in stating the account ordered. We may add that we see nothing in the circumstances attending the statement sufficient to cast suspicion upon it, or to call upon the defendants to support it by extraneous proofs. The relation between Mrs. Devereaux and her son, created by the deed of 1839, was more like that of debtor and creditor than that of trustee and *cestui que trust*. It was no relation of confidence reposed. Similar remarks may be made respecting the second statement, which ascertained the balance due from June 21, 1847. The decree of the court respecting its effect was right.

The remaining exception to the decree of the court is that it denied the liability of Thomas P. Devereux to account, as executor of the last will and testament of Mrs. Devereaux, for "*All her personal estate, especially for so much as came into the hands of Seymour W. Whiting as administrator pendente lite or cum testamento annexo.*" We think this part of the decree was correct. He was required to account for all the estate that came to his hands; and correctly so required, for he had made himself an executor *de son tort* by intermeddling with the estate of the testatrix, and by taking most of it into his possession, and undertaking to dispose of it. But he never quali-

fied as executor of the will, or administrator *cum testamento annexo*, nor was he even administrator *pendente lite*. As such, therefore, he did not become responsible, and as executor *de son tort* he was only liable for what came into his hands. *Mitchel v. Lunt*, 4 Mass., 654; *Kinard v. Young*, 2 Rich. Eq., 247; *Leach v. House*, 1 Bail. (S. C.), 42. This is clear, upon both reason and authority.

Our conclusion, therefore, is, after reviewing the whole case, that there has been no error committed, except the single one which we first noticed. *For that, however, the decree of the Circuit Court must be reversed and the case sent back, with instructions to direct a new accounting and to enter a decree in conformity with this opinion. It is so ordered.*

Cited—108 U. S., 423, 425, 432; 109 U. S., 367.

UNITED STATES, *Appl.*, v.

THE UNION PACIFIC RAILROAD COMPANY ET AL.

(See S. C., 8 Otto, 569-620.)

Act of March 3, 1873—Service of process—suit by Attorney-General—demurrer—Union Pacific R. R. Co.—decree—recovery, when allowed—fraud of directors—relief founded on contract—trust.

*1. The Act of Congress of March 3, 1873, 17 Stat. at L., 509, requiring the Attorney-General to bring a suit in equity against the Union Pacific Railroad Company and others was not intended to change the substantial rights of the parties to the suit, but was intended to provide a specific mode of procedure, which, by removing restrictions on the jurisdiction, processes and pleading in other cases, would give a larger scope to the action of the circuit court, and a more economical and efficient remedy than existed before, and is a valid and constitutional exercise of legislative power.

2. The authority to serve process without the territorial limits of the district in which the suit should be brought, and to mingle in one bill parties and subjects of controversy which would be multifarious in an ordinary suit, is a regulation of practice and procedure in regard to rules founded on convenience within legislative control.

3. Statutes, directing suits for specific objects to be brought by an Attorney-General and regulating the proceedings in them, are very common; such as *quo warranto*, or bill in equity against corporations to test the right to the exercise of their franchises or declare them forfeited, or, if insolvent, to wind up their business and distribute their assets; and their validity has uniformly been recognized.

4. The bill in this case was dismissed on demurrer in the court below, and its sufficiency must be determined here by the provisions of the Act under which it was brought; for it cannot be supposed that Congress, in laying down in specific terms the subject-matter of the suit and granting enlarged and peculiar powers to the court, intended that any other matters should be tried in that case.

5. This is confirmed by the fact that the same statute provided other remedies for other subjects of controversy with the Railroad Company, and an effectual means of investigating all its affairs.

6. The statute in this case authorized a moneyed decree in favor of the Union Pacific Railroad Company for money due for capital stock, for money or property received from it on fraudulent contracts, or for money or property which ought in equity to belong to the Company; and it authorized a decree in favor of the United States or the Company for money, bonds or lands wrongfully received from the United States, which ought in equity to be paid or accounted for.

7. There can, under this statute, therefore, be no

*Head notes by Mr. Justice MILLER.

recovery except in favor of the Corporation or the United States and none but such as was authorized by the principles of equity before the statute was enacted.

8. The Railroad Company, which might by a cross-bill have availed itself of the Act, refuses to do so and demurs to the bill, thereby resisting any relief in its favor in this suit, and it is conformable neither to the principles of equity nor of the common law, to render judgment in favor of a competent party who asserts no claim, denies the right to relief, and refuses to proceed in the case. There can, therefore, be no recovery in this suit in favor of the Union Pacific Railroad Company.

9. Though the bill sets up many fraudulent transactions on the part of the directors and some of the stockholders of the Company, for which innocent stockholders would be entitled to relief, these latter are not parties to this suit, and neither the frame of the bill nor the provisions of the statute authorize any relief or recovery in their favor.

10. The United States has two distinct relations to the Railroad Company, namely: the legislative and visitatorial power of a Government creating the Corporation; and the relation growing out of the contract found in the charter and its amendment.

11. This bill exhibits no right to relief on the part of the United States founded on the charter contract. The Company has constructed its road to completion, keeps it in running order, and carries for the Government all that is required of it. It owes the Government nothing that is due, and the Government has the security which by law it provided.

12. Nor does the bill show anything which authorizes the United States as the depository of a trust, public or private, to sustain this suit.

13. This interference, by the Attorney-General, with corporations, on the ground of such a trust in the Government, is limited to two classes of cases: 1. Religious, charitable, municipal or other corporations whose functions are solely public and whose managers have destroyed the fund or are putting it to improper uses, or otherwise abusing their functions. 2. Other corporations which are exercising powers beyond those to which they are limited by the law of their organization. The present case belongs to neither of these classes.

14. While the court will not say that there is no trust in regard to the duties of this Corporation which the United States may enforce in equity, it is of opinion that none such is shown in this bill, as is authorized by the Act under which it is brought.

15. There is, therefore, no case made by the bill for any relief authorized by the statute, and the decree of the circuit court dismissing it on demurrer is affirmed.

[No. 3.]

Argued Dec. 13, 14, 1876. Re-argued Nov. 26, 27, 1878. Decided Jan. 6, 1879.

APPEAL from the Circuit Court of the United States for the District of Connecticut. The case is fully stated by the court.

Messrs. Chas. Devens, Atty-Gen., S. F. Phillips, Solicitor-Gen., J. Hubley Ashton and Aaron F. Perry, for appellant:

In the present instance the variation against the defendants, as regards service of process, is unimportant; for it is indifferent to a suitor in equity, whether he be sued in one district or in another, because:

1. The Constitution, which regards political and geographical limits as important for criminal and perhaps for other trials at common law, is significantly silent in this respect as regards suits in equity.

It might well be suggested that a retrospective law subjecting a person to trial by a jury drawn from a different locality from that of juries who by law try such matters for citizens in general, would violate an important right of such person.

It is otherwise where trial by a judge is competent. There both principle and authority show that, under our system, venue is immaterial.

Burnam v. Com., 1 Duvall, 210.

This decision seems entirely in point here, the only difference as regards service of process being that, in *Burnam's* case, Kentucky had no political jurisdiction over the territory in which the defendants were supposed to be and, therefore, was shut up to a summons by publication; whereas, here the United States has such jurisdiction and, therefore, could authorize actual service.

2. The method of taking testimony in courts of equity renders subordinate political or geographical limits in that connection unimportant.

3. So, also, does their method of deciding upon issues of fact.

4. Courts of the United States, no matter where sitting, take notice of and, whenever applicable, administer in behalf of suitors, the laws of every other State. *Owings v. Hull*, 9 Pet., 607.

The remark last made shows that executors and administrators are at no special disadvantage in being sued outside of the State to which they owe their appointment or qualification. A New York executor or administrator has in the United States Courts of Connecticut, every advantage and protection which he possesses in those of his own State.

Green v. Creighton, 23 How., 90 (64 U. S., XVI., 419).

(b). The Act of 1873 is said to be unconstitutional in empowering the United States to bring the suit.

The only right of recovery given to the United States by the statute is, of such moneys and property as in equity they shall be entitled to.

The statute herein confers no title, but allows of a remedy by which to ascertain whether there be a title.

Surely, if in such case the Act provides that the recovery shall be for such uses as are warranted by equity, the question who shall be plaintiff of record, is a mere question of form. It has been not unusual in the different States to provide by special statutes that debts may be sued upon and recovered, for the benefit of those really interested, in the name of some one designated by the Act, and not privy to the contract.

Cuyahoga Falls Co. v. McCaughey, 2 Ohio St., 152; *Carey v. Giles*, 9 Ga., 253; *Crawford v. Bk.*, 7 How., 279; *Hindman v. Piper*, 50 Mo., 292.

See also, a like principle asserted in such cases as *Livingston v. Moore*, 7 Pet., 496; *Watkins v. Holman*, 16 Pet., 25; *Edwards v. Pope*, 3 Scam., 465; *Hepburn v. Curtis*, 7 Watts, 300; *Kirby v. Chittwood*, 4 Mon., 91.

The circumstance, that the United States is not a stranger to the Company, but has always been represented within it by directors appointed by the President, has been, from the first, a standing suggestion of a sort of guardianship by it, and therefore of a right in it to apply to equity to enforce any course of honest or lawful dealing, which being in a minority in the direction may have prevented it from otherwise securing, and consequently shows that the legislation of 1873 is no surprise, but is according to due process, and the reason of the thing.

The Act of 1873 is plainly an amendment to the charter of the Company.

The Act evidently contemplates a case in which the Company, if ever it were so, may be no longer *sui juris*, but may have been captured

and, therefore, may not be able or willing to bring suit against its masters, or, at least, cannot be relied upon to maintain such a suit to its legitimate end.

As to the relations in equity between the United States and the Union Pacific Railroad Company created by the charter:

1. A chief end of the creation and endowment of the Union Pacific Company was the accomplishment of governmental purposes.

This is manifested in:

(a) The title of the Act of 1862, which created the Company.

(b) The special provisions for vesting the franchises in the Company.

(c) The appointment and the duties of the directors on the part of the United States.

(d) The requirement of a continuous road for the use of the Government for postal, military and other purposes.

(e) The absolute and preferential character of the right of the United States to use the road. Act of 1862, secs. 6 and 17.

(f) The reserved right of the United States to control the profits of the Company's business. Act of 1862, sec. 18.

It was upon these considerations that the United States invested the Company with franchises, rights of way and of eminent domain, public land, bonds (lent) and a right to make a first mortgage to secure its own bonds.

(g) In addition to its rights as sovereign, the United States reserved certain rights as creditor, viz.:

That the bonds lent should be paid by the Company at maturity and, in the meanwhile, should be secured by mortgage.

That five per cent. of the net earnings should annually be applied to the principal and interest of such bonds.

That one half of the compensation payable to the Company for public services should also be so applied.

(h) The Company was not empowered by its charter to include its franchises in its first mortgage, nor to make mortgages of its land grants nor of its income.

2. The endowment of the Company is held as a public trust, and not as a mere donation.

See in this connection, *Olcott v. Supervisors*, 16 Wall., 691 (83 U. S., XXI., 387); *Worcester v. R. Co.*, 4 Met., Mass., 594; *R. R. Comrs.*, v. *R. R. Co.*, 63 Me., 269; as to railroad companies in general.

The Union Pacific Company, however, by its charter, has specific and extraordinary relations and duties of that sort.

Thompson v. R. R. Co., 9 Wall., 579 (76 U. S., XIX., 792); *R. Co. v. Peniston*, 18 Wall., 5 (85 U. S., XXI., 787).

See, upon this topic, also, *Rice v. R. R. Co.*, 1 Black, 378 (66 U. S., XVII., 153); *Trucker v. Ferguson*, 22 Wall., 572 (89 U. S., XXII., 815).

3. Property held for public purposes becomes a trust fund, subject to the ordinary jurisdiction of equity.

See, *Atty-Gen. v. Brown*, 1 Swanst., 265; *Atty-Gen. v. Dublin*, 1 Bligh, N. R., 312; *Atty-Gen. v. Aspinall*, 2 Mylne. & C., 613; *Parr v. Atty-Gen.*, 8 Clark & F., 409; *Skinner's Co. v. Irish Soc.*, 12 Cl. & F., 482.

Such jurisdiction is not visitatorial.

Dartmouth College case, 4 Wheat., 676.

See 8 OTTO.

U. S., Book 25.

4. The obligations assumed by the Company under the charter, raise a trust in favor of the United States.

The charter is a contract affecting specific property, and this fastens a trust upon such property.

Legard v. Hodges, 1 Ves., Jr., 477; 1 Perry, Trusts, sec. 82; *Seymour v. Freer*, 8 Wall., 214 (75 U. S., XIX., 310); *Barings v. Dabney*, 19 Wall., 9 (86 U. S., XXII., 94); *Evans v. Coventry*, 5 De Gex M. & G., 920.

The word "condition" (see Act of 1862, sec. 6) creates a trust.

See, *Stanley v. Colt*, 5 Wall., 165 (72 U. S., XVIII., 509); *Solier v. Trinity Ch.*, 109 Mass., 1; *Wright v. Wilkin*, 2 Best & Smith, 248.

So the assets of corporations are said to be a trust fund for creditors.

Curran v. Ark., 15 How., 307; *R. R. Co. v. Howard*, 7 Wall., 409 (74 U. S., XIX., 120).

The objects to which the Company was required by its charter to devote its entire property were, the construction, operation and maintenance of the road as an agency in governmental matters, and the security and ultimate payment of the bonds lent by the United States. A diversion of its property from these ends was a breach of trust.

See, *Burke v. Smith*, 16 Wall., 395 (83 U. S., XXI., 363.)

In this connection see the provisions in the following sections of the charter, viz.: Act of 1862, secs. 1, 3, 5, 6, 17, 18, and Act of 1864, secs. 2, 5, 10.

5. The property of the Company and its proceeds were a trust fund for the payment of the bonds of the United States.

The bonds lent by the United States were secured, not only by a condition to that effect (Act of 1862, sec. 6), but also by a mortgage; and by stipulations for five per cent. of the net profits and one half of the compensation for services to the United States; and that the subscriptions for stock should be paid in cash.

6. The court has jurisdiction on the ground that the transactions were *ultra vires* the Company.

See, *Hare v. R. Co.*, 2 Johns. & H., 111; *East Ang. R. Co. v. Eastern Co.*, 11 C. B., 812; *Salomons v. Laing* (cited in 1 R. I., 352, and in 3 do., 14), 14 Jur. 279 and 471; *Zabriskie v. R. Co.*, 23 How., 395 (64 U. S., XVI., 496); *Pearce v. R. R. Co.*, 21 How., 443 (62 U. S., XVI., 184); *Bissell v. R. R. Co.*, 22 N. Y., 288; *Holmes v. Abattoir Co.*, L. R. Ch. Div., 682 (distribution of capital among stockholders).

As to the parties entitled to sue, in order to correct action *ultra vires*, see, *Bagshaw v. R. Co.*, 2 Macn. & G., 389 (a scrip holder); *Spackman v. Lattimore*, 3 Giff., 15 (one who has a right to become a shareholder); *Kearns v. Leaf*, 1 Hem. & M., 681 (a policy holder); *Hare v. R. Co.*, *ubi supra* (shareholders) and, also, *The Atty-Gen.*

For observations pertinent to any dispute of the right of the United States, considering their special relations to this Company, to obtain relief in equity against its transactions *ultra vires*, see, *Walkworth v. Holt*, 4 Myl. & C., 635.

7. Jurisdiction of equity to protect public interests against violations of charters.

See, also, *Atty-Gen. v. Detroit*, 26 Mich., 266; *Atty-Gen. v. Ice Co.*, 104 Mass., 239; *State v.*

Saline Co. Ct., 51 Mo., 366; *Atty-Gen. v. R. Co.*, L. R., 3 Ch. App., 100, etc.; *Fuller v. Dame*, 18 Pick., 472; *Com. v. Smith*, 10 Allen, 449; *Atty-Gen. v. R. Co.*, 35 Wis., 511; *Dodge v. Woolsey*, 18 How., 331 (59 U. S., XV., 401).

8. Jurisdiction to decree specific performance of the obligations of the charter as to the use of the property.

9. Jurisdiction on the grounds of waste and fraud.

See, *Clagett v. Salmon*, 5 Gill & J., 334; *Md. v. R. Co.*, 18 Md., 193; *Kearns v. Leaf*, 1 Hem. & M., 708; *Jackson v. Ludeling*, 21 Wall., 616 (88 U. S., XXII., 492); *Jones v. Bolles*, 9 Wall., 369 (76 U. S., XIX., 736).

Messrs. Wm. M. Everts, S. Bartlett, W. G. Russell, R. D. Hubbard, James E. Mott, H. W. Clark, I. D. Ball, Geo. Shattuck, E. P. Wheeler, Wm. Tracy (with Chas. Tracy, Fred'k. I. Talmage and B. D. Silliman, for various individuals impleaded), for appellees:

First. The Constitution, in its distribution of the legislative, executive and judicial powers of the Government, for exercise by the authorities created for the purpose, has not undertaken to define or describe the several and separate powers otherwise than by their nature.

Their complete separation is secured, and the whole sum of each is reposed in its designated depositary.

The Constitution has, however, assigned certain limits to the authority of the Government, in any or all of its departments, over the persons or property of its subjects, in the intent of further securing that equality, impartiality and generality of its operation upon the whole People of the country, for whom and by whom it was created, which are essential to the maintenance of free and popular institutions.

I. Art. I, sec. 9, provides "That no bill of attainder or *ex post facto* law shall be passed."

"The prohibition of the Constitution was intended to secure the rights of the citizen against deprivation for past conduct, by legislative enactment, under any form, however disguised."

"Although the prohibition of the Constitution to pass an *ex post facto* law is aimed at criminal cases, it cannot be evaded by giving a civil form to that which is in substance criminal."

Cummings v. Mo., 4 Wall., 278 (71 U. S., XVIII., 356); *Ex parte Garland*, 4 Wall., 338 (71 U. S., XVIII., 366).

II. The Fifth Amendment of the Constitution provides that "No person shall be deprived of life, liberty or property without due process of law."

These words convey the same meaning as the words "by the law of the land" in *Magna Charta*, and are a restraint on the legislative, as well as on the executive and judicial powers of the Government.

Murray v. Land, etc., Co., 18 How., 276 (59 U. S., XV., 374).

Lord Coke says that the words "*per legem terræ*" mean by due process of law, and being brought into court to answer according to law. 2 Inst., 50; *Ervine's Appeal*, 16 Pa., 263.

Chancellor Kent says: "The better and larger definition of due process of law, is, that it means law in its regular course of administration through courts of justice."

2 Kent, Com., 13.

And these terms "due process of law," include all the progressive action of the court,

from the original process to the execution of the final judgment in every case.

Ch. J. Marshall delivering the opinion of the court; *Wayman v. Southard*, 10 Wheat., 27.

In substance, then, these constitutional provisions, as expounded and enforced by the Supreme Court, and accepted by the profession and the community throughout the land, are a practical security to all rights of person and property against any species or degree of deprivation, by whatever power of government, except under the law of the land, made by legislative authority, as the rule and measure of right and duty, for all cases arising from its application, and applied and enforced, upon and against particular cases and particular parties, only through the action of the established courts.

The State Constitutions have observed these essential conditions of equality, impartiality and generality, in the operation of the authority of Government upon their subjects, in provisions of adequate vigor and comprehension.

"In the Government of this Commonwealth, the Legislative Department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

Const., Mass., 1780, art. 30, part 1.

"No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

Const. N. Y., art. I, sec. 1.

The valuable and vital point of all these efforts to maintain the liberty and safety of the citizen against any encroachment from government is, that no department of its authority shall have power to make laws for particular persons and transactions, not applicable to all persons and transactions in similar cases, and no special tribunal or special judicial procedure shall be possible for particular persons or transactions not open to or against all persons, and applicable to all transactions in similar case.

Ervine's Appeal, 16 Pa., 268.

Second. It was the settled law of the land before the passage of the Act of 1873, that this Circuit Court of the United States, in and for the District of Connecticut, had—and by its process served outside of the district could procure—no jurisdiction over the persons and corporations now moving to dismiss the bill. It still remains the law of the land as respects all other persons or corporations in the United States, in all suits, and as respects these moving defendants in every other suit but this very one, supposed to be warranted by the Act of 1873.

In *Ex parte Graham*, 3 Wash. (C. C.), 456, it was held by *Mr. Justice Washington*, that the circuit courts have a jurisdiction which is limited in respect to locality in reference to the person or thing against whom or against which the court proceeds; and that the just construction of the judicial system of the United States confines the powers of the courts within the limits of the district in which the court sits from which the process issued.

This is the settled doctrine of all the courts of the United States.

Toland v. Sprague, 12 Pet., 300; *Picquet v. Swan*, 5 Mass., 35; *Day v. Rubber Co.*, 1 Blatchf., 628; *Pomeroy v. R. R. Co.*, 4 Blatchf., 120; *Sayles v. Ins. Co.*, 2 Curt. (C. C.), 212; *Sadlier v. Fallon*, 2 Curt. (C. C.), 579.

Third. The special and exceptional rules prescribed by this Act of Congress for the adjudication of these defendants' rights of person and of property, are not "the law of the land," are not "due process of law," and the threatened deprivation in respect of person and of property, by the methods of this Act, is repugnant to the constitutional guaranties of the rights of person and property.

Lewis v. Webb, 3 Me., 326.

Held, by the Supreme Court of Maine, Mel- len, *Ch. J.*, delivering an elaborate opinion of the court, that the Legislature has no power to pass a law to dispense with a general law in favor of a particular case. (Question of appeal or new trial.)

Durham v. Lewiston, 4 Me., 140.

The Legislature has no authority to grant a review of a suit between private persons.

Holden v. James, 11 Mass., 396.

A party whose action was barred by the Statute of Limitations, procured an Act of the Legislature authorizing the suit notwithstanding. Held, that it was not in the power of the Legislature, under the Constitution, to suspend the operation of a general law in favor of an individual.

Jackson J., in *Picquet*, Appellant, 5 Pick., 65.

A resolve of the Legislature "empowering" a judge of probate to take an administration bond in a mode different from that prescribed by the general laws of the Commonwealth, is not imperative, and if it were, it would be unconstitutional.

Parker, Ch. J., in *Davison v. Johannot*, 7 Met., 393.

The court collects the cases from the reports and says: "These cases have passed in review before the judicial tribunals, and have been declared to be inconsistent with the principles of the Constitution of the various States in which these questions have been raised, and this course of legislation, it is understood, has been abandoned."

In New York we refer to the leading cases of *Taylor v. Porter*, 4 Hill, 140; *Westervelt v. Gregg*, 12 N. Y., 202; *Winehamer v. People*, 13 N. Y., 378; *Rockwell v. Nearing*, 35 N. Y., 306; *O'Connor v. Warner*, 4 W. & S. (Pa.), 227; *Gibson, Ch. J.*

"No one will assert that a court will be bound by a mandate to decide a principle or a cause a particular way. Such a mandate would be an usurpation of judicial power."

De Chastellux v. Fairchild, 15 Pa., 18.

The power to order new trials is judicial: The Legislature does not possess judicial power, and has not a right to direct that a new trial be granted.

Gibson, Ch. J., *Bagg's Appeal*, 43 Pa., 512.

An Act of Assembly, nearly twelve years after distribution of an estate and final decree thereon, directing the orphan's court, on the petition of any party interested, to grant a review of the administrator's account and of the decree of distribution, with the same effect as if application had been made within five years after decree, is unconstitutional and void.

See 8 OTTO.

Lowrie, C. J., *Ervine's Appeal*, 16 Pa., 263; see, also, *Dale v. Medcalf*, 9 Pa., 111; *Budd v. State*, 3 Humph., 490.

A section of a bank charter making a felony for embezzlement, etc., in that bank, unconstitutional as not being "the law of the land."

Wally v. Kennedy, 2 Yerg., 554.

Every partial or private law which directly proposes to destroy or affect individual rights, or afford remedies which lead to similar consequences, is unconstitutional and void.

Catron, J., *Teft v. Teft*, 3 Mich., 67.

Divorce for insanity, authorized by the Legislature through judicial action in a particular case, held unconstitutional.

Bull v. Conroe, 13 Wis., 238.

General laws of exemption alone are constitutional.

Janes v. Reynolds, 2 Tex., 251.

The terms "law of the land" are now, in their most usual acceptance, regarded as general public laws, binding all the members of the community under similar circumstances; and not partial or private laws, affecting the rights of private individuals or classes of individuals.

Fourth. By the Constitution, article 3, section 12, the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. No part of it can be delegated to the Attorney-General of the United States, or to any other executive officer. In effect, the determination by that officer to file this bill in the Circuit Court for Connecticut, and filing of the same therein, has conferred upon that court jurisdiction which it did not before possess, and which belongs to no other court of the United States. This, Congress alone could do.

As to the merits of the bill:

The suit prescribed by the Act in its frame is to be a suit adapted "To compel payment for said stock, and the collection and payment of such moneys and the restoration of such property, or its value, either to said railroad corporation or to the United States, whichever shall in equity be held entitled thereto."

Now, it is to be noted that no one of these prescribed purposes of the suit is to enjoin, restrain, regulate or enforce the future conduct of the Corporation, so as to secure or compel the performance of various services or duties to the Government, which are designated in and were the leading and declared objects of the Act of incorporation. No bill framed for either of the above purposes could have any foundation in fact to rest on.

On the contrary, the entire object to be accomplished by the Act on which the suit is founded, is to procure restoration or pecuniary compensation for past alleged wrongs or frauds suffered by the defendant Corporation during its early history, and asserted to have been committed by a portion of its directors and by others, members of, as well as strangers to the Corporation.

There is thus raised the broad and general question: does the Government stand in the attitude, or fill such relations to the Corporation as would enable it, upon legal principles, without the Act, to maintain a suit of such character.

So far as this is to be determined by precedents or authority, if the English authorities on which the Government largely relies are, as has

been held, of weight on this point in this country, a thorough scrutiny of all the cases and an examination of the principles on which they rest will, we think, warrant the assertion of the following propositions:

1. That, as a general rule, wrongs to a corporation, of the character described in this Act and bill, are to be redressed by the action of the corporation itself; or, on its neglect or refusal, by any one or more of its shareholders and not by the State; the remedy by stockholders being complete even in case of the control of the corporation by adverse directors or by majorities of stockholders. *Lind. Part. & Corp.*, ed. 1867, p. 521, sec. 2.

2. That, upon the same authorities, the only exceptions to the above general rule—that the State cannot in any form interpose merely to recover to its use compensation for wrongs done to a corporation—or, either: (1) When such corporation holds its property to charitable uses, or (2.) When, by legislation, its property is impressed with a public trust; and thus (as declared by Lord Cottenham, *Atty-Gen. v. Aspinall*, 2 Mylne & C., 623), brought within the principle that governs charitable uses. *Id.*, 921.

The principle is succinctly stated by Lord Redesdale in the leading case in the House of Lords. *Atty-Gen. v. Dublin*, 1 Bligh. (N. S.), 306, 347.

3. As to the only other class of corporations, whose past wrongs or injuries can, by the law of England, be the subject of suit by the State, they consist of municipal or other public corporations, and it is settled that the right of the State thus to interpose had no existence until the same was created by recent legislation.

The condition of the law in England prior to the Statute of William IV. (1835), is displayed and the authorities collected by counsel, and the doctrine conceded by the court in *Atty-Gen. v. Corp. of Liverpool*, 1 Mylne & C., 201, and is thus stated by Lord Campbell in *Parr v. Atty-Gen.*, 8 Clark & F., 431.

“Before the Municipal Corporations Act passed, corporate property was not subject to any trust; the corporations might do with it what they pleased, and, generally speaking, no relief could be obtained at law or equity for any misapplication of it.”

See, also, *Atty-Gen. v. Aspinall*, 2 Mylne & C., 613; *Atty-Gen. v. Poole*, 4 Mylne & C., 17; *Atty-Gen. v. Wilson*, Cr. & Phil., 1.

Examination of the above and all other cases cited by the Government where past wrongs were rectified at the suit of the Attorney-General, proceeding for the Government alone and not by information and bill in which the injured party may join, will show that each of them falls within one or the other of the classes forming the two above stated exceptions to the general principle that corporations or their shareholders must bring suit to redress their own wrongs.

This question of the right of a State by suit in its name to redress and restore pecuniary losses of political corporations arising from the frauds of their officers, was thoroughly discussed, and it is believed all the authorities now cited by the Government collected by eminent counsel in the somewhat noted *Threeed* case (*People v. Ingersoll*, 58 N. Y., 1). The suit was at law,

and it was determined that the State could not maintain the action, but that redress must be sought by the corporation. The dissent of two of the Judges was seemingly placed upon the ground that by certain statutes the wrong-doers were constituted agents of the State.

The character of the defendant Corporation has been discussed and determined by this court to be one where the property is “neither in whole or in part, the property of the Government; the ownership is in complainant, a private corporation, though existing for the performance of public duties.”

R. R. Co. v. Peniston, 18 Wall., 32 (85 U. S., XXI., 792).

To use the language of Chief Justice Marshall: “Corporations are only public when the whole interest and trust franchises are the exclusive property and domain of the Government itself.”

See, *Bk. v. Com.*, 9 Wall., 353 (76 U. S., XIX., 701).

It remains to refer to the rather numerous authorities relied on by the Government, in which a State has, by information or otherwise, interfered with and asserted a control of corporations generally, and to find whether or not, within the doctrine those cases establish, this bill can be maintained.

Their perusal will show with distinctness:

First. That, although the power of the Government has in England been recently extended to the restraint by information in equity, of excesses or abuses of corporate franchises; See, *Atty-Gen. v. Great Northern R. R. Co.*, Drew & Smale, 154 (a doctrine which is in controversy in this country—see cases cited at the end of section 927, 2 Story Eq.), yet no case has been cited or can, it is believed, be found, where, in any proceeding in equity by the State alone against a corporation, except in the cases of public charity or public trust above referred to, any attempt has ever been made to recover to its own use or that of the corporation, compensation or restoration for losses suffered by maladministration.

Second. That not only is there an absence of any such case or cases, but the authorities show that the only method known to the law by which such restoration or compensation can be attained, is for the Government to permit the corporation or party injured and seeking redress or compensation, to join with the information of the Attorney-General, filed in behalf of the Government, seeking to enjoin and restrain an existing abuse, a bill in behalf of the injured corporation or party seeking compensation for such loss.

This process is familiarly known as “A proceeding by information and bill.”

The case of *Atty-Gen. v. Wilson*, Craig & Ph., 1, is an illustration of this rule, and contains an exposition of the doctrine.

See, also, *Atty-Gen. v. Johnson*, 2 Wils. Ch. C., 87; *Atty-Gen. v. Forbes*, 2 Myl. & C., 123; *Soltan v. DeHeld*, 2 Sim. (N. S.), 151; *Atty-Gen. v. Sheffield Gas Co.*, 3 De Gex M. & G., 304.

What is there in this charter expressly, or as a legal result of the relations it creates, which can authorize the Government, whensoever the means and property of the Corporation have, during its past administration, been corruptly perverted by its managers and others, to recover,

by suit in its own name against not only those managers, but all parties who received the fruits of the wrong, adequate compensation or damages?

1. If the assumed right depends upon the inaction of the Corporation, or the complicity of its present managers, seemingly such right exists in favor of stockholders, or of some party who fills substantially that relation.

2. Next, if this asserted right of action on the part of the Government is placed on the ground of trust, then, since it seeks to follow trust property into the hands of third parties, by reason that their holding and possession is derived from fraud, to which the managers of the Corporation were parties; *then the asserted trust must be shown to be one in which the title to the whole property of the Corporation is held by it in trust for the Government*, of which trust, aside from any alleged actual notice, the parties have notice by the public charter.

Perhaps it may be conceded that, as the result of the agreement contained in the charter, the road of the Company upon its completion, and all its appurtenances are, as between the parties, held in what may perhaps be called a *quasi* trust, to carry out and give effect to all its declared duties to the Government in relation to the construction and use of the road, and that the Government might, on neglect or refusal, by proceeding in equity, compel the execution of that trust, and that its redress for the violation of the trust is not limited to the forfeiture set forth in the charter.

See, *Knob v. Gye*, L. R., 5 H. of L., 667.

But this Act and bill are neither of them framed to enforce the performance of any such trusts.

3. To sustain, then, this Act and bill, it is submitted that there must be shown, as resulting from the charter, a further agreement under which, not only is the property of the Company held in trust to secure the completion and use of the road by the Government, but that, although the Corporation has effected that completion, and is in the entire discharge of all its duties to the Government, yet, lest in some future contingency, the performance of those duties may be imperiled, all its assets are to be forever held in trust; so that at all times, whenever by misapplication or fraudulent abstractions of its property by its managers (or strangers with notice of the trust), the same shall be diminished, the State may interfere, not merely to restrain, but by suit to enforce restoration from the wrong-doers, be they managers or third parties.

Can such a view of the charter be possibly maintained? In substance, it assumes for the Government the relation of a stockholder. It places the entire internal administration of the Company under the inspection of the Government. Any dividend declared by the Company may be arrested or impeached on the ground that it is in excess of earnings, and so impairs the security of the Government.

The seemingly conclusive argument against the existence of any such trust is to be found in the fact that the endowments are, by the same Act creating the defendant Corporation, bestowed upon the same terms and like conditions, in all respects, upon the several state corporations, which make up the continuous trans-

continental line of railway, which was the purpose of the Act; and such corporations can hardly, by the acceptance of the endowments, be deemed to have subjected their entire property to a trust of this character.

Mr. Justice Miller delivered the opinion of the court:

The Act of Congress making appropriations for the legislative, executive and judicial expenses of the Government, approved March 3, 1873, has the following language in its fourth and last section:

"The Attorney-General shall cause a suit in equity to be instituted, in the name of the United States, against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity; or who may have received as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property which ought, in equity, to belong to said railroad corporation; or who may, under pretense of having complied with the acts to which this is an addition, have wrongfully and unlawfully, received from the United States bonds, moneys or lands, which ought, in equity, to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, which ever shall in equity be held entitled thereto. Said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit. Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties, or the representatives of parties deceased, or to carry into effect the purposes of this Act. On filing the bill, writs of subpoena may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district." 17 Stat. at L., 508.

Following this, and part of the same section, are certain provisions for the future government of the Railroad Company and its officers to wit: that its books and correspondence shall at all times be open to inspection by the Secretary of the Treasury; that no dividend shall be made but from actual net earnings, and no new stock issued or mortgages created without consent of Congress: and punishing directors who shall violate these provisions. Also enacting that the Corporation shall *not* be subject to the bankrupt law, and *shall* be subject to a *mandamus* to compel it to operate its road, as required by law.

A previous section of the Act directs the Secretary of the Treasury to withhold from every

railroad company which has failed to pay the interest on bonds advanced to it by the Government, all payments on account of freights or transportation over such roads, to the amount of such interest paid by the United States, and also the five per cent. of the net earnings of the roads due and unapplied as provided by law; and it authorized the companies who might wish to contest the right to withhold these payments to bring suit against the United States in the Court of Claims for the money so withheld.

The Union Pacific was one of these companies. That Company did bring the suit provided for in that section and the case has been argued before us on appeal from the judgment of the Court of Claims, and all the questions which concern the obligations of the railroad company to pay money to the Government either by way of freight or government transportation or for the five per cent. on the net income of the road are raised in that suit.

The Attorney-General, in pursuance of the directions of the 4th section of the Act, filed a bill in equity in the Circuit Court for the District of Connecticut making the Union Pacific Railroad Company, the Wyoming Coal Company, the Credit Mobilier Company and some hundred and fifty individuals defendants.

These defendants were served with subpoenas in ten different States. Most of them have entered their appearance. Several of them have made motions to dismiss the bill entirely or as to the parties so moving, for want of jurisdiction. Many others have demurred to the bill generally, and at the head of this class is the Railroad Company.

The circuit court sustained this demurrer and dismissed the bill, and the case is before us on appeal from that decree.

No suggestion is made either here or in the court below of any defect in the bill which can be remedied by amendment. The bill is very elaborate, very ably drawn, and no doubt presents in a very intelligible manner everything which the facts, known or suspected, justified the pleader in placing in any bill which can be framed under the special statutes authorizing the suit.

The question is, therefore, squarely presented to us for decision, as it was to the circuit court, whether this bill can be sustained under the general principles of equity jurisprudence by the aid of the special statute, and within the limits of the power intended to be conferred by the statute.

We say by the aid of the special statute, because it is conceded on all sides that the bill cannot stand without that aid. The service of compulsory process on parties residing without the limits of the district of Connecticut, who are not found within those limits, is expressly forbidden by the general statute defining the jurisdiction of the circuit courts. Parties and subjects of complaint are brought together in one suit by this bill which, by the accepted canons of equity pleading, are incongruous and multifarious, having no proper connection with each other, except as they are so grouped in this bill. This, and other matters of like character, are proper causes of demurrer, and fatal to this bill, unless the difficulty be cured by the statute.

When we recur to the provisions of the Act which are said to authorize these and other de-

partures from the general rules of equity procedure, counsel for appellees reply that the statute is unconstitutional; that it is not only void in the particulars just alluded to, but that it is absolutely void as affecting the substantial rights of defendants in regard to matters beyond the legislative power of Congress.

If this be true, we need inquire no further into the frame of the bill, and we therefore proceed, on the threshold, to consider the objections to the validity of the statute.

The Constitution declares (art. III., section 1) that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; and to controversies to which the United States shall be a party.

The matters in regard to which this statute authorizes a suit to be brought are very largely matters arising under the law of the United States which chartered the Union Pacific Railroad Company, and conferred on it certain rights and benefits, and imposed on it certain obligations. It is in reference to these rights and these obligations that the suit is to be brought. It is also to be brought by the United States, which is, therefore, necessarily a party and the party plaintiff. Whether, therefore, the suit which has been brought is one authorized by the statute or not, it is very clear that the general subject on which Congress legislated is within the judicial power of the Government, as defined by the Constitution.

The same article declares, in section 1, that this "Power shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain."

The discretion, therefore, of Congress as to the number, the character, the territorial limits of the courts among which it shall distribute this judicial power, is unrestricted except as to the Supreme Court. That court has conferred on it by the same article of the Constitution a very limited original jurisdiction, namely: "In all cases affecting ambassadors, other public ministers, and consuls, and cases in which a State shall be a party," and an appellate jurisdiction in all the other cases to which the judicial power of the United States extends, with such exceptions and under such regulations as the Congress shall make.

There is in this same section a limitation as to the place of trial in a criminal case, which it declares shall (except in cases of impeachment) be in the State where the crime was committed, if committed within any State.

Article VI. of the amendments also provides that in all criminal prosecutions "The accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." These provisions, which relate solely to the place of the trial for criminal offenses, do not affect the general proposition. We say, therefore, that, with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power vested in the United States, is unlimited by the Constitution.

Congress has, under this authority, created

several classes of courts. It has established by statute the district courts, the circuit courts and the Court of Claims, and has conferred on each of these a defined portion of the judicial power found in the Constitution, and has regulated by similar statutes the appellate jurisdiction of the Supreme Court.

In regard to the Supreme Court and the Court of Claims, their jurisdiction is unlimited by geographical boundaries, and each of them having, by the law of its organization, jurisdiction of the subject-matter and of the parties to a suit, can exercise its power, sitting at Washington, by any appropriate process, served anywhere within the limits of the United States or the territory over which the Federal Government exercises dominion.

It would have been competent for Congress to have organized a judicial system analogous to that of England and some of the States of the Union, in which all original jurisdiction would have been conferred on a court or courts invested with the judicial power which that body thought proper, within the Constitution, to confer, with authority to exercise that jurisdiction all over the limits of the Federal Government. In reference to the Court of Claims, it has done this. That court has jurisdiction only of cases in which the United States is defendant. It is just as clearly within the power of Congress to give it exclusive jurisdiction of all actions in which the United States is plaintiff. Such an extension of the jurisdiction of that court would have included all that the statute under consideration has conferred on the circuit courts.

It is true that Congress has enacted that no person shall be sued in a Circuit Court of the United States who does not reside within the district for which the court is established, or who is not found there. But a person residing in Oregon, and being a citizen of that State, may be sued in Maine, if found there, so that process can be served on him. There is, therefore, nothing sacred nor anything forbidden by the Constitution in declaring by an Act of Congress that, as to a class of cases or a case of special character, a circuit court—any circuit court—in which the suit may be brought, shall have the power to bring before it all the parties necessary to its decision by process served anywhere in the United States.

Whether parties to a suit shall be compelled to answer in any court of the United States wherever they may be served with process, or shall only be bound to appear when found within the district where the suit is brought, is mere matter of legislative discretion, a discretion which ought to be governed by considerations of convenience, expense, etc., but which, when exercised by Congress, is controlling in the courts.

So, also, the doctrine of multifariousness; whether it relate to improperly combining persons or grievances in the bill, is a rule of courts of equity adopted by those courts on the same principle. It has been found convenient in the administration of justice, and promotive of that end, that parties who have no proper connection with each other shall not be compelled to litigate together in the same suit, and that matters shall not be alleged and litigated in one suit which are wholly distinct from and have no re-

See 8 OTTO.

lation to each other, and which require defenses equally unconnected. The rule itself, however, is a very accommodating one, and by no means inflexible. Such as it is, however, it is under the control of the legislative will, and may be modified, limited and controlled by the same power which creates the court and confers its jurisdiction. It is simply a matter of practice. The Constitution imposes no restraint in this respect upon the legislative power of Congress. Section 921 of the Revised Statutes, which has been the law for fifty years, declares that when causes of like nature or relating to the same question are pending, the court may consolidate them, or make such other orders as are necessary to avoid costs and delay. It is every-day practice, under this rule, to do what the statute authorizes to be done in the case before us.

But it is argued that the statute is special, confers a special jurisdiction to try a single case, and is intended to confer new and substantial rights on the complainant at the expense, and by a corresponding invasion of the rights, of the defendants.

It does not create a new or special tribunal to try the case. All the circuit courts of the United States were, by the Act, invested with the jurisdiction whenever called into action by filing the bill. Nor was any *new power* conferred on these courts beyond those which we have considered as affecting the mode of procedure. It seems to us that any circuit court, sitting as a court of equity, which could by its process have lawfully obtained jurisdiction of the parties, and could have considered in one suit all the matters mentioned in the statute, could have done this before the Act as well as afterwards.

But if this be otherwise, there is no constitutional objection that we are aware of, to the power of the legislative body to confer a special jurisdiction on a court already in existence, to try a specific matter which in its nature is of judicial cognizance.

The principal defendant in this suit, the one around which all the contest is ranged, is a Corporation created by an Act of Congress with a reservation in its charter of a right in Congress to repeal or modify it. To this Corporation Congress made a loan of \$27,000,000, and a donation of lands of a value probably equal to the loan.

The statute-books of the States are full of Acts directing the law officers to proceed against corporations, such as banks, insurance companies, and others, to have a decree of the courts declaring their charters forfeited. Special statutes are also common, ordering suits to be brought against such corporations when they have become insolvent, to wind up their business affairs, and to distribute their assets, and prescribing with minuteness the course of procedure which shall be followed and the court in which the suit shall be brought.

This court said, in the case of *Bk. v. Okely*, 4 Wheat., 235, in speaking of a summary proceeding given by the charter of that bank for the collection of its debts.

"It is the remedy, and not the rights, and as such we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalien-

able, so as to bind subsequent Legislatures." And in *Young v. Bk.*, 4 Cranch, 397, *Chief Justice* Marshall says: "There is a difference between these rights on which the validity of the transactions of the corporation depends, which must adhere to these transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last can only be exercised in those courts which the power making the grant can regulate." See, also, *Canal Co. v. Com.*, 48 Pa., 227; *Maryland v. R.R. Co.*, 18 Md., 193; *Colby v. Dennis*, 36 Me., 1; *Gowen v. R.R. Co.*, 44 Me., 140.

This class of statutes, if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well recognized acts of legislative power uniformly sustained by the courts.

It may be said, and probably with truth, that such statutes, when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power or to give improved methods of procedure to the courts in dealing with existing rights.

This leads to an inquiry indispensable to a sound decision of the case before us, namely: does this statute, by its true construction, do anything more than this?

We might rest this branch of the case upon the concession of counsel for appellants, made both in their brief and in the oral argument, but we propose to examine the proposition for ourselves.

The first suggestion of the legal mind on this inquiry, is that it will not be presumed, unless the language of the statute imperatively requires it, that Congress did intend, by a retrospective law, to create new rights in one party to the suit at the expense, or by invasion of the rights, of other parties; that where no right of action against a party existed, Congress intended to create a right of action against that party founded on past transactions.

The United States was to be sole plaintiff, and though there may be other defendants, the Union Pacific Railroad Company is the only one named in the Act. The suit is to be a suit in equity. The relief to be granted is the collection and payment of moneys and the restoration of property, or its value, "either to said railroad corporation or to the United States, whichever shall in equity be entitled thereto." The decree, therefore, can only be made on the ground of some relief to which the United States or the Company is entitled by the general principles of equity jurisprudence, and it is no objection to granting such relief that the Company is a defendant to the suit; for by the flexibility of chancery practice a person whose interests in the subject of litigation are on the same side with the plaintiff may be made a defendant. The Corporation could also, in such a suit, file a cross-bill against the plaintiff, and, by virtue of this statute, against any co-defendant of whom it could rightfully claim the relief which the statute authorizes.

But whatever be the relief asked, the court could only, by the express terms of the Act, grant such relief to one or the other of the parties as that party was in equity entitled to. It is very plain that there was here no new right established. No new cause of equitable relief. No

new rule for determining what were the rights of the parties. That was to be decided by the principles of equity; not new principles of equity, but the existing principles of equitable jurisprudence.

But the statute has very specifically defined the matters which may be embraced in this suit as foundations for relief, and they may be and are classified by the Act under a very few heads. It does this by declaring who besides the corporation may be sued. They are:

1. Persons who have received capital stock of the Company without paying for it in money;

2. Or other property of the Company unlawfully and contrary to equity;

3. Or who have received, as profits or proceeds of contracts for construction, money or other property which ought in equity to belong to the Corporation;

4. Or who have wrongfully received from the United States, bonds, moneys, or lands which ought in equity to be accounted for, or paid to the Company, or the United States.

There is in this description of the class of persons who may be sued an implied condition that they are persons who are already liable to be sued and the causes for which they may be sued are such as make them equitably liable. The relief to be granted is also such as to equity belongs.

We are of opinion, therefore, that the Act under which this suit is brought was not intended to change the substantial rights of the parties to the suit which it authorized, and that it *was* intended to provide a specific method of procedure, which, by removing restrictions on the jurisdiction, processes and pleading in ordinary cases; would give a larger scope for the action of the court, and a more economical and efficient remedy than existed before; and that it is a valid and constitutional exercise of legislative power.

If in passing on the constitutional validity of the Act under which this suit is brought we have given the subject much consideration, it will be seen that we have at the same time been compelled to give a construction to its language which will go far to enable us to decide whether the bill is authorized by the statute. For we are of opinion that nothing can be introduced into this suit as a foundation for the action of the court which is not found in the Act either by express language or by fair implication.

The proceeding is one which the Attorney-General is peremptorily ordered to bring. The filing of the bill and the subject-matter of the suit are both removed from the domain of discretion. For the purposes of this suit, the court which may try it is vested with powers and aided by methods of procedure which it can apply to no other case. Parties are subjected to the jurisdiction of this court by processes to which the same court cannot subject them in any other suit, and they are required to litigate their rights in a suit common to them and others, with whom they could not be joined under the rules governing such matter in any other case but this.

We are bound, therefore, to presume that Congress did not intend that this special remedy should include anything beyond the matters which we have seen were so carefully and so specifically mentioned as grounds of relief.

The parts of the Act not quoted show that Congress had, or believed it had, other griev-

ances against this Company for which it provided other remedies. Any director or officer who violated certain provisions was to be punished criminally. The Company was to be compelled to operate its road as required by law by *mandamus* in the proper court, but not in this suit. By the 2d section of the Act the Secretary of the Treasury was directed to withhold payment for transportation for the United States until what was due for interest paid was satisfied, and if the matter was disputed, it should be settled by suit brought by the Company in another court, namely: the Court of Claims.

This consideration makes it clear that any bill brought by the Attorney-General, under the 4th section of the Act of 1873, must be limited by the provisions of that Act, both as to the grievances on which it counts and the relief which it seeks.

With these views of the statute under which this bill is brought, and by which its sufficiency on demurrer must be tested, we approach the examination of the bill itself.

It consists of forty-seven pages of printed matter, divided into forty-eight separate paragraphs, each of which undertakes to set forth a distinct ground of relief, or points out the relief which is sought.

It will, therefore, be impossible to give in this opinion the results of the separate examination of each of these paragraphs; nor is this at all necessary. A consideration of the principal grounds of relief, grouped as they can easily be under a few heads, will indicate the views which we believe to be sufficient to decide the whole.

We will consider together the allegations of the bill against the Wyoming Coal Company, the Credit Mobilier Company, the Pullman Palace Car Company, and the three construction contracts of H. M. Hoxie, Oakes Ames and James W. Davis. These are far the most important as regards the sums involved, as well as the principles which must decide the case.

The substance of the charge in all these cases is, that the Board of Directors of the Railroad Company made contracts for the building of the road, and for running the Pullman cars on it, and for the mining of its coal lands and the purchasing the coal so mined, which were a fraud upon the Company whose directors they were; that these contracts allowed exorbitant prices for work done and material furnished for the use of the Railroad Company; that otherwise they were very advantageous to the parties contracting with that Company and injurious to the Company; that in all of these contracts the directors of the Corporation, or a controlling majority of them, were interested, that interest being against the Company; that in fact the directors were, in the name of the Company, making contracts with themselves as the other party. In short, it may be taken for granted that if these allegations are true, as they must be held to be on demurrer, more unmitigated frauds were never perpetrated on a helpless corporation by its managing directors than are set forth in this bill.

That these frauds are such as a court of equity would relieve against in a proper case, may be seen in the opinion of the Circuit Court for the Nebraska District, in the case of *Wardell v. R. R. Co.*, 4 Dill., 330, which was a suit growing out of Wyoming Coal Company's contract.

See 8 OTTO.

The first inquiry arising on these facts is: what relief can be given, and who is entitled to it?

The obvious reply to the first branch of the question is, that the parties who made this contract and received the pecuniary benefit of it can be made responsible in damages at law, or held to compensation in equity for the loss suffered. There would be no difficulty in holding in a proper suit such contracts void, and then ordering an accounting, on the basis of a fair compensation for what was done in the way of construction, building, opening mines, furnishing coal, etc., and what was received for such work and materials. The difficulty is, to whom shall this money be paid when recovered, and can it be recovered in this suit? If the Railroad Corporation, falling into purer hands, had brought such a suit, the bill might be sustained.

But the Corporation is not plaintiff here. It seeks no relief for these wrongs. It may have been the design of the law to give the Corporation an opportunity by a cross-bill against the other defendants, who are charged with these frauds to obtain relief against them. Such a bill, if not strictly within the rule of equity procedure, which only allows a defendant to file a cross-bill against a plaintiff, might be sustained under the provisions of this statute.

But the Corporation files no such bill. It desires no such relief. On the contrary, it resists by demurrer any further proceeding in the matter. Can it be compelled in this mode to prosecute such a suit? So long as the Corporation exists in possession and unrestrained in the exercise of all its corporate powers, those powers must be exercised by its Board of Directors. To them belongs, unless under judicial restraint or compulsion, the sole power to decide whether it will assert its right of action for a supposed injury, or will condone it.

The circumstances of the alleged fraud, the probability of success in the suit, the extent of the injury and the amount which may be recovered, the expense of the proceeding, and the danger of injury to the Company itself, are all matters which address themselves to them as grounds for the exercise of their discretion. They have decided to have nothing to do with it. How, then, can this court render a decree in their favor? How can relief be given to them which is not asked? With what hope of advantage can the court enter upon the inquiry into the truth of the frauds alleged, and the amount of the injury, when the party aggrieved refuses to proceed?

On the other hand, if the court does proceed, and renders decrees against the defendants, shall those decrees be in favor of the Company? If so, what good would follow? Since they resist any decree in their favor now, they would probably enter satisfaction or releases of the judgments as fast as the court renders them. If they did not do this, but the money is collected and paid into the treasury of the Company, what would be done with it? The bill alleges that the Company is insolvent and is in debt, but except the claim of the Government, which will be presently considered, there is no allegation showing any use of this money to which the court can decree its application. It must, therefore, go into the treasury of the Company, to become subject to the control of the directors, who are now resisting this action. Not only this, but it is

obvious that the money recovered would come mainly out of the same men who now as directors or stockholders would control the fund, and would probably order its redistribution to the parties who paid it, or give receipts or releases in advance.

The truth is, that the persons who were actually defrauded by these transactions, if any such there be, were the few *bona fide* holders of the stock of the Corporation who took no part in these proceedings, and had no interest in the fraudulent contracts. But it is not alleged that there were such. If there are any such, they are not made parties to this bill, nor does the bill provide any relief for them. Yet, a moment's consideration will show that they alone (to say nothing of plaintiffs for the present) suffered any legal injury, or are entitled to any relief. As to the directors and stockholders who took part in these fraudulent contracts, they are *participes criminis*, and can have no relief. This class probably included nine tenths in value of the shareholders. It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If the innocent stockholders are not parties here, we have already seen that, with the power of the directors over the money recovered, they would get no relief by the suit.

The statute, however, did not permit them to be made parties. Their interest is not the same as the Company. The statute provides only for collection and payments of money or restoration of property, or its value, to the *railroad corporation, or to the United States*, as either of them may be in equity held entitled thereto. This does not embrace what a defrauded stockholder may be entitled to in his individual right.

We are of opinion, therefore, that no decree can be rendered in favor of the Railroad Company on account of these transactions. The same considerations prevent a recovery in this suit for the value of the stock not paid for by those who received it. Although the law may have been violated by issuing such stock without payment, and though an implied contract may exist on which the Company could compel payment, the United States cannot recover it as plaintiff in this suit, and the Company refuses to assert its right of recovery.

The same principle applies to the arrangements made by the Railroad Company with the Atlantic and Pacific Telegraph Company, and with the Omaha Bridge Company, which are here assailed. These are existing contracts under which the business of the principal Corporation with the others is conducted, and with which it is satisfied. It asks no rescission, and is content to comply with them. It is not within the power of the court to annul them, or to make new ones for the parties.

There is, therefore, no decree which this court can render on this bill in favor of the Union Pacific Railroad Company, because it is not plaintiff in the suit, but defendant, and asks no affirmative relief or any other; because it resists being brought into this suit, and refuses to plead in it any further than compelled by the court.

If there is any relief to which the United States is entitled against the Company, being a defendant, it must remain and answer to the claim. But it is conformable neither to the principles of the common law nor equity, to compel it to pro-

secute a suit as plaintiff which it disapproves, nor to establish a claim which it denies, or take a judgment where it asserts nothing to be due.

We must now inquire whether the bill makes a case in which the United States, the plaintiff, is entitled under the terms of the statute to relief.

The United States is not a stockholder in this Company and never has been. It is a creditor.

The Government sustains two distinct relations to the Railroad Company, and it is important in considering her rights under this statute, to keep them separate. The Company is organized under an Act of Congress. It owes its corporate existence to that Act, and the Government has all the rights which belong to any other government as a sovereign and legislative power over this creation of that power. That this power should not be too much crippled by the doctrine that a charter is a contract, the 18th section declares that Congress may at any time, having due regard for the rights of the companies named therein, add to, alter, amend or repeal the Act. The power of Congress, therefore, in its sovereign and legislative capacity over this Corporation is very great.

The Government, however, holds another very important relation to the Company, namely: the relation of contract. It has loaned to the Company \$27,000,000. It has granted to it on certain terms many millions of acres of land. The Government is paying all the time the semi-annual interest on its own bonds which it loaned to the Company. The Company is bound by contract to pay the bonds, principal and interest, at their maturity. The Government by the contract has a lien on the road and its appurtenances to secure this payment. The Company is also bound by the contract to perform for the Government all that may be required of it of transportation and telegraphing, and to keep its road always in order and readiness to do this. There may be other contract obligations of the Company to the Government not here mentioned, but these are all that are important to our inquiry. The Government has delivered its bonds to the Company. The Company has built the road, owns it and operates it. Is there anything growing out of this contract alleged in the bill for which the United States is entitled to relief.

One of the allegations of the bill is that there is due to the United States and unpaid, on account of interest on the bonds, the sum of \$6,198,700, and that the balance of interest for which the Company is liable is rapidly accumulating. The bill in this case was filed in May, 1873, and this court decided, at its October Term, 1875, in a suit between the same parties that the Company was not bound to pay this interest until the maturity of the bonds, except so far as the Act made two special provisions on that subject. One of them was that half the compensation for transportation performed for the United States should, as provided by the subsequent amended charter of 1864, be withheld by the Government for that purpose; the other was the provision that after the road should be completed five per cent. of the net earnings of the road should be applied annually to extinguish the debt to the United States. *U. S. v. R. R. Co.*, 91 U. S., 72 [XXIII., 224].

The 2d section of the Act of 1873, as we have

seen, provides for the first of these cases, and suits have been brought by the Government and are now ripe for decision in this court, as to the other.

There is, therefore, no ground for relief on account of money due by defendant to plaintiff.

It is said that the United States, as a creditor whose lien is endangered by the extravagance and misappropriation of means by the Company, has a right to come into equity for preventive relief to secure the collection of the sums of which the Company has been defrauded.

The Government made its contract and bargained for its security. It had a first lien on the road by the original Act of incorporation, which would have made its loan safe in any event. But in its anxiety to secure the construction of the road, an end more important to the Government than to anyone else, and still more important to the people whom it represented, it postponed this lien to another mortgage, that the means might be raised to complete it. The Government has the second lien, however, and it has the right to appropriate one half of the price it pays for the use of the road—a very large sum—annually, and five per cent. of the net earnings of the road, which may become much larger, to the extinction of this debt. It is not wholly unreasonable to suggest that the amount which the Company may be compelled to pay annually, under these two provisions, will be sufficient as a sinking fund to pay the entire debt, principal and interest, before it falls due.

It is difficult to see any right which the Government has as a creditor to interfere between the Corporation and those with whom it deals. It has been careful to look out for itself in making the contract, and it has the right which that contract gives. What more can it ask? It is true that there is an allegation of insolvency. But in what that insolvency consists is not clearly shown. It has a floating debt. What railroad company has not? It is said it does not pay the interest on its debt to the United States. We have shown that it owes the United States no money that is due. There is no allegation that it does not pay the interest on all its own funded debt. The allegation as it is would be wholly insufficient to place the Corporation in bankruptcy, even if that was not forbidden by the Act under which this bill is drawn. The facts stated are utterly insufficient to support a creditor's bill by the United States. That requires a judgment at law, an execution issued, and a return of *nulla bona*. Here there is no judgment, no money due, and no sufficient allegation of insolvency.

We are unable, therefore, to see any relief which the United States would be entitled to in a court of equity under this bill on account of its contract relations with the defendant.

If we look at the statute this is still clearer. The money due for unpaid stock, or for property of the Company unlawfully received, or as profits in fraudulent contracts for construction, are all described in the Act as belonging to the Corporation, and to be restored to it. Those who may have wrongfully and unlawfully received from the United States, bonds, moneys or lands which ought in equity to be accounted for and paid to said Railroad Company or the United States, may be compelled to pay the mon-

ey or restore the property to the Company or the United States whichever shall in equity be entitled thereto.

But no one has received property, lands, or money from the United States in this connection but the Company. There is no allegation that this money was not used to build the road. If there was, there is nothing due under the contract, and the Company is performing all its obligations to the Government under the contract.

The bill has established no right in the Government, under this clause or under any clause of the Act, to recover in its own right any property or money from this Corporation.

In its sovereign or legislative relation to this Corporation, the United States has powers the extent of which it is unnecessary to define in this case. The two sections of the Act, under one of which this suit was instituted, are exercises of this power. They affect the interest of the Corporation in important particulars. In addition to this, Congress might have directed the Attorney-General by this bill as part of this proceeding or as an independent one, to ask the court to declare the franchises of the Company forfeited. It might have ordered a bill to inquire if the Company was insolvent, and if so, to wind up its affairs and distribute its assets. In short, there are many modes in which the Legislature could have called into operation all the judicial powers known to the law. But it has not done so, and that is the constantly recurring answer to this bill. It did provide in the statute for a mode of securing a full inquiry into the affairs of this Corporation, by enacting that the Secretary of the Treasury should have free access to all its books and correspondence—a mode of obtaining information far more effective than a bill of discovery. The statute, therefore, did not authorize a bill of discovery. Congress did not want the Company declared bankrupt and closed out by a decree of the court, and it enacted that it should not be subject to the bankrupt law, as other corporations were, it desired that the Company should continue to exercise its franchises and perform its duties, and provided that it might be compelled to do this by a writ of *mandamus* from the proper court. It limited the relief to be granted under this Act, therefore, both by the terms in which it was granted and by the other provisions of the Act to the recovery of a moneyed decree, or a restoration of specific property to which the United States or the Company was by law entitled.

It is useless, therefore, to inquire what the Government might have done by some other legislation, or what are its rights independent of legislation; for we can only act on such as are recognized by the statute under which the Circuit Court proceeded.

This brings us to the consideration of the last ground of relief which we propose to notice, and which, with the alleged right to have a decree in favor of the Company against the individuals and corporations who have defrauded it, is most earnestly insisted on here.

The proposition is that the United States, as the grantor of the franchises of the Company, the author of its charter, and the donor of lands and of rights, and privileges of immense value, and as *parens patriæ*, is a trustee, invested with

power to enforce the proper use of the property and franchises granted for the benefit of the public.

The legislative power of Congress over this subject has already been considered, and need not be further alluded to. The trust *here* relied on is one which is supposed to grow out of the relations of the Corporation to the Government, and which are cognizable in the ordinary courts of equity without any aid from legislation.

It must be confessed that, with every desire to find some clear and well-defined statement of the foundation for relief under this head of jurisdiction, and after a very careful examination of the authorities cited, the nature of this claim of right remains exceedingly vague. Nearly all the cases, we may almost venture to say all of them, fall under two heads:

1. They are cases of municipal, charitable, religious, eleemosynary corporations, public in their character, which have abused their franchises, perverted the purpose of their organization, or misappropriated their funds, and being from the nature of their corporate functions, more or less under Government supervision have been proceeded against by the Attorney-General to obtain correction of the abuse; or—

2. They are private corporations, chartered for definite and limited purposes, which have exceeded their powers, and have been restrained or enjoined in the same manner from further violation of the limitation of those powers.

The doctrine in this respect is well condensed in the opinion of the court in the case of *People v. Ingersoll*, recently decided by the Court of Appeals of New York. "If," says the court, "the property of a corporation be illegally interfered with by corporation officers and agents or others, the remedy is by action at suit of the corporation, and not of the Attorney-General. Decisions are cited from the reports of this country and of this State, entitled to consideration and respect, affirming to some extent the doctrine of the English courts, and applying it to like cases as they have arisen here. But in none has the doctrine been extended beyond the principles of the English cases; and, aside from the jurisdiction of courts of equity over trusts of property for public uses and over the trustees, either corporate or official, the courts have only interfered at the instance of the Attorney-General to prevent and prohibit some official wrong by municipal corporations or public officers and the exercise of usurped or the abuse of actual powers." 58 N. Y., 16.

To bring the present case within the rule for the exercise of the equity powers of the court, it is strongly urged that this Corporation does belong to the class first described.

The public duties imposed upon it by the law of its creation, the loan of money and the donation of lands made to it by the Government, its obligation to carry for the Government and the great public purpose which Congress had of opening a highway for public use and postal service between the widely separated States of the Union, are relied on as establishing this proposition.

But in answer to this it must be said that, after all, it is but a railroad company, with the ordinary powers of such corporations. It has made its contract with the Government, and the Government has taken good care of itself

in that contract; all the rights of the Government under that contract may be enforced in the courts without the aid of this trust relation. They may be aided by the general legislative powers of the Government, and by the powers reserved in the charter, which we have specifically quoted.

The statute which conferred the benefits on this Company—the loan of money, the grant of lands, and the right of way—did the same for other corporations already in existence under State or territorial charters. Has the United States the right to assert a trust in the Federal Government which would authorize a suit like this by the Attorney-General against the Kansas Pacific Company, the Central Pacific Company, and other roads in similar position?

If the United States is a trustee, there must be *c'estuis que trust*. There cannot be the one without the other, and the trustee cannot be a trustee for himself alone. If the legal right and the use is in the same party, and there are no ulterior trusts, it ceases to be a trust.

Who are the *c'estuis que trust* for whose benefit this suit is brought? If it be the defrauded stockholders, we have already shown that they are capable of asserting their own rights; that if this suit should be successful, no means are provided by the statute for securing those rights in it, and there is nothing in the statute which indicates any such purpose.

If the trust concerned relates to the rights of the public in the use of the road, no wrong is alleged capable of redress in this suit, or which requires such a suit for redress.

The case of the *R. R. Co. v. Peniston*, 18 Wall., 5 [85 U. S., XXI., 787], shows that the Company is not a mere creature of the United States, but that while it owes duties to the Government, which may, in a proper case, be enforced, it is still a private corporation, the same as other railroad companies, and, like them, subject to the laws of taxation and other laws of the States in which the road lies, so far as they do not destroy its usefulness as an instrument for government purposes.

We are not prepared to say that there are no trusts which the United States may not enforce in a court of equity against this corporation. When such a trust is shown, it will be time enough to recognize it. But we are of opinion that there is none set forth in this bill which, under the statute authorizing the present suit, can be enforced in the Circuit Court.

There are many matters alleged in the bill in this case, and many points ably presented in argument, which have received our careful attention, but of which we can take no special notice in this opinion. We have devoted so much space to the more important matters, that we can only say that, under the view which we take of the scope of the enabling statute, they furnish no ground for relief in this suit.

The liberal manner in which the government has aided this Company in money and lands is much urged upon us as reasons why the rights of the United States should be liberally construed. This matter is fully considered in the opinion of the court already cited, in the case of the *U. S. v. R. R. Co.*, in which it is shown that it was a wise liberality for which the Government has received all the advantages for which it bargained, and more than it expected.

In the feeble infancy of this child of its creation, when its life and its usefulness were very uncertain, the Government, fully alive to its importance, did all that it could to strengthen, to support, to sustain it. Since it has grown to a vigorous manhood, it may not have displayed the gratitude which so much care called for. If this be so, it is but another instance of the absence of human affections which is said to characterize all corporations. It must, however, be admitted that it has fulfilled the purpose and realized the hopes in which it was founded that the Government has found it a useful agent, enabling it to save vast sums of money in transportation of troops, mails and supplies, and in the use of the telegraph.

A court of justice is not called on to inquire into the balance of benefits and favors on each side of this controversy, but into the rights of the parties as established by law, as found in their contracts, as recognized by the established principles of equity, and to decide accordingly. Governed by this rule, and by the intention of the legislature in passing the law under which this suit is brought, we concur with the Circuit Court in holding that no case for relief is made by the bill, and the decree of that court dismissing it is accordingly affirmed.

Mr. Justice Swayne.

I concur in the opinion just read, so far as it relates to the constitutional validity of the Act of Congress which lies at the foundation of the case. In the residue of the opinion, I cannot concur.

I am authorized to say that *Mr. Justice Harlan* unites with me in this dissent.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the opinion of the court in the case of *The United States of America, App'ts., v. The Union Pacific R. R. Co.*, No. 3, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

[L. S.] In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this seventh day of May, A. D. 1885.
JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

JAMES O. CARSON, Exr. of the Estate of
JOHN B. CARSON, Deceased, *Plff. in Err.*,

v.

ROBERT P. OBER, ET AL.

Federal question in State Court.

A decision, of a State Court, that as between vendor and vendee, there could be a sale and delivery of cotton, so as to pass title to the vendee, before the payment of the government tax assessed upon the cotton under the Act of July 1, 1862, 12 Stat. at L., 465, presents no federal question, but a question of general law only, of which this court has no jurisdiction.

[No. 123]

Argued Jan. 10, 1879. Decided Jan. 13, 1879.

IN ERROR to the Supreme Court of Missouri. The defendants in error brought suit for the value of certain cotton, in the Circuit Court of St. Louis, Missouri. Judgment having been given in favor of the plaintiffs, and affirmed See 8 OTTO.

upon appeal by the General Term, and by the Supreme Court of the State, the defendant sued out this writ of error.

Messrs. J. S. Black and **H. W. Garnett**, for plaintiff in error.

Messrs. S. T. Glover and *J. R. Shepley*, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We find no federal question in this record. The court below decided that, as between vendor and vendee, there could be a sale and delivery of cotton, so as to pass title to the vendee before the payment of the government tax assessed upon the cotton, under the Act of July 1, 1862, 12 Stat. at L., 465. This was a question of general law only. The plaintiff in error claimed no right or title under the tax laws or treasury regulations. The court was not called upon to determine whether the lien of the tax was valid or invalid, but only whether, so long as the lien existed, the ownership of the property subject to the lien could be transferred. The case is clearly within the rule considered in *Long v. Converse*, 91 U. S., 112 [XIII., 234].

Dismissed for want of jurisdiction.

C. WYLLYS BETTS, ETC., *Plff in Err.*,

v.

DANIEL S. MUGRIDGE ET AL.

Review of facts.

Where the cause was tried by the court, and there was no findings of fact, and no exceptions taken during the trial, and the only error assigned is that the general finding of the court was for the wrong party, the whole testimony cannot be brought up for review by bill of exceptions.

[No. 870.]

Submitted Jan. 6, 1879. Decided Jan. 13, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Upon an action in *assumpsit* by the plaintiff in error, judgment was given in the court below for the defendants; whereupon the plaintiff sued out this writ of error.

The case is sufficiently stated in the opinion of the court.

Mr. Alfred B. Mason, for plaintiff in error.

Mr. Charles M. Sturges, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This cause was tried by the court below without the intervention of a jury. The facts were not agreed upon and there is no special finding. No exceptions were taken to the rulings of the court in the progress of the trial, but all the evidence has been embodied in a bill of exceptions, and the only error assigned is, that the general finding of the court was in favor of the defendant below, when it should have been for the plaintiff. We have often decided that a bill of exceptions cannot be used to bring up the whole testimony for review when the case has been tried by the court, any more than when

there has been a trial by jury. *Norris v. Jackson*, 9 Wall., 128 [76 U. S., XIX., 609]; *Ins. Co. v. Sea*, 21 Wall., 159 [88 U. S., XXII., 511].
The judgment is affirmed.

OTTO ANDREAE AND BERNHARD ANDREAE, Partners Composing the Firm of
 ANDREAE & CO. ET AL., *Appts.*,

v.

CONSTANCE C. REDFIELD, *Exrx.* and
 FRANK B. REDFIELD, *Exr.* of HEMAN
 J. REDFIELD, Deceased.

(See S. C., 8 Otto, 225-239.)

Illegal duties—action to recover back—limitation—concealment.

1. An action against a collector for illegal exactions of duties made by him, is the only judicial remedy authorized by Congress for the redress of such grievances.

2. Such an action cannot proceed against the successor after the incumbent goes out of office.

3. Promises or representations made by the Secretary of the Treasury, or by officers of the customs in regard to the claims, do not preclude the collector, when sued, from pleading any defense, such as the Statute of Limitations.

4. The concealment of a cause of action *ex contractu* does not, in courts of law, interrupt or delay the running of the Statute of Limitations as a bar to the action.

[No. 22.]

Argued Dec. 13, 19, 1878. Decided Jan. 13, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

The bill in this case was filed in the court below by the appellants, to enjoin the plea of the Statute of Limitations in certain pending suits at law.

The case is fully stated by the court.

Messrs. A. W. Griswold and Robert G. Ingersoll, for appellants.

If the Acts of Mar., 1839, Feb., 1845, and Mar., 1863, deprived the collector of all interest and relieved him of all personal liability, and cast it upon the United States, so that the latter became and was the real debtor and the real defendant, then it follows that he is not the party to be charged, and he cannot remove or set up that bar.

Darby & Bos. Lim., 12, and cases cited.

The construction is, that the debtor must be personally chargeable.

Whippy v. Hillary, 5 Carr. & P., 209; *Quantock v. England*, 5 Burr., 2628; 9 Ir. Ch., 284; *McClellan*, 45.

The defendant cannot set up this bar of the Statute, after his term of office had expired.

The United States is the real party in interest.

If the defendant, Redfield, ever had the right to set up this defense of the Statute, his principal, the United States, by the Secretaries of the Treasury, has, since the defendant's term of office expired, taken away that right by acknowledging the debt within six years before the commencement of this suit.

It would be a breach of national faith, and

certainly of common honesty, to allow a party so circumstanced to interpose a defense which shall prejudice an honest creditor of the Government.

Ang. Lim., sec. 208, *et seq.*; *Dean v. Hewit*, 5 Wend., 257; *Thompson v. Peter*, 12 Wheat., 565.

The plaintiffs had certain claims due them from the Government of the United States, for duties overpaid under protest, which that Government, had admitted in a general circular by its Secretary of the Treasury, to be due, and subsequently, on plaintiff's complaint at the delay of the collector in adjusting these claims, in preparing the certified statements, the Secretary directed Mr. Schell, the successor of Collector Redfield, to do it.

This acknowledgment is ample to take the case out of the Statute.

See, *Clarke v. Dutcher*, 9 Cow., 674; *Bucket v. Church*, 9 Car. & P., 209; *Dabbs v. Humphries*, 10 Bing., 446; *Lang v. Mackenzie*, 4 Car. & P., 463.

"A party is always estopped from denying the truth of a fact upon the faith of which he has suffered another person to act, knowing at the time that the other's conduct was materially influenced by a reliance on the truth of that fact.

Hicks v. Cram, 17 Vt., 449; *Canal Co. v. Hathaway*, 8 Wend., 483; *Swain v. Seamen*, 9 Wall., 254 [76 U. S., XIX., 554]; *McClellan v. Kennedy*, 8 Md., 230; *Cummings v. Webster*, 43 Me., 192; *Branson v. Wirth*, 17 Wall., 32 [84 U. S., XXI., 566]; *Cont. Nat. Bk. v. Nat. Bk. of the Com.*, 50 N. Y., 575, and cases cited; *Cow. & H. Notes to Phil. Ev.*, 200; *Stonard v. Dunkin*, 2 Camp., 344; *Chapman v. Searle*, 3 Pick., 38; *Titus v. Morse*, 40 Me., 348; *Taylor v. Ely*, 25 Conn., 250; *McAfferty v. Conover*, 7 Ohio St., 99; *Whitaker v. Williams*, 20 Conn., 98; *Thrall v. Lathrop*, 30 Vt., 307; *Shapley v. Abbott*, 42 N. Y., 448, and cases cited; *Stephens v. Baird*, 9 Cow., 274; *Cowles v. Bacon*, 21 Conn., 451; *Brown v. Wheeler*, 17 Conn., 345; *Roe v. Jerome*, 18 Conn., 138, 153; *Carpenter v. Stilwell*, 12 Barb., 128; *N. E., Car. S. Co. v. Union I. Rub. Co.*, 4 Blatchf., 1-11; *Dezell v. Odell*, 3 Hill, 215.

Messrs. Charles Devens, Atty-Gen., and **Edwin B. Smith, Asst. Atty-Gen.**, for appellees.

In *Harpending v. Dutch Ch.*, 16 Pet., 493, this court declared itself "Bound to conform to the decisions of the State Court of New York in the construction of their Acts of limitation. Such is the settled doctrine of this court."

Green v. Neal, 6 Pet., 291; *Porterfield v. Clark*, 2 How., 125.

The Statutes of New York provide that where an action proceeds upon the ground of fraud, the lapse of time is to be computed from its discovery; but fraud in or the fraudulent concealment of a cause of action *ex contractu*, does not interrupt or delay the running of time against the suit. The N. Y. Courts have always and repeatedly so declared.

Troup v. Smith, 20 Johns., 43, *et seq.*, per *Spencer, Ch. J.*; *Allen v. Mille*, 17 Wend., 202, per *Nelson, Ch. J.*

So in other States.

Smith v. Bishop, 9 Vt., 110; *Fee v. Fee*, 10 Ohio, 469; *Clarke v. Reeder*, 1 Spear, law, 405, *et seq.*

NOTE.—Return of duties paid under protest; action to recover; protest, how made and its effect. See note to *Greely v. Thompson*, 51 U. S. (10 How.), 225.

Indeed, if fraud would take a case out of the statute, there would be no occasion for equitable interference. But this fact could be replied to the plea. But if the Legislature has made no such exception, the court cannot engraft it upon the statute.

See, cases cited *supra*; also, *McIver v. Ragan*, 2 Wheat., 80; *Bk. v. Dalton*, 9 How., 528; *French v. Spencer*, 21 How., 238 (62 U. S., XVI., 99).

If a court of equity interferes in any way to remove the bar of the Statute, it is only upon the ground of fraud. "Equity, in giving relief in such cases, must do it solely upon the principle of relieving against fraud."

2 Story, Eq. Jur., 12th ed., sec. 1521, n. 1; *Troup v. Smith*, 20 Johns., 47; *Smith v. Bishop*, 9 Vt., 110, *supra*.

Equity does not interfere to rectify the consequences of a mistake of law.

Lord Irnham v. Child, 1 Bro. Ch. Cas., 92; *Bk. v. Daniel*, 12 Pet., 32; *Pullen v. Ready*, 2 Atk., 591; *Shotwell v. Murray*, 1 Johns. Ch., 515; *Storrs v. Barker*, 6 Johns. Ch., 170; *Champlin v. Laytin*, 18 Wend., 407; *Marshall v. Collett* 1 Yon. & Coll., 232; *Denys v. Shuckburgh*, 4 Yon. & Coll., 42; *Teed v. Johnson*, 25 L. J., Exch., 110; *Midland Railway v. Johnson*, 6 H. of L. Cas., 798.

The Court of Appeals authoritatively declares that a verbal promise not to plead the Statute, relying upon which the statutory period is allowed to expire, cannot have any effect, as an estoppel or otherwise.

Shapley v. Abbott, 42 N. Y., 443, *et seq.*, seems decisive of the present case.

Either these suits at law must be treated as against Mr. Redfield personally, or as against the United States. If against Mr. Redfield, then he is not affected by the conversations, statements, letters, etc., of various officers of the Government, occurring long after he ceased to be collector.

If against the United States, none of the customs or revenue officers mentioned had any right or power to stipulate away their legal rights, much less to estop the Government by casual remarks about their understanding of the law.

Mr. Justice Clifford delivered the opinion of the court:

Customs duties, illegally exacted, may be recovered back by an action in the circuit court against the collector for money had and received, provided the payment was made under protest, in writing, signed by the party, as required by the Act of Congress applicable to the case. 5 Stat. at L., 727; 13 Stat. at L., 214; *Assessors v. Osbornes*, 9 Wall., 567 [76 U. S., XIX., 748].

Circuit courts under existing laws have not jurisdiction of suits to recover back moneys illegally exacted for internal revenue duties, unless the parties are citizens of different States, or the suit is removed into the circuit court from a state court. *Hornthall v. Collector*, 9 Wall., 560 [76 U. S., XIX., 560].

None of the Acts of Congress, however, which exclude the jurisdiction of the circuit courts in these cases have any application where the suit is brought to recover back duties of customs illegally exacted, if the payment was made under protest, as required by law. R. S., secs. 2931-3011.

See 8 OTTO.

Goods to a large amount were imported by the complainants, or by the several firms to which they belong; and they allege that the goods were subject to duty in proportion to the actual market value of the articles at the principal market of the country from which the same were imported, and that the collector, in order to ascertain the dutiable value of the merchandise, erroneously added to the said market value, or compelled the owner or consignee to add to the same, certain charges for the expenses of transportation from the market where purchased to the place of shipment, together with two and a half per cent. commissions on such charges, and that he unlawfully computed the duty upon such erroneous and excessive valuation.

Importations of the kind, it is admitted, were subject to duty; but the complaint is that the duties as ascertained and liquidated were excessive, and that the complainants, in order to obtain possession of the goods, were obliged to pay the excessive amount charged; and they aver that they paid the same under protest, as provided by law.

Sixty importations of the kind were made by the complainants, and seven years after the respondent went out of office they commenced suits to recover back the excess of duty illegally exacted in each of the sixty cases.

Service was made; and the respondent, in November, 1866, appeared and pleaded, among other defenses, the Statute of Limitations. Four replications were filed by the plaintiffs to the plea, to which demurrers were interposed by the defendant. Hearing was had; and the court sustained the demurrers to the third and fourth replications, and overruled the demurrers to the first and second. Issuable matters being set forth in the first and second replications, the plaintiffs filed rejoinders to those tendering issues; and in April, 1872, the issues were joined, and the cases have since been ready for trial. Continuances from term to term followed, and on the 11th of March, 1874, the present bill of complaint was filed by the plaintiffs in those several actions, all joining as complainants. All of the actions at law are still pending, and the only relief sought by the bill of complaint is an injunction to restrain the respondent "From prosecuting or maintaining upon the trial of any of the said sixty actions his plea of the Statute of Limitations, and from claiming and insisting in said trials" that the said actions or any of them are barred by the said Statute of Limitations.

Two objections are taken to the action of the collector: 1. That in ascertaining the dutiable value of the goods he improperly included the expense of transportation from the principal market of the country where purchased to the place of shipment; 2. That he also erroneously included in such dutiable value a higher rate of commissions than is authorized by the revenue law.

Various matters are set forth in the bill of complaint as causes that entitle the complainants to the relief sought, which, in brief, may be described as follows: 1. That the complainants respectively have a just and legal claim to recover back the excess of duties which they paid under protest, and which were illegally exacted by the respondent. 2. That the Statute

of Limitations at the time hereafter mentioned was about to take effect as a bar to the causes of action embraced in the said several suits. 3. That an officer in the custom-house where the goods were entered stated to the attorney of the importers that, by the rules and practice of the Treasury Department, the presentation of their respective claims to the auditor or to the refund clerk of the custom-house would prevent the running of the Statute of Limitations; and that the statute, if the claims were so presented, could not and would not be interposed as a defense, in case suits should subsequently be commenced to recover back such excess of duties. 4. That the respondent, as such collector, though he disclaimed any control in the matter, declared his confidence in the knowledge and experience of the officer who made that statement, and expressed to the said attorney his concurrence in the said opinion and statement. 5. That the complainants did present their respective claims to the auditor or refund clerk of the custom-house, as suggested, and that relying upon the prior action of the Secretary of the Treasury in recognizing claims of a like nature, and upon the said statements and opinion of the officer of the custom-house, and the concurrence of the respondent therein, they respectively refrained from bringing actions to recover back such excess of duties so illegally exacted until the Statute of Limitations had run against all of their claims.

Preliminary to those allegations in the bill of complaint, it is also alleged that actions of a like kind to recover back such illegal exactions were previously commenced and prosecuted in two other districts, in which it was decided and adjudged that the charges for transportation and commissions on the same were illegal, and that the Secretary of the Treasury paid back the excess in those cases; and they also allege that orders were issued by that officer to the respondent and to his successor in office to prepare statements showing the amount of such excess, and to transmit the same to the department for consideration.

Due appearance was entered by the respondent, and he demurred to the bill of complaint. Certain interlocutory proceedings followed, which it is not important to notice in this investigation. Suffice it to say, in this connection, that the parties having been fully heard, the court entered a decree dismissing the bill of complaint, and the complainants appealed to this court. Since the appeal was entered here, the complainants assign for error the ruling of the circuit judge sustaining the demurrers of the respondent, and the decree of the court dismissing the bill of complaint.

Discussion to show that the several importers had a good cause of action, irrespective of the Statute of Limitations, is unnecessary, as that proposition is admitted by the demurrer; but it is equally clear that that admission, without more, will not avail the complainants in the present controversy, as it is obvious that they had a plain, adequate and complete remedy at law.

Excessive customs duties illegally exacted may be recovered back in an action of *assumpsit* for money had and received, if due protest in writing is made by the party aggrieved, at or before the payment of the duties, setting forth distinct-

ly and specifically the grounds of objection to the required payment. 5 Stat. at L., 727.

Suppose that is so; still it is insisted by the complainants that they were wrongfully induced by the public authorities to delay the enforcement of their legal claims until their respective causes of action became barred by the Statute of Limitations; and attempt is made in argument to support that proposition by each and every of the grounds specifically set forth in the bill of complaint.

1. That the circuit courts in two instances decided and adjudged that the exaction of such duties was illegal, and that the Secretary of the Treasury repaid the same in accordance with the judgments.

2. That the Secretary of the Treasury submitted to the rule established in those cases, and was willing to apply it to the claims of the importers in these cases, when the claims were duly adjusted and presented in the manner required by the regulations of the department.

3. That the Secretary of the Treasury issued an order to the collector to ascertain the amount of such excess of duty, and to transmit the account when prepared to the department, together with a statement of the excess charged for commissions on the same importations.

4. Orders, it is also alleged, were adopted by the Treasury Department which show that the importers in such cases were entitled to the excess of duties illegally exacted as soon as the importers could furnish to the auditor or refund clerk detailed statements of the previous importations, and the names of the vessels in which they were made, and the dates of their arrival in the port, such statements being required in order to enable the auditor of the custom-house or refund clerk to prepare certified copies of the same to be forwarded to the department, pursuant to the instructions of the Secretary of the Treasury.

Labor, care and attention were required to comply with that requirement; and the complainants allege that whatever devolved upon them in the matter was seasonably accomplished, but they admit that the certified statements to be forwarded to the department were not completed by the auditor or refund clerk when the respondent, as collector, went out of office.

Culpable remissness of duty is not charged upon the auditor or refund clerk, during the period while the collector who liquidated the duties remained in office as collector of the port. Nothing of the kind is alleged, but the charge is that his successor refused to allow the process of adjusting the claims of the complainants to be continued; that they complained of the delay and the refusal of the successor, and that the Secretary of the Treasury issued an order to the new collector requesting that the instructions upon the subject given to his predecessor should be complied with at his earliest convenience; and it is alleged that such an order was given, as shown by the exhibit annexed to the bill of complaint, but it is admitted that the claims of the complainants were never reported in pursuance of the orders of the Secretary of the Treasury.

Considerable progress was made in preparing the necessary statements; and the complainants allege that it was during that period that their

attorney suggested to the auditor of the custom-house that the claims would soon be barred by the Statute of Limitations, and made inquiry of him whether it would not be necessary to commence suits to prevent the bar from attaching, to which the auditor replied, that instructions having been given by the department to refund the money, it was not the fault of the department that it had not been done; that all the complainants had to do to prevent the Statute of Limitations from running was to present their claims to the refund clerk for adjustment, as required by the rules and practice of the Treasury Department.

Subsequent conversations were also had by their attorney with the auditor of the custom house, of like import and to the same effect; and the complainants also allege that the respondent, in a conversation with their attorney, remarked that the auditor was very familiar with the practice of the department, and that he, the attorney, could rely upon the auditor's statements; and added, that he could see no necessity for commencing suits in the cases, as if the complainants would present their claims for adjustment the statute would cease to run from that time, and would not be interposed as a defense to the claims.

Many other excusatory allegations of a corresponding import are set forth in the bill of complaint; and the complainants allege that, relying upon those matters, and for the purpose of avoiding a multiplicity of suits, they refrained from bringing the actions, in full faith and confidence that the Statute of Limitations would not be set up as a defense to any actions which should thereafter be brought to enforce their claims.

Afterwards the same attorney, as the complainants allege, sought an interview with the Secretary of the Treasury, and brought to his notice the representations of the auditor of the custom-house and the respondent in respect to the Statute of Limitations, and inquired of him whether the complainants could rely upon the representations and statements that suits need not be commenced to prevent the Statute of Limitations from running, provided they presented their claims for adjustment in proper time. Before replying to the inquiry, the allegation is that the Secretary of the Treasury consulted with the clerk in charge, and the complainants allege that his reply was that such had been the practice for many years, and that latterly it had become even more liberal, referring to the fact that where a favorable decision was obtained in one case the same rule was applied in others of the same class.

Claims of the kind in great numbers were in the meantime, as the complainants allege, adjusted and paid to the claimants, and they also allege that on the 10th of May, 1864, sixty of their claims remained unadjusted and unpaid, for which they brought the several suits described in the bill of complaint. Process being issued and served, the respondent appeared and pleaded *non assumpsit*, payment, and the Statute of Limitations. Replications, as before explained, were filed, and demurrers interposed and disposed of in the manner heretofore stated, leaving issues for the jury under the first two of the replications.

Viewed in the light of these several suggestions See 8 Otto. U. S., Book 25.

tions, it is clear that the several claims of the complainants were never prepared and presented, as required, to the Secretary of the Treasury for adjustment and allowance; but the complainants allege that they were induced to delay such preparation and presentation by the recited official representations and others of like import, and they pray for an injunction restraining the respondent from setting up the bar of the Statute of Limitations in defense of the several actions to recover back the moneys which the respondent, as collector, illegally exacted of them as such importers.

Importers in such cases may make payment under protest, and bring an action of *assumpsit* for money had and received against the collector to recover back whatever amount was illegally exacted. Preventive remedies are not authorized by the Acts of Congress, nor have they ever been since the revenue system of the United States was organized. Instead of that, the Act of Congress now in force provides as follows: "And no suit for the purpose of restraining the assessment and collection of a tax shall be maintained in any court." 14 Stat. at L., 475.

Appropriate remedy is given in such cases by action against the collector, and provision is made in case the importer recovers, that no execution shall issue against the collector if the court certifies that he had probable cause for his action, or in case it appears that he acted under directions of the Secretary of the Treasury or other proper officer of the Government, the regulation being that the amount recovered shall in that event be paid out of appropriations made for the purpose. 12 Stat. at L., 741; R. S., sec. 989.

Merchants importing goods find ample remedy under the provisions mentioned for illegal exactions made by collectors, and the better opinion is that it is the only judicial remedy authorized by Congress for the redress of such grievances. Beyond all doubt, the remedy the importing merchant has in such a controversy is against the collector; and in case of recovery he is entitled to an execution against the defendant in the action, unless the court shall certify that the collector had probable cause for his action, or it appears that he acted under directions from the proper official source. Directions of the kind are doubtless frequently given; and in such cases it may well be contended that the suit is in the nature of a suit against the United States, as the provision is that "The amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriations from the Treasury." 12 Stat. at L., 741.

Cases of that kind present little or no difficulty of decision; but it is equally true that cases arise where no such instructions were given, and in such cases it follows that the importer, if he prevails in the suit, is entitled to an execution against the defendant which will bind his goods and estate, unless the court where the judgment is rendered deems it proper to give the collector a certificate that he had probable cause for his action in exacting the excessive duties. Certificates of the kind are never given until the litigation is closed and, of course, it cannot be known whether it will be given or refused pending the litigation.

Where the collector acts under antecedent

directions from the proper source, it is clear that the suit is in the nature of a suit against the United States, and it may be that the suit, if the certificate of probable cause is finally given, may be regarded in the same light; but more difficulty would attend the solution of the question in a case where neither of those conditions occur, especially if it appears that the suit was not commenced until after the collector went out of office. Actions of the kind must be commenced against the collector who made the illegal exaction, and no one pretends that such an action can proceed against the successor after the incumbent goes out of office.

Importers, in case they prevail, are in any view entitled to be paid the amount which they recover; nor is it important in this case to determine whether the pending actions are in the nature of suits against the United States, or merely suits against the collector, as in either view the result must be the same. Argument to show that the actions in form are actions against the present respondent is unnecessary, as that is conceded, but there is much reason to suppose that the collector acted under official orders.

Concede that the United States is the real party; still the court is of the opinion that there is nothing in the remarks attributed to the auditor of the custom-house or to the refund clerk or to the Secretary of the Treasury which can be held to preclude the respondent from pleading any proper plea to the actions which he may think necessary in making his defense. When the suits against the collector were commenced to recover back the money which the complainants allege he exacted from them illegally, he was a private citizen, and nothing is shown in pleading to justify the conclusion that the Secretary of the Treasury or the customs officers made any remarks which can create any liability as against the respondent which he did not incur. Nor is there anything in the remarks of that officer, made to the attorney of the complainants, which will support the theory that he ever intended to deprive the respondent, as the defendant in these actions, of the right to plead any plea he, the respondent, might see fit in defense of the claims therein prosecuted.

Congress, undoubtedly, might authorize actions of the kind to be brought directly against the United States; but all must concede that such a power has never been exercised and is not conferred, and in the absence of such legislation the court is of the opinion that such actions may in certain aspects be treated as actions against the collector, unless it appears that he acted under the directions of the proper official authority, or that a case is made where no execution can issue against the collector.

Even suppose it were otherwise, still it is clear that none of the remarks attributed to the Secretary of the Treasury or to the officers of the customs can have any effect to estop the respondent from pleading any matter in defense of the actions which he may think necessary to protect his rights. Rightly interpreted, all that the respondent said to the attorney of the complainants had reference to the future action of the Secretary of the Treasury; that is, he expressed the opinion that the complainants could rely upon the statements of the auditor as correct, that according to the practice of the de-

partment the Statute of Limitations would cease to run when their claims were properly prepared and presented for adjudication and allowance.

Taken in the most favorable view for the complainants, it is clear that it is impossible to regard those remarks as a contract or promise made by either party. There was no promise to forbear instituting the suits, nor was there any promise, if forbearance was accorded, that the statute should cease to run. Every pretense of that sort is negatived by the language employed, which even fails to show that any negotiation took place between the parties looking to any such arrangement, contract or promise. When they separated, each party was as free to pursue his own course as when the interview commenced. Complainants might have brought suits the same day; and if they had, the respondent would have been at liberty to make any defense in his power, irrespective of anything which had transpired at the interview.

Nor is there anything shown in the remarks attributed to the Secretary of the Treasury which can be held to support the theory of the complainants that he entered into any contract with their attorney, or ever made any promise that the Statute of Limitations should cease to run. All he did was to answer the questions propounded as to the practice of the department; but he gave no assurance that any indulgence would be granted to the complainants, unless the claims were duly prepared and presented for adjustment in proper time.

Examined in the light of these suggestions, as the case should be, it is obvious that the complainants have no just cause of complaint, as they have not in fact been deceived or misled.

Grant that, and still the complainants contend that it had the effect to conceal from them the necessity of instituting suits to prevent their claims from being barred by the lapse of time, and they contend that the same rule should be applied in the case as when the defendant fraudulently conceals from the plaintiff his cause of action; and decided cases are referred to where it is held that in such controversies the statute does not begin to run until the fraud is discovered.

Except where the Constitution, treaties or statutes of the United States otherwise require, the Judiciary Act provides that the laws of the several States shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. 1 Stat. at L., 92; R. S., sec. 721.

Repeated decisions of this court decide that the court is bound to conform to the decisions of the state courts in the construction of their Statutes of Limitation. *Green v. Neal*, 6 Pet., 291; *Harpending v. Dutch Ch.*, 16 Pet., 455; *Porterfield v. Clark*, 2 How., 125.

State statutes in many cases provide that, where the action proceeds upon the ground of fraud, the lapse of time is to be computed from its discovery; but the courts of New York, as well as several other States, have always held that the concealment of the cause of action *ex contractu* does not interrupt or delay the running of the statute as a bar to the action. *Troup v. Smith*, 20 Johns., 44.

Assumpsit was brought in that case to recover damages, for that the testator, in his lifetime,

undertook to survey a certain township of land, and to divide the same into convenient lots, to enable the plaintiff to sell the same to the best advantage; and the charge was, that he performed the work so unfaithfully and unskillfully, that it caused great damage to his employer, to which was added the money counts. Due appearance was entered by the executors of the deceased, and they pleaded *non assumpt* and the Statute of Limitations. Issue was joined upon the first plea, and to the second the plaintiff replied that the cause of action was not discovered until within less than six years before the action was commenced. More than six years had elapsed after the fraud was committed, but it was not discovered until two or more years later; and the defendant demurred to the replication, insisting that the statute commenced to run from the time the fraud was committed, and the question of the sufficiency of the replication was argued by eminent counsel.

Plaintiff's counsel, in endeavoring to support the replication, contended that the cause of action did not accrue until the plaintiff discovered the fraud in making the survey; and in responding to that proposition, Spencer, *Ch. J.*, who delivered the opinion of the court, remarked that the inquiry, is: when did the plaintiff's cause of action accrue? and he immediately answered the inquiry as follows: "Most certainly, when the fraud was consummated;" which was, as the whole court held, when the testator had completed the survey, as far as it was completed, and made the return of his field notes and received his compensation, adding that the injury, as far as he was concerned, was then done, and that he then became liable to an action for the fraudulent and imperfect manner of executing the duties he had assumed.

Speaking to the same point, the learned *Chief Justice* also remarked, that the fact that the plaintiff did not discover the imposition practiced is a matter entirely distinct from the existence of the fraud and imposition. If, then, the plaintiff's cause of action accrued from the consummation of the fraud by the testator, and not at the time the plaintiff discovered it, the statute interposes as a protection, unless the action is commenced within six years next after the wrong was perpetrated.

Some countenance, he admits, is given to the opposite theory by certain decided cases, to which he refers, and then he proceeds to say: "We cannot, however, yield the convictions of our own minds to decisions evidently borrowed from the courts of equity, and which have never been sanctioned by the courts of law in the country from which our jurisprudence is derived." He admits that the rule is otherwise in courts of equity; but the court decided that courts of law are expressly bound by the statute, giving as a reason for the conclusion, that it relates to specified actions, and that it declares that such actions shall be commenced and sued within six years next after such actions accrued, and not after. Maxwell, Statutes, 6; *Imper. Gas-L. and Coke Co. v. London Gas-L. Co.*, 10 Exch., 39. Thus not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period.

It is no answer to a plea of the Statute of See 8 OTTO.

Limitations, says Nelson, *Ch. J.*, that the cause of action was fraudulently concealed by the defendant until after the statute had attached, and that the suit was brought within the time limited by the statute after the discovery of the right to sue. *Allen v. Mille*, 17 Wend., 204; *Leonard v. Pitney*, 5 Wend., 30.

Courts of equity, says Bronson, may grant relief against acts and contracts executed under mistake or in ignorance of material facts; but it is otherwise where a party wishes to avoid his act or deed on the ground that he was ignorant of the law. *Ignorantia juris non excusat*. *Champlin v. Laytin*, 18 Wend., 407; *Storrs v. Barker*, 6 Johns. Ch., 166.

It is not a sufficient answer to the Statute of Limitations, says Phelps, in an action on the case for deceit, that the plaintiff was ignorant of his cause of action until within six years, although that ignorance was occasioned by the nature of the deceit or the manner in which the fraud was perpetrated. *Smith v. Bishop*, 9 Vt., 110; *Fee v. Fee*, 10 Ohio, 469; *Clarke v. Reeder*, 1 Speers (S. C.), 407.

Without more, it must be conceded that these authorities are sufficient to show what the established rule in the States mentioned is, where the suit is an action at law, and that the fraudulent concealment by the defendant of the plaintiff's cause of action is not a good answer to the plea of the Statute of Limitations. Other States adopt the opposite rule, and their courts hold that the rule at law is the same as in equity. *Hovenden v. Annesley*, 2 Sch. & L., 607; *Coster v. Murray*, 5 Johns. Ch., 522; *Michoud v. Girod*, 4 How., 503; *Hallett v. Collins*, 10 How., 187; *Sherwood v. Sutton*, 5 Mas., 149; *Jones v. Conoway*, 4 Yeates, 109; *McDonnell v. Young*, 12 Serg. & R., 128; Ang. Lim., 6th ed., secs. 189 to 190 inclusive.

But it is not necessary to rest the case entirely upon the state rule of decision, as it is clear that the matters alleged in the bill of complaint are not sufficient to support any such theory, nor is that the true theory of the claim made by the complainants. On the contrary, they allege that they had a legal and just claim to recover back certain import duties illegally exacted by the respondent; and the necessary implication from the allegation is that they knew the legality of the claims as well when they filed their protests as when, seven years later, they instituted the pending actions against the respondent.

Fraudulent concealment of the cause of action is not alleged, nor is it the *gravamen* of the complaint. No such charge is made; but the complaint is that they were induced by the aforesaid representation to refrain from bringing their actions until the bar of the Statute of Limitations had attached, which, in the judgment of the court, the matters set forth in the bill of complaint are not sufficient to show.

Give the allegations the broadest signification the language employed will justify, and it is clear that the conversations attributed to the Secretary of the Treasury and the officers of the custom-house do not amount to a contract or promise that the Statute of Limitations should cease to run in any contingency, whether the complainants did or did not cause their claims to be prepared and presented to the Treasury Department for adjustment and allowance.

They never did prepare and present their

claims to the Secretary of the Treasury for allowance, as required by the alleged rules of the department, nor do the conversations alleged amount to a promise that the statute should cease to run even if they had complied with the supposed rules and practice of the department.

Conversations of the kind cannot benefit the complainants, for several reasons: 1. Because they do not amount to a promise that the Statute of Limitations should cease to run; and if they did, they cannot avail the complainants as a *new promise*, because they are not in writing. 2. They do not amount to a contract to that effect; and if they do, they are without consideration. 3. They cannot have the effect to estop the respondent from pleading the bar of the Statute, because both parties were equally well informed of all the facts. *Shapley v. Abbott*, 42 N. Y., 443; *Pickard v. Sears*, 6 Ad. & Ell., 474; *Freeman v. Cooke*, 2 Exch., 654; *Foster v. Dawber*, 6 Exch., 839; *Edwards v. Chapman*, 1 Mees. & W., 231; *Swain v. Seamens*, 9 Wall., 274 [76 U. S., XIX., 560].

Tested by these considerations, it follows that there is no error in the record. *S. C.*, 12 Blatchf., 419.

Decree affirmed.

Mr. Justice Miller:

I dissent from the judgment in this case, because I believe that the acts and promises of the officers of the Government, alleged in the bill, are such as to work an estoppel in equity to the plea of the Statute of Limitations in this case; and that the facts establishing this estoppel are too complex, and their relation to the defendant such that the issue cannot be well tried on a replication to the plea.

Mr. Justice Field concurs with me in this dissent.

BENJAMIN H. SCULL ET AL., *Appts.*,

v.

UNITED STATES.

(See *S. C.*, 8 Otto, 410-424.)

Private land claims—Mexican and Spanish claims—action for—limitations—survey—impossible calls for boundary.

*1. The Act of January 22, 1860, concerning private land claims in Florida, Louisiana and Missouri, provided for presenting all such claims before the register and recorder of the respective land-offices in which the land lay, and the Recorder of Land Titles in Missouri; and for a report on these claims to the Commissioner of the General Land-Office and through him to Congress. In all such cases Congress reserved the right to confirm or reject the claim.

2. But the 11th section of the Act authorized the claimants in a defined and much more limited class of cases to sue by petition in the District Court of the United States within whose jurisdiction the land lay.

3. The title on which such a suit could be sustained was one which had been perfected under the Spanish or French Government before the cession to the United States and separated from the mass of the public domain by actual survey, or capable

*Head notes by *Mr. Justice MILLER*.

NOTE.—*Missouri private land claims.* See note to *Les Bois v. Bramell*, 45 U. S. (4 How.), 449.

of such separation by a description in the grant which would enable a surveyor to ascertain and identify the lands by the boundaries found in that instrument, or in an order of survey or investiture of possession.

4. No person could bring suit under that Act, who had not, by himself or those in privity of title, been out of possession over twenty years.

5. The statute thus intended to provide a suit in the nature of an action of ejectment, in which the United States should be defendant, whether out of possession or in possession, with the bar of the Statute of Limitations removed.

6. There has never been any actual survey or location of the claim under the grant in this case for over seven millions of acres of land. Nor does the claimant here present any actual survey or ask for an order for one to see if it can be made under the description in the grant made in 1793.

7. An inspection of the maps presented by complainant, copied from the surveys which the United States have for the purpose of sale extended over the region to which the grant refers, shows that the calls for the boundary of the grant are impossible calls. That the royal surveyor was not on the ground, and was mistaken as to the locality of the natural objects on which he relied for description, and that no surveyor can by the calls of the grant locate or identify the land intended to be given.

8. The suit was not, therefore, authorized by the Act of 1860, and the District Court properly dismissed the petition.

[No. 654.]

Submitted Dec. 16, 1878. Decided Jan. 13, 1879.

APPEAL from the District Court of the United States for the Western District of Missouri.

The case is fully stated by the court.

Messrs. Wm. H. Duryea and J. Warren Greene, for appellants.

Mr. Edwin B. Smith, Asst. Atty-Gen., for appellee.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the decree of the District Court for the Western District of Missouri, dismissing plaintiff's bill. The suit was brought under the Act entitled "An Act for the Final Adjustment of Private Land Claims in the States of Florida, Louisiana and Missouri, and for Other Purposes," approved January 22, 1860. 12 Stat. at L., 85.

The claim in this case is founded on three instruments of writing:

1. An order of June 11, 1793, signed by Baron de Carondelet, Spanish Governor of Louisiana, for a survey of land in favor of Don Joseph Valliere.

2. A certificate of survey by Charles Trudeau, Surveyor-General, dated October 24, 1793.

3. A cession or grant by Carondelet, dated December 22, 1793.

The history of the relation of the Government of the United States to the claims for lands asserted under rights derived from the Spanish and French Governments, prior to the cessions of Louisiana and Florida to our Government, as it is found in the Treaties, the Acts of Congress and the judicial decisions of the American tribunals, is given very fully and with accuracy in the opinion of this court in the case of *U. S. v. Lynde*, 11 Wall., 632 [78 U. S., XX., 230], and will be referred to now without repeating it. The necessity and the policy of the Act of 1860, 12 Stat. at L., 85, are there fully considered. It declares that the Registers and Receivers of the public Land-Offices in Florida and Louisiana, within their respective districts, and the Recorder of Land Titles for the State of

Missouri, shall be commissioners to hear the evidence and make report to the Commissioner of the General Land-Office concerning this class of claims. They are directed in their reports to divide the cases into three classes, two of which were to be reported as valid and the third as invalid. The nature and character of these claims, and the evidence on which they are to be held valid or invalid, are fully set out in the statute. After the reports of these officers are filed with the Commissioner of the General Land-office, they are to be subject to the examination of that officer, who is to report thereon directly to Congress. In all cases where he and the local commissioner concur in the rejection of the claim, that action is to be final; but where he concurs with these commissioners in holding a claim valid, he shall report the same to Congress for its action. And in cases where he disapproves the report of the commissioners, he shall in like manner report the whole matter to Congress for final action. It will thus be seen that in all cases brought before any of these officers, under this Act, except when the Commissioner of the General Land-Office concurs with them in rejecting the claim, the whole proceeding amounts merely to a report to Congress, and the final action of confirming or rejecting the claim rests with that body.

The 11th section of the statute, however, enacts that in a much more limited class of cases, specifically defined by that section, the claimants "May at their option, instead of submitting their claims to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States within whose jurisdiction the lands or any part of the lands claimed may lie, unless such claim comes within the purview of the 3d section of the Act." The 11th section proceeds to declare that the United States may be made defendant to such a suit, that an appeal may be allowed, and for the mode of executing a final decree in favor of claimant, and other matters. The provision excluding claims coming within the purview of the 3d section evidently has reference to the proviso of that section, that no case shall be reported favorably by the commissioners, which has already been twice rejected on its merits by previous Boards of Commissioners, or has been rejected as being fraudulent, or procured or maintained by fraudulent or improper means.

The difference in these two modes of procedure, and in the results which followed them, are obvious and important. The first, as already observed, is merely a mode of placing before Congress the result of an investigation by the local commissioner and the Commissioner of the General Land-Office, with their opinion on the merits of the claim. On these reports Congress either rejects or confirms the claim, as it may think right. Until such action by Congress, nothing is concluded; and if it fails to act, the previous inquiry amounts to nothing.

The suit in the district court, on the other hand, has all the elements of any other judicial proceeding, among which are the conclusiveness of the judgment on both parties, and the right to an appeal to this court for final decision. Considering the more valuable results which may be obtained in the courts, and the better defined course of procedure there, it is not strange that parties who have faith in the valid-

ity of their claims should prefer that tribunal.

But Congress did not intend to refer all the cases embraced in the Act to the courts, at the option of the claimant. It was only claims of a class defined by the 11th section of the Act, which the claimant might bring either before the court or before the commissioner, at his election. If the case before us does not belong to this class, the court did right in dismissing the petition, whatever may be its merits, and though it may be a case which, if brought before a commissioner, would be entitled to a favorable report.

We must, therefore, examine the case in the light of the provisions of the 11th section, which defines this class in these words:

"Any case of such a claim to lands as is hereinbefore in the first section of this Act mentioned, where the lands claimed have not been in possession of and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances, by the competent authority prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over, or had the actual possession of, such territory."

A careful examination shows three distinguishing elements necessary to a suit in the court.

1. The claimant or those under whom he holds must have been out of possession for twenty years or more.

2. The land must be claimed by a complete grant or concession, or order of survey duly executed, or other mode of investiture of the title in the original claimant by separation from the mass of the public domains, either by actual survey or defined fixed natural boundaries or initial points and courses and distances, by the competent authority, prior to the cession to the United States.

3. Where such title was created and perfected during the period of the actual possession of the prior government under which the claim is asserted.

This is substantially an action of ejectment, with the bar of the Statute of Limitations removed, the United States having a constructive possession for the defendant.

The title must be complete under the foreign government. The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered by such metes and bounds, natural or otherwise, with precision.

There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow and find each line and its length, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*. The separation from the public domain must not be

a new or conjectural separation, with any element of discretion or uncertainty.

The right to sue here given is not on an inchoate or imperfect title. It is not on a perfected grant for an unknown location, or for a given quantity within defined out-boundaries. All these are left to be pursued, if at all, before the commissioners appointed by the statute. They could pass upon the equities arising from imperfect or incomplete grants. An order of survey was sufficient before them, if otherwise sustained by proof. Permission to settle on the land, or any other written evidence of title emanating from the foreign government prior to the cession. This required no completed title, no actual survey, no twenty years out of possession, no prior segregation from the public domain. In all this class of cases, Congress, which reserved the right to decide, only required evidence of some equitable claim arising under the former government, on which it could make an intelligent decision.

But in the cases brought before the courts, while removing the bar of the lapse of time, and the want of a defendant in possession, and the defense of a better title by patent from the United States, the Act still requires a title completed under the foreign government, evidenced by written grant, actual survey, or investiture of possession and, in short, evidence of a title on which recovery of possession could be had when these defenses were out of the way. This view is confirmed by the provision that the petitioner must have been out of possession for twenty years. The only reason that occurs to us for this is, that having the superior legal title, he could recover from anyone in adverse possession without the aid of the statute, where he was not bound by twenty years' limitation.

Does the case before us come within this class.

There was no actual survey. The order of survey made by Governor Carondelet is very indefinite. It is thus translated in the record:

"11th June, 1793, to Captain Don Joseph Valliere, in the District of Arkansas, a tract of land situated on the White River, extending from the Rivers Norte Grande and Cibolos to the source of said White River, ten leagues in depth.

BARON DE CARONDELET."

On the strength of this order, Trudeau, the Surveyor-General, proceeded to make what he calls in his certificate of survey "a figurative plan" by conjecture, and from this gives a certificate of survey. It appears by the paper called a grant and signed by Carondelet, that this plan was made by his order because it was impossible for the royal surveyor to make an actual survey at the time.

Based upon this figurative plan, the concession or grant makes an attempt to describe the land granted by certain natural objects, and some general but not specific directions as to the courses and distances. It does not appear that any actual survey has ever been made locating this grant. It does not appear that any attempt has ever been made to do it. We have in the record copies of Trudeau's sketch; we have a copy of the official map of the surveys of the land into congressional subdivisions, made for the purpose of selling these lands, which have been extended over all the area in which this grant could possibly be found; and

we have a map of the State of Arkansas, with county and township subdivisions; and in both these latter the general course of the White River, its branches and affluents, are laid down.

On this latter map we have what Mr. Day, a civil engineer, swears to be a correct location of this grant according to boundaries given in Carondelet's cession. This was not made by any actual survey, but simply taking the sectional map of the State of Arkansas, Mr. Day has made lines on it, which he declares to be a location, on that map, of Valliere's grant. He does this by assuming a point in township 13 north, range 25 west, in Arkansas, to be the origin of the White River, and proceeding directly south from this point ten leagues, or 37½ miles, he makes a series of arbitrary lines, with a corresponding number of angles and changes of course, tending first northwest, and then northeast, and then southeast, until he reaches the Great North Fork of said river. He then descends said fork until it intersects the river, descends the main river until he reaches Buffalo Fork, ascends Buffalo Fork until he comes near the initial point or source of White River, and then makes a straight and arbitrary line southwest to the beginning. As regards this survey, the straight lines and the changing courses and distances are wholly arbitrary and artificial, having no natural objects to establish them, and nothing in the descriptive language of the grant. They are intended to be the conjectural or average distances of ten leagues from the White River; that is to say, in a distance of nearly three hundred miles on one side of White River, in order to ascertain definitely what lands are within ten leagues of that river—one of the most tortuous ever known—the surveyor makes six new departures and courses, and, running these by straight lines, declares that he has solved the problem and made an accurate survey.

But let us compare this survey with the calls of the grant. The latter describes the land as "Situated on both banks of White River, ten leagues on both banks, beginning at the origin of the most western branch or source of the White River, and running southwest ten leagues, descending thence on the South by parallel line with White River, at the distance of ten leagues, until it intersects Buffalo River at a point ten leagues in a direct line with White River; from thence descending the Buffalo River to its confluence with White River; following this as far as the mouth of the Great North Fork of the White River, up the same to a point ten leagues in a direct line from its mouth, from thence ascending the White River to the north in a westerly direction, ten leagues from the same, as far as its source, which will be better seen on the figurative plan," etc.

Assuming that Day's survey has located the original source of White River, as the initial point correctly, the first call in the grant is southwest ten leagues. Mr. Day's line is ten leagues directly south; the next departure in the grant is descending thus on the south by parallel with the White River at the distance of ten leagues, until it intersects the Buffalo River at a point ten leagues in a direct line with White River. Here Mr. Day utterly disregards the call, makes a due west line, taking him directly away from the Buffalo River, and making his artificial courses and distances nearly

three hundred miles, not on the south, but on the west and north, of White River, and never gets to Buffalo River until he has run the reverse course of the call, and meets it near the last of his survey at its junction with White River. The reason of this is obvious. The call in the grant is an impossible call. The Buffalo River is not in the direction supposed by Trudeau and Carondelet, and the source of White River is not where it is supposed to be.

The next call in the grant is to descend the Buffalo to its confluence with White River. But the Buffalo would never be reached by the call of the grant. In short, looking at the calls for material objects, courses of streams and distances, that which might have been predicted occurred. In attempting to make a grant described by rivers of whose courses and location they were ignorant, by given distances which could not be made to conform to the natural objects, making a grant of over seven millions of acres of land by specific boundaries of which they knew nothing, they made a total failure, and gave no description by which any surveyor could, without the aid of a lively imagination, make any location.

This is clearly manifest by a comparison of Trudeau's plan with Day's location, and with the actual locality and course of the streams as they are now ascertained.

Trudeau's plan and the calls of the grant make the initial point and source of White River in the northeast corner of the plat; Day makes the source of the river and the initial point in the middle south part of his survey. Trudeau runs a waving line in a southeastern direction to Buffalo River, where he supposed it to be; Day runs in a reverse direction northwest, until he meets the North Fork, and comes down it.

Trudeau was mistaken if the source of the river is where Day locates it. But this destroys all Trudeau's plan, and locates the grant in a very different place from where he and Carondelet intended it to be, and where it can never be reached by any survey following the description of the grant.

But on what evidence Mr. Day relies to fix the source of the river, the beginning point of his location is unknown. He did not go on the ground or trace the stream. He merely takes the map of Arkansas, and says: here on this map I find the origin of the river to be a point in township 13 north, range 25 west, in Madison County.

Whether this map gave the origin of the most western branch of that river correctly is wholly uncertain. How far a surveyor must pursue such a branch or stream to find the fountain from which it flows is left in the dark. If Mr. Day had gone on the ground, ordered to make the survey under oath, he might have felt bound to locate this point many miles from where he finds it on the map. It is almost absurd to suppose that in an ordinary traveler's map of a State, made to be folded into a pocket-case, any reliance can be placed on its location of the source of a stream which would justify its acceptance as a warrant for locating with precision a grant of over seven millions of acres of land. The combined exhibits E and F, which are certified copies of the official surveys of the United States, call this most western branch Buffalo Fork, and do not locate the origin of this west-

See 8 OTTO.

ern branch within thirty miles of the point which the Arkansas map does, and where Mr. Day does.

We are of opinion that for want of any actual survey at the time the grant was made, or at any other time, by the Spanish Government, for want of any other separation of the land granted from the mass of the public domain, and for want of any description of the land granted in the instrument of cession, or order of survey, by which the land can be surveyed and identified, the claim does not come within the 11th section of the Act of 1860, and the decree of the district court rejecting it, is, therefore, affirmed.

Cited—98 U. S., 424; 101 U. S., 706, 825, 827, 830.

UNITED STATES, *Appts.*,

v.

McDONOUGH'S LEGATEES, THE CITIES OF NEW ORLEANS AND BALTIMORE.

(See S. C., "*United States v. Baltimore*," 8 Otto, 424, 425.)

Spanish title.

*1. A mere permission to settle on land in Florida, followed by no grant or anything which evidenced a title under the Spanish Government, will not sustain a claim in a suit in the District Court, brought under the 11th section of the Act of 1860, on that subject.

[No. 796.]

Submitted Dec. 16, 1878. Decided Jan. 13, 1879.

APPEAL from the District Court of the United States for the District of Louisiana.

The case appears in the opinion of the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellants.

Mr. Edward Janin, for appellees.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the decree of the District Court of the United States for the District of Louisiana confirming a claim of the appellees to a grant of land under the Spanish Government.

The suit is brought under the 11th section of the Act of 1860, 12 Stat. at L., 85, which we have just construed in the case of *Scully v. U. S.* [*ante*, 164].

The foundation of the present claim is a petition of Philip Robinson to the Commandant, Don Thomas Estevan, dated January 20, 1804.

This petition recites that Robinson had established himself on a tract of land, which he describes, in the year 1797, by the permission of Estevan's predecessor, and had unfortunately lost the permit by the burning of his house. Fearing lest some intruder might encroach upon his rights, he begs a renewal of the order or permit.

The reply to this is as follows:

"GALVESTON, Jan. 20, 1804.

"This party may remain in possession of the land settled by him under the permit of my predecessor, and he will apply to the Intendant-General for his formal title.

THOMAS ESTEVAN."

*Head notes by *Mr. Justice MILLER*.

No other title, grant, cession, survey or order of survey was ever issued on this claim. It was a mere permit for possession and settlement, and no more. There was here no perfected title. There was no title at all, nor anything which purported to give title. The title remained in the Spanish Government until transferred to ours; and except the part which has been patented to others it remains there now. There is nothing on which the claimant, under the 11th section of the Act, as we understand it, is entitled to recover in this suit.

If there is any just claim in this case, it belongs to the class of imperfect, incomplete, equitable rights over which Congress has reserved control, and which could only be confirmed in the mode pointed out before the commissioners under the Act of 1860.

The decree of the District Court confirming the claim is, therefore, reversed, with directions to dismiss the petition.

STEAMSHIP ABBOTSFORD, HER
TACKLE, etc., JOHN DE LA MOTTE,
Master and Claimant, *Appts.*,

v.

THOMAS J. JOHNSON, Master of the
SCHOONER ROSANNA ROSE.

(See S. C., "*The Abbotsford*," 8 Otto, 440-447.)

Admiralty causes—review of facts—collision.

1. Under the Act of 1875, which provides for causes of admiralty and maritime jurisdiction the finding of facts in the circuit court is conclusive, and the only rulings which can be reviewed in this court, by bill of exceptions, are those made upon questions of law.

2. When words in a statute, limiting the power of this court in the review of cases, have acquired, through judicial interpretation, a well understood legislative meaning, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears.

3. Where a collision between a steamer and a schooner was alone due to the fact that the steamer undertook to pass between two schooners when she should have gone outside of them, the steamer is liable.

[No. 130.]

Argued Jan. 16, 1879. Decided Jan. 20, 1879.

NOTE.—*Collision; vessel overtaking another.*

Where two vessels are running upon the same course, the rear vessel must keep out of the way of the one ahead. *The Governor*, Abb. Adm., 108; *The Rhode Island*, Abb. Adm., 100; *S. C. Olcott*, 505; *6 N. Y. Leg. Obs.*, 12; *Aff'd 1 Blatchf.*, 363; *Portevant v. The Bella Donna*, Newb. Adm., 510.

Vessel overtaking another must keep out of the way of the vessel ahead. She may pass, but must select time and place to do so safely. *The W. H. Clark*, 5 Biss., 302; *The Narragansett*, 10 Blatchf., 475; *The Peckforton Castle*, 47 Law J., 12; *The Ann Caroline v. Wells*, 69 U. S., XVII., 833; *Whitridge v. Dill*, 64 U. S., XVI., 581; *The Oceanus*, 12 Blatchf., 430; *The Lena*, Holt, R. R., 61, 313; *The Emma*, Holt, R. R., 252; *The Intrepid*, Holt, R. R., 210; *The Emily*, Holt, R. R., 217; *The Royal Consort*, Holt, R. R., 220; *The Evangeline*, Holt, R. R., 217.

A vessel which unnecessarily attempts to pass another in a place difficult of navigation, does so at her peril. *Naugatuck Trans. Co. v. The Rhode Island*, 7 N. Y. Leg. Obs., 38; *The Charles Morgan*, 6 Fed. Rep., 913; *The Columbia*, 9 Ben., 254; *Andus v. The Saratoga*, 1 Fed. Rep., 730.

It is peculiarly the duty of steamers to keep clear

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is fully stated by the court.

Mr. Morton P. Henry, for appellant.

Mr. Henry Flanders, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the Eastern District of Pennsylvania, in an admiralty cause on the instance side of the court rendered April 13, 1876. The case was up for consideration once before at the present Term, and remanded for a finding of the facts and the conclusions of law required by the "Act to Facilitate the Disposition of Cases in the Supreme Court of the United States, and for Other Purposes," 18 Stat. at L., 315, which went into effect May 1, 1875. The circuit court has since complied with the requirements of that statute, and made its return stating the facts and the conclusions of law separately. Accompanying this return is a bill of exceptions, which is now a part of the record. This bill of exceptions shows that each of the parties presented to the court requests for findings of fact upon the evidence, and the exceptions are to the effect that the court neglected to find certain facts claimed by the appellant to have been proved. The evidence relied upon to prove what was claimed and not found is set out at length.

The first question to be determined is as to the operation and effect of the bill of exceptions. The Act of 1875 provides "That the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such

of vessels ahead. Of two steamers, the one ahead must keep her course and the one astern avoid collision. *The Ellen Holgate v. The Illinois*, 6 Rep., 40; 13 Phila., 470; *The Carolus*, 2 Curt., C. C., 69; *McGrew v. The Melnotte*, 1 Bond, 453; *The Rhode Island*, Olcott, 505; 1 Blatchf., 363; *The General McCandless*, 6 Benn., 223; *Ward v. The Dousman*, 6 McLean, 231.

The vessel ahead must keep her course, and must not change it at a time or under circumstances which involve danger of a collision. *The Charles Morgan*, 6 Fed. Rep., 913; *The W. H. Clark*, 5 Biss., 295.

A steamer passing a tug with her tow is liable for collision caused by swells arising from her motion. *The Leo*, 11 Blatchf., 225; *The C. H. Northam*, 3 Blatchf., 31; *S. C.*, 7 Ben., 249; *The Morrisiana*, 1 Blatchf., 512.

The following vessel is bound to take proper measures to allow the other vessel to come about in changing tack. *Smith v. The Nellie D.*, 2 Int. Rev. Rec., 62; *S. C.*, 5 Blatchf., 245.

Where both vessels are running free, the leading vessel must give way and the one in pursuit must pass under her stern. *Marsh v. Blyth*, 1 Nott & Mc., 170; *The Rhode Island*, Olcott, 505.

jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.*

Under this statute we are clearly of the opinion that the finding of facts in the circuit court is conclusive, and that the only rulings which can be presented for review here by bill of exceptions are those made upon questions of law. Such has been the construction given by this court to statutes of a similar character in a long line of decisions, commencing soon after the court was organized. Thus, section 19 of the Judiciary Act of 1789, provided that it should "Be the duty of the Circuit Court, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties or their counsel, or if they disagree, by a stating of the case by the court." 1 Stat. at L., 83. In *Wiscart v. Dauchy*, 3 Dall., 324, decided in 1796, Chief Justice Ellsworth, speaking for the court in reference to the proper practice under this Act, said: "If causes of equity or admiralty jurisdiction are removed hither, accompanied with a statement of facts, but without the evidence, it is well; and the statement is conclusive as to all the facts which it contains. This is unanimously the opinion of the court. If such causes are removed with a statement of the facts, and also with the evidence, still the statement is conclusive as to all the facts contained in it. This is the opinion of the court, but not unanimously." Soon afterwards the Act of 1803, 2 Stat. at L., 244, allowing appeals, was passed, which directed that, upon an appeal, "A transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause," should be transmitted to this court and, consequently, the question did not again come up for consideration until after the "Act to Regulate the Mode of Practice in the Courts of the United States for the District of Louisiana," 4 Stat. at L., 62, passed May 26, 1824. Under the Louisiana practice, which was adopted by this Act for the courts of the United States in that district, trials were allowed by the court without a jury, and almost immediately questions arose as to the manner in which such cases should be brought to this court for review by writ of error. There was much difficulty in reaching a settlement of the practice, but in *U. S. v. King*, 7 How., 845, it was decided unanimously "That the decision of the circuit court upon the questions of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law." Following this was the case of *Bond v. Brown*, 12 How., 256, where Chief Justice Taney said: "And whether the fact was rightly decided or not according to the evidence is not open to inquiry in this court. The decision of the court below in this respect is as conclusive as the verdict of a jury

See 8 OTTO.

when the case is brought here by writ of error." Other cases to the same effect may be found. Such is now the settled law with reference to trials of issues of fact in Louisiana, when a review is sought in this court by writ of error.

In 1865 an Act of Congress was passed, 13 Stat. at L., 501, which is as follows:

"That issues of fact in civil cases in any Circuit Court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk waiving a jury. The finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury. The rulings of the court in the cause in the progress of the trial, when excepted to at the time, may be reviewed by the Supreme Court of the United States upon a writ of error, or upon appeal, provided the rulings be duly presented by bill of exceptions. When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment."

This statute has been reproduced in sections 649 and 700 of the Revised Statutes, and under it we have universally held that a bill of exceptions cannot be used to bring up the evidence for a review of the findings of fact. The facts, as found and stated by the court below, are conclusive. The case stands here precisely the same as though they had been found by the verdict of a jury. *Norris v. Jackson*, 9 Wall., 125 [76 U. S., XIX., 608]; *Basset v. U. S.*, 9 Wall., 38 [76 U. S., XIX., 548]; *Copelin v. Ins. Co.*, 9 Wall., 461 [76 U. S., XIX., 739]; *Coddington v. Richardson*, 10 Wall., 516 [77 U. S., XIX., 981]; *Miller v. Ins. Co.*, 12 Wall., 295 [79 U. S., XX., 400]; *Ins. Co. v. Folsom*, 18 Wall., 249 [85 U. S., XXI., 893]; *Ins. Co. v. Sea*, 21 Wall., 158 [88 U. S., XXII., 511]; *Jennisons v. Leonard*, 21 Wall., 302 [88 U. S., XXII., 539].

At the December Term, 1865, under the authority we have to prescribe rules by which appeals may be taken from the Court of Claims to this court, we provided that such appeals should be had on the transcript of the record, etc., below, and "A finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts, on which the court founds its judgment or decree. The finding of facts and conclusions of law to be stated separately, and certified to this court as part of the record. The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded." 3 Wall., vii. This rule was changed somewhat in form but not in substance, October 12, 1873, 17 Wall., xvii.* In the case of *De Groot v. U. S.*, 5 Wall., 419 [72 U. S., XVIII., 700], decided in 1866, we took occasion to say that the object of this rule was "To present in a simple form the questions of law which arose in the progress of the case, and which were decided adversely to the appellant. Only such statement of facts is intended to be brought to this court as may be necessary to enable it to decide upon the correctness of the propositions of law ruled by the Court of Claims, and that is to be presented in the shape of facts found by

*NOTE.—See Rules, 1, Sub., 2, 1884, Book XX., 909, which remains as in 1873.

that court, to be established by the evidence, in such form as to raise the legal question decided by the court. It should not include the evidence in detail." This practice has always been strictly adhered to.

From this it is apparent that when the Act of 1875 was passed, words in a statute limiting the power of this court in the review of cases where the facts had been found below "To a determination of the questions of law arising upon the record and to the rulings of the court excepted to," had acquired, through judicial interpretation, a well-understood legislative meaning, and that they confined our jurisdiction to the re-examination of questions of law alone. Having that meaning, therefore, it is to be presumed they were used in that sense in this instance, unless the contrary is in some way made to appear. So far from there being any manifestation of such a contrary intention, the reverse is very clearly indicated. Thus, the rulings of the court on which we are authorized to pass are such as may be presented by a bill of exceptions, prepared as in actions at law. It is an elementary principle in the common law that a bill of exceptions "Is founded on a matter of law or a point of law arising out of a fact not denied." 1 Saund. Pl. and Ev., 640. "The only modes known to the common law to re-examine the facts are the granting of a new trial by the court where the issue is tried, or to which the record is properly returnable, or the award of a *venire de novo* by an appellate court for some error of law which intervened in the proceedings." *Pursons v. Bedford*, 3 Pet., 448. By the Constitution, Amend. VII., no fact tried by a jury can be otherwise re-examined in any court of the United States than according to the rules of the common law. It follows that had this case been tried by a jury it could not be re-examined on the facts in this court, because under the rules of the common law a bill of exceptions could not be used for that purpose. The decision of a court denying a new trial because the verdict of a jury is against the evidence is not reviewable upon error in the courts of the United States. *Pomeroy v. Bk.*, 1 Wall., 592 [68 U. S., XVII., 638]. Since, therefore, the bill of exceptions in this class of cases is to be taken as in actions at law, it follows most unmistakably that only such rulings are to be presented by it for our consideration as could properly be put into a bill of exceptions on the trial of an action at law.

This intention is still further manifested in that part of the Act which provides for a trial by jury. The trial is to be had as at common law, and the finding of the jury on such a trial, unless set aside for lawful cause, is to stand as the finding of the court. No distinction is made in respect to our power of review between cases tried by a jury and those by the court; and if the trial is had by a jury, it is clear that the verdict was intended to be conclusive upon us.

Taking the whole statute together, we think it clearly manifests an intention on the part of Congress to relieve us from the great labor of weighing and considering the mass of conflicting evidence which usually filled the records in this class of cases. There is no real injustice in this. Parties to suits in admiralty have now the right to two trials on questions of fact—once in the District Court, and again on appeal in

the Circuit. There seems no good reason why they should be entitled to a third trial here. At law there is but one trial, except by leave of the court in the exercise of its supervisory power over verdicts, and in equity only one before an appeal to this court.

Upon the facts as found the decree of the circuit court was clearly right. The schooners *Rosanna Rose* and *Gov. Burton* were beating down the Delaware River under sail, and *The Abbotsford* was following them under steam at half-speed by her engine, which, with the tide, gave her a speed of eight or nine miles an hour. When the steamer had approached near enough to the schooners to render it necessary to make calculations to keep out of their way, the schooners were sailing on parallel courses, not far apart, on their starboard tacks, and nearing the Jersey side of the river. The *Rose* was to the eastward of *The Burton*, and having run out her starboard tack by going as near as she could in safety to what is known as the Red Bank Shoal, she came about on her port tack. While on that tack, and before she had got under full headway, she was compelled to tack again to avoid a collision with *The Burton*, still on the starboard tack and having the right of way. While engaged in this evolution, and being "in stays," she was run into by the steamer. The court finds that the tack of *The Rose* on the shoal was entirely proper, both for her own safety and in regard to *The Burton* and the steamer, as they were far enough away to allow her to do so with perfect safety. There was plenty of room for the steamer to pass to the westward of both the vessels, and if she had ported her wheel a point or half-point at any time within a distance of two miles, a collision would have been impossible. As it was, she undertook to pass between the schooners without any necessity for so doing, when it must have been apparent to any skillful navigator that *The Rose* was nearing the shoal, and would be compelled to come about and cross the bow of the steamer before she could get by on the course she was steering. In addition to this, there was the complication growing out of the proximity of *The Burton*, entitled to keep on her starboard tack after *The Rose* must come about. Notwithstanding all these circumstances, the steamer held her course and speed until she had approached so close to the vessel that there was neither room nor time to overcome her momentum when she became involved in the necessary and proper movements of *The Rose* to keep out of the way of *The Burton*. A prudent navigator would have avoided this danger by a change of course or a slackening of speed long before. The collision occurred between nine and ten o'clock in the morning, and there is no pretense that both schooners were not in full view from the steamer for a sufficient time to enable her to make the necessary movement to keep out of the way. The collision was due alone to the fact that the steamer undertook to pass between the schooners when she should have gone outside of them.

The decree of the Circuit Court is affirmed.

Cited—101 U. S., 261; 102 U. S., 201, 218; 103 U. S., 97, 300, 731; 104 U. S., 184, 187; 105 U. S., 387; 107 U. S., 500; 107 U. S., 359; 112 U. S., 673.

SARAH W. REED, Impleaded with LUCY S. SANDERSON, *Appt.*,

v.

CHAS. W. MCINTYRE, Assignee in Bankruptcy of WM. H. SHUEY.

(See S. C., 8 Otto, 507-513.)

Assignment—levy on property.

Where a debtor made an assignment of his property for the benefit of his creditors, which was set aside in favor of his subsequent assignee in bankruptcy, a creditor who had levied upon the assigned property under execution after the assignment and before the proceedings in bankruptcy, secures thereby no priority over the other creditors of the bankrupt.

[No. 99.]

Argued Dec. 20, 1878. Decided Jan. 20, 1879.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is fully stated by the court.

Mr. E. C. Palmer, for appellant:

The judgment obtained by Reed against Shuey was without taint of fraud, the execution thereon duly issued, the levy by the sheriff regular and lawful, and his possession and right of possession of the goods levied on, *prima facie* valid.

Wilson v. Bk., 17 Wall., 473 (84 U. S., XXI., 723); Gen. Stats. of Minn., ch. 66, secs. 269, 270, 271; *Bk. v. Warren*, 96 U. S., 539 (XXIV., 640).

The adjudication in bankruptcy did not disturb or affect the levy or the lien acquired thereby. The assignee in bankruptcy took title subject to all existing liens, legal and equitable.

Kelly v. Scott, 49 N. Y., 595; *Cook v. Tullis*, 18 Wall., 332 (85 U. S., XXI., 933); *Hayes v. Dickinson*, 9 Hun, 277; *In re Hambright*, 2 Bk. Reg., 498; *Mitchell v. Winslow*, 2 Story, 630; *McLean v. Meline*, 3 McLean, 201; *McDonald v. Moore*, 15 Bk. Reg., 26; *Dolson v. Kerr*, 16 Bk. Reg., 405.

An assignment for the benefit of creditors without preference, is not necessarily an act of bankruptcy. An actual fraudulent intent must be shown.

Sedgwick v. Place, 1 Bk. Reg., 673; *Langley v. Perry*, 2 Bk. Reg., 596; *Mayer v. Hellman*, 91 U. S., 496 (XXIII., 377).

But all the cases hold that an instrument made with the intent to hinder, delay or defraud creditors, is not only an act of bankruptcy, but is absolutely void.

In the case at bar this intent is directly charged, is admitted to have existed, and is so adjudged upon the record.

See, also, *In re Goldschmidt*, 3 Bk. Reg., 165.

The cases of *Dodge v. Sheldon*, 6 Hill, 9, and *Seaman v. Stoughton*, 3 Barb. Ch., 344, rest upon the peculiar language of the Bankrupt Act of 1841, and furnish slight support to the construction attempted to be put upon the present law.

The court below erred in decreeing that the levy set out in complainant's bill was invalid and of no effect.

The authorities cited and the argument made under the previous points are applicable here.

Messrs. E. G. Rogers, W. P. Warner and George L. Otis, for appellee:

At the time of the making of the said assignment by said Shuey to said Combs, there was no statute in force, in reference to assignments in the State of Minnesota; consequently the common law prevailed. Our State Supreme Court has frequently and uniformly upheld such assignments and declared them to be valid; also the courts of the United States; in fact, they have always been regarded as valid in this country.

The assignment being regular was not void, but simply voidable, and only as to the assignee in bankruptcy. It was good and valid against all the world beside.

Cook v. Rogers, 31 Mich., 391 and cases cited; *Mayer v. Hellman* (*supra*); *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Bk. Reg., 311, and cases cited; *Cragin v. Thompson*, 2 Dill., 515.

The assignee, W. S. Combs, having taken possession of the assigned property before the judgment and before the levy of the execution, was the legal owner of the property and entitled to the possession of the same; consequently the levy was wrongful and a trespass, and the judgment creditor obtained no valid lien thereon by virtue thereof.

The object of the Bankrupt Act was to provide primarily for the equal and ratable distribution of the assets of insolvents among their creditors. Can it be said that, through the operation of that law, one creditor can be put in a better and more favorable position than he was before the operation of the law was invoked?

Everett v. Stone, 3 Story, 454; *Dodge v. Sheldon*, 6 Hill (N. Y.), 9; *Cook v. Rogers* (*supra*), and cases cited; *Penniman v. Cole*, 8 Met. (Mass.), 496.

By virtue of the assignment, the legal title to the property vested in the assignee, Combs. The matter remained in that condition until the petition for adjudication of bankruptcy was filed, and so continued until an actual adjudication was made and entered. Such adjudication, when made, related back to the time when such petition was filed, so that there never was an instant of time when such seizure was rightful.

In re Hull, 18 Bk. Reg., 5; *In re Steele*, 16 Bk. Reg., 105; *In re Walker*, 18 Bk. Reg., 56; *In re Nelson*, 16 Bk. Reg., 312; *Johnson v. Rogers*, 15 Bk. Reg., 1; *Dodge v. Sheldon* (*supra*); *Seaman v. Stoughton*, 3 Barb. Ch., 344; *Everett v. Stone* (*supra*); *In re Croughwell*, 17 Bk. Reg., 338; *Penniman v. Cole* (*supra*).

Mr. Justice Harlan delivered the opinion of the court:

On the 13th of March, 1874, W. H. Shuey, a merchant at St. Paul, Minnesota, executed a deed of assignment conveying his entire property, including his stock in trade, to W. S. Combs in trust, for the equal benefit of all his creditors. Upon the same day, immediately after the acknowledgment of the deed, Combs, the assignee, entered upon the discharge of his duties by taking possession of Shuey's stock. During the succeeding day, Mrs. Reed obtained a judgment in one of the State Courts of Minnesota against Barnard and Shuey, for the sum of \$5,120.45. Execution immediately issued, and was levied by the sheriff upon the same goods of which Combs, as assignee of Shuey, had taken possession. Upon the occasion of the levy, the officer was notified of the assignment to Combs and his possession of the goods.

Subsequently, on the 31st of March, 1874, Mrs. Sanderson, a creditor of Shuey, by petition filed in the proper court, prayed that he might be declared a bankrupt, upon two grounds: 1st, that being a merchant and trader, he had, on 1st of January, 1874, fraudulently stopped and suspended payment of his commercial paper, to wit: the promissory note held by the petitioner, and had not resumed payment thereof; 2d, that on 13th March, 1874, being then insolvent, he made the said assignment to Combs with intent to hinder, delay and defraud his creditors, which assignment was alleged to be an act of bankruptcy within the meaning of the Bankrupt Act. Before the return of the rule which issued upon this petition, Shuey, by written stipulation, filed in court, without admitting or denying the alleged grounds of bankruptcy, consented that an adjudication might be entered against him forthwith. An adjudication was at once made, the order reciting that, in consideration of Shuey's written consent, and of the proofs in the cause, it was found that the facts set forth in the petition were true; and it was, therefore, adjudged that Shuey was a bankrupt, within the meaning of the Act of Congress. McIntyre, the appellee, was duly selected assignee in bankruptcy, and to him the usual conveyance by the register was made. Afterwards, to prevent a sacrifice of the goods at forced sale, and to save expense, a written agreement was made between appellant and McIntyre, whereby the latter took possession of all the property levied upon under appellant's execution but without prejudice to such rights as appellant had acquired under and by virtue of the levy referred to and without prejudice to her right to raise any question in a suit in equity, to be promptly instituted, which she might have raised had said property remained in the custody of the sheriff under the levy.

The present suit was commenced by a bill in equity filed by the assignee in bankruptcy for the purpose of obtaining a judicial determination of the rights of the appellant in the property, or rather in the proceeds of the property levied on under the execution. The appellant claims that to the extent of the judgment against Shuey the rights acquired by her through the levy are superior to any rights of the assignee in bankruptcy. That view was controverted by the assignee, and his position was sustained by the decree appealed from.

It is stated in the printed argument of counsel for the appellee, and the statement is not controverted by opposing counsel, that at the date of the assignment to Combs there was no statute of Minnesota relating to assignments by debtors for the benefit of creditors.

In determining, therefore, the validity and effect of the assignment in question, we must look to the doctrines of the common law and to the provisions of the Bankrupt Act passed by Congress.

The assignment to Combs was, according to the evidence in *this* cause, made in good faith for the purpose of securing an equitable distribution of the debtor's property for the benefit of all of his creditors, including the appellant, and not with any intent to hinder, delay or defraud them. The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results, as *Chief Justice Mar-*

shall declares, "From that absolute ownership which every man claims over that which is his own." *Brashear v. West*, 7 Pet., 608; *Mayer v. Hellman*, 91 U. S., 496 [XXIII., 377]. Assignments of property for such purposes, not made with the intent to hinder, delay or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects. Nor, according to the doctrines of the common law, could the validity of the assignment to Combs be assailed, simply because its *effect* was to prevent appellant, by judgment and execution, from obtaining a priority and preference over other creditors. An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law was not, for that reason alone, fraudulent and void. If not made with the *intent* to hinder, delay or defraud creditors, it was sustained at common law. Such an intent was often conclusively presumed, if the assignment contained provisions inconsistent with good faith, or so unreasonable and unusual in their character as to justify the conclusion that it was, in the language of Lord Mansfield in *Cadogan v. Kennett*, Cowp., 432, 434, a mere "trick or contrivance to defeat creditors." But where its provisions were consistent with an honest purpose to deal fairly and justly with creditors—the deed reserving no control over or interest in the property for the benefit of the debtor or his family, and imposing no improper restrictions upon the speedy sale and distribution of the property in satisfaction of the debts—the consequent temporary interference with the prosecution by particular creditors of their claims by the ordinary legal remedies, was regarded at common law as a necessary and unavoidable incident in the discharge by a debtor of his duty to creditors. *Mayer v. Hellman* [*supra*]. Such interference was not regarded as hindrance and delay, within the meaning of the statutes against fraudulent conveyances. This precise question arose in *Pickstock v. Lyster*, 3 Mau. & S., 371. In that case, a debtor, being sued, made an assignment by deed of all of his effects for the equal benefit of creditors. The jury having been instructed that they must find the deed void if made with the intent to defeat the plaintiff in his execution, returned a verdict in his favor. But the verdict was set aside upon the ground that the jury were misdirected. Lord Ellenborough held that the assignment was "to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors. * * * It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceedings in his suit. I see no fraud: the deed was for the fair purpose of equal distribution." In the same case, Bayley, J., said: "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all of his debts, and he proposed to distribute his property in liquidation of them; this was not acceded to, for the plaintiff endeavored by legal process to obtain his whole debt, the obtaining of which would have swept away the property from the rest of the creditors." To the

like effect are the authorities generally, as will be seen from an examination of the adjudged cases cited in Burrill, Tr. Vol. Assign., 3d ed., sec. 319, *et seq.*, and in 1 Amer. L. Cas., 5th ed., 71, *et seq.* Our conclusion, therefore, is that the assignment to Combs could not, upon common law principles, be impeached simply because it had the effect to prevent appellant, by means of the execution levy, from securing priority over all other creditors.

But it is contended that her right of preference over other creditors, in the distribution of the proceeds of the property levied upon, can be sustained under the provisions of the Bankrupt Law, and the adjudication of bankruptcy against Shuey. The argument is, that that adjudication having been made upon the ground, in part, that the assignment to Combs was made with the intent, on the part of Shuey, to hinder, delay and defraud his creditors, such assignment is to be regarded as fraudulent and void from the moment of its execution and, therefore, as interposing no obstacle whatever in the way of the levy subsequently made in behalf of the appellant. This argument, although plausible and ingenious, is not, in our judgment, sound, or at all consistent with the objects intended to be accomplished by the Bankrupt Law. If there had been no bankrupt statute in force when Shuey's assignment was made, the appellant as we have shown would not have acquired priority over other creditors by the execution levy, for the obvious reason that the right of property, in the goods seized by the sheriff under that execution, had previously passed, by a valid and unimpeachable deed of assignment, to Combs in trust for the benefit of all the creditors of Shuey and were not, thereafter, subject to execution levy and seizure as the property of the debtor. We have often declared that the equal distribution of the property of the bankrupt *pro rata* was the main purpose which the Bankrupt Statute sought to accomplish. *Buchanan v. Smith*, 16 Wall., 277 (83 U. S., XXI., 280). It would, therefore, develop a serious defect in that statute if its provisions received such a construction as would enable appellant to defeat that purpose by obtaining an advantage over other creditors. We are of opinion that no such construction is demanded, either by its letter or spirit. Since by the sheriff's levy appellant acquired no priority of right in or lien upon the goods, how could the subsequent proceedings in bankruptcy have the retroactive effect to give her a preference as of the date of levy when as between her and the creditors of Shuey, she obtained no priority by virtue of that levy. The argument in support of the opposite view ignores the fact that neither Combs nor the creditors who acquired an equitable interest in the property under the assignment to him, were parties to the proceedings, which resulted in the adjudication of bankruptcy against Shuey. Their rights, therefore, under his assignment, were not, and necessarily could not be, conclusively determined by those proceedings. Notwithstanding the adjudication, Combs, the assignee of Shuey, was at liberty to contest with the assignee in bankruptcy the question whether the assignment to Combs was a fraud on the Bankrupt Act, or was made with the intent to prevent the property from coming to the assignee in bankruptcy. See 8 OTTO.

or from being distributed under the Bankrupt Act or was made with the intent to hinder, delay or defraud creditors. That no such issue was made between the assignee in bankruptcy and Combs, representing the creditors of Shuey, is due, doubtless, to the fact that the administration of the debtor's effects in the Bankruptcy Court will accomplish the same end designed by the assignment to Combs, viz.: the distribution of the property for the equal benefit of all the creditors. But the absence of such an issue, and the failure of Combs to assert his rights against appellee, cannot have the effect to increase appellant's rights to any extent whatever. She cannot complain that the creditors submit without contest to the distribution of the property through the assignee in bankruptcy rather than through Combs, under the assignment to him. If she did not acquire any right by force of the levy, it is of no consequence to her, under the issues in this suit, that the assignee in bankruptcy rather than Combs has possession of the property in question. Appellant cannot use the adjudication in bankruptcy to give vitality to an execution levy, which when made was ineffectual for any purpose of priority, and then employ the levy, thus vitalized, to defeat the primary object of the adjudication, which was to distribute the bankrupt's effects for the equal benefit of all the creditors. Whatever may be the respective claims of the assignee in bankruptcy and Combs, it is sufficient for the disposition of this case to say that the appellant acquired no priority of right by the execution levy. The adjudication in the Bankruptcy Court was for the purpose of bringing the bankrupt's effects into that court for distribution, and appellant cannot, by force of that adjudication, secure a priority, which, without such adjudication, she would not have had. To hold otherwise would be to make the bankruptcy proceedings the instrument of defeating the wise and beneficent policy which the Bankrupt Act was intended to subvert. Even if it were conceded that the assignment to Combs was an act of bankruptcy upon the ground that it was made with the intent to prevent the property from coming to the assignee in bankruptcy, and from being distributed under the Bankrupt Act, it was not invalid, except with reference to proceedings under the Bankrupt Statute, to be instituted by the bankrupt, or by some creditor, for the purpose of bringing the bankrupt's effects into the Bankruptcy Court. *Everett v. Stone*, 3 Story, 446; *Dodge v. Sheldon*, 6 Hill, 9; *Seaman v. Stoughton*, 3 Barb. Ch. 348; *Matter of Biesenthal*, 15 Bk. Reg., 228.

Decree affirmed.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the opinion of the Court in the case of *Sarah W. Reed, impleaded with Lucy S. Sanderson, appellant, v. Chas. W. McIntyre, assignee, etc.*, No. 99, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

[L. S.] In testimony whereof I herunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this Fifth day of May, A. D. 1885.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

Cited—108 U. S., 386, 387; 6 Sawy., 77.

WILLIAM J. DE TREVILLE, *Plff. in Err.*,
v.
ROBERT SMALLS.

(See S. C., 8 Otto, 517-528.)

*Certificate, evidence as to tax sale—purchaser—
Acts of Congress.*

1. The certificate, which by the Act of 1863 the Board of Tax Commissioners was required to give to purchasers, is *prima facie* evidence, not merely of the irregularity of the sale, but also of its validity and of the title of the purchaser.

2. The Act contemplates a certificate of sale in cases where the United States was the purchaser, as fully as where the purchase was made by another.

3. The Acts of Congress of Aug. 5, 1861, June 7, 1862 and Feb. 6, 1863, are constitutional.

[No. 102.]

Argued Dec. 20, 23, 1878. Decided Jan. 20, 1879.

IN ERROR to the Circuit Court of the United States for the District of South Carolina.

The plaintiff in error brought suit of trespass to try title, in the Court of Common Pleas of Beaufort County, South Carolina, whence the case was removed, upon petition of the defendant, to the court below.

Judgment having been given for the defendant, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Mr. Theodore G. Barker and *James Lowndes*, for plaintiff in error.

Mr. S. F. Phillips, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

This case presents for our consideration the several Acts of Congress of 1861, 12 Stat. at L., 292, 1862 and 1863, which provided for the levy and collection of a direct tax, and the contest below was whether, under those Acts, the defendant had obtained a valid title to the land in controversy. In support of his possession, he gave in evidence at the trial a tax sale certificate, as follows:

"UNITED STATES OF AMERICA.

Tax Sale Certificate No. 238.

This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an Act entitled 'An Act for the Collection of Direct Taxes in Insurrectionary Districts Within the United States, and for Other Purposes,' held, pursuant to notice, at Beaufort, in District of Beaufort, in the State of South Carolina, on the 13th day of March, A. D. 1863, the tract or parcel of land hereinafter described, situate in the town of Beaufort and State aforesaid, and described as follows, to wit:

Lot B, in block 23, according to the commissioners' plat, was sold and struck off to the United States for the sum of fifteen dollars and — cents, being the highest bidder, and that being the highest sum bidden for the same; the receipt of which said sum in full is hereby acknowledged and confessed.

Given under our hands at Beaufort this 2nd day of April, A. D. 1863.

WILLIAM E. WORDING,

WILLIAM HENRY BRISBANE,

Commissioners."

To the reception in evidence of this certificate

NOTE.—Sale of land for taxes; strict compliance with statute necessary. See note to *Williams v. Peyton*, 17 U. S. (4 Wheat.), 77.

exception was taken, for several reasons, and most of those reasons are now urged in support of the assignments of error. It is said that the certificate is not evidence of title in the defendant, because it did not on its face show that those proceedings had been taken by the commissioners prior to the alleged sale, which were essential to the regularity and validity of the sale under the Acts of June 7, 1862, 12 Stat. at L., 422, and February 6, 1863, 12 Stat. at L., 640. This objection entirely overlooks the provisions of those Acts of Congress. The certificate which by the Act of 1863 the Board of Tax Commissioners was required to give to purchasers was simply a certificate of sale. The law did not require it should set forth that a tax had been assessed upon the property; that the tax was unpaid; that the sale had been advertised for a specified time or in a particular manner; nor that it should recite any of the facts which were necessary antecedents to any sale. It made the certificate of sale equipollent with a deed, and cast upon the former owners of the land the burden of showing that the certificate or deed was made without authority. The numerous decisions cited by the plaintiff in error to support his objection are quite inapplicable to the case. No doubt it has been decided that statutes which make a tax sale deed *prima facie* evidence of the regularity of the sale, do not relieve a purchaser from the burden of showing that the proceedings anterior and necessary to the power to make the sale actually took place. Such a provision has been held to relate only to the conduct of the sale itself. But the Act of Congress of 1863 declares that the commissioners' certificate shall be *prima facie* evidence not merely of the regularity of the sale, but also of its validity and of the title of the purchaser; and it enacts that it shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed. How can a deed be *prima facie* evidence of the validity of a sale unless it be such evidence of the transmission of the title of the property? Is any sale *valid* which does not pass title to the subject of the sale? It may be regular in form and in the mode of its conduct, but it cannot be *valid*, unless authorized by law. Now, the Act of Congress makes a certificate of sale by the commissioners, evidence that the title acquired by the purchaser under the sale was a valid one, assailable only by proof of one or the other of three things. It is not the certificate of an assessment or of an advertisement of a sale, followed by an actual sale, to which such an effect is given, but a certificate of sale alone. We are not at liberty to interpolate in the statutes requisites for the certificate which the statute does not demand.

The second objection to the reception of the tax certificate is that it was not authorized by the statutes, inasmuch as it certified a sale to the United States. It is insisted that the effect of *prima facie* evidence is given only to certificates of sale made to the highest bidder, when such bidder was some person other than the United States, and that no authority was given to the Board of Commissioners to certify a sale when the government was the highest bidder, and when the property was stricken off to it.

To this we cannot assent. The plain object of the statutory provision was to give confidence to purchasers, and thereby to enable the government to obtain the taxes due to it. For these purposes it was quite as important that the government should have evidence of its title, if it purchased, as it was that any other purchaser should have such evidence. Taxes, not lands, were what the government required. If the United States became the purchaser at the commissioners' sale, it was only to obtain the taxes by a resale, and such a resale, resting as it must have done upon the original sale made by the commissioners, needed the encouragement and support of a commissioners' certificate equally with a purchase by any bidder. It is not, therefore, to be admitted that the statute intended to put the United States in any worse condition than that occupied by any other successful bidder. The argument that it is only that highest bidder who shall pay the purchase money, and not the United States, who of course do not pay so much as is claimed for taxes, who is entitled to the certificate, is plausible, but we think it unsound. The words, "Who shall, upon paying the purchase money," etc., be entitled to this certificate, are not descriptive of the highest bidder entitled, but declaratory of the duty of every purchaser. It is, however, unnecessary to dwell longer on this part of the case. In *Cooley v. O'Connor*, 12 Wall. 391 [79 U.S., XX., 446], we held that the Act of Congress did contemplate a certificate of sale in cases where the United States becomes the purchaser, as fully as where the purchase is made by another. In that case, the point now made was distinctly presented, and such was our judgment. We adhere to the opinion we then expressed.

The other reasons urged in support of the objection to the admission of the tax certificate of sale may be considered in connection with the first exception to the rejection of evidence. In substance, they are that the certificate was not legal, because on its face it shows the commissioners did not sell the plaintiff's lot according to the enumeration thereof required by the Acts of Congress; and to show that such was the fact, the plaintiff offered evidence which was rejected by the court. What was sold was lot B, "according to the commissioners' plat." Now, if it be assumed, as it must be, in view of the evidence offered, that the enumeration and valuation of lot B was not in accordance with the last assessment and valuation made under authority of the State previous to January 1, 1862, we do not perceive that it affects the validity of the title acquired by the purchaser at the sale. It was foreseen by Congress that the State records of assessments and valuation of the lots of land in insurrectionary districts might be destroyed, concealed or lost, so as not to come into the possession of the Board of Commissioners, whose duty it was to enforce the collection of the tax, and therefore it was enacted by the 13th section of the Act of 1862 that they should be authorized to value and assess the same upon such evidence as might appear before them, and it was declared that "No mistake in the valuation of the same, or in the amount of tax thereon, should, in any manner whatever, affect the validity of the sale of the same, or of any of the proceedings preliminary thereto." The provisions respecting the mode of valuation were only

See 8 OTTO.

directory. But if they were more, so far as relates to the admissibility of the certificate of sale, the requisition of the 1st section of the Act was quite immaterial. That certificate was made *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser irrespective of any recitals it might contain, or of any evidence which might afterwards be adduced to rebut the *prima facies*. It was presumptive evidence of all antecedent facts essential to its validity, and hence admissible as such. The only question, then, is whether the evidence offered tended to rebut this presumption.

Assuming the evidence would have proved that the commissioners did not apportion the tax upon the lot as the same had been enumerated and valued by the State in the last assessment prior to January 1, 1862, their action was at most a mere irregularity, and the evidence by itself did not prove that. The Act authorized the Board to assess and value lots of ground according to their own judgment, when the state records of valuation and assessments were destroyed, concealed or lost, so as not to come into their possession. It is a fair presumption that they discharged their duty according to law. The plaintiff did not offer to show, and disclaimed any intention to show, that the state records of assessment and valuation came into the possession of the Commissioners previous to their making the valuation and assessment; and in view of the history of the times, to which we cannot close our eyes, it was a reasonable presumption which the jury ought to have accepted, that the state assessments and valuations were withheld or concealed. They were, of course, in the hands of the insurrectionary state government, and hence inaccessible to the commissioners. The evidence offered had no tendency to show the contrary. As we have seen, the Act of Congress declared that no mistake in the valuation or in the amount of the taxes would in any manner affect the validity of the sale, or of any of the proceedings preliminary thereto. Besides, all possible attack upon the *prima facies* of the certificate was limited by the express provisions of the Act, which enacted, as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of lands subject to the tax every substantial right. It was his duty to pay the tax when it was due. His land was charged with it by the Act of Congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the permission to show that he owed no tax, that his land was not taxable, that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert everything of substance; everything except mere irregularities.

We do not feel at liberty to disregard the plain intention of the Acts of Congress. We are not unmindful of the numerous decisions of state courts which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the

letter of the enactments, until of late years the astuteness of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was that bidders at tax sales, if obtained at all, were mere speculators. The chances were greatly against their obtaining a title. The least error in the conduct of the sale, or in the proceedings preliminary thereto, was held to vitiate it, though the tax was clearly due and unpaid. Mr. Blackwell, in his treatise on Tax Titles, says (p. 71), "that out of a thousand cases in court of tax sales, not twenty have been sustained." To meet this tendency of judicial refinement very many States have of late adopted very rigid legislation. The Acts of Congress we are considering must have had it in view. Hence the stringent provisions they contain. They declare, in effect, that the certificate of the commissioners' sale shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or the other of three specified things. There is no possible excuse for not enforcing such statutes according to their letter and spirit. In *Gwynne v. Neiswander*, 18 Ohio, 400, it appeared that the Statute of the State prescribed certain preliminaries to a sale of land for taxes, and directed a deed to be made to the purchaser, which should be received in all courts of the State as good evidence of title, adding, "Nor shall the title conveyed by said deed to the purchaser or purchasers, his heirs, or their heirs, assignee or assignees, be invalidated or affected by any error previously made in listing, taxing, selling or conveying said land." The court held that, even if there were irregularities in the proceedings, they would not justify declaring invalid a deed which the law under which it was made enacted should not be invalidated for any error in the listing, selling or conveying.

In *Allen v. Armstrong*, 16 Iowa, 508, we find a construction of another state statute. It enacted that a county treasurer's deed for land sold by him for taxes should be *prima facie* evidence, 1, that the property conveyed was subject to taxation; 2, that the taxes were not paid; 3, that the property conveyed was not redeemed; and should be conclusive evidence of the following facts: 1st, that the property had been taxed and assessed as required by law; 2d, that the taxes were levied according to law; 3d, that the property was advertised for sale in the manner and for the length of time required by law; 4th, that the property was sold as stated in the deed; 5th, that the grantee was the purchaser; 6th, that the sale was conducted as required by law; and, 7th, that all the prerequisites of the law were complied with by all the officers, from the listing and valuation of the property up to the execution of the deed, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except in regard to the three points first above named, wherein the deed should be *prima facie* evidence only. This, it will be noticed, was substantially the same as the United States Statute, and the court ruled that irregularities preceding the sale were inoperative to defeat it. The case is in many particulars instructive. See, also, *Tharp v. Hart*, 2 Sneed, 569.

In regard to the assignment of the plaintiff, that the court erred in refusing to admit evidence of the order of General Hunter and its revocation, as well as of the fact that Beaufort County was under martial law when the sale was made, it is sufficient to say that we cannot perceive its possible legitimate bearing upon any question really involved in the case, and the assignment has not been seriously pressed.

Nor was there error, of which the plaintiff can take advantage, in refusing evidence to prove that the advertisement and notice of the sale did not describe the property sold as it was enumerated in the last preceding valuation. What we have heretofore said is a sufficient answer to this objection.

One other assignment only remains. It is, that the Acts of Congress were unconstitutional, because the amount of the direct taxes apportioned to the State of South Carolina was increased by the addition thereto of a penalty of fifty per cent., and therefore was not in proportion to the census or enumeration directed to be taken by the 2d section of the 1st article of the Constitution.

The assignment rests upon a mistaken construction of the Acts of Congress. It is true that direct taxes must be apportioned among the several States according to the population. The Acts of August 5, 1861, June 7, 1862, and February 6, 1863, did so apportion the tax. The fifty per cent. penalty was no part of it. The Act of Congress of 1861, which levied the tax, provided for no penalty, except for failure to pay it when it was due; and the penalty charged by the Acts of 1862 and 1863 was also for default of voluntary payment in due time. A careful reading of the Acts makes this very plain. Throughout, a distinction is made between the tax and the added penalty. It is recognized in the first section of the Act of 1862, in the second, and in the third, as well as elsewhere. By the 3d section the owner of the lots or parcels of land was allowed to pay the tax charged thereon (*not the tax and penalty*), and take a certificate of payment, by virtue whereof the lands would be discharged. It cannot, therefore, be maintained that the tax was in conflict with the Constitution.

We have thus considered all the questions presented by the record, and we discover no error.

The judgment is, therefore, affirmed.

Dissenting, *Mr. Justice Field.*

Cited—99 U. S., 442, 445, 498; 102 U. S., 594; 1 Flipp., 490.

GEORGE HENDRIE, *Appt.*,

v.

THOMAS SAYLES.

(See S. C., 8 Otto, 546-555.)

Assignment of invention—rights of assignee.

1. Where an invention is assigned before a patent is obtained therefor, and the assignment is recorded, the exclusive title to the invention vests in the assignee, and the patent for the original and extended term may be issued to him.

NOTE.—*Assignment of patent before issuing and re-issuing; when assignment transfers extended term.* See note to *Gaylor v. Wilder*, 51 U. S. (10 How.), 477.

2. Such assignee may convey the entire interest in the patent to a purchaser, including any extension thereof.

[No. 947.]

Submitted Jan. 6, 1879. Decided Jan. 20, 1879.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case is fully stated by the court.

Mr. B. Bethune Duffield, for appellant:

The assignment is to be construed, like any other contract, to carry out the intention of the parties. *Pavement Co. v. Jenkins*, 14 Wall., 456 (81 U. S., XX., 778).

And to gather that intention, the court may look at the situation of the parties and the surrounding circumstances.

2 Pars. Cont., 499; *Shore v. Wilson*, 9 Cl. & F., 555; *Mumford v. Gething*, 7 C. B. (N. S.), 309; *Carr v. Montefiore*, 5 Best & S., 427.

The inventors sell the right they now have, or by letters patent would be entitled to have and possess, in the aforesaid invention.

And again, the inventors authorize the issue of "said letters patent to Tanner, as the assignee of their whole right and title to the same," not to any letters patent, but to said letters patent.

Does not this clearly show that the original term was alone intended to be conveyed?

See, *Wilson v. Rousseau*, 4 How., 646.

Two cases in the circuit courts, *Clum v. Brewer*, 2 Curt. C. C., 520, *Waterman v. Wallace*, 13 Blatchf., 132, hold that the term "invention" does not necessarily include both terms.

Tanner bought this patent "as a matter of business and speculation." Had he supposed he was buying the most valuable part of the patent, the extension, can there be any doubt that he would have been careful to see that it was included *eo nomine*?

Mr. Albert H. Walker, for appellee:

First. The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires.

Gayler v. Wilder, 10 How., 493 (1850).

Second. Also a further inchoate right to have the term extended, provided, etc.

Curtis, J., in *Clum v. Brewer*, 2 Curt. C. C., 520 (1855).

Third. The first of these inchoate rights is capable of assignment while inchoate.

Gayler v. Wilder (*supra*).

Fourth. The inchoate right to an extension of a patent is also assignable while inchoate.

Wilson v. Rousseau, 4 How., 679 (1846); *Pavement Co. v. Jenkins*, 14 Wall., 456 (81 U. S., XX., 778), 1872.

Fifth. An assignment of this last inchoate right, equally with an assignment of the inchoate right to the first term, operates to vest the legal title in the assignee, the moment the patent is extended.

R. R. Co. v. Trimble, 10 Wall., 380 (77 U. S., XIX., 952).

The decision of this court in the case of *Pavement Co. v. Jenkins*, *supra*, is, in the opinion of Judge Shepley, alone conclusive of such a question as the one at bar. In referring to that case he said: "The law must, therefore, be considered as settled by this decision, that whenever a patentee conveys his invention, without See 8 OTTO. U. S., Book 25.

any other language in the deed of conveyance, restricting the right to use the invention by a limitation of time or place, he must be considered to have granted the right to any letters patent which may be issued thereon."

Emmons v. Sladdin, IX Pat. Off. Gaz., 354 (1875).

Doubts arising on assignments, must be resolved against the grantor.

Smith v. Selden, 1 Blatchf., 475 (1849).

Mr. Justice Clifford delivered the opinion of the court:

Patents or any interest therein may be assigned by an instrument in writing, and the patentee, his assigns or legal representatives, may in like manner grant and convey an exclusive right under the patent; and where the conveyance precedes the granting of the patent, it may be issued to the assignee, the assignment thereof being first entered of record in the Patent Office. 16 Stat. at L., 202, 203; R. S., secs. 4895, 4896.

Sufficient appears to show that the complainant claims to be the lawful owner of the patented improvement, which consists of a new mode of operating railroad brakes, and that he became such, as he alleges, by virtue of an instrument of assignment, bearing date July 13, 1854, from the assignee of the original inventors.

Prior to the granting of the patent, to wit, on the first day of April, 1852, the inventors conveyed and set over to the assignor of the complainant all the right, title and interest whatever which they had, or by letters patent would be entitled to have and possess, in the described invention; and the record shows that the assignment was duly recorded in the Patent Office, as required by law.

Such an assignment may be made before the patent is obtained; and provision is made that the patent may be issued to the assignee, provided the application is made and duly sworn to by the inventor himself, and the assignment is duly recorded. When so granted, the exclusive interest is vested as a legal estate in the assignee, who thus becomes the lawful holder of the invention, and the inventor himself is divested of the legal title. Curt. Pat., 4th ed. sec. 168; 16 Stat. at L., 202.

By virtue of the assignment the legal title to the invention vested in the assignee of the inventors, and the record also shows that the patent, on the 6th of July, 1852, was duly issued in his name, it appearing that the application for the same was duly sworn to by the inventors, and that the assignment was duly recorded in the Patent Office, as the Act of Congress requires.

Even the respondent concedes that the legal title to the invention was vested in the assignee, as the patentee named in the patent, for the period of fourteen years, which is the term for which the patent was granted. From the date of the assignment to the close of the term for which the patent was granted, it is conceded that the legal title to the invention became vested in the assignee of the inventors, by virtue of the instrument of assignment which they executed to the assignee before the patent was issued. Such an instrument, though executed before the patent is granted, transfers the legal title to the assignee. *Gayler v. Wilder*, 10 How.,

477; *Rathbone v. Orr*, 5 McLean, 131; *Rich v. Lippincott*, 2 Fish., 1; *Herbert v. Adams*, 4 Mas., 15; *Dixon v. Moyer*, 4 Wash., 72.

Assume that the legal title to the invention was in the assignee, and it requires no argument to prove that he could convey the entire interest to a purchaser for a valuable consideration. Well founded doubt upon that subject cannot arise, and the record shows that the assignee of the inventors, on the 13th of July, 1854, sold, assigned, transferred and conveyed to the complainant all his right, title, interest and claim whatsoever which he then had or may have in and to said invention and patent, and any extension thereof that may hereafter be granted, with certain specified exceptions not material to be noticed in this investigation. Before the term of the original patent expired, due application was made for a renewal and extension of the patent; and it is conceded that it was duly extended and renewed by the Commissioner for the further term of seven years from and after the expiration of the first term.

Controversy arising between these parties, the complainant instituted the present suit in the circuit court against the respondent. When instituted, the bill of complaint contained many matters which are wholly immaterial in the present controversy and, consequently, are omitted. Suffice it to say in this connection that the complainant charges that the respondent has infringed his exclusive right under the extended term of the patent, and prays for process and for an account.

Service was made, and the respondent appeared and demurred to the bill of complaint, showing for cause that the complainant has not in and by his amended bill of complaint made any such title in himself to the extended term of the patent therein set forth as entitles him to any relief. Hearing was had, and the court overruled the demurrer and entered a decree in favor of the complainant, the respondent electing to stand upon his demurrer. Prompt appeal was taken by the respondent to this court, and he maintains the same proposition that he did in the court below, to wit: that the bill of complaint shows no legal title to the extended term in the complainant.

When the patentee assigns the patent to a purchaser, the assignee acquires only the exclusive right to make, use and vend the patented improvement during the term for which the patent was granted, unless the instrument of assignment contains words showing that the parties intended that the instrument should be more comprehensive and include the extended term in case an extension should be granted by the commissioner. During the term for which the patent is granted the assignee of all the right, title and interest of the patentee in the same may himself sell, assign and convey the patent for the residue of the term granted, or he may continue to hold the same during that period, and may make, use and vend the patented improvement, but his title to the invention terminates when the term of the patent expires; nor will his assignee or grantee stand in any better condition, as the maxim *Nemo dat non habet* applies to the assignee of the patentee. *Benj. Sales*, 2d ed., 5; *Peer v. Humphrey*, 2 Ad. & Ell., 495.

Assignees of the patent from the patentee can

only sell and convey what they acquire by virtue of the instrument of assignment, and inasmuch as the presumption is that the grantor contracts to sell and convey only what is secured by the patent, the proper construction of the instrument limits the right conveyed to the term expressed in the patent, unless the instrument contains words to indicate a different intent. Holders of patents may not be the inventors, nor is it true in every case that the patent is issued to the inventor. On the other hand, the inventor is vested by law with the inchoate right to the exclusive use of the invention to every extent that the Patent Act accords, which he may perfect and make absolute by proceeding in the manner which the law requires.

Bona fide inventors' rights are never derivative, and they, even before the patent is issued, have the exclusive inchoate right not only to the original patent that may issue, but to any re-issue, renewal or extension that may thereafter be granted under the Patent Act. Authorities to support that proposition are numerous and decisive, and it is equally clear that they may sell, assign or convey the invention, including the inchoate right to obtain the patent, and to surrender and re-issue it or to procure a renewal or extension of the monopoly from the Commissioner, if the instrument of assignment contains apt words to show that such was the intent of the grantor.

Such an inventor has no exclusive right to make, use and vend the improvement until he obtains a patent for the invention, and that is created and secured by the patent; nor can the inventor maintain any suit for infringing the same before the patent is issued, but the inventor, says Taney, *Ch. J.*, is vested by law, with an inchoate right to the exclusive use, which he may perfect and make absolute in the manner which the law requires. *Gayler v. Wilder* [*supra*].

Enough appears in that case to show that the invention had been made and the specification prepared to obtain a patent before the instrument of assignment was executed, and the question was whether the instrument was sufficient to transfer the inchoate right of the inventor to the assignee, it appearing by the language of the instrument that it was intended to operate upon the perfect legal title which the inventor then had a lawful right to obtain, as well as upon the imperfect and inchoate interest which he also possessed. Speaking to that point, the learned *Chief Justice* said there would seem to be no sound reason for defeating the intention of the parties by restraining the operation of the assignment to the right to obtain the patent, and compelling them to execute another transfer of the other inchoate right, unless the Act of Congress makes it necessary in order to render the transfer complete; and the court held that no such second assignment is required, as the matter to be assigned is the monopoly or the right of property vested in the inventor, so that when the party acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the whole interest of the inventor, whether the instrument was executed before or after the patent issued, passed to the assignee.

Two other reasons were given by the *Chief Justice* in support of the construction of the

assignment, which the court adopted in that case, both of which are entitled to weight: (1) That no purpose of justice would be subserved by the opposite rule, which would require the execution of a second instrument to accomplish what the parties intended to do by the first. (2) That the construction was the same as had prevailed in such cases under the prior Patent Acts. *Herbert v. Adams* [supra].

Views of a like character were expressed by Judge Curtis at a later period, in a case of great importance. *Clum v. Brewer*, 2 Curt. (C. C.), 520. Prior to obtaining the patent, the inventor conveyed to the assignee one undivided fourth part of the invention, and all his rights and property therein; and the patent having subsequently been obtained and the term extended, the question was whether the assignee held the same interest in the extended term. Both parties were represented by able counsel, and the court, upon the authority of *Gayler v. Wilder* [supra], held that the extended term passed by the assignment as well as the original term. Discussion, it seems, had taken place at the bar in respect to the extent of the property of the inventor in his invention before it is secured by a patent. Preliminary to that subject he adverted to the fact that the instrument of assignment only conveyed one quarter part of the inchoate right. But the inventor, remarked the Judge, has not only an inchoate right to obtain a patent securing to him the exclusive right to his invention for the term of fourteen years, but also a further inchoate right to have the term extended on the conditions annexed by the law to the right.

Differences of opinion prior to that time existed in some quarters whether the inchoate right to obtain an extension of the term was the proper subject of purchase and sale; but the court in that case answered the inquiry in the affirmative, and supported his conclusions by the following satisfactory reasons: (1) That the inchoate right to obtain an extension of the patent appertains to the invention as well as the inchoate right to obtain the original patent. (2) That each is incomplete, and its completion depends upon the compliance by the inventor with the statutory conditions and the performance by public officers of certain acts prescribed by law. (3) Though there is an additional condition annexed to the right to obtain an extension of the term beyond what is required to obtain a patent, yet that does not change the nature of the right, and it no more prevents it from being the subject of a contract of sale than any other condition which is attached to it; and he held that the inchoate right to obtain the extension passed by the assignment as well as the inchoate right to obtain the original patent.

Instruments of the kind have more than once been construed by this court, and always in the same way, where the instrument was executed under existing laws. *R. R. Co. v. Trimble*, 10 Wall., 367 [77 U. S., XIX., 948]; *Pavement Co. v. Jenkins*, 14 Wall., 452 [81 U. S., XX., 777].

A deed of assignment, says Mr. Justice Swayne, by which a patentee of an invention conveys all the right, title and interest which he has in the "said invention," as secured to him by letters patent, and also all right, title and interest which may be secured to him from time to time, the same to be held by the assignee for his own use and that of his legal representatives

to the full end of the term for which said letters patent are or may be granted, carries the entire invention and all alterations and improvements, and all patents whatsoever, issued and extensions alike, to the extent of the territory specified in the instrument.

Beyond doubt, the assignment in that case was made subsequent to the issuing of the patent; but the case fully supports the proposition that the operation of such an instrument is not limited to the term specified in the patent, where the instrument contains apt words to show that the parties intended that its operation should be more comprehensive.

Decisive support to that view is also found in the second case. An assignment of an invention secured by letters patent, says Justice Davis, is a contract and, like all other contracts, is to be construed so as to carry out the intention of the parties to it; and he adds, that it is well settled that the title of an inventor to obtain an extension may be the subject of a contract of sale, and when it is, the instrument by which the sale was effected is the proper subject of construction, in order to determine whether it secures to the purchaser any subsequent extension of the patent, or merely the patent for the original term.

Conveyance in that case was made of all the title and interest the patentee had in the re-issued patent, to be enjoyed by the grantee and his legal representatives to the full end of the term for which the patent is or may be granted. Taking the whole instrument together, say the court in that case, it is quite clear that it was intended to secure to the grantee and his assigns the right to use the invention in the locality specified as long as the patentee and his legal representatives have the right to use it anywhere else. Manifestly, say the court, something more was intended to be assigned than the interest secured by the patent, and the court decided that it included the renewal as well as the residue of the original term.

Apt words are required, where the conveyance is of an existing patent, to show that the conveyance includes more than the term specified in the patent; but where the conveyance is of the invention, whether before or after the patent is obtained, the rule is otherwise, unless there is something in the instrument to indicate a different intention, the rule being that a conveyance of the described invention carries with it all its incidents, and all the well considered authorities concur that the inchoate right to obtain a renewal or extension of the patent is as much an incident of the invention as the inchoate right to obtain the original patent; and if so, it follows that both are included in the instrument which conveys the described invention, without limitation or qualification. *Emmons v. Sladden*, 9 Off. Gaz., 354; *Gayler v. Wilder* [supra]; *Clum v. Brewer* [supra]; *Carnan v. Bowles*, 2 Bro. Ch., 84.

Viewed in the light of these suggestions, the court is of opinion that the entire interest in the invention passed from the inventors to the assignor of the complainant by the instrument of assignment which they executed to him before the patent was granted, and that the patent was properly issued in the name of their assignee. They, the inventors, do not controvert the exclusive right of the complainant, nor does the respondent deny that the terms of the assign-

ment from the assignee of the inventors to the complainant are amply sufficient to convey to him all that he claims, if his assignor at the time held the title to obtain the extended term; and the court being of opinion that the assignor of the complainant did hold that right, it follows that there is no error in the record.

Decree affirmed.

Cited—105 U. S., 204; 16 Blatchf., 457.

UNITED STATES, by Indictment,

v.

JEREMIAH HALL.

(See S. C., 8 Otto, 343-358.)

Embezzlement of pension money—valid law.

1. Congress has the power to define the offense of embezzlement by a guardian, of his ward's pension money, and the circuit court is vested with the jurisdiction to try the offender and sentence him to the punishment which the Act of Congress imposed.

2. The Act of Congress defining the said offense is a valid law enacted in pursuance of the Constitution.

[No. 687.]

Argued Jan. 15, 1879. Decided Jan. 27, 1879.

CERTIFICATE of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

The case is fully stated by the court.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for the United States.

Mr. P. C. Smith, for defendant.

Mr. Justice Clifford delivered the opinion of the court:

Pensions granted to children under sixteen years of age may, in certain cases, be paid to their guardians, and the Act of Congress provides that every guardian having the charge and custody of the pension of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding \$2,000, or imprisonment at hard labor for a term not exceeding five years, or both. R. S., sec. 4783.

Sufficient appears to show that the defendant in the indictment is the guardian of William Williamson, who was at the time mentioned, and long before had been, entitled to a pension from the Government of the United States, and that the defendant, as such guardian, had collected pension money belonging to his said ward as such pensioner, to the amount of \$500, for which he had never accounted, and which he had never expended for nor paid to his said ward.

Payment of the money being refused and withheld, an indictment against the defendant was returned by the grand jury of the circuit court, in which it is charged, among other things, that he, the respondent, being then and there the duly appointed guardian of William Williamson, who was entitled to a pension from the Government of the United States, and having then and there, as such guardian, the charge and custody of the pension money belonging to said ward, did unlawfully and feloniously embezzle, in violation of his trust, a large sum of

money, to wit: \$500, pension money, belonging to his said ward, which he, the defendant, as such guardian, had theretofore collected from the Government of the United States.

Due appearance was entered by the defendant, and he demurred to the indictment. Hearing was had; and the following questions arose, upon which the judges of the circuit court were opposed in opinion, and the same were duly certified to this court:

1. Whether the circuit court has any jurisdiction over the alleged offense, or any power to punish the defendant for any appropriation of the money after its legal payment to him as such guardian, it appearing that the defendant is the legal guardian of his ward under the laws of the State; and that the money alleged to have been embezzled and fraudulently converted to his own use, had been paid over to him by the Government, and belonged to his said ward.

2. If the defendant did embezzle the money and convert the same to his own use after it was paid over to him by the Government, is he liable to indictment for the offense under the Act of Congress, or only under the state law?

3. Is the Act of Congress under which the indictment is found a constitutional and valid law?

Preliminary to the examination of the questions certified into this court for decision, it is proper to remark that the court, in reproducing the questions exhibited in the transcript, has not preserved the exact phraseology in which they appear to have been framed, but it is believed that the form here adopted is, in substance and legal effect, the same as the questions certified from the court below. They present only two questions for decision which it is important to answer in any formal manner:

1. Whether the offense defined by the Act of Congress is committed when the embezzlement and conversion charged in the indictment did not take place until the pension money was paid over by the Government to the defendant, as guardian of the ward.

2. Whether the Act of Congress defining the offense charged in the indictment is a valid law, passed in pursuance of the Constitution.

Attempt is made, undoubtedly, to raise a third question, as before explained; but it is so obvious that the Act of Congress would be invalid if it defined an offense as punishable in the courts of the United States which is justiciable *only* in the courts of the State, that it is not deemed necessary to give the question much consideration, it being clear that if the offense charged in the indictment is punishable *only* by the state law, then the defendant must prevail upon one or the other, or both of the other two questions. Reasonable doubt upon that proposition cannot arise, and it is equally clear that if the answers to the first and third questions certified are adverse to the theory of the defendant, then the answer to the second question must be in the negative, which is all that need be said upon the subject.

Circuit courts have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the Acts of Congress otherwise provide, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable in those courts. 1 Stat. at L., 79; R. S., sec. 629, p. 112.

Such courts possess no jurisdiction over crimes and offenses committed against the authority of the United States, except what is given to them by the power that created them; nor can they be invested with any such jurisdiction beyond what the power ceded to the United States by the Constitution authorizes Congress to confer, from which it follows that before an offense can become cognizable in the circuit court, the Congress must first define or recognize it as such, and affix a punishment to it, and confer jurisdiction upon some court to try the offender. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat., 415; 1 Am. Cr. L., sec. 163.

Courts of the kind were not created by the Constitution, nor does the Constitution invest them with any criminal jurisdiction. Even the powers of an express character given to Congress upon the subject, embrace only a limited class of well known offenses. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States, and may pass laws to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Treason is defined by the Constitution, but it has never been decided that the offender could be tried and punished for the offense until some court is vested with the power by an Act of Congress.

Implied power in Congress to pass laws to define and punish offenses, is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof.

Power to grant pensions is not controverted, nor can it well be, as it was exercised by the States and by the Continental Congress during the war of the Revolution; and the exercise of the power is coeval with the organization of the Government under the present Constitution, and has been continued without interruption or question to the present time.

Five days after the Act passed organizing the judicial system of the United States, Congress enacted that the military pensions which have been granted and paid by the States respectively, in pursuance of an Act of the United States in Congress assembled, shall be continued and paid by the United States from the 4th day of March last for the space of one year, under such regulation as the President may direct. 1 Stat. at L., 95.

Before that provision expired, to wit: on the 5th of July of the next year, Congress enacted that military pensions granted and paid by the States in pursuance of former Acts of Congress, See 8 OTTO.

or of Acts passed in the then present session, to invalids who were wounded or disabled during the late war, shall be continued and paid by the United States for one year from the 4th of March preceding the approval of the Act. 1 Stat. at L., 129.

Seven years' half pay of certain deceased officers was granted to their widows or orphans, which grant it was supposed was barred by a subsequent Resolution; and the Congress, on the 23d of March, 1792, passed an Act that the right to prosecute the claims should be extended for and during the term of two years from the passing of the Act giving the extension, and made further provision for placing other officers, commissioned and non-commissioned, and soldiers and seamen disabled in actual military service during the late war, on the pension list during life or the continuance of such disability. 1 Stat. at L., 244.

Reference is made to these early Acts of Congress in order to show that the pension system of the country had its origin in the Revolution, and beyond all question was sanctioned by the framers of the Constitution who were members of the first Congress, and enacted the laws for putting the new government into operation.

Other Acts of Congress of a like character were passed, granting pensions to the officers and soldiers disabled in the War of 1812, and in the Mexican War, and in the more recent war of the rebellion. Fresh as these laws are in the memory of everyone, it is not necessary to refer to the volumes where they are found, as the public statutes of the United States are full of such provisions; nor should it be forgotten that some of these laws throughout the same period have been passed by Congress in favor of the disabled officers and seamen of the navy.

Suppose that is so; still it is insisted that the circuit court had no jurisdiction of the offense alleged in the indictment, which involves both the construction of the Act of Congress defining the offense and the power of Congress to pass the law, which latter point will more appropriately be considered when the third question presented for decision is examined.

Guardians having the charge and custody of the pensions of their wards, who embezzle the same in violation of their trust, or fraudulently convert the same to their own use, are the material words of the enactment; and the proposition is that the circuit court has no power to punish the defendant for any appropriation by him of said money after its legal payment to him as such guardian, which to a demonstration is a mistake, if the Act of Congress is a valid and constitutional Act, for several reasons, each of which is sufficient to show that the proposition is unsound: 1. Because the guardian has not, and cannot have, in the nature of things, the charge and custody of the pension money of his ward until it is paid to him by the Government. 2. Because he cannot, within the meaning of the Act of Congress, embezzle the pension money of his ward, or fraudulently convert the same to his own use, in violation of his trust, before the same is paid to him as such guardian. 3. Because, if the theory of the defendant is correct, the Act of Congress defines certain acts of such a guardian as an offense that in the nature of things is practically impossible, which would show that the Act of

Congress is an absurdity. 4. Because the plain import and obvious meaning of the language of the provision contradicts the theory of the defendant, and shows that Congress intended to protect the pension money as a fund for the ward after it was paid to the guardian, and to punish the depository if he embezzled or fraudulently converted it to his own use before he rendered an account for it or expended it for the benefit of the ward, as the law required.

Viewed in the light of these suggestions, it follows that the offense set forth in the indictment is well defined in the Act of Congress, and that the offense as there defined, if the Act of Congress is valid and constitutional, consists of embezzling the pension of the ward by the guardian, or of fraudulently converting the same to his own use after the same is paid to him by the Government.

Argument to show that the circuit courts have jurisdiction of offenses against the authority of the United States since the passage of the Judiciary Act is unnecessary, as all the offenses cognizable in those courts have been defined since the Judiciary Act went into operation. Grant all that, and still the question is, whether the Act defining the offense set forth in the indictment is a valid and constitutional Act.

Briefly stated, the objections to the constitutionality of the law are as follows: 1. That it is municipal in its character, operating directly on the conduct of individuals, and that it assumes to take the place of ordinary state legislation. 2. That if Congress may pass such a law, then Congress may assume all the police regulations of the States, and work their entire destruction. 3. That inasmuch as the state law authorized the guardian to receive the pension money, the defendant cannot be subjected to an indictment under an Act of Congress for embezzling it after he lawfully received it. 4. That matters of police regulation are not surrendered to Congress, but are exclusively within state legislation. 5. That a guardian is a state officer, and as such is not subject to the laws of Congress in the performance of his duties.

Power to protect the fund from misappropriation, fraud and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary, has been claimed and exercised through the whole period since Congress, under the Constitution, commenced to grant such bounties.

Provision was made by the 6th section of the Act of the 25th of March, 1792, that no sale, transfer or mortgage of the whole or any part of the pension or arrearages of pension payable to any non-commissioned officer, soldier or seaman, before the same shall become due, shall be valid; and the same section also provided that every person claiming such pension or arrears of pension, or any part thereof, under power of attorney or substitution, shall, before the same is paid, make oath or affirmation before some justice of the peace of the place where the same is payable, that such power or substitution is not given by reason of any transfer of such pension or arrears of pension; and any person who shall swear or affirm falsely in the premises, and be thereof convicted, shall suffer as for willful and corrupt perjury. 1 Stat. at L., 245.

Three of the sections of that Act were repealed by the revisory Act of the 28th of Feb-

ruary, 1793, but the 6th section, with its penal clause, was left in full force. 1 Stat. at L., 324.

Officers of the navy, seamen and marines, disabled in the line of their duty, were declared to be entitled to pensions for life or during their disability by the Act of the 3d of March, 1803, 2 Stat. at L., 242, and by the subsequent Act of the 10th of April, 1806, the operation of the Act was extended to the widows and children of such officers, seamen and marines. 2 Stat. at L., 376.

Rules and regulations for prosecuting applications to obtain the benefits of the Act were prescribed, and the 8th section of the Act, like the 6th section of the Act of the 23d of March, 1793, prohibits the sale, transfer or mortgage of the whole or any part of the pension before the same becomes due, and requires every person claiming such pension under a power of attorney or substitution to make oath or affirmation, before the same is paid to them, that the power of attorney or substitution is not given by reason of any transfer of such pension; and the provision is, that if the affiant shall swear or affirm falsely in the premises, and be thereof convicted, he shall suffer as for willful and corrupt perjury.

Regular allowances paid to an individual by government in consideration of services rendered, or in recognition of merit, civil or military, are called pensions. Military pensions are divisible into two classes: invalid and gratuitous, or such as are granted as rewards for eminent services, irrespective of physical disability. Laws of the kind in this country granting invalid pensions were passed by the States during the Revolution, and were followed by similar provisions passed by the Continental Congress. 1 L. U. S. (B. & D. ed.), 687-692; 2 L. U. S. (B. & D. ed.), 73.

Many of those provisions were in force when the Constitution was adopted, and some of the early laws of the Congress under the new Constitution were passed to fulfill and make good the obligations which were acknowledged by continental legislation. Such laws had their origin in the patriotic service, great hardships, severe suffering and physical disabilities contracted while in the public service by the officers, soldiers and seamen who spent their property, lost their health and gave their time for their country in the great struggle for liberty and independence, without adequate or substantial compensation.

Power existed in the States before the Constitution was adopted, and it would serve to undermine the public regard for our great charter if it could be held that it did not continue the same power in the Congress. Even the respondent admits that Congress may declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces; and it is equally clear that Congress may make all laws which shall be necessary and proper for carrying the powers granted by the Constitution into execution.

Concede that, and it follows that Congress may grant such donations to the officers, soldiers and seamen employed in such public service. Bounties may be offered to promote enlistments, and pensions to the wounded and disabled may be promised as like inducements.

Past services may also be compensated, and pensions may also be granted to those who were wounded, disabled or otherwise rendered invalids while in the public service, even in cases where no prior promise was made or antecedent inducement held out. Enactments of the kind, it is conceded, may be valid; and if so, it is difficult to see why Congress may not pass laws to protect the fund appropriated for such a beneficiary of the Government, certainly until it reaches his hands. Congress in many cases has passed such laws, and provided that the money shall not be transferable or subject to attachment, levy or seizure, even after it has been received by the agent, attorney or guardian.

Conclusive support to that proposition is found in the 4th section of the Act of the 15th of May, 1828, which provides that the pay of the pensioners therein named shall not in any way be transferable or liable to attachment, levy or seizure by any legal process whatever, but shall inure wholly to the personal benefit of the officer or soldier entitled to the same by this Act. 4 Stat. at L., 270.

Exemptions of certain properties of small value, such as personal apparel and tools of trade, existed in the state laws; but no court ever called the federal exemption in question because it was something in addition to what was contained in the state law, nor because the operation of the Act of Congress was extended beyond the time when the money was received by the agent, attorney or guardian of the pensioner.

Payment of pensions under the 2d section of the Act passed the next year, might be made to the widow of the deceased pensioner or to her attorney, or, if he left no widow or no one then living, to the children of the pensioner or to their guardian or his attorney, and if no child or children, then to the legal representatives of the deceased. 4 Stat. at L., 350.

Authority was also given to the Secretary of the Treasury by the Act of the 4th of June, 1832, to pay pensions to the pensioners, or their authorized attorneys, at such places and times as he might direct; but the same section provided that the pay of the pensioner should not be in any way transferable or liable to attachment, levy or seizure by any legal process whatever, and that it should inure wholly to the personal benefit of the individual entitled to the same. 4 Stat. at L., 529; 5 Stat. at L., 128.

Certain duties in that regard, previously devolved upon the Secretary of the Treasury, were, by the Resolution of the 28th of June, 1832, 4 Stat. at L., 605, transferred to the Secretary of War. Five years' half-pay and pensions were granted to certain widows of the officers and soldiers of the Revolution by the Act of the 7th of July, 1838; and the 2d section of the Act provided that no pledge, mortgage, sale, assignment or transfer of any right, claim or interest in any annuity, half-pay, or pension granted by the Act shall be valid, nor shall the half-pay, annuity, or pension granted by the Act, or any former Act of Congress, be liable to attachment, levy or seizure by any process in law or equity, and adds, as in the prior Acts cited, that it shall inure wholly to the personal benefit of the pensioner or annuitant entitled to the same. 5 Stat. at L., 303.

Ten years later, additional relief was granted
See 8 OTTO.

to the widows of officers and soldiers of the Revolution, and the 2d section of the Act contains the same prohibition and regulations as those contained in the prior Act. 9 Stat. at L., 266.

Without more, these selections from the almost innumerable list of Acts passed granting pensions are sufficient to prove that throughout the whole period since the Constitution was adopted it has been the policy of Congress to enact such regulations as will secure to the beneficiaries of the pensions granted the exclusive use and benefit of the money appropriated and paid for that purpose. Other legislation of Congress may also be referred to, confirming that proposition.

Pensioners of the kind are, in certain aspects, wards of the United States, and the legislation of Congress already reviewed shows that the National Legislature has been constant and vigilant in endeavors to protect their interest and secure to them the use of the annuities and pensions granted in their behalf. For the same purpose and to the same end, Congress, on the 14th of July, 1862, prescribed the fees to be charged by agents and attorneys for making out and causing to be executed the papers necessary to establish claims for such pensions, bounty or other allowance, and provided that if any agent or attorney in such a case shall demand or receive any greater compensation than the Act allows, he shall be deemed guilty of a high misdemeanor, and be punished as therein provided. 12 Stat. at L., 568.

Stated fees were allowed to agents and attorneys by that Act; but Congress, two years later, passed a supplemental Act, which allows to such agents or attorneys a fixed sum instead of fees. By that provision they are allowed \$10 in full for all service in procuring a pension; and the provision is, that if the agent or attorney shall demand or receive any greater compensation for his services, or agree to prosecute any claim for a pension, bounty, or other allowance under the Act, on the condition that he shall receive a per centum upon any portion of the amount of such claim, or shall wrongfully take from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, he shall be deemed guilty of the offense there defined, and be punished as therein prescribed. 13 Stat. at L., 389.

Regulations somewhat different in certain respects are made in the supplementary Act of the 6th of July, 1866, and some of those contained in the two preceding Acts are repealed; but every one of the provisions of those Acts intended to give protection to pensions or bounties to be paid to the pensioner are either left in full force, or are re-enacted in the supplemental Act in the same or equivalent words. 14 Stat. at L., 56.

Prior regulations having proved inadequate to effect the intention of the law-makers that the pension should inure solely to the benefit of the pensioner, Congress, on the 8th of July, 1870, enacted that hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise than according to that Act, and that no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner to any attorney, claim agent, broker or other person, shall be recognized by any agent for the payment of pensions, nor

shall any pension be paid thereon, subject to two provisos: 1. That payment to persons laboring under legal disabilities may be made to the guardian of such persons in the manner the Act provides. 2. That pensions payable in foreign countries may be made according to the provisions of existing laws.

Provision is also made by the 7th section of the Act that the fee of agents and attorneys for the preparation and prosecution of a claim for pension or bounty land, under any Act of Congress granting the same, shall not exceed in any case the sum of \$25, and the 8th section makes it a misdemeanor to demand, receive, or retain any greater compensation for such services in any particular case. 16 Stat. at L., 195.

Enough appears in these references to the legislation of the Congress under the Constitution to show that throughout the entire period since its adoption it has been the unchallenged practice of the Legislative Department of the Government, with the sanction of every President, including the Father of the Country, to pass laws to prevent the diversion of pension money from inuring solely to the use and benefit of those to whom the pensions are granted. With that view, sales, pledges, mortgages, assignments and every other kind of conveyance have been prohibited. Agents employed to collect the money have been required to make oath that they have no interest in such money by any such pledge, mortgage, transfer, agreement or arrangement, and that they know of none, and provision has several times been made for their punishment if they swear falsely.

Most of these regulations have been enacted to prevent agents, attorneys, and guardians from withholding the fund or converting the same to their own use before it passes into the hands of the beneficiary; but Congress has gone further, and passed laws exempting the money from attachment, execution and seizure by any legal process in law or equity. No question of such exemption is involved in the present case; but if Congress may legislate to protect the fund from the grasp of creditors before it reaches the beneficiary, none, it is presumed, will deny the power of Congress to legislate to the end to prevent the agent, attorney or guardian from converting the same to his own use.

Any other argument is hardly necessary to show that the Act of Congress in question is a valid and constitutional law; but if more be needed, it will be found in the decisions of the courts, which are numerous and decisive in support of the same proposition.

State courts in more than one instance have decided that money received as pension from the United States is not liable to attachment, levy or seizure by or under any legal or equitable process whatever. Congress has the power, says *Justice Peters*, to attach such condition to the grant of the bounty beyond all doubt; and the court held that the language of section 2, in the Act of June 6, 1866, 14 Stat. at L., 56, was comprehensive enough to exempt such money from any such attachment, levy or seizure under state laws. *Eckert v. McKee*, 9 Bush, 355.

It is undoubtedly competent for the United States, said *Judge Hoar*, to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which

the property shall finally pass to the pensioner. *Kellogg v. Waite*, 12 Allen, 530. But the court in that case held that the rule did not apply to the money after the same had passed into the hands of the pensioner, which is a question that does not arise in this case.

Sections 12 and 13 of the Pension Act of July 4, 1864, 13 Stat. at L., 389, prescribed the fees of agents employed to collect pensions, and imposed a penalty for receiving a greater fee than that prescribed. Marks was indicted for a violation of that provision, and by the report of the case it appears that he had demanded and received an excess of fees beyond what the Act allowed, and he contended that the Act was unconstitutional. Hearing was had; and *Judge Ballard* overruled the defense, holding that the power of Congress for the protection of both persons and things was co-extensive with their powers of legislation; that if they grant pensions to meritorious officers, soldiers and seamen, or to their widows, they may by all suitable laws guard and protect the fund thus devoted from being diverted from its object by either the craft or the extortion of unscrupulous agents. *U. S. v. Marks*, 2 Abb. (U. S.), 534; *S. C.*, 10 Int. Rev. Rec. 42; *U. S. v. Bennett*, 12 Blatchf., 352.

Armies may be raised and supported by Congress, and under this grant of power, says *Judge Withey*, Congress may enact laws making it an offense punishable in the National Courts to detain from a military pensioner any portion of a sum collected in his behalf as his pension. *U. S. v. Fairchilds*, 1 Abb. (U. S.), 74; *S. C.*, 16 Am. L. Reg. (N. S.), 306.

Pensioners were forbidden by the Act of July 29, 1848, 9 Stat. at L., 266, to pledge the certificate by anticipation to an agent employed to secure the pension; and *Slosson, Judge*, held that such a pledge, no matter for what purpose or to whom made, was wholly void, and that an action would lie against such agent, if he refused to deliver it up, for the recovery of the value or the damages resulting from its detention. *Payne v. Woodhull*, 6 Duer, 169.

Moneys due to a debtor from the public authorities, says *Daly, J.*, cannot be reached by a creditor of a pensioner until actually paid over to the debtor. *Nagle v. Stagg*, 15 Abb. Pr. (N. S.), 348.

Proof of a grant of a pension certificate to the plaintiff, that it is in the possession of the defendants, and that upon a demand made upon the defendants to deliver it to the plaintiff they refused to do so, not only entitles the plaintiff to recover, but makes a case which renders it impossible, in the nature of things, for the defendants to prove any facts which can operate as a bar to the action, or modify in any respect the plaintiff's right to the whole relief sought. *Moffatt v. Van Doren*, 4 Bosw., 610.

An agreement between the widow of a soldier of the Revolution entitled to a pension, and an agent, that the latter was to receive a part of the pension money for his services in obtaining it, says *Nash, Ch. J.*, is void, and the money received under such an agreement can be recovered back by the pensioner in an action of *assumpsit*. *Powell v. Jennings*, 3 Jones (N. C.), 547.

A widow entitled to arrears of pension, dying and leaving children, says *Woods, J.*, cannot dispose of such arrears by will, nor can her

executor, having received the same, retain it for purposes of administration, but each child is entitled to an equal share, and may recover it of the executor in an action for money had and received. *Fogg v. Perkins*, 19 N. H., 101; *Walton v. Cotton*, 19 How., 357 [60 U. S., XV., 659].

It is competent for Congress to enforce, by suitable penalties, all legislation necessary or proper to the execution of power with which it is intrusted, and any act committed with a view of evading such legislation or fraudulently securing its benefits may be made an offense against the United States. *U. S. v. Fox*, 95 U. S., 670 [XXIV., 538].

Acts of Congress granting such donations to officers, soldiers and seamen, or to their widows or children, in some cases direct that the payment may be made to the attorney or agent of the beneficiary, and in other Acts the direction is that the payment may be made to the guardian of the party, and in still another class of such Acts the requirement is that the money shall be paid directly to the beneficiary. 4 Stat. at L., 350; 3 Stat. at L., 569.

For the defendant, it is insisted that when the payment is made to the guardian the money paid ceases to be within the constitutional control of the United States, and that the Act of Congress, which enacts that the guardian who embezzles the money or fraudulently converts the same to his own use is guilty of a misdemeanor, is unconstitutional and void. But the court is unhesitatingly of a different opinion, for several reasons: 1. Because the United States, as the donors of the pensions, may, through the Legislative Department of the Government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary. 2. Because the guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund; but if he does, he must accept it subject to the annexed conditions. 3. Because the word "guardian," as used in the Acts of Congress, is merely the designation of the person to whom the money granted may be paid for the use and benefit of the pensioners. 4. Because the fund proceeds from the United States, and inasmuch as the donation is a voluntary gift, the Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary, which is all that is necessary to decide in this case. 5. Because the elements of the offense defined by the Act of Congress in question consist of the wrongful acts of the individual named in the indictment, wholly irrespective of the duties devolved upon him by the state law. 6. Because the theory of the defendant that the Act of Congress augments, lessens or makes any change in respect to the duties of a guardian under the state law is entirely erroneous, as the Act of Congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided.

Viewed in the light of these suggestions, it is clear that Congress possessed the power: 1. To define the offense set forth in the indictment, See 8 OTTO.

and that the circuit court is vested with the jurisdiction to try the offender and sentence him to the punishment which the Act of Congress imposed. 2. That the defendant, under the circumstances disclosed in the record, was liable to indictment in the Circuit Court of the United States. 3. That the Act of Congress defining the offense set forth in the indictment is a valid and constitutional law enacted in pursuance of the Constitution.

Let answers be certified in conformity with this opinion; that is, the answer to the first question must be in the affirmative, and the answers to the second and third questions should be in the negative.

THE ATLANTIC AND GULF RAILROAD COMPANY, *Pf. in Err.*, v. STATE OF GEORGIA.

(See S. C., 8 Otto, 359-366.)

Consolidation of railroad companies—exemption from taxation—state judgment.

*1. By the statutory Code of Georgia which came in force January 1, 1863, it was enacted that private corporations were subject to be changed, modified or destroyed at the will of the creator, except so far as the law forbids it; and that in all cases of private charters thereafter granted, the State reserved the right to withdraw the franchise, unless such right is expressly negated in the charter. Two railroad corporations created prior to 1863, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an Act of the Legislature passed on the 18th of April, 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. *Held*: 1. That, by the consolidation a new Corporation was created and the original companies were dissolved. 2. That the new corporation became subject to the provision of the Code which reserved the right of the Legislature to withdraw its charter or to change, modify or destroy it. 3. That a subsequent legislative Act, taxing the property of the Corporation as other property in the State is taxed, was not prohibited by that provision of the Constitution of the United States which denies to a State the power of passing a law impairing the obligation of contracts.

2. The judgment of the highest court of a State, that a statute has been enacted in accordance with the requirements of the State Constitution, is conclusive upon this court, and it will not be reviewed.

[No. 103.]

Argued Dec. 23, 24, 1878. Decided Jan. 27, 1879.

IN ERROR to the Supreme Court of the State of Georgia.

An issue was formed in this case, in the Superior Court of Fulton County, Georgia, upon an affidavit of illegality, concerning a *feri facias*

*Head notes by Mr. Justice STRONG.

NOTE.—When consolidation dissolves former companies. See note to *Shields v. Ohio*, 95 U. S., XXIV., 357.

Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts. Power of state courts to construe their own statutes. See note to *Jackson v. Lamphire*, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes. Supreme Court will not review their decisions, except when specially authorized to by statute. See note to *Commercial Bank v. Buckingham*, 46 U. S. (6 How.), 317.

for collecting a certain tax. Judgment was given in favor of the validity of the tax, and affirmed by the Supreme Court of the State; whereupon the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Robert Falligant, Julian Hart-ridge & W. S. Chisholm, for plaintiff in error.

Messrs. Robert Toombs, Robert N. Ely, Atty-Gen. of Georgia and C. N. West, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

The single question presented in this case is, whether the Act of the Legislature of Georgia approved Feb. 28, 1874, whereby it was enacted that the property of all railroad companies in the State should be taxed as other property of the people of the State, impairs the obligations of the contract contained in the charter of the plaintiff in error. The question compels consideration of the inquiry: what was the contract into which the State entered with the Company and what are the rights which the Company holds under it?

Prior to the 18th day of April, 1863, there were two railroad companies in the State, one incorporated on the 25th day of December, 1847, as the "Savannah, Albany and Gulf Railroad," and the other incorporated on the 27th day of February, 1856, with the name, "The Atlantic and Gulf Railroad Company," the same name now borne by the plaintiffs. The charter of each of these companies contained a grant of all the rights, privileges and immunities, which had been granted to or were held and enjoyed by any other incorporated railroad company or companies, or which had been granted to the Central Railroad and Banking Company, or to the Georgia Railroad Company, or to either of them. Both these latter companies had been incorporated prior to 1840, and each held by its charter the privilege or immunity of not being subject to be taxed higher than one half of one per cent. upon its annual net income in the one case, and in the other, on the net proceeds of its investments. Consequently, the Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, severally acquired by their charters an exemption from taxation at any higher rate, or in any different manner. And such an immunity they severally continued to hold down to 1863. This, we think, admits of no reasonable doubt. And if their rights are now the same as they were when the original charters of the two companies were first granted, it is quite clear the provisions of the Taxing Act of 1874 could not be applied to them without impairment of the contracts they had with the State. Neither of the companies, however, is now existing under or by virtue of its original charter. On the 18th day of April, 1863, the Legislature of the State passed an Act whereby they were empowered to consolidate their stocks upon such terms as might be agreed upon by the directors and ratified by a majority of the stockholders; and the Act enacted, that when so consolidated they should be known as "The Atlantic and Gulf Railroad Company," with a proviso that nothing therein contained should relieve or discharge either of them from

any contract theretofore entered into by either but that *this Company* should be liable on the same. By the 2d section it was enacted that the stockholders of said consolidated railroad companies, *by such corporate name*, and *in such corporate capacity*, should be capable in law to have, purchase, and enjoy such real and personal estate, goods and effects as might be necessary and proper to carry out the objects therein specified, and to secure the full enjoyment of all the rights therein and thereby granted, and by said name to sue and be sued, plead and be impleaded, in any court of competent jurisdiction; to have and use a common seal, and the same to alter at pleasure; to make and establish by-laws, and generally to exercise corporate powers.

The 3d section of the Act declared that the several immunities, franchises and privileges granted to the said Savannah, Albany and Gulf Railroad Company, and the Atlantic and Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, should continue in force, except so far as they might be inconsistent with the Act of consolidation.

The 5th section repealed all laws and parts of laws militating against the Act.

It is conceded that under this Act a consolidation took place. It is, therefore, a vital question: what was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the Act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the Legislature as expressed in the consolidating Act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *E. R. & Bkg. Co. v. Georgia*, 92 U. S., 665 [XXIII., 757]. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the Act authorized the consolidation of the *stocks* of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being? True, the proviso to the first section declared that nothing therein contained should relieve or discharge either of the companies from any contract theretofore entered into by either, adding: "But *this company* (that is, the company created by the Act) shall be liable on the same." It is thus distinguished between the two original companies and the one contemplated to be formed by their consolidation. And the proviso would have been quite unnecessary, had it not been thought by the Legislature that the consolidation would work a dissolution of the amalgamated companies. Hence it was considered necessary to preserve the rights of parties who might have contracted with them. Only their contracts

were mentioned in the proviso, and that in order to authorize a novation. The 3d section continued in force the several immunities, franchises and privileges granted by the *original charters* and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit of the consolidated companies. Why speak of *original charters*, if a later charter was not intended by the Act? That such was the intention appears still more clearly in the 3d section. That conferred upon the consolidated stockholders complete corporate powers. It granted to them, when consolidated, not only a corporate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws and generally to do everything that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it, if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning. If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consolidation, a new grant of corporate power and existence was unnecessary. They had it already.

Looking thus at the legislative intent appearing in the consolidation Act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them solely by virtue of the grant that Act made. That generally the effect of consolidation, as distinguished from an union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan v. Morrison*, 16 Ind., 172, the effect of a consolidation was said to be "A dissolution of the corporations previously existing, and, at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence." So in *Lauman v. R. R. Co.*, 30 Pa., 42, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the Legislature, and the formation of a new company out of such portions of the old as enter into the new." This court, in *Clearwater v. Meredith*, 1 Wall., 40 [68 U. S., XVII., 608], expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason. When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or *quasi* partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: the stockholders of the Savannah and Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic and Gulf Railroad Company. They could

not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities and privileges by virtue of the consolidation Act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only its being, but its powers, its franchises and immunities, are grants of the Legislature which gave it its existence.

If, then, the old Atlantic and Gulf Railroad Company and the Savannah, Albany and Gulf Railroad Company went out of existence when their stocks were consolidated under the Act of the Legislature of 1863, their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation Act of 1863. That Act created a new corporation, and endowed it with the several immunities, franchises and privileges which had previously been granted to the two companies, but which they could no longer enjoy.

It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted. And the Code of the State, which came of force on the 1st of Jan., 1863, before the charter was granted, contained the following provision:

"Section 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of the creator; they are called corporations."

"Section 1082. In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the Code became, in substance, a part of the charter. *R. R. Co. v. Maine*, 96 U. S., 499 [XXIV., 836]. It is quite too narrow a definition of the word "franchise," used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the Legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in *R. R. & Bkg. Co. v. Georgia*, 54 Ga. 401, and so it must be held now, especially in view of the statutory provision of the Code, that private corporations are subject to be

changed, modified or destroyed at the will of their creator. Hence the exemption from taxation, except to the extent and in the mode designated in the charter, could be withdrawn without any violation of the State's contract with the Company, and the Act of 1874 was such a withdrawal.

In regard to the position taken by the plaintiff in error, that the sections of the Code we have quoted were not laws of the State in 1863, because the Code was not read three times in each House of the General Assembly, as required by the State Constitution, it is sufficient to say the Supreme Court of the State has decided they were, and its decision of such a question is not open for revision by us in a case brought here from a state court. *Pa. Coll. Cas.*, 13 Wall., 190 [80 U. S., XX., 550].

The judgment of the Supreme Court is, therefore, affirmed.

RAILROAD COMPANY v. GEORGIA, No. 772, was argued at same time and by same counsel as preceding, and decided same way.

Mr. Justice Strong delivered the opinion of the court.

The judgment is affirmed.

Cited—105 U. S., 21; 106 U. S., 565; 112 U. S. 623; 16 Blatchf., 55.

THE UNION NATIONAL BANK OF SAINT LOUIS ET AL., *Plffs. in Err.*,

v.

ELIZABETH A. MATTHEWS.

(See S. C., 8 Otto, 621-630.)

Right of national banks to security by mortgage—estoppel.

1. Where a payee of a note, which was secured by a deed of trust of lands, assigned the note and deed of trust to a national bank to secure a loan made by it to him thereon, the bank, on the loan being unpaid, may sell the lands, under the deed of trust, through the trustee, to pay the loan.

2. That the deed of trust was the same thing in effect as a direct mortgage, does not alter the case.

3. Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity.

[No. 128.]

Argued Jan. 16, 1879. Decided Jan. 27, 1879.

IN ERROR to the Supreme Court of the State of Missouri.

The case is fully stated by the court.

Messrs. P. Phillips and Britton A. Hill, for plaintiffs in error:

The mortgage was a mere incident to the note, and stood as security for its payment to whoever might become the holder thereof in good faith, although ignorant, at the time of taking it, of its existence.

In *Green v. Hart*, 1 Johns., 590, Spencer, J., says: "Had the mortgage not been delivered, nor anything said about it, I should have considered the respondent (the assignee), on failure of the mortgagor to pay the note, entitled to the aid of the mortgagee."

Chappell v. Allen, 38 Mo., 213; *Bk. v. Haire*, 36 Ia., 443; *Bk. v. Mears*, Thomp. Nat. Bank Cas., 353.

188

It would be no violation of the Act, if the Bank should require as collateral, a deposit of bonds or stocks, either of States, municipalities or incorporated companies.

Shoemaker v. Bk., 2 Abb., U. S., 416; *Schouler*, Personal Prop., 87, 94; *Car Works v. Bk.*, Thomp. Nat. Bank Cas., 315.

There can be no doubt that the Bank, in this transaction, acted in good faith and in the belief that it was entirely warranted by the powers conferred in its charter.

On the other side the attacking party, under the circumstances disclosed, must be considered as having received the benefit of the loan made by the Bank.

Can she now be permitted to retain this advantage, and ask of a court of justice, upon a sharp question of construction, to cancel the contract she has made, and thus inflict a heavy loss upon the stockholders and creditors of the Bank?

There is some contrariety of decision upon this question, and we refer the court to some of the numerous cases which hold the negative of the proposition.

Smith v. Sheeley, 12 Wall., 360 (79 U. S., XX., 431); *Mining Co. v. Bk.*, 96 U. S., 640 (XXIV., 648); *Bk. v. North*, 4 Johns. Ch., 370; *Steam Nav. Co. v. Weed*, 17 Barb., 380; *Ang. & Ames*, Corp., sec. 153.

Messrs. Jno. C. Orrick, Jno. W. Noble and J. A. Hunter, for defendant in error:

Where the statute says a bank may loan money on personal security, there is an implied prohibition that it should loan it on any other—*expressio unius est exclusio alterius*," that the whole transaction was not only *ultra vires*, but absolutely illegal; that the loan was prohibited, and that all incidental transactions were affected by it. A collateral contract, made under one tainted with illegality, cannot be enforced.

Armstrong v. Toler, 11 Wheat., 253; *McBlair v. Gibbs*, 17 How., 232 (58 U. S., XV., 132).

National banks cannot do what natural persons can do under like circumstances, either as to real estate or as to their own stock.

First Nat. Bk. v. Nat. Exch. Bk., 92 U. S., 127, 128 (XXIII., 681).

Mr. Justice Swayne delivered the opinion of the court:

This case involves a question arising under the National Banking Law which has not heretofore been passed upon by this court. We have considered it with the care due to its importance. There is no controversy about the facts, and so far as it is necessary to advert to them, they may be briefly stated:

On the first of March, 1871, Hugh B. Logan and the defendant in error, Elizabeth Matthews, executed and delivered to Sterling Price & Co. their joint and several promissory note for the sum of \$15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent. per annum. The payment of the note was secured by a deed of trust, executed by the defendant in error, of certain real estate therein described.

On the 13th of the same month, the note and deed of trust were assigned to the Bank. The answer of the Bank avers that the Bank "accepted the said note and deed of trust as security for the sum of \$15,000, then and there advanced

98 U. S.

and loaned to said Sterling Price & Co. * * * on the security of said note and deed of trust." Price & Co. failed to pay the loan at maturity. The Bank directed the trustee in the deed of trust to sell. The defendant in error thereupon filed this bill in the proper state court to enjoin the sale. A perpetual injunction was decreed, upon the ground that the loan by the Bank to Price & Co. was made upon real estate security; that it was forbidden by law; and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side. The plaintiff in error removed the case to the Supreme Court of this State. There the decree of the lower court was affirmed. Hence this writ of error.

Our attention has been called to but a single point which requires consideration, and that is whether the deed of trust can be enforced for the benefit of the Bank.

The statutory provisions which bear upon the subject are as follows:

Sec. 5136. Every national banking association is authorized "To exercise by its Board of Directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this Title.

Sec. 5137. A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: First. Such as may [shall] be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate * * * purchased to secure any debts due to it for a longer period than five years." R. S. 999; 13 Stat. at L., 49.

Here the Bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust; but that has not yet occurred, and never may.

Section 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Section 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note and a right to the benefit of the

deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in *mortmain*. The intent, not the letter of the statute, constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The Bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the *Chancellor*. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error.

In *Bk. v. Haire*, 36 Iowa, 443, the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defense was set up as here. In disposing of this point, the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this." *Bk. v. North*, 4 Johns. Ch., 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage, with respect to a party entitled to the benefit of the security, and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not *declare* such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris v. Runnels*, 12 How., 79, this court said that "The statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase money of slaves, taken into Mississippi contrary to a statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester*, 7 Mass., 48; *Parton v. Hervey*, 1 Gray, 119; *King v. Birmingham*, 8 Barn. & C., 29.

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *Bk. v. Sharp*, 4 Sm. & M. (12 Miss.), 75; *Bk. v. Archer*, 8 Sm. & M. (16 Miss.), 151; *Bk. v. Sherwood*, 10 Wis., 230.

The charter of a savings institution required that its funds should be "invested in or loaned on public stocks or private mortgages," etc. A loan was made and a note taken, secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter and, therefore void. The court held the borrower bound, and upon a counterclaim adjudged that he should pay the amount of the loan with interest. *Mott v. Tr. Co.*, 19 Barb., 568.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.), 313; *Gouldie v. Water Co.*, 7 Pa., 233; *Runyan v. Coster*, 14 Pet., 122; *The Bks. v. Poitauux*, 3 Rand., 136; *McIndoe v. St. Louis*, 10 Mo., 577.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax v. Hunter*, 7 Cranch, 604.

In *Bk. v. North*, 4 Johns. Ch., 370, the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defense "that by the Act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defense to the one we are considering is too obvious to need remark. Both present exactly the same question. *Chancellor Kent* said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the Government of Pennsylvania, to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of misuser, by setting aside a

just and bona fide contract." * * * "If, the loan and mortgage were concurrent acts and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced bona fide as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See, also, *Baird v. Bk.*, 11 Serg. & R., 411.

Sedg. Stat. and Const. Constr., 73, says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the Government.

The decree of the Supreme Court of Missouri is reversed and the cause will be remanded, with directions to dismiss the bill.

Mr. Justice Miller, dissenting:

I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned at the time of the transaction by the Bank, to whomsoever the conveyance may be made; that the Bank is forbid to accept such security, and it is void in its hands.

The contract to repay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall.

In the present case the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the Bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews personally. With this latter contract the state court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

Cited—101 U. S., 397, 628; 103 U. S., 101; 105 U. S., 4; 112 U. S., 413, 451; 19 Blatchf., 289; 32 N. J. Eq., 808; 30 Hun., 643; 94 Ill., 385; 71 Mo., 228, 469; 4 N. W. Rep., 852, 918; 8 N. W. Rep., 135; 16 N. W. Rep., 424; 21 N. W. Rep., 850; 131 Mass., 272; 41 Am. Rep., 235; 9 Neb., 324; 31 Am. Rep., 415; 36 Ohio, 357; 38 Am. Rep., 597.

THE COUNTY COURT OF KNOX COUNTY AND THE JUSTICES THEREOF, *Plffs.*
in *Err.*,

v.

UNITED STATES, *ex rel.* GEORGE W. HARSHMAN.

Supersedeas bond may be amended.

Where the *supersedeas* bond is clearly defective, in not truly describing the judgment upon which the writ of error was sued out, the *supersedeas* will be vacated unless the plaintiff in error shall file a new bond in such sum and within such time as directed by the court.

[No. 712.]

Submitted Nov. 18, 1878. Decided Jan. 29, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri. On motion to vacate *supersedeas*.

The case is sufficiently stated by the court.

Messrs. T. K. Skinker and W. A. McKenney, for defendants in error.

Mr. David P. Dyer, for plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The *supersedeas* bond in this case is clearly defective. It recites a judgment rendered at the March Term, 1878, of the circuit court, against the defendant, "In a suit depending in said court between George W. Harshman, plaintiff, and Knox County, in the State of Missouri, defendant." That is not a true description of the judgment awarding the *mandamus* upon which the writ of error was sued out, or of either of the judgments for the collection of which the *mandamus* was awarded.

1 We think the case a proper one for the allowance of an amendment of the bond *O'Reilly v. Edrington*, 96 U. S., 726 [XXIV., 659], and it is, accordingly, ordered that the *supersedeas* be vacated, unless the plaintiffs in error shall on or before the first Monday in January next, file with the clerk of this court a new bond in the penal sum of \$20,000, with good and sufficient security, conditioned according to law.

JOHN FOSTER ET AL., *Plffs. in Err.*,

v.

FRANCIS MORA.

(See S. C., 8 Otto, 425-428.)

Ejectment—title in.

In actions of ejectment in the United States Courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal Courts.

[No. 140.]

Submitted Jan. 21, 1879. Decided Feb. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Mr. Edmund L. Goold, for plaintiffs in error.

Mr. John T. Doyle, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

This is an action of ejectment brought origi-

See 8 OTTO.

nally in the Circuit Court for the District of California, by the defendant in error, in which he recovered judgment against the plaintiffs in error.

The parties waived a jury, and the court made a finding of the facts, on which its judgment was rendered. Those which set out plaintiff's title are as follows:

"I. The lands in controversy are the ancient mission buildings and quadrangle, and the gardens and orchards, of the ancient Mission of San Juan Capistrano, as formerly occupied by the priests of the mission: area, forty-six acres and seventy-four hundredths of an acre ($46\frac{74}{100}$).

II. That on the 19th day of February, A. D. 1853, Joseph S. Alemany, Roman Catholic Bishop of Monterey, filed with the Board of Commissioners to ascertain and settle private land claims in California, appointed under the Act of Congress of March 3d, 1851, his petition in writing, a copy of which (omitting the description of the several parcels of land herein described and claimed) is hereto annexed and made part hereof, and marked 'Schedule A,' and thereupon such proceedings were had before the said Board, that the said Board, on the 18th of December, A. D. 1855, made a decree confirming to said petitioner the lands described in his petition, to be held by him for the uses and purposes in said petition described. A copy of the decree (omitting the description of the several parcels of land) is hereto annexed and made part hereof, marked 'Schedule B.' That afterwards the United States appealed from the said decree to the District Court of the United States for the Southern District of the State of California, and thereafter the Attorney-General of the United States, having given notice that he would not prosecute such appeal, the same was thereupon, afterwards, on the 15th day of March, A. D. 1858, at a regular term of the said court, by its order duly entered, dismissed, and the said Joseph S. Alemany, Bishop as aforesaid, was adjudged and decreed to have leave to proceed in the premises under the decree of the Land Commissioners as under final decree.

III. That on the 18th day of March, A. D. 1865, letters patent were duly issued by the United States of America to the said Reverend Joseph S. Alemany, Bishop as aforesaid, a copy whereof is annexed, and made a part hereof, marked 'Schedule C.'

IV. Afterwards, and before the commencement of this suit, the title of the said Joseph S. Alemany, Roman Catholic Bishop as aforesaid, to the said premises became vested in the plaintiff herein, and that they are the same premises described in the complaint and here in controversy."

It also appears that this land had been in possession of the Mission ever since the year 1796.

The defendants were admitted to be in possession at the commencement of the action, and their claim of title is in substance founded on these facts, as stated by the court:

A grant by Pio Pico, Governor of California, of the premises in controversy, dated December 6, 1845; a petition to the Board of Commissioners of Private Land Claims, dated October 23, 1852; a decree of confirmation of that Board, dated July 7, 1855; an appeal, which was dismissed; and a survey of the lands so confirmed

by the Surveyor-General of the United States.

No patent has been issued to the claimants under these proceedings.

It thus appears that plaintiff has the only title founded on a patent from the United States. The Act of Congress of 1857, to ascertain and settle the private land claims in California, required that every claim to land arising under the Mexican Government should be presented to the Board of Commissioners appointed under it, and that they should reject or affirm the claim.

It also contemplated as the final evidence of title that a patent should issue to the claimant or his representatives when the claim was established, in whole or in part. This patent is declared by the statute to be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

The patent to Bishop Alemany in this case and in this action is conclusive as against the United States that the Bishop had a meritorious claim derived from the Mexican Government to the land in question, and that the United States conveys to him the legal title to the land.

In actions of ejectment in the United States courts the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal Courts.

This record shows that plaintiff holds the only legal title which the courts of the United States can recognize. The oldest claim, the oldest possession, the oldest legal title and the only patent from the United States are with the plaintiff, and in this action these must prevail.

We are invited by plaintiffs in error into the discussion of the canon and civil laws of Mexico concerning the titles to lands held by missions and other ecclesiastical bodies. We must decline to follow this lead.

If there is any equitable reason why the only strict legal title and the older Mexican claim and possession should not prevail, it is not available in a court of law.

The judgment of the Circuit Court is affirmed.

▲ Cited—7 N. W. Rep., 64.

UNITED STATES, *Piff.*,

v.

LOUIS BENECKE.

(See S. C., 8 Otto, 447-450.)

Withholding bounty money by attorney—claimant—limitation.

1. Wrongfully withholding pay or bounty by an agent or attorney from a claimant, is not an offense under section 13 of the Act of July 4, 1864.

2. The word "claimant" under that Act means a claimant before the Pension Bureau.

3. A defendant cannot be punished under section 31 of the Act of March 3, 1873, where the money had already been withheld five years before the Act was passed.

[No. 126.]

Submitted Jan. 15, 1879. Decided Feb. 3, 1879.

ON a certificate of a division in opinion between the Judges of the Circuit Court of the

United States for the Western District of Missouri.

The case is stated by the court.

Mr. Edwin B. Smith, Asst. Atty-Gen., for plaintiff.

Messrs. Louis Benecke, in person and Waters & Winslow, for defendant.

Mr. Justice Miller delivered the opinion of the court:

The defendant was indicted in the District Court for the Western District of Missouri, and the sixth and tenth counts of the indictment charged him with unlawfully withholding arrearages of pay and bounty from persons for whom, as agent and attorney, he had collected the same from the United States.

In the one case, the date was alleged to be the 16th day of March, 1868, and in the other the 17th of the same month, and in both continuing thereafter.

On these counts the defendant was found guilty in the circuit court; and on motion for a new trial and arrest of judgment the judges of that court certified six questions of law to this court on which they differed as applicable to the case.

The first of these is thus stated:

1. Is wrongfully withholding back pay or bounty by an agent or attorney from a claimant an offense under section 13 of the Act of July 4th, 1864, 13 Stat. at L., 389, or under section 31 of the Act of March 3, 1873, 17 Stat. at L., 575, section 5485, Rev. Stat.?

The Act of 1864 is entitled "An Act Supplementary to an Act entitled 'An Act Granting Pensions,' approved July 14, 1862, 12 Stat. at L., 566." It consists of fifteen sections, the 12th of which is devoted to prescribing specifically the compensation of agents and attorneys for procuring the allowance of pensions and bounty, or other claims under the Act; and the 13th section, to prescribing a punishment for violation of the 12th. It is as follows:

"Sec. 13. *And be it further enacted*, that any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services under this Act than is prescribed in the preceding section of this Act, or who shall contract or agree to prosecute any claim for a pension, bounty or other allowance under this Act, on the condition that he shall receive a per centum upon [or] any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof shall, for every such offense, be fined not exceeding \$300, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offense."

There is here no provision in regard to services for procuring pay, nor any provision in the Act regarding it. The pensions to soldiers, their widows and orphans, is not pay, and the provisions for paying them are not under that Act. Arrearages of pay were not collected under any pension law, or through the pension office. What is meant by bounty here is said in the briefs to be also passed upon and paid in another bureau. The indictment is, perhaps, on this

point a little obscure. In the sixth count the defendant is charged as guilty of withholding *arrears of pay and bounty*, and in the tenth with withholding pay and bounty.

Since the Act in which this offense is described makes no provision for pay or for bounty, and the fees regulated and the acts forbidden are those done in regard to that Act, it seems a reasonable construction of the penal part of the statute that withholding *pay and bounty*, which are not mentioned there, are not intended to be punished by the Act.

It is not in reference to pay that Congress was legislating. The persons described who may be guilty are those prosecuting claims for *pensions* or bounty before the pension office. The offense described is "withholding from a pensioner or other claimant the whole or any part of the claim allowed and due said pensioner or claimant," and it is but a just limitation of the word "claimant" that he should be a claimant under that Act, a claimant before the Pension Bureau. This part of the section is to be taken in connection with the taking of illegal fees, which manifestly refers to cases before the pension office, and which are described and punished in the same sentence and by the same penalty. The word "bounty" is not used in this sentence, nor the word "pay," but the argument is that the word "claim" includes them. We think this would be an unjustifiable extension of a penal statute beyond its terms and against its purpose.

The first question is, therefore, to be answered in the negative, and we need not inquire if the statute was repealed, since the offense described in the indictment is not within it.

The offenses in this indictment are said to have been committed in 1868. The law then in existence did not make the act charged a crime. It is argued by counsel that withholding the money due is a continuous offense, and if the same money was withheld after the Act of 1873 did make such withholding punishable, the indictment is good under that Act. But without deciding here how far the withholding the money under a law which made that an offense when the wrongful withholding began, can be held to be a continuous offense, we are of opinion that it would be a forced construction of the Act to hold that it was intended to apply to a case where the money had already been withheld five years when the statute was passed. The party might very well be criminally wrong in failing to pay when he received it; but Congress could hardly be supposed to intend to punish as a crime his failure to pay afterwards what was in law but a debt created five years before.

This answers the fifth question, namely: "Can the defendant be punished under section 31 of the Act of March 3, 1873?" These answers also render unnecessary a reply to the others.

It is, therefore, ordered to be certified to the Circuit Court that the first and fifth questions are answered in the negative, and that answers to the others are thereby rendered unnecessary.

Cited—98 U. S., 451.

See 8 Otto.

U. S., Book 25.

UNITED STATES, *Plff.*,

v.

CLARK IRVINE.

(See S. C., 8 Otto, 450-453.)

Withholding pension money by attorney—limitations—continuous crime.

1. In order to constitute the crime of wrongfully withholding a pension by an agent or attorney, there must be such unreasonable delay, refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding capable of proof to a jury.

2. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.

3. The crime is not a continuous one to the time of the indictment. Where defendant, in 1870, unlawfully withheld the money, after a demand, and the indictment was found in 1875, the two years Statute of Limitations was a bar to the prosecution.

[No. 127.]

Submitted Jan. 15, 1879. Decided Feb. 3, 1879.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Missouri.

The case arose in the District Court of the United States for the Western District of Missouri. Judgment having been given against him, the defendant moved in arrest of judgment; whereupon the court, on the ground that the questions "are important and difficult," certified the case to the circuit court. The circuit court being divided in opinion, certified certain questions arising in the case, to this court.

The case is fully stated in the opinion.

Mr. Edwin B. Smith, Asst. Atty-Gen., for plaintiff.

No counsel appeared for defendant.

Mr. Justice Miller delivered the opinion of the court:

The defendant is charged in the indictment in this case, that on the 20th day of December, 1870, as the agent and attorney of Mrs. Berkely, he wrongfully withheld from her the amount of her pension, to wit: \$500, allowed her under the pension laws, and continuously withheld it until the time of finding the indictment in September, 1875.

The indictment comes within the terms of the Act of 1864, which we have considered in *U. S. v. Benecke* [*ante*, 193].

But the judges have certified to us, among other questions, whether the Act of July 8, 1870, does not repeal the 13th section of the Act of 1864.

By the 3d section of the later Act, pensions are forbidden to be paid to attorneys and agents any more, and are required to be paid directly to the pensioner. It is not easy to see, therefore, how the attorney is to get possession of the money, and how he can withhold it, or why there should be any longer a law for punishing him for such withholding.

The statute revises the Act of 1864, as regards fees of such attorneys, and increases the punishment for exacting more fees than the law allows, but totally omits any penalty for withholding. Sects. 7 and 8, Act of July 8, 1870, 16 Stat. at L., 195.

It is argued that this omission was intentional, for the reason above stated; and as the statute repeals all Acts in conflict with its provisions, it was intended to repeal the penalty for withholding prescribed by the Act of 1864. The argument is not without force; but we prefer to answer another question, which will decide the present case, without deciding that.

The plaintiff pleaded the Statute of Limitations of two years as a bar to the indictment, and the court, having refused him the benefit of the bar on trial, now certify other questions on that subject, namely: 2. Is the crime a continuous one down to the time of finding the indictment? 3. Does the Statute of Limitations constitute a bar to this prosecution, the indictment having been found September 15, 1875?

It is not very easy to define for all purposes what constitutes under the statute a withholding of the pension. It cannot commence, of course, until the money is received by the party charged. Nor can it commence then, unless there is a duty of immediate payment to the pensioner. A reasonable time must certainly be allowed for this. What that is must depend in each case on its own circumstances. A refusal to pay on demand without just excuse would constitute withholding at once. Such delay as would show an intention to evade payment would constitute a withholding. If there is nothing but careless delay, the party might hold the money for some time without incurring this severe penalty of two years imprisonment. In short, there must be such unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law.

But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment.

There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the Statute of Limitations applicable to the offense begins to run.

It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office.

He pleads the statute of two years, a statute which was made for such a case as this; but the reply is: You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute.

We do not so construe the Act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.

In the case before us, the judges certify that it appeared on the trial that the pensioner demanded her money of defendant on the 24th of December, 1870, and he refused to pay her, and had never paid her up to the finding of the

indictment, September 15, 1875; that he requested the judge to instruct the jury to acquit him, because the offense was barred by the Statute of Limitations, which the court refused to do.

We think the statute, R. S., sec. 1044, was a bar; and we say in answer to the 2d question, that the crime, as shown in this case, was not a continuous one to the time of the indictment; and to the 3d, that the Statute of Limitations constitutes a bar to this prosecution.

The answers to these two questions, 2d and 3d, the second in the negative and the third in the affirmative, which are to be so certified to the Circuit Court, disposes of the case.

Cited—9 Biss., 340.

UNITED STATES, *Piff. in Err.*,

v.

CLARK W. THOMPSON ET AL.

(See S. C., 8 Otto, 486-491.)

United States, not barred by state statute.

1. A state Statute of Limitations cannot bar the United States.

2. The Judiciary Act of 1789, that the laws of the several States shall be regarded as rules of decision in the courts of the United States, does not apply in such a case.

[No. 754.]

Argued Jan. 13, 14, 1879. Decided Feb. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The case, which arose in the court below, is fully stated in the opinion.

Mr. Edwin B. Smith, Asst. Atty-Gen., for plaintiff in error.

Messrs. M. S. Wilkinson and H. F. Masterson, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The United States sued upon the bond of the defendant in error, Clark W. Thompson, as Superintendent of Indian Affairs in Minnesota. The other defendants in error were sued as his sureties. The breach alleged was that Thompson, as such officer, had received \$10,562.27 of the moneys of the United States, which he had neglected and refused to account for and had converted to his own use.

The defendants pleaded that the cause of action did not accrue within ten years next preceding the commencement of the suit. The United States demurred. The demurrer was overruled, and judgment rendered for the defendants. The United States has brought the judgment here for review.

This case turns upon a statute of the State of Minnesota which bars actions, *ex contractu*, like this, within a specified time, and the same limitation is applied by the statute to the State. The United States are not named in it. The court below held that the statute applied to the United States, and hence this judgment.

NOTE.—Neither time nor the Statute of Limitations runs against the State. See note to Gibson v. Chouteau, 80 U. S., XX., 534.

There is no opinion in the record, and we are at a loss to imagine the reasoning by which the result announced was reached. The Federal Courts have been in existence nearly a century. The reports of their decisions are numerous. They involve a great variety of questions, and the fruit of much learned research. We have been able to find but two cases in the lower Federal Courts in which it appears the question was raised. They are *U. S. v. Hoar*, 2 Mas., 311, and *U. S. v. Williams*, 5 McLean, 133. In both it was held, without the intimation of a doubt, that a state statute cannot bar the United States. The same doctrine has been several times laid down by this court; but it seems always to have been taken for granted, and in no instance to have been discussed either by counsel or the court. *U. S. v. Buford*, 3 Pet., 12; *Lindsey v. Miller*, 6 Pet., 666; *Gibson v. Chouteau*, 13 Wall., 92 [80 U. S., XX., 534].

This state of things indicates a general conviction throughout the country that there is no foundation for a different proposition. There are also adjudications in the state reports upon the subject, but they concur with those to which we have referred. Among the earliest of them is *The People of Stoughton v. Baker*, 4 Mass., 522. In that case Chief Justice Parsons said: "No laches can be imputed to the Government, and against it no time runs so as to bar its rights." The examination of the subject by Judge Story, in *U. S. v. Hoar*, is a fuller one than we have found anywhere else. He and Parsons are in accord. So far as we are advised, the case before us stands alone in American jurisprudence. It certainly has no precedent in the reported adjudications of the Federal Courts.

The United States possess other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent. *U. S. v. Clarke*, 8 Pet., 436. If they sue, and a balance is found in favor of the defendant, no judgment can be rendered against them, either for such balance or in any case for costs. *U. S. v. Boyd*, 5 How., 29; *Reeside v. Walker*, 11 How., 272. A judgment in their favor cannot be enjoined. *Hill v. U. S.*, 9 How. 386. Laches, however gross, cannot be imputed to them. *U. S. v. Kirkpatrick*, 9 Wheat., 720. There is no presumption of payment against them arising from lapse of time. *U. S. v. Williams* [supra]. They can maintain a suit in their own name upon a non-negotiable claim assigned to them. *U. S. v. White*, 2 Hill, 59.

The rule of *nullum tempus occurrit regi* has existed as an element of the English law from a very early period. It is discussed in Bracton, and has come down to the present time. It is not necessary to advert to the qualifications which successive Parliaments have applied to it.

The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The King was held never to be included, unless expressly named. No laches was imputable to him. These exemptions were founded upon considerations of public policy. It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants. "In a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must of ne-

cessity be exercised by them, if exercised at all, the reason for applying these principles is equally cogent."

When the Colonies achieved their independence, each one took these prerogatives, which had belonged to the Crown; and when the National Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments. *U. S. v. Hoar* [supra]; *People v. Gilbert*, 18 Johns., 227; Bac. Abr., tit. Lim. of Act.; Bac. Abr., tit. Prerog., E. 5-7; 5 Com. Dig. Parliament, R. 8; Chit. L. of Prerog., 379.

Congress, like the British Parliament, has made a number of specific limitations both in civil and criminal cases. They will be found in the Revised Statutes (U.S.) and need not be here repeated.

The only argument suggested by the learned counsel for the defendants in error is, that the Judiciary Act of 1789, 1 Stat. at L., 73, re-enacted in the late revision of the statutes, declares "That the laws of the several States, except where the Constitution and treaties of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is insisted that the case in hand is within this statute. To this there are several answers.

The United States not being named in the Statute of Minnesota, are not within its provisions. It does not and cannot "apply" to them. If it did, it would be beyond the power of the State to pass it, a gross usurpation, and void. It is not to be presumed that such was the intention of the State Legislature in passing the Act, as it certainly was not of Congress in enacting the law of 1789. *U. S. Hoar* [supra]; *Field v. U. S.*, 9 Pet., 182.

The Federal Courts are instruments competently created by the Nation for national purposes. The States can exercise no power over them or their proceedings, except so far as Congress shall allow. This subject was considered in *Bk. v. Dearing*, 91 U. S., 29 [XXIII., 196], and we need not pursue it further upon this occasion.

The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal Government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark.

But viewing the subject in the light of considerations *ab inconvenienti*, we need not look beyond the consequences of the ruling, if sustained, of the court below. The doctrine is alike applicable to civil and criminal actions. There are thirty-eight States in the Union. The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The Government of the Union would in this respect be at the mercy of the States. How that mercy would in many cases be exercised it is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The judgment of the Circuit Court is reversed and the cause will be remanded, with directions to proceed in conformity with this opinion.

Cited—106 U. S., 227.

THE UNION PACIFIC RAILROAD COMPANY, *Plff. in Err.*

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DODGE.

(See S. C., "*Railroad Company v. Commissioners*," 8 Otto, 541-546.)

Voluntary payment.

The payment of taxes under a written protest that they were illegal and that a suit would be brought to recover them back, without any demand therefor or effort to collect the same, does not make the payment a compulsory one in such sense as to give the party paying, the right to recover the amount thereof, there being no statute giving the right of recovery in such cases.

[No. 669.]

Submitted Jan. 6, 1879. Decided Feb. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The case, which arose in the court below, is fully stated in the opinion.

Mr. A. J. Poppleton, for plaintiff in error:

The circumstances under which courts have held payment compulsory, vary greatly, but the principle is substantially the same. We refer to some of the cases, commencing with those in the Supreme Court of the United States.

Elliott v. Swartwout, 10 Pet., 137; *Bend v. Hoyt*, 13 Pet., 263.

In *Phila. v. Collector*, 5 Wall., 731 (72 U. S., XVIII., 616), the court says: "Where the party voluntarily pays the money, he is without remedy; but, if he pays it by compulsion of law or under protest or with notice that he intends to bring suit to test the validity of the claim, he may recover it back if the assessment was erroneous or illegal, in an action for money had and received."

Brainard, Coll., v. Hubbard, 12 Wall., 1 (79 U. S., XX., 272); *State Tonnage Tax Cases*, 12 Wall., 204 (79 U. S., XX., 370).

"Where the party assessed voluntarily pays the tax, he is without remedy in such an action; but if the tax is illegal or was erroneously assessed, and he had paid it by compulsion of law or under protest, or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in such an action, unless the legislative authority in the jurisdiction where the tax was levied, has prescribed some other remedy, or has annexed some other condition to the exercise of the right to institute such a suit."

And in *Erskine v. Van Arsdale*, 15 Wall., 75 (82 U. S., XXI., 63), the *C. J.*, says: "Taxes illegally assessed and paid, may always be recovered back if the collector understands from the tax payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them."

Upon this subject generally, we refer to: *Dill. Mun. Corp.*, 751, *et seq.*; *Cooley, Taxation*, 565, *et seq.*; *Baker v. Cincinnati*, 11 Ohio St.,

534; *Hospital v. Phila. Co.*, 24 Pa., 229; *Taylor v. Board of Health*, 31 Pa., 73; *Vt. R. Co. v. Burlington*, 28 Vt., 193; *Hubbard v. Brainard*, 35 Conn., 563; *Atwater v. Woodbridge*, 6 Conn., 223; *Adam v. Litchfield*, 10 Conn., 127; *Torrey v. Millbury*, 21 Pick., 64; *Dorr v. Boston*, 6 Gray, 131; *Dunnell Mfg. Co. v. Pawtucket*, 7 Gray, 277; *Covington v. Powell*, 2 Met. (Ky.), 226; *Matheson v. Mazomanie*, 20 Wis., 191.

Messrs. W. H. Munger and J. M. Woolworth, for defendant in error:

The statute has provided an ample and convenient remedy which must be regarded as exclusive and not cumulative.

Macklot v. Davenport, 17 Ia., 379; *Osborn v. Danvers*, 6 Pick., 98; *Hughes v. Kline*, 30 Pa., 227; *Doane v. Todd*, 32 Mo., 90; *Howe v. Boston*, 7 Cush., 273; *Emery v. Bradford*, 29 Cal., 86, 87; *Conlin v. Seamen*, 22 Cal., 549; *Nolan v. Reese*, 32 Cal., 487; *Williams v. Holden*, 4 Wend., 227; *Peoria v. Kidder*, 26 Ill., 358.

The payments made in the manner and under the circumstances of this case, can only be regarded as voluntary payments; while, to entitle a party to recover money paid, the payment must have been made upon compulsion, to prevent the immediate seizure of his goods or the arrest of the person.

Dill. Mun. Corp., 751; *Baltimore v. Jefferman*, 4 Gill (Md.) 425; *Town Council v. Burnett*, 34 Ala., 400; *Lee v. Templeton*, 13 Gray, 476; *Smith v. Readfield*, 27 Me., 147; *Elliott v. Swartwout*, 10 Pet., 131; *Wabauensee Co. v. Walker*, 8 Kan., 436; *Jenks v. Lima*, 17 Ind., 326.

The protest in this case being general, a protest against the whole tax, that which was legal as well as the illegal, is not such a protest as the law recognizes as sufficient.

Thomson v. Maxwell, 2 Blatchf., 385; *Curtis v. Feidler*, 2 Black, 461 (67 U. S., XVII., 273); *Meek v. McClure*, 49 Cal., 623.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit to recover back taxes for the years 1870 and 1871, paid by the Union Pacific Railroad Company upon certain lands in Dodge County, Nebraska. The lands were among those granted by Congress to the Company to aid in the construction of its railroad, 12 Stat. at L., 489, but the patents were withheld until after the taxes had been paid, by reason of the Joint Resolution of Congress "For the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes," approved April 10, 1869. 16 Stat. at L., 56.

The lands were returned by the United States land officers to the State Auditor and by him to the county clerk for taxation, as required by the General Statutes of Nebraska, and were placed upon the assessment list of the county. The general and the local taxes levied for the respective years were carried out against these lands, with others upon the lists, and the Railroad Company designated as owner. In due time the tax lists, with warrants attached for their collection, were delivered to the treasurer of the county. The taxes for the year 1870 became payable May 1, 1871, and those for 1871, May 1, 1872. The warrants authorized the Treasurer, if default

should be made in the payment of any of the taxes charged upon the lists, to seize and sell the personal property of the persons making the default, to enforce the collection.

No demand of taxes was necessary, but it was the duty of every person subject to taxation to attend at the treasurer's office and make payment. During the years 1870, 1871 and 1872, the Railroad Company was the owner of other lands in the county, and other property, both real and personal, on which taxes were properly levied. On the 11th of August, 1871, the Company attended at the treasurer's office and paid all taxes charged against it for the year 1870, and on the 20th July, 1872, all that were charged for the year 1871. Before these payments were made there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The Company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way.

At the time the several payments were made, the Company filed with the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and that suit would be instituted to recover back the money paid.

This suit was begun August 20, 1875, and on the trial the Judges of the circuit court were divided in opinion as to the question, among others, "Whether the payment of the said taxes under the written protests above appearing, without any demand therefor or effort to collect the same, made the payment a compulsory one in such sense as to give the plaintiff (the Railroad Company) the right to recover back the amount thereof as at common law, there being no statute giving or regulating the right of recovery in such cases." The presiding Judge being of the opinion that the payment was voluntary and not compulsory, judgment was entered against the Railroad Company, and the case has been brought to this court upon a writ of error for a determination of the question upon which the Judges were divided, and which has been duly certified upon the record.

We have no difficulty in answering the question in the negative. We had occasion to consider the same general subject at the last term in the case of *Lamborn v. Comrs.*, not yet reported [97 U. S., 181, XXIV., 926], which came up on a certificate of division from the Circuit Court for the District of Kansas. As that was a case from Kansas, we followed the rule adopted by the courts of that State, which is thus stated in *Wabunsee Co. v. Walker*, 8 Kan., 431: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

This, as we understand it, is a correct statement of the rule of the common law. There are, See 8 OTTO.

no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott v. Swartwout*, 10 Pet., 137, and *Bend v. Hoyt*, 13 Pet., 266, which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia v. Collector*, 5 Wall., 730 [72 U. S., XVIII., 616], and *Collector v. Hubbard*, 12 Wall., 13 [79 U. S., XX., 276], which were internal revenue tax cases, the actions were sustained "Upon the ground that the several provisions in the internal revenue Acts referred to, warranted the conclusion as a necessary implication, that Congress intended to give the tax payer such remedy." It is so expressly stated in the last case, p. 14. As the case of *Erskine v. Van Arsdale*, 15 Wall., 75 [82 U. S., XXI., 63], followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand.

The real question in this case is, whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the Company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases *Chief Justice Shaw* states the rule in *Preston v. Boston*, 12 Pick., 14, as follows: "When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received." This, we think, is the true rule, but it falls far short of what is required in this case. No attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the Company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is, that the Company was charged upon the tax lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the Company presented itself at the treasurer's office,

and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered either in the power to tax or the manner of executing the power. Three years afterwards, and after the case of *R. Co. v. McShane*, 22 Wall., 444 [89 U. S., XXII., 747], which was supposed to decide that the particular lands now in question were not subject to taxation, this suit was brought. Under such circumstances, we cannot hold that the payment was compulsory in such a sense as to give a right to the present action. As the answer to this question disposes of the case, it is unnecessary to consider the other questions certified, and the judgment is affirmed.

Cited—16 Blatchf., 301; 23 Kan., 203; 29 Hun, 83; 63 Ga., 119; 45 Am. Rep., 479; 101 Pa. St., 310; 47 Am. Rep., 717.

UNITED STATES, *Appt.*,

v.

THE BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA.

(See S. C., 8 Otto, 334-342.)

Land grant to railroad—construction of—selection of land—substituted land—Union Pacific Co.—Act of Congress.

1. The land grant to the Burlington and Missouri R. R. Co., by the Act of July 2, 1864, does not require the land to be contiguous to the road. There is no limitation of distance from the road within which the selection is to be made, and the court can make none.
2. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed, as often as each section of twenty miles was completed.
3. If this privilege was not claimed, the land could be selected along the whole line of the road, without reference to any particular section of twenty miles.
4. If the land opposite to any section of the road has been taken up by others and patented to them, the grant to the company can be satisfied by land situated elsewhere along the general line of the road.
5. The amendment of the Act of 1864, enlarging the grant of 1862, to the Union Pacific Company, was intended to apply to the grants made to all the branch companies, except when it was otherwise specially stated.
6. The Act of Congress contemplates that one half of the land granted should be taken on each side of the road; and the Land Department could not enlarge the quantity on one side to make up a deficiency on the other.

[No. 146.]

Argued Jan. 23, 24, 1879. Decided Mar. 3, 1879.

A PPEAL from the Circuit Court of the United States for the District of Nebraska.

The case is fully stated by the court.

Mr. Edwin B. Smith, Asst. Atty-Gen., for appellants.

Messrs. J. M. Woolworth and T. M. Marquette, for appellee.

Mr. Justice Field delivered the opinion of the court:

This is a suit in equity, brought by the United States to annul certain patents issued by them to the Burlington and Missouri River Railroad Company, for lands situated in Nebraska, amounting in the aggregate to 1,200,000 acres. It is founded upon alleged errors made by the Land Department in the construction of the statute under which the patents were issued, and presents several interesting questions for determination. These questions, however, are so fully considered by the presiding Justice of the Circuit Court, and the views we entertain are so clearly stated in his opinion, that we can add but little to what he has said.

By the 18th section of the Act of Congress of July 2, 1864, 13 Stat. at L., 356, amending the Act of 1862, 12 Stat. at L., 489, "To Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the same for Postal, Military and Other Purposes," the Burlington and Missouri River Railroad Company, an existing Corporation under the laws of Iowa, was authorized to extend its road through the then Territory of Nebraska from the point where it strikes the Missouri River, south of the mouth of the Platte River, to some point not further west than the one hundredth meridian of west longitude, so as to connect by the most practicable route with the main line of the Union Pacific Railroad, or with that part of it which runs from Omaha to the said meridian. By the 19th section of the Act, there was granted to the Company, for the purpose of aiding in the construction of this road, every alternate section of public land (excepting mineral land) designated by odd numbers, to the amount of ten alternate sections per mile on each side of the road, on the line thereof, which were not sold, reserved or otherwise disposed of by the United States, or to which a preemption or homestead claim had not attached at the time the line of the road was definitely fixed.

In April, 1869, this Railroad Company was authorized to assign and convey to a company to be organized under the laws of Nebraska, all the rights, powers and privileges granted to it by the Act of 1864, subject to the same conditions and requirements. The defendant Company was thereafter organized and incorporated under the laws of Nebraska, with power to build the railroad mentioned; and to it the Iowa Company made the assignment authorized. The new company thereupon proceeded to construct the road from Plattsmouth, on the Missouri River, to Fort Kearney, where it connected with the road of the Union Pacific, a distance of two hundred miles. The work was commenced on the 4th of July, 1869, and was completed on the 2d of September, 1872.

By the 20th section of the Act of 1864, whenever twenty consecutive miles of the road should be completed in the manner prescribed, the President of the United States was to appoint three commissioners to examine and report to him in relation to it; and if it should appear

that the twenty miles were completed as required, then, upon the certificate of the commissioners to that effect, patents were to be issued to the Company for land on each side of the road to the amount designated. Such examination, report and conveyance were to be made from time to time, until the entire road should be completed.

In compliance with this provision, as each section of twenty miles of the road was completed, commissioners were appointed by the President to examine and report upon it; and upon their reports patents were issued for land within twenty miles from the road. But within that distance, on the north and south side, portions of the land, amounting to 1,200,000 acres, had been sold, reserved or otherwise disposed of by the United States, or homestead or preemption claims had attached to it at the time the line of the road was definitely fixed. Thereupon the Company made application to the Land Department for land outside of the limit of twenty miles in lieu of the land thus disposed of; and accordingly, in 1872, five patents for such land were issued. It is to annul these patents that the present bill was filed, their validity being called in question on the ground that the Act of Congress limited its grant to land within twenty miles of the road.

The line of the road was definitely located in June, 1865, and land embracing the odd sections, within the limit of twenty miles, was withdrawn from sale in July following; but land outside of this limit, which was subsequently patented to the Company, was not withdrawn until May, 1872. Between the definite location of the road in 1865 and the withdrawal of the land outside of the twenty-mile limit in 1872, the greater part of the land opposite the eastern sections of the road was disposed of by the Government; and, therefore, most of the land covered by the patents lies opposite the western sections. This constitutes another ground of the alleged invalidity of the patents, it being contended that the grant was to aid in the construction of each section of the twenty miles, taken separately, and that it must be of land directly opposite to such section.

By the Act of 1862, the Union Pacific Railroad Company was authorized to construct a railroad from a point on the one hundredth meridian of longitude west of Greenwich to the western boundary of Nevada Territory, the initial point of which was to be fixed by the President. To aid in the construction of this road, a grant was made to the Company of five alternate sections of land, designated by odd numbers on each side of the road, along its line within the limit of ten miles. By the same Act, the Company was also authorized to construct a road from a point on the western boundary of the State of Iowa, to be fixed by the President, to the one hundredth meridian of longitude, upon the same terms and conditions prescribed for the construction of the Union Pacific line. By the Act of 1864, the grant of five sections was increased to ten sections, and the limit within which they were to be taken was increased from ten to twenty miles. This enlargement of the grant was not made by the terms of a new and additional grant, but by enacting that the numbers five and ten in the original Act should be

stricken out, and the numbers ten and twenty substituted in their places.

In March, 1864, the President fixed the initial point of the new road near Omaha, and thereupon the Company commenced its construction. This initial point was distant about twenty miles only from the defendant Company's road, and the roads of the two companies ran west on nearly parallel lines, so close that the grants to both could not be satisfied. The Union Pacific claimed the whole of the odd sections between the ten-mile and the twenty-mile limit, and its claim in this respect was recognized by the Land Department by the issue of patents or certificates for patents for them. The defendant thereupon selected land more than twenty miles distant from the line of its road, in order to make up the entire number of sections granted to it. It is now contended by the Government that the Act of 1864 did not enlarge the grant made in aid of the Omaha branch by the original Act, and that the defendant was entitled to the odd sections outside of the ten-mile limit, and could not take land elsewhere in lieu of them; and that if the Act did enlarge the grant, the defendant, having received its grant by the same Act, was entitled to one half of the land within the enlarged limit, and could not, therefore, take land to that amount elsewhere. Assuming this construction of the Act of 1864 to be correct, these objections are also urged against the validity of the patents.

It also appears by the allegations of the bill, that land to the extent of one hundred and fifty thousand acres, which should have been taken, if at all, on the south side of the road, was selected on the north side of the road beyond the twenty-mile limit, and included in the patents to the defendant; and this fact is made an objection to the validity of the patents as to the land thus taken.

Upon the several grounds stated, the United States ask a decree for the cancellation of the patents, or, if that cannot be granted, a decree that they be declared void as to a portion of the land embraced by them.

The position that the grant to the Company was only of land situated within twenty miles of the road, finds no support in the language of the Act of Congress; that simply declares that a grant is made of land to the amount of ten sections per mile on each side of the road. The grant is one of quantity, and the selection of the land is subject only to these limitations: 1, that the land must be embraced by the odd sections; 2, that it must be taken in equal quantities on each side of the road; 3, that it must be on the line of the road; and, 4, that it must not have been sold, reserved or otherwise disposed of by the United States, and a preemption or homestead claim must not have attached to it at the time the line of the road was definitely located. There is here no limitation of distance from the road within which the selection is to be made, and the court can make none. The objection, undoubtedly, has its suggestion from the fact that nearly all, perhaps all, other grants of land in aid of the construction of railroads prescribe a lateral limit within which the land is to be selected; and provide for the selection of land elsewhere to make up any deficiency arising from the disposition of a portion of it within

such limit, between the date of the Act and the location of the road. The reasons for the omission in this case are obvious. The road was to run through a country already partially settled, and likely to be more settled before the line of the road would be definitely located. It was doubtful, therefore, whether any considerable portion of the amount of land intended for the Company would be found undisposed of within twenty miles of its road. Moreover, the road of the Union Pacific was to be constructed within a short distance, and its grant would necessarily preclude a selection of land by the defendant if the latter's grant were confined within a similar lateral limit. Congress gave no government bonds to the Company: its aid consisted merely in the grant of land; and that this might not fail, it allowed the land to be taken along the line of the road wherever it could be found. And the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific Company, in which the lateral limit is twenty miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.

The position that the grant was in aid of the construction of each section of twenty miles taken separately, and must be limited to land directly opposite to the section, is equally untenable. The grant was to aid in the construction of the entire road, and not merely a portion of it, though the Company was not to receive patents for any land except as each twenty miles were completed. The provision allowing it to obtain a patent then, was intended for its aid. It was not required to take it; it was optional to apply for it then, or to wait until the completion of other sections or of the entire road. The grant was of a quantity of land on each side of the road, the amount being designated at so many sections per mile, with a privilege to receive a patent for land opposite that portion constructed as often as each section of twenty miles was completed. If this privilege were not claimed, the land could be selected along the whole line of the road, without reference to any particular section of twenty miles. When lateral limits are assigned to a grant, the land within them must of course be exhausted before land for any deficiency can be taken elsewhere. And when no lateral limits are assigned, the Land Department of the Government, in supervising the execution of the Act of Congress, should, undoubtedly, as a general rule, require the land to be taken opposite to each section; but in some instances good reasons may exist why a selection elsewhere ought to be permitted. If, as in the present case, by its neglect for years to withdraw from sale land beyond twenty miles from the road, the land opposite to any section of the road has been taken up by others and patented to them, there can be no just objection to allowing the grant to the Company to be satisfied by land situated elsewhere along the general line of the road.

That the amendment of the Act of 1864, enlarging the grant of 1862 to the Union Pacific Company, was intended to apply to the grants made to all the branch companies, there can be no doubt. All the reasons which led to the enlargement of the original grant, led to its enlargement to the branches. It was the intention of Congress, both in the original and in the amendatory Act, to place the Union Pacific Company and all its branch companies upon the same footing as to land, privileges and duties, to the extent of their respective roads, except when it was otherwise specially stated. Such has been the uniform construction given to the Acts by all departments of the Government. Patents have been issued, bonds given, mortgages executed and legislation had upon this construction. This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question.

Now, the enlargement of the grant by the Act of 1864 is not made, as already stated, by words of a new and additional grant, but simply by altering the number of sections granted and the distance from the road within which they are to be taken. The numbers in the first Act, says the amendment, shall be stricken out and larger numbers substituted, so that the Act of 1862 must thenceforth be read, at least as against the Government and parties claiming under concurrent or subsequent grants, as though the larger numbers had been originally inserted in it. The Burlington and Missouri Railroad Company received its grant from the same Act, which declared that the Act of 1862 in its grant to the Union Pacific should be thus read: it must, therefore, take its rights to the land subject to the claim of that company.

"This view," as the presiding *Justice* of the Circuit Court justly observes, "would commend itself to Congress by its intrinsic equity, for by it each road gets the largest quantity of land which the statute permits, while the other construction allows the Burlington and Missouri Company to get all it could under any circumstances, the other road losing what the latter took within the lap. This comes out of the fact that the Burlington and Missouri Company was not confined within any lateral limits, while the Union Pacific could not go without its twenty mile limit to make up deficiencies." "Besides," he adds, "both of these roads have acquiesced in the construction given and acted on by the United States, the officers of the Government having prescribed it as the one which should govern all their rights; the patents have been issued under it for the full amount of all the land which could be so claimed under both grants; and innocent purchasers have no doubt become owners of much of the land patented to the Union Pacific Company; and it is certainly all mortgaged, so that an incalculable amount of injustice would be done by holding all this void and setting aside the patents."

It only remains to notice the further objection to the patents, that land to the amount of 150,000 acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true, the Act of Congress contemplates that one half of the land granted should be taken on each side of the road; and

the department could not enlarge the quantity on one side to make up a deficiency on the other. But the answer to the objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents cannot be adjudged invalid as to any land not identified, so as to be capable of being separated; nor can any decision go against the Company for its value without such identification. It is possible that the land to which the Company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the Government may be without remedy; it certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees. It is sufficient, however, that it makes no case for relief by the present bill.

Decree affirmed.

Mr. Justice Strong did not sit on the argument of this case, and took no part in its decision.

Cited—104 U. S., 332; 112 U. S., 417, 418, 730; 2 McCrary, 410, 422; 11 N. W. Rep., 354.

THE CLEVELAND INSURANCE COMPANY, *Plff. in Err.*,

v.

THE GLOBE INSURANCE COMPANY.

(See S.C., 8 Otto, 366-381.)

Jurisdiction in Bankruptcy—review in Circuit Court.

1. The only remedy for the correction of error, in a proceeding in the District Court for an adjudication in bankruptcy, is such as may be had under the supervisory jurisdiction of the Circuit Court; the action of the Circuit Court therein is final, and not subject to review in this court.

2. No particular form of proceeding is required, in order to take the case to the Circuit Court for review under this jurisdiction; it is sufficient if some "proper process" for that purpose is employed. A writ of error is "proper process."

[No. 250.]

Submitted Jan 27, 1879. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

On motion to dismiss.

The case is fully stated by the court.

Messrs. Jacob D. Cox and John F. Follett, for defendant in error.

Messrs. H. L. Terrell, S. Burke and Geo. Willey, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 2d of May, 1872, the Globe Insurance Company, of Cincinnati, filed a petition in the District Court of the United States for the Northern District of Ohio, sitting in bankruptcy, against the Cleveland Insurance Company, asking to have the last named Company adjudged a bankrupt. To this petition the Cleveland Insurance Company in due time appeared and filed its answer, and on the 16th of October, 1874, after hearing in the District Court, a judgment was entered dismissing the petition. On the 16th of December, a bill of ex-

ceptions was signed by the district judge and filed in the cause, which contained a statement of all the evidence submitted upon the hearing, with the findings of the District Court thereon both as to the facts and the law. On the same day, the following writ of error, omitting the mere formal parts, was sued out of the Circuit Court:

"Because in the record and proceedings, and also in the rendition of judgment, in a certain matter which is in the said District Court in bankruptcy before you, wherein the Globe Insurance Company is petitioning creditor against the Cleveland Insurance Company, debtor, a manifest error hath happened, to the great damage of the said Globe Insurance Company, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the Circuit Court of the United States for the Sixth Circuit and Northern District of Ohio, together with this writ, so that you have the same at Cleveland, in said district, on the fifth day of January next, in the said Circuit Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done."

On the next day, in obedience to the command of this writ, a transcript of the proceedings and judgment of the District Court, including the bill of exceptions, was sent to the Circuit Court, and on the 27th of November, 1875, the Cleveland Insurance Company appeared in the Circuit Court and moved to dismiss the writ, for the following reasons:

"1st. Because this being a petition in involuntary bankruptcy, where the bankrupt or debtor demanded no jury, but hearing was had to the court, the case is not removable into this court by writ of error, but by petition for review, or other proper process under the first clause of the 2d section of the Bankrupt Act.

2d. Because the debt or damages claimed in the petition herein do not amount to more than \$500; in fact, no debt or damages [are claimed at all.

3d. Because the writ of error herein was not sued out or taken within ten days after the entry of the decree or decision of the District Court herein, nor were the statutes regulating the granting of writs of error complied with within ten days after the entry of the decree or decision of the District Court."

This motion was overruled, and on the 15th of June, 1876, the Circuit Court, after hearing, "as well upon the transcript of the judgment and other proceedings between the parties in the District Court; * * * brought here by writ of error from this court to said District Court, as also upon the matters by the said Globe Insurance Company herein assigned for error," entered its judgment as follows:

"Therefore, it is considered that the judgment aforesaid for the errors aforesaid be reversed, annulled and altogether held for naught,

and that the said Globe Insurance Company be restored to all things which it has lost by occasion of said judgment, and recover against the said Cleveland Insurance Company its costs in this behalf expended, taxed at \$60.65.

And thereupon it is ordered that a special mandate be sent down to said District Court to carry this judgment into execution. And it is further ordered that this cause be remanded to the said District Court by writ of *procedendo*, commanding the judge of said court to proceed according to law to set aside its order dismissing the petition of the said Globe Insurance Company, and thereupon to adjudge the said Cleveland Insurance Company bankrupt, as prayed for in and by said petition of said Globe Insurance Company, and further to proceed in said matter in such manner according to the laws of the land as he shall see proper, the said writ of error to the contrary notwithstanding."

To reverse this judgment the present writ of error has been sued out of this court by the Cleveland Insurance Company, and the Globe Insurance Company now moves to dismiss the suit for want of jurisdiction.

In *Sandusky v. Bk.*, 23 Wall., 289 [90 U. S., XXIII., 155], and *Hill v. Thompson*, 94 U. S., 322 [XXIV., 193], it was decided that the only remedy provided for the correction of errors in a proceeding in the District Court for an adjudication in bankruptcy was such as could be had under the supervisory jurisdiction of the Circuit Court, and as to that jurisdiction it is well settled that the action of the Circuit Court is final and not subject to review in this court. The correctness of these decisions is conceded, but the plaintiff in error claims that as the Circuit Court could only take jurisdiction under its supervisory power, and the case was actually taken to that court by writ of error, this court, under the rule laid down in *Stickney v. Wilt*, 23 Wall., 150 [90 U. S., XXIII., 50], must reverse the judgment of the Circuit Court, and remand the cause with instructions to grant the motion to dismiss the writ.

The section of the Revised Statutes which grants to the Circuit Court its supervisory jurisdiction is as follows:

"Sec. 4986. The Circuit Court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the District Court for such district when sitting as a court in bankruptcy; * * * and, except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time or in vacation by the Circuit Justice or the Circuit Judge of the circuit."

No particular form of proceeding is required in order to take the case to the Circuit Court for review under this jurisdiction. It is sufficient if some "proper process" for that purpose is employed; and in *Ins. Co. v. Comstock*, 16 Wall., 259 [83 U. S., XXI., 493], which, like this, was a suit in involuntary bankruptcy against an insurance company, this court held that a writ of error was "proper process" when the questions to be re-examined arose upon a bill of exceptions taken at a jury trial under section 5026, R. S., to ascertain the alleged fact of bank-

ruptcy. In that case the Circuit Court, upon its own motion, dismissed the writ "for want of jurisdiction, holding that a writ of error will not lie in such a case to remove the record from the District Court into the Circuit Court for re-examination." P. 266. In this court it was argued that abundant provision was made for a review of such proceedings under the supervisory power of the Circuit Court, and that a writ of error was improper process; but we held it was clearly wrong to dismiss the writ, and although we could not entertain jurisdiction of the cause, the Circuit Court not having passed upon the merits, we sent it back with the suggestion that the Circuit Court should, under the circumstances, "grant a rehearing and re-instate the case, and proceed to decide the questions presented on the bill of exceptions." It is true some stress was laid upon the fact that there had been a trial by jury; but the point was directly made and decided that the Circuit Court could use a writ of error to bring the case up for review under its general superintendence of bankruptcy proceedings. At that time we had not decided that this court could not re-examine such judgments of the Circuit Court, and that question was purposely left open; but *Mr. Justice Clifford*, in delivering the opinion, said: "It is clear beyond doubt that the Circuit Court erred in dismissing the writ of error for want of jurisdiction, as it was the right of the excepting party to have the questions, if duly presented by bill of exceptions, re-examined by the Circuit Court." Since it is now settled that this re-examination must be had under the supervisory jurisdiction of that court, this language is to be interpreted to mean, that when a writ of error is employed as "process" for the purposes of that jurisdiction, it will not deprive the court of its power to proceed.

Looking to the writ in this case to see under what jurisdiction it was issued, we find that it was in terms sent down to bring up the record and proceedings in a certain matter pending in the District Court sitting in bankruptcy, wherein the Globe Insurance Company was petitioning creditor and the Cleveland Insurance Company was debtor. Thus it is apparent that the proceeding to be reviewed was in bankruptcy, and not a suit at law or in equity. The only jurisdiction, therefore, appropriate to the relief which was asked was the supervisory jurisdiction; and as there is nothing in the form of the writ or otherwise to manifest a contrary intent, it will be presumed that the court actually proceeded under that jurisdiction in all that was done. It follows that the Circuit Court had jurisdiction, and that its judgment is final. The proceeding was one which could only be re-examined under the supervisory jurisdiction, and the process employed to bring the case up was proper under the circumstances. The record which went up carried not only the bill of exceptions, but the entire proceedings below and all the testimony.

There is nothing in the case of *Stickney v. Wilt* [*supra*], at all in conflict with this. There, the suit in the District Court was one in equity, and not one in bankruptcy. Such suits can only be taken to the Circuit Court for review by appeal. The case was, however, prosecuted in the Circuit Court, under its supervisory jurisdiction. This was distinctly manifested

throughout, and we held that as in that form of proceeding the court had no jurisdiction whatever, we would reverse its decree, and remand the cause with instructions to dismiss the petition for review.

Here, however, the Circuit Court had jurisdiction, and over its judgment we have no control.

The motion to dismiss for want of jurisdiction is granted.

Mr. Justice Clifford, dissenting:

Jurisdiction of the district courts as courts of bankruptcy extends to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. R. S., sec. 4972; 14 Stat. at L. 518.

Circuit Courts for each district of their respective circuits have a general superintendence and jurisdiction of all cases and questions arising in the District Court for such district, when sitting as a court of bankruptcy, which may be exercised by the court in term time or in vacation by the Circuit Justice or by the Circuit Judge of the circuit; and the provision is that such Circuit Court, Circuit Justice or Circuit Judge may, in term time or vacation, except when special provision is otherwise made upon bill, petition or other proper process of the party aggrieved, hear and determine the case as in a court of equity. 14 Stat. at L. 518; *Morgan v. Thornhill*, 11 Wall., 65 [78 U. S., XX., 60].

Apart from those two provisions, the third clause of the 2d section provides that Circuit Courts shall also have concurrent jurisdiction with the District Courts of all cases at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of such bankrupt transferable to or vested in such assignee. *Smith v. Mason*, 14 Wall., 419 [81 U. S., XX., 748]; *Knight v. Cheney*, 5 Nat. Bk. Reg., 305.

Petition in bankruptcy against the defendant Company was filed in the District Court by the Corporation plaintiffs, and they prayed that the defendant Company may be declared bankrupt and that a warrant may be issued to take possession of their estate. Due proceedings followed, and the District Court, sitting without a jury, decided that the facts set forth in the petition were not proved, and entered a decree dismissing the petition.

Instead of petitioning the Circuit Court for a revision of the ruling and decision of the District Court, under the first clause of the 2d section of the Bankrupt Act, as the petitioners should have done, they filed a bill of exceptions as in action at law, and the same was signed and sealed by the District Judge as in the trial of an information for a seizure on land under the 9th section of the Judiciary Act.

Application was then made by the original petitioners to the Circuit Court for a writ of error to the District Court, which was granted, and the cause was removed into the Circuit Court just as when an action at law tried before a jury is removed from the court of original jurisdiction into an appellate tribunal pursuant to the common law bill of exceptions, See 8 OTTO.

except that the bill of exceptions contains the court's findings of fact as in common law cases where a jury is waived.

When the cause was entered and the transcript filed in the Circuit Court, the defendant Company appeared and moved to dismiss the writ of error, for the following reasons: (1) Because the proceeding being a petition in involuntary bankruptcy, where the bankrupt did not demand a jury and the hearing had been by the District Court, the case is not removable into the Circuit Court by writ of error, but by petition for review or other proper process under the first clause of the 2d section of the Bankrupt Act. (2) Because the debt or damage claimed in the petition does not amount to \$500. (3) Because the writ of error was not sued out within ten days after the entry of the decision in the District Court.

Hearing was had; and the Circuit Court overruled the motion to dismiss the writ of error, and reversed the decree of the District Court with costs, and ordered that a special mandate be sent down to the District Court directing that court to carry the judgment of the Circuit Court into execution and to adjudge the defendant Company bankrupt, as prayed in the petition, and to proceed in the matter according to law. Exceptions were filed by the defendant Company, and they sued out the present writ of error and removed the cause into this court.

Since the cause has been entered here, the plaintiff Company has filed a motion to dismiss the writ of error upon the ground that no appeal lies to this court from a judgment or decree of the Circuit Court exercising the supervisory jurisdiction conferred upon it by the first clause of the 2d section of the Bankrupt Act. *Morgan v. Thornhill* [supra]; *Smith v. Mason* [supra].

Both of these cases affirm that rule beyond all doubt, and the same rule is confirmed by every subsequent case upon the same subject; but the difficulty is, that the Circuit Court did not exercise the supervisory jurisdiction which the 1st section of the Bankrupt Act conferred. Jurisdiction under that clause of the 2d section of the Act is usually exercised in pursuance of a petition for revision, and it must be exercised in some mode of proceeding which will give the defending party the right to answer the allegations of the pleading, as in a bill of complaint, as is plainly to be inferred from the language of the clause, else the hearing would be a mockery, as it would be practically *ex parte*.

Circuit Courts are not courts of bankruptcy, nor have they power to re-examine or review the rulings, decisions or judgments of the District Courts sitting in bankruptcy, except in the cases and in the manner provided by the Bankrupt Act; nor is it pretended that the Bankrupt Act gives the Circuit Court any power whatever in a case like the present, to re-examine the decision or judgment of the District Court by a writ of error.

Suppose the proceedings in the Circuit Court were in every respect erroneous, leaving the losing party without remedy unless the error can be corrected here, still it is insisted that this court is without the power to grant relief. Cases wrongly brought up, it may be admitted, should as a general rule, be dismissed by the appellate tribunal; but a necessary exception exists to

that rule where the effect of a judgment or decree of dismissal will be to give full operation to an irregular and erroneous judgment or decree of the subordinate court in a case where the judgment or decree of such a court is rendered without jurisdiction, or in violation of some legal or constitutional right of the losing party.

Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect from that which it was intended to accomplish, courts of justice have never hesitated to establish an exception to it. Appellate courts, where there is no defect in bringing up a cause, usually affirm or reverse the judgment or decree of the court below; but cases occasionally arise where the proceedings of the subordinate court are so unusual and irregular that the appellate court can neither reverse nor affirm the merits of the case without doing great injustice, and in such cases the appellate court never hesitates to remand the case for a new trial or rehearing, first reversing the judgment or decree in order to open the case for that purpose. *Suydam v. Williamson*, 20 How., 427 [61 U. S., XV., 978].

Where, as in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special finding, but will remand the cause to the court below with directions to award a new venire. *Barnes v. Williams*, 11 Wheat., 415; *Graham v. Bayne*, 18 How., 60 [59 U. S., XV., 265].

So where the circumstances disclosed in the record rendered it proper, in the view of the court, to remand the case for a further hearing, the court decided to reverse the judgment, in order that the rehearing might be granted. *U. S. v. Cambuston*, 20 How., 59 [61 U. S., XV., 828].

Admiralty cases have more than once been appealed to this court, in which it appeared that the Circuit Court had no jurisdiction of the case, in consequence of irregularities in the District Court; and in such cases it has been held by this court that it is the regular course to reverse the decree of the Circuit Court and to direct the Circuit Court to remand the cause to the District Court for further proceedings. *Montgomery v. Anderson*, 21 How., 386 [62 U. S., XVI., 160]; *Mordecai v. Lindsay*, 19 How., 199 [60 U. S., XV., 624]; *U. S. v. Galbraith*, 22 How., 89 [63 U. S., XVI., 321].

Difficulties of the kind frequently occur in cases of seizures, as the district courts have often failed to distinguish between seizures on land and seizures on navigable waters. Mistakes of a like kind have also been made in libels of information under the confiscation Acts. Where the seizure is on land, the rule is that the case is triable according to the course of the common law; but seizures, when made on waters which are navigable from the sea by vessels of ten or more tons burthen, are exclusively cognizable in the admiralty, subject to appeal to the Circuit Courts. *Dunlap, Pr.*, 116; *Cross v. U. S.*, 1 Gall., 26; *Confiscation Cas.*, 7 Wall. 454 [74 U. S., XIX., 196]; 3 Greenl. Ev., sec. 396; 1 Kent, Com., 12th ed., 304.

Want of jurisdiction in the court below, however, does not prevent this court from assuming jurisdiction, on appeal, for the purpose of reversing the decree rendered by the Circuit Court,

in order to vacate any unwarranted proceedings necessarily standing in the way of the proper proceeding in a case where, in the judgment of this court, other proceedings ought to take place in consequence of the irregularity in either of the subordinate courts. Where the court below has no jurisdiction of the case in any form of proceeding, the regular course is to direct the cause to be dismissed, if the judgment or decree of the lower court is for the defendant or respondent; but if the judgment or decree is for the plaintiff or libellant, the court here will reverse the judgment or decree, and remand the cause, with proper directions, as for example, to reverse the decree of the District Court in a case where that court proceeded irregularly or without jurisdiction, and to remit the cause to the District Court in order that the cause may be dismissed in the court where the error commenced; or this court will reverse the judgment or decree of the Circuit Court, and remand the cause with directions to dismiss the case, or to grant a new trial or rehearing, with or without leave to amend the pleadings, according to the circumstances of the case and as justice may require. *Morris' Cotton*, 8 Wall., 507 [75 U. S., XIX., 481]; *Mail Co. v. Flanders*, 12 Wall., 130 [79 U. S., XX., 249].

Nor did those decisions announce any new rule of practice, as this court had in repeated instances decided in the same way before that time. *Ins. Co. v. U. S.*, 6 Wall., 759 [73 U. S., XVIII., 879]; *Armstrong's Foundry*, 6 Wall., 766 [73 U. S., XVIII., 882].

Precisely the same question was presented in the case of *U. S. v. Hart*, 6 Wall., 770 [73 U. S., XVIII., 914], where this court decided that the proper disposition of the case was to reverse the decree, and remand the cause to the court below with directions to enter a decree remitting the case to the District Court, that the case might be tried on the common law side with a jury, it appearing in that case that the seizure had been made on land and not on waters navigable from the sea. *The Caroline v. U. S.*, 7 Cranch, 496; *The Sarah*, 8 Wheat., 391.

Unless the practice was as explained, great injustice would be done in all cases where the judgment or decree in one or both of the subordinate courts is erroneous and in favor of the party instituting the suit, as he would obtain the full benefit of a judgment or decree rendered in his favor by a court which had no jurisdiction to hear and determine the controversy. Common justice demands a strict adherence to this practice, which requires that this court in all such cases will reverse the judgment or decree of the lower court, and remand the cause with proper directions either to dismiss the case or allow the pleadings to be amended, or grant a new trial; or direct that the cause be remitted to the District Court, as the circumstances of the case may require, in order that justice may be administered according to law.

Decided cases to that effect are numerous and decisive, showing that the rule must be regarded as founded in the settled practice of the court.

Beyond question, the general rule is that, where the Circuit Court is without jurisdiction, it is irregular to make any order in the cause except to dismiss the suit; but that rule does not apply to the action of the court in setting aside such orders as had been improperly made before

the want of jurisdiction was discovered, especially if it appears that the effect of the dismissal would be to leave the moving party in possession of judgment rendered without jurisdiction or authority of law. *Mail Co. v. Flanders* [supra].

In such cases, the writ of error or appeal gives jurisdiction not only to dismiss the appeal, but also to remove all the hindrances to justice between the parties that have been created by the irregular acts of the subordinate court, and which were performed without jurisdiction or in violation of legal authority. *Armstrong's Foundry* [supra].

Were it not so, the plaintiff would obtain the full benefit of the judgment or decree in the case rendered in his favor by a court which had no jurisdiction to hear and determine the controversy. *Morris' Cotton* [supra].

Nor is it any answer of a satisfactory character to that obvious principle of justice to say that the Circuit Court would have had jurisdiction of the case if the party had petitioned the Circuit Court under the first clause of the 2d section of the Bankrupt Act, instead of resorting to the bill of exceptions and the common law writ of error, as the conclusive reply to that suggestion is that the case before the court was removed by a writ of error from the District Court to the Circuit Court, and every lawyer knows that the Circuit Court could not acquire any jurisdiction by that mode of proceeding to render any valid decree in such a case.

Suppose that is so; then it follows that the dismissal of the writ of error without reversing the decree of the Circuit Court will leave the defendant Company adjudged bankrupt by a court which had no jurisdiction of the case, and without any remedy on the part of the Company to avoid that erroneous decree.

Argument to verify that proposition is quite unnecessary, as the statement of the case shows that the Circuit Court granted a writ of error to the District Court, as in an action at common law, and having removed the cause from the District Court, sitting as a court of bankruptcy, into the Circuit Court, reversed the decree of the District Court dismissing the petition in bankruptcy, and issued a *procedendo* directing the District Court to grant the prayer of the petition, all of which was done as in an action at law; and the record shows that the Circuit Court sent down its mandate to the District Court, as in an action at law, directing the District Court to execute the judgment rendered by the Circuit Court.

None of these proceedings are controverted, nor can they be; from which it follows that, when the judgment of the court dismissing the present writ of error is carried into effect, the defendant Company will stand adjudged bankrupt by the Circuit Court, which had no more power to render such a judgment than a state justice of the peace, as every lawyer knows that the Circuit Court has no other jurisdiction than what is conferred by an Act of Congress, and that the Bankrupt Act confers no jurisdiction upon the Circuit Courts, *in that mode of proceeding*, to reverse such a decree of the district court.

Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal; but a necessary exception

exists to that rule where the consequence of a dismissal will be to give full effect to an irregular and erroneous decree of the subordinate court in a case where the court was without jurisdiction, and acted in violation of some legal or constitutional right of the party against whom the decree was entered.

Serious embarrassment often arises in such cases where it appears that the subordinate court is without jurisdiction; but that difficulty does not prevent the court here from assuming jurisdiction under the writ of error or appeal for the purpose of reversing the judgment or decree rendered in the subordinate court, in order to vacate the same, when rendered or passed without authority of law. *The Caroline v. U. S.* [supra]; *The Sarah* [supra].

All other arguments failing, the attempt is made to show that certain remarks of the court in the case of *Ins. Co. v. Comstock*, 16 Wall., 258 [83 U. S., XXI., 493] support the proposed judgment of the court in the present case; but it is clear that no inference of the kind can properly be drawn from the opinion of the court in that case, for the plain reason that the court held that *mandamus* was the proper remedy in that case, and dismissed the writ of error solely upon that ground.

Prior to certain more recent decisions, it was an unsettled question whether or not a writ of error would lie from the Circuit Court to the District Court, where, in a proceeding in bankruptcy, the bankrupt demanded a trial by jury. Exceptions were taken in that case where the proceeding was in bankruptcy, and the Circuit Court refused to decide the question. Hearing was had here; and this court was of the opinion that *mandamus* was the proper remedy of the party, but did not deem it necessary to issue the writ, as it was suggested that the Circuit Court would at once conform to the views of this court. Since that time, it has been decided that a writ of error will not lie in such a case, which removes all doubt upon the subject and every pretense of inconsistency in our former decisions. *Wiswall v. Campbell*, 93 U. S., 347 [XXIII., 923]; *Hill v. Thompson*, 94 U. S., 322 [XXIV., 193].

Conclusive support to the proposition that nothing is to be inferred from the case of *Ins. Co. v. Comstock*, to sustain the theory of the court in the present case, is found in the subsequent decision of the court, which is reported in the same volume. *U. S. v. Huckabee*, 16 Wall., 414 [83 U. S., XXI., 457]. In that case the court say that usually, where a court has no jurisdiction of a case, the correct practice is to dismiss the suit; but a different rule necessarily prevails in an appellate court in cases where the subordinate court was without jurisdiction, and has given a judgment or decree for the plaintiff, or improperly decreed affirmative relief to a libellant. In such cases the judgment or decree in the court below must be reversed, else the party which prevailed there will have the benefit of the judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy. *U. S. v. Huckabee* [supra]; *Coit v. Robinson*, 19 Wall., 274 [86 U. S., XXII., 152].

Two cases are also reported in the twenty-third volume of Wallace's Reports to the same effect, the opinion of the court in the last of

which was given by the present *Chief Justice*. In the first case, the court say that where the court below has no jurisdiction of the case in any form of proceeding, the regular course, if the judgment or decree is for the defendant or respondent, is to direct the cause to be dismissed; but if the judgment or decree is for the plaintiff or petitioner, the court here will reverse the judgment or decree, and remand the cause with proper directions, which, in the case supposed, must be to dismiss the writ, libel or petition, as the subordinate court cannot properly hear and determine the matter in controversy.

Viewed in the light of these suggestions, it is clear that the decree of the Circuit Court should be reversed; and inasmuch as that court has no jurisdiction of the subject-matter in that form of proceeding, the directions should be that the writ of error be dismissed.

Instead of a writ of error, an appeal was taken in the second case, in which the *Chief Justice* said, that in order to sustain the jurisdiction of the Circuit Court in such a case, it must be a case in equity arising under and authorized by the Bankrupt Act, that a proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit, and that the District Court, for all the purposes of its bankruptcy jurisdiction, is always open, and that the only remedy for the correction of errors in such cases is to be found in the supervisory jurisdiction of the Circuit Courts under the provisions of the first clause of the 2d section of the Bankrupt Act.

Corresponding views are expressed by the *Chief Justice* in two later cases, both of which are reported in the regular series of reports of the Supreme Court. *Wiswall v. Campbell* [supra]; *Hill v. Thompson* [supra]. Both of these cases show to a demonstration that the Circuit Court, in reversing the decree of the District Court, acted without jurisdiction; and yet the effect of the judgment of the court in this case is to leave the judgment of the Circuit Court, rendered without jurisdiction, in full force, which, in my judgment, is error.

Six times, at least, the question in the case has been decided by this court, without a dissent, which would seem to be a sufficient justification of a member of the court who concurred in all of the decisions for adhering to the rule which those cases prescribe. For these reasons, I am of the opinion that the decree of the Circuit Court should be reversed, and that the case should be remanded to the Circuit Court with directions to that court to dismiss the writ of error sued out from that court to the District Court.

Also dissenting, *Mr. Justice Swayne*.

THE MISSISSIPPI AND RUM RIVER
BOOM COMPANY, *Plff. in Err.*,
v.
WILLIAM C. PATTERSON, JR.

(See S. C., 8 Otto, 403-410.)

Jurisdiction—objection to—right of eminent domain—state right—transfer of cause—value of land—evidence.

1. Objections to the jurisdiction of the Circuit Court, when they go to the subject-matter of the controversy, may be taken at any time.

2. The exercise by the State of its sovereign right of eminent domain, cannot be interfered with by the United States; but when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed, is a proper matter for judicial cognizance.

3. When the proceeding before commissioners appointed to appraise the land is transferred to a State Court by appeal from the award of the commissioners, it takes the form of a suit at law, and is thenceforth subject to its ordinary rules and incidents, and may be transferred from the State to the Federal Court, if the controversy is between citizens of different States.

4. In determining the value of land appropriated for public purposes, the inquiry must be: what is the property worth in the market, from its availability for valuable uses, both now and in the future?

5. In estimating the value of lands sought to be taken by a boom company for a boom, its adaptability for boom purposes is a proper element of value for consideration.

[No. 113.]

Argued Jan. 9, 10, 1879. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The case is stated by the court.

Mr. William Lochren, for plaintiff in error:

It is not a suit at law in any ordinary sense; but is still, in fact, an inquest to determine the value of the property. *Garrison v. Mayor of N. Y.*, 21 Wall., 204 (88 U. S., XXII., 614). And it ought not to be regarded as a suit or action within the meaning or scope of the Acts of Congress respecting the removal of actions; where the effect would be to cause one sovereignty to trench, however lightly, on the powers or prerogatives of another.

The object of the Acts of Congress touching the removal of the causes into the Federal Courts, was only to reach ordinary civil actions, and such others as are specially named, and not to interfere in proceedings like this.

The Mississippi River is a navigable stream, and the land owner had no right to sink piers or make booms in it.

Atlee v. Packet Co., 21 Wall., 389 (88 U. S., XXII., 619).

The plaintiff in error had the exclusive right, under its charter, to construct and maintain booms at this place.

It follows, that the right to use these islands in connection with the river for boom purposes is a franchise granted by the Legislature to the Boom Company for a public purpose, and with which the land owner had nothing to do.

The adaptability of the land to booming purposes was of no value to the owner, nor to anyone to whom he could make sale. It could not, therefore, affect the market value.

In *R. R. Co. v. Elliott*, 5 Nev., 358, the court held that, while everything which actually enhances the present worth of the land should be considered, the fact that the land is necessary

NOTE.—Eminent domain; right to payment for private property taken for public use generally recognized; Fifth Amendment to Constitution applies only to Federal Government and not to States. See note to *Withers v. Buckley*, 61 U. S., XV., 816.

Navigable waters; what are, in United States; streams and inland waters as highways. See note to *U. S. v. The Montello*, 87 U. S., XXII., 391.

or is indispensable for the public purpose for which it is claimed, cannot be considered.

Mr. Chas. E. Flandrau, for defendant in error:

The ownership and possession of these islands gave them a great value to their owners. It is proven in the case, that they constituted one of the largest, best and safest booms of the Company. This is a substantial commercial advantage, possessing a market, property value and creating a demand for this land, not only from every stockholder in the Boom Company, but from everybody else desiring to become so.

Cooley, Const. Lim., 2d ed., 565.

In the *Matter of Furman*, 17 Wend., 670, the court says: "The proper inquiry is: what is the value of the property for the most advantageous uses to which it may be applied?"

Brisbane v. R. R. Co., 23 Minn., 114; *Goodin v. Can. Co.*, 18 Ohio St., 169; *Matter of the N. Y. Cen. and H. R. Co.*, 6 Hun, 149; *R. R. Co. v. Braham*, 79 Pa., 447; *Harrison v. Young*, 9 Ga., 359; *Young v. Harrison*, 17 Ga., 30; *Robb v. Turnpike Co.*, 3 Met. (Ky.), 117; *R. R. Co. v. Dickerson*, 17 B. Mon., 178; *Trust. of Coll. Point v. Dennett*, 5 T. & C., 217.

Mr. Justice Field delivered the opinion of the court:

The plaintiff in error is a Corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum Rivers in that State. It is authorized to enter upon and occupy any land necessary for properly conducting its business; and, where such land is private property, to apply to the District Court of the County in which it is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation.

It is unnecessary to state in detail the various steps required to obtain the condemnation. It is sufficient to observe that the law is framed so as to give proper notice to the owners of the land, and secure a fair appraisement of its value. If the award of the commissioners should not be satisfactory to the company, or to anyone claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the clerk "as a case upon the docket" of the court, the persons claiming an interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The court is then required to "Proceed to hear and determine such case in the same manner that other cases are heard and determined in said court." Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, which is subject to review by the Supreme Court of the State on a writ of error.

The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River above the Falls of St. Anthony, in the County of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one eighth of a mile. The land owned by him amounted to a little

over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error, the Company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of \$3,000. The Company and the owner both appealed from this award. When the case was brought before the District Court, the owner, Patterson, who was a citizen of the State of Illinois, applied for and obtained its removal to the Circuit Court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at \$9,358.33, but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at \$300, and, in view of its adaptability for those purposes, a further and additional value of \$9,058.33. The Company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to \$5,500. The owner made this election, and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the Company has brought the case here on a writ of error.

The only question on which there was any contention in the Circuit Court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the Company now raise a further question as to the jurisdiction of the Circuit Court. Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court.

The position of the Company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an Act of the Legisla-

ture, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties, the owners of the land on the one side, and the Company seeking the appropriation on the other, there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner v. Holleran*, 11 Minn., 253. The case would have been in no essential particular different had the State authorized the Company by statute to appropriate the particular property in question, and the owners to bring suit against the Company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the Company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed.

The Act of March 3, 1875, 18 Stat. at L., 470, provides that any suit of a civil nature, at law or in equity, pending or brought in a State court, in which there is a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district; and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. *Paul v. Virginia*, 8 Wall., 177 [75 U. S., XIX., 359]. And in *Gaines v. Fuentes*, 92 U. S., 20 [XXIII., 528], it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy.

Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In de-

termining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is, perhaps, impossible to formulate a rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point on the Mississippi River must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners. Whilst in *Atlee v. Packet Co.*, 21 Wall., 389 [88 U. S., XXII., 619], we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation

of the stream. Aside from this, we do not think that the State is precluded by anything in the charter of the Company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the Company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the Company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the Company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value, find support in the several cases cited by counsel. Thus, in the *Matter of Furman Street*, 17 Wend., 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the City of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In *Goodin v. Canal Co.*, 18 Ohio St., 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in *Young v. Harrison*, 17 Ga., 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner.

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them.

Judgment affirmed.

Cited 103 U. S., 492; 109 U. S., 497, 518; 3 McCrary, 265; 33 Hun, 644, 647.
See 8 OTTO.

U. S., Book 25.

JESSE D. CARR, *Appt.*,

v.

UNITED STATES.

(See S. C., 8 Otto, 433-439.)

San Francisco lots—sale to U. S.—estoppel—individual action—possession—claims to public property.

*1. Where the City of San Francisco had conveyed certain lots within the city to the United States, prior to the Van Ness Ordinance, and another party claimed the lots under said ordinance, held: that the previous conveyance to the United States was a bar to any claim under the ordinance.

2. The United States filed a bill to quiet the title to certain lots in its possession in San Francisco; the defendant set up, by way of estoppel, certain judgments in ejectment rendered by the state courts at the suit of his grantor, against certain officers of the Government, who, as its agents, had possession of the lots. In those actions the district attorney, and additional counsel employed by the Secretary of the Treasury, appeared for the defendants and the title was contested on the trial. Held, that these facts constituted no estoppel against the Government, although, in California, a judgment in ejectment is, in ordinary cases, an estoppel both against the tenant in possession, and against the landlord who has notice of the suit.

3. The United States cannot be estopped by proceedings against its tenants or agents; and cannot be sued without its consent, and such consent can only be given by Act of Congress. No State can pass a law making the United States suable in its courts.

4. Without an Act of Congress no direct proceedings will lie at the suit of an individual against the United States, or its property; and no officer of the Government can waive its privilege in this respect, nor lawfully consent that such a suit may be prosecuted so as to bind the Government.

5. The Government can only hold possession of its property by means of its officers or agents; and to allow them to be dispossessed by suit would enable parties always to compel the Government to come into court and litigate its rights. Therefore, when it becomes apparent by the pleadings or the proofs that the possession assailed is the possession of the Government by its agents, the jurisdiction of the court ought to cease, and its proceedings cannot be set up as an estoppel against the Government.

6. The cases in which the property of the Government may be subjected to claims against it are those in which the property is in juridical possession by the act of the Government itself, or has become so without violating its possession, and it seeks the aid of the court to establish or reclaim its rights therein. In such case it is equitable that the prior rights of others to the same property should be adjudicated and allowed.

The cases of *The Siren* and *The Davis*, 7 and 10 Wall. [XIX.], cited and approved.

[No. 96.]

Argued Dec. 10, 1878. Decided Mar. 3, 1879.

A PPEAL from the Circuit Court of the United States for the District of California.

The case, which arose in the court below, is fully stated by the court.

Messrs. Wm. Matthews and A. A. Sargent, for appellant.

Mr. Edwin B. Smith, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

This case arises upon a bill to quiet title, filed by the United States against the appellant, Carr, and various other persons, upon which a decree was rendered by the court below in favor of the plaintiff. Carr appealed from this decree. The controversy relates to certain lands at San Fran-

* See notes by *Mr. Justice BRADLEY.*

cisco, being two lots, each fifty *varas* square, on Rincon Point, which are claimed by the Government as having, with other adjoining lands, been set apart and reserved for public use in 1847, and as having been conveyed to the United States by the City of San Francisco in 1852. The appellant claims the lots in question under one Thomas White, alleging that said White occupied the same in 1849, and that he and his grantees continued to occupy the same until June, 1855, when the Van Ness Ordinance was passed.

It is conceded that the premises in question were once *pueblo* lands, belonging to the municipality of San Francisco; but as such lands, until conveyed to private parties, were subject to the public uses of the Government, both before and after the conquest of the country by the United States, it is evident that the government of the latter had the undoubted right to make such appropriation thereof for public use as it might see fit. It is denied, however, that any such appropriation was ever made by the proper authority. It appears from the pleadings and evidence in the case that, from the first occupation of San Francisco by the United States, in 1847, the military authorities of the Government set apart Rincon Point (including the premises in question) for the use of the Government; but that after the discovery of gold, in 1849, the officers had much ado to keep them clear of trespassers, who entered upon and endeavored to appropriate the same. In November, 1849, a lease of this tract, with others, was given by the officer in command at San Francisco to one Thomas Shillaber, apparently for the purpose of keeping possession on behalf of the Government. This lease was approved by the Secretary of the Interior. About 1852, a marine hospital was built by the Government on the southeast half of the block on Rincon Point, bounded by Folsom, Harrison, Spear and Main Streets. The whole block was 550 feet in length from Harrison to Folsom Street, and 275 feet in width from Main to Spear Street. The southeast half was 275 feet square, forming four lots, each fifty *varas*, or 137½ feet square, numbered 1, 2, 3 and 4. Numbers 1 and 2 adjoined Harrison Street, 3 and 4 adjoined 1 and 2. Lots 3 and 4 are the premises in controversy. The hospital building was actually constructed on lots 1 and 2, standing within four or five feet of lots 3 and 4; and the latter were occupied by buildings or for yard room, as accessory to the hospital.

As before stated, however, different parties attempted to possess themselves of portions of the property; and amongst others, White, under whom the appellant claims, made such an attempt in 1849, in reference to the whole block which includes the lots in question, but was ejected, as appears by the orders and correspondence set out in the complaint.

The consequence of White's attempt was, that adverse claims to the property under him were afterwards preferred from time to time. For the purpose of quieting these claims, when the hospital was being erected, a conveyance to the Government was procured from the city authorities. On the 10th of December, 1852, the Common Council of the city passed a resolution that the mayor be directed to convey to the United States all its right, title and interest to

six fifty *vara* lots, bounded on the east by Spear Street, on the South by Harrison Street, on the west by Front Street, and on the north by the beach; which description includes the four lots above referred to. Such a conveyance was accordingly made by the mayor, by deed dated the 11th of December, 1852; and from thenceforward the United States claimed the property in question, as well by virtue of the said deed as by right of original appropriation for public uses.

The appellant, as before stated, claims the property by virtue of the Van Ness Ordinance, passed June 20, 1855, by which, amongst other things, the City of San Francisco did relinquish and grant all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. 1855, provided such possession was continued up to the time of the introduction of the ordinance in the Common Council. 15 Cal., 627.

Now, it is too evident to require discussion that the City of San Francisco could not, in 1855, make a valid grant of property which it had already granted in 1852; and which the grantee (in this case the United States) constantly claimed as part and parcel of premises which were in its undoubted possession. The weight of the evidence in the case is, that the Government was in actual possession of lots 3 and 4 as appendant to the hospital, from 1852 to the passage of the ordinance. This would bring it within the terms of the ordinance itself. But we do not deem this material. It had a clear title from the city before, even if the action of the military authorities in 1847 and 1849 was not sufficient to effect an appropriation for public uses.

But the appellant relies on certain judgments rendered in the state courts in actions brought against the agents of the Government having possession of the lands in question, which judgments he contends estop the Government from claiming any title therein.

The first of these actions was an action for forcible entry and detainer brought in a justice's court in December, 1857, by one Edward Barry against one McDuffie, and one Palmer, for ejecting him (Barry) from lot No. 4, which lies on Main Street. The defendants justified under an order of President Pierce, requiring the Marshal of the District of California to remove all persons trespassing on said lot. The county court, to which the cause was appealed, found for the plaintiff, and re-instated him in the possession. The only question made in the case was whether the justification was sufficient for ousting a person who was in peaceable possession. This judgment would not have been decisive upon the title, even if the defendants themselves had been the true owners of the land, and had claimed to eject the plaintiff by virtue of said ownership.

The next action was an ejectment brought in the State District Court in February, 1865, by one Wakeman and others (under whom the appellant claims title), against one Hastings and others, to recover possession of the same lot No. 4. The defendants, besides the general issue, pleaded that the premises were the freehold of the United States, and that they, as its officers and *employés*, and by its authority, entered, etc.

The question of title was gone into, and decided against the defendants. A similar action of ejectment was brought in the same court in April, 1865, by one Volney Cushing (under whom the appellant also claims), against the said Hastings and others, to recover possession of the lot numbered 3, situated on Spear Street. The defendants pleaded the general issue and the Statute of Limitations. The title was also contested in this case, and the judgment was for the plaintiff.

It is proved that the person who was District Attorney of the United States for the District of California at the time when said actions were brought and tried, appeared as attorney for the defendants therein; and that Nathaniel Bennett, Esquire, attended the trial of one of said causes as counsel for the defendants, being employed and paid by the Secretary of the Treasury of the United States; and, not being able to attend the trial of the other cause, he procured another person to attend in his place.

The appellant contends that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity, with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action; and to this point the counsel of the appellant cited the cases of *Douglas v. Fulda*, 45 Cal., 592; *Russell v. Mallon*, 38 Cal., 259; and *Valentine v. Mahoney*, 37 Cal., 389, as well as various cases decided in other States.

Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the Government of the United States. We consider it to be a fundamental principle that the Government cannot be sued except by its own consent; and certainly no State can pass a law which would have any validity, for making the Government suable in its courts. It is conceded in the case of *The Siren* in 7 Wall., 152 [74 U. S., XIX., 129], and in that of *The Davis* in 10 Wall., 15 [77 U. S., XIX., 875], that without an Act of Congress no direct proceeding can be instituted against the Government or its property. And in the latter case it is justly observed that "The possession of the Government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the Government with the control of the property, coupled with actual possession." If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a postoffice or a custom-house, a prison or a fortification.

In some cases (perhaps it was so in the present case), it might not be apparent until after suit brought that the possession attempted to be assailed was that of the Government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the Government could always be compelled to come into court and litigate with private parties in defense of its property.

It may be contended that the United States See 8 OTTO.

consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, he had no authority to waive those rights. In England it is usual, in the admiralty courts, in proceedings *in rem*, when it is made to appear that property of the Government ought, in justice, to contribute to a general average, or to salvage, for the proper officer of the Government to consent in court that it may take jurisdiction of the matter. As stated by this court in the *The Davis* [supra]: "This consent is given by authority of the King, who thus submits to be sued in his own courts. The liberal exercise of this authority [there] removes the difficulty presented here, where no power to do this exists in any officer of the Government, and prevents any apprehension of gross injustice in such cases in England."

The cases like that of *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of Government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the Government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject-matter should be protected. The *Siren* was brought into the Port of Boston as prize, was libeled, condemned and sold, and the proceeds paid into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with *The Siren* during her voyage subsequent to the capture. It was held that, inasmuch as the United States had resorted to the aid of the court to procure the condemnation of *The Siren*, and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the Government, might well be satisfied out of such proceeds. At the same time, it was conceded that neither the Government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some Act of Congress. 7 Wall., 154 [74 U. S., XIX., 130]. The *Davis* and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The Government appeared as claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the Government could not be taken out of its own possession by any direct proceeding.

Without discussing the matter further, we are clearly of opinion that the judgments in the cases relied on by the appellant constitute no

estoppel against the United States. And being of opinion that the title of the United States to the premises in question is undoubted, our conclusion is that the decree of the Circuit Court must be affirmed.

Cited—104 U. S., 359; 106 U. S., 216, 227, 248, 250; 5 Sawy., 217.

DAVID BARNET AND ISAAC E. CRAIG,
Assignees of BARNETS AND WHITESIDE, *Plffs.*
in Err.,

v.

THE MUNCIE NATIONAL BANK OF
MUNCIE, INDIANA.

(See S. C., 8 Otto, 555-559.)

*Statutory offense—usurious interest—remedy for,
against national banks.*

1. Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive.

2. The payment of usurious interest to a national bank, cannot be set up as an offset or defense in an action brought by it on a bill of exchange.

3. The remedy given by the statute for usury in such case is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure.

[No. 856.]

Submitted Jan. 8, 1879. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The case is fully stated by the court.

Messrs. Samuel Shellabarger, J. M. Wilson and R. B. Wilson, for plaintiffs in error.

Messrs. Hagans & Broadwell, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The Bank brought this suit upon a bill of exchange, dated November 18, 1873, for \$4,000, drawn by David Barnett upon Barnets and Whiteside, in favor of Robert Marshall, and payable ninety days from date, at the Second National Bank of Cincinnati, Ohio. It was accepted by the drawees, indorsed by the payee, and discounted by the Bank. Before the maturity of the bill the acceptors made an assignment to the plaintiffs in error. The suit was commenced in the Court of Common Pleas of Preble County, Ohio, against all the parties to the bill. The assignees intervened and made themselves parties. After the pleadings were made up, the case was removed by the Bank to the Circuit Court of the United States for that district. There new pleadings were filed on both sides. The assignees set up three defenses: (1) That Barnets and Whiteside were borrowers from the Bank as early as January 11, 1866; that the indebtedness was continuous and unbroken from April 8th, 1866; that it was at no time less than \$4,000, and amounted at one time to \$36,000; that at the time of the assignment it was \$28,000, upon bills of exchange which represented it; that the Bank had taken not less than \$5,000 in excess of the legal rate

of interest; that for evasion the bills were arranged in series, and that each series was terminated from time to time by refusing to renew and the discounting of a new bill, the proceeds of which were applied in payment of the prior terminating one; that the Bank had received satisfaction of all the bills but the one in suit, and that there was nothing due from the defendants. (2) That the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of \$1,116, which it was claimed should be applied as a payment upon the bill in question. (3) That fifty-one bills of exchange of \$4,000 each, having ninety days to run, were discounted by the Bank for the assignors, the first bearing date March 27, 1872, and the last, July 27, 1873 (the date of each one is given); that illegal interest was taken upon these bills to the amount of \$6,324; and that the assignees are entitled to recover double this sum from the Bank, to wit: \$12,648. There is a prayer for judgment accordingly, and for other proper relief.

Marshall, the payee and indorser of the bills, also filed an answer; but as the record discloses no question raised by him, it need not be more particularly adverted to.

The Bank demurred to the several defenses set up by the assignees. To the first and third the demurrer was sustained, and overruled as to the second. Upon the latter the plaintiff took issue, and the case was tried by a jury. The jury rendered a verdict in favor of the Bank for \$4,080.31, and judgment was given accordingly. It does not appear that anything done by the court touching this trial was objected to by the plaintiffs in error. There is no bill of exceptions in the record.

But one point has been insisted upon by the plaintiffs in error in this court, and it is that the circuit court erred in sustaining the demurrers to their first and third defenses. That is the only subject before us for examination.

All questions arising under the second defense have been disposed of by the verdict and judgment. How the jury reached their conclusion it is not easy to see, but this is not material, as nothing relating to that part of the case is open to inquiry.

The National Currency Act of Congress of June 3, 1864, 13 Stat. at L., 99, sec. 30, after prescribing the rate of interest to be taken by the banks created under it, declares:

"And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon; and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred."

Two categories are thus defined, and the consequences denounced:

1. Where illegal interest has been *knowingly* stipulated for, but *not paid*, there only the sum lent without interest can be recovered.

2. Where such illegal interest *has been paid*,

NOTE.—*Usury by National Banks*. See note to Bk. v. Dearing, 91 U. S., XXIII., 196.

then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives.

The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case.

Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Bk. v. Dearing*, 91 U.S., 29 [XXIII., 196].

The procedure in the case after it reached the circuit court, as well as before, was governed by the Ohio Code of Practice. *R. R. Co. v. Horst*, 93 U.S., 291 [XXIII., 898].

The ground of demurrer specified as to both the defenses in question is, that the assignees had no legal capacity to defend or prosecute by counter claim in the case. But this does not take from the plaintiff the right to insist that the facts set forth were insufficient to bar the action. *Swan, Pl. and Pr.*, 234; 1 *Nash, Pl. and Pr.*, 161. Under the New York Code, from which the Ohio Code is largely copied, it has been held that a demurrer to an answer may be sustained upon a ground not adverted to in the argument by the counsel upon either side. *Bk. v. Lee*, 2 Bosw., 694. The demurrer was a waiver of every objection not specified, except the substantial and fatal insufficiency of the pleading to which it related with respect to the facts alleged.

An issue ought not to be tried where it would be a sheer mistrial and a mere waste of time. The court ought *sua sponte* to strike it out or disregard it. If a frivolous issue is left in the record, it does not, therefore, follow that it is to be seriously treated.

In the first defense, the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of offset or payment to the bill of exchange in suit. In our analysis of the statute, we have seen that this could not be done. Nothing more need be said upon the subject.

In the third defense as set forth the like payment is alleged, and there is a claim to recover double the amount paid by way of counter claim in the pending suit on the bill.

This pleading is also fatally defective for the same reason as the first one. The remedy given by the statute for the wrong is a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties.

While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose, where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case and mislead the jury to the prejudice of either party.

The point specified in the demurrer we have had no occasion to consider. Both defenses, as they appear in the record are, perhaps, liable to other objections; but in examining the case we have

not gone beyond the points we have discussed and we decide nothing else.

The judgment of the Circuit Court is affirmed.

Cited—100 U. S., 250; 104 U. S., 54; 111 U. S., 37, 198; 112 U. S., 483; 81 N. Y., 17; 91 Pa. St., 384; 30 Hun, 630; 133 Mass., 250; 43 Am. Rep., 511.

C. H. AIRHART, otherwise HENRY C. AIRHART, *Plff. in Err.*,
v.
ANNA REDDING MASSIEU ET AL.

(See S. C., 8 Otto, 491-506.)

Mexican title—divestment of right—proceedings for forfeiture—copy title as evidence—bona fide purchaser.

*1. A citizen of Mexico was not divested of his title to lands in Texas by the Revolution, nor by the Constitution or laws subsequently adopted; but retained the right to alienate the same and to transmit the same to his heirs, being also citizens of Mexico, and such heirs are entitled to sue for and recover such lands in the courts of Texas.

2. The division of an Empire does not of itself destroy rights of property held by the citizens of its different parts, though situated in a different division from that in which they may reside.

3. Although the Constitution of Texas declared generally that no alien should hold lands in Texas except by titles emanating directly from the government, that declaration did not divest the title of aliens; for it was added that aliens should have a reasonable time to take possession of and dispose of their lands in a manner thereafter to be pointed out by law. Before the title can be divested, proceedings for enforcing their forfeiture must be provided by law, and carried into effect; and no such proceedings have hitherto been provided for that purpose.

4. In Texas, the protocol of a Mexican title is an archive which may be deposited in the General Land-Office at any time, subject to all just implications arising from delay and the circumstances of its history; and after being so deposited, a certified copy thereof from the land-office is competent *prima facie* evidence of the title.

5. Until a title is deposited in the land-office, or is duly recorded in the proper county, *bona fide* purchasers of the land, not having notice of such title, though claiming under a junior Mexican grant, will be protected.

[No. 61.]

Argued Dec. 10, 1878. Decided Mar. 17, 1879.

IN ERROR to the Circuit Court of the United States for the Western District of Texas.

The case, which arose in the court below, is fully stated by the court.

Mr. John H. Reagan, for plaintiff in error.
Messrs. J. M. Carlisle & John D. McPherson, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This is an action of trespass to try title to land, being equivalent, in Texas, to an action of ejectment. The defendants in error were the plaintiffs below, and judgment being given in their favor, the case is brought here by writ of error. The petition in the action was filed on the 3d of June, 1872, and sets out that the plaintiffs are citizens of the Republic of Mexico, residing in the City of Mexico, and that on the first of July, 1869, they were seized in fee and possessed of a certain tract of land (containing eleven leagues) situated in the Counties of Anderson and Freestone, on the right and left

* Head notes by *Mr. Justice BRADLEY*.

banks of Trinity River, stating the metes and bounds thereof; and that on that day the defendant, Alhrart (now plaintiff in error), illegally ousted them, and continues to hold possession of the tract, to their damage.

The defendant demurred, and pleaded, 1st, not guilty; 2d, the Statute of Limitations for three years, in virtue of possession under regular title from the sovereignty of the soil, as to a certain portion of the land, containing 1,855 acres, giving the metes and bounds thereof, being the south part of E. C. Harris's survey; and the same plea as to another portion of the tract sued for (containing about 153 acres), giving the metes and bounds of the same; and disclaiming as to all the rest of the land sued for. The defendant further pleaded, 3d, the Statute of Limitations of five years, and payment of taxes as to the two tracts last named; 4th, the Statute of Limitations of ten years; and, 5th, adverse possession under an entry of title since 1850, and the erection of permanent improvements, for which he claimed compensation. Various amendments of the pleadings were subsequently added, which it is unnecessary to notice.

It appears from the various bills of exception taken in the case that the plaintiffs claimed title, 1st, under an eleven league grant, made by the Government of Coahuila and Texas to one José Ygnacio Aguilera, of the City of Mexico, on the 22d of March, 1830, and possessory title executed thereon by Commissioner Vicente Aldrete on the 26th of November, 1833; 2d, An Act of sale of the said eleven leagues, passed on the 12th day of March, 1836, in the City of Mexico, from the said Aguilera to Anna Matilda Massieu, a citizen of Mexico, then an infant, and who died in August, 1851, under age; and, 3d, descent to the plaintiffs as the heirs at law of said Anna Matilda, they being her mother and brothers and sisters, and all citizens of Mexico.

The defendant claimed title to the tract of 1,855 acres, mentioned in his pleas, under a grant from the State of Coahuila and Texas to Edward C. Harris, made January 26, 1835, and through various *mesne* conveyances from said Harris to himself. He claimed title to the 153 acre tract (the other tract mentioned in his pleas) under a head right grant made by the State of Texas to one Robert S. Patton, on the 4th of February, 1857, and through various *mesne* conveyances to himself.

The first question raised for the consideration of this court is that arising upon the alienage of the plaintiffs. This question was raised by the demurrer to the petition, so far as relates to their right to maintain an action for land. The subsequent proceedings raised the further question, whether, being aliens, they could inherit lands in Texas in 1851, from Anna Matilda Massieu, who was also an alien; and, if they could, whether they could continue to hold the title thereof without residing in Texas and becoming citizens. These questions may be conveniently considered together.

Texas, which, with Coahuila, had constituted a State of the Mexican Republic, declared her independence on the 2d of March, 1836; but the Mexican or Spanish law, except as to criminal cases, and except as modified by the Congress, was continued as the law of the Republic until the 16th of March, 1840, when the common law was adopted. By the common law an alien could

indeed, take land by purchase, but it would be liable to forfeiture to the King; and he could neither take nor transmit land by inheritance. Co. Litt., 2; 1 Bl. Com., 372; 2 Bl. Com., 349; 3 Cruise, Dig., 365; Wms., Real Prop., 53; 2 Kent, Com., 53. It is conceded, however, by the counsel of the defendant, that important qualifications of this rule have always existed in the laws of Texas. The precise question is, whether a citizen of Mexico, not being a resident of Texas, but of some other Mexican State, owning lands in Texas at the time of the Revolution, lost his title thereto, or his right to convey the same, or to transmit the same to his heirs, by means of the Revolution, or by reason of subsequent legislation. The separation of Texas from the Republic of Mexico was the division of an Empire. Up to the time of such division, all the citizens of the Republic were citizens in every portion thereof, and had full right to hold property, movable or immovable, in every portion. If the Revolution in Texas deprived the citizens of Mexico residing in other Mexican States of the right to hold and transmit their property situated in Texas, it amounted to confiscation. Did such confiscation take place by virtue of general international law, or by virtue of legislation adopted by Texas after its independence was declared? That such is not the general consequence of a division of empire, seems to be settled. *Mr. Justice Nelson*, delivering the opinion of this court in the case of *Jones v. Mc Masters*, 20 How., 8 [61 U.S., XV., 805], which related to a Texas title, says: "The general principle is undisputed, that the division of an Empire works no forfeiture of a right of property previously acquired."

The original Constitution of Texas, adopted March 17, 1836, fifteen days after the Declaration of Independence, did, indeed, provide as follows: "All persons who shall leave the country for the purpose of evading a participation in the present struggle, etc., shall forfeit all rights of citizenship, and such lands as they may hold in the Republic." Gen. Provs., sec. 8. But this did not refer to Mexicans residing elsewhere. The 10th section, however, declared as follows: "No alien shall hold land in Texas except by titles emanating directly from the Government of the Republic; but if any citizen of this Republic should die intestate or otherwise, his children or heirs shall inherit his estate; and aliens shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." So that, although it was declared that aliens should not hold lands in Texas, a reasonable time was to be given to them to come in, or dispose of their lands—the last clause evidently referring to aliens generally, and not merely to the "children and heirs" just referred to.

By an Act of the Congress of Texas, passed January 28, 1840, it was provided as follows: "In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien; and every alien to whom any land may be devised or may descend shall have nine years to become a citizen of the Republic, and take possession of such land; or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the government." Oldham & White, 699, 700.

This statute has continued in force to the present time, being re-enacted in 1848. The State Constitution of 1845 effected no change in rights of property, but expressly established existing rights. Art. VI., sec. 20. By an Act passed February 13, 1854 (Pasch. Dig., arts. 45-47), it was further provided, in favor of aliens, that they should have the same rights as are accorded to American citizens by the laws of the Nation to which such aliens belong; including the right to take and hold property real or personal, by devise or descent from any alien or citizen. This law being passed subsequent to the death of Anna Matilda Massieu, cannot affect the present case, but is cited for the purpose of illustrating the spirit and course of Texas legislation on the subject under consideration.

Aguilera became an alien to Texas by virtue of the separation of that State from the rest of the Mexican Republic. His title to the lands in question had been lawfully acquired before this forced alienage commenced, and whilst his rights of citizenship extended to Texas as a portion of the Republic of Mexico.

At that time, as before stated, the Spanish law, as modified by the local laws of Mexico and of the State of Coahuila and Texas, was the general law of the infant State; and in some of the early cases in Texas, as in *Holliman v. Peebles*, 1 Tex., 673, and in *Yates v. Iams*, 10 Tex., 168, it was argued, though not expressly decided, that by the general Spanish law, and if not by that law, at least by the colonization laws of Mexico, and of Coahuila and Texas, a non-resident alien could not hold real estate. The same views were expressed in the case of *McKinney v. Sa-viego*, 18 How., 235 [59 U. S., XV., 365]. But the laws referred to had respect to the case of aliens who, when they were such, acquired, or attempted to acquire, lands in Spain or her colonies, and not to the case of citizens or subjects who, on the division of an Empire, happened to hold lands in the section in which they did not reside, and therefore had good title thereto when, by operation of law, they became aliens as to such section. It must be admitted that aliens of this class stand on a different footing, in equity at least, from those who, being aliens, attempt, against the law, to acquire real estate in a foreign country. It may be a wise policy to prevent the latter class from acquiring lands, whilst it would be extremely unjust to confiscate the lands of the former class—lands which they had rightfully and innocently acquired, having only become aliens afterwards, by force of law resulting from events beyond their control. This precise question came before this court in the case of *Jones v. McMasters* [supra], and it was decided that the title of such persons is not divested by their forced alienage resulting from the division of an Empire. In that case the plaintiff was a citizen of Mexico, and owned the land in controversy situated in Texas, at the period of the Texan Revolution. The defendants claimed under patents from the State, and contended that the plaintiff must fail in her action. But it was sustained by the court below and by this court. Mr. Justice Nelson, in delivering the opinion of this court, said: "Assuming that the plaintiff is an alien, and not a citizen of Texas, the next question is whether or not she is under any disability that would prevent her from the

See § OTTO.

assertion of her title to the premises in question; in other words, whether her absence and alienage worked a forfeiture of the estate. The general principle is undisputed that the division of an Empire works no forfeiture of a right of property previously acquired. *Kelly v. Harrison*, 2 Johns. Cas., 29; *U. S. v. Percheman*, 7 Pet., 87. And, consequently, the plaintiff's right still exists in full effect, unless the new sovereignty created, within which the lands are situate, has taken some steps to abrogate it. The title remains after the Revolution, and erection of the new government, the same as before." This case was decided in December Term, 1857, and it is believed that no case in Texas has held the contrary since that time. The same views were expressed, and many authorities cited in support thereof, in *Kilpatrick v. Sisneros*, 23 Tex., 130-134, decided in 1859; also in *Sabrieo v. White*, 30 Tex., 581-584, decided in 1868, all which cases are recognized in the late case of *Andrews v. Spear*, 48 Tex., 567.

We think, therefore, it may be regarded as settled that the severance of Texas from the Republic of Mexico, did not divest the title of Aguilera to the lands in dispute.

This conclusion disposes of another point in the case, the question as to the validity of the act of sale passed on the 12th day of March, 1836, from Aguilera to Anna Matilda Massieu. Notwithstanding the existence of hostilities between Texas and Mexico, it was competent for one citizen of Mexico to convey to another, both residing and being in Mexico, lands situated in Texas. This point was settled by the late decision of this court in the case of *Conrad v. Waples*, 96 U. S., 279 [XXIV., 721]. We may assume, therefore, that at the time when the Constitution of Texas was adopted, on the 17th of March, 1836, the lands in dispute rightfully belonged to Anna Matilda Massieu, who was then an infant, and a citizen of Mexico residing in the City of Mexico.

Then did the Constitution which was adopted on the 17th of March, 1836, divest the title which Anna Matilda Massieu had acquired? We have already quoted its language, and have seen that whilst it declared that aliens should not hold lands in the Republic, a reasonable time should be given to them by law to become citizens or to dispose of their lands.

It seems clear, therefore, that the Constitution itself did not, *proprio vigore*, divest the titles of aliens, especially the titles of those Mexican citizens who had become aliens by the course of events. It was left to future legislation to provide the mode and manner in which such divestiture should take place. This view is sustained by the cases already referred to, and by many others that might be cited on the subject. We may assume, therefore, that Anna Matilda Massieu continued to hold the title to the lands in question after, as well as before, the adoption of the Constitution on the 17th of March, 1836.

Then came the Act of January 28, 1840, already quoted, removing the bar of alienage in descendants, and giving to aliens, and alien heirs, nine years to become citizens of the Republic, and take possession of their land; or nine years to sell the same "Before it shall be declared to be forfeited, or before it shall escheat to the Government."

This law being passed whilst Anna Matilda Massieu was lawful owner of the land, gave her nine years to become a citizen, or dispose of the same before it could be forfeited by proceedings at the suit of the Government. Of course, after the nine years should expire, namely: after January 28, 1849, the land would be forfeitable if the Legislature should, in the meantime, provide a proceeding to be taken for declaring such forfeiture. The common law, so far as not inconsistent with the Constitution or the Acts of Congress, was adopted as a rule of decision in Texas on the 20th of January, 1840, to take effect on the 16th of March thereafter. But it is not perceived how this could materially affect the case under consideration, which was already provided for. The common law doctrine respecting alienage as affecting title to land was superseded by the Constitution of the Republic and the statute referred to.

The next modification of the law was made by the State Constitution of 1845, which by article XIII., section 4, provided as follows: "All fines, penalties, forfeitures and escheats, which have accrued to the Republic of Texas, under the Constitution and laws, shall accrue to the State of Texas; and the Legislature shall, by law, provide a method for determining what lands may have been forfeited or escheated."

This provision only renders it still more clear that the Legislature must first act before any proceedings can be taken to annul the title of an alien, or any other escheatable titles. Under this provision, it has been held that, since its adoption, no locations can be made upon lands held by aliens on the ground of their title being void, since no law has been framed to provide the means for declaring forfeitures for alienage. *Hancock v. McKinney*, 7 Tex., 384; *Swift v. Herrera*, 9 Tex., 263; *Johnston v. Smith*, 21 Tex., 722; *Luter v. Mayfield*, 26 Tex., 325.

The only law which has been passed relating to proceedings for enforcing forfeitures and escheats is that of March 20, and which went into effect April 29, 1848. But this only relates to the case of escheat when a person dies without heirs, and cannot apply to the plaintiffs if they were capable of inheriting from Anna Matilda Massieu in August, 1851, at the time of her death.

As to this point, we have seen that the Act of January, 1840, declared that, in making title by descent, it should be no bar to a party that any ancestors through whom he derives his descent from the intestate is or hath been an alien. This law would seem to be the legitimate result of the *status* of aliens with regard to title to lands in Texas; the prohibition to hold lands being provisional only, not operative, unless they failed to become citizens, or to dispose of their lands, within nine years; and not even then, until regular proceedings should be provided for, and should be had, to annul the title. The later cases in Texas have fully established this doctrine. We refer particularly to the cases of *Sabrigio v. White*, 30 Tex., 576; *Settegast v. Schrimpf*, 35 Tex., 323; and *Andrews v. Spear*, 48 Tex., 567.

From this review of the law of Texas, it would seem indubitable that the title of the

plaintiffs to the land in question is free from objection on the score of alienage.

Then, have the plaintiffs a right to vindicate their title in the courts of justice? Several cases have undoubtedly decided that an alien cannot sue for lands in Texas. The last case referred to is that of *White v. Sabrigio*, 23 Tex., 243, which presented the naked question of alienage as a bar. The court, however, stated that under special circumstances aliens may sue; that is, under circumstances which entitle them to hold land; as, where they have a title emanating directly from the Government, or where they acquired land by descent or purchase before the division of the Empire and the change of Government. In the subsequent case of *Sabrigio v. White* [*supra*], involving the same title, the plaintiff showed that the land was granted to her mother before the Revolution; and that her mother (with herself) removed to Matamoras during the Revolution, and her mother died there in 1842; and that the plaintiff had ever since continued to reside in Matamoras, remaining a Mexican citizen. The court held that the plaintiff lawfully succeeded to her mother's rights, and retained her title to the property, no office having been found to forfeit it; and hence that she was entitled to maintain her action. The case of *Jones v. McMasters* [*supra*], is also a case in point on this question, it being there held that alienage was no bar to an action, if the title of the alien was good; and the title was held good as against third persons until office found, and a judgment of forfeiture.

Our conclusion, therefore, is, that the objection to the right of the plaintiffs to vindicate their title in the courts, as well as the objection to the title itself, was properly overruled.

II. The next question is, whether the plaintiffs succeeded in proving the title by which they claimed the lands in dispute.

To prove the original grant from the Government of Coahuila and Texas to Aguilera, the plaintiffs, at the trial, offered in evidence a certified copy from the General Land-Office of the Spanish title, consisting of Aguilera's petition for eleven leagues of land on Trinity River or elsewhere, the act of concession, dated March 20, 1830, the petition for possession in September, 1833, the reference for a survey, the notes of survey, and the title of possession, dated November 26, 1833, executed by Vicente Aldrete, Commandant at Nacogdoches and General Commissioner of the Government, in the presence of two witnesses.

The imperfect condition of the record does not enable us to understand clearly whether or not, in addition to this certified copy, a *testimonio* of the title was also offered in evidence. From a translated copy, and the fact that the Spanish original thereof was waived by the parties and not inserted in the record, we infer that such a *testimonio* was offered. From the translation referred to, it appears that this *testimonio* was verified by the signature of Aldrete, and two assisting witnesses, named Rodriguez and Perez.

This paper purported, by certificates thereon, to have been recorded in August and October, 1870, in the Counties of Anderson and Free-stone, where the land lies. The only authentication of the instrument at the time of record-

ing consisted of an affidavit made by one R. D. Johnson, at Galveston, in 1857, that the residence of the subscribing witnesses was unknown to him; and a joint affidavit of one Taylor and one Edwards, made at Nacogdoches in 1857, deposing to the genuineness of Aldrete's signature.

The defendant objected to the admission of this evidence of the title as an authenticated and recorded instrument. The objection was overruled.

The admission of this evidence forms the basis of one of the errors assigned. If the accessory circumstance of the title having been recorded in the proper counties in 1870 had been a material fact in the determination of the cause, its admission as a recorded title would have made it necessary for us to examine the sufficiency of the affidavits in virtue of which the recording was made. But from the view which was taken of the case by the court below the recording of the instrument became immaterial; the learned Judge holding that the defendant could claim no benefit from the fact that the plaintiff's title was not properly recorded, inasmuch as both parties claimed the principal tract in question under titles emanating from the Mexican Government and, therefore, as between them the recording Acts did not apply. If this position was correct, the recording of the plaintiff's title was certainly immaterial; if not correct, the judgment should be reversed. It is unnecessary, therefore, to consider the question whether that title was properly authenticated for recording or not, a question which might give us some embarrassment. The correctness of the ruling made by the court will be considered further on.

Whether the *testimonio* was sufficiently authenticated to make it competent evidence of the title, as contradistinguished from its registry, it is also unnecessary to decide. It is clear that the certified copy of the title from the Land-Office was *prima facie* evidence of its existence; for it would be presumed that the original was an archive of the Land-Office. For the mere purpose, therefore, of proving title only, without clothing it with the privileges of registry, the certified copy was sufficient.

But after the plaintiffs had rested, the defendant recurred to his attack upon their evidence of the grant to Aguilera. He called as a witness the translator of the Land-Office, who produced the protocol or original title of said grant, and showed that it had never been deposited in the Land-Office until July, 1873, after the commencement of this action. The defendant further proved by E. A. Mexia that he, as agent of the plaintiffs, had procured the said protocol in June or July, 1873, from the Governor of the State of Coahuila in the Republic of Mexico, and had deposited the same in the General Land-Office of Texas in July, 1873. The defendant now moved to exclude the certified copy as evidence on the ground that the protocol was not an archive of the General Land-Office of Texas, but was an archive of the Mexican State of Coahuila, and was put in said office by a private individual without the authority or sanction of any law, and that there is no law of the State of Texas or of the United States authorizing the use of a copy thereof as evidence in any court or judicial proceeding.

See 8 Orto.

This motion was overruled, and the defendant excepted; and the question is again presented here as to the admissibility of the evidence.

We think the certified copy was admissible in evidence.

By an Act of the Congress of Texas, passed December 14, 1837, it was declared "That it shall be the duty of every person or persons who may have in his or her possession or control any titles or documents whatever which relate to lands, and which, by the laws now or heretofore existing in Texas, have been and are considered archives, to deliver the same to the Commissioner of the General Land-Office, on his order, within sixty days after the final passage of this Act." Pasch. Dig., art. 70. The 6th section of the same Act constituted the Land-Office the proper depository of all books, records, papers and original documents appertaining to the titles of lands denominated archives. Pasch. Dig., art. 71. There can be no doubt that the protocol of the title in question belonged to the class of documents here designated; and it does not appear that any law has ever been passed to prevent such documents from being deposited in the Land-Office at any time. It is true that a door is thereby left open for the perpetration of frauds; but fraud is always open to investigation, and if titles which have been long kept back from the proper public depository, and whose existence has thereby been unknown, are not allowed to disturb subsequent titles acquired *bona fide* in the meantime, the apprehended evil will be greatly diminished. This consideration renders it important that the position taken by the court below in reference to the question of registry as between persons holding under titles issued by the Mexican Government should be carefully considered.

III. The next question to be considered, therefore, is, whether a *bona fide* purchaser claiming under a Mexican title is bound to take notice of a prior Mexican title which is neither recorded in the proper county nor deposited in the Land-Office.

The defendant, in this case, claimed title to the 1,855-acre tract in question, under a grant of one league of land, dated June 26, 1835, from the Government of Coahuila and Texas to one Edward C. Harris, and by the following intermediate conveyances from Harris to himself: 1, a deed from Harris to one Hotchkiss, dated June 9, 1840; 2, a deed from Hotchkiss to one Vail, dated April 24, 1844; 3, a deed from Vail to one Mynott and his wife, dated June 1, 1855; 4, a deed from Mynott and wife to one Kimbrough, dated October 30, 1856, in pursuance of a title bond executed in June, 1855; 5, a deed from Kimbrough to the defendant and another person, dated November 30, 1868, all of which deeds were duly recorded. This chain of title was duly proved, and there was no evidence that the defendant or any of those through whom he deraigned title had, at the times they respectively acquired their titles, any actual notice of the existence of the said grant to Aguilera. Some proof was offered to show constructive notice, but the ruling of the court renders it unnecessary to consider it.

According to the view taken by the court below, none of the persons who thus acquired title under Harris could claim any benefit from the fact that Aguilera's title was totally un-

known and unheard of, and that no trace of it was to be found in any public office of archives or records in Texas. If this be the law of Texas, the owners of lands in that State hold them by a very uncertain tenure.

But we cannot believe that this is a correct view of the law. However the case may have stood between the original grantees of Coahuila and Texas, namely: Aguilera and Harris (and of this we express no opinion), we think that the subsequent *bona fide* purchasers and possessors under Harris acquired an unquestionable right to contest the unknown and dormant title of Aguilera, though antedating that under which they claimed.

The Texas recording Acts are not so clear and explicit as they might be, it is true; but, in our judgment, their tenor and spirit are sufficient to prevent such great injustice and wrong as must necessarily follow if they do not apply to such a case as this.

The Act of December 20, 1836, "organizing inferior courts," etc., provided, amongst other things, as follows:

"Sec. 37. Any person who owns or claims land of any description, by deed, lien or other color of title, shall, within twelve months from the 1st of April next, have the same proven in open court, and recorded in the office of the clerk of the county court in which said land is situated; but if a tract of land lies on the county lines, the title may be recorded in the county in which part of said land lies.

Sec. 40. No deed, conveyance, lien or other instrument in writing, shall take effect, as regards the interests and rights of third parties, until the same shall have been duly proven and presented to the court, as required by this Act, for the recording of land titles. And it shall be the duty of the clerk to note particularly the time when such deed, conveyance, lien or other instrument is presented, and to record them in the order in which they are presented." Pasch. Dig., arts. 4980, 4983.

The limit of time prescribed in the 37th section was repealed in 1838.

As most original titles in Texas, originating before the Revolution, like that of Aguilera in this case, were public archives, the parties holding only *testimonios* thereof, the following law was passed January 19, 1839.

"Copies of all deeds, etc., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." Pasch. Dig., art. 4984.

It seems to us that these provisions cover the case under consideration. And such is the judgment of the Supreme Court of Texas. In the case of *Guilbeau v. Mays*, 15 Tex., 410, the plaintiff claimed under a grant of a league of land from the former government; the defendants pleaded prescription for three years, and that there was no record of the plaintiff's grant in the General Land-Office nor in the county where the land was situated; that they held by patents issued from the Government of Texas and locations of valid certificates, without notice of the plaintiff's title. The proofs corresponded with this defense, and the court held it to be a valid one. After reviewing the laws above referred to, and the manifest policy

by which they were dictated, they proceed as follows: "In view of the legislation on this subject, it is believed not to be susceptible of a doubt that the grants upon which the plaintiff bases his right to the lands in question ought to have been recorded, and their failure so to be recorded, or delineated on the maps, or other notice, will postpone them to a junior title, derived from the government, and will place the defendants in the position before the court as innocent purchasers without notice, and in principle not distinguishable from the great class of cases of innocent purchasers without notice, of any prior or superior titles." This case is corroborated by the subsequent cases of *Musquis v. Blake*, 24 Tex., 461; *Nicholson v. Horton*, 25 Tex., 47; *Wilson v. Williams*, 25 Tex., 54.

Had the grant to Aguilera been deposited in the Land-Office, the case would have presented a question of very different consideration. It is generally conceded that an archive in the General Land-Office is entitled to all the privileges of an instrument recorded in the proper county. In the case just cited the court say: "Now, in cases of title emanating from the government, where the patent or *testimonio* had not been recorded in the county where the land lies, the archives of the General Land-Office and the maps of survey, and the records and maps of the county surveyor, would be regarded as notice that the land was appropriated, and was not a part of the vacant domain of the Republic." See, also, *Byrne v. Fagan*, 16 Tex., 391; *Chambers v. Fisk*, 22 Tex., 504; *Wilson v. Williams*, 25 Tex., 54. But here all the transfers of the Harris tract took place before the Aguilera title was either recorded or deposited in the Land-Office. Under these circumstances, the plaintiffs should have been required to show that the defendant and those under whom he claimed had either actual or at least constructive notice of their title at the time when they respectively purchased; but the court required neither, holding, in effect, that the elder title was entitled to preference without any notice of its existence.

Of course, buying with actual notice of a previous title, or under circumstances which make it a duty to take notice, is a fraud, and deprives the purchaser of the immunity arising from the fact that such title is not recorded nor deposited in the Land-Office. *Crosby v. Huston*, 1 Tex., 203; *Grumbles v. Sneed*, 22 Tex., 565.

By a late law, passed October 20, 1866, a title not deposited in the Land-Office, and not recorded, will no longer avail as against certain descriptions of title without actual notice. The Act is as follows:

"Titles to land which may have been deposited in the General Land Office subsequently to the time when the land embraced by such titles had been located and surveyed, by virtue of valid land warrants or certificates, shall not be received as evidence of superior title to the land against any such location or survey, unless such elder title had been duly recorded in the office of the county clerk of the county where the land may have been situated, prior to the location and survey, or the party having such location and survey made had actual notice of the existence of such elder title before he made such location and survey." Pasch. Dig., Vol. II., art. 5825.

Whether this law can properly be extended to protect any other titles than those based on "land warrants or certificates" may be questionable. But it is not necessary for the defendant to invoke the aid of this law: he can stand on the fair construction of the Laws of 1836 and 1839. The title which he is called upon to combat was not to be found either in the Land-Office or in the records of the counties, the only public depositories to which the people could resort to ascertain what lands have been granted, and what are vacant and free; and he may well insist that if he and his several grantors had not actual, they should at least have had constructive, notice of an elder title in order to be affected by it—something beyond the mere fact of its existence; some legal *indicia* or evidence of that existence, deposited in some proper place, which he was legally bound to find, and which, in the exercise of ordinary diligence, he might have found and relied on.

Many other questions are made in the record; but as this is a controlling one, we have thought it unnecessary to discuss them. *We are satisfied that the judgment must be reversed, with directions to award a new trial.*

JAMES HOOPER, *Plff. in Err.*,

v.

DOUGLASS ROBINSON AND JAMES F. COX, as ROBINSON & COX.

(See S. C., 8 Otto, 528-541.)

Construction of policy—insurable interest—lost goods—burden of proof—agent.

1. A policy "on account of whom it may concern" will be applied to the interest of the persons for whom it was intended by the person who ordered it; provided the latter had the requisite authority from the former, or they subsequently adopted it.

2. An insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured

NOTE.—Insurance; policy "for whom it may concern," effect of; who may recover on.

A policy of insurance in the name of a particular person, "for whom it may concern," or with any other equivalent clause, will apply to those who were contemplated at the time the insurance was made and have an insurable interest in the subject-matter. 1 Phillips, Ins., sec. 383; Catlett v. Pacific Ins. Co., 1 Paine, C. C., 594; Seamans v. Loring, 1 Mason, 127; Bauduy v. Union Ins. Co., 2 Wash. 391; Routh v. Thompson, 11 East, 428; Alliance Mar. Ins. Co. v. La. State Ins. Co., 8 La., 1; Lambeth v. Western F. & Mar. Ins. Co., 11 Rob. (La.), 82; Frierson v. Brenham, 5 La. Ann., 540; Protection Ins. Co. v. Wilson, 6 Ohio St., 553; Haynes v. Rowe, 40 Me., 181; Newson v. Douglass, 7 Harr. & J., 417; S. C., 16 Am. Dec., 317.

The intention of the party effecting the insurance and his authority from or a subsequent ratification by the party intended, determines the interest insured. Bauduy v. Union Ins. Co., 2 Wash., 391; De Bolle v. Penna. Ins. Co., 4 Whart., 68; S. C., 33 Am. Dec., 38; Buck v. Chesapeake Ins. Co., 26 U. S. (1 Pet.), 151; Holmes v. U. S. Ins. Co., 2 Johns. Cas., 329; 1 Pars. Mar. Ins., 47.

It may be intended for whoever has an insurable interest. It will then apply to the interest of one subsequently ascertained to have an insurable interest, who adopts it. Duncan v. Sun Ins. Co., 12 La. Ann., 486.

Ratification may be presumed where it is for party's benefit. Flemming v. Mar. Ins. Co., 4 Whart., 59; S. C., 33 Am. Dec., 33.

Ratification may be after loss. DeBolle v. Penna. Ins. Co., 4 Whart., 68; S. C., 33 Am. Dec., 38; Finney

See 8 Otto.

need not also allege or prove that he was interested at the time of effecting the policy.

3. Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and the contract yet be valid.

4. Where the insurers had paid the loss and sought to recover it back, the burden is upon them to show that the assured had no insurable interest.

5. Where an agent of the assured received the money and paid it over to his principals, the insurers cannot recover it from him, but must look to the principals.

[No. 170.]

Argued Mar. 4, 1879. Decided Mar. 17, 1879.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The case, which arose in the court below, is fully stated by the court.

Messrs. I. Nevett Steele and Thomas W. Hall, for plaintiff in error.

Messrs. Stewart Brown and Arthur Geo. Brune, for defendants in error.

Mr. Justice Swayne delivered the opinion of the court:

The record presents the following state of facts and there is no controversy about them. The British steamer *Carolina* came to Baltimore, consigned to James Hooper & Co. They were also her agents while she remained in that port. The plaintiff in error was a member of the firm. Having taken on board her return cargo, the steamer proceeded on her homeward voyage. While in the Chesapeake Bay she was injured by a collision with another vessel, and put back to Baltimore for repairs. She was repaired, and Hooper & Co. paid all the bills and made other disbursements for her. McGarr, the captain, drew on Good Brothers & Co., of Hull, England, for the amount in favor of Hooper & Co., and at the same time directed them to protect the drawees by insurance, which was intended to be done by the policy here in question. The draft bore date October 20, 1872; was for £1,611 18s. 7d.; was payable in London thirty days after sight; and directed that the amount should be charged

v. Fairbank Ins. Co., 5 Met., 192; S. C., 38 Am. Dec. 397; Finney v. Bedford Com. Ins. Co., 8 Met., 350; Howard F. Ins. Co. v. Chase, 72 U. S., XVIII., 524; Oliver v. Mut. Com. M. Ins. Co., 2 Curt., C. C., 296.

Suit may be maintained on such a policy in the name of the party effecting the policy, or of the party for whose benefit it was intended. Sleeper v. Union Ins. Co., 65 Me., 385; S. C., 20 Am. Rep., 706; Barnes v. Union M. F. Ins. Co., 45 N. H., 21; Ballard v. Merch. Ins. Co., 9 La., 258; S. C., 29 Am. Dec., 444; Burrows v. Turner, 24 Wend., 276; S. C., 35 Am. Dec., 622.

Interest at time of loss is all that is required to entitle one to recover on a policy issued and payable to plaintiff, "for whom it may concern." Martin v. Fishing Ins. Co., 20 Pick., 389; S. C., 32 Am. Dec., 220.

Party authorized to insure "for whom it may concern," may sue for whole loss in his own name and make an abandonment of the whole interest insured, in the absence of dissent. Hamilton v. Phoenix Ins. Co., 106 Mass., 398; Reynolds v. Ocean Ins. Co., 22 Pick., 191; S. C., 33 Am. Dec., 727; Burrows v. Turner, 24 Wend., 276; S. C., 35 Am. Dec., 622.

A blank in a policy for the name of the party for whose benefit insurance is effected, is equivalent to an insertion of the words "for whom it may concern." Lane v. Col. Ins. Co., 2 Code Rep., 65; Burrows v. Turner, 24 Wend., 276; S. C., 35 Am. Dec., 622.

Extrinsic evidence is admissible to prove for whose benefit the insurance was effected, where that fact does not appear from the face of the policy. Lee v. Adsit, 37 N. Y., 97; Clinton v. Hope Ins. Co., 45 N. Y., 461; Pitney v. Glens Falls Ins. Co., 65 N. Y., 14.

"To account for advances for repairs and disbursements of steamship Carolina and her freight, to enable the ship to proceed on her voyage."

The policy of insurance was dated on the 26th of October, 1872, and was to "James Hooper & Co., on account of whom it may concern, in case of loss to be paid to their order." The insurance was "lost or not lost, * * * on merchandise, to cover such risks as are approved and indorsed on the policy." The indorsement set forth the date of the insurance, the name of the vessel, the course of the voyage, the rate of the premium, the amount insured (\$8,000), and the remark, "Paid advance to cover disbursements and repairs." The names of the agents of the underwriters were affixed. The instrument was a cargo policy. No inquiry was made of Hooper as to whom he was insuring for, and no representation was made by him except as is disclosed in the memorandum indorsed upon the policy. The draft of McGarr was bought by Brown & Sons, bankers, of Baltimore. They transmitted it to their correspondents in London. On the 11th of November, 1872, it was accepted by Good Brothers & Co., and on the 14th of December following they paid it. On the 14th of November, 1872, the steamer foundered at sea. On the 28th of that month notice of the loss was given to the underwriters. On the 6th of December, in answer to a call for proof of loss and interest, Hooper & Co. furnished the Baltimore agent of the underwriters with the protest and a full account of the items of "outfit and disbursements of the British steamer Carolina." In the statement was the charge, "To cash paid insurance on advances \$117.33." On the 15th of January, 1873, the agent in Baltimore drew on the defendants in error, his principals in New York, for \$8,012, at five days' sight. The draft was paid on the 24th of that month, and on the 31st Hooper & Co. remitted the amount to Good Brothers & Co. in England. When Hooper & Co. received the draft of the 15th of January, they gave a receipt setting forth that when the draft was paid it would be "In full for claim for total loss of advancements for disbursements and repairs per steamer Carolina, * * * insured 26th October, 1872, under policy No. 22,706." The receipt concluded with a promise, upon the payment of the draft, "To assign all our right, title and interest in the above advances for disbursements and repairs to the underwriters." Hooper said at the time to the agent "that he had nothing to assign." On the 10th of February, 1873, Hooper & Co. executed the promised assignment, which was a printed form filled up by the agent, "such as is taken in all cases of abandonment for total loss." Hooper then again told the agent "That he had no interest in the matter, but as it was customary, he would sign the paper."

During all these transactions Hooper & Co. were not asked whether they had insured for themselves or for others; whether they had been or expected to be repaid their disbursements; whether anyone else was interested in the policy, or for whom they were collecting the insurance. More than a month after the loss had been paid and the money remitted to England, a marine adjuster came from New York to Baltimore "To ascertain who owed Mr. Hooper for advances." A full disclosure was thereupon made

by Hooper. The adjuster suggested to him "To write his friends on the other side to return the money." Hooper asked if the underwriters did not get the premium for insurance, and if the vessel was not lost. Being answered in the affirmative, he said he "Would not have the face to write to the parties to return the money." No offer has been made to return to Hooper & Co., or to Good Brothers & Co., the premium for insurance. This suit was brought on the 30th of October, 1873, more than nine months after the loss was paid and the money remitted to Good Brothers & Co., and more than seven months after Hooper's disclosure to the adjuster.

When the testimony was closed on both sides in the court below, the defendant, Hooper, asked the court to charge the jury, in effect, that if they believed the advances and the insurance were made; that the draft on Good Brothers & Co. was drawn, accepted and paid; that the steamer was lost; proof of loss and payment demanded; that Hooper then furnished the plaintiffs with the account of his disbursements; that the plaintiffs thereupon paid him and took the assignment without having made any inquiry as to whether he was collecting for himself or for others, and that within a few days thereafter he remitted the money to Good Brothers & Co., all as stated in the evidence, the plaintiffs were not entitled to recover. This instruction the court refused to give, and instructed, in substance, that if the jury believed that when Hooper made his claim for indemnity under the policy he produced the account and subsequently gave the receipt and executed the assignment, and that when he received payment and delivered the assignment he had received notice of the payment of the draft upon Good Brothers & Co., given to him to recover his advances, which fact he did not communicate to the underwriters, then the plaintiffs were entitled to recover the amount of the insurance money which he had received. Hooper excepted to the refusal to instruct and to the instruction given. The jury found for the plaintiff, and judgment was entered accordingly. The defendant has brought the case here for review, and is the plaintiff in error in this court.

As the facts of which the instruction given was predicated were all indisputable and undisputed, that instruction was equivalent to a direction to find for the plaintiffs. The same remarks apply *mutatis mutandis* to the instruction asked by the defendant. The case, then, resolves itself into this: Were the plaintiffs entitled to recover upon the case as presented in the record?

A policy like the one here in question, in the name of a specified party, "on account of whom it may concern," or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. 1 Phil. Ins., sec. 383.

This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Phil. Ins., sec. 384.

One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place,

though the loss may have happened before the insurance was made. Phil. Ins., sec. 388.

The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient.

"It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkin, Arnould, 238.

This is consistent with reason and justice, and is supported by analogies of the law in other cases. We will name a few of them.

A deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration. A devise to a charitable use may be made to a grantee not *in esse*, and vest and take effect when the grantee shall exist. The doctrine of springing and shifting uses is familiar to every real property lawyer. They always depend for their efficacy upon events occurring subsequently to the conveyance under which they arise.

Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it.

It has been held where a vessel was insured for a stated time, was sold and transferred, and was repurchased and transferred back within that time, the insurance was suspended while the title was out of the insured, "And was revived again on the reconveyance of the insured during the term specified in the policy." *Worthington v. Bearse*, 12 Allen, 382.

A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. *Lucena v. Crawford*, 3 Bos. & P., 75; *S. C.*, 5 Bos. & P., 269; *Buck v. Ins. Co.*, 1 Pet., 151; *Hancox v. Ins. Co.*, 3 Sumn., 132.

In the law of marine insurance, insurable interests are multifarious and very numerous.

The agent, factor, bailee, carrier, trustee, consignee, mortgagee and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification.

Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.

Where money is advanced, as in this case, for repairs and supplies to enable a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. *Ins. Co. v. Baring*, 20 Wall., 163 [87 U. S., XXII., 252], and the authorities there cited. If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo, not being the

owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly. *Clark v. Mauran*, 3 Paige, 373; *Dows v. Greene*, 24 N. Y., 638; *Holbrook v. Wight*, 24 Wend., 169. The assignment of a bill of lading passes the legal title to the goods. *Chandler v. Belden*, 18 Johns., 157. The assignment of a debt, *ipso facto*, carries with it a lien and all other securities held by the assignor for the discharge of such debt. *The Hull of a New Ship*, 2 Ware [Davies], 203; *Pattison v. Hull*, 9 Cow., 747; *Langdon v. Buel*, 9 Wend., 80.

Where a lien subsists either on the vessel or cargo, a third party may pay the debt, and, with the consent of the debtor and creditor, be substituted to all the rights of the latter. *Dixon on Subrogation*, 163; *Garrison v. Ins. Co.*, 19 How., 312 [60 U. S., XV., 656]; *The Cabot*, 1 Abb. Adm., 150. Where there is neither an agreement nor an assignment, there can be no subrogation, unless there has been a compulsory payment by the party claiming to be substituted. *Sanford v. McLean*, 3 Paige, 117.

Recurring to the facts, there are two points upon which we deem it proper particularly to remark:

First. We find no ground for any imputation of bad faith upon Hooper. We think there was no indirection and no purpose of concealment on his part. Before the insurance was effected, the underwriters had a clear right, if they so desired, to know for whom they were asked to insure. *Buck v. Ins. Co.* [*supra*]. They made no inquiry. This excused Hooper from making any communication upon the subject. When the insurance money was paid, although the face of the policy and other facts, patent and notorious, which must have been known to the underwriters, showed clearly that the advances were made, and that the insurance was effected by Hooper, not for himself, but for others, the underwriters were again silent. The draft on Good Brothers & Co. had then been sold, and Hooper had received the money. Thereafter he had nothing at stake but the solvency of the drawees. When the adjuster, more than a month later, made the inquiry, which should have been made before, Hooper had paid over the money. He then made a frank and full disclosure. We see no reason to doubt that if the inquiry had been made earlier it would have been answered in the same way. In this respect the underwriters have themselves to blame rather than Hooper. The record discloses no ground upon which, *ex equo et bono*, he can be called upon to pay back the fund in controversy.

Second. It does not appear in the record to whom the vessel and cargo belonged. There is not a ray of light upon the subject. In that respect the case is left wholly in the dark.

The proof as to who were intended to be insured is that they were Good Brothers & Co., and no one else, though, according to the terms of the policy, payment in the event of loss was to be made to Hooper & Co. The former fact is established by the testimony of Hooper, and there is none other upon the subject. He is unimpeached and his testimony is conclusive. The inquiry then arises, whether Good Brothers

& Co. had any insurable interest in the cargo. It does not appear whether they had or had not. We have suggested several ways in which such an interest may have arisen, and have shown that under the policy in question it would have been sufficient if it had subsisted at any time before the loss was known to them. It may possibly have arisen in other modes. This brings us to the question of the burden of proof. Did it rest upon the plaintiffs or upon the defendant? In order to maintain the plaintiff's case it was necessary to be made to appear that Good Brothers & Co., the assured, *had no insurable interest* in the cargo, the cargo being the thing insured. Upon both reason and authority, we think the *onus probandi* was upon the plaintiffs.

It was for them to make out their case. The premium had been paid, the loss had occurred and the indemnity money had been received by the agents of the assured and paid over to their principals. The plaintiffs claim the right to go behind all this, and to reclaim from Hooper the fund thus received and parted with. It was incumbent upon them to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves. For authorities upon this subject see 1 Greenl. Ev., secs. 34, 35, 80, 81, and the *notes*. Such is the legal result, notwithstanding the negative form of the averment, to be established.

But suppose the case were made out as against Good Brothers & Co., and that a recovery could be had if the action were against them, still it by no means follows that the plaintiff in error was liable.

There was laches on the part of the underwriters, or their agents, which is the same thing. Nothing in the record is clearer than that Hooper received the money as the agent of the assured. It was his duty immediately to advise his principals and promptly to pay them. 1 Waite, Act. and Def., 252, 255. This latter duty it appears he performed. He had then received no notice of the adverse claim subsequently made, and had no reason to expect it. His parting with the money is proof of his sincerity and honesty.

Under all the circumstances, we think he is entitled to the benefit of the principle which, in such cases, gives immunity to the agent, and refers the party complaining for satisfaction to the principals who have received and hold the money.

There was error in the instruction given by the court to the jury.

The counsel on neither side referred to the state of the pleadings. We have, therefore, not adverted to that subject, but have considered the case as it was argued, entirely upon the merits.

The judgment of the Circuit Court is reversed, and the case will be remanded for further proceedings in conformity to this opinion.

Cited—16 Vroom., 549; 46 Am. Rep., 796.

THE ST. LOUIS IRON MOUNTAIN AND
SOUTHERN RAILWAY COMPANY, *Pff.*
in Err.,

v.

JOHN H. LOFTIN.

(See S. C., 8 Otto, 559-565.)

Charter exemption from taxation—presumption.

1. The charter of the Cairo and Fulton Railroad Company, which forever exempts from taxation the capital stock and dividends of the company, does not carry with it an exemption of the lands, granted by Congress to the State by the Act of Feb. 9, 1853, and transferred by the State to such company, so long as they remain unsold.

2. Exemptions from taxation are never presumed. On the contrary, the presumptions are always the other way.

[No. 173.]

Submitted Mar. 5, 1879. Decided Mar. 24, 1879.

IN ERROR to the Supreme Court of the State of Arkansas.

The case arose in the Circuit Court of Jackson Co., Ark., upon a bill to restrain the collection of certain taxes. A decree was entered dismissing the bill, which the Supreme Court of the State affirmed upon appeal; whereupon the complainant sued out this writ of error.

Mr. U. M. Rose, for plaintiff in error:

In the case of *Baltimore v. R. R. Co.*, 6 Gill, 288, the statute declared that the shares of the capital stock of the Company should be considered as personal property, and exempt from the imposition of any tax or burden, and the court held that the specific property of the Company was exempt.

To the same effect, see *R. R. Co. v. Mayor*, 14 Ga., 275; *Augusta v. R. R. Co.*, 26 Ga., 661.

In *New Haven v. Bk.*, 31 Conn., 106, the same question being presented, the court said: "That question is whether the promised exemption, which confessedly covers the intangible ideal rights, called shares, in the hands of the stockholders, covers also the property—real and personal—in which the whole value of those shares consists; whether it is possible to impose a tax upon the latter without having the entire burden of imposition fall upon the former; and if it is not, whether the construction contended for by the town can be the true construction of the grant; and, for the purposes of this question, we can see no difference between the real and personal property held by the corporation. The shares of the capital stock cover and include them both."

A similar decision was made in *R. R. Co. v. Shacklett*, 30 Mo., 551.

Richmond v. R. R. Co., 21 Gratt., 604; *Bk. v. Brackenridge*, 7 Blackf., 395; *State v. Hood*, 15 Rich. Law., 177.

To the same purpose, see, also, *Osborn v. R. R. Co.*, 40 Conn., 491, and *State v. Haight*, 34 N. J. Law, 319.

These cases only lay down and illustrate the same principle declared by this court in *Farrington v. Tenn.*, 95 U. S., 679 (XXIV., 558).

This court, in *Murray v. Charleston*, 96 U. S., 448 (XXIV., 764) said: "There is no more important provision of the Federal Constitution than the one which prohibits States from passing laws impairing the obligations of contracts; and it is one of the highest duties of this court to take care that the prohibition shall neither be evaded nor frittered away."

Mr. A. H. Garland, for defendant in error:

The term "capital stock" in an Act of incorporation, means the amount contributed or advanced by the stockholders, as members of the same, and does not refer to the property thereof.

State v. Morristown F. Asso., 3 Zab., 195; *State v. Newark*, 2 Dutch. (N. J.), 519; *Ia. Homestead Co. v. Webster Co.*, 21 Ia., 221, 235; *R. R. Co. v. Lincoln Co.*, 1 Dill., 314; *R. R. Co. v. Berks Co.*, 6 Pa., 70; *State v. Newark*, 1 Dutch. (N. J.), 315; *R. R. Co. v. Burlington*, 28 Vt., 193.

The attention of the court is here called to the *Delaware R. R. Tax Case*, 18 Wall., 206 (85 U. S., XXI., 888), for the rule of construction, that before any such exemption can be admitted, "The intent of the Legislature to confer the immunity must be clear, beyond a reasonable doubt."

See, also, to the same effect, the *R. R. Co. v. Pa.*, 21 Wall., 492 (88 U. S., XXII., 595); *Bailey v. Magwire*, 22 Wall., 215 (89 U. S., XXII., 850); *Tucker v. Ferguson*, 22 Wall., 527 (89 U. S., XXII., 805); *Turnpike Co. v. Ill.*, 96 U. S., 68, 69 (XXIV., 633); and especially is it true, that the right to tax is never deemed to be surrendered, except upon the clearest and most explicit language.

Was the grant of immunity, if any, to be held ever ready to be tacked on to anything the Company might acquire, it mattered not how, or for what purpose?

That the two and a half *per centum* mentioned in section 13 of the Act of 1856, is not in lieu of other taxes, see *R. R. Co. v. Louisville*, 4 Bush., 479; *Delaware R. R. Tax Case*, (*supra*); *R. R. Co. v. Pa.*, (*supra*); *Bk. v. Com.*, 10 Pa. St., 449.

Though exempted from state taxes, the counties, cities and towns may, nevertheless, tax, unless the exemption is broad enough to cover exemption from all.

St. Jo. v. R. R. Co., 39 Mo., 476; *R. R. Co. v. Dulle*, 48 Mo., 282; *R. R. Co. v. Alexandria*, 17 Gratt., 176.

Mr. Chief Justice Waite delivered the opinion of the court:

The Cairo and Fulton Railroad Company was incorporated by the General Assembly of the State of Arkansas, January 12, 1853, to construct a railroad from the Mississippi River opposite the mouth of the Ohio, in Missouri, by way of Little Rock, Arkansas to the Texas State line. The capital stock was fixed at \$1,500,000, with power of increase, divided into shares of \$25 each, to be held as personal property. The Board of Directors named in the Act were authorized to open books of subscription to the stock, and the directors for the time being had power to require the payment of the sums subscribed in such manner and on such terms as they deemed proper. Sections 11 and 13 are as follows:

"Section 11. That the capital stock and dividends of said Company shall be forever exempt from taxation. The road, fixtures and appurtenances shall be exempt from taxation until after it pays an interest of not less than ten per cent. per annum."

"Section 13. This Act shall be deemed a public Act, and shall be favorably construed for all purposes therein expressed, and declared in all courts and places whatsoever, and shall be in force from and after its passage: *Provided*, That all the rights, privileges, immunities and franchises contained in the charter, granted at

See 8 Otto,

this session of the Legislature of this State to 'The Mississippi Valley Railroad Company,' and not restricting or inconsistent with this Act, are hereby extended to, and shall form a part of, this incorporation as fully as if the same was inserted herein." Acts of 1853-54, p. 176.

Section 25 of the Act to incorporate the Mississippi Valley Company is as follows:

"Section 25. That the capital stock of said Company, with all the immunities and franchises herein specified, and all machines, cars, engines or carriages belonging to said Company, together with all their works and property, and all profits which shall arise from the same, shall be vested in the respective stockholders of the Company forever, in proportion to their respective shares; and the capital stock of said Company and the dividends shall be exempted from taxation until a dividend of six per cent. is realized upon the capital stock; and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempted from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be levied on said road or its fixtures which will reduce the dividends below ten per cent. per annum. Said stockholders shall not be bound or liable for any greater amount than the respective shares of stock which they or either of them own." Acts 1853-54, p. 181.

On the 9th of February, 1853, Congress made a grant of lands to the State of Arkansas to aid in the construction of the Cairo and Fulton road, 10 Stat. at L., 155, 156, and on the 16th of January, 1855, the State transferred the grant to the Corporation. Section two of the statute of the State making this transfer is as follows:

"Section 2. That after the expiration of twenty years from the date of the completion of the said Cairo and Fulton Railroad from the Missouri line to the Texas boundary line to the point where said road shall cross Red River, near Fulton, said Company shall pay into the State Treasury an annual tax upon the road, fixtures, lands, tenements and houses equal to that paid upon other taxable property in this State, for the time being, and for the purposes of taxation the road, fixtures, lands, tenements and houses shall be considered separate and distinct from the capital stock, whether all the capital stock shall be expended in building said road, fixtures, houses, tenements or not, and the capital stock shall be exempt from taxation, as provided for in the 11th section of said Cairo and Fulton railroad charter, approved the 12th of January, 1853." Acts 1854-55, p. 150.

This Act was amended November 26, 1856, and this particular provision repealed, but section 9 of the amended Act is as follows:

"Section 9. That after said Cairo and Fulton Railroad shall have been completed, and shall have declared a dividend of ten per cent. per annum upon the capital stock of said Company, then, and in that event, said Cairo and Fulton Railroad Company shall pay into the State Treasury two and one half per cent. upon their net proceeds annually." Acts 1856-57, p. 7.

The road was not completed until January 15, 1874, and no dividend has ever been declared upon the stock of the Company. The total quantity of lands included in the grant was about

1,400,000 acres. Only about \$300,000 of capital stock was ever paid in, and the road, which cost about \$11,000,000, was built with money borrowed upon bonds and otherwise.

On the 8th of April, 1869, the General Assembly passed an Act requiring each railroad company in the State, on or before the first day of January in each year, to furnish the Auditor of Public Accounts a full list of all lands acquired by grant, donation or subscription in aid of the construction of its road, but provided that such lands should not be listed or subject to taxation until conveyed to actual purchasers. Acts of 1868-69 p. 131. The Cairo and Fulton Company made its returns in accordance with the requirements of this Act. On the 30th of November, 1875, another Act was passed, as follows:

"Section 1. That the assessor in the different counties of this State shall, at the time he assesses the personal property in his county, in the year one thousand eight hundred and seventy-five, assess and place on the tax-book of his county, under the same rule and restrictions as is required in assessing lands in this State, all the lands in his county heretofore donated, granted, or given to any railroad or railroad corporation, when the title to the lands has passed from the United States Government, and such lands shall thereafter be assessed and taxed as other lands in this State.

Section 2. That all laws and parts of laws in conflict with this Act be and the same are hereby repealed, and this Act take effect and be in force from and after its passage." Acts 1875-76, p. 29.

The Cairo and Fulton Company has been consolidated, pursuant to laws of Arkansas and Missouri, with the St. Louis and Iron Mountain Railroad Company, under the name of the St. Louis, Iron Mountain and Southern Railway Company, the plaintiff in this action. The lands granted to the Cairo and Fulton Company passed by the consolidation to the consolidated Company.

The unsold lands were assessed for taxation under the law of 1875, and the consolidated Company filed its bill in equity in the state court to restrain the collection, on the ground that the Act under which the assessment was made impaired the obligation of the contract of exemption contained in the charter of the Cairo and Fulton Company. The Supreme Court of the State, upon appeal, decided otherwise, and affirmed the decree of the court below, dismissing the bill. To reverse this decree of the Supreme Court, the present writ of error has been brought.

The principal question in this case is, whether the 11th section of the charter of the Cairo and Fulton Railroad Company, which exempts forever from taxation the capital stock and dividends of the Company, carries with it an exemption of the lands in question so long as they remain unsold. We had occasion at the present term, in the case of the *R. R. Co. v. Gaines* not yet reported [97 U.S., 697, XXIV., 1091], to construe an exemption clause in a railroad charter almost in the exact language of that now under consideration; and while conceding that ordinarily an exemption of the capital stock is equivalent to an exemption of the property into

which the capital has been converted, unless a contrary intention is in some way manifested, we held that as the railroad, with its fixtures and appurtenances, was only exempted from taxation for twenty years, and the capital stock was exempted for ever, it was clear that the road and fixtures could not represent the capital for the purposes of taxation. The 25th section of the Mississippi Valley charter, even if it was incorporated with that of the Cairo and Fulton Company, of which there may be doubt, does not materially change the effect of the 11th section. It vests the capital stock and property of the Company in the stockholders in proportion to their respective shares, but that is far from making the stock and the property identical for the purposes of taxation. Indeed, taking the whole section together, it is apparent that there was in the case of that Company the same intention to separate the taxation of the stock from that of the property as is found in the Cairo and Fulton charter.

But when the land grant was made, the intention not to include the lands granted in the exemption of the stock is still more manifest; for it is there expressly provided that the "road, fixtures, lands, tenements and houses shall be considered separate and distinct from the capital stock," and while the original exemption of stock was continued, the lands, etc., were to be taxed after twenty years from the date of the completion of the road. It is quite true that this provision of the granting Act was afterwards repealed, and a different mode of taxation adopted but there is nowhere in the repealing Act any intention shown of converting the lands into capital stock, and without some express declaration to that effect, no such conversion will be presumed. The lands were used in lieu of capital. They were given in aid of the construction of the road, and to that extent relieved the Company from the necessity of raising money through stock subscriptions; but it would be unreasonable to hold that, because they rendered stock to some extent unnecessary, they were on that account stock itself. Exemptions from taxation are never presumed. On the contrary, the presumptions are always the other way: and as in this case the capital stock is alone exempt, the property of the company is not to be included in the exemption, unless it manifestly represents the stock, within the meaning of that term as used by the Legislature in the particular Act to be construed. As we said in the case of *R. R. Co. v. Gaines* [supra], whenever property is exempted by reason of the exemption of capital stock, it is because, taking the whole charter together, such appears to have been the intention of the Legislature.

On the whole, we are clearly of the opinion that the lands in question are not included in the exemptions of the original charter. None of the other statutes set out in the bill amount to a limitation of the power of future Legislatures in respect to the taxation of the property. They are in no sense contracts, and are not, therefore, irrepealable. *Tucker v. Ferguson*, 22 Wall., 527 [89 U. S., XXII., 805].

UNITED STATES, *ex rel.* MORRIS RANGER,
Plff. in Err.,

v.

CITY OF NEW ORLEANS.

(See S. C., 8 Otto, 381-398.)

Power of taxation—municipal corporation—levying tax—judgment against city—security—mandamus.

1. The power of taxation belongs exclusively to the legislative branch of the Government, but may be delegated by the Legislature to municipal corporations.

2. When a municipal corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited.

3. When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment accompanies it, without any special mention that such power is granted.

4. Where the indebtedness of a city is conclusively established by judgments recovered against it, the payment of the judgments is not restricted to any species of property or revenues, or subject to any conditions.

5. Where the indebtedness is upon bonds, which are secured by a pledge of stocks, the bond holder is not compelled to look to the security, but may proceed directly against the city without regard to it.

6. Having a power to levy a tax for the payment of the judgments, it is the duty of the city, through its authorities, to exercise the power. Neglect of this duty, makes the case one in which a *mandamus* should be issued to enforce its performance.

[No. 150.]

Argued Jan. 28, 29, 1879. Decided Mar. 31, 1879.

ERROR to the Circuit Court of the United States for the District of Louisiana.

This case, like each of the three hereto appended, which were argued and decided with it, arose in the court below upon a petition for a writ of *mandamus*.

The case is stated by the court.

Messrs. **D. C. Labatt, Aroni & Clinton**, and **E. B. Smith**, for plaintiff in error.

Messrs. **B. F. Jonas** and **Henry C. Miller**, for defendant in error.

In no case in this court, it is believed, has a writ of *mandamus* issued, in the absence of express legislation authorizing the imposition of the taxes. In the leading case of *Von Hoffman v. Quincy*, 4 Wall., 535 (71 U. S., XVIII., 403), it is settled that when a statute has authorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, the power of taxation thus given is a contract; and in that case, the statute providing for the tax, the *mandamus* issued.

See, also, *Supervisors v. U. S.*, 4 Wall., 435 (71 U. S., XVIII., 419); *Riggs v. Johnson Co.*, 6 Wall., 166 (73 U. S., XVIII., 768); *Galena v. Amy*, 5 Wall., 705 (72 U. S., XVIII., 560).

Mr. Justice **Field** delivered the opinion of the court:

This was an application for a writ of *mandamus* to compel the City of New Orleans to pay certain judgments. The petition of the relator which was presented in April, 1876, alleges that he had recovered three judgments in the Circuit Court of the United States against the City for an amount exceeding in the aggregate \$59,000; that they were recovered on bonds and coupons of the City issued under the provisions of Acts See 8 OTTO.

U. S., Book 25.

of the Legislature of Louisiana, passed on the 15th of March, 1854, and designated as Nos. 108 and 109; that executions had been issued upon the judgments and returned unsatisfied; and that there was no property belonging to the City subject to seizure thereon.

It also alleges that in June, 1870, the City had sold eighty thousand shares of stock of the New Orleans, Jackson and Great Northern Railroad Company, which it held, for the sum of \$320,000, and that by the Act No. 109, of 1854, these shares were forever pledged for the payment of the bonds issued under its provisions; that the City should, therefore, be compelled to pay out of their proceeds so much of the judgments as appears on the face of the records to have been rendered upon the bonds; or, in case their payment cannot be enforced in this way, that it should be compelled to levy and collect a tax for that purpose, and also a tax to pay so much of the judgments as was rendered upon bonds and coupons issued under the Act No. 108, of 1854; but that the mayor and administrators, who represent and exercise the powers of the City, refuse to pay the judgments out of any funds in their possession or under their control, or to levy a tax for their payment. The relator, therefore, prays the court to order them to show cause why a writ of *mandamus* should not be issued compelling them to apply the proceeds and to levy a tax as mentioned.

The order to show cause was accordingly issued; and the city authorities appeared and filed an answer to the petition, in which they admitted the recovery of a judgment by the relator—speaking of the three judgments as one—the issue of executions thereon, and their return unsatisfied, the sale of the eighty thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company for \$320,000, and the receipt of the money by their predecessors; and set up as a defense to the prayer of the petition that the judgment was recovered upon certain bonds issued by the City to that company under the Act of March 15, 1854, No. 109—making no mention of the Act No. 108—that no tax for the payment of the principal of the bonds is directed to be levied by that Act or any other Act of the Legislature; that, as respects the interest on the bonds, provision is made for its payment out of the back taxes due to the City, and inserted in its budget for 1876; and that the proceeds arising from the sale of the stock of the railroad company are not in the treasury of the City or under their control, having been used and expended by their predecessors. They, therefore, prayed that the petition be dismissed.

The relator demurred to this answer. The court overruled the demurrer and refused the writ; and from its judgment the case is brought to this court.

The Judge of the Circuit Court accompanied the judgment with an opinion giving the reasons of his decision, which were substantially those stated in the answer; that the statute authorizing the issue of the bonds, upon which the judgments were recovered, made no provision for levying a tax to pay the principal, but intended that it should be paid out of the stock of the railroad company and its revenues; and that the proceeds from the sale of the stock had been already expended by the predecessors of the

the present city authorities. The court, adopting the view of the city authorities as to the construction of the statute and the supposed intention of the Legislature, proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the Legislature, and that the issuing of a *mandamus* to apply the proceeds received from the sale of the stock would be a futile proceeding, they having been previously used for other purposes. A writ, said the court, could not issue commanding the performance of an admitted impossibility.

The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the Legislature to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets; the construction of sidewalks, sewers and drains; the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation. "It is, therefore, to be inferred," as observed by this court

in *Loan Asso. v. Topeka*, 20 Wall., 660 [87 U. S., XXII., 460], "that when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

The doctrine here stated is asserted by the Supreme Court of Pennsylvania in *Com. v. Comrs. of Allegheny Co.*, 37 Pa., 277. That county was authorized by an Act of the Legislature to subscribe to the capital stock of a railroad company, and to issue its bonds in payment thereof. The interest on them being unpaid, a writ of *mandamus* was applied for to compel the commissioners of the county to make provision to pay it. The return of the officers set up, among other objections to the writ, that the Act authorizing the subscription and issue of the bonds provided no means of payment, either of the principal or interest. To this defense the court said: "The Act of 1843 authorized subscriptions by certain counties to be made as 'fully as any individual could do,' without prescribing more precisely the terms. But by the 5th section of the Act of April 18, 1843, counties subscribing are authorized to borrow money to pay for such subscriptions. We have decided that bonds or certificates of loan issued by a municipal corporation is an ordinary and appropriate mode of borrowing money, and the Act of 1853 expressly authorized the issue of such securities. The subscriptions were accordingly made, and the bonds issued. Thus was a lawful debt incurred by the county; and as no other than the ordinary mode of extinguishing it or of paying the interest thereon was provided, it follows of course, that the ordinary mode of raising the means must be resorted to, namely: to provide for it in the annual assessment of taxes for county purposes." Again; in the same case, the court said: "In the next place, it is averred that there is no authority to levy a tax for the payment of the interest by the county. We have already treated of this, and said that the authority to create the debt implies an obligation to pay it; and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way: by the levy and collection of taxes."

In numerous cases, similar language is found in opinions of the state courts, not required, perhaps, to decide the point in judgment therein, but showing a recognition of the doctrine stated. Thus, in *Lowell v. Boston*, 111 Mass., 460, the Supreme Court of Massachusetts, in speaking of bonds which the Legislature had authorized the City of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: "The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." To the same purport is the language of the Supreme Court of Wisconsin, in

Hasbrouck v. Milwaukee, 25 Wis., 122. And in the recent case of *Ex parte Parsons*, in the United States Circuit Court, the *Chief Justice* gave emphatic affirmation to the doctrine. 1 Hughes, 282. Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the Legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it.

In the present case, the indebtedness of the City of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed.

If the question were an open one, our conclusion would be the same. The Act of 1854 provided that the railroad company should issue to the City certificates of stock for an amount equal to the amount of bonds received; and that the stock should remain "forever pledged for the redemption of said bonds." It is plain that this language was intended only to create a statutory pledge by way of collateral security for the payment of the bonds. It does not import that the holders of the bonds were to be thereby precluded from looking to the City, or that they were obliged to have recourse, in the first instance, to the pledge. The City, by the terms of the bonds, was primarily liable; and nothing in the language of the Act in any respect affects this primary liability. The bond holder is not compelled to look to the security, but may proceed directly against the City without regard to it. Besides, as was justly observed by counsel, if we could seek the intention of the Legislature from other considerations than the words of the statute, it would be still plainer that no such construction could be given to its language. The object of issuing the bonds for the stock was to aid the company in obtaining funds to build its road. If the stock had been available, the bonds would not have been needed; the stock would have been sold. But it was not available; and it is difficult to believe that the bonds would have been any more so, if their payment had been limited to the revenues and proceeds of the stock. The proposal of such a scheme for raising money would not have indicated much wisdom on the part of the Legislature; to have assented to it would have indicated less on the part of the bond holders. And even if the bond holders had been required to look for payment of the bonds only to the revenues and proceeds of the stock, See 8 OTTO.

it comes with bad grace from the City, not to say evinces an insensibility to its obligations, to allege exemption from liability after its authorities have sold the stock and diverted the proceeds to other uses.

This construction is not affected, as contended by counsel, by the Statutes of 1852 and 1853, restraining cities and towns from creating any indebtedness without providing at the same time for the payment of the principal and interest. Those statutes were not limitations on the power of the Legislature to authorize the creation of debts by cities upon other conditions. It does not follow that because it was deemed expedient, as a general rule, to prohibit cities and towns from incurring debts on their own motion, without making provision for their payment, that the Legislature might not authorize the incurring of a particular obligation without such provision. And it will be found, upon examination, that the Act of 1854 prescribed the details of the ordinance which should be passed by the City in the execution of the authority conferred and that the ordinance passed conformed to them. *Butz v. Muscatine*, 8 Wall, 575 [75 U. S., XIX., 490]; *Amey v. Allegheny*, 24 How., 364 [65 U. S., XVI., 614]; *Com. v. Pittsburg*, 34 Pa., 496; *Com. v. Comrs.*, 40 Pa., 348; *Com. v. Perkins*, 43 Pa., 400; *Fosdick v. Perryburg*, 14 Ohio St., 472.

There is nothing, therefore, in the positions of counsel to impair the validity of the bonds upon which the judgments were recovered, if we were at liberty to consider them on this application. But, as already said, the judgments are conclusive upon this point. Owing the debt, the City has the power to levy a tax for its payment. By its charter, in force when the bonds were issued, it was invested, in express terms, "With all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same."

As already said, the power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the Legislature empowers the corporation to do is presumably for its benefit, and may, in "the proper government of the same," be done. Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the City, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a *mandamus* should have been issued to enforce its performance. *Knox Co. v. Aspinwall*, 24 How., 376 [65 U. S., XVI., 735]; *Von Hoffman v. Quincy*, 4 Wall., 535 [71 U. S., XVIII., 403]; *Benbow v. Iowa City*, 7 Wall., 313 [74 U. S., XX., 79]; *Supervisors v. Rogers*, 7 Wall., 175 [74 U. S., XIX., 162]; *The Supervisors v. Durant*, 9 Wall., 415 [76 U. S., XIX., 732]; *Cass Co. v. Johnston*, 95 U. S., 360 [XXIV., 416].

The judgment of the court below must, therefore, be reversed and the cause remanded, with directions to issue the writ as prayed in the petition of the relator; and it is so ordered.

Cited—103 U. S., 360; 105 U. S., 736.

NOTE.—U. S., *ex rel.*, PARSONS, *Plff. in Err.*, v. NEW ORLEANS, No. 151, argued at the same time with

No. 150, by W. B. Hornblower and D. H. Chamberlain, for Plff. in Err.

This case is similar in all essential particulars to that of the *United States, ex rel., Morris Ranger, v. The City of New Orleans*; and, upon the authority of the decision therein, the judgment below must be reversed, and the cause remanded with directions to issue a writ of *mandamus* to levy and collect a tax as prayed by the relator, to pay the judgment described in his petition, with lawful interest thereon; and it is so ordered.

U. S. *ex rel.* PETERKIN v. SAME, No. 188; and U. S. *ex rel.* WADDICK v. SAME, No. 189, argued at the same time by **Thomas J. Semmes** and **Robert Mott**, for Plff. in error.

Upon the authority of the decision in the case of *The United States, ex rel. MORRIS RANGER, v. The City of New Orleans*, the judgment in each of these cases must be reversed, and the cause remanded to the court below, with directions to issue a writ of *mandamus* as prayed in the petition of the relator; and it is so ordered.

HENRY AMY, Plff. in Err.,

v.

CITY OF DUBUQUE.

(See S. C., 8 Otto, 470-476.)

State Statute of Limitations—town law—action on coupons.

1. The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals.

2. In Iowa, where interest is, by contract, made payable at stated times, an action may be maintained therefor in advance of the maturity of the principal debt, and legal interest upon such interest recovered.

3. The Iowa Statute of Limitations, of ten years, applies equally to bonds and their coupons, although the coupons have never been severed from the bonds, and are held by the owner of the latter. It begins to run from the respective maturities of the coupons.

[No. 104.]

Submitted Dec. 24, 1878. Decided Apr. 7, 1879.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The plaintiff in error brought suit in the court below upon certain bonds, for the installments of interest represented by certain undetached coupons. A demurrer to the declaration was sustained, on the ground that the Statute of Limitations had run against the coupons. The plaintiff thereupon sued out this writ of error.

The case is further stated by the court.

Messrs. Jas. Grant, H. Lacey and Orion Clemens, for plaintiff in error:

In *Kenosha v. Lamson*, 9 Wall., 477, (76 U. S. XIX., 725), *Mr. Justice Nelson*, delivering the opinion of the court, says:

"The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due upon the bond, which interest is a parcel of the bond, and partakes of its nature, and the bond being of a higher security than a simple contract debt, is not barred by lapse of time short of twenty years," p. 483 (789.) "There is nothing in the contract between the parties that would lead to the conclusion that the nature or character of the security by the bond for the interest was to be changed or lessened by the is-

sue of the coupons, but the contrary. There was but one contract and that evidenced by the bond, which covenanted to pay the bearer \$500 in twenty years, with semi-annual interest.

The point established in this case touching upon the limitation of actions upon coupons detached from the bonds, is simply that the lapse of time after their maturity necessary to bar an action upon such coupons, must be the same as that to bar an action upon the bond from the date of its maturity.

The same principle is maintained in *Lexington v. Butler*, 14 Wall., 282 (81 U. S., XX., 809).

In *Clark v. Iowa City* (87 U. S., 589, XXII., 429), the action was upon the coupons which were overdue more than ten years. *Mr. Justice Field*, after reviewing the cases of *City v. Lamson* and *Lexington v. Butler*, *supra*, proceeds to say: "Coupons, when severed from bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims. They then possess the essential attributes of commercial paper;" citing,

Thomson v. Lee Co., 3 Wall., 327 (70 U. S., XVIII., 177); *Aurora v. West*, 7 Wall., 105, (74 U. S., XIX., 50); *Co. of Beaver v. Armstrong*, 44 Pa., 63; *Bk. v. R. R. Co.*, 8 R. I., 375.

The principle contained in *Clark v. Iowa City* (*supra*), that a coupon once detached and negotiated ceases to be a mere incident of the bond, and becomes an independent claim, was laid down in the *Bk. v. R. R. Co.*, 8 R. I., 381, in 1866.

In *Bk. v. Doe*, 19 Vt., 463, the rule is declared as follows: "That statutes of limitations do not begin to run upon a demand until the principal, or at least some separate or distinct portion of the principal, becomes due and payable, and then only upon such distinct and separate portion."

The interest accruing from year to year is not thus separated from the principal demand and, consequently, the Statute of Limitations does not run upon it until the principal is barred by the Statute.

Howe v. Bradley, 19 Me., 36.

Again; interest follows the principal as an incident to it so long as it remains an incident; but where it is separated and set apart from the principal by actual payment, or by being carried when due to the credit of the owner of the principal in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it is so far separated and disjoined from the principal as to cease to be an incident to, and does not follow it.

Ohio City v. R. R. Co., 6 Ohio St., 489.

If a note be payable in installments, the Statute does not run against the note, unless the last installment falls due, or unless the note contains a provision that if the first installment be unpaid, the whole note shall be due, in which case it begins to run as soon as the first installment is unpaid.

Hemp v. Garland, 4 Q. B., 519; *Irving v. Veitch*, 3 Mees & W., 90.

The 3 and 4 Will., 4 ch. 42, sec. 3, which prescribes twenty years, constitutes a bar to an action on a writing obligatory, in those cases

only where every breach of the condition has taken place more than twenty years previous to the commencement of the action.

Sanders v. Coward, 15 Mees. & W., 48.

Whatever may be the force or bearing of the cases above cited, we find that this court decided the very point in issue in this suit at the October Term, 1877, in *Cromwell v. Sac Co.*, 94 U. S., 362 (XXIV., 201). The court held that "The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond, that is, until the principal was payable. The action was upon the bonds, not upon the coupons. The coupons were attached to the bonds, not detached.

See, also, *Bk. v. Kirby*, 180 Mass., 497.

Messrs. H. T. McNulty and O. P. Shiras, for defendant in error:

The decisions only establish the doctrine that the coupons so far partook of the nature of the bonds that, as the latter were specialties, so were the specialties also, and not mere simple contracts.

This is the sum and substance of the decisions of this court.

If the coupons are negotiable after being detached from the original bonds, they would be so before. The mere fact of cutting them from the original bond does not make them negotiable; neither does the actual negotiation of them.

In the case of *Cromwell v. Sac Co.* (*supra*), Judge Clifford in his dissenting opinion lays down on this point the true rule. He says: "Coupons are written contracts for the payment of a definite sum of money on a given day, and being drawn and executed in a given mode, for the very purpose that they may be separated from the bonds, it is held that they are negotiable and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached."

Knox Co. v. Aspinwall, 21 How., 544 (62 U. S., XVI., 210); *White v. R. R. Co.*, 21 How., 575 (62 U. S., XVI., 221); *Aurora v. West*, 7 Wall., 105 (74 U. S., XIX., 50); *Murray v. Lardner*, 2 Wall., 121 (69 U. S., XVII., 859)."

Mr. Justice Harlan delivered the opinion of the court:

The question of limitation presented for our consideration upon this writ of error depends for its solution upon the Statutes of Iowa. "It is not to be questioned," said this court in *Hawkins v. Barney*, 5 Pet., 457, "that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for administering justice, one of the most sacred and important of sovereign rights." *McElmoyle v. Cohen*, 13 Pet., 312.

It is as little to be questioned that "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statutes of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals." *Lefingwell v. Warren*, 2 Black, 599 [67 U. S., XVII., 261]; *Green v. Neal*, 6 Pet., 291; *Harpending v. Dutch Ch.*, 16 Pet., 455; *Davie v. Briggs*, 97 U. S., 628 [XXIV., 1086].

Guided by these established rules, we proceed to the consideration of the question before us, See 8 OTTO.

in the light both of the Statutes of Iowa and of the construction given to them by the highest court of that State.

Our first inquiry is as to the cause of action set out in the petition. The plaintiff in error seeks to recover the amount of sundry interest-coupons annexed to bonds issued by the City of Dubuque in 1857, in payment of a subscription to the capital stock of a railroad company. The bonds are in the usual form of municipal securities, and were made payable on the 1st of January, 1877, at a bank in the City of New York, together with interest thereon at the rate of ten per cent. per annum, payable semi-annually on each first day of July and January, on the presentation and surrender of the coupons at such bank as they should respectively become due by the terms thereof. Each bond was secured by a pledge of the shares of stock received in exchange therefor; and the stock pledged was placed in the hands of authorized trustees, who were empowered and required, at the request of the holder of the bond, and when the City was in default in the payment of either principal or interest, or any part thereof, to sell it, at public or private sale, in discharge of the unpaid principal or interest. The coupons sued on had not, at the institution of this action, been severed from the bonds to which they were annexed. Judgment is asked for the several installments of interest, with interest on each installment from the time it became due. The City contends that the action is barred by the Iowa Statute of Limitations. In that view the circuit judge concurred, and judgment was rendered for the City.

The Code of Iowa declares that actions "Founded on written contracts" may be brought within ten years "after their causes accrue, and not afterwards." Code of 1873, sec. 2529. Such had been the law of that State for many years prior to the adoption of the Code of 1873. We find the same provision in the Code of 1851. Code of 1851, sec. 1659. What actions are founded on written contracts, and when causes of action accrue, within the meaning of the Iowa Code, may be gathered from decisions of the Supreme Court of that State. The earliest decision to which we are referred is *Bahr v. Arndt*, 9 Iowa, 39. That was the case of a mortgage executed to secure a note payable ten years after date, with interest, at the rate of ten per cent. per annum from date, payable annually. The court held that a foreclosure could be had before the maturity of the note for an installment of interest due. In *Mann v. Cross*, 9 Iowa, 327, which was a suit to foreclose a mortgage, given to secure a note bearing ten per cent. interest, payable annually, the court said: "Was he (the mortgagee) entitled to six per cent. interest upon the interest annually due? We think he was. The respondent was under a legal obligation to pay this interest at the end of the year; it was a sum of money then due, without a contract fixing the rate of interest upon it, and for which he might have been sued. He was, therefore, bound to pay its legal value, which by our law, in the absence of a written agreement reserving more, is fixed at six cents on the hundred." *Hershey v. Hershey*, 18 Iowa, 24, was the case of a written agreement to purchase an interest in mill property at a valuation by appraisers, and "To pay the principal sum

of such purchase on or before five years from the date of the appraisement, and in the meantime to pay interest for the full sum at the rate of seven per cent. per annum, the interest to be paid semi-annually." It was held that an action at law could be maintained for any unpaid semi-annual installment of interest. Said the court: "The payment of interest periodically is expressly stipulated for, and for a breach of this contract plaintiff may recover, just as clearly as for the non-payment of an installment of principal. By their agreement the parties have made this interest, when it matures, not simply an incident of the debt, but *pro tanto* the debt itself. And plaintiff was not, therefore, bound to wait the expiration of the five years from the date of the award to recover for the semi-annual installment of interest." The court said further: "The plaintiff sues at law for the interest precisely as if he had separate notes for the same, and as he might do in case of an ordinary bond." To the same general effect is *Preston v. Walker*, 26 Iowa, 205. In the subsequent case of *Baker v. Johnson Co.*, 33 Iowa, 151, the inquiry arose as to the time when limitation commenced to run upon a contract whereby Baker was employed to render services in behalf of the county in connection with its claim against the General Government for swamp land money and land scrip. The court held that Baker had a right of action from the date when his services were completed, and that his cause of action accrued at that date. *Callanan v. Madison Co.*, 45 Iowa, 561, was an action to recover back taxes which had been improperly exacted. The defense of limitation being interposed, the court said that "The cause of action accrues at the very moment of payment of the taxes, if at that time the tax was erroneous or illegal. The right of the plaintiff and the liability of the county do not depend upon the future acts to be done or suffered by either; their relation as creditor and debtor is fixed by the illegality of the tax."

It seems from these authorities to be the settled law of Iowa: 1. That where interest is, by contract, made payable at stated times, an action may be maintained therefor in advance of the maturity of the principal debt, and legal interest upon such interest recovered. 2. That, within the meaning of the Iowa Statute of Limitations, the cause of action accrues when suit may be commenced for the breach of such contract. Both of these propositions are in line with the former decisions of this court. We have held in numerous cases not only that suit may be maintained upon unpaid coupons, in advance of the maturity of the principal debt and without producing the bonds, but that the holder of such coupons is entitled to recover interest thereon from their maturity. *Knob Co. v. Aspinwall*, 21 How., 539 [62 U. S., XVI., 208]; *Gelpcke v. Dubuque*, 1 Wall., 175 [68 U. S., XVII., 520]; *City v. Lamson*, 9 Wall., 477 [76 U. S., XIX., 725]; *Lexington v. Butler*, 14 Wall., 282 [81 U. S., XXI., 809]; *Clark v. Iowa City*, 20 Wall., 583 [87 U. S., XXII., 427]; *Genoa v. Woodruff*, 92 U. S., 502 [XXIII., 536]. This court has also had occasion to consider the question as to when, upon principle, limitation commences to run. In *Wilcox v. Plummer*, 4 Pet., 172, it was said: "The ground of action here is a contract to act diligently and skillfully; and both the

contract and the breach of it admit of a definite assignment of date. When might this action have been instituted is the question; *for from that time the statute must run.*" Ang. Lim., sec. 42; 2 Saund. Pl. & Ev., 309.

This action is, beyond question, founded upon written contracts. The coupons in suit matured more than ten years prior to its commencement. Upon the non-payment, at maturity, of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. From that date, therefore, the statute commenced to run against them. The premises conceded, as they must be, there is no escape from the conclusion stated.

But it is insisted that this conclusion is in conflict with the former decisions of this court in *City v. Lamson* [supra]; *Lexington v. Butler* [supra]; and *Clark v. Iowa City* [supra]. In this counsel are mistaken. They misapprehend altogether the doctrines settled in those cases. That of *City v. Lamson*, arose under the Wisconsin Statute of Limitations, while *Lexington v. Butler* involved the construction of a Kentucky Statute. The decisions in those cases, as declared in *Clark v. Iowa City*, only established the doctrine that coupons were not mere simple contracts, but, under the local statutes of particular States, were to be regarded as specialties and separate contracts, like the bonds to which they are attached. In the last named case, after an examination of the cases in 9 Wall. and 14 Wall., we said that "It was not the intention of the court in those cases to decide that an action upon a coupon, detached from the bond, and negotiated to other parties, was not subject to the same limitations as an action upon the bond itself; much less to hold that the coupons remained a valid and subsisting cause of action not only for the period prescribed for actions on the bond after its maturity, but for the additional period intervening between the maturity of the coupon and the maturity of the bond, however great that might be. The question before the court in those cases was only whether the time the statute ran against the coupon was the longest or shortest period; was it six or twenty years in the *Wisconsin* case, or was it five or fifteen years in the *Kentucky* case; and the court held that the statute ran for the longest period, because the coupons partook of the nature of the bonds, and the statute ran for that period as to them."

The case of *Clark v. Iowa City*, arose under the same Statute of Limitations which is invoked by the City of Dubuque for its protection in this case. It is cited by counsel for plaintiff in error in support of the proposition that limitation, under the Iowa Statute, does not commence to run against a coupon until it is detached from the bond. There are some expressions in the opinion in that case which, standing alone, would seem to sustain that construction of the statute. But it is quite obvious, from the whole opinion, that the conclusion reached, upon the point necessary to be decided, did not rest upon the isolated fact that the coupons sued on had become severed from the bond. It did rest, mainly, upon the ground that the coupons sued on were specialties, separate written contracts, capable of supporting

actions after their maturity, without reference to the maturity or ownership of the bonds. We distinctly held in that case, that all Statutes of Limitation begin to run when the right of action is complete. We said: "Every consideration, therefore, which gives efficacy to the Statute of Limitations, when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity." Our answer to the specific question certified to us was, "That the Statute of Iowa, which extends the same limitations to actions on all written contracts, sealed or unsealed, began to run against the coupons in suit from their respective maturities." So far, then, from that case supporting the defense of the City, it is an express authority for the position that the limitation of ten years, prescribed by the Iowa Statute, applies equally to bonds and their coupons. The only material respect in which this case differs from *Clark v. Iowa City*, is that the coupons in suit here have never been severed from the bonds, and are held by the same person who owns the bond, while in that case they were severed from bonds which had been previously paid off. But this difference cannot logically, or in view of the Iowa decisions, affect the construction of the statute under examination. The right of the plaintiff in error to sue upon the coupons was complete after their non-payment at maturity, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when by contract, he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years, without suit, from the time "their causes accrue;" that is, from the time the right to sue for a breach attaches. We adhere, therefore, to our decision in *Clark v. Iowa City*, that the Statute of Limitations begins to run, under the Iowa Statute, from their respective maturities.

The judgment is affirmed.

Cited—104 U. S., 669, 673, 677; 105 U. S., 153; 2 McCrary, 328.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, *Plff. in Err.*,

v.

JAMES H. GRANT.

(See S. C., 8 Otto, 398-403.)

Review of judgments of District of Columbia—jurisdictional amount—vested right.

1. The Act of Feb. 25, 1879, authorizing this court to review judgments of the Supreme Court of the District of Columbia, where the matter in dispute exceeds \$2,500, was a repeal of the provision of the

NOTE.—Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases are reviewable without regard to sum in controversy. See note to *Gordon v. Ogden*, 28 U. S. (3 Pet.), 33.

See 8 OTTO.

Revised Statutes authorizing such review where the matter in dispute is of the value of \$1,000.

2. A judgment for \$2,250 brought to this court when that provision of the Revised Statutes was in force, cannot be heard here after that Act took effect, and the case must be dismissed, on the ground that the jurisdiction has been taken away.

3. A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege, once granted, may be taken away.

[No. 196.]

Argued Apr. 1, 2, 1879. Decided Apr. 14, 1879.

IN ERROR to the Supreme Court of the District of Columbia.

On Motion to dismiss.

The case is fully stated by the court.

Messrs. R. T. Merriek and W. F. Mattingly, for defendant in error:

When an Act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed. And the effect of repealing Acts upon suits under Acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker*, 13 How., 429, and more recently in *Ins. Co. v. Ritchie*, 5 Wall., 541 (72 U. S., XVIII., 540). In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the Act under which it was brought and prosecuted. It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal.

Ex parte McCardle, 7 Wall., 506 (74 U. S., XIX., 264); *McNulty v. Batty*, 10 How., 72; *Norris v. Crocker*, 13 How., 429; *Ins. Co. v. Ritchie* (*supra*); *Stewart v. Kahn*, 11 Wall., 502 (78 U. S., XX., 178).

Moreover, "The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed, is established. *Ex parte McCardle* (*supra*).

Messrs. Enoch Totten and E. L. Stanton, for plaintiff in error:

The case of the *Ins. Co. v. Ritchie*, 5 Wall., 541 (72 U. S., XVIII., 540), is not applicable, because the repealing statute in that case expressly prohibited and took away the entire appellate jurisdiction. The same observation may be made as to *Ex parte McCardle*, 7 Wall., 506 (74 U. S., XIX., 264). The statute in that case, was purely a partisan enactment, and it provided that this court should not possess nor exercise any appellate jurisdiction in cases of the character mentioned, where appeals have been or may hereafter be taken. The Act was notoriously aimed at the *McCardle* case.

In the case of *Norris v. Crocker*, 13 How., 429, the court declared that, inasmuch as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law. In this case the appellant had no vested right in the penalty; the Legislature might discharge the defendant by repealing the law. In this case the appellant has a deep interest, if not a vested right, in having its writ of error considered and passed upon. To sue out and perfect a writ of error to this court is attended with very considerable expense.

One statute is not to be construed as a repeal of another, if it be possible to reconcile the two with each other.

McCool v. Smith, 1 Black, 459 (66 U. S., XVII., 218); *Harford v. U. S.*, 8 Cranch, 109; *Sedg. Stat. Const. L.*, 127; *Can. Co. v. R. R. Co.*,

4 Gill & J., 1; *Bowen v. Lease*, 5 Hill, 221; *Wood v. U. S.*, 16 Pet., 342.

It is a rule of construction that all statutes are to be considered as operating prospectively unless the language is expressed to the contrary, or there is a necessary implication to that effect.

Harvey v. Tyler, 2 Wall., 347 (69 U. S., XVII., 875); *U. S. v. Heth*, 3 Cranch, 399; *Prince v. U. S.*, 2 Gall., 204.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a writ of error to the Supreme Court of the District of Columbia, sued out by the defendant below on the 6th of December, 1875, to reverse a judgment of that court against the defendant for \$2,250. At that time sections 846 and 847 of the Revised Statutes were in force defining our jurisdiction in this class of cases.

They are as follows:

"Sec. 846. Any final judgment, order or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the Circuit Courts of the United States.

Sec. 847. No cause shall be removed from the Supreme Court of the District to the Supreme Court of the United States, by appeal or writ of error, unless the matter in dispute in such cause shall be of the value of \$1,000 or upward, exclusive of costs, except in the cases provided for in the following section."

On the 25th of February, 1879, Congress passed "An Act to Create an Additional Associate Justice of the Supreme Court of the District of Columbia, and for the Better Administration of Justice in said District," sections 4 and 5 of which are as follows:

"Sec. 4. The final judgment or decree of the Supreme Court of the District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of \$2,500, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a circuit court.

Sec. 5. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed."

The defendant in error now moves to dismiss the suit, on the ground that the jurisdiction of this court has been taken away.

The single question presented by this motion is whether there is any law now in force which gives us authority to re-examine, reverse or affirm the judgment in this case. Nearly seventy years ago, *Chief Justice Marshall* said, in *Duroseau v. U. S.*, 6 Cranch, 307, that "This court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of \$2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the Legislature to except

from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value and implies negative words." There has been no departure from this rule, and it has universally been held that our appellate jurisdiction can only be exercised in cases where authority for that purpose is given by Congress.

It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. *U. S. v. Boisdore*, 8 How., 113; *McNulty v. Batty*, 10 How., 72; *Norris v. Crocker*, 13 How., 429; *Ins. Co. v. Ritchie*, 5 Wall., 541 [72 U. S., XVIII., 540]; *Ex parte McCordle*, 7 Wall., 514 [74 U. S., XIX., 265]; *Assessors v. Osbornes*, 9 Wall., 567 [76 U. S., XIX., 748]; *U. S. v. Tynen*, 11 Wall., 88 [78 U. S., XX., 153].

Section 847 of the Revised Statutes is in irreconcilable conflict with the Act of 1879. The one gives us jurisdiction when the amount in dispute is \$1,000 or more, the other in effect says we shall not have jurisdiction unless the amount exceeds \$2,500. It is clear, therefore, that the repealing clause in the Act of 1879 covers this section of the Revised Statutes.

The Act of 1879 is undoubtedly prospective in its operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. The appeal or writ remains in full force, but we dismiss the suit, because our jurisdiction is gone.

It is claimed, however, that, taking the whole of the Act of 1879 together, the intention of Congress not to interfere with our jurisdiction in pending cases is manifest. There is certainly nothing in the Act which in express terms indicates any such intention. Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the Act of 1875, 18 Stat. at L., 316, raising the jurisdictional amount in cases brought here for review from the circuit courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the Act of 1874, 18 Stat. at L., 27, regulating appeals to this court from the supreme courts of the Territories, the phrase is, "That this Act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed." Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing Act, that if nothing of the kind is found, the presumption is

always strong against continuing the old law in force for any purpose. We think it will not be claimed that an appeal may now be taken or a writ of error sued out upon a decree or a judgment rendered before the Act of 1879 took effect, if the matter in dispute is not more than \$2,500; but it seems to us there is just as much authority for bringing up new cases under the old law as for hearing old ones. There is nothing in the statute which indicates any intention to make a difference between suits begun and those not begun. If, as is contended, the object of Congress was to raise our jurisdictional amount because of the increase of the judicial force in the District, we see no good reason why those who had commenced their proceedings for review of old judgments should be entitled to more consideration than those who had not. No declaration of any such object on the part of Congress is found in the law; and when, if it had been the intention to confine the operation of what was done to judgments thereafter rendered or to cases not pending, it would have been so easy to have said so, we must presume that Congress meant the language employed should have its usual and ordinary signification, and that the old law should be unconditionally repealed.

Without more we conclude that our jurisdiction in the class of cases of which this is, one has been taken away, and the writ is accordingly dismissed, each party to pay his own costs.

Cited—100 U. S., 113; 101 U. S., 438; 103 U. S., 522.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plff.*
in *Err.*,

v.

GEORGE W. VARNELL.

(See S. C., 8 Otto, 479-485.)

Charge to jury—exception.

1. Where the charge of the judge to the jury is of a character to mislead them, the error is one of law and may be corrected in an appellate court.

2. But in every such case, unless the part of the charge to which the exception is addressed be distinctly pointed out, the exception cannot be sustained as a ground for reversing the judgment.

[No. 198.]

Argued Apr. 2, 1879. Decided Apr. 14, 1879.

ERROR to the Supreme Court of the District of Columbia.

The case which arose in the court below, is fully stated by the court.

Mr. Enoch Totten, for plaintiff in error.
Messrs. T. T. Crittenden and Glen W. Cooper, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vehicles or vessels are employed as common carriers of merchandise.

NOTE.—What particularity in exceptions is necessary in order to a review in appellate court; general exception or objection, when not sufficient. See note to *Moore v. B'k of Metropolis*, 38 U. S. (13 Pet.), 302. See 8 OTTO.

Obligations of the kind in the former case are in some respect less extensive and more qualified than in the latter, as the owners of the vehicle or vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety; but in most other respects the obligations assumed are equally comprehensive and, perhaps, even more stringent.

Common carriers of merchandise, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods and are liable at all events and for every loss or damage, unless it happened by the act of God or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without fault or negligence on the part of the carrier. *The Niagara v. Cordes*, 21 How., 23 [62 U. S., XVI., 46].

Carriers of passengers even in street cars are bound to a higher degree of care, skill and vigilance in the preparation and management of their vehicles of conveyance than were required of the owners of the stage-coaches, as well on account of the greater number transported at the same time as the constant ingress and egress of the persons entering or leaving the car. Travelers must take the risk necessarily incident to the mode of travel which they select; but those risks in the legal sense are only such as the utmost care, skill and caution of the carrier in the preparation and management of the vehicle of conveyance is unable to avert. *Pendleton v. Kinsley*, 3 Cliff., 420.

Prepayment of the usual fare having been made by the plaintiff, he entered the car of the defendants, as he alleges, for a passage from Washington to Georgetown, and on arriving at the depot of the latter place, and when being in the act of getting off from the car, was thrown from the same upon the ground by the carelessness and negligence of the defendants, and was thereby greatly injured, so that he could not perform the usual duties of his employment; that, in consequence of the injuries so received, he was compelled to employ a physician at great expense, and was confined to the house for a long time, during which he suffered great pain and anguish. Suitable indemnity being refused, the plaintiff instituted the present suit to recover compensation for the alleged injuries and the consequent expenses. Service was made, and the defendants appeared and pleaded the general issue, which was subsequently joined by the plaintiff. The preliminary proceedings being closed, the parties went to trial, and the verdict and judgment were for the plaintiff in the sum of \$4,000, with costs of suit. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court for re examination.

Since the case was entered here, the defendants have assigned for error the following causes, for which they claim that the judgment should be reversed: (1) That the instructions of the court set forth in the first three exceptions are erroneous as to the supposed contributory negligence of the plaintiff. (2) That the court erred in the instruction given to the jury as to the measure of damages. (3) That the court erred in refusing the two prayers for instruction presented by the defendants, and in

the instructions given in lieu of those prayers. (4) That the instructions given by the court to the jury were incoherent, contradictory and incomprehensible, and must, necessarily, have confused and misled the jury to the disadvantage of the defendants.

Evidence was introduced by the plaintiff tending to show that he, on the day and at the place alleged in the declaration, entered one of the cars of the defendants, and that he, having first paid his fare to the conductor, rode in the car to the terminus of the route in Georgetown, at the intersection of High and Bridge Streets; that the car was then stopped at the usual place for passengers to leave and pass out; that several passengers had got off from the car, and that plaintiff started for that purpose, and having passed out of the rear end had stepped on the lower step of the car and was about stepping to the ground when the car was suddenly started with a jerk, which threw him to the ground, his left hip striking the paved street, and that the thigh bone of his hip at the socket was dislocated and fractured by the fall; that the plaintiff was carried to his home, where he was confined to his bed for several weeks; and that he has ever since been compelled to walk with a cane, and has been unable to perform any labor, and that the injured leg is considerably shorter than the other; that he was sixty-four years of age at the time of the accident, and that up to that time he had always been healthy.

Witnesses were examined by the defendants, and they gave evidence tending to show that the plaintiff, just before the accident, was standing upon the rear platform of the car, and that he jumped from the car before it stopped, and that in jumping from the car he fell and was injured; that at the time of the accident the car had almost reached its usual stopping-place, and that the plaintiff, if he had waited a short time, could have alighted from the car in safety.

Rebutting evidence contradicting that given by the defendants was also introduced by the plaintiff, and the bill of exceptions shows that in cross examining one of the defendants' witnesses he laid the foundation to admit proof that the witness had made contradictory statements out of court. Proof to that effect was subsequently offered by the plaintiff; and in examining the witness called for that purpose the questions put were leading in form, to which the defendants objected on that account, but the court overruled the objections, and having admitted the answers the defendants excepted. Three or four exceptions of the kind were taken; but inasmuch as the rulings of the court are not assigned for error, it will be sufficient to say upon the subject, that if they had been assigned as error, it could not have benefited the defendants.

More difficulty arises in disposing of the exceptions to the charge of the court, for two principal reasons: 1. Because the instructions are so framed as to render it somewhat uncertain what the principle of law is that the presiding Justice gave, or intended to give, to the jury. 2. Because the exceptions are so general and indefinite, that it is impossible to determine with certainty to what part of any one of the instructions any one of the exceptions refers.

Three exceptions are embraced in the first assignment of error, and the complaint is that the court erred in failing to give the defendants the full benefit of their evidence as to the contributory negligence of the plaintiff.

Turning to the record, it appears that the first exception to the charge of the court is addressed to nearly a page of the remarks of the presiding Justice, with nothing to aid the inquirer in determining what the complaint is, beyond what may be derived from the exception, which is in the following words: "To which instruction the counsel for the defendants then and there excepted."

Much less difficulty would arise if the assignment of error contained any designation of the precise matter of complaint; but nothing of the kind can be obtained from that source. Certain portions of those remarks appear to be unobjectionable; as, for example, the Judge told the jury that they must first determine whether the plaintiff was a passenger on the railroad of the defendants, and he called their attention to the testimony of the conductor, that the plaintiff was not in the car in which it seems he claimed that he had been riding just before he received the injury.

Comments were made upon the testimony bearing upon that point, and the Judge next stated to the jury to the effect that they must then determine from the evidence whether he fell off or got off, and was hurt in getting off, remarking that probably there was no dispute that he got hurt in falling from the car, but that the question was, whether he, the plaintiff, was in fault, or whether the driver or conductor of the car caused the injury; adding, that if it was the fault of the conductor, the Company was responsible. If you come to the conclusion, said the Judge, that the plaintiff acted in a neglectful manner in getting off from the car, or that he was in fault, he cannot recover; but if you come to the conclusion that it was the fault of the driver in starting too soon, or in not properly observing that the plaintiff was about to get off, and that the accident occurred in consequence of the too sudden starting of the car, the Company is liable, if it was the fault of the driver or conductor.

Inaccurate language and, in some instances, incomplete sentences were employed by the Judge; but the court is not able to see that any error of law was committed, or that the errors of language committed were of such a character as to warrant the conclusion that the jury were misled in respect to the legal rights of the parties; nor is the court here able to see that any remarks of the Judge were of a character to withdraw any of the evidence from the proper consideration of the jury. Instead of that he submitted it all to their determination, and then remarked, that if they found that the injury received by the plaintiff was by the neglect of the railroad, then it would be their duty to ascertain the extent of the injury from the evidence, to which no objection can properly be made.

Reference was then made to the evidence, and comments of a general character followed; and at the close of the Judge's remarks upon that subject is another exception, in the words following: "To which instruction the counsel for the defendants then and there excepted." Discussion of that exception may well be omitted,

as the remarks made in respect to the preceding exception are believed to be sufficient to show that it is not sufficiently explicit, and that it must be overruled.

Expert witnesses were called and examined in the case, and the third exception has respect to the remarks of the Judge upon that subject. Neither the exception nor the assignment of error designates any particular remark of the judge as erroneous, and in view of the fact that the exception is addressed to the entire remarks as an instruction, the court is of the opinion that it requires no further examination.

Extended remarks were made by the Judge upon the subject of damages, in case the jury came to the conclusion that the plaintiff was entitled to recover, to which two exceptions are appended, to the effect that the defendants then and there excepted to the remarks which preceded the note of exception. Exceptions put in that general form are certainly not entitled to favor; but it is proper to remark that those under consideration stand in a worse condition than those previously examined, for the reason that the attention of the Judge after the charge was concluded was directed to many passages in his remarks as objectionable, every one of which the judge either corrected as requested, or, where the suggestion of error was in respect to the testimony, he referred the question to the recollection of the jury. Such corrections must, of course, be considered in connection with the antecedent remarks of the Judge; and when that part of the charge is viewed in that light, the court is of the opinion that the exceptions must be overruled.

3. Two prayers for instruction were presented by the defendants: (1) That the court should instruct the jury that the plaintiff is not entitled to recover anything for the services of the physicians or other expenses, as there was no testimony to show the amount of money, if any, he paid on that account. (2) That the court should instruct the jury that in estimating the damages of the plaintiff they must take into consideration his advanced age as lessening his capacity for earning money.

Responsive to the first request, the Judge remarked to the jury that there being no evidence on the subject of the specific amount of the physician's bill, "you will not take that into consideration unless there is doubt," evidently leaving the sentence incomplete; but his attention was not called to the omission, and the court here is of the opinion that the defendants have no cause to complain of that part of the charge as an error of law.

Both requests were refused, and in response to the second the Judge remarked to the effect that the jury acting reasonably must ascertain the proper amount of the damages; that if they found damages, they must be reasonable, as they could not tell whether a man would live one, two or five years. Probably no one will think that these remarks of the Judge were very instructive to the jury; but it is not possible to hold that they show any legal error for which the judgment should be reversed.

4. Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court; but in every such case the part of the charge to which the exception is addressed

ought to be distinctly pointed out. Unless that be done, the exception cannot be sustained as a ground for reversing the judgment, as that can only be done for error of law.

For these reasons, the court is of the opinion that there is no error in the record.

Judgment affirmed.

UNITED STATES, *ex rel.* ALEXANDER

McLEOD, *Plff. in Err.*,

v.

JOHN SHERMAN, SECRETARY OF THE
TREASURY.

(See S. C., 8 Otto, 535-568.)

*Liability of United States for interest—delay—
writ of error—interest on judgment.*

1. Where a judgment was obtained in the circuit court against an agent of the Treasury Department, who subsequently obtained a certificate of probable cause under the Acts of March 3, 1863, and July 28, 1866, the United States is not under obligation to pay interest on the judgment from the time it was rendered, until the certificate of probable cause was given.

2. When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the Government. Delay or default cannot be attributed to the Government.

3. That the plaintiff's execution was suspended by writ of error directed by the Secretary of the Treasury, did not suspend his power to obtain the certificate necessary to cast the liability upon the Government.

4. The "amount recovered," spoken of in the Acts of 1863 and 1866, is the sum for which judgment was given, and it does not include the interest which the judgment may bear, prior to the time when the certificate of probable cause is made.

[No. 813.]

Argued Mar. 26, 27, 1879. Decided Apr. 14, 1879.

IN ERROR to the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. P. Phillips and W. A. Maury, for plaintiff in error.

Messrs. Chas. Devens, Atty-Gen., and John S. Blair for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

This was an application to the Supreme Court of the District of Columbia for a *mandamus* to the Secretary of the Treasury, commanding him to pay to the relator, the sum of \$4,279.94, with interest from the 9th day of November, 1874. The facts of the case, as they are made to appear, are as follows:

On the 18th day of June, 1869, the relator recovered a judgment in the Circuit Court of the United States for the District of South Carolina against T. C. Callicott, a supervising special agent of the Treasury Department, for the sum of \$11,700.68, besides \$119.80 for costs. On the 5th of July next following a *fi fa.* was issued upon this judgment. The execution, however, was suspended by a writ of error sent from this court to the circuit court, sued out by direction of the Secretary of the Treasury. But the writ was dismissed on the 17th day of February, 1871. Nothing further appears to have been done until June 8, 1874, when the relator applied to the circuit court for a certificate of probable cause under the Act of Congress of March 3, 1863, 12 Stat. at L., 741, and

the Act of July 28, 1866, 14 Stat. at L., 329; and the court certified "That on the trial of said cause (in the circuit court) it appeared there was probable cause moving the defendant (Callicott), for the acts done by him whereon the judgment was had and recovered against him," "and, further, that the said acts were done under the direction of the Secretary of the Treasury." The certificate thus obtained was then brought to the Treasury Department, and on the 4th of November next following the First Auditor adjusted the account, and certified that there was due from the United States to the relator the sum of \$12,039.50, the amount of the judgment recovered in the circuit court, with interest from June 8, 1874, the time when the certificate of probable cause was given. This adjustment was confirmed and certified by the controller, and that sum was received by the relator on the 9th of the same month.

He now contends that it was an insufficient payment, and that there is still due to him from the United States the sum of \$4,279.94, with interest from November 9, aforesaid. It will be noticed that in the adjustment of the account by the first auditor, and in the payment made, no interest was allowed for the time which intervened between the rendition of the judgment and the date when the certificate of probable cause was obtained. That interest at the rate allowed in South Carolina amounted to \$4,279.94, and the principal question now raised is whether the United States is under obligation to pay that. The *mandamus* asked for is to compel allowance and payment of that interest.

We have, therefore, to inquire whether the United States is under obligation to pay interest on the judgment obtained in the circuit court from the time when the judgment was rendered, until the certificate of probable cause was given. To this question alone we address ourselves. Several objections to the issue of the *mandamus* asked by the relator, some of them grave, have been interposed by the defendant, but we do not think it necessary to consider them. The 12th section of the Act of Congress of March 3, 1863, 12 Stat. at L., 741, relative to suits against revenue officers, enacted that where a recovery shall be had in any such suit, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government, no execution shall issue against the collector or other officer, *but the amount so recovered* shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury. This section was, by the Act of July 28, 1866, 14 Stat. at L., 328, declared to extend to and embrace all cases arising under the Captured and Abandoned Property Acts of March 12, 1863, 12 Stat. at L., 820, and July 2, 1864, 13 Stat. at L., 375, whether then pending or thereafter brought, "Provided, That such Acts done, or proceedings under the two Acts last mentioned, shall have been done and had under the authority or by the direction of the executive Government of the United States."

It was under these Acts ostensibly that the certificate of probable cause was obtained.

It was obtained not by the agent of the Treas-

ury Department sued, but on motion of the relator, who was the plaintiff in the suit. Conceding, however, as we do, that the circuit court was empowered to give the certificate on the request of either party, it is to be considered what was the liability fastened thereby upon the United States.

The Act of Congress enacts that when the certificate of probable cause is given, *the amount recovered* shall, upon final judgment, be paid out of the appropriation from the Treasury. When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the Government. But not until then.

Before that time, the Government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The Act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by federal legislation, declared to bear interest. Such legislation, however, has no application to the Government. And the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the Government. It is presumed to be always ready to pay what it owes. Certainly there was no delay in the present case. The Government paid the amount recovered against Callicott, viz.: the sum for which the verdict and judgment were given, as soon as its liability accrued. If there has been a loss of interest, it is not due to the Government. It is due to the dilatoriness of the relator himself. He might have applied to the circuit court for the certificate of probable cause immediately on the rendition of the judgment, as is generally done, though commonly by the defendant. But he waited nearly five years, from June 18, 1869, to June 8, 1874. It would be strange, indeed, if by his own delay he can compel the United States to pay interest on a judgment which it was ready to pay as soon as its liability accrued.

We do not overlook the fact that the plaintiff's execution was suspended by the writ of error directed by the Secretary of the Treasury. But the execution did not suspend his power to obtain the certificate necessary to cast the liability upon the Government, and the writ was dismissed in February, 1871. Then there was nothing in the way of a second execution against Callicott. But no step was taken until more than three years had elapsed, when the certificate was obtained. It cannot be admitted that the plaintiff, at his option, may impose upon the United States a liability to pay interest, as long as he pleases, upon a sum of money that, during all the time in which the interest accrues, the Government was not bound to pay. Such, we think, is not the requirement of the Act of Congress. The "amount recovered," spoken of in the Acts of 1863 and 1866, is the sum for which judgment was given, and it does not include the interest which the judgment may bear prior to the time when the certificate of probable cause is made.

It follows that there is nothing due to the relator and, therefore, he is not entitled to a writ of *mandamus*.

The judgment is affirmed.

Cited—107 U. S., 627.

HENRY O. HARKNESS, *Plff. in Err.*,

v.

JORDAN W. HYDE.

(See S. C., 8 Otto, 476-479.)

District Court of Idaho—waiver of illegal service.

* 1. Process from a District Court of the Territory of Idaho cannot be served upon a defendant on an Indian reservation in that territory.

2. Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of defendant to move that the service be set aside nor after such motion is denied, by his answering to the merits. Objection to the illegal service is considered as abandoned only when the party pleads to the merits in the first instance, without insisting upon the illegality.

[No. 219.]

Argued Apr. 8, 1879. Decided Apr. 21, 1879.

ERROR to the Supreme Court of the Territory of Idaho.

The case is fully stated by the court.

Messrs. George H. Williams and Jno. R. McBride, for plaintiff in error.

Mr. R. P. Lowe, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

This was an action to recover damages for maliciously and without probable cause procuring the seizure and detention of property of the plaintiff under a writ of attachment. It was brought in September, 1873, in a District Court of the Territory of Idaho for the County of Oneida. The summons, with a copy of the complaint, was soon afterwards served by the sheriff of the county on the defendant, at his place of residence, which was on the Indian Reservation, known as the Shoshonee Reservation.

The defendant thereupon appeared specially by counsel appointed for the purpose, and moved the court to dismiss the action, on the ground that the service thus made upon him on the Indian Reservation was outside of the bailiwick of the sheriff, and without the jurisdiction of the court. Upon stipulation of the parties, the motion was adjourned to the Supreme Court of the Territory, and was there overruled. To the decision an exception was taken. The case was then remanded to the District Court, and the defendant filed an answer to the complaint. Upon the trial which followed, the plaintiff obtained a verdict for \$3,500. Upon a motion for a new trial, the amount was reduced to \$2,500; for which judgment was entered. On appeal to the Supreme Court of the Territory, the judgment was affirmed. The defendant thereupon brought the case here, and now seeks a reversal of the judgment, for the alleged error of the

court in refusing to dismiss the action for want of jurisdiction over him.

The Act of Congress of March 3, 1863, organizing the Territory of Idaho, provides that it shall not embrace within its limits or jurisdiction any territory of an Indian Tribe without the latter's assent, but that "All such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho," until the Tribe shall signify its assent to the President to be included within the Territory. 12 Stat. at L., 808.

On the 3d of July, 1868, 15 Stat. at L., 674, a Treaty with the Shoshonee Indians was ratified, by which, among other things, that portion of the country within which service of process on the defendant was made in this case was set apart for their "absolute and undisturbed use and occupation;" and such other friendly Tribes or individual Indians as they might be willing, with the consent of the United States, to admit amongst them; the United States agreeing that no persons except those mentioned, and such officers, agents and *employés* of the Government as might be authorized to enter upon Indian Reservations in discharge of duties enjoined by law, should ever be permitted "to pass over, settle upon, or reside" in the territory reserved, and the Indians relinquishing their title to any other territory within the United States. 15 Stat. at L., 674, art. 2. No assent was given by this Treaty that the territory constituting the reservation should be brought under the jurisdiction or be included within the limits of Idaho. Any implication even of such an assent is negatived by the terms in which the reservation is made, and it is not pretended that any such assent has been signified to the President. The territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the Government of Idaho, as if it had been set apart within the limits of another country or of a foreign State. Its lines marked the bounds of that government. The process of one of its courts, consequently, served beyond those lines, could not impose upon the defendant any obligation of obedience, and its disregard could not entail upon him any penalties. The service was an unlawful act of the sheriff. The court below should, therefore, have set it aside on its attention being called to the fact that it was made upon the defendant on the reservation. The motion was to dismiss the action; but it was argued as a motion to set aside the service; and we treat it as having only that extent. The Code of Idaho considers an action as commenced when the complaint is filed, and provides that a summons may be issued within one year afterwards. Had the defendant been found in Idaho outside the limits of the Indian Reservation, he might during that period have been served with process.

There can be no jurisdiction in a court of a Territory to render a personal judgment against anyone upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant, is essential in such cases. It is only where property of a non-resident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance, that it has jurisdiction to inquire into his personal liabilities or obligations without personal

*Head notes by *Mr. Justice FIELD*.

NOTE.—*Appearance cures defects in service of process and its non-service; but not want of jurisdiction of subject-matter.* See note to *Knox v. Summers*, 7 U. S. (3 Cranch), 496.

See 8 OTTO.

service of process upon him, or his voluntary appearance to the action. Our views on this subject are expressed at length in the late case of *Pennoyer v. Neff*, and it is unnecessary to repeat them here. 95 U. S., 714 [XXIV., 565].

The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived.

The judgment of the Supreme Court of the Territory, therefore, must be reversed and the case remanded, with directions to reverse the judgment of the District Court for Oneida County, and to direct that court to set aside the service made upon the defendant; and it is so ordered.

Cited—102 U. S., 146; 2 McCrary., 67; 4 Hughes, 69.

EMERSON G. ORVIS, *Appt.*,

v.

NATHAN POWELL.

(See S. C., 8 Otto, 176-179.)

Sale on foreclosure—in parcels—equity of redemption.

NOTE.—Order of sale of mortgaged premises.

The general rule is that the mortgagee on foreclosure must first sell such parts of the mortgaged premises as the mortgagor still retains, and then the parts which have been sold by him, in the inverse order of alienation. *Alexander v. Welch*, 10 Ill. App., 181; *Dickerson v. Tillinghast*, 4 Paige, 215; S. C., 25 Am. Dec., 528; *Ingalls v. Morgan*, 10 N. Y., 178; *Barnes v. Mott*, 64 N. Y., 402; *Sanford v. Hill*, 46 Conn., 53; *Aiken v. Milwaukee*, etc., R. R. Co., 37 Wis., 469; *Worth v. Hill*, 14 Wis., 559; *Brown v. Simons*, 44 N. H., 475; *Dawes v. Cammus*, 32 N. J. Eq., 456; *Hill v. McCarter*, 27 N. J. Eq., 41; *Miller v. Rogers*, 49 Tex., 388; *George v. Wood*, 9 Allen, 80; *Jones v. Myrick*, 8 Gratt., 179; *Stoney v. Shultz*, 1 Hill Ch., 465; S. C., 27 Am. Dec., 429; *Cary v. Raymond*, 17 S. C., 206; *Lynch v. Hancock*, 14 S. C., 66; *Lansman v. Drahos*, 8 Neb., 475; *Hiles v. Coult*, 30 N. J. Eq., 40; *Savings Bk. v. Creswell*, 100 U. S., *infra*; *St. John v. Bumpstead*, 17 Barb., 103; *Iglehart v. Crane*, 42 Ill., 267; *Niles v. Harmon*, 80 Ill., 396; *Mobile*, etc., Co. v. *Huder*, 3 Ala., 713; *Cumming v. Cumming*, 3 Ga., 460; *McCullum v. Turpie*, 32 Ind., 146; *Day v. Patterson*, 18 Ind., 114; *Shepherd v. Adams*, 32 Me., 63; *Holden v. Pike*, 24 Me., 427; *Conrad v. Harrison*, 3 Leigh, 532; *Sager v. Tupper*, 35 Mich., 134; *McKinney v. Miller*, 19 Mich., 142; *Com. B'k of L. Erie v. W. R. B'k*, 11 Ohio, 444; *Cary v. Folsom*, 14 Ohio, 365; *Meng v. Houser*, 13 Rich. Eq., 210; *Lyman v. Lyman*, 32 Vt., 79; *Root v. Collins*, 34 Vt., 173; *Cowden's Est.* 1 Pa. St., 267; *Warren v. Sennett*, 4 Pa. St., 114; *Carpenter v. Koons*, 20 Pa. St., 222; *Steere v. Childs*, 15 Hun, 518; *Green v. Milbank*, 3 Abb. N. C., 155; *Engle v. Haines*, 1 Halst. Ch., 186; S. C., 43 Am. Dec., 624; *aff'd*, 1 Halst. Ch., 632.

In Iowa and Kentucky, the different grantees

*1. The order in which real estate which has been mortgaged and subsequently sold, at different times to different purchasers, shall be subjected to satisfaction of the mortgage is, where the rule is established by state statute or the decisions of state courts, a rule of property which will be followed by the Federal Courts sitting in such State.

2. The right of redemption after sale on foreclosure in Illinois, as decided in *Brine v. Ins. Co.*, 96 U. S., re-affirmed.

[No. 35.]

Argued Oct. 22, 1878. Decided Nov. 4, 1878.

Submitted on Reargument, Apr. 15, 1879. Re-affirmed Apr. 28, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The appellee filed a bill in the court below, to foreclose a mortgage. The property had been sold in many parcels, and the contest in the case was as to the order in which the parcels should contribute.

The case further appears in the opinion of the court.

Messrs. *Melville W. Fuller, O. D. Barrett, and B. F. Butler*, for appellant.

Messrs. *Edward S. Isham, Julius Rosenthal, A. M. Pence, Geo. L. Paddock, and John P. Wilson*, for appellee.

Mr. Justice MILLER delivered the opinion of the court:

This is a suit in chancery to foreclose a mortgage executed by Henry H. Walker and Samuel I. Walker to the appellee, covering forty acres of land in Cook County, Illinois. The mortgage was given April 8, 1869, to secure the payment of the sum of \$40,500. Payments were made reducing the amount due at the date of the decree to \$14,853.33. As payments were made, releases had been executed as to part of the land; and before the suit was brought, all the land had been conveyed, in distinct parcels, at different times, to different parties. The

*Head notes by Mr. Justice MILLER.

must contribute proportionately to the discharge of encumbrances, and not in the inverse order of alienation. *Barney v. Myers*, 28 Iowa, 472; *Dickey v. Thompson*, 8 B. Mon., 312; *Bates v. Riddick*, 2 Iowa, 423; *Massey v. Wilson*, 16 Iowa, 390; *Gruft v. Lowell*, 26 Iowa, 226; *Burk v. Chrisman*, 3 B. Mon., 50; *Morrison v. Beckwith*, 4 T. B. Mon., 73; S. C., 16 Am. Dec., 136.

The general rule first stated applies to the case of successive mortgages of parts of mortgaged premises. *Stuyvesant v. Hale*, 2 Barb. Ch., 151; *Steere v. Childs*, 15 Hun, 511; *Bernhardt v. Lymbruner*, 85 N. Y., 172; *Dodds v. Snyder*, 44 Ill., 53; but see *Pancoast v. Duval*, 36 N. J. Eq., 445.

The rule, however, is one which is to be equitably applied and may be varied by circumstances. It is not applied where it would work injustice. *Guion v. Knapp*, 6 Paige, 35; S. C., 29 Am. Dec., 741; *Patty v. Pease*, 8 Paige, 277; S. C., 35 Am. Dec., 683; *Kellogg v. Rand*, 11 Paige, 59; *Hill v. McCarter*, 27 N. J. Eq., 41; *Bernhardt v. Lymbruner*, 85 N. Y., 172; *Worth v. Hill*, 14 Wis., 559.

It is not applied where grantee of mortgagor assumes mortgage, in whole or in part. *Hoy v. Bramhall*, 19 N. J. Eq., 563; *Cole v. Appleby*, 22 Hun, 72; *Pancoast v. Duval*, 26 N. J. Eq., 445.

Where the mortgage provides an order of sale, it will be followed. *Mickle v. Maxfield*, 42 Mich., 304.

Generally, where a mortgage is upon two parcels of land and there is a subsequent incumbrance on one, the mortgagee will be compelled to sell one on which there is no lien first. *Oppenheimer v. Walker*, 3 Hun, 30; *Scott v. Webster*, 44 Wis., 185; *Hoy v. Bramhall*, 19 N. J. Eq., 74; *Terry v. Rosell*, 32 Ark., 478; *Cheesebrough v. Millard*, 1 Johns. Ch., 409; *Swift v. Conboy*, 12 Iowa, 444; *Blazey v. Delius*, 74 Ill., 299.

court, in its decree, ordered that these parcels should be sold separately, and in the inverse order of the dates of the conveyances made by the Walkers, until the amount due, as ascertained by the decree, was satisfied, so that the parcels first sold should be the last subjected to the satisfaction of the debt. The decree made no provision for redemption after sale, as required by the Statute of Illinois.

Three principal errors are assigned here:

1. That the decree should have subjected all the property on which the mortgage was a lien equally, and without regard to priority of conveyances by the mortgagors.

2. That the court erred in determining the order of these priorities.

3. That the decree made no provision for redemption after sale.

1. As regards the question raised by the first of these assignments, we are relieved from any discussion of what is the true, equitable rule on the subject, because we consider that when such rule is adopted it is, within the decisions of this court, a rule of property affecting the title to real estate, and as such is to be governed, in its application in this court, by the law of the State where the land lies. In a case where no statute of the State makes provision on the subject, and no decisions of the state court have established a rule, it would be our duty to inquire what is the doctrine of the equity courts on the subject.

The Supreme Court of the State of Illinois having announced on very full consideration the rule which was followed by the circuit court, there was no error in that court in following it. *Iglehart v. Crane*, 42 Ill., 261.

2. In regard to the order in which the parcels of the land are subjected to sale, it is to be observed that no one can complain but Orvis, because he is the only party who has appealed from the decree.

So far as Orvis is concerned, the only error assigned which seems worthy of notice is that block 18 should have been subjected to plaintiff's debt first, because Walker, the mortgagor, was still owner of an equitable interest in it. This does not appear by any written instrument, but so far as it is established at all, it is by Walker's parol testimony. It thus appears, however, that Colbaugh and Powell held the title in trust to secure money advanced by them on a sale which had been rescinded, and it was by virtue of this rescission that Walker had any interest in it. What the amount of the sum is for which Colbaugh and Powell held it is not shown, nor is the value of the lot. But appellant's witness, Walker, states that the debt due these parties is more than the lot is worth, after paying some liens on it prior to theirs. As the title of Walker had passed from him to this lot long before that claimed by Orvis, we do not believe that the court was bound to prosecute an inquiry, through all the ramifications of Walker's dealing with this lot, dependent solely on conflicting oral testimony, to ascertain if Walker had a possible ultimate interest in it. Nor does it consist with the general course of equity practice to order a public sale of a very doubtful contingent interest, the value of which is incapable of estimation, and where any price given might do great injustice to the purchaser or to the party whose interest is sold,

See 8 OTTO,

and which would lead to further expensive litigation. Besides, if in the end appellant has to pay any part of this mortgage, there is nothing to prevent his pursuing this equity of Walker's so far as may be necessary to indemnify him in an independent suit, where that matter may be fully investigated without further delaying the present plaintiff.

On the whole, we see no error to the prejudice of appellant in the order of sale adopted by the decree.

But we decided in *Brine v. Ins. Co.*, at last Term, 96 U. S., 627 [XXIV., 858], that a decree of foreclosure in the Circuit Court of the United States for the District of Illinois, which gave no time for redemption after the sale, was erroneous and must be reversed. The larger part of the briefs of several counsel in this case is devoted to a consideration of the question there decided. It is sufficient to say that we are satisfied with the soundness of the opinion given in that case, and it must govern the one now before us.

The result of those considerations is, that the decree of the circuit court ascertaining the sum due the plaintiff, and fixing the order in which the various parcels of land shall be sold, and in fact all of said decree is affirmed, except so far as it fails to give a time for redemption; and the case is remanded to that court with directions to amend the decree so as to allow redemption of each parcel which may be sold, as provided by the Statute of Illinois on that subject. As appellant had to take this appeal to obtain correction of the error in this respect, he must recover costs.

Upon Reargument,

Mr. Justice Miller delivered the opinion of the court:

The appellant, Orvis, was granted a reargument in this case because the question of the order of subjecting lands mortgaged, and sold subsequently by the mortgagor, to different parties at different dates to satisfaction of the mortgage debt, was a new one in this court, and because the subsequent sales on which the court had to pass in the case were numerous and, as presented by the record, a little perplexing.

Since the reargument was allowed, appellant makes application for a writ of *certiorari*, to bring up a paper found in the clerk's office of the court below, which he considers important.

That paper, of which a photographic copy is presented to us, seems to have been the original draft of the final decree presented to the Judge for his approval. It has written on its back, "Draft of decree for sale," with a date, and the word "Enter," followed by the initials of the Judge who entered the decree. It has erasures and interlineations in its body and additions on its margin, and because these do not seem to be in the same handwriting as the body of the instrument, we are asked to presume that, though the decree as entered corresponds with these changes, it is by forgery or fraud that it is done. The paper itself is no part of the record of the case. It is obviously what it purports to be, a draft for a decree, no doubt submitted to the Judge, and changed by him to suit his views, or possibly by suggestions of counsel on the other side. There is absolutely not the slightest reason to show that the decree as thus altered or

amended was not the one to be entered by the Judge, or that it is not the one in the record now before us. But suppose it was a fraud upon the court or upon the other side, we could do nothing in the matter, even if the original of this paper was now before us. We cannot here correct the record of the circuit court and make a record for it. Nor do we see any reason to delay the case or remit it to that court, for there is not the slightest evidence of any wrong. It would be a very dangerous precedent to set, that whenever the rough draft of a decree which the judge orders to be entered shall, two years afterwards be found to contain erasures and interlineations, this court will stop proceedings and direct an inquiry into the circumstances under which those changes were made.

On the reargument it is urged by appellant that the mortgage debt of Walker to Powell, on which the decree was rendered, was contracted for the purchase of an undivided one fourth part of the land covered by the mortgage, while the mortgage covers the whole interest.

1. But it does not appear that the mortgage *was* given for the purchase money at all. No such thing is stated in any deed in the record, or any such averment in the bill or answer.

2. If Powell had conveyed only the undivided fourth, and taken a mortgage on the whole of it, such a mortgage is valid, as Powell had a right to require the entire interest as security for the part he sold.

3. There is no deed from Powell to Walker in the record, and in the short abstract of title found in the master's report of such a deed, it is obvious that the "*und. 1-4 of the S. W. 1-4*" is an error in printing or transcribing for the N. E. 1-4 of the S. W. 1-4, which is the description also in the mortgage.

But whereas, on the former hearing, the principal effort of counsel was directed to showing that block 18 of the subdivision of the land covered by the mortgage should have been ordered to be sold before the property of the appellant, the contest is now between block 14 and the appellant's property.

The piece of the mortgaged property ordered to be first sold in satisfaction of the mortgage debt is the south one hundred feet of block 16, of Packer's subdivision, which was owned by appellant. His title is a deed with covenant of warranty from H. H. Walker, the mortgagor and defendant in this suit, dated Feb. 26, and recorded April 9, 1874. This is the latest conveyance by Walker of any of the land covered by the mortgage, and when it was made, left none of it in his ownership. It should, therefore, be first subjected to the payment of Powell's mortgage, according to the rule of the inverse order of sales, unless there is some sufficient reason to the contrary. The last piece of the land conveyed by Samuel Walker previous to this conveyance to Orvis, was block 14, to S. A. Ricker, by deed of Feb. 25, 1873. As between the two parcels it is argued by the counsel for Orvis, that when Ricker bought block 14, the title to block 16 had been previously conveyed to John D. Kinny, April 25, 1872, and it so appears by the record. If matters had remained in this condition when the decree of foreclosure was rendered, Ricker's block should have been first subjected to sale by the rule of the inverse order of sale by the mortgagor.

But in point of fact it appears that on the 26th Feb., 1874, Orvis made an agreement in writing with both Samuel J. Walker and Henry H. Walker for the purchase of the one hundred feet of block 16 now in question; and on the same day Henry H. Walker, the original mortgagor made him a deed in fulfillment of that contract, with covenants of warranty. While the contract of purchase with Samuel and H. H. Walker was recorded the day it was made, the deed from H. H. Walker was not recorded until April 9.

In the meantime John D. Kinny quitclaimed this hundred feet of block 16 to H. H. Walker on the 6th day of March, and on the 8th day of April procured a release from John G. Rogers of a deed of trust for that part of block 16.

There can be little doubt that the agreement for a purchase by Orvis from both the Walkers, the deed from Kinny to Henry Walker, the release of the deed of trust on the property by Rogers, and the warranty deed by H. H. Walker to Orvis were parts of one transaction.

It shows quite plainly that this piece of land originally mortgaged by Henry Walker to Powell to secure notes made by Henry and Samuel Walker, after it had once been sold by the Walkers came back to Henry Walker, with a fee simple title, freed from all other incumbrance but the original mortgage. Being liable to that mortgage in his hands, it was liable before any other piece of the land first mortgaged was equitably liable in the hand of others. Coming thus to their hands, or to speak more properly, to the hands of Henry H. Walker, the priority of liability for the original mortgage became re-attached to it. Mr. Orvis took it, therefore, subject to the original mortgage, which is not denied; but so subject before that of others whose title had been acquired before his.

And this view of the subject is the same, whether we regard Samuel J. Walker the real sub-vendee, or Henry Walker as the principal party. Orvis contracted with both, took covenants of warranty from both, and in any event the title in H. H. Walker's hand became legally liable to the mortgage he himself had given in exoneration of all that he had previously conveyed.

The same decree will be entered that was made on the former hearing.

Cited—100 U. S., 106, 640; 9 Biss., 209.

S. JENNISON, Exr. of B. B. TITCOMB, *Plff.*
in *Err.*,
v.

JOHN T. KIRK.

(See S. C., 8 Otto, 453-462.)

Act granting right to ditch and canal owners—mining law—water-right—use of water—damages.

*1. The 9th section of the Act of Congress of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," enacted "that, whenever, by priority of

*Head notes by Mr. Justice FIELD.

NOTE.—Title to water by appropriation; common law rule; rule of mining States. See note to Atchison v. Peterson, 87 U. S., XXII., 414.

possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed. *Provided*, however, that whenever, after the passage of this Act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." Held: 1. That this section only confirmed to the owners of water-rights and of ditches and canals on the public lands of the United States the same rights which they held under the local customs, laws and decisions of the courts, prior to its passage. 2. That the proviso conferred no additional rights upon the owners of ditches subsequently constructed, but simply rendered them liable to parties on the public domain whose possessions might be injured by such construction.

2. The origin and general character of the customary law of miners stated and explained.

3. By that law, the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.

4. By that law, a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes.

5. Accordingly, where the owner of a mining claim worked by the method known as "the hydraulic process," cut and washed away a portion of a ditch so as to let out the water flowing in it, the ditch having been so constructed across the claim previously acquired as to prevent it from being further worked by that method, and to prevent the use of water previously appropriated by him, held: that the cutting and washing away of the ditch, it having been done in order that the claim might be worked and the water used as before, was not an injury for which damages could be recovered.

No. 199.

Argued Apr. 2, 1879. Decided Apr. 28, 1879.

ERROR to the Supreme Court of California. Titcomb brought an action for damages and an injunction in this case, in the District Court, Placer County, Cal. Judgment having been given for the defendant, and affirmed by the Supreme Court of the State, the plaintiff sued out this writ of error.

The case is fully stated by the court.

Messrs. B. F. Myers and Hall McAllister, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice Field delivered the opinion of the court:

In 1873, the plaintiff's testator constructed a ditch or canal in Placer County, California, to convey the waters of a *cañon* and of tributary and intermediate streams to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling and agricultural purposes, and for sale. The ditch was completed in December of that year, and immediately thereafter the waters of the *cañon* were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the first of November to the first of April, the *cañon* tributaries and intermediate streams would supply that

quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters, by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or *cañon* in the mountains known as Fulweiler's Gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed. One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and re-opened his own ditch, turning into it the waters which had previously flowed in it, and in so doing cut and washed away a portion of the ditch of the testator, so as to let out the waters brought down from the *cañon* above, and the intermediate streams. It is for alleged damages thus caused to the testator, and to restrain the continuance of the alleged injury to his ditch, and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated, because necessary for the repair and re-opening of his own ditch, and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears from the answer, which the court finds to be correct in this particular, that for many years prior to this action the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's Gulch, extending from a point about 1,200 feet below the crossing of the testator's ditch to a point about 1,200 feet above it, including the bed of the gulch and fifty feet of its banks, on each side; that during this period the ground was continuously held and worked for mining purposes, and as a mining claim, in accordance with the usages, customs and laws of miners in force in the district; that in working the claim and extracting the gold the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills, and the gold-bearing earth and gravel are washed down, and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument, it was admitted that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction, and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon the testator, and since his death upon his executor, to so adjust the crossings of the ditches as not to interfere with the full use and enjoyment, by

the defendant, of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the 9th section of the Act of Congress of July 26, 1866. That section enacted,

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided*, however, that whenever, after the passage of this Act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 14 Stat. at L., 253.

There are some verbal changes in the section as re-enacted in the Revised Statutes, but none affecting its substance and meaning. R. S., sec. 2339.

The position of the plaintiff's counsel is, that of the two rights mentioned in this section, only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment, to the local customs, laws and decisions. This position, we think, cannot be sustained. The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the Act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches and *cañons*, and probing the earth in all directions for the precious metals. Wherever they

went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were, consequently, carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through *cañons* and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the state courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the Act, the 9th section of which we have quoted, was passed. In the 1st section it was declared that the mineral

lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz-bearing gold, silver, cinabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the Act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government. The Senator of Nevada, Hon. William M. Stewart, the author of the Act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The Legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the Constitution or laws of the State or of the United States, should govern their determination; and a series of wise judicial decisions had molded these regulations and customs into "A comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous government. And the Act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., part iv., pp. 3225-3228.

These statements of the author of the Act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the Act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and molded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims,

the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws and decisions, would be thereby destroyed, unless secured by the Act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it which were thus recognized, that the 9th section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed: it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, should be "acknowledged and confirmed;" but where ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the Act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws and decisions of the courts.

This view of the object and meaning of the 9th section was substantially taken by the Supreme Court of California in the present case; it was adopted at an early day by the Land Department of the Government, and the subsequent legislation of Congress respecting the mineral lands is in harmony with it. Letter of Commissioner Wilson of Nov. 23, 1869; Copp., U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, 16 Stat. at L., 217 and May 10, 1872, 17 Stat. at L., 91, R. S., tit. 32, ch. 6.

By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case, the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that, so far as the flow of

the water was concerned, this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process. The position of the testator's ditch prevented this working, and thus deprived him of this value of the water, and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch by the defendant, this having been done "in the exercise, use, and enjoyment of his own water-rights, in the usual and in a reasonable manner," as found by the court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered.¹

Judgment affirmed.

1. NOTE.—The customary law of miners, as stated in the opinion, is not applicable in California to controversies arising between them, or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." *Tartar v. Spring Creek Co.*, 5 Cal., 398. But at an early day an exception was made to this policy in cases where the interests of agriculturists and of miners conflicted. By an Act passed April 20, 1852, a right of action was given to anyone settled upon the public lands for the purpose of cultivating or grazing against parties interfering with his premises, or injuring his lands where the same were designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent: with a proviso, however, that if the lands contained mines of precious metals, the claim of the occupant should not preclude any persons desiring to do so from working the mines "As fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes." Stat. at L., 1852, p. 158.

Under this Act the Supreme Court of the State held that miners, for the purpose simply of mining, could enter upon the land thus occupied, but that the Act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specially provided for. Accordingly, ditches constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. *Stokes v. Barrett*, 5 Cal., 37; *McClinton v. Bryden*, 5 Cal., 97; *Fitzgerald v. Urton*, 5 Cal., 308; *Burge v. Underwood*, 6 Cal., 46; *Werner v. Lowery*, 11 Cal., 104.

Since these decisions, there has been some legislation in the State permitting water to be conveyed, upon certain conditions, across the lands of others. Such legislation, if limited to merely regulating the terms upon which possessory rights subsequently acquired on the public lands in the State may be enjoyed in the absence of title from the United States, may not be open to objection.

Cited—101 U. S., 276.

GEORGE REYNOLDS, Plff. in Err.,

v.

UNITED STATES.

(See S. C., 8 Otto, 145-168.)

Grand jurors—challenges—manifest error—forming opinion—challenge for cause—bigamy in Utah—former testimony—religious belief—polygamy—intent—charge to jury.

1. The number of grand jurors necessary to find an indictment in a Territory must be determined by the territorial laws, and not by the Acts of Congress.

2. It is good ground for a challenge for principal cause, that a juror has formed an opinion as to the issue to be tried; but it must be founded on some evidence and be more than a mere impression.

3. The finding of the trial court upon the competency of a juror ought not to be set aside by a reviewing court, unless the error is manifest.

4. That a juror believed he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony, does not necessarily disqualify him.

5. A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause.

6. On a trial for bigamy in Utah, it is sufficient objection to a juror that he was, or had been, living in polygamy.

7. If a witness is wrongfully kept away by the prisoner, his testimony taken on a former trial of the prisoner for the same offense, but under another indictment, may be given in evidence. The finding of the trial court that the witness was thus wrongfully kept away should not be disturbed unless the error is manifest.

8. Religious belief cannot be accepted as a justification of an overt act made criminal by the law of the land.

9. The constitutional guaranty of religious freedom was not intended to prohibit legislation in respect to polygamy. Section 5352 of the U. S. R. S., respecting bigamy is within the legislative power of Congress.

10. A criminal intent is generally an element of crime; but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.

11. It was not error in the court, in its charge to the jury, to call their attention to the evil consequences of bigamy, or to remind them of the duty they had to perform.

[No. 180.]

Motion submitted Feb. 13, 1878. Decided Feb. 18, 1878.

Argued Nov. 14, 15, 1878. Re-decided Jan. 4, 1879.

On Petition for Rehearing Judgment of Jan. 6 Vacated and case Re-decided May 5, 1879.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is fully stated by the court.

Messrs. **Geo. W. Biddle, Ben. Sheeks, E. D. Hoge** and **Geo. Q. Cannon**, for plaintiff in error:

The challenge of the defendant to the jurors, **Eli Ranschoff** and **Charles Read**, should have been allowed.

Whart. Cr. L., 7th ed., 1877, sec. 3065; *Burr's Trial*, pp. 414, 415; *U. S. v. Hanway*, 2 Wall., Jr., 143; *U. S. v. Wilson* (1830), Baldwin and Hopkins, JJ., 1 Bald., 83, 84; *Ex parte Vermilyea* (1826), 6 Cow., 563; *People v. Mather* (1830), 4 Wend., 238; *People v. Rathbun* (1839), 21 Wend., 542.

Cowen, J., says on page 542: "The better opinion, I think, as collectible from these cases is, that the merely forming, without expressing, an opinion, is principal cause." He refers to the two cases just cited, *Ex parte Vermilyea* and *People v. Mather*.

Cancemi v. People (1858), Strong, J., 16 N. Y., 502-3; *State v. Jewell*, 33 Me., 583; *Flouts v. State*, 7 Ohio St., 472; *Neely v. People*, 13 Ill.,

NOTE.—When evidence of what witness testified to on former trial is admissible. See note to *Ruch v. Rock Island*, 97 U. S., XXIV., 1101.

Causes of challenge of jurors and their qualifications. See note to *Clinton v. Eaglebrecht*, 80 U. S., XX., 659.

685; *Smith v. Eames*, 3 Scam., 76; *Schoeffler v. State*, 3 Wis., 831; *Trimble v. State*, 2 Greene (Iowa), 410; *Nelms v. Mississippi*, 13 Sm. & M., 503; *Cotton v. State*, 31 Miss., 509; *Commonwealth v. Lesker*, 17 Serg. & R., 155; *Starup v. Comm.*, 74 Pa., 460; *Armistead's Case*, 11 Leigh., 658; *Stewart v. State*, 13 Ark., 740.

The court erred in asking several jurors upon their *voir dire* whether they were living in polygamy.

In *Anonymous*, Salk., 153, where one Cook, being indicted for high treason and the jury called, it was offered to ask the jurors, in order to challenge them, if they had not said he was guilty or would be hanged, it was said by the court: "This is a good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the jurymen. The jurymen may be asked upon *voir dire*, whether he hath any interest in the cause; whether he hath a freehold; for these do not make him criminal. But you shall not ask a witness or jurymen whether he hath been whipped for larceny or convicted for felony, or whether he was ever committed to Bridewell for a pilferer, or to Newgate for clipping and coining, or whether he is a villain or outlaw, because that would make a man discover that of himself which tends to shame, crime, infamy or misdemeanor."

Bac. Abr., tit. "Juries," 12 F.; Dane's Abr., ed. 1824, Vol. 7, ch., 221, art. 7, sec. 13; *Hudson v. State* (1824), 1 Blackf., 319.

The court erred in admitting the testimony given by Amelia Jane Schofield, on a former trial of a different indictment.

Richardson v. Stewart (1815), 2 Serg. & R., 84; *Chess v. Chess* (1828), 17 Serg. & R., 409; *Hvidekoper v. Cotton*, 3 Watts, 56 (1834); *Powell v. Waters* (1819), 17 Johns., 176; *Wilbur v. Selden*, 6 Cow., 162; *LeBarron v. Crombie*, 14 Mass., 234; *Orary v. Sprague* (1834), 12 Wend., 45; *People v. Newman* (1843), 5 Hill., 295; *Finn v. Com.*, 5 Rand. (Va.), 701; see, *Broggy v. Com.*, 10 Gratt., 722; *Bergen v. People*, 17 Ill., 426; *Dupree v. State*, 33 Ala., 380.

The court erred in its charge, in refusing to instruct the jury that if they found that the defendant was married in pursuance of and conformity with what he believed at the time to be a religious duty, their verdict should be "Not guilty."

Bigamy is not prohibited by the general moral code. There is no command against it in the Decalogue. Its prohibition may, perhaps, be said to be found in the teachings of the New Testament. Granted; for the purpose of the argument. But a majority of the inhabitants might be persons not recognizing the binding force of this dispensation. In point of fact, we know that a majority of the People of this particular Territory deny that the Christian law makes any such prohibition. We are, therefore, led to the assertion, that as to the People of this Territory, the supposed offense is a creature of positive enactment. Had Congress a right to fasten this burden upon them?

There is always an excess of power, when any attempt is made by the Federal Legislature to provide for more than the assertion and preservation of the rights of the General Government over a Territory, leaving necessarily the enactment of all laws relating to the social and domestic life of its inhabitants, as well as its in-

ternal police, to the people dwelling in the Territory.

But whether Congress had or had not the right to make the having of more than one husband or wife at the same time a criminal offense, surely we must look at the intent of the party who is charged with the violation of a criminal statute.

Thus it has been held in the case of one who belonged to a religious community which thought it a violation of God's commandments to administer temporal aid or remedies to the sick, that there could be no conviction for the crime of manslaughter, by reason of a neglect to provide medicine and suitable care for a sick child.

See, *Regina v. Wagstaffe*, 10 Cox, Cr. Cas., 530, Willes, *Justice* (1868).

In consequence of this case, the Statute of 31 and 32 Victoria was passed, rendering the neglect to provide medical assistance a criminal offense.

Now how does the case in hand differ from the case of *Regina v. Wagstaffe*? Let it be conceded that the Act of Congress, making the having of two wives at the same time a criminal offense, is entirely free from constitutional objection. Still, in order to make out a conviction under it, you must bring home to the offender guilty knowledge. This is the very gist of the offense, as it necessarily is of all crimes.

Messrs. **Ohas. Devens**, *Atty-Gen.*, and **S. F. Phillips**, *Solicitor-Gen.*, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This is an indictment for bigamy under Section 5352, Revised Statutes, which, omitting its exceptions, is as follows:

"Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years."

The assignments of error, when grouped, present the following questions:

1. Was the indictment bad because found by a grand jury of less than sixteen persons?
2. Were the challenges of certain petit jurors by the accused improperly overruled?
3. Were the challenges of certain other jurors by the Government improperly sustained?
4. Was the testimony of Amelia Jane Schofield, given at a former trial for the same offense, but under another indictment, improperly admitted in evidence?
5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?
6. Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy?

These questions will be considered in their order.

1. As to the grand jury.

The indictment was found in the District Court of the Third Judicial District of the Territory. The Act of Congress "In Relation to Courts and Judicial Officers in the Territory of Utah," approved June 23, 1874, 18 Stat. at

L., 253, while regulating the qualifications of jurors in the Territory, and prescribing the mode of preparing the lists from which grand and petit jurors are to be drawn, as well as the manner of drawing, makes no provision in respect to the number of persons of which a grand jury shall consist. Sec. 808, Revised Statutes, requires that a grand jury impaneled before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the Territory limits the number in the district courts of the Territory to fifteen. Comp. L. Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is, whether the section of the Revised Statutes referred to, or the statute of the Territory governs the case.

By section 1910 of the Revised Statutes the District Courts of the Territory have the same jurisdiction (in all cases) arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States; but this does not make them Circuit and District Courts of the United States. We have often so decided. *Ins. Co. v. Canter*, 1 Pet., 511; *Benner v. Porter*, 9 How., 235; *Clinton v. Englebrecht*, 13 Wall., 434 [80 U. S., XX., 659]. They are courts of the Territories, invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the Supreme Court of the Territory, and from that court as a territorial court to this in some cases.

Section 808 was not designed to regulate the impaneling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being. *Clinton v. Englebrecht* [supra]; *Hornbuckle v. Toombs*, 18 Wall., 648 [85 U. S., XXI., 966]. As Congress may at any time assume control of the matter, there is but little danger to be anticipated from improvident territorial legislation in this particular. We are, therefore, of the opinion that the court below no more erred in sustaining this indictment than it did at a former term, at the instance of this same plaintiff in error, in adjudging another bad which was found against him for the same offense by a grand jury composed of twenty-three persons. 1 Utah, 226.

2. As to the challenges by the accused.

By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, "be indifferent as he stands unsworn." Co. Litt., 155 b. Lord Coke also says that a principal cause of challenge is "so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers," Co. Litt., 156 b; or, as stated in Bacon's Abr., "It is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the * * * juror." Bac. Abr., tit. Juries, E, 1. "If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to

the satisfaction of the court or the triers." Bac. Abr. tit. Juries, E, 12. To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire*, and asked any questions that do not tend to his infamy or disgrace.

All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive, Gabbet, Cr. L., 391; others, that it must be decided and substantial, *Armistead's Case*, 11 Leigh, 659; *Wormeley v. Com.*, 10 Gratt., 658; *Neely v. The People*, 13 Ill., 685; others, fixed, *State v. Benton*, 2 Dev. & B. L., 196; and still others, deliberate and settled, *Staup v. Com.*, 74 Pa., 458; *Curley v. Com.*, 84 Pa., 151. All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Chief Justice Marshall, in *Burr's Trial*, 1 Burr Trial, 416, states the rule to be that, "Light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

The challenge in this case most relied upon

in the argument here, is that of Charles Read. He was sworn on his *voir dire*; and the whole of his testimony is in the record. It is as follows:

Q. (By the district attorney:) "Have you formed or expressed any opinion as to the guilt or innocence of this charge?"

A. "I believe I have formed an opinion."

Q. (By the court:) "Have you formed and expressed an opinion?"

A. "No, sir; I believe not."

Q. "You say you have formed an opinion?"

A. "I have."

Q. "Is that based upon evidence?"

A. "Nothing produced in court."

Q. "Would that opinion influence your verdict?"

A. "I don't think it would."

Q. (By defendant:) "I understood you to say you had formed an opinion, but not expressed it?"

A. "I don't know that I have expressed an opinion. I have formed one."

Q. "Do you now entertain that opinion?"

A. "I do."

This was all the evidence and, taken as a whole, it shows that the juror "believed" he had formed an opinion which he had never expressed, and which he did not think would influence his verdict on hearing the testimony.

We cannot think this is such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. Under these circumstances, it is unnecessary to consider the case of *Ranschoff*, for it was confessedly not as strong as that of Read.

3. As to the challenges by the Government.

The questions raised upon these assignments of error are not whether the district attorney should have been permitted to interrogate the jurors, while under examination, upon their *voir dire* as to the fact of their living in polygamy. No objection was made below to the questions,

but only to the ruling of the court upon the challenges, after the testimony taken in answer to the questions was in. From the testimony, it is apparent that all the jurors to whom the challenges related were or had been living in polygamy. It needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause, it was for favor. A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside. In one case the challenge was for favor. In the courts of the United States, all challenges are tried by the court without the aid of triers, R. S., sec. 819, and we are not advised that the practice in the territorial courts of Utah is different.

4. As to the admission of evidence to prove what was sworn to by *Amelia Jane Schofield* on a former trial of the accused for the same offense, but under a different indictment.

The Constitution gives the accused the right to a trial, at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the *privilege* of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

In *Lord Morley's Case*, 6 Howell, St. Tr., 770, as long ago as the year 1666, it was resolved in the House of Lords "That in case oath should be made that any witness, who had been examined by the coroner and was then absent, was detained by the means or procurement of the prisoner, and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships." This Resolution was followed in *Harrison's Case*, 12 Howell, St. Tr., 851, and seems to have been recognized as the law in England ever since. In *Regina v. Scrafe*, 17 Ad. & Ell. (N. S.), 242, all the judges agreed that if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read. Other cases to the same effect are to be found, and in this country the ruling has been in the same way. *Drayton v. Wells*, 1 Nott. & M., 409; *Williams v. Stagle*, 19 Ga., 403. So that now, in the leading text books, it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence. 1 Greenl. Ev., sec. 163; 1 Taylor

Ev., sec. 446. Mr. Wharton, 1 Whart. Ev., sec. 178, seemingly limits the rule somewhat, and confines it to cases where the witness has been corruptly kept away by the party against whom he is to be called, but in reality his statement is the same as that of the others; for in all it is implied that the witness must have been wrongfully kept away. The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony. We are content with this long established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and if properly administered, can harm no one.

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In *Lord Morley's Case* [supra], it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is at least to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest.

The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offense under another indictment; that she had no home, except with the accused; that at some time before the trial a subpoena had been issued for her, but by mistake she was named as Mary Jane Schofield; that an officer who knew the witness personally went to the house of the accused to serve the subpoena, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, "Will you tell me where she is?" that the reply was "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh, no; she won't, till the subpoena is served upon her;" and then, after some further conversation, that "She does not appear in this case."

It being discovered after the trial commenced that a wrong name had been inserted in the subpoena, a new subpoena was issued, with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible.

In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own. Upon the testimony as it stood, it is clear to our minds that the judgment should not be reversed because secondary evidence was admitted.

This brings us to the consideration of what the former testimony was, and the evidence by which it was proven to the jury.

It was testimony given on a former trial of the same person for the same offense, but under another indictment. It was substantially testimony given at another time in the same cause. The accused was present at the time the testimony was given, and had full opportunity of cross-examination. This brings the case clearly within the well established rules. The cases are fully cited in 1 Whart. Ev., sec. 177.

The objection to the reading by Mr. Patterson of what was sworn to on the former trial does not seem to have been because the paper from which he read was not a true record of the evidence as given, but because the foundation for admitting the secondary evidence had not been laid. This objection, as has already been seen, was not well taken.

5. As to the defense of religious belief or duty.

On the trial, the plaintiff in error, the accused, proved that at the time of his alleged second marriage he was, and for many years before, had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that Church "That it was the duty of male members of said Church, circumstances permitting, to practice polygamy;" * * * that this duty was enjoined by different books which the members of said Church believed to be of divine origin, and among others the Holy Bible, and also that the members of the Church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said Church; that the failing or refusing to practice polygamy by such male members of said Church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come." He also proved "That he had received permission from the recognized authorities in said Church to enter into polygamous marriage; * * * that Daniel H. Wells, one having authority in said Church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed, to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the doctrines of said Church."

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he "was married as charged (if he was married) in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'" This request was refused, and the court did charge "That there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right—under an inspiration, if you please, that it was right—deliberately married a second time, having a first wife living, the want of consciousness of evil intent, the want of understanding on his part that he was committing a crime, did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed?

Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "A bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the People be requested "to signify their opinion respecting the adoption of such a bill at the next session of Assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil

government. Simple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, 1 Jeff. Works, 45; 2 Howison, Hist. of Va., 298, was passed. In the preamble of this Act, 12 Hen. Stat., 84, religious freedom is defined; and after a recital "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the Church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, 2 Jeff. Works, 355, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the States, while adopting the Constitution, proposed amendments. Three, New Hampshire, New York and Virginia, included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted.

Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, 8 Jeff. Works, 113, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the Supreme will of the Nation in behalf of the rights of conscience, I shall see, with sincere satisfaction, the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power

over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the Northern and Western Nations of Europe and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people. At common law, the second marriage was always void, 2 Kent, Com., 79, and from the earliest history of England polygamy has been treated as an offense against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil, the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offenses against the rights of marriage; just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the Statute of 1 James I., ch. 11, the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the Colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the Act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a Bill of Rights that "All men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience," (the Legislature of that State substantially enacted the Statute of James I., death penalty included) because as recited in the preamble, "It hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth." 12 Hen. Stat., 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the Government of the People, to a greater or less extent, rests. Professor Lieber says: polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound. 2 Kent, Com., 81, n. e. An exceptional colony of polygamists

under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does. Here the accused knew he had been once married, and that his first wife was living. He also knew that his second marriage was forbidden by law. When, therefore, he married the second time, he is presumed to have intended to break the law. And the breaking of the law is the crime. Every act necessary to constitute the crime was knowingly done, and the crime was, therefore, knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion; it was still belief, and belief only.

In *Regina v. Wagstaffe*, 10 Cox, Cr. Cas., 531, the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been

starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.

6. As to that part of the charge which directed the attention of the jury to the consequences of polygamy.

The passage complained of is as follows: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children; innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply and spread themselves over the land."

While every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked, and while it is the imperative duty of a reviewing court to take care that wrong is not done in this way, we see no just cause for complaint in this case. Congress, in 1862, 12 Stat. at L., 501, saw fit to make bigamy a crime in the Territories. This was done because of the evil consequences that were supposed to flow from plural marriages. All the court did was to call the attention of the jury to the peculiar character of the crime for which the accused was on trial, and to remind them of the duty they had to perform. There was no appeal to the passions, no instigation of prejudice. Upon the showing made by the accused himself, he was guilty of a violation of the law under which he had been indicted: and the effort of the court seems to have been not to withdraw the minds of the jury from the issue to be tried, but to bring them to it; not to make them partial, but to keep them impartial.

Upon a careful consideration of the whole case, we are satisfied that no error was committed by the court below, and the judgment is consequently affirmed.

Mr. Justice Field.

I concur with the majority of the court on the several points decided except one: that which relates to the admission of the testimony of Amelia Jane Schofield given on a former trial upon a different indictment. I do not think that a sufficient foundation was laid for its introduction. The authorities cited by the Chief Justice to sustain its admissibility seem to me to establish conclusively the exact reverse.

On Petition for Rehearing.

Mr. Chief Justice WAITE delivered the opinion of the court:

Since our judgment in this case announced on the fourth of January last a petition for rehearing has been filed, in which our attention is called to the fact that the sentence of the court below requires the imprisonment to be at hard labor, when the Act of Congress under which the indictment was found provides for punishment by imprisonment only. This was not assigned for error on the former hearing, and we might on that account decline to

consider it now; but as the irregularity is one which appears on the face of the record, we vacate our former judgment of affirmance, and reverse the judgment of the court below for the purpose of correcting the only error which appears in the record, to wit: in the form of the sentence. *The cause is remanded, with instructions to cause the sentence of the District Court to be set aside and a new one entered on the verdict in all respects like that before imposed, except so far as it requires the imprisonment to be at hard labor.*

Cited—103 U. S., 310; 6 Sawy., 451; 11 N. W. Rep., 510; 127 Mass. 470; 34 Am Rep., 422.

UNITED STATES, *Appt.*,

v.
EVELINA PEROT, WIFE OF JOHN ASKEW,
ET AL.,

(See S. C., 8 Otto, 428-432.)

Spanish grants—Mexican league and vara—usage—laws of antecedent government.

*1. Spanish grants made in Texas for lands in the "Neutral Ground," east of the Sabine, from 1790 to 1800, are valid.

2. The Mexican league as used in Texas and applicable to Spanish grants in the Neutral Ground has always been estimated at 4,428.4 acres, being a square of 5,000 varas on each side, the vara being considered 33 1-3 American inches, and grants of leagues in the Neutral Ground should be estimated at that rate.

3. The true Mexican vara is slightly less than 33 American inches; but by use in California it is estimated at 33 inches, and in Texas at 33 1-3 inches.

4. The common usage of any country in reference to its measures should be followed in estimating such measures, when referred to in grants made there.

5. The courts of the United States take judicial notice of the laws which formerly prevailed in countries acquired by the United States up to the time of such acquisition. As to such countries they are not deemed foreign laws, but the laws of an antecedent government.

[No. 143.]

Submitted Jan. 21, 1879. Opinion delivered Mar. 10, 1879. Final decree rendered Oct. 28, 1879.

APPEAL from the District Court of the United States for the District of Louisiana.

The case, which arose in the court below, is fully stated by the court.

Mr. S. F. Phillips, Solicitor-Gen., for appellant.

Messrs. T. J. Durant & C. W. Hornor, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

The claim in this case is for four leagues of land granted by Bernardo Fernandez, commandant of the post of Nacogdoches, under the Spanish Government, in the Province of Texas, to Pedro Dolet, on the 27th of December, 1795, and extended in possession on the 14th of January, 1796. The land was situated on the Bayou of the Adoise, in the settlement of Bayou Pierre, and in what is known as the Neutral Ground, lying east of the Sabine River, and west of the Arroyo Hondo, the Kisachey, and the Calcasieu. This territory was then claimed as belonging to Texas, and was occupied and settled by the Spanish authorities of that Province, though claimed by the Province of Louisiana—the Spanish settlements in Texas having

*Head notes by *Mr. Justice BRADLEY*.

been pushed forward easterly across the Sabine. After the cession of Louisiana to the United States, it became a subject of dispute between our Government and Spain, and the Sabine was finally acquiesced in as the boundary line. But as Spain owned both provinces at the time of this grant, there can be no question as to its validity. Such a grant for a large tract of over 200,000 acres of land in the same district was confirmed by this court in *U. S. v. Davenport*, 15 How., 1. The grant in that case was made in the same year as the grant in this case, 1795. The court, by *Mr. Justice Campbell*, said: "The land comprehended in these grants at their respective dates was within the unquestioned dominions of the Crown of Spain. The evidence clearly established that the commandants of the posts at Nacogdoches, before and subsequently, were accustomed to make concessions to lands in the neutral territory. This was not at all times an unquestioned jurisdiction, but between the years 1790 and 1800 it seems to have been generally acquiesced in."

We think, therefore, that the grant must be sustained. The evidence produced to authenticate it is, under the circumstances, all that the claimants could be expected to produce.

But the grant is for four leagues only. The claimants obtained a decree below for four American or English Leagues; and such leagues may have been inadvertently allowed in some previous cases. But it is evident that no such leagues were in the minds of the parties. The leagues intended were Spanish leagues, such as were used in land measures and grants in Mexico and Texas at that period. Now we are bound to take judicial notice that the Mexican league was not the same as the American league. The laws of Mexico, of force in Texas previous to the Texan Revolution, were the laws not of a foreign, but of an antecedent government, to which the Government of the United States, through the medium of the Republic of Texas, is the direct successor. Its laws are not deemed foreign laws; for as to that portion of our territory they are domestic laws; and we take judicial notice of them. *Frémont v. U. S.*, 17 How., 542, 557 [58 U. S., XV., 241, 245].

If any doubt existed as to the extent of the Mexican league, an inquiry might be necessary to ascertain it. But no such doubt exists. The old legal league, by the laws of Spain, and which was adopted in Mexico, consisted of 5,000 *varas*; and a *vara* in Texas has always been regarded as equivalent to $33\frac{1}{3}$ English inches, making the league equal to a little more than 2.63 miles, and the square league equal to $4,428\frac{4}{10}$ acres. This is perfectly well understood in Texas, where controversies respecting Spanish titles are constantly brought before the courts.

Strictly speaking, the standard *vara* of Mexico is somewhat less than $33\frac{1}{3}$ inches. Our engineers, at the close of the Mexican war, brought back with them a copy of that standard found in the Mexican archives, being one of a set prepared for distribution among the Mexican States. This standard is still preserved in the Coast Survey Office, and by careful comparison with our standards by Professor Bache, was found to be only 32.9682 inches. This agrees very closely with the public reports of the Government of Mexico on the subject, which make

their *vara* 838 *millimètres*, which are equivalent to 32.9927 inches. Humboldt, in 1803, found it to be 839.16 *millimètres*, or a slight fraction over 33 inches. But it seems that a *vara* measure of somewhat larger dimensions obtained in Texas from an early period; and the result is what has been stated above, $33\frac{1}{3}$ inches to the *vara*, and 4,428.4 acres to the league. The *cordel*, a cord of 50 *varas*, or about 137 $\frac{1}{2}$ feet in length, was the instrument generally used in measuring large tracts, one hundred of these making a league; and it is probable that the *cordel* originally employed in Texas had become somewhat lengthened by use. See "the Constitution and Laws of the Republic of Mexico and of the States of Coahuila and Texas, New York, 1832," also Yoakum's History of Texas, Vol. I., p. 217; Rockwell's Spanish and Mexican Laws, p. 664; Halleck's Report, Ex. Doc., No. 17, Ho. Rep., 1st Sess., 31st Cong., p. 145.

The standard Mexican *vara* is so near to 33 inches (wanting according to the best measurements, less than a hundredth of an inch of that quantity), that a standard *vara* measure laid on an American yard would so nearly correspond with 33 inches, that the difference could not be perceived by the naked eye. Hence in California, after its acquisition by the United States, a *vara* came to be considered as exactly equal to 33 inches; and this result was sanctioned by the General Land-Office as early as 1852. The United States Surveyor-General of California, in a report to the Land-Office, dated at San Francisco, November 14, 1851, said: "All the grants, etc., of lots or lands in California, made either by the Spanish Government, or that of Mexico, refer to the '*vara*' of Mexico as the measure of length. By common consent here, that measure is considered as being exactly equivalent to thirty-three American inches." He then refers to other estimates found in a recent publication, and adds: "It is important that the relative proportions of their measures should be clearly settled. I, therefore, have to ask the aid of the Department in doing so." The commissioner, in an answer to this letter, dated Washington, March 5, 1852, said: "You state that by common consent it [the Mexican *vara*] is considered in California as exactly equivalent to 33 American inches. I can see no reason why there should be any departure from this ratio, and agree with you that any important change in the length of the '*vara*' recognized and acted upon in California would produce confusion."

It is understood that the Department has always, since that time, acted upon this standard of value of the *vara* in respect to surveys in California: which makes the square league of 5,000 *varas* to the side, equivalent to 4,340.278 acres. In a letter addressed by Mr. Wilson, Commissioner of the General Land-Office, to the late *Mr. Justice Catron*, of this court, on the 20th of February, 1855, he says that the practice of the Land-Office is to consider and allow the *vara* in California as equivalent to 33 inches, and the league as equivalent to 4,340.27 acres.

It is important that the uniform practice and usage of a country should be observed in the construction of all grants made therein whilst such usage prevailed.

For this reason, we think that in Texas, and in relation to grants emanating from the Mexi-

can Government in that province, before its separation from the parent State, the *vara* and league recognized in land measures there should be respected.

Allowing the claimant, therefore, at the rate of 4,428.4 acres to the league, according to the rate above referred to, he is entitled to a decree for 17,713⁸/₁₀ acres, instead of 23,040, as decreed by the court below, requiring a deduction of 5,326⁴/₁₀ acres. If the claimant will remit this excess, he will be entitled to an affirmation of the decree for the balance, namely: for 17,713⁸/₁₀.

On filing such remitter, a decree may be entered accordingly.

NOTE.—The following table shows the different values given to the Mexican *vara* and league by different measurements and authorities :

AUTHORITY.	1 Mexican Vara		1 League = Miles	1 Sq. League = Acres.
	= Metres.	= Inches.		
Humboldt (1803)	0.839,16	33.08339	2,607,1966	4350.384
Mexican Decree (1839)	.838,01	32.94811	2,603,6236	4338.464
Orbegozo (1847)	.838,00	32.94272	2,603,5924	4338.363
U. S. Coast Survey (1850)	.837,377	32.94820	2,601,6572	4331.917
Bustamante (1851)	.837,33	32.94634	2,601,5112	4331.430
Use in California	---	33.00000	2,604,1687	4340.277
Use in Texas	---	33.33333	2,630,4714	4428.402

THE FLAGSTAFF SILVER MINING
COMPANY OF UTAH, Limited, *Plff. in*
Errr.,

v.
HELEN TARBET.

(See S. C., 8 Otto, 463-470.)

Act as to mining rights—location of mining claim—effect of—trespass for taking ore.

- *1. A location of a mining claim upon a lode or vein of ore, should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the Mining Act of 1866 as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers.
- 2. Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him outside of the side lines of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded

* Head notes by Mr. Justice BRADLEY.
See 8 OTTO.

at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downwards, and indefinitely in their own direction.

3. If a location be laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof, for the purpose of defining the rights of the owners.

4. A locator working subterraneously into the dip of the vein belonging to another locator, who is in possession of his location, is a trespasser and liable to an action for taking ore therefrom.

[No. 998.]

Submitted Jan. 6, 1879. Decided May 5, 1879.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is fully stated by the court.

Mr. J. M. Woolworth for plaintiff in error.

Mr. Charles W. Bennett, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This is a writ of error to the Supreme Court of the Territory of Utah.

The action was in the nature of trespass *quare clausum fregit*, brought in the District Court of the Territory for the Third District, by Alexander Tarbet, and continued by his assignee, Helen Tarbet, the defendant in error, against the plaintiff in error, and other persons. The action being dismissed as to the other persons, judgment was rendered upon the verdict of a jury against the plaintiff in error for \$45,000 damages. The Company carried the case to the Supreme Court of the Territory, where the judgment was affirmed on the 3d day of June, 1878.

The controversy relates to the working of a mine in Little Cottonwood Mining District in the County of Salt Lake Territory of Utah. The defendant in error claims to own, and to have been in possession of, a mining location on a lode called the Titus Lode, the location including three claims, and extending six hundred feet westwardly from the discovery, with a width of 200 feet, and including ten feet on the east side of the discovery belonging to the South Star mine. The plaintiffs in error owned and had a patent for another mining location, called the Flagstaff mine, 100 feet in width and 2,600 feet in length, running in a northerly and southerly direction, and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine the plaintiffs in error worked around subterraneously, to a point some 300 feet to the east of their location, and on the north side of the Titus mine, and within about 100 feet of the Titus location. It is for this working that the suit was brought; and the principal question is, whether the plaintiff in error had a right thus to work outside of its location on the east, and whether, in doing so, it interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiff in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about 550 feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These

croppings, however show that the direction or course of the apex of the vein, at or near the surface, is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to plaintiffs in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that, by following a level beneath the surface, the strike of the vein runs in a northwesterly direction, or about north 50° west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the strike of the vein would be northwest instead of west, as it now is on the surface; or, at least, as the evidence tended to show that it is. In that case, the location of the defendant in error would leave the vein to its right, and the location of the plaintiff in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence being given *pro* and *con* in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the judge charged the jury as follows:

"If you find that Alexander Tarbet, during the time mentioned in the complaint, to wit: from January 1, 1873, to December 14, 1875 (being a period of 2 years, 11 months, and 14 days), was in possession of the whole or an undivided interest of Nos. 1, 2 and 3 of the Titus mining claim, and ten feet off No. 1 of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways: by the length of the course of the vein within the surface, and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip: and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again; "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

The court refused to give the following instructions propounded by the plaintiffs in error, to wit: "By the Act of Congress of July 26,

1866, 14 Stat. at L., 253, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that Act takes a fee simple title to the lode, to the full extent located and claimed under said Act."

Second. "In the very nature of the thing, a lode or vein, in its unworked and undeveloped stage, cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the Act of 1866 was a diagram of the surface area claimed; and this diagram might be extended laterally and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below, namely: that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiff in error has made the following assignment of error, which indicates the position which it contends for:

"The plaintiff in error assigns for error the charge of the court and the refusal to give its requests, that is, that the Judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury that by the Act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff Company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the Act of Congress. The language of the Act of 1866, 14 Stat. at L., 251, in relation to "a vein or lode" is, "That no location hereafter made shall exceed two hundred feet in length *along the vein* for each locator, with an additional

claim for discovery to the discoverer of the lode with the right to follow such vein to *any depth, with all its dips, variations and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules," etc. The Act of 1872, 17 Stat. at L., 91, is more explicit in its terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only 100 feet wide, that 100 feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

The location of the plaintiffs in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of their claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See, Rockwell, pp. 56-58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the court to charge, in effect, that having received a patent for 2,600 feet in length and 100 feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface, it was entitled to 2,600 feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We cannot think that this is the intent of the law. It would lead to inextricable confusion. Other localities correctly laid upon the lode, and com-

ing up to that of the plaintiff in error on either side, would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein further than it continued substantially to correspond with it.

Of what use would a location be, for any purpose of defining the rights of parties, if it could be thus made to cover a lode or vein which runs entirely away from it? Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it, and not interfere with their right, he might probably do so; but no farther.

And this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the Act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question in a proper manner; and the Flagstaff claims, belonging to the plaintiffs in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiff in error. The question was presented in different forms, but all to the same general purport.

The judgment of the court below is affirmed.

SAMUEL R. BRICK AND THE WASHINGTON GAS-LIGHT COMPANY,
Appts.,

v.

JULIA E. BRICK ET AL., Exrs. of JOSEPH K. BRICK.

(See S. C., 8 Otto, 514-517.)

Parol evidence to prove instrument a security.

1. It is proper to prove, by parol evidence, that a certificate of stock was issued as security for a loan and not upon a purchase.

2. The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. It does not forbid an inquiry into the object of the parties in executing and receiving the instrument.

[No. 233.]

Argued Apr. 16, 17, 1879. Decided May 5, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The bill in this case was filed in the court below by the appellees, to establish title to certain shares of stock. A decree having been rendered in their favor, the respondents took an appeal to this court.

The case is fully stated by the court.

Mr. W. B. Webb, for appellants.

Mr. Joseph H. Bradley, for appellees.

Mr. Justice Field delivered the opinion of the court:

In 1864, between the 7th and 27th of September, the appellant, Samuel R. Brick, a resident of Philadelphia, purchased eight hundred and ninety-two shares of stock in the Washington Gas-Light Company, a corporation existing in the District of Columbia, chartered by Congress, paying for the same \$17,277. Of this stock, two hundred and fifty shares were afterwards transferred by his direction on the books of the Company to his brother, Joseph K. Brick, a resident of Brooklyn, N. Y., to whom a certificate was issued and from whom a check for \$5,250 was received. The question presented is whether this transaction between the brothers was a sale of the stock, or a loan of money on its pledge. Joseph K. Brick is dead, and the evidence as to the character of the transaction is conflicting, as is generally the case when the object of parties in the execution of instruments is not expressed in writing, and is sought years afterwards to be shown by parol. But notwithstanding such conflict, there are certain facts established, indeed not controverted, which must control our judgment.

In the first place, it appears that in September, 1864, the appellant was anxious to purchase stock in the Gas Company. He had become acquainted with its affairs, and knew that it intended to apply to Congress for power to increase its capital and was convinced that with such increase the value of the stock would be greatly enhanced. He expressed this conviction in letters to his son, which the complainants produced; and, acting upon it, he purchased to an extent beyond his means of immediate payment, and gave his note for a portion of the purchase money.

In the second place, the appellant applied to his brother, Joseph, for a loan of money, at the

time he was expressing his anxiety to buy the stock of this Company, and his brother replied that the money could be raised on call. It was not many days afterwards when a check for the \$5,250 was sent.

In the third place, in May and July, 1866, Joseph stated, under oath, that he was not the owner of the stock. In the previous year he had given to the Board of Assessors of Brooklyn a statement of his personal property, in which he had specified the stock of the Gas-Light Company, valuing it at \$5,000, and was accordingly assessed upon it. In May, 1866, he made oath that he had been thus erroneously assessed, and that the error had arisen from his having inserted in the statement the stock held by him for his brother, in which he had no pecuniary interest. The assessment was accordingly corrected. On the same day, he wrote to his brother what he had done, saying that he had told the assessors he held the stock for the latter's benefit, and requesting him to advise the president and secretary of the Company that such was the case. And in the statement of his personal property for that year, made in July following, he omitted the stock in question, and verified the statement with his oath that he had no personal property not included in it.

So far from questioning the character of this testimony, the complainants refer to it in their bill, annex copies of the oaths taken, and observe that the stock was purchased to aid Samuel in some matters of business, and was often spoken of as his, though not so in fact, but that being unproductive, the oaths were made by Joseph in order to get rid of the tax assessed against him and make Samuel pay it, as if this circumstance could possibly extenuate what, if not true, was simple perjury.

This bill is signed by the widow of the deceased, and the suit is prosecuted by her and the executors of his will; but we do not think that the evidence in the case justifies the reproach they would cast upon his name and character. There are casual observations made by him, sometimes in loose conversation, mostly in friendly letters, which, unexplained, would indicate that he was owner instead of mortgagee of the stock, expressions not at all unnatural where one holds the absolute title to property; but there is nothing in them which overcomes the weight of his affirmation under oath, supported as that is by all the attendant circumstances.

We are satisfied that the certificate of the 250 shares was issued to the deceased as security for a loan, and not upon a purchase. It is competent to show by parol what the transaction was. In the late case of *Peugh v. Davis*, 96 U.S., 336 [XXIV., 776], we stated the doctrine of equity on this subject, where an instrument was in form a conveyance, but was in fact intended as a security; and though the instrument there was a deed of real property, the principle applies when the instrument purports to transfer personal property. A court of equity, we there said, "Looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real

character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice." *Hughes v. Edwards*, 9 Wheat., 489; *Russell v. Southard*, 12 How., 139; *Taylor v. Luther*, 2 Sumn., 228; *Peerce v. Robinson*, 13 Cal., 116.

As in our opinion the appellant is the owner
See 8 OTTO. U. S., Book 25.

of the stock in question, and his brother held it merely as collateral security for the \$5,250 loaned, it is unnecessary to consider what, if any, effect is to be given to the decree obtained in the former case of *Samuel Brick* against the executors of the deceased. Assuming that the District Court never acquired jurisdiction over the executors resident in the State of New York, the situation of the parties remains as previously; and upon payment of the loan with interest, after proper credits for the dividends received, the appellant will be entitled to the possession of the certificate. The present suit proceeds upon the theory that the stock belongs to the estate of the deceased, and is not held as security. It seeks to enforce a claim of ownership to the property, and not the payment of the loan by its sale.

The decree must, therefore, be reversed, with directions to the court below to dismiss the bill; and it is so ordered.

XCVIII UNITED STATES.

98 U. S. 1-19, 25 L. 60, PALMER v. LOW.

Public lands.—Record of alcalde grants of pueblo lands, turned over to county recorder by virtue of statutes of California, is primary evidence of the recorded grants, p. 11.

Courts.—A rule of property established by State courts is binding upon Federal courts, p. 14.

Approved in *Gravelle v. Minneapolis, etc., Ry.*, 3 McCrary, 386, 16 Fed. 436, depositions admissible in State courts will be admitted in Federal court after removal.

Public lands.—Grant by alcalde to one, his heirs and assigns, forever, etc., carried a fee-simple, p. 15.

Public lands.—Alcalde grant, in California, to infant, affirmed before the Van Ness ordinance was confirmed by Congress, carries a title superior to that of one claiming as occupant under said ordinance, p. 16.

Public lands.—City of San Francisco held an imperfect title in the pueblo until act of July 1, 1864, p. 16.

Applied in *San Francisco v. Scott*, 111 U. S. 769, 28 L. 593, 4 S. Ct. 688, holding decisions of State courts as to whether an alcalde, after the conquest, could make a valid grant, presents no Federal question; *San Francisco v. Le Roy*, 138 U. S. 664, 34 L. 1099, 11 S. Ct. 366, holding confirmation of pueblo lands to San Francisco was in trust for lotholders and inhabitants; *People v. Holladay*, 68 Cal. 443, 9 Pac. 656, holding title acquired long after issue was joined, unaffected by the judgment; *Baker v. Brickell*, 87 Cal. 334, 25 Pac. 490, holding like cited case.

Adverse possession.—Party could acquire no title by possession from 1851 to 1867, in California, as against title derived from Spanish government, p. 17.

Reaffirmed in *Holladay v. San Francisco*, 124 Cal. 356, 57 Pac. 148.

Public lands.—Act of Congress of 1864, respecting title to San Francisco lands, was confirmatory of the city's equitable claims under old Mexican title, and not a grant, p. 17.

Cited in *Ohm v. San Francisco*, 92 Cal. 457, 28 Pac. 585, holding legislative grants have all the effects of a patent.

Ejectment.—Where plaintiff in ejectment declared generally upon his title, it was not incumbent upon defendant in his answer to state the matters he relies upon, p. 19.

98 U. S. 20-31, 25 L. 43, **GLENNY v. LANGDON.**

Bankruptcy.—Suit to recover property conveyed by bankrupt in fraud of creditors can only be brought by assignee, p. 28.

Reaffirmed in *Trimble v. Woodhead*, 102 U. S. 650, 26 L. 291. Cited and principle applied in *McKenna v. Simpson*, 129 U. S. 511, 32 L. 773, 9 S. Ct. 366, holding State court has jurisdiction of action by assignee in bankruptcy to set aside fraudulent transfer; *Olney v. Tanner*, 10 Fed. 104, 107, and *Olney v. Tanner*, 21 Blatchf. 542, 18 Fed. 637, both holding receiver could not assail fraudulent transfer by bankrupt; *In re Pitts*, 9 Fed. 544, and *Scott v. Little*, 76 Fed. 565, both holding suit barred by delay of assignee; *Hill v. Graham*, 11 Colo. App. 542, 53 Pac. 1062, holding that assignee for creditors does not become a stockholder; *Lane v. Nickerson*, 99 Ill. 288, holding right of action for unpaid subscriptions passed to assignee; *Banking Assn. v. Le Breton*, 4 Woods, 205, 14 Fed. 647, *In re Lowe*, 19 Fed. 591, *Blair v. Hanna*, 87 Ind. 299, 300, and *Peery v. Carnes*, 86 Mo. 656, all holding like cited case; *John Deere Plow Co. v. Bank*, 59 Kan. 41, 51 Pac. 893, if assignee refuses to proceed for property withheld wrongfully, creditor must seek order of court; *Hale v. Christy*, 24 Neb. 751, 40 N. W. 298, holding that property of bankrupt vests in assignee by virtue of the adjudication; *Colt v. Sears Commercial Co.*, 20 R. I. 327, 38 Atl. 1058, holding assignee of insolvent estate is the only one who can bring a suit to avoid a preference; *McCartin v. Perry*, 39 N. J. Eq. 201, and *Mount v. Manhattan Co.*, 41 N. J. Eq. 215, 3 Atl. 729, that assignee has not recovered the property, gives creditors no right to do so. Cited, without particular application, in *Platt v. Mead*, 9 Fed. 97.

Distinguished in *Kimberling v. Hartly*, 1 McCrary, 142, 1 Fed. 576, holding subsequent bankruptcy of debtor does not divest jurisdiction of State court in pending suit; *Pulsifer v. Waterman*, 73 Me. 241, holding receipt by payee of his dividend of the estate was no abandonment of his remedy under the statute; *Ferrell v. Madigan*, 76 Va. 197, holding State court could enforce judgment obtained before bankruptcy; *Beall v. Walker*, 26 W. Va. 748, holding State court could enforce lien against bankrupt's estate.

Bankruptcy.—Court may require assignee to protect full rights of creditors, under punishment for contempt or removal, p. 28.

Reaffirmed in *Trimble v. Woodhead*, 102 U. S. 649, 26 L. 290. Cited and principle applied in *Brady v. Brady*, 71 Ga. 76, holding Bankrupt Court only can relieve bankrupt against mistake of assignee; *Bird v. Cleveland*, 78 Me. 528, 7 Atl. 391, holding equity will not order assignee to declare a dividend, until application has first

been made to Insolvent Court; *Riley v. Carter*, 76 Md. 607, 610, 612, 35 Am. St. Rep. 456, 458, 460, 25 Atl. 672, 673, 674, 19 L. R. A. 498, 499, and n., holding creditors may file petition to have appointment of conventional trustee set aside.

Bankruptcy.—Neither assignee nor any creditor can have any greater right under the Bankrupt Act than the act itself confers p. 29.

Approved in *Tennessee, etc., R. R. v. East Ala., etc., Ry.*, 75 Ala. 529, holding sale by assignee, not in conformity with bankrupt law, is not binding.

Bankruptcy.—Assignee is not bound to take possession of an asset which would prove a burden to the estate, p. 31.

Cited and principle applied in *Sparhawk v. Yerkes*, 142 U. S. 13, 35 L. 918, 12 S. Ct. 106, deeming assignees to have elected, not to accept the rights; *Quincy, etc., R. R. v. Humphreys*, 145 U. S. 99, 36 L. 638, 12 S. Ct. 793, holding occupation of road by receivers, under order of court, did not obligate them to pay rent; *Breed v. Glasgow Inv. Co.*, 92 Fed. 766, holding receiver could not authorize contractor to finish building without an order of the court; *Dushane v. Beall*, 161 U. S. 515, 40 L. 792, 16 S. Ct. 638, *Kimberling v. Hartly*, 1 McCrary, 140, 1 Fed. 575, and *Brookfield v. Stephens*, 40 Ark. 373, all holding like cited case; *Burton v. Perry*, 146 Ill. 112, 34 N. E. 70, and *Coleman v. Riggs*, 61 Iowa, 546, 16 N. W. 584, both holding right to maintain action on claim not accepted by assignee revested in bankrupt; *Young v. Kimball*, 59 N. H. 449, holding it no defense that mortgagor's assignee in bankruptcy can recover chattel, but does not claim it; *Beall v. Dushane*, 149 Pa. St. 443, 24 Atl. 285, holding property, which may be a burden, only passes to assignee upon acceptance.

98 U. S. 31-50, 25 L. 68, *BATES v. COE*.

Patent.—Presumption is that invention described in patent in infringement suit, was made at time accompanying application was filed; plaintiff may, if he can, prove a much earlier date, p. 34.

Approved in *Consolidated, etc., Co. v. Wörle*, 29 Fed. 452, where defense is prior invention, the patent will be considered as relating back to date of original discovery; *American Roll-Paper Co. v. Knopp*, 44 Fed. 610, presuming first applicant to be first inventor.

Distinguished in *Barnes, etc., Sprinkler Co. v. Manufacturing Co.*, 60 Fed. 606, 607, 18 U. S. App. 538, admitting evidence of dates of respective inventions.

Patents.—Reference may be had to the specifications, drawings and claims of a patent in construing it, p. 38.

Reaffirmed in *Von Schmidt v. Bowers*, 80 Fed. 140, 48 U. S. App. 160, and *Holly v. Machine Co.*, 4 Fed. 78.

Patents.—Where actual invention, described in specification, is larger than the claims of the patent, patentee, in suit for infringement, is limited to what is specified in the claims, p. 38.

Cited in *Kelly v. Clow*, 89 Fed. 304, 60 U. S. App. 366, as to accurate description of patent.

Patent.—Person suing for infringement of reissued patent need not introduce the surrendered patent, and if it is not put in by defendant, he cannot have that defense, p. 40.

Patent.—Where complainant, in infringement suit, introduced reissued patents, the burden is cast upon respondent to prove claimant not the original and first inventor of alleged improvement, p. 40.

Patents.—Courts are not governed by the names of machines if devices are different when they perform different duties in a substantially different way, or produce substantially a different result, p. 42.

Cited in *Palmer, etc., Tire Co. v. Lozier*, 84 Fed. 668, applying rule to a patented product.

Patent.—A public use or sale prior to the application, and with consent of patentee, is an abandonment, p. 46.

Cited, without particular application, in *Stegner v. Blake*, 36 Fed. 186. See 47 Am. Dec. 446, note.

Denied in *Andrews v. Hovey*, 124 U. S. 713, 31 L. 562, 8 S. Ct. 682, construing clause of section 7 of patent act of 1839.

Patent.—Inventors, by keeping invention secret, do not forfeit their right, unless another in the meantime has made the invention and secured a patent, p. 46.

Cited in 47 Am. Dec. 445, note, on abandonment before application.

Patents.—Under act of Congress defending party may plead a general denial of infringement, and having given required notice, may give special matters of defense, p. 47.

Trial.—Appellant cannot assign for error ruling of court in respect to any defense not set up in plea or answer, p. 47.

Patent.—Where patented thing is an entirety, defenses must be addressed to the invention, and not merely to one or more claim if less than the whole of invention, p. 48.

Reaffirmed in *Imhäuser v. Buerk*, 101 U. S. 660, 25 L. 947, and *Parks v. Booth*, 102 U. S. 104, 26 L. 57. Cited and principle applied in *Diamond Match Co. v. Ohio Match Co.*, 80 Fed. 118, holding bill averring that defendant's machines embody "the whole, or one or more of the said inventions," contained in the patent sued on, is demurrable; *Wilkins Shoe-Button, etc. Co. v. Webb*, 89 Fed. 986, holding separate machines may be included in the same patent

where each is a complement of the other; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 32, holding patent infringed, though devices differ in form and location; Strobbridge v. Lindsay, 2 Fed. 695, Sessions v. Romadka, 21 Fed. 131, Rhodes v. Press-Drill Co., 64 Fed. 219, and Consolidated Fastener Co. v. Fastener Co., 79 Fed. 798, all holding valid patent for combination of known elements. Cited without particular application in Holloway v. Dow, 54 Fed. 517.

Distinguished in Campbell v. Bailey, 45 Fed. 565, holding combination of old elements performing no new function and producing no new result is not invention.

Miscellaneous.—Cited in Nellis v. Pennock Mfg. Co., 13 Fed. 452, to point that claims for infringement of several patents may be included in one suit. Miscited in United States v. Hancock, 12 Sawy. 384.

98 U. S. 50-56, 25 L. 83, KESNER v. TRIGG.

Usury.—In Virginia, usury must be averred and proved, and in such a case debtor must, by statute, pay the principal, p. 52.

Trustee of land conveyed to secure debt is considered a purchaser, and if without notice of claim of another to the title, has rights of a bona fide owner, p. 53.

Reaffirmed in Peters v. Bain, 133 U. S. 696, 33 L. 705, 10 S. Ct. 363. Approved in Robinson v. Owens, 103 Tenn. 97, 52 S. W. 872, holding vendor not reserving a specific lien cannot enforce his equity against bona fide purchaser from vendee.

Husband and wife.—Postnuptial contract upon sufficient consideration, wholly or partly executed, will be sustained in equity, p. 54.

Approved in In re Wood, 5 Fed. 446, setting aside conveyance to wife where terms of agreement were not specific; Halferty v. Scarce, 135 Mo. 437, 37 S. W. 256, holding widow need not renounce contract for jointure, to claim dower in lands previously sold.

Husband and wife.—At common law, where wife's land is sold, money received by husband, without any reservation of her rights, belongs to him, p. 54.

Approved in In re Wood, 5 Fed. 445, holding, in Ohio, money received by wife, for separate use, remained her property; In re McKenna, 9 Fed. 31, holding tenancy by curtesy initiate passed to assignee in bankruptcy; Beecher v. Wilson, etc., Co., 84 Va. 817, 10 Am. St. Rep. 886, 6 S. E. 211, holding money of wife used by husband as his own, cannot afterwards be claimed by her.

98 U. S. 56-61, 25 L. 91, **PETERS v. BOWMAN.**

Covenant of seisin or of good right to convey, is broken, if at all, when made, p. 58.

Reaffirmed in *Curtis v. Brannon*, 98 Tenn. 157, 38 S. W. 1073, and *Wright v. Phipps*, 90 Fed. 562, 567.

Vendor and purchaser.—On bill to enforce lien for purchase money, where there has been no fraud or eviction, vendee cannot controvert title of vendor, he must rely upon covenants of title. No adverse title can be brought forward in that suit, p. 60.

Reaffirmed in *Union Pacific Ry. v. Barnes*, 64 Fed. 84, 27 U. S. App. 421, *Barry v. Guild*, 126 Ill. 445, 18 N. E. 760, 2 L. R. A. 335, and n., and *Safe Deposit, etc., Co. v. Electric-Light, etc., Co.*, 12 Wash. 139, 40 Pac. 732. Cited and principle applied in *Hillens v. Brinsfield*, 108 Ala. 614, 18 So. 608, holding that the only adverse title that can defeat a petition for division is one that has been determined previous to the hearing; *Morris v. Ham*, 47 Ark. 297, 1 S. W. 520, *Randall v. Bourgardez*, 23 Fla. 266, 11 Am. St. Rep. 380, 2 So. 311, *Adams v. Fry*, 29 Fla. 327, 10 So. 561, *Emmons v. Gille*, 51 Kan. 183, 32 Pac. 617, and *McConihe v. Fales*, 107 N. Y. 408, 14 N. E. 285, all holding purchaser in possession cannot set up defect in title as a defense in foreclosure suit; *Hilts v. Ladd*, — Or. —, 58 Pac. 34, refusing to impeach former decree on evidence merely cumulative; *Adams v. Edgerton*, 48 Ark. 423, 3 S. W. 630, *Bell v. Pate*, 47 Mich. 469, 11 N. W. 275, and *Dickerson v. Uhl*, 71 Mich. 406, 39 N. W. 476, all holding claims of prior lienholders cannot be litigated in foreclosure suit. Cited also in *Gee v. McMillan*, 14 Or. 274, 58 Am. Rep. 316, 12 Pac. 419, where one sells and conveys land, a lien for purchase price arises. See 89 Am. Dec. 434, note that title may not be tried in foreclosure suit.

Distinguished in *Hefner v. Life Ins. Co.*, 123 U. S. 752, 31 L. 311, 8 S. Ct. 339, holding equity in foreclosure suit may permit purchaser at tax sale to be made a party; *Potivin v. Blasher*, 9 Wash. 463, 37 Pac. 711, holding in action for foreclosure, mortgagor may set off his expenses in defending an ejectment suit.

98 U. S. 61-71, 25 L. 93, **UNITED STATES v. THROCKMORTON.**

United States is not bound by the statute of limitations, but many rights originally founded in fraud become, by lapse of time, no longer open to inquiry; e. g., to set aside patent to lands or confirmation of Mexican grant, pp. 64-65.

Cited and principle applied in *United States v. Des Moines, etc., Co.*, 142 U. S. 540, 35 L. 1107, 12 S. Ct. 316, sustaining *défensé de laches* where government is only a nominal party; *Foster v. Mansfield, etc., R. Co.*, 36 Fed. 639, refusing to set aside transaction where bill showed laches, even for fraud; *United States v. Wallamet*

Valley, etc., Road Co., 14 Sawy. 488, 42 Fed. 358, and *United States v. Wallamet, etc., Road Co.*, 44 Fed. 240, dismissing stale claim to set aside patents; *Snider v. Rinehart*, 20 Colo. 460, 39 Pac. 412, equity will not interfere where a party has been negligent.

Judgment.—There are no maxims more firmly established or salutary than those designed to prevent repeated litigation between same parties over same thing, p. 65.

Approved in *Hendrickson v. Bradley*, 85 Fed. 514, 55 U. S. App. 725, refusing to vacate judgment on same grounds alleged in motion for new trial.

Judgment may be set aside in equity for some fraud practiced directly upon the party seeking relief from it, by which he has been prevented from presenting all of his case, p. 66.

Reaffirmed in *Zellerbach v. Allenberg*, 67 Cal. 299, 7 Pac. 900, *Dunlap v. Steere*, 92 Cal. 347, 348, 355, 27 Am. St. Rep. 145, 146, 28 Pac. 563, 564, 16 L. R. A. 363, 364, 366, and n., *Ritchie v. McMullen*, 79 Fed. 531, 47 U. S. App. 470, *Lazarus v. McGuick*, 42 La. Ann. 201, 8 So. 255, and *Hyatt v. Wolfe*, 22 Mo. App. 199. Cited and principle applied in *Vance v. Burbank*, 101 U. S. 520, 25 L. 931, refusing relief where it did not appear that party was prevented from fully presenting his case; *Steel v. Smelting Co.*, 106 U. S. 454, 27 L. 229, 1 S. Ct. 395, holding party could not set up perjury, etc., to defeat patent; *Pacific R. R. v. Missouri Pacific Ry.*, 111 U. S. 520, 28 L. 504, 4 S. Ct. 591, granting relief where judgment was obtained through misconduct of solicitor and directors of defendant; *Leavenworth v. Chicago, etc., Ry.*, 134 U. S. 710, 33 L. 1074, 10 S. Ct. 716, sustaining foreclosure sale, where there was no collusion or fraud in fact; *Marshall v. Holmes*, 141 U. S. 596, 35 L. 873, 12 S. Ct. 64, holding Circuit Court may deprive party of benefit of judgment fraudulently obtained in State court; *Brooks v. O'Hara*, 2 McCrary. 650, 651, 8 Fed. 533, holding party estopped from raising any question, which he was not prevented by wrongful act of other party from raising in former suit; *Graham v. Boston, etc., R. Co.*, 14 Fed. 760, holding adjudication in bankruptcy not impeachable collaterally by a party; *United States v. Hancock*, 12 Sawy. 386, 30 Fed. 854, refusing to set aside patent containing more than amount granted in absence of proof of fraud in survey; *Young v. Sigler*, 48 Fed. 184, giving relief where judgment was obtained through fraud of plaintiff and co-defendant; *Smith v. Worthington*, 53 Fed. 981, 10 U. S. App. 616, refusing relief, because orders of Probate Court were without authority of law; *Tompkins v. Drennen*, 56 Fed. 696, 13 U. S. App. 308, refusing relief where defendant was not prevented from availing himself of such relief by fraud or accident; *Hatch v. Ferguson*, 57 Fed. 971, holding judgment against minors, resulting from an appearance by unauthorized guardian, may be collaterally ques-

tioned; *Graver v. Faurot*, 64 Fed. 242, 244, 245, query, whether final decree can be impeached for perjury; *Society of Shakers v. Watson*, 77 Fed. 515, 516, 47 U. S. App. 170, refusing bill of review because of newly-discovered evidence; *Golden Reward Mining Co. v. Mining Co.*, 79 Fed. 874, holding action of land department in locating boundary of mining claim conclusive; *Miller v. Irrigation District*, 85 Fed. 701, holding validity of de facto corporation cannot be questioned by private parties; *United States v. Beebe*, 92 Fed. 245, and *Mosby v. Gisborn*, 17 Utah, 282, 54 Pac. 128, setting aside decree obtained through false representations of plaintiff; *United States v. Gleeson*, 90 Fed. 778, 779, 62 U. S. App. 312, 313, and *Munro v. Callahan*, 55 Neb. 81, 70 Am. St. Rep. 370, 75 N. W. 153, holding equity cannot vacate a judgment on account of perjury; *Humphreys v. Burleson*, 72 Ala. 6, giving distributee relief where administrator was guilty of fraud against her; *Hall v. Pegram*, 85 Ala. 529, 5 So. 211, holding that misconduct of administrator authorized a restatement of the account in equity; *California Beet-Sugar Co. v. Porter*, 68 Cal. 373, 9 Pac. 314, setting aside judgment obtained in violation of a stipulation; *Wilson v. Wilson*, 18 Colo. 620, 34 Pac. 177, considering an award of arbitrators as conclusive as a final judgment; *Ward v. Durham*, 134 Ill. 202, 25 N. E. 747, refusing to set aside a judgment for mere irregularity; *Haverty v. Haverty*, 35 Kan. 445, 11 Pac. 368, holding judgment may be set aside if attorney sells out to other side; *Kimberly v. Arms*, 40 Fed. 558, *United States v. Chung Shee*, 71 Fed. 282, 283, *Pico v. Cohn*, 91 Cal. 134, 135, 25 Am. St. Rep. 163, 164, 25 Pac. 971, 3 L. R. A. 339, 340, and n., *Nichols v. Stevens*, 123 Mo. 116, 45 Am. St. Rep. 523, 25 S. W. 583, and *Hamilton v. McLean*, 139 Mo. 687, 41 S. W. 226, all refusing to set aside judgment because founded on a forged instrument; *Ward v. Southfield*, 102 N. Y. 293, 6 N. E. 662, refusing to set aside judgment where the certificate was not fraudulently concealed from plaintiff; *Morrill v. Morrill*, 20 Or. 105, 23 Am. St. Rep. 101, 25 Pac. 365, 11 L. R. A. 161, and n., holding judgment could not be collaterally attacked for errors of law; *McMurray v. McMurray*, 67 Tex. 670, 4 S. W. 359, holding relief may be obtained against a judgment of divorce procured by fraud by one of the parties; *Harrison v. Wallton*, 95 Va. 726, 64 Am. St. Rep. 835, 30 S. E. 374, 41 L. R. A. 707, holding decree establishing debt is a complete bar to action by one of the parties assailing; *McDongall v. Walling*, 21 Wash. 487, 58 Pac. 671, holding failure of defendant to disclose adverse facts will not defeat the judgment. Cited, without particular application, in *Maddox v. Apperson*, 14 Lea, 615, 616. See 50 Am. Dec. 510, note.

Distinguished in *Moffat v. United States*, 112 U. S. 32, 28 L. 626, 5 S. Ct. 14, holding patent issued to a fictitious patentee conveys no title; *Graver v. Faurot*, 76 Fed. 260, 261, 262, 263, 46 U. S. App. 268, holding that making of false answers vitiated the decree.

Judgment between same parties, rendered by court of competent jurisdiction, will be set aside only for frauds, extrinsic or collateral, p. 68.

Reaffirmed in *Reed v. Stanly*, 89 Fed. 433, *In re Griffith*, 84 Cal. 113, 23 Pac. 529, *Fealey v. Fealey*, 104 Cal. 359, 362, 43 Am. St. Rep. 114, 116, 38 Pac. 50, 51, *Dringer v. Receiver*, 42 N. J. Eq. 580, 583, 8 Atl. 815, 817, and *Camp v. Ward*, 69 Vt. 289, 60 Am. St. Rep. 931, 37 Atl. 748. Cited and principle applied in *Marquez v. Frisbie*, 101 U. S. 479, 25 L. 802, refusing to set aside the judgment; *Maxwell Land-Grant Case*, 121 U. S. 379, 30 L. 958, 7 S. Ct. 1028, equity will annul a written instrument only upon unequivocal evidence of fraud or mistake; *Hilton v. Guyot*, 159 U. S. 207, 40 L. 123, 16 S. Ct. 160, holding foreign judgment is prima facie evidence in absence of proof of fraud or prejudice; *United States v. Bell Telephone Co.*, 167 U. S. 240, 42 L. 154, 17 S. Ct. 810, holding rights of patentee cannot be affected by delay of government officials; *Pacific R. R. v. Missouri, etc., Ry.*, 2 McCrary, 229, 12 Fed. 642, one seeking relief from decree obtained by fraud must allege lack of knowledge of it at time of suit; *M'Dermott v. Copeland*, 9 Fed. 537, holding bill will not lie by distributee against executor where estate has been closed in Probate Court; *United States v. Minor*, 26 Fed. 672, and *United States v. White*, 9 Sawy. 127, 128, 17 Fed. 562, 563, refusing to set aside patent for perjury; *United States v. Hancock*, 12 Sawy. 389, 392, 395, 396, 30 Fed. 856, 858, 860, 861, refusing to set aside patent containing more than amount granted, in absence of proof of fraud in the survey; *Hilton v. Guyott*, 42 Fed. 252, holding foreign judgment could not be impeached though defendant was denied the benefit of our rules of procedure; *Yeatman v. Bradford*, 44 Fed. 538, dismissing auxiliary bill attacking proceedings because of irregularities; *Daniels v. Benedict*, 50 Fed. 352, holding judgment for divorce open to collateral attack; *Andes v. Millard*, 70 Fed. 517, refusing to set aside judgment for falsity of allegations or misrepresentations of the attorney; *United States v. Chung Shee*, 76 Fed. 956, 44 U. S. App. 751, holding judgment, discharging a Chinese on habeas corpus, conclusive of right of entry; *McNeil v. McNeil*, 78 Fed. 836, holding Federal courts have jurisdiction to annul State judgments for fraud; *Miller v. Irrigation District*, 85 Fed. 702, holding validity of de facto corporation cannot be questioned by private parties; *Harrison v. Walton*, 95 Va. 726, 64 Am. St. Rep. 835, 30 S. E. 374, 41 L. R. A. 707, where there has been a decree, recovery cannot be had in subsequent suit on ground that claim was invalid; *United States v. Northern Pac. R. Co.*, 95 Fed. 882, holding decisions of land department on questions of fact are conclusive, unless induced by fraud; *Adler v. Land, etc., Co.*, 114 Ala. 562, 62 Am. St. Rep. 140, 21 So. 493, and *McDonald v. Pearson*, 114 Ala. 644, 21 So. 537, refusing to set aside decree where no actual fraud in the

procurement was shown; *Weir v. Vail*, 65 Cal. 470, 4 Pac. 425, holding judgment cannot be attacked for matters which might have been availed of in original action; *Langdon v. Blackburn*, 109 Cal. 26, 41 Pac. 816, holding party did not show such extrinsic fraud as to warrant annulment of probate; *Sullivan v. Lumsden*, 118 Cal. 668, 50 Pac. 778, holding equity can set aside decree in partition for extrinsic mistake; *Telford v. Brinkerhoff*, 163 Ill. 443, 45 N. E. 157, holding equity will not enjoin judgment upon grounds relied on in overruled motion for new trial; *Weiss v. Guérineau*, 109 Ind. 444, 9 N. E. 402, holding judgment is valid until set aside; *Horsky v. Moran*, 21 Mont. 352, 53 Pac. 1066, holding townsite patent to probate judge only voidable; *Richardson v. Stowe*, 102 Mo. 44, 14 S. W. 812, and *Irvine v. Leyh*, 102 Mo. 207, 14 S. W. 717, refusing to set aside judgment where fraud was not perpetrated in procuring the judgment; *Mayor, etc., New York v. Brady*, 115 N. Y. 615, 22 N. E. 242, refusing to set aside judgment on ground that contract on which it was based was fraudulently obtained; *Fraser v. City Council*, 19 S. C. 403, holding judgments by innocent creditors against an executor on notes forged by latter are conclusive upon legatees; *Wiseman v. Eastman*, 21 Wash. 171, 57 Pac. 400, holding decision of land department cannot be reviewed as to fraud which was made an issue before the department; *Earle v. Earle*, 33 S. C. 504, 12 S. E. 165, holding first action *res judicata* as to an accounting. Cited in *Graver v. Faurot*, 162 U. S. 436, 437, 40 L. 1031, 16 S. Ct. 800. See 20 Am. Dec. 275, 61 Am. Dec. 468, 25 Am. St. Rep. 167, 168, 169, 27 Am. St. Rep. 148, and 54 Am. St. Rep. 233, extensive note on this point.

Distinguished in *United States v. Rose*, 11 Sawy. 84, 24 Fed. 196, holding rule not applicable to patents granted by land officers; and *United States v. San Pedro, etc., Co.*, 4 N. Mex. 290, 308, 17 Pac. 402, 420, cancelling patent for fraud.

Judgment of board of commissioners in California, as to validity of a Mexican grant, will not be retried on the ground of fraud in title document, p. 69.

Reaffirmed in *Manning v. San Jacinto Tin Co.*, 7 Sawy. 427, 93 Fed. 733. Cited and principle applied in *Cragin v. Powell*, 128 U. S. 699, 32 L. 568, 9 S. Ct. 206, holding Circuit Court cannot consider whether official survey is erroneous; *United States v. San Jacinto Tin Co.*, 10 Sawy. 641, 643, 661, 23 Fed. 280, 282, 294, holding confirmation of a Mexican grant is conclusive against the United States, in absence of fraud; *United States v. Hancock*, 12 Sawy. 385, 30 Fed. 853, holding patent valid though containing more than amount granted in absence of fraud; *United States v. Oregon, etc., Road Co.*, 14 Sawy. 400, 41 Fed. 501, holding decision of governor that road was completed, to be conclusive, in absence of fraud; *Porter v. Bishop*, 25 Fla. 760, 6 So. 866, holding decision of secretary of interior on questions of law and mixed questions is final.

Distinguished in *United States v. Minor*, 114 U. S. 241, 29 L. 113, 5 S. Ct. 839, holding equity can give government a remedy if proofs for patents were fraudulent.

Public lands.—Only the attorney-general or some one authorized to use his name can bring suit to set aside a patent issued by United States, or a judgment rendered in its courts upon which such patent is founded, p. 70.

Approved in *United States v. San Jacinto*, 10 Sawy. 655, 23 Fed. 290. Cited and principle applied in *McLaughlin v. United States*, 107 U. S. 528, 27 L. 806, 2 S. Ct. 803, and *Western Pacific R. R. v. United States*, 108 U. S. 512, 27 L. 806, 2 S. Ct. 803, both holding there was sufficient authority to bring suit; *United States v. San Jacinto Tin Co.*, 125 U. S. 281, 304, 31 L. 750, 8 S. Ct. 866, where government has no interest in bringing the suit, it must fail; *United States v. Mullan*, 7 Sawy. 476, 10 Fed. 793, entertaining bill filed in name of United States with authorized signature of attorney-general; *State v. Lord*, 28 Or. 530, 43 Pac. 480, 31 L. R. A. 482, holding signing by attorney-general of complaint shown to be that of a private relator, was insufficient; dissenting opinion in *Mahn v. Harwood*, 112 U. S. 365, 368, 28 L. 669, 670, 6 S. Ct. 451, 453, majority holding it a good defense that commissioner reissued a patent without authority.

98 U. S. 72-75, 25 L. 51, *WILLIAMS v. HAGOOD*.

Courts will not entertain bill raising an abstract question merely to test the constitutionality of a State statute, p. 75.

Reaffirmed in *Hagood v. Southern*, 117 U. S. 64, 29 L. 809, 6 S. Ct. 613, and *Tucker v. Russell*, 82 Fed. 268.

Miscellaneous.—Cited generally in *Wesley v. Eells*, 90 Fed. 156.

98 U. S. 75-79, 25 L. 84, *GARRATT v. SEIBERT*.

Patent is infringed where principle is manifestly the same, though arrangement for its operation is different, p. 77.

Approved in *Siebert, etc., Cup Co. v. Lubricator Co.*, 4 Fed. 331, holding patentee could not subsequently obtain a reissue of first patent, which would cover the change of pressure as given in second; *Siebert, etc., Co. v. Nightingale*, 32 Fed. 172, without application.

Distinguished in *Miller v. Manufacturing Co.*, 151 U. S. 109, 38 L. 128, 14 S. Ct. 315, holding that a second patent may be granted for an improvement that is a distinct invention. Distinguished upon question of pleading in *Nathan Mfg. Co. v. Craig*, 49 Fed. 371, holding court cannot go beyond the claims where answer denies interference.

98 U. S. 79-85, 25 L. 66, *IVINSON v. HUTTON*.

Reformation of instruments.—Equity may correct a written instrument incorrectly framed, or executed through mistake, p. 82.

Reaffirmed in *Minot v. Tilton*, 64 N. H. 374, 10 Atl. 684. Cited and principle applied in *Ferguson v. Dent*, 29 Fed. 7, holding Circuit Court should withhold the execution, if there be equitable considerations of mistake, to warrant a reformation of the defective supersedeas bond; *Messenger v. Life Ins. Co.*, 59 Fed. 529, rejecting in action at law evidence that release was given under a mistake.

Reformation of instruments.—Equity may reform written instruments for mistake and fraud only where proof is entirely satisfactory, pp. 82, 83.

Approved in *Reynolds v. Campbell*, 45 Mich. 532, 8 N. W. 582, refusing to correct a deed. See 65 Am. St. Rep. 481, note.

Partnership.—Where dissolution of partnership was by mutual consent equity may decree an accounting where a mistake was made in the settlement by a clerk acting for both parties, p. 85.

98 U. S. 85-98, 25 L. 52, *SNELL v. INSURANCE CO.*

Insurance.—Where partner orally insured partnership cotton, relying upon representation of agent that insurance in his name would protect interest of his firm, and agent reduced contract to writing after loss, but issued policy to the partner only, held, that the firm having promptly disavowed the policy as drawn, was entitled to relief thereunder, p. 91.

Cited and principle applied in *Elliot v. Sackett*, 108 U. S. 142, 27 L. 682, 2 S. Ct. 382, reforming deed where there was a departure through mutual mistake; *Thompson v. Phenix Ins. Co.*, 136 U. S. 296, 34 L. 412, 10 S. Ct. 1022, holding policy not setting forth correctly the contract may be reformed; *Adams v. Henderson*, 168 U. S. 579, 42 L. 587, 18 S. Ct. 181, holding parties could rescind contract where scrivener had misnumbered the lot; *Bailey v. American, etc., Ins. Co.*, 4 McCrary, 225, 13 Fed. 253, and *Sias v. Insurance Co.*, 8 Fed. 186, holding mistake, caused by erroneous representation of law by agent, may be corrected; *Ferguson v. Dent*, 29 Fed. 7, holding equity may withhold execution until Supreme Court acts on defective supersedeas bond; *Travelers' Ins. Co. v. Henderson*, 69 Fed. 767, 32 U. S. App. 536, holding evidence insufficient to justify reformation; *Abraham v. Insurance Co.*, 40 Fed. 723, and *Western Assurance Co. v. Ward*, 75 Fed. 341, 41 U. S. App. 443, both holding like cited case upon similar facts; *Moffett Co. v. Rochester*, 82 Fed. 257, enjoining the enforcement of bid induced by mistake; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 48, 53 Pac. 216, and *Moffett v. Rochester*, 91 Fed. 34, 62 U. S. App. 403, holding equity cannot rescind a contract for mistake by one party; *Park, etc., Co. v. Blodgett*, 64 Conn. 36, 29 Atl. 135, admitting oral testimony to prove alleged mistake; *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 475, 76 N. W. 157, holding party cannot ignore the in-

insurance policy and sue upon a preliminary parol agreement; *Benson v. Markoe*, 37 Minn. 34, 5 Am. St. Rep. 819, 33 N. W. 40, limiting quitclaim by mortgagee so as not to release the mortgage; *Spurr v. Ins. Co.*, 40 Minn. 427, 42 N. W. 207, reforming policy so as to include property intended; *Dennis v. Northern Pac. Ry.*, 20 Wash. 324, 325, 55 Pac. 211, reforming deed where reservation was omitted through mutual mistake; *Ryder v. Ryder*, 19 R. I. 190, 32 Atl. 920, correcting mistake in terms of chattel mortgage, though in one sense a mistake of law; dissenting opinion in *Bishop v. Insurance Co.*, 49 Conn. 177, majority holding parol contract was not established with such certainty as to warrant court in amending the policy. See 4 McCrary, 229, note 65 Am. St. Rep. 481, 482, note 65 Am. St. Rep. 515, note on insurance policies, and 65 Am. St. Rep. 492, note as to evidence.

Distinguished in *Trustees, etc. v. Insurance Co.*, 93 Wis. 67, 66 N. W. 1143, where agent was not requested to write the insurance in that way.

Reformation of instruments.— Mere mistake of law constitutes no ground for the reformation of a written contract, p. 92.

Reaffirmed in *Allen v. Galloway*, 30 Fed. 467. Cited and principle applied in *Griswold v. Hazard*, 141 U. S. 284, 35 L. 688, 11 S. Ct. 979 (see dissenting opinion in 141 U. S. 293, 35 L. 692, 11 S. Ct. 1000), holding party entering upon bond in misapprehension of the law should have it reformed; *Taylor v. Holmes*, 14 Fed. 503, holding equity will relieve from a mutual mistake of law arising from ignorance; *Andrews, etc., Co. v. Coke Co.*, 39 Fed. 354, holding contract could be reformed to comply with statutory requisites; *Spurlock v. Brown*, 91 Tenn. 262, 18 S. W. 873, holding invalid antenuptial contract entered into under mistake of law and fact. See 65 Am. St. Rep. 488, 498, note, 55 Am. St. Rep. 449, note, and 55 Am. St. Rep. 513, note.

Equity.— A mistake is "a head of equity on which the court always relieves," p. 89.

Principle reasserted in *Massie v. Heiskell*, 80 Va. 801. See 65 Am. St. Rep. 486, note.

98 U. S. 98-104, 25 L. 112, *DAVIESS CO. v. HUIDEKOPER*.

Municipal corporations.— Where subscription was assented to by two-thirds of the voters, and bonds were issued pursuant to order of County Court, in payment of stock of railroad to be constructed by company not fully created until afterwards, and county paid the taxes for several years, it cannot set up defense that company was not a legally-organized corporation when election was held, p. 101.

Cited and principle applied in *Knox Co. v. National Bank*, 147 U. S. 99, 37 L. 96, 13 S. Ct. 270, holding decisions of State court

subsequent to an issue of bonds are not controlling in Federal courts; *Catron v. La Fayette Co.*, 106 Mo. 670, 17 S. W. 579, holding bonds not vitiated because made to bear 10 per cent. interest; *Commissioners v. Call*, 123 N. C. 320, 31 S. E. 485, 44 L. R. A. 256, holding county bond reciting act under which it is issued estops holder from controverting the statement; *Francis v. Howard Co.*, 50 Fed. 57, and *Nolan Co. v. State*, 83 Tex. 195, 17 S. W. 827, both holding county estopped to deny bonds were issued for purpose recited. See 98 Am. Dec. 676, and 51 Am. St. Rep. 827, extensive notes on municipal bonds.

Municipal corporations.—Municipal bonds, authoritatively issued, are securities having the immunity given by common law to bills and notes, p. 100.

See note in 98 Am. Dec. 683.

98 U. S. 104-117, 25 L. 105, *BRADLEY v. UNITED STATES*.

Landlord and tenant.—Leases should receive a reasonable construction, as derived from the language and surrounding circumstances, p. 111.

United States.—Where lease of premises to government was made subject to an appropriation by Congress, lessor cannot recover beyond the amount appropriated, p. 114.

United States.—Two annual appropriations by Congress for the yearly rent of leased premises, held not recognitions of validity of lease binding United States to pay same amount for a third year, p. 115.

United States.—Lease to government must be deemed to have been drafted with view to provision prohibiting head of department from involving government in contract for future payment of money in excess of appropriation made for its fulfillment.

Approved in *Leavitt v. United States*, 34 Fed. 626, where appropriation has been made for a general purpose the agency of the department is general within those limits.

98 U. S. 118-122, 25 L. 86, *WIRTH v. BRANSON*.

Public lands.—Where location under a military land warrant was never vacated, a subsequent location, though followed by a patent, is void, p. 121.

Cited and principle applied in *Simmons v. Wagner*, 101 U. S. 261, 25 L. 911, holding public land sold is no longer open to entry; *Widdicombe v. Childers*, 124 U. S. 405, 31 L. 430, 8 S. Ct. 520, and *Hedrick v. Atchison, etc., R. R.*, 167 U. S. 679, 681, 42 L. 322, 323, 17 S. Ct. 924, 925, holder of legal title in bad faith holds as trustee for equitable owner; *Gray v. Jones*, 4 McCrary, 520, 14 Fed. 86,

holding locator assigning land holds patent as trustee for assignee; *Aurora Hill, etc., Min. Co. v. Eighty-five Min. Co.*, 12 Sawy. 360, 34 Fed. 518, holding entry and certificate of purchase to be equivalent to a patent; *Hamilton v. Mining Co.*, 13 Sawy. 118, 33 Fed. 566, and *Amador, etc., Min. Co. v. Mining Co.*, 13 Sawy. 525, 36 Fed. 670, after entry on public lands, no subsequent grant by United States can affect the right; *Cawley v. Johnson*, 21 Fed. 495, holding certificate of receiver of land office a proper foundation for a ten-years' adverse possession *Black v. Mining Co.*, 49 Fed. 553, holding dower in mining claim is extinguished when patent is issued; *United States v. Steenerson*, 50 Fed. 507, 4 U. S. App. 332, and *American Mortgage Co. v. Hopper*, 56 Fed. 70, both holding certificates of pre-emption may be cancelled for fraud; *Deweese v. Reinhard*, 61 Fed. 779, 10 U. S. App. 698, holding settler on land previously conveyed cannot maintain suit to cancel certificate; *Stimson Land Co. v. Rawson*, 62 Fed. 428, holding annulment of entry by land office not binding on courts if supported only by a general conclusion of fraud; *Gilkerson-Sloss Co. v. Forbes*, 54 Ark. 149, 26 Am. St. Rep. 30, 15 S. W. 191, holding party may mortgage land before patent is issued; *McNee v. Donahue*, 76 Cal. 505, 18 Pac. 441, holding State cannot dispose to others than beneficiaries lands granted to her in trust; *Pioneer Land Co. v. Maddux*, 109 Cal. 641, 50 Am. St. Rep. 72, 42 Pac. 297, holding equitable owner of swamp land may maintain action to quiet title; *Janes v. Wilkinson*, 2 Kan. App. 369, 42 Pac. 738, holding naked possessor of land cannot question a voidable title; *Gay v. Ellis*, 33 La. Ann. 252, holding certificate of purchase operates as an equitable severance of the land from the public domain; *Hedrick v. Atchison, etc.*, R. R., 120 Mo. 540, 25 S. W. 766, holding applicant has a vested interest though application misdescribes range; *Horsky v. Moran*, 21 Mont. 361, 53 Pac. 1069, holding voidable townsite patent cannot be collaterally attacked by owner of placer claim, who has never perfected his title; *Headley v. Coffman*, 38 Neb. 73, 56 N. W. 702, deciding that holder of certificate, after cancellation of entry, cannot maintain ejectment; *Risdon v. Davenport*, 4 S. Dak. 564, 57 N. W. 484, holding commissioner cannot cancel receipt and entry without notice to entryman; *Steele v. Boley*, 6 Utah, 312, 22 Pac. 312, holding statute of limitations runs against grantee from United States from date of certificate of final proof and payment; *Fowler v. Scott*, 64 Wis. 514, 25 N. W. 717, holding same as cited case. See 20 Am. Dec. 275, extensive note on this point. Cited, without particular application, in *Sanborn v. Vance*, 69 Mich. 226, 37 N. W. 274, and *Diedrich v. Northwestern, etc.*, Ry., 47 Wis. 665, 3 N. W. 750.

Distinguished in *American Mortgage Co. v. Hopper*, 64 Fed. 558, 29 U. S. App. 12, holding land department can cancel entry fraudulently made; *Weeks v. White*, 41 Kan. 572, 21 Pac. 601, discussing homestead rights.

Public lands.—Person complying with all requisites to entitle him to a patent in a particular lot is to be regarded as equitable owner; hence patent to another will not defeat his rights, p. 121.

* Approved in *Benson Mining Co. v. Mining Co.*, 145 U. S. 433, 36 L. 764, 12 S. Ct. 879, when price of mining claim has been paid, purchaser is no longer obliged to do annual work.

Miscellaneous.—Miscited in *Magruder v. Esmay*, 35 Ohio St. 232.

98 U. S. 123-125, 25 L. 75, *NATIONAL BANK v. GRAND LODGE*.

Contracts.—Where, under a contract between two persons, assets have come to promisor's hands, which in equity belong to a third, latter may sue in his own name, p. 124.

Cited and principle applied in *Austin v. Seligman*, 21 Blatchf. 508, 509, 18 Fed. 521, 522, *Hall v. Alford*, — Ky. —, 49 S. W. 445, and *Chung Kee v. Davidson*, 102 Cal. 197, 36 Pac. 521, all holding same as cited case; *Keller v. Ashford*, 133 U. S. 620, 621, 33 L. 672, 10 S. Ct. 496, 497, holding assumption of mortgage by grantee is a contract between grantee and mortgagor only; *Constable v. Steamship Co.*, 154 U. S. 74, 38 L. 914, 14 S. Ct. 1071, holding agreement of respondent with collector to pay consignee, could not be availed of by libellants; *Anderson v. Fitzgerald*, 21 Fed. 298, holding rule not applicable; *Pope v. Porter*, 33 Fed. 9, holding purchaser of mortgaged personalty, agreeing to pay mortgage, is liable to mortgagee; *Sayward v. Dexter*, 72 Fed. 765, 44 U. S. App. 376, there being nothing to show that stipulation not to sue was made for his benefit, he could not take advantage of it; *Burton v. Larkin*, 36 Kan. 250, 59 Am. Rep. 544, 13 Pac. 400, holding third person could not sue B. for goods furnished C.; *Davis v. Water-Works Co.*, 54 Iowa, 61, 6 N. W. 127, and *Eaton v. Water-Works Co.*, 37 Neb. 557, 40 Am. St. Rep. 517, 56 N. W. 204, 21 L. R. A. 656, holding owner could not sue water company for loss by fire, on provision in franchise; *State v. St. Louis, etc., Ry.*, 125 Mo. 617, 28 S. W. 1079, where agreement is to save harmless another against the claims of a third person, latter cannot sue; *Parker v. Jeffery*, 26 Or. 189, 37 Pac. 713, holding contract must have been entered into directly for the benefit of such third person to entitle him to sue; *First Nat. Bank v. Hovey*, 34 Or. 164, 55 Pac. 536, where maker delivered money to bank to be forwarded to payee, he cannot sue bank to which money was forwarded, for failure to deliver. See 33 Am. Rep. 6, note, and 39 Am. St. Rep. 533, extensive note.

Contracts.—Where one person contracts with another to pay money or deliver some valuable thing to a third, latter may sue, p. 124.

Cited and principle applied in *Jackson Iron Co. v. Concentrating Co.*, 65 Fed. 303, 31 U. S. App. 1, holding there was no contract for

the benefit of third party; *Baxter v. Camp*, 71 Conn. 249, 71 Am. St. Rep. 171, 41 Atl. 804, 42 L. R. A. 516, holding contract made by wife to pay money loaned after her death can only be sued on by her personal representative; *Ward v. De Oca*, 120 Cal. 105, 52 Pac. 131, holding grantee assuming mortgage debt is liable to mortgagee. See 71 Am. St. Rep. 206, note.

Contracts.—Promise by third person to pay existing debt cannot be sued on by original creditor, p. 124.

Approved in *American, etc., Bank v. Northern Pacific R. Co.*, 76 Fed. 130, 131, and *Washburn v. Investment Co.*, 26 Or. 442, 38 Pac. 621, holding same; *Bissell v. Bugbee*, 3 Fed. Cas. 462, assumption of mortgage by grantee accrues to benefit of mortgagee.

Contracts.—Where a corporation assumed payment of bonds of a lodge, provided stock was issued to it of the amount of such assumption, bondholder could not enforce the contract for want of privity, p. 125.

Cited and principle applied in *Cragin v. Lovell*, 109 U. S. 199, 27 L. 905, 3 S. Ct. 135, upon a negotiable note made by agent in his own name, no action lies against principal; *Willard v. Wood*, 135 U. S. 314, 34 L. 214, 10 S. Ct. 833, holding in *District of Columbia* mortgagee can enforce in equity promise of grantee to pay mortgage; *Constable v. Steamship Co.*, 154 U. S. 73, 38 L. 914, 14 S. Ct. 1071, holding agreement of respondent with collector, to pay consignee, could not be availed of by libellants; *Willard v. Wood*, 164 U. S. 519, 41 L. 538, 17 S. Ct. 179, holding liability of one assuming a mortgage is barred by statute of limitations, same as a simple contract; *Nebraska City, etc., Bank v. Gas-Light, etc., Co.*, 4 McCrary, 322, 14 Fed. 765, where vendee assumes indebtedness of vendor to a third person, and deducts same from purchase price, he does not become trustee for latter; *Jesup v. Illinois, etc., R. Co.*, 43 Fed. 493, holding that assumption of lease created no direct obligation as to original lessor; *Hennessy v. Bond*, 77 Fed. 405, 48 U. S. App. 92, holding one not a party cannot declare on the contract; *Knapp v. Life Ins. Co.*, 85 Fed. 332, 56 U. S. App. 459, 40 L. R. A. 864, holding assumption by grantee of mortgage is based on doctrine of subrogation; *Boston Safe-Deposit, etc., Co. v. Salem Water Co.*, 94 Fed. 240, holding individual cannot enforce contract by city for fire protection; *Thomas Mfg. Co. v. Prather*, 65 Ark. 30, 44 S. W. 218, holding physician cannot sue on contract of employer to provide medical aid for employee; *Locke v. Homer*, 131 Mass. 107, 41 Am. Rep. 212, and *Coffin v. Adams*, 131 Mass. 136, holding mortgagor, consenting to let mortgagee sue in his name one promising to pay mortgage, may have action dismissed; *Morrill v. Lane*, 136 Mass. 95, holding promise by assignee to pay assignor's employees will not render promisor liable to latter; *New England, etc., Co. v. Granite Co.*, 149 Mass. 383, 21 N. E. 948, holding contract, under

seal, not enforceable by persons not parties to the instrument; *Hand v. Evans Marble Co.*, 88 Md. 230, 40 Atl. 900, where party contracting to do labor assigns contract, assignee cannot sue thereon; *Montgomery v. Rief*, 15 Utah, 501, 50 Pac. 625, holding bondsmen on public work not liable to materialmen and laborers; 78 Am. Dec. 77, note on direct enforcement by mortgagee of grantee's contract of assumption; dissenting opinion in *McKay v. Ward*, — Utah, —, 57 Pac. 1034, majority holding purchaser agreeing to pay mortgage debt is personally liable to mortgagee; *Constable v. Steamship Co.*, 154 U. S. 98, 38 L. 922, 14 S. Ct. 1080, majority holding agreement of respondent with collector to pay consignee could not be availed of by libellants.

Not followed in *Sonstebly v. Keeley*, 2 McCrary, 106, 7 Fed. 449, and *Sonstebly v. Keeley*, 11 Fed. 579, both following rule of State courts.

98 U. S. 126-140, 25 L. 77, POWDER CO. v. POWDER WORKS.

Patent.— Whether a patent is for a process or a compound is a question of construction, and for the court, p. 134.

Approved in *Market St. Ry. v. Rowley*, 155 U. S. 625, 39 L. 287, 15 S. Ct. 226, if upon a comparison it appears that claims are not novel, court should so instruct the jury.

Patents.— Reissued letters-patent must be for same invention as original letters; hence processes in original patent for exploding nitro-glycerine will not support a reissue for compounds of nitro-glycerine with other substances, pp. 134, 135, 136.

Principle reaffirmed in *James v. Campbell*, 104 U. S. 377, 26 L. 794, *Heald v. Rice*, 104 U. S. 753, 26 L. 916, *Johnson v. Railroad Co.*, 105 U. S. 547, 26 L. 1165, *Wing v. Anthony*, 106 U. S. 146, 147, 27 L. 111, 1 S. Ct. 96, and *Moffitt v. Rogers*, 106 U. S. 428, 27 L. 77, 1 S. Ct. 74. Cited and principle applied in *Manufacturing Co. v. Corbin*, 103 U. S. 791, 26 L. 612, *McMurray v. Mallory*, 111 U. S. 103, 28 L. 366, 4 S. Ct. 378, *Torrent Co. v. Rodgers*, 112 U. S. 669, 28 L. 846, 5 S. Ct. 507, *Eachus v. Broomall*, 115 U. S. 438, 29 L. 423, 6 S. Ct. 234, *Dobson v. Lees*, 137 U. S. 263, 34 L. 654, 11 S. Ct. 72, and *Kells v. M'Kenzie*, 9 Fed. 287, all holding reissue enlarging original patent, void; *Huber v. Manufacturing Co.*, 148 U. S. 292, 37 L. 454, 13 S. Ct. 611, holding reissue leaving out an element is invalid; *Edgerton v. Furst, etc., Mfg. Co.*, 10 Biss. 407, 9 Fed. 454, holding patentee cannot claim in reissue what he disclaimed in original; *Wilson v. Coon*, 18 Blatchf. 541, 6 Fed. 621, if patentee, in original patent, erroneously sets forth something short of his real invention, a reissue is proper; *Wooster v. Handy*, 22 Blatchf. 333, 21 Fed. 66, dismissing bill when patentee, after twelve years, seeks reissue to expand his claim; *Yale Lock Mfg. Co. v. Manufacturing Co.*, 18 Blatchf. 255, 3 Fed. 296; *Putnam v. Tinkham*, 4 Fed. 414,

and *Parker v. Yale Clock Co.*, 21 Blatchf. 490, 18 Fed. 47, holding reissue different from original patent is void; *Electric, etc., Co. v. Electric Co.*, 23 Fed. 196, holding void reissue for electrical apparatus for lighting street lamps; *Carpenter, etc., Machine Co. v. Searle*, 52 Fed. 814, holding reissue, containing a new element, is invalid. Cited, without particular application, in *Atlantic, etc., Powder Co. v. Hulings*, 21 Fed. 521. See note in 10 Biss. 416, on this point.

Distinguished in *Tucker v. Dana*, 7 Fed. 214, holding process patent may be reissued in two parts; *Eastern Paper-Bag Co. v. Paper-Bag Co.*, 30 Fed. 65, not dealing with reissues.

Patents.—Under act of 1870, patentee might, in reissue, amend so as to describe the original patent, not fully secured by original because of mistake, etc., but could not make additions not applied for, p. 138.

Reaffirmed in *Topliff v. Topliff*, 145 U. S. 166, 36 L. 662, 12 S. Ct. 829, *Washburn, etc., Mfg. Co. v. Haish*, 10 Biss. 76, 4 Fed. 910, and *Gold, etc., Telegraph Co. v. Wiley*, 17 Fed. 235. Cited and principle applied in *Parker, etc., Co. v. Yale Clock Co.*, 123 U. S. 100, 31 L. 106, 8 S. Ct. 45, *Heald v. Rice*, 104 U. S. 749, 26 L. 914, *Parker, etc., Co. v. Yale Clock Co.*, 21 Blatchf. 490, 18 Fed. 46, and *Averill, etc., Paint Co. v. Paint Co.*, 20 Blatchf. 44, 9 Fed. 464, all holding reissue different from original patent, void; *Siebert, etc., Cup Co. v. Lubricator Co.*, 4 Fed. 333, holding patentee could not obtain a reissue covering new method of feeding; *Flower v. Rayner*, 5 Fed. 799, holding reissue invalid for variance from original; *Smith v. Merriam*, 6 Fed. 718, 719, holding claims in reissue may be varied to express the real invention; *Atwater Mfg. Co. v. Manufacturing Co.*, 8 Fed. 609, holding new matter, inadvertently omitted, cannot be introduced into reissue; *Haggenmacher v. Nelson*, 88 Fed. 493, holding reissue valid, where one claim, while different, expresses more clearly the legal effect of original.

Equity.—Where demurrer is to whole bill, and also to part, and latter is demurrable, it should be dismissed, the demurrer as to residue overruled, and defendant be directed to answer, p. 140.

Principle reasserted in *International, etc., Lumber Co. v. Maurer*, 44 Fed. 621, and *Gay v. Skeen*, 36 W. Va. 588, 15 S. E. 66.

98 U. S. 140-142, 25 L. 114, *CITIZENS' BANK v. BOARD OF LIQUIDATION*.

Courts.—Supreme Court has no jurisdiction over decision of State court that railroad bonds, guaranteed by State, are not fundable, where no Federal question was raised or necessarily involved, p. 143.

Reaffirmed in *De Saussure v. Gaillard*, 127 U. S. 234, 32 L. 132, 8 S. Ct. 1062. Approved in *New Orleans Water Works v. Sugar Co.*,

125 U. S. 29, 31 L. 612, 8 S. Ct. 747, and *Hale v. Akers*, 132 U. S. 565, 33 L. 446, 10 S. Ct. 175, where State court decides against plaintiff on ground independent of the Federal question decided, writ will be dismissed.

98 U. S. 142-144, 25 L. 65, *DUMONT v. UNITED STATES*.

Bond.— Where condition of bond was to pay \$425, or the amount of duties to be subsequently ascertained, or that importer should within three years withdraw and export goods, the payment of designated sum discharged surety, though duties were liquidated for a much larger amount, p. 143.

Bonds.— “Or” is never construed “and”, when it would defeat the intention of the parties, p. 143.

Approved in *O'Brien v. Miller*, 67 Fed. 610, 35 U. S. App. 138, refusing to depart from plain terms of a bottomry bond; *Cook v. Gilchrist*, 82 Iowa, 282, 48 N. W. 86, but construing “or” in mortgage as “and.” See note in 48 Am. Dec. 574, on this point.

Bond.— Where condition in bond is in the alternative, surety is discharged by the performance of one condition, p. 144.

Reaffirmed in *Chattanooga, etc., R. Co. v. Evans*, 66 Fed. 826, 31 U. S. App. 432, and *United States v. Georgi*, 44 Fed. 257.

Customs duties.— Importer is liable, without reference to terms of bond, for all the duties, p. 144.

Approved in *United States v. De Visser*, 10 Fed. 660, holding importer not discharged by postponement of sale; *United States v. Campbell*, 10 Fed. 618, holding reliquidation might have been made against importer at any time.

98 U. S. 145-169, 25 L. 244, *REYNOLDS v. UNITED STATES*.

Indictment and information.— Section 808 of revised statutes regulates the impanelling of grand juries only in Circuit and District Courts of United States, hence indictment found, according to laws of Utah Territory, by grand jury of less than sixteen persons, is good, p. 154.

Cited and principle applied in *Miles v. United States*, 103 U. S. 310, 26 L. 483, in impanelling jury court is bound to follow the law of the territory; *In re Mills*, 135 U. S. 268, 34 L. 109, 10 S. Ct. 763, construing “punishable by imprisonment at hard labor,” in act to establish a United States court in Indian Territory, embraces offenses which may, in the discretion of the court, be so punished; *McAllister v. United States*, 141 U. S. 183, 35 L. 696, 11 S. Ct. 952, holding person appointed by president to be judge of District Court of Alaska is not a judge of a court of the United States; *Thiede v. Utah Territory*, 159 U. S. 515, 40 L. 241, 16 S. Ct. 64, holding local courts of Utah not controlled by Federal practice act; *Steamer*

Coquitlam v. United States, 163 U. S. 351, 41 L. 186, 16 S. Ct. 1119, regarding District Court of Alaska as Supreme Court of that territory within act of 1891; *United States v. McMillan*, 165 U. S. 510, 41 L. 807, 17 S. Ct. 398, holding clerk of territorial court must account to United States for fees received in civil action; *Thompson v. Utah*, 170 U. S. 347, 42 L. 1065, 18 S. Ct. 621, holding provision of Constitution relating to jury trials, applies to the territories; *Ex parte Farley*, 40 Fed. 70, holding like cited case; *In re Esmond*, 42 Fed. 827, holding statute of Idaho, providing for cumulative sentences, applies to offenses against United States tried in territorial courts; *United States v. Hailey*, 2 Idaho, 30, 3 Pac. 264, holding Federal statute, relating to United States courts, not applicable to territorial courts; *Braithwaite v. Jordan*, 5 N. Dak. 235, 65 N. W. 714, 31 L. R. A. 253, holding practice on appeal in admiralty case to Territorial Supreme Court was regulated by rules of admiralty; *Fuller v. Johnson*, 8 Okl. 605, 58 Pac. 747, holding United States court, of the Indian Territory, is not a "United States court" within the statutes of Oklahoma; *United States v. Jones*, 5 Utah, 553, 18 Pac. 234 (see dissenting opinion in 5 Utah, 563, 18 Pac. 239), holding persons indicted for felony have right to separate trials; *People v. Ritchie*, 12 Utah, 195, 42 Pac. 213, territory adopting code of another State is not bound by decisions of Federal courts construing it; *In re Murphy*, 5 Wyo. 304, 40 Pac. 400, that Congress had passed law against bigamy did not impair the right of territory to provide for its punishment. See note in 12 Am. St. Rep. 904, on this point. Cited in *American Publishing Co. v. Fisher*, 166 U. S. 466, 41 L. 1081, 17 S. Ct. 619.

Distinguished in *Territory v. Baca*, 6 N. Mex. 427, 430, 30 Pac. 866, 867, holding unconstitutional territorial regulations for summoning or impanelling of jurors.

Denied in *McCann v. United States*, 2 Wyo. 283, but without particular application.

Jury.—By sixth amendment to Constitution, accused, in territorial courts, is entitled to a trial by an impartial jury, p. 154.

Approved in *Callan v. Wilson*, 127 U. S. 550, 32 L. 226, 8 S. Ct. 1304, holding provisions in Constitution relating to trial by jury, are in force in District of Columbia; *United States v. Beebe*, 2 Dak. 303, 11 N. W. 510, holding act of Congress relating to jurors, not applicable to territorial courts.

Jury.—It was not error to overrule challenge to petit juror, who believed he had formed an opinion, which he did not think would influence his verdict on hearing the testimony, p. 156.

Reaffirmed in *State v. Walton*, 74 Mo. 275, *Haugen v. Chicago*, etc., Ry., 3 S. Dak. 400, 53 N. W. 771, and *Conatser v. State*, 12 Lea, 448. Cited and principle applied in *Thiede v. Utah Territory*, 159 U. S. 516, 40 L. 241, 16 S. Ct. 64, and *Gallot v. United States*, 87 Fed. 450, both holding juror with opinion, formed from newspapers,

that will yield to evidence, is competent; *Williams v. United States*, 93 Fed. 308 (see dissenting opinion in 93 Fed. 401), holding juror not sure whether he could return a verdict on evidence alone properly challenged; *Long v. State*, 86 Ala. 42, 5 So. 447, holding juror able to lay aside his opinion is not disqualified; *State v. Boyle*, 104 N. C. 833, 10 S. E. 1025, where juror has an opinion, formed from information received at a preliminary investigation, he is disqualified; *Kumli v. Southern Pacific Co.*, 21 Or. 511, 28 Pac. 639, opinion, to disqualify a juror, must be such that he could not, in law, be deemed impartial; *Rothschild v. State*, 7 Tex. App. 548, holding juror with opinion of guilt, and vowing to act upon it, unless he heard something to change same, was disqualified; *People v. Thiede*, 11 Utah, 273, 39 Pac. 845, upholding statute providing that juror shall not be disqualified because of an opinion based on newspaper report, if, on oath, he states he can act impartially; *Baker v. State*, 88 Wis. 152, 59 N. W. 574, refusing to disturb decision of trial court in permitting juror to serve; *Carter v. Territory*, 3 Wyo. 199, 18 Pac. 753, that it will take evidence to change juror's opinion does not disqualify him; *State v. Bryant*, 93 Mo. 295, 6 S. W. 112, majority holding juror, with opinion formed from reading newspapers, but states that he could act impartially, to be competent. See note in 36 Am. Dec. 525.

Jury.—Competency of jurors being a mixed question of law and fact, finding of trial court should not be set aside unless error is manifest, p. 156.

Reaffirmed in *Press, etc., Co. v. M'Donald*, 73 Fed. 442, 38 U. S. App. 557, *State v. Morse*, — Or. —, 57 Pac. 632, *United States v. Langford*, 2 Idaho, 521, 21 Pac. 409, and *Garlitz v. State*, 71 Md. 301, 18 Atl. 41, 4 L. R. A. 604. Cited and principle applied in *Spies v. Illinois*, 123 U. S. 179, 31 L. 90, 8 S. Ct. 30, refusing to reverse because of partial juror, where the case left anything to the discretion of the trial court; dissenting opinion in *State v. Culler*, 82 Mo. 635, majority holding one who has read evidence at preliminary hearing and formed an opinion thereon, is disqualified; *Coughlin v. People*, 144 Ill. 192, 195, 33 N. E. 17, 18, 19 L. R. A. 76, 77, majority disqualifying juror with fixed opinion, then stating he could be impartial.

Jury.—Judgment will not be reversed because a challenge good for favor was sustained in form for cause, p. 157.

Jury.—In trial for polygamy, belief of jurors in that creed incapacitates them, p. 157.

Approved in *Miles v. United States*, 103 U. S. 310, 26 L. 483, holding it proper to question jurors as to their belief in polygamy; *Logan v. United States*, 144 U. S. 298, 36 L. 441, 12 S. Ct. 628, juror with conscientious scruples against death penalty may be challenged. See 36 Am. Dec. 532, note.

Evidence.—The Constitution gives accused the right to be confronted with the witnesses against him, but where burden has been cast upon him of showing he has not kept the witness away, and he fails, the witnesses's testimony at former trial of same person for same offense, but under another indictment, is admissible, p. 160.

Approved in *Eureka Lake Co. v. Yuba Co.*, 116 U. S. 418, 29 L. 674, 6 S. Ct. 432, where party conceals himself to evade service, direct service of order to show cause can be made on his attorney of record; *Mattox v. United States*, 156 U. S. 242, 39 L. 411, 15 S. Ct. 339, admitting verified testimony of witness at former trial who has since died; *Lowe v. State*, 86 Ala. 53, 5 So. 438, at former trial, testimony of witness, without the jurisdiction, is admissible; *Gore v. State*, 52 Ark. 286, 12 S. W. 565, 5 L. R. A. 835, and n., holding defendant cannot abscond, and then complain of his own absence; *Butler v. State*, 97 Ind. 382, holding like cited case; *Louisiana v. Harris*, 34 La. Ann. 121, holding it not necessary that accused be personally present in court at the trial of a motion for a new trial; *Commonwealth v. McKenna*, 158 Mass. 210, 33 N. E. 390, holding witness cannot testify as to what he heard a witness, now ill, testify to at former trial; *State v. Hope*, 100 Mo. 359, 13 S. W. 493, 8 L. R. A. 613, and n., one examining witness waives objection that he was not sworn; *State v. Mitchell*, 119 N. C. 786, 25 S. E. 784, holding constitutional privilege to confront witness will be waived where prisoner does not, in express terms, insist on their presence; dissenting opinion in *People v. Murray*, 52 Mich. 298, 17 N. W. 848, majority holding accused, by stipulating for a deposition, waives right to be confronted with witness. See 65 Am. Dec. 678, and 61 Am. St. Rep. 888, notes on this point.

Bigamy.—To support an indictment for polygamy, it is sufficient that accused knew his wife to be living and that second marriage was forbidden by law, p. 167.

Reaffirmed in *Dotson v. State*, 62 Ala. 145, 34 Am. Rep. 4.

Distinguished in *Commonwealth v. Munson*, 127 Mass. 470, 34 Am. Rep. 422, cohabitation through mistaken belief of marriage will not support an indictment for lewd cohabitation.

Bigamy.—Religious belief is no justification for a crime, and party's belief in polygamy is no defense for bigamy, p. 167.

Reaffirmed in *Davis v. Beason*, 133 U. S. 343, 33 L. 640, 10 S. Ct. 301. Cited and principle applied in *In re Wong Yung Quy*, 6 Sawy. 451, 2 Fed. 633, holding statute preventing disinterment does not violate treaty with China; *United States v. Stone*, 8 Fed. 245, belief that goods floating from a wreck may be appropriated will not excuse their taking; *Guiteau's case*, 10 Fed. 175, charging jury; *The Ambrose Light*, 25 Fed. 426, in absence of any recognition of belligerency, the seizure of the vessel as piratical was lawful; *Scales v.*

State, 47 Ark. 485, 58 Am. Rep. 772, 1 S. W. 772, holding party not excused from laboring on Sunday by religious belief; *Musick v. State*, 51 Ark. 167, 10 S. W. 225, one selling liquor is not excused by the belief that he had the right to sell it as "brandy fruit;" *Innis v. Bolton*, 2 Idaho, 414, 17 Pac. 267, upholding State statute prescribing test oath as qualification for voter; *Wooley v. Watkins*, 2 Idaho, 565, 22 Pac. 105, holding organizations which practice the commission of crimes are criminal organizations; *State v. Brady*, 44 Kan. 439, 21 Am. St. Rep. 299, 24 Pac. 949, 9 L. R. A. 607, holding that in libel per se it is not necessary to show express malice; *Harrison v. Brophy*, 59 Kan. 7, 51 Pac. 884, 40 L. R. A. 724, upholding bequest for celebration of mass; *Commonwealth v. Plaisted*, 148 Mass. 381, 12 Am. St. Rep. 569, 19 N. E. 226, 2 L. R. A. 145, and n., and *State v. White*, 64 N. H. 49, 5 Atl. 829, holding a sense of religious duty no defense to action for disturbance of peace; *State v. Carver*, — N. H. —, 39 Atl. 975, holding ignorance of law no defense to compounding a misdemeanor; *Wilcox v. State*, 94 Tenn. 118, 28 S. W. 316, holding party with insane delusion is not excused from crime, if he is conscious of right and wrong and has the ability to choose; *United States v. Snow*, 4 Utah, 314, 9 Pac. 698, discussing purposes of Edmunds act against polygamy; *United States v. Adams*, 2 Dak. 330, 9 N. W. 723, and *People v. Monk*, 8 Utah, 38, 28 Pac. 1116, ignorance of law is no defense to charge of extortion. See 63 Am. St. Rep. 101, extensive note on moral insanity.

Bigamy.—It is not error for court to call attention of jury to peculiar character of crime (polygamy), and remind them of their duty, there being no appeal to their passions, p. 168.

Approved in *Hickory v. United States*, 160 U. S. 425, 40 L. 480, 16 S. Ct. 334, holding charge appealed to passions, and was erroneous; *Hayes v. United States*, 32 Fed. 663, holding it not error for court to disabuse the minds of jurors that they were trying an unprecedented case; *United, etc., Ins. Co. v. Thomas*, 82 Fed. 410, 53 U. S. App. 524, without particular application.

Criminal law.—Where Supreme Court affirmed sentence of imprisonment at hard labor, though statute authorized only imprisonment, the error, being apparent on the record, was corrected upon application, though not assigned as error at the regular hearing, pp. 168, 169.

Approved in *Woodruff v. United States*, 58 Fed. 768, holding sentence of imprisonment only in embezzlement is invalid; *United States v. Harman*, 68 Fed. 473, where cause has been remanded trial court could resentence, though part of void sentence had been executed; *United States v. Woodruff*, 68 Fed. 538, holding, under the statute, that the judgment could not be amended; *Territory v. Guthrie*, 2 Idaho, 405, 17 Pac. 42, holding appellate court may remand case to have sentence modified; *Commonwealth v. Murphy*,

174 Mass. 374, 54 N. E. 862, holding resentence on reversal does not put twice in jeopardy; *People v. Reggel*, 8 Utah, 25, 28 Pac. 956, holding appellate court may modify excessive fine of lower court.

Miscellaneous.—Cited in *Snow v. United States*, 118 U. S. 349, 30 L. 208, 6 S. Ct. 1061, as to removal of criminal cases from State courts.

98 U. S. 169-176, 25 L. 88, *SCHUYLER COUNTY v. THOMAS*.

Municipal corporations.—Statute authorizing “any county in which any part of the route of said railroad may be” to subscribe aid, authorizes any county through or into which it was possible for railroad to be located to subscribe, p. 172.

See 98 Am. Dec. 675, note on this point.

Municipal corporations.—Authority given Schuyler county to subscribe to railroad and issue bonds for that purpose, held not revoked by adoption of State Constitution of Missouri, p. 173.

Reaffirmed in *Scotland County v. Hill*, 132 U. S. 111, 33 L. 263, 10 S. Ct. 27, *Cass County v. Gillett*, 100 U. S. 592, 25 L. 586, and *Louisiana v. Taylor*, 105 U. S. 458, 26 L. 1134. See 98 Am. Dec. 669, note on this point.

Municipal corporations.—Consolidation of railroads, by authority given after the adoption of Missouri Constitution of 1865, held not to extinguish the privilege to receive subscriptions from county, p. 174.

Approved in *Scotland County v. Hill*, 132 U. S. 112, 33 L. 263, 10 S. Ct. 27, *Green County v. Conness*, 109 U. S. 104, 27 L. 872, 3 S. Ct. 69, and *Atchison, etc., R. R. v. Fletcher*, 35 Kan. 248, 10 Pac. 605, holding the one road had right to accept stock and guarantee bonds of other. See 98 Am. Dec. 671, note on this point.

Miscellaneous.—Cited to point that decision of commissioner as to performance of prerequisites is binding upon municipality, in *Pompton v. Cooper Union*, 101 U. S. 203, 25 L. 805, and *Rich. v. Mentz*, 21 Blatchf. 496, 18 Fed. 55. See 98 Am. Dec. 638, note.

98 U. S. 176-179, 25 L. 238, *ORVIS v. POWELL*.

Courts.—Order in which parcels of land sold shall be subject to mortgage, as fixed by State decision or statute, is binding on Federal courts, p. 177.

Reaffirmed in *Philadelphia, etc., Trust Co. v. Needham*, 71 Fed. 599.

Approved in *Elder v. M'Claskey*, 70 Fed. 538, 37 U. S. App. 1, following State courts' construction of statutes of limitations applicable to real property.

Mortgage.—In Illinois, where mortgage land is sold in parcels, those first sold are last subjected to satisfaction of debt, p. 177.

Reaffirmed in *Savings Bank v. Creswell*, 100 U. S. 640, 25 L. 714.

Courts.—Decree of foreclosure in Circuit Court in Illinois, which does not give the statutory time for redemption, is erroneous, p. 178.

Approved in *Columbia, etc., Trust Co. v. Kentucky, etc., Ry.*, 60 Fed. 799, 22 U. S. App. 54, holding, where railroad franchises and property, upon foreclosure, are to be sold as an entirety, it is not real estate within the Kentucky statute; *Hyman v. Bogue*, 135 Ill. 16, 26 N. E. 41, holding decree of absolute sale cannot defeat statutory right of redemption.

Distinguished in *Burley v. Flint*, 9 Biss. 209, 215, dismissing writ of review filed after expiration of statutory time for redemption, if absolute sale; *Farmers, etc., Co. v. Water Co.*, 78 Fed. 888, holding code did not apply to redemption of property necessary to the franchises of a quasi-public corporation.

Miscellaneous.—Cited generally in *Ricker v. Powell*, 100 U. S. 106, 25 L. 527.

98 U. S. 179-186, 25 L. 115, **McKNIGHT v. UNITED STATES.**

United States.—Assignment of claim of contractor for army supplies against United States, held contrary to law, and void, p. 185.

Approved in *Ball v. Halsell*, 161 U. S. 79, 40 L. 624, 16 S. Ct. 555, holding, under act of 1853, every assignment of a claim against United States, without its consent, is void; *American Surety Co. v. United States*, 76 Miss. 293, 24 So. 388, and *Greenville, etc., Bank v. Lawrence*, 76 Fed. 547, 42 U. S. App. 179, both holding person contracting with United States cannot assign any part of his claim so as to affect anyone but himself; *Price v. Forrest*, 54 N. J. Eq. 688, 35 Atl. 1082, sustaining an assignment for benefit of creditors of claim against United States.

Distinguished in *Milliken v. Barrow*, 65 Fed. 891, upholding assignment of expected profits from claim against United States.

United States cannot set up as a counterclaim amount paid assignee of claimant, when sued for the amount of said claim remaining unpaid, assignment being invalid, p. 185.

Approved in *People v. Foster*, 133 Ill. 509, 23 N. E. 617, holding moneys paid by county board on settlement with sheriff cannot be recovered.

United States, by paying part of a claim, does not waive objection of invalidity as to residue, p. 186.

United States.—Except where restricted by public policy, the rules of law which apply to the government and to individuals are the same, p. 186.

Reaffirmed in *United States v. Campbell*, 10 Fed. 821. Approved in *United States v. De Visser*, 10 Fed. 647, holding sureties in ware-

house bond given to United States have same rights as ordinary sureties; *McCann v. Randall*, 147 Mass. 89, 9 Am. St. Rep. 672, 17 N. E. 79, holding responsibility of United States, as party to a negotiable instrument, is the same as that of an individual.

United States may set off a sum from amount due claimant, to meet his liability as surety on a bond, p. 186.

98 U. S. 187-202, 25 L. 116, STEWART v. SONNEBORN.

Malicious prosecution.—Malice and want of probable cause are essential to maintenance of the action, pp. 192, 194.

This principle has been reaffirmed in *Foster v. Pitts*, 63 Ark. 392, 38 S. W. 1114, *Whitehead v. Jessup*, 2 Colo. App. 79, 29 Pac. 917, *Wilcox v. McKenzie*, 75 Ga. 75, *Le Clear v. Perkins*, 103 Mich. 139, 61 N. W. 359, 26 L. R. A. 631, *Burton v. St. Paul, etc., Ry.*, 33 Minn. 193, 22 N. W. 302, *Welascheck v. Glass*, 46 Mo. App. 213, 215, and *Fenstermaker v. Page*, 20 Nev. 290, 291, 21 Pac. 322. Approved in *M'Cracken v. National Bank*, 4 Fed. 606, holding party must allege that action was brought maliciously; *Staunton v. Goshorn*, 94 Fed. 56, holding party must prove want of probable cause.

Malicious prosecution.—Existence of malice is always a question exclusively for the jury, p. 193.

Approved in *Gonzales v. Cobliner*, 68 Cal. 156, 8 Pac. 699, holding it error to refuse instruction that if defendant instituted suit without malice, plaintiff cannot recover; *Hopkins v. McGillicuddy*, 69 Me. 276, holding fact that defendant consulted an attorney should have been submitted to the jury; *Gee v. Culver*, 12 Or. 233, 6 Pac. 776, holding like cited case. See 26 Am. St. Rep. 151, note on this point.

Malicious prosecution.—Whether circumstances alleged to show probable cause are true and existed, is a matter of fact; whether they amount to probable cause is a question of law, p. 194.

This principle has been reasserted in *Williams v. Kyes*, 9 Colo. App. 225, 47 Pac. 841, *Pennsylvania Co. v. Weddle*, 100 Ind. 145, *Atchison, etc., R. R. v. Watson*, 37 Kan. 782, 783, 784, 15 Pac. 883, 884, *Burton v. St. Paul, etc., Ry.*, 33 Minn. 192, 22 N. W. 301, *Thaule v. Krekeler*, 81 N. Y. 434, and *Jackson v. Bell*, 5 S. Dak. 265, 58 N. W. 674.

Cited and principle applied in *Knight v. International, etc., Ry.*, 61 Fed. 91, 23 U. S. App. 356, and *Crescent Live-Stock Co. v. Butchers' Union*, 120 U. S. 149, 30 L. 617, 7 S. Ct. 476, both holding judgment for plaintiff, although reversed, is, in absence of fraud, conclusive proof of probable cause; *Castro v. De Urairte*, 16 Fed. 101, holding verdict was properly directed by court, there being no facts in dispute; *Staunton v. Goshorn*, 94 Fed. 57, *Sanders v. Palmer*, 55 Fed. 220, 14 U. S. App. 297, and *Wuest v. American Tobacco Co.*,

10 S. Dak. 399, 401, 73 N. W. 905, where defendant offers no evidence of probable cause, it is proper to refuse to submit that question to the jury; *Short v. Spragins*, 104 Ga. 632, 30 S. E. 812, holding sanction by judge of petition for injunction conclusive evidence of probable cause; *Hess v. Baking Co.*, 31 Or. 512, 49 Pac. 806, and *Wright v. Ascheim*, 5 Utah, 490, 491, 17 Pac. 130, where undisputed facts known to defendant would justify a belief that charge was true, want of probable cause is a question of law. See 26 Am. St. Rep. 141, note.

Malicious prosecution.—Malice may be inferred by jury from want of probable cause, but latter cannot be inferred from express malice, p. 194.

Approved in *Johnson v. Ebberts*, 6 Sawy. 539, 11 Fed. 130, holding an arrest to find out who committed a particular offense is malicious; *Reed v. Savings Bank*, 130 Mass. 445, 39 Am. Rep. 468, holding action for malicious prosecution will lie against a savings bank; *Bartlett v. Hawley*, 38 Minn. 310, 37 N. W. 581, holding that question of malice was for the jury; *McGarry v. Missouri, etc., Ry.*, 36 Mo. App. 346, 348, holding malice not inferable from want of probable cause.

Malicious prosecution.—What defendant's belief was, as to facts relied upon to prove probable cause, is always a question for jury, p. 194.

Reaffirmed in *Billingsley v. Maas*, 93 Wis. 181, 67 N. W. 50. See 26 Am. St. Rep. 142, note.

Distinguished in *Brewer v. Jacobs*, 22 Fed. 231, where there was no dispute about plaintiff's belief as to his cause of action.

Malicious prosecution.—It must be averred and proved that proceedings instituted against plaintiff have failed, p. 195.

Approved in *Severance v. Judkins*, 73 Me. 378, holding like cited case; *McCracken v. National Bank*, 4 Fed. 607, holding party must allege termination of action; *Thompson v. Gatlin*, 58 Fed. 535, 536, 19 U. S. App. 157, holding failure to allege termination of suit in plaintiff's favor fatal to his action; *Lonque v. Drez*, 37 La. Ann. 85, holding creditors intervening in bankruptcy proceedings cannot be held for malice in absence of averment and proof of malice; *Apgar v. Woolston*, 43 N. J. L. 60, disposition of prosecution so it cannot be revived is a sufficient termination. *See 81 Am. Dec. 479, and 39 Am. Rep. 432, notes on this point.

Malicious prosecution.—Failure of action is no evidence of either malice or want of probable cause in instituting suit, p. 195.

Reaffirmed in *Allen v. Codman*, 139 Mass. 139, 29 N. E. 538, *Leyser v. Field*, 5 N. Mex. 362, 23 Pac. 174, *Willard v. Holmes*, 142 N. Y. 503, 37 N. E. 483, *Eastman v. Monastes*, 32 Or. 297, 67 Am. St. Rep.

534, 51 Pac. 1097, *Hamer v. National Bank*, 9 Utah, 221, 33 Pac. 943, and *Lawrence v. Cleary*, 88 Wis. 475, 60 N. W. 794. Cited and principle applied in *Vinas v. Insurance Co.*, 33 La. Ann. 1268, 1269, holding party alleging fraud in civil suit, in good faith, not liable for slander; *Mitchell v. Lodge*, 29 Or. 303, 45 Pac. 800, dismissing complaint not alleging malice; *Eastman v. Monastes*, 32 Or. 297, 51 Pac. 1097, holding acquittal of defendant not prima facie evidence of want of probable cause; *Womack v. Circle*, 32 Gratt. 344, majority holding judgment of justice, though reversed, is conclusive evidence of probable cause. See 26 Am. St. Rep. 155, note on this point.

Distinguished in *Jermon v. Stewart*, 12 Fed. 271, holding defendant in attachment suit entitled to recover damages, under code, where plaintiff fails to prosecute his suit with effect.

Malicious prosecution.— If defendants, who had filed petition in bankruptcy against plaintiff, had an honest and reasonable conviction that an act of bankruptcy had been committed, they had probable cause for instituting such proceedings, p. 195.

Approved in *Burton v. St. Paul, etc., Ry.*, 33 Minn. 191, 22 N. W. 301, holding "probable cause" are such reasons, supported by facts, as will warrant a cautious man in the belief that his action is legally proper.

Malicious prosecution.— If defendants acted bona fide upon legal advice, their defense is perfect, p. 197.

Reaffirmed in *Staunton v. Goshorn*, 94 Fed. 60, and *St. Johnsbury, etc., R. R. v. Hunt*, 59 Vt. 300, 7 Atl. 278. Cited and principle applied in *Cuthbert v. Galloway*, 35 Fed. 470, holding advice of counsel no protection where plaintiff did not lay all the material facts before him; *Miller v. Chicago, etc., Ry.*, 41 Fed. 908, that prosecuting attorney advised prosecution is a prima facie case of probable cause; *Kemp v. Brown*, 43 Fed. 392, 393, holding one libelling ship in good faith and without malice not liable in an action ex delicto; *Womack v. Fudikar*, 47 La. Ann. 37, 16 So. 647, that defendant consulted counsel is strong proof of absence of malice; *Monaghan v. Cox*, 155 Mass. 488, 31 Am. St. Rep. 556, 30 N. E. 467, admitting evidence that defendant acted upon advice of magistrate issuing complaint; *Billingsley v. Maas*, 93 Wis. 181, 67 N. W. 50, although defendants acted under legal advice, whether they acted honestly was a question for jury.

Malicious prosecution.— Plaintiff's counsel fee in prosecuting the case cannot be recovered as damages, p. 197.

Distinguished in *Titus v. Corkins*, 21 Kan. 723, in case of vindictive damages, jury may take in account cost of litigation.

Miscellaneous.— *Tabert v. Cooley*, 46 Minn. 367, 49 N. W. 125, 13 L. R. A. 465, and n., not in point.

98 U. S. 203-217, 25 L. 97, SNYDER v. SICKLES.

Public lands.—Secretary of interior has power of supervision and appeal in all matters relating to general land office, and that power is co-extensive with the authority of the commissioner to adjudge, p. 211.

Distinguished in *Butterworth v. Hoe*, 112 U. S. 56, 28 L. 658, 5 S. Ct. 28, holding executive supervision does not extend to judicial action of subordinate.

Public lands.—Secretary of interior may lawfully set aside a survey, order another to be made and issue a patent upon it, p. 212.

Approved in *Cragin v. Powell*, 128 U. S. 699, 32 L. 568, 9 S. Ct. 206, holding decision of land commissioner upon survey unassailable collaterally; *Knight v. United States Land Assn.*, 142 U. S. 180, 35 L. 980, 12 S. Ct. 263, holding secretary of interior could set aside survey, although confirmed by land commissioner; *Stimson Land Co. v. Rawson*, 62 Fed. 430, holding annulment of entry by land office, before legal title has passed, is not binding on courts if supported only by a general conclusion of fraud; *Michigan, etc., Lumber Co. v. Rust*, 68 Fed. 166, holding secretary of interior, before issuance of patent, may correct a mistaken selection of lands.

Public lands.—Decree confirming Spanish or Mexican grant is void, if grants and survey would not enable court to ascertain their specific boundaries, p. 212.

Approved in *Muse v. Arlington Hotel Co.*, 68 Fed. 644, holding no title was conveyed in absence of actual survey.

Public lands.—Act of 1874, dispensing with issuing of patents for land claims in Missouri, applies only where party interested is by law entitled to a patent, p. 216.

98 U. S. 218-224, 25 L. 103, ELCOX v. HILL.

Innkeepers.—In Illinois, where a safe is provided for valuable articles by hotel-keeper, and statutory notice given, one placing bags with jewelry in coatroom must bear his own loss, p. 224.

See 7 Am. Dec. 457, and 69 Am. Dec. 224, notes on this point.

Innkeeper is not liable for loss occasioned by negligence of guest, p. 224.

Approved in *Spring v. Hager*, 145 Mass. 190, 1 Am. St. Rep. 453, 13 N. E. 481, holding guest locking door, but omitting to bolt same, may recover. See 7 Am. Dec. 455, note.

Evidence.—Admission of innkeeper's servant of theft of guest's articles, held inadmissible in action against landlord, p. 224.

Approved in *Beale v. Posey*, 72 Ala. 332, rejecting evidence of conduct of servant charged with larceny, in action against landlord.

98 U. S. 225-239, 25 L. 158, *ANDREAE v. REDFIELD*.

Customs duties.—Remedy for illegal exactions by collectors is action of *assumpsit* against them, p. 232.

Customs duties.—Actions for illegal exactions by collector cannot be made against successor of incumbent, p. 233.

Estoppel.—In action against collector of customs for illegal exactions, statement of secretary of treasury and auditor to claimant's attorney, that statute of limitations would cease to run when claims were properly presented, does not estop collector from setting up the statute, p. 233.

Approved in *John Shillito Co. v. M'Clung*, 45 Fed. 781, holding silence of collector in leading claimant to believe appeal has been acted upon, does not estop him from setting up the ninety-day limitation. See 51 Am. Dec. 700, note.

Limitation of actions.—In New York, concealment of cause of action *ex contractu* does not stop the running of the statute of limitations, p. 235.

Approved in *Amy v. Watertown*, 22 Fed. 420, holding action arose although plaintiffs were prevented by defendant's officers from serving mayor.

Miscellaneous.—Cited in *Campbell v. Haverhill*, 155 U. S. 620, 39 L. 284, 15 S. Ct. 221, as having treated actions against collectors as subject to statute of limitations of the several States.

98 U. S. 240-242, 25 L. 105, *EX PARTE SCHWAB*.

Mandamus cannot be used to perform the office of an appeal or a writ of error, p. 241.

Approved in *In re Hawkins*, 147 U. S. 490, 37 L. 252, 13 S. Ct. 527, holding Supreme Court cannot by mandamus review action of court in refusing to receive further proof; *Virginia v. Paul*, 148 U. S. 124, 37 L. 392, 13 S. Ct. 542, holding mandamus does not lie to review order on a writ of habeas corpus discharging prisoner committed under State authority; *American Construction Co. v. Jacksonville Ry.*, 148 U. S. 379, 37 L. 489, 13 S. Ct. 761, holding mandamus does not lie to Circuit Court of Appeals to review a decree which might be made on appeal; *Ex parte Perry*, 102 U. S. 186, 26 L. 44, and *State v. Judge District Court*, 33 La. Ann. 270, holding mandamus does not lie to control exercise of discretion by an inferior court. See 89 Am. Dec. 739, note on this point.

Courts.—Injunctions may be granted by Federal courts to stay proceedings in State court, where authorized by any law relating to proceedings in bankruptcy, p. 241.

Reaffirmed in *In re Litchfield*, 13 Fed. 867.

Courts.— Assignee in bankruptcy may sue citizen of same State in Circuit Court to settle title to the goods, p. 242.

Distinguished in *Schott v. Hudson*, 109 U. S. 476, 27 L. 1002, 3 S. Ct. 313, holding that the suit to have title to goods of bankrupt determined could not be brought in Circuit Court.

Appeal and error.— Where Circuit Court had jurisdiction of action and parties, its decision granting an injunction, if erroneous, may be corrected on appeal after final decree, but not by mandamus, p. 242.

98 U. S. 242-248, 25 L. 122, *SLAUGHTER v. GLENN*.

Courts.— In controversy respecting title to lands, Federal courts will decide according to jurisprudence of State where located, p. 247.

Approved in *Hewitt v. Storey*, 14 Sawy. 320, 39 Fed. 721, applying local law where bill was to enjoin interference with water.

Infant.— In Texas, if an infant convey and choose to rescind after coming of age, he must restore what he has received before he will be permitted to recover, p. 245.

Husband and wife.— In Texas, lands of wife are her "separate property," and she has in equity all the power of disposition which the amplest deed of settlement could give her, p. 246.

See 30 Am. Dec. 240, note on this point.

98 U. S. 248-253, 25 L. 51, *GIFFORD v. HELMS*.

Bankruptcy.— Purchaser from assignee in bankruptcy of equity in lands alleged to have been fraudulently conveyed acquires no greater rights than his grantor; hence, the rights of both are barred after two years, p. 253.

Reaffirmed in *Wisner v. Brown*, 122 U. S. 219, 30 L. 1207, 7 S. Ct. 1158, *Greene v. Taylor*, 132 U. S. 441, 442, 33 L. 419, 10 S. Ct. 146, and *Cobbs v. Gilchrist*, 80 Va. 510. Cited and principle applied in *Phelan v. O'Brien*, 4 McCrary, 467, 13 Fed. 657, holding proceedings instituted against assignee two years after the sale were barred; *Smith v. Cincinnati, etc., R. Co.*, 11 Fed. 291, holding dismissal for want of jurisdiction does not remove bar of statute; *Chicago, etc., Ry. v. Jenkins*, 103 Ill. 598, holding substitution of assignee as plaintiff is not a commencement of suit by him; *Gage v. Du Puy*, 127 Ill. 219, 19 N. E. 878, holding grantee of assignee in bankruptcy is barred whenever former would be; *In re Churchman*, 5 Fed. 188, and *Ross v. Wilcox*, 134 Mass. 22, holding action by assignee in bankruptcy must be brought within two years; *Sessions v. Romadka*, 145 U. S. 51, 36 L. 618, 12 S. Ct. 805, and *Kenyon v. Wrisley*, 147 Mass. 478, 18 N. E. 228, 1 L. R. A. 350, both holding, bank-

rupt's action barred after two years on claim not assigned; *Rock v. Dennett*, 155 Mass. 501, 30 N. E. 171, and *Lewis v. Prendergast*, 45 Minn. 535, 48 N. W. 440, holding action was barred before the transfer by assignee; *Upton v. McLaughlin*, 105 U. S. 643, 26 L. 1199, holding section 5057, revised statutes, does not declare that the court, wherein suit is brought more than two years after accrual of action, shall not have jurisdiction; *Rosenthal v. Walker*, 111 U. S. 191, 28 L. 397, 4 S. Ct. 385, and *Bartles v. Gibson*, 17 Fed. 299, to point that statute does not run until discovery of fraud.

Distinguished in *Gildersleeve v. Gaynor*, 4 Woods, 544, 15 Fed. 103, holding foreclosure of mortgage is not within the statute; *International Bank v. Jenkins*, 104 Ill. 155, and *Coryell v. Klehm*, 157 Ill. 477, 41 N. E. 868, both holding rule not applicable to property sold before statute began to run; *Bowen v. Delaware, etc., R. R.*, 153 N. Y. 481, 482, 485, 60 Am. St. Rep. 669, 670, 673, 47 N. E. 909, 910, holding rule not applicable to action for ejectment by assignee for wrongful entry, after assignment.

98 U. S. 254-266, 25 L. 47, *BOWEN v. CHASE*.

Evidence.—Declarations of one in possession of land over which he had control, and in harmony with deeds executed by him, and against his interest, in reference to property not conveyed, held admissible on question of title, pp. 262-263.

See notes, 95 Am. Dec. 71, and 42 Am. Dec. 632.

Appeal and error.—Where counsel on both sides agreed there was no conflict of evidence, and it was a matter for court to determine, its decision was in the nature of a finding of fact, and not reviewable, p. 265.

Miscellaneous.—*Schermerhorn v. De Chambrun*, 64 Fed. 196, 26 U. S. App. 212, incidentally.

98 U. S. 266-308, 25 L. 124, *BECKWITH v. BEAN*.

False imprisonment.—In suit for false imprisonment, by military officer, every fact serving to illustrate his motives, and to prove the existence of grounds for the arrest, are admissible, not in justification, but in mitigation of damages; in this case, facts discovered after the prisoner's release held admissible, p. 275.

Approved in *Palmer v. Maine, etc., R. R.*, 92 Me. 412, 69 Am. St. Rep. 520, 42 Atl. 804, 44 L. R. A. 676, holding conduct of plaintiff entitled to consideration on question of damages. See 54 Am. Dec. 262, note.

Appeal and error.—An exception at the trial, not calling court's attention to the specific propositions objected to, cannot be regarded on appeal, p. 284.

Approved in *Moulor v. Life Ins. Co.*, 111 U. S. 338, 28 L. 448, 4 S. Ct. 467, refusing to reverse upon a general exception to refusal to charge several propositions, some of which should have been given; *Connecticut Life Ins. Co. v. Union Trust Co.*, 112 U. S. 261, 28 L. 712, 5 S. Ct. 125, holding exception not specifically stating the modification objected to is too vague; *Block v. Darling*, 140 U. S. 239, 35 L. 478, 11 S. Ct. 834, refusing to consider a general exception to a charge; *Charleston Ice Mfg. Co. v. Joyce*, 54 Fed. 333, 8 U. S. App. 309, holding they could not consider specific objections not presented to court below; *Phoenix Ins. Co. v. Lucker*, 77 Fed. 248, 42 U. S. App. 111, holding exception "to so much of" a long charge "as requires the evidence should show there was an intention to deceive," is too general; *Black v. Lewiston*, 2 Idaho, 257, 13 Pac. 81, and *Morrill v. Palmer*, 68 Vt. 17, 33 Atl. 834, 33 L. R. A. 417, and n., refusing to sustain a general exception to an entire charge; *Van Gunden v. Coal & Iron Co.*, 52 Fed. 841, 8 U. S. App. 229, *arguendo*.

False imprisonment.— Admission of plaintiff, in action of false imprisonment, made after his release, is admissible, in mitigation of damages, p. 280.

False imprisonment.— Evidence of what was known and believed at time of arrest to exist, should be admitted in action for false imprisonment, p. 281.

Miscellaneous.— 87 Am. Dec. 510, note on liability of soldiers destroying property during war.

98 U. S. 308-315, 25 L. 108, *LITTLE ROCK v. NATIONAL BANK*.

Municipal corporation, with power to bind itself by substituting a new liability for a cancelled one, may do so by any instrument of acknowledgment affording sufficient evidence of a debt, p. 311.

Municipal corporation is liable on bonds properly issued in lieu of previous bonds improperly issued in the form of bank-notes, though latter were illegal, the money received for such invalid bonds having been legitimately expended, p. 314.

Approved in *Gause v. Clarksville*, 1 McCrary, 83, 1 Fed. 357, where bond is given for two considerations, one of which is illegal, the remedy of holder is action for money had and received; *Dodge v. Memphis*, 51 Fed. 167, holding no suit can be maintained on negotiable bonds issued by municipality without authority; *Whitthorne v. Jett*, 39 Ark. 144, because bonds were invalid it does not follow that warrants might not have been issued in lieu thereof; *Iron Mountain, etc., R. R. v. Stansell*, 43 Ark. 283, holding illegal change tickets are a written admission of value received; *Wilson v. Monticello*, 85 Ind. 14, holding neither agent nor his sureties could question the validity either of the old or new bonds; *Lovejoy v.*

Foxcroft, 91 Me. 377, 40 Atl. 145, holding town liable to lender, though its treasurer embezzles the money. See note in 98 Am. Dec. 680.

Contracts.—Where consideration of a contract, declared void by statute, is morally good, a repeal of the statute will validate the contract, p. 314.

Miscellaneous.—Cited generally in 5 Dill. 309, note, F. C. 9,445.

98 U. S. 315-331, 25 L. 139, **BLAKE v. HAWKINS.**

Wills.—In interpreting will, one may place himself in position of testator, and should consider his attending circumstances, p. 324.

Approved in *Lee v. Simpson*, 134 U. S. 587, 33 L. 1046, 10 S. Ct. 636, and *Brooks v. Raynolds*, 59 Fed. 931, 16 U. S. App. 679, applying rule in construing wills; *Smith v. M'Intire*, 83 Fed. 459, holding parol testimony cannot override a contrary intention manifested by the whole will; *Cole v. Cole*, 79 Va. 255, holding little aid can be derived from adjudged cases in construing wills; dissenting opinion in *Bray v. Miles*, — Ind. App. —, 54 N. E. 461, majority holding "children" in will included an adopted child; *Van Horne v. Campbell*, 100 N. Y. 322, 3 N. E. 779, without particular application.

Wills.—Although a will be expressed to be made in pursuance of a power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will, p. 326.

Distinguished in *Machir v. Funk*, 90 Va. 287, 18 S. E. 199, holding, under statute, devise of the subject of the power operates as an execution, unless a contrary intention appears.

Wills.—If will contains no expressed intent to exert the power, yet if it may reasonably be gathered from the gifts and directions, that such was the purpose, it must be regarded as an execution, p. 326.

Approved in *Warner v. Mutual Life Ins. Co.*, 109 U. S. 367, 27 L. 965, 3 S. Ct. 225, *Lee v. Simpson*, 134 U. S. 590, 33 L. 1046, 10 S. Ct. 637, and *Lee v. Simpson*, 39 Fed. 241, all holding will was a valid execution of the power.

Wills.—A previously-expressed intention, found in the acts or dispositions of the donee of a power, may serve to explain language afterwards used in his will, p. 326.

Powers.—An appointment, under a power, is an intent to appoint carried out, and if made by will, the intent and its execution are to be sought for through the whole instrument, p. 327.

Will of testatrix, having power to appoint a certain fund, and also some small amount of property of her own, construed and held that certain legacies therein for charitable purposes were intended as an execution of the power, though not so expressed, and

that her will was an appointment of the fund to her executors, pp. 327, 328.

Approved in *Hawkins v. Blake*, 108 U. S. 432, 434, 27 L. 779, 780, 2 S. Ct. 811, 813, holding it no error to charge amount due appellees, upon the real estate.

Executor *de son tort* is only liable for what comes into his hands, p. 331.

Miscellaneous.—Cited generally in *Hawkins v. Blake*, 108 U. S. 423, 27 L. 776, 2 S. Ct. 804.

98 U. S. 332-334, 25 L. 110, *BANK v. McVEIGH*.

Courts.—Federal question is not presented by decision of State court that indorser was not sufficiently apprised of dishonor of note by notice left at his former residence in loyal States, it being well known that he had taken up abode in rebel State, p. 333.

Reaffirmed in *Allen v. McVeigh*, 107 U. S. 435, 27 L. 573, 2 S. Ct. 559. Approved in *Dugger v. Boccock*, 104 U. S. 602, 26 L. 848, refusing to re-examine decision of State court dismissing bill to set aside sale because payment was in Confederate notes; *Chicago, etc., R. R. v. Ferry Co.*, 119 U. S. 624, 30 L. 523, 7 S. Ct. 403, holding decision of State court upon general principles of law, as to validity of contract, not reviewable here; *Alexandria, etc., Institution v. McVeigh*, 84 Va. 49, 3 S. E. 888, holding court will not give instructions injecting irrelevant Federal questions into the case.

98 U. S. 334-342, 25 L. 198, *UNITED STATES v. BURLINGTON, ETC., R. R.*

Public lands.—Under act of 1864, granting land to Burlington and Missouri railroad, there is no limitation of distance from the road within which selection must be made, p. 339.

Approved in *Wood v. Railroad Co.*, 104 U. S. 332, 26 L. 773, holding grant of 1864 necessarily implied that sections nearest the line should be taken; *United States v. Southern Pacific R. R.*, 14 Sawy. 69, 70, 39 Fed. 139, holding company acquired no rights as to lands in said indemnity strip so far as two routes were on the same general line; *Vance v. Burlington, etc., R. R.*, 12 Neb. 288, 289, 11 N. W. 334, as to land within twenty miles of the road, the title was effective from time of definite location of road; *Barney v. Winona, etc., Ry.*, 2 McCrary, 422, 6 Fed. 802, without particular application; *Northern Pacific R. R. v. Barnes*, 2 N. Dak. 357, 370, 51 N. W. 400, 405, discussing legislative powers of taxation.

Public lands.—Grant of land to Burlington and Missouri railroad, by act of 1864, was not limited to land directly opposite to that section of the road, but if such land had been patented, the company could take land situated elsewhere along the general line of the road, p. 340.

Approved in *Denver, etc., R. Co. v. United States*, 34 Fed. 842, holding railroad could take timber from any point of the line.

Public lands.—Amendment of 1864, enlarging grant of 1862 to Union Pacific railroad, was intended to apply to grants made to all branch companies, except where otherwise specially stated, p. 341.

Cited in *Kansas Pacific v. Atchison R. R.*, 112 U. S. 417, 418, 28 L. 796, 5 S. Ct. 210, discussing statutes granting lands to railroads; *St. Paul R. R. v. Winona R. R.*, 112 U. S. 730, 28 L. 876, 5 S. Ct. 339, without particular application.

Statutes.—Uniform construction given by executive departments is entitled to the greatest consideration, p. 341.

Reaffirmed in *Hastings, etc., R. R. v. Whitney*, 132 U. S. 366, 33 L. 367, 10 S. Ct. 115. Approved in *United States v. Winona, etc., R. Co.*, 67 Fed. 964, 32 U. S. App. 272, holding that certificates, though erroneous, were only voidable; *St. Paul, etc., Ry. v. Sage*, 71 Fed. 52, 36 U. S. App. 340, company acquiescing in commissioner's decision, cannot contend that his error could not affect its rights; *Hastings, etc., Ry. v. Whitney*, 34 Minn. 542, 27 N. W. 71, holding lands, of which there was a homestead entry valid upon its face, excepted from the grant; *Northern Pacific R. Co. v. United States*, 36 Fed. 285, without particular application.

Public lands.—Act of Congress of 1862, as amended in 1864, respecting grants to Union Pacific railroad, contemplated that one-half of land granted should be taken on each side of road, and land department could not enlarge quantity on one side to make up deficiency upon the other, but the patents cannot be adjudged invalid as to any land not identified, p. 342.

Approved in *Kansas City, etc., R. R. v. Attorney-General*, 118 U. S. 695, 30 L. 284, 7 S. Ct. 72, holding there was not sufficient evidence for the court to ascertain which of the certificates should be held invalid; *Grandin v. La Bar*, 3 N. Dak. 459, 57 N. W. 245, holding grant by Congress did not vest title to lands in "Indemnity Belt" in company upon the definite location of its line; *Southern Pacific R. R. v. Smith*, 74 Fed. 592, holding company cannot select indemnity lands on one side of road to make up losses sustained on the other; *United States v. Union Pacific Ry.*, 37 Fed. 554, without particular application.

Public lands.—Government cannot insist upon a cancellation of the patents, claimed to have been improperly issued under Union Pacific grants, so as to affect innocent purchasers, p. 342.

Cited and principle applied in *United States v. Land Co.*, 148 U. S. 41, 37 L. 358, 13 S. Ct. 462, holding special plea of a bona fide purchaser, set up by land company, was sufficient, if true; *United States v. Winona, etc., R. R.*, 165 U. S. 478, 41 L. 796, 17 S.

Ct. 382, holding act of 1887 confirmed title to purchasers from railroad of land erroneously certified; *United States v. Winona, etc.*, R. Co., 67 Fed. 961, 32 U. S. App. 272, holding equity of bona fide purchasers, under certificates issued under mistake of law, superior to that of the United States; *United States v. Southern Pac. R. Co.*, 88 Fed. 837, holding cancellation of patents under railroad grant will not affect rights of bona fide purchasers; *Janes v. Wilkinson*, 2 Kan. App. 368, 42 Pac. 738, holding patent issued for lands excepted, conveyed good title to an innocent purchaser.

Miscellaneous.—Cited in *Taboreck v. Burlington, etc.*, R. R., 2 McCrary, 410, 13 Fed. 104, to point that grants to railroad take effect from time line is definitely located.

98 U. S. 343-358, 25 L. 180, UNITED STATES v. HALL.

Pensions.—United States has power to protect pension money from seizure under State laws until it has passed into the hands of pensioner, p. 351.

Approved in *Price v. Savings Society*, 64 Conn. 366, 42 Am. St. Rep. 199, 30 Atl. 140, and *Reiff v. Mack*, 160 Pa. St. 266, 28 Atl. 699, holding attachment will not lie against proceeds of a pension check deposited with bank for collection; dissenting opinion in *Crow v. Brown*, 81 Iowa, 353, 46 N. W. 994, 11 L. R. A. 112, majority holding property purchased with pension money exempt from execution.

Pensions.—Congress has power to provide for the trial and punishment of guardian embezzling ward's pension money, p. 358.

Cited and principle applied in *Frisbie v. United States*, 157 U. S. 166, 39 L. 659, 15 S. Ct. 588, and *United States v. Van Leuven*, 62 Fed. 56, holding Congress can regulate amounts which claimants, under pension law, may pay their solicitors; *United States v. M'Cready*, 11 Fed. 235, 236, holding statute protected letter left in the residence of sendee by carrier; *United States v. Ryckman*, 12 Fed. 49, holding law against withholding of pension, applies to the withholding of the treasury warrant; *United States v. Moyers*, 15 Fed. 417, holding any scheme by which a party obtains more than his legal fee is a violation of statute as to withholding of pension. See note in 98 Am. Dec. 147, on this point.

98 U. S. 359-366, 25 L. 185, RAILROAD CO. v. GEORGIA.

Corporations.—The consolidation, by Georgia act of 1863, of two existing Georgia railroads, held to have created a new corporation, which, accordingly, became subject to reserve power to alter, amend and repeal, provided for in the general laws of the State at that time, though the original concerns each had qualified exemptions from taxation under irrevocable charters, p. 363.

Approved in *Memphis R. R. v. Commissioners*, 112 U. S. 623, 28 L. 842, 5 S. Ct. 305, holding mortgage of charter of corporation, con-

fers no right upon purchasers at foreclosure sale to exist as the same corporation; Chesapeake, etc., *Ry. v. Miller*, 114 U. S. 188, 25 L. 125, 5 S. Ct. 819, holding that immunity from taxation did not pass to the new corporation; Wabash, etc., *Ry. v. Ham*, 114 U. S. 595, 29 L. 239, 5 S. Ct. 1085, holding property not subject to lien for equipment bond of one of the old companies, issued after passage of consolidation act; *Adams v. Yazoo, etc., R. Co.*, — Miss. —, 24 So. 202, 203, 204, 212, and *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S. 594, 29 L. 501, 6 S. Ct. 197, holding that consolidation, under statute of Missouri of 1879, creates a new corporation, subject to obligations of old companies; *Henderson v. Central Passenger Ry.*, 21 Fed. 364, holding that company's right as a corporation to operate the road did not pass by sale; *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. 610, holding that by consolidation two became one corporation; *Edison, etc., Light Co. v. Electric Co.*, 35 Fed. 236, holding that assignment of patent by officers of old corporation, after the consolidation, to new corporation, carried title; *Smith v. Lake Shore, etc., Ry.*, 114 Mich. 468, 72 N. W. 330, holding company consolidating lost its special privileges; *Miner v. New York, etc., R. R.*, 123 N. Y. 251, 25 N. E. 341, holding corporate life ceased upon consolidation, and statute of limitations began running. See notes in 79 Am. Dec. 422, 425, on effect of consolidation.

Constitutional law.—Where general law of Georgia reserved power to repeal franchises of private corporations, two existing corporations consolidating subsequently to such general law, under act conferring full powers and immunities of original corporations, may be taxed, though each, by its original charter, enjoyed a limited exemption from taxation, pp. 364-365.

Reaffirmed in *Keokuk, etc., R. R. v. Missouri*, 152 U. S. 307, 38 L. 454, 14 S. Ct. 594. Cited and principle applied in *Greenwood v. Freight Co.*, 105 U. S. 21, 26 L. 965, holding legislature of Massachusetts could repeal charter of a street railroad; *Savannah v. Jesup*, 106 U. S. 565, 567, 570, 27 L. 277, 278, 1 S. Ct. 514, 515, 518, holding that Atlantic and Gulf railroad could not be subjected to additional taxation by Savannah without further legislation; *Louisville Water Co. v. Clark*, 143 U. S. 14, 36 L. 58, 12 S. Ct. 350, holding that immunity of water company from taxation was withdrawn by general revenue act; *Covington v. Kentucky*, 173 U. S. 239, 19 S. Ct. 386, holding statute relating to taxation not irrevocable unless intent is unmistakably expressed; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 647, 19 S. Ct. 534, holding grant of immunity from taxation for a designated time repealable; *Tilley v. Railroad Commrs.*, 4 Woods, 438, 5 Fed. 651, holding valid, regulation of railroad rates by State; *Tennessee v. Whitworth*, 22 Fed. 83, holding that "privileges" included immunity from taxation; *Citizens, etc., R. Co. v. Memphis*, 53 Fed. 731, holding that consolidation did not subject rights granted by

original charters to dominion of State; *Tod v. Land Co.*, 57 Fed. 56, holding land company empowered to form a "temporary or permanent consolidation" with any railway may purchase all its stock; *Northern Bank v. Stone*, 88 Fed. 424, holding retention of right to appeal applies to extensions of existing charters; *Macon R. R. v. Gibson*, 85 Ga. 12, 15, 21 Am. St. Rep. 137, 139, 11 S. E. 443, holding State could amend charter so as to confine railroad to a particular route; *Board of Administrators v. Gas-Light Co.*, 40 La. Ann. 386, 391, 4 So. 435, 438, holding obligation imposed on former company to furnish gas free to charity hospital adheres to consolidated company; *Day v. Worcester, etc., R. R.*, 151 Mass. 309, 23 N. E. 825, holding new company was bound to deliver its own stock for the bonds; *St. Louis, etc., Ry. v. Berry*, 41 Ark. 518, 521, and *State v. Keokuk, etc., Ry.*, 99 Mo. 39, 41, 12 S. W. 292, 6 L. R. A. 224, 225, holding immunity from taxation did not pass to new company; *Watson Seminary v. Pike County Court*, 149 Mo. 67, 50 S. W. 882, 45 L. R. A. 679, holding general statutory reservation becomes a part of charter; *People v. New York, etc., R. R.*, 129 N. Y. 482, 29 N. E. 961, 15 L. R. A. 88, and *n.*, holding to consolidate a foreign and domestic corporation, consent of other State is necessary; *Attorney-General v. Looker*, 111 Mich. 506, 69 N. W. 931, and *Dow v. Northern R. R.*, 67 N. H. 26, 36 Atl. 523, holding lease of railroad for ninety-nine years invalid as against dissenting stockholders; *Cross v. West Virginia, etc., Ry.*, 35 W. Va. 177, 12 S. E. 1072, holding valid statute providing for cumulative voting of shares. Cited in *Tennessee v. Whitworth*, 117 U. S. 145, 29 L. 835, 6 S. Ct. 651, holding right of exemption from taxation is conferred upon a railroad by State statute granting it "all rights, powers and privileges" of a corporation so exempt; dissenting opinion in *Commonwealth v. Bank*, 97 Ky. 626, 31 S. W. 1021, majority holding banks entering into contract under Hewitt act are exempt from all taxation. See notes in 35 Am. St. Rep. 400, and 7 Am. St. Rep. 723, on this point.

Distinguished in *State v. Railroad*, 12 Lea, 596, holding immunity from taxation passed by sale to purchaser; *International, etc., Ry. v. State*, 75 Tex. 378, 12 S. W. 688, holding dissolution would not destroy right of exemption from taxation.

Courts.—Decision of State court that code was enacted in manner provided by Constitution is not open to revision in Federal court, p. 366.

Reaffirmed in *Leeper v. Texas*, 139 U. S. 467, 35 L. 227, 11 S. Ct. 579, *Board of Commrs. v. Coler*, 96 Fed. 290, and *In re Duncan*, 139 U. S. 456, 35 L. 222, 11 S. Ct. 575.

Approved in *First Nat. Bank v. Bennington*, 16 Blatchf. 55, following decision of State court upholding validity of State statute; *Caldwell v. Wilson*, 121 N. C. 458, 23 S. E. 557, without particular application. See 85 Am. Dec. 363, note, on this point.

Corporation.—Franchise means not only the right to be a corporation, but generically covers all rights granted by the legislature, p. 365.

Approved in *Buchanan v. Knoxville, etc., R. Co.*, 71 Fed. 334, 37 U. S. App. 499, construing statutes; *Pipe-Line Co. v. Berry*, 52 N. J. L. 310, 19 Atl. 666, holding foreign corporations doing business here subject to the State tax.

98 U. S. 366-381, 25 L. 201, *CLEVELAND INS. CO. v. GLOBE INS. CO.*

Bankruptcy.—No particular form of proceeding is required to take case to Circuit Court for exercise of its supervisory jurisdiction in bankruptcy cases; a writ of error is sufficient, pp. 369, 370.

Bankruptcy.—Decision of Circuit Court, in exercise of its supervisory jurisdiction over proceeding in bankruptcy of District Court, is not reviewable in Supreme Court, p. 371.

Cited generally in *In re Cleveland Ins. Co.*, 22 Fed. 202.

98 U. S. 381-398, 25 L. 225, *UNITED STATES v. NEW ORLEANS.*

Municipal corporations.—Power of taxation belongs exclusively to the legislative branch of government, but may be delegated to municipal corporations, which are merely instrumentalities of State for local purposes, p. 392.

Cited and principle applied in *New Orleans Water Works v. Sugar Co.*, 125 U. S. 31, 31 L. 612, 8 S. Ct. 748, holding ordinance granting permission to lay pipes is a license, and not a law of the State; *Spencer v. Merchant*, 125 U. S. 355, 31 L. 767, 8 S. Ct. 926, holding legislature could direct apportionment of assessment; *Hanford v. Davies*, 51 Fed. 259, holding obligation of contract may be impaired by municipal ordinance; *Iron Mountain R. Co. v. Memphis*, 96 Fed. 126, holding resolution of city council to be a State law; *Ray v. Natural Gas Co.*, 138 Pa. St. 592, 21 Am. St. Rep. 928, 20 Atl. 1067, 12 L. R. A. 293, and n., to give Federal courts jurisdiction it must be some enactment, having the force of law, either by State or of some municipality exercising legislative power, which impairs the contract; dissenting opinion in *Canal Co.'s Case*, 83 Md. 630, 35 Atl. 366, without particular application. See note in 74 Am. Dec. 591.

Municipal corporations.—Power of taxation is vested in a municipal corporation as an essential attribute, for all the purposes of its existence, unless expressly prohibited, p. 393.

Reaffirmed in *Muller v. Denison*, 1 Tex. Civ. App. 296, 21 S. W. 392. Cited and principle applied in *Scotland Co. Court v. Hill*, 140 U. S. 46, 35 L. 353, 11 S. Ct. 699, holding subsequent legislation could not take away power of taxation to pay bonds; *United States v.*

New Orleans, 17 Fed. 486, holding municipality contracting a liability can levy tax to pay same; *United States v. Key West*, 78 Fed. 91, 41 U. S. App. 726, holding city could be compelled to levy a tax in one year or within reasonable number, to pay a judgment; *Security Savings, etc., Co. v. Hinton*, 97 Cal. 219, 32 Pac. 5, holding enactment of general law not necessary to empower city having a freeholder's charter to impose taxes.

Municipal corporations.—Municipality authorized to borrow money to execute public works, has implied power to tax for that purpose, p. 395.

Reaffirmed in *United States v. Elizabeth*, 25 Fed. Cas. 999, *Oconto City Water-Supply Co. v. Oconto*, — Wis. —, 80 N. W. 1116, *Charlotte v. Shepard*, 122 N. C. 603, 29 S. E. 842, and *Peoria, etc., Ry. v. People*, 116 Ill. 408, 6 N. E. 500. Cited and principle applied in *Ralls County Court v. United States*, 105 U. S. 736, 26 L. 1222, holding county authorized to contract an extraordinary indebtedness can levy a tax to meet it; *Quincy v. Jackson*, 113 U. S. 337, 28 L. 1003, 5 S. Ct. 546, holding act authorizing municipality to incur a debt, confers authority to levy a tax in excess of limit of taxation; *United States v. Lincoln Co.*, 5 Dill. 195, F. C. 15,503, holding judgment creditors of counties in Missouri are entitled to the levy of a special tax to pay judgment, if no other means is provided; *Savings, etc., Assn. v. Alturas Co.*, 65 Fed. 683, holding that division of county did not impair the obligations of its bonds; *Stryker v. Board of Commrs.*, 77 Fed. 574, 40 U. S. App. 583, holding creditor could only demand that a tax to the full limit be levied each year; *Southerland-Innes Co. v. Evart*, 86 Fed. 602, holding power of corporation to contract is limited to purposes for which a tax may be levied; *Warner v. New Orleans*, 87 Fed. 835, 59 U. S. App. 146, holding city liable for special assessments against itself; *Taylor v. McFadden*, 84 Iowa, 271, 50 N. W. 1072, holding power given city to erect water works carries right to levy a tax for that purpose; *Boody v. Watson*, 64 N. H. 177, 188, 9 Atl. 806, 813, holding correctional authority to reverse a tax-exemption that can only be reversed by a tax-assessment, is authority to make the assessment; *Munday v. Rahway*, 43 N. J. L. 342, holding legislature could not take away right to enforce municipal obligation by mandamus; *Rahway v. Munday*, 44 N. J. L. 417, holding legislature cannot impair taxing power of municipality so far as it relates to existing contracts; *Avery v. Job*, 25 Or. 522, 36 Pac. 295, holding remedy of bondholders not limited to the special tax; *Austin v. Nalle*, 85 Tex. 542, 22 S. W. 673, holding power to issue bonds implies power to levy tax to pay them; dissenting opinion in *Peake v. New Orleans*, 139 U. S. 373, 35 L. 142, 11 S. Ct. 553, majority holding contractor for local improvements must look to the special assessments; *Atlantic City Water-Works Co. v. Read*, 50 N. J. L. 672, 15 Atl. 13, majority holding it criminal for city council to incur obligations in

excess of appropriations and limit of expenditures. See note on this point in 85 Am. Dec. 544. Cited in note in 98 U. S. 398, 25 L. 228.

Municipal corporations.—Indebtedness of a city on railroad-aid bonds is conclusively established by judgments in bondholders' favor, and their payment is not restricted to any species of property or revenues, or subject to any conditions not stated in the judgment; hence, mandamus to compel levy of tax to pay bonds cannot be refused on ground that bonds prescribed no such remedy, p. 395.

Reaffirmed in *Mayor, etc., New Orleans v. United States*, 49 Fed. 41, 2 U. S. App. 125. Cited and principle applied in *Wolff v. New Orleans*, 103 U. S. 360, 26 L. 396, holding mandamus lies to compel city to exercise her taxing power, though laws withdrawing it have been passed; *Board of Commrs. v. Platt*, 79 Fed. 572, 49 U. S. App. 225, holding judgment upon contract determines power of corporation to make it; *New Orleans v. Warner*, 175 U. S. 141, holding judgment for taxes conclusive; *United States v. Mobile*, 4 Woods, 538, 12 Fed. 769, holding subsequent legislation impairing the obligation of judgment creditors must be disregarded; *United States v. Auditors*, 28 Fed. 409, holding auditors must audit judgment against town; *Police Jury v. United States*, 60 Fed. 252, 23 U. S. App. 10, holding questions decided on application for mandamus are res judicata on subsequent application to enforce a new judgment; *Fleming v. Trowsdale*, 85 Fed. 190, 54 U. S. App. 577, on application for mandamus to compel levy of tax to pay judgment on bonds, no question as to their validity is open; *Smith v. Broderick*, 107 Cal. 651, 48 Am. St. Rep. 173, 40 Pac. 1036, holding judgment against San Francisco cannot be paid out of revenues raised for a subsequent year; *Grand Island, etc., R. R. v. Baker*, 6 Wyo. 394, 71 Am. St. Rep. 943, 45 Pac. 501, 34 L. R. A. 841, *Sherman v. Langham*, 92 Tex. 18, 42 S. W. 961, 39 L. R. A. 260, *Rio Grande Co. v. Burpee*, 24 Colo. 59, 48 Pac. 539, and *People v. Rio Grande Co.*, 7 Colo. App. 237, 42 Pac. 1035, in mandamus proceedings, the judgment must be accepted as a verity; *State v. Rainey*, 74 Mo. 234, holding State court will not interfere with tax levied to pay judgment of Federal courts; *Howard v. Huron*, 5 S. Dak. 547, 59 N. W. 835, 26 L. R. A. 498, holding city cannot attack judgment in proceedings by mandamus to enforce same. Cited in *State v. Gloyd*, 14 Wash. 7, 44 Pac. 103, without particular application.

Municipal corporations.—Where city railroad-aid bonds were secured by pledge of stock of railroad, the bondholder is not compelled to look to security, but may proceed directly against the city, p. 396.

Approved in *Conger v. New Orleans*, 32 La. Ann. 1253, where pledgor in possession of pledge sells same, the prescription of the debt does not remain interrupted.

Municipal corporations.—A general statute prohibiting towns from incurring debts, without making provision for their payment, does not prevent legislature authorizing the incurring of a particular obligation without such provision, p. 397.

Distinguished in *Knox v. City*, 36 La. Ann. 431, holding the reasons for decision in cited case were independent of the provision of limiting act.

Municipal corporations.—Neglect of city to levy tax for payment of bonds may be enforced by mandamus, p. 397.

Reaffirmed in *First Nat. Bank v. Society of Savings*, 80 Fed. 582, 42 U. S. App. 517, and *Deuel Co. v. First Nat. Bank*, 86 Fed. 266. Cited and principle applied in *Goelet v. Elizabeth*, 10 Fed. Cas. 527, holding complainants not entitled to equitable relief, since they could, by mandamus, compel collection of tax; *United States v. Elizabeth*, 24 Fed. 851, denying writ for want of competent proof; *Harkness v. Hutcherson*, 90 Tex. 386, 38 S. W. 1121, holding teacher entitled to mandamus to compel trustees to issue a warrant. See 18 Am. Dec. 240, and 85 Am. Dec. 545, notes on this point.

98 U. S. 398-403, 25 L. 231, *RAILROAD CO. v. GRANT*.

Courts.—Act of 1879, giving Supreme Court jurisdiction to re-examine judgment of Supreme Court of District of Columbia, involving over \$2,500, repealed section 847 of revised statutes, where jurisdictional amount was \$1,000, p. 401.

Reaffirmed in *Railroad Co. v. Trook*, 100 U. S. 113, 25 L. 571, *Dennison v. Alexander*, 103 U. S. 522, 26 L. 313, and *Bank of Republic v. Millard*, 154 U. S. 656, 25 L. 529, 14 S. Ct. 1207. Cited and principle applied in *United States v. Wanamaker*, 147 U. S. 150, 37 L. 118, 13 S. Ct. 280, declaring that section 847 of revised statutes is longer in effect; *In re Schneider*, 148 U. S. 162, 37 L. 406, 13 S. Ct. 572, holding writ of error does not lie to judgment of Supreme Court of District of Columbia, dismissing petition of convict for writ of habeas corpus; *In re Cilley*, 58 Fed. 988, holding right of removal because of diverse citizenship is limited by acts of 1887-1888 to suits of a civil nature "at common law or in equity;" *Postal Tel. Cable Co. v. Southern Ry.*, 89 Fed. 194, holding statute amending code as to condemnation by railroad did not repeal those sections; *Irrigation Co. v. Canal Co.*, 14 Utah, 167, 46 Pac. 827, and *Eastman v. Gurrey*, 14 Utah, 171, 46 Pac. 828, both holding Constitution, giving appeal from final judgments, denies right of appeal in all other cases.

Courts.—If law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall within the law, p. 401.

Reaffirmed in *South Carolina v. Gaillard*, 101 U. S. 438, 25 L. 939, *Sherman v. Grinnell*, 123 U. S. 680, 31 L. 279, 8 S. Ct. 261, *Gurnee v. Patrick Co.*, 137 U. S. 144, 34 L. 603, 11 S. Ct. 35, *National Bank v. Peters*, 144 U. S. 572, 36 L. 546, 12 S. Ct. 768, *McClain v. Williams*, 10 S. Dak. 336, 73 N. W. 74, 43 L. R. A. 289, *Manley v. Olney*, 32 Fed. 709, and *Dulin's case*, 91 Va. 725, 20 S. E. 823. Cited and principle applied in *In re Hall*, 167 U. S. 42, 42 L. 70, 17 S. Ct. 725, holding that repealing act took away jurisdiction of Court of Claims to proceed; *Larkin v. Saffarans*, 15 Fed. 153, holding statute enlarging jurisdiction applies to pending cases; *Birdseye v. Shaeffer*, 37 Fed. 825, holding constitutional, statute that Circuit Court shall remand case removed because of local prejudice, upon examination of affidavit; *Scott v. Hamner*, 72 Fed. 290, 36 U. S. App. 547, and *Gowen v. Bush*, 72 Fed. 300, 36 U. S. App. 543, holding Circuit Court of Appeals had no jurisdiction of pending cases from Indian Territory after act of 1895; *Emblen v. Lincoln Land Co.*, 94 Fed. 713, holding Congress can withdraw contest pending before land department; *Pendleton v. Cowling*, 11 Mont. 48, 27 Pac. 388, holding decision of Supreme Court of United States not binding on State court in deciding a case which, at time of its commencement, was appealable to that court. Cited, arguendo, in *Keller v. Ashford*, 133 U. S. 617, 33 L. 671, 10 S. Ct. 495.

Appeal and error.—A party to a suit has no vested right to an appeal or writ of error from one court to another, p. 401.

Reaffirmed in *Schuster v. Weiss*, 114 Mo. 173, 21 S. W. 442, 19 L. R. A. 187, and *Irrigation Co. v. Canal Co.*, 14 Utah, 168, 46 Pac. 828. Cited and principle applied in *Royston v. Miller*, 76 Fed. 54, holding co-owner, doing work on mining claim, has no vested right to contribution from co-owner; *Campbell v. Mining Co.*, 83 Fed. 646, 55 U. S. App. 155, holding statute giving two new trials as of right in ejectment confers no vested right; *Day v. Madden*, 9 Colo. App. 469, 48 Pac. 1055, holding repeal of statute allowing an attachment is not invalid; *Bartol v. Eckert*, 50 Ohio St. 42, 33 N. E. 296, holding valid statute limiting time within which to revive a dormant judgment.

98 U. S. 403-410, 25 L. 206, **BOOM CO. v. PATTERSON.**

Trial.—Objections to jurisdiction of court going to subject-matter of controversy may be taken at any time, p. 406.

Eminent domain.—United States cannot interfere in an exercise by State of its sovereign right of eminent domain, p. 406.

Reaffirmed in *United States v. Jones*, 109 U. S. 518, 27 L. 1017, 3 S. Ct. 350, and *Baltimore, etc., R. R. v. P. W., etc., R. R.*, 17 W. Va. 863. Cited and principle applied in *Huling v. Kaw Valley Ry.*, 130 U. S. 564, 32 L. 1048, 9 S. Ct. 605, holding, after notice

to owner, condemnation cannot be attacked because of disqualification of commissioner; *Cherokee Nation v. Southern Kansas R. Co.*, 33 Fed. 914, holding that right of eminent domain may be granted to a railroad company; *In re Rugheimer*, 36 Fed. 371, 379, holding valid, act authorizing condemnation of property for public use without providing compensation; *Chappell v. United States*, 81 Fed. 765, 42 U. S. App. 539, holding condemnation proceedings by United States may be instituted in State or Federal courts; *Tait v. Asylum*, 84 Va. 277, 4 S. E. 701, holding every contract made with State is in subordination to its right of eminent domain.

Eminent domain.—When the sovereign power attaches conditions to its exercise of the right of eminent domain, the inquiry, whether conditions have been observed, is a subject of judicial cognizance, p. 406.

Reaffirmed in *Baltimore, etc., R. R. v. P. W., etc., R. R.*, 17 W. Va. 841. Approved in *Weidenfield v. Sugar Run R. Co.*, 48 Fed. 618, holding railroad, built for private use, not entitled to exercise right of eminent domain.

Eminent domain is the right to take property for public use, p. 406.

Approved in *Cherokee Nation v. Southern Kansas R. Co.*, 33 Fed. 905, holding eminent domain to be "that superior dominion of sovereign power which authorizes it to appropriate any property."

Eminent domain.—When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance, p. 406.

Reaffirmed in *Illinois, etc., R. R. v. Chicago*, 141 Ill. 602, 30 N. E. 1047, 17 L. R. A. 535. Cited and principle applied in *Backus v. Depot Co.*, 169 U. S. 568, 42 L. 859, 18 S. Ct. 450, holding State may authorize possession to be taken prior to the final determination of the amount of compensation; *Reynolds v. Railway Co.*, 59 Ark. 176, 26 S. W. 1039, holding railway abandoning condemnation proceedings may recover deposit; *Bennett v. Marion*, 106 Iowa, 630, 76 N. W. 845, holding city could not arbitrarily fix amount of land to be taken for sewer; *Lynch v. Forbes*, 161 Mass. 309, 42 Am. St. Rep. 404, 37 N. E. 437, holding there is no constitutional right to have the necessity of taking of land for public use submitted to a jury; *Stratford v. Greensboro*, 124 N. C. 132, 32 S. E. 396, whether a particular use is public is for the judiciary; *Fairchild v. St. Paul*, 46 Minn. 543, 49 N. W. 326, and *Roanoke City v. Berkowitz*, 80 Va. 623, holding valid, statute requiring the condemnation of fee-simple. See 22 Am. Dec. 697, note, as to what use justifies the exercise of the power of eminent domain.

Eminent domain.—In determining value of lands, sought to be condemned by a lumber boom company for its use, their adapta-

bility for boom purposes is properly considered in estimating their value, p. 408.

Cited and principle applied in *San Diego Land, etc., Co. v. Neale*, 78 Cal. 69, 20 Pac. 375, 3 L. R. A. 86, and n., allowing value of property for reservoir purposes; *Webster v. Kansas City, etc., Ry.*, 116 Mo. 119, 22 S. W. 475, evidence of land's adaptability for manufacturing purposes, admissible; *Currie v. Waverly, etc., R. R.*, 52 N. J. L. 396, 19 Am. St. Rep. 457, 20 Atl. 59, allowing its value for railroad purposes; *Alloway v. Nashville*, 88 Tenn. 519, 13 S. W. 125, 8 L. R. A. 126, and n., holding value upon particular capabilities cannot be exclusively shown; *Seattle, etc., Ry. v. Murphine*, 4 Wash. St. 457, 30 Pac. 722, admitting evidence of its value for any use for which adapted. See 83 Am. Dec. 117, note on this topic.

Distinguished in *Gibson v. Norwalk*, 13 Ohio C. C. 436, holding adaptability of land taken for reservoir could not be considered; *United States v. Seufert*, 78 Fed. 521, in estimating value of land taken for public use, its value for such use is not to be considered.

Eminent domain.—In determining value of land appropriated for public purposes, its market value, with reference to its availability for present and future valuable uses, is the measure, p. 408.

Reaffirmed in *Lafin v. Chicago, etc., R. Co.*, 33 Fed. 420, *Little Rock, etc., Ry. v. McGehee*, 41 Ark. 207 (see dissenting opinion in 41 Ark. 211), *Santa Ana v. Harlin*, 99 Cal. 542, 34 Pac. 226, *West Virginia, etc., R. R. v. Gibson*, 94 Ky. 237, 21 S. W. 1055, *Missouri, etc., Ry. v. Porter*, 112 Mo. 368, 20 S. W. 569, *Lowe v. Omaha*, 33 Neb. 596, 50 N. W. 763, *Amoskeag Co. v. Worcester*, 60 N. H. 526, *Low v. Railroad*, 63 N. H. 562, 3 Atl. 742, and *Shenandoah, etc., R. R. v. Shepherd*, 26 W. Va. 677. Cited and principle applied in *Chicago, etc., R. R. v. Chicago*, 166 U. S. 250, 41 L. 989, 17 S. Ct. 590 (see dissenting opinion in 166 U. S. 260, 41 L. 993, 17 S. Ct. 594), allowing railroad, where city opened street, the amount of decrease in the value of its use for railroad purposes; *Payne v. Kansas, etc., R. Co.*, 46 Fed. 557, admitting value of land as a ferry; *L. R. Junction Ry. v. Woodruff*, 49 Ark. 388, 392, 394, 4 Am. St. Rep. 53, 56, 58, 5 S. W. 793, 795, 796, admitting evidence of special value of land as a bridge site; *Muller v. Railway Co.*, 83 Cal. 245, 23 Pac. 267, admitting bona fide offers made to owners of abutting land not taken; *San Diego Land, etc., Co. v. Neale*, 88 Cal. 60, 62, 66, 25 Pac. 979, 980, 981, 11 L. R. A. 608, 610, and n., holding that value of land, when taken in connection with plaintiff's land, cannot be considered; *Chicago, etc., R. R. v. Chicago*, 149 Ill. 463, 37 N. E. 79, where lands are restricted to a special use their value for that use is the measure of damages; *Illinois, etc., R. R. v. Chicago*, 169 Ill. 338, 48 N. E. 494, holding value of right of way for erection of structures other than tracks, cannot be allowed where public street is extended; *Ohio Valley, etc., Co. v. Kerth*,

130 Ind. 317, 30 N. E. 299, admitting map showing position of land with reference to city; *Doud v. Mason City, etc., Ry.*, 76 Iowa, 440, 41 N. W. 66, admitting evidence of coal, in right of way, as damages; *San Antonio, etc., Ry. v. Hunnicutt*, 18 Tex. Civ. App. 314, 44 S. W. 537, and *Chicago, etc., Ry. v. Davidson*, 49 Kan. 590, 31 Pac. 133, both holding adaptability of farm for city property could be considered; *Orleans, etc., R. R. v. Jefferson, etc., R. R.*, 51 La. Ann. 1616, 26 So. 283, holding improvement of land sought to be utilized is a proper element in fixing compensation; *Rock Island, etc., Ry. v. Leisy Brewing Co.*, 174 Ill. 555, 51 N. E. 575, allowing compensation for deprivation of ice privileges; *Portland, etc., R. R. v. Deering*, 78 Me. 67, 2 Atl. 671, holding jury may take into consideration what use the railroad may reasonably be expected to make of the crossings; *Fales v. Easthampton*, 162 Mass. 425, 38 N. E. 1131, holding jury could take into consideration the value of land as a millsite; *Beale v. Boston*, 166 Mass. 55, 43 N. E. 1030, holding it error to exclude evidence of value of land in a way other than the market value; *Russell v. St. Paul, etc., Ry.*, 33 Minn. 214, 22 N. W. 380, rejecting value with reference to possible future changes; *Sullivan v. Lafayette Co.*, 61 Miss. 283, allowing difference in value of land before and after appropriation; *Montana Ry. v. Warren*, 6 Mont. 279, 280, 12 Pac. 643, and *Northern Pac., etc., Ry. v. Forbis*, 15 Mont. 455, 48 Am. St. Rep. 694, 39 Pac. 572, both holding owner could recover the value of the land for its most valuable use; *Eastmar v. Mayor*, 152 N. Y. 473, 46 N. E. 842, holding damages for failure of city to put lessee of wharf in possession is difference between the rent and value of the use of the wharf; *Alloway v. Nashville*, 88 Tenn. 514, 13 S. W. 123, 8 L. R. A. 125, and *n.*, construing "just compensation" to mean the fair market value; *Richmond, etc., R. R. v. Humphreys*, 90 Va. 436, 18 S. E. 905 (see dissenting opinion in 90 Va. 445, 18 S. E. 909), holding damages to be market value of the land at time of taking, in view of the uses to which they have been put; *Stewart v. Ohio, etc., R. R.*, 38 W. Va. 451, 18 S. E. 608, holding measure of damages to be depreciation of market value of adjoining property. See 88 Am. Dec. 116, note on this topic.

Distinguished in *Mobile, etc., R. R. v. Postal Telegraph Co.*, 76 Miss. 751, 752, 26 So. 373, 45 L. R. A. 227, holding change of route by railroad too remote a contingency to be considered; *Munkwitz v. Chicago, etc., R. Co.*, 64 Wis. 406, 25 N. W. 439, refusing to consider speculative damages based on future contingencies.

Removal of causes.—Proceeding before commissioners to determine value of land when transferred by appeal from award of commissioners, took the form of a suit and was transferable to Federal court, where parties were citizens of different States, pp. 406-407.

Reaffirmed in *Colorado, etc., Ry. v. Jones*, 29 Fed. 193, 195, and *Sugar Creek, etc., R. Co. v. M'Kell*, 75 Fed. 35. Cited and principle

applied in *Kern v. Huidekoper*, 103 U. S. 492, 26 L. 357, holding replevin suit, which could not have originally been brought in Federal court, may be removed; *Ellis v. Davis*, 109 U. S. 497, 27 L. 1010, 3 S. Ct. 334, holding jurisdiction as to wills cannot be exercised by Federal courts until a controversy thereon arises between citizens of different States; *Hess v. Reynolds*, 113 U. S. 79, 28 L. 929, 5 S. Ct. 379, holding proceeding in State court against administrator for debt is removable notwithstanding State statute that such claims can only be established in Probate Court; *Pacific R. R. Removal Cases*, 115 U. S. 18, 19, 29 L. 325, 5 S. Ct. 1121, holding proceeding in Missouri before mayor, etc., to take land for widening street, becomes a "suit," when transferred to State court on appeal; *Searl v. School District*, 124 U. S. 199, 31 L. 416, 8 S. Ct. 461, holding proceedings in Colorado to condemn land for school purposes is a "suit;" *Delaware Co. v. Diebold Safe Co.*, 133 U. S. 487, 33 L. 680, 10 S. Ct. 403, holding claim against county on appeal from County Court may be removed; *Upshur Co. v. Rich*, 135 U. S. 474, 475, 34 L. 199, 10 S. Ct. 653, holding appeal from an assessment of taxes to "County Court," acting as commissioners, is not a "suit;" *Clark v. Bever*, 139 U. S. 103, 35 L. 92, 11 S. Ct. 470, holding proceeding against administrator, to determine liability of estate for a claim, is removable; *Northern Pacific, etc., Co. v. Lowenberg*, 9 Sawy. 353, 18 Fed. 343, holding proceeding to appropriate property is removable; *Washington, etc., Co. v. Kansas, etc., Ry.*, 5 Dill. 491, holding proceeding, by mandamus, to compel company to register transfer of stock is removable; *Chicago v. Hutchinson*, 11 Biss. 487, 494, 15 Fed. 131, 136, holding non-resident owner appearing in proceedings by city to open a street can remove case; *Mineral, etc., R. Co. v. Copper Co.*, 25 Fed. 516, 517, 518, where plaintiff petitioned Probate Court for condemnation and defendant answered, the case was removable; *New York, etc., Co. v. Machine Co.*, 3 Fed. 226, holding suit appealed from Justice's Court, when defendant claimed set-off of \$3,000, is not removable, the jurisdictional limit of such court being \$500; *Filer v. Levy*, 17 Fed. 612, and *Brodhead v. Shoemaker*, 44 Fed. 522, 524, 525, 11 L. R. A. 569, 571, 572, and n., both holding probate proceeding under the code removable; *Minneapolis, etc., Ry. v. Nestor*, 50 Fed. 3, holding, in condemnation proceedings, demand for trial by jury is equivalent to filing of answer in ordinary suits; *Mt. Washington Ry. v. Coe*, 50 Fed. 637, 638, holding rule requiring special pleas to be filed within ninety days, applicable to condemnation proceedings; *In re Chicago*, 64 Fed. 898, 901, 902, holding assessment proceedings for municipal improvements do not constitute a "suit;" *Colorado Eastern Ry. v. Union Pac. Ry.*, 94 Fed. 313, holding proceeding for condemnation to be a suit; *Postal Tel. Cable Co. v. Cleveland, etc., Ry.*, 94 Fed. 236, holding Federal court cannot entertain a suit by a telegraph company of another State to condemn right of

way in Ohio; *Hartford, etc., R. Co. v. Montague*, 94 Fed. 228, 230, holding statutory proceeding to condemn property in Connecticut is not a suit; *Chicago, etc., R. R. v. Butts*, 55 Kan. 664, 41 Pac. 950, in an appeal from award of damages, the landowner becomes the plaintiff; *State v. Oil Co.*, 42 W. Va. 95, 24 S. E. 693, holding when question of legality of assessment is made up for the purpose of appeal, the order of court is the exercise of judicial power.

Cited in dissenting opinion in *Rosenbaum v. Bauer*, 120 U. S. 461, 30 L. 747, 7 S. Ct. 639, majority holding original proceeding to obtain mandamus not removable; without particular application in *Martin v. Baltimore, etc., Ry.*, 151 U. S. 683, 33 L. 315, 14 S. Ct. 537.

Distinguished in *Rosenbaum v. Bauer*, 120 U. S. 458, 30 L. 746, 7 S. Ct. 637, holding original proceeding to obtain mandamus not removable; *New York, etc., R. Co. v. Cockcroft*, 46 Fed. 882, holding petition filed with railroad commissioners to obtain their consent to the taking of certain land is not removable; *In re Cilley*, 58 Fed. 986, holding proceeding to probate a will not a suit.

Miscellaneous.—*Rutz v. St. Louis*, 3 McCrary, 265, 10 Fed. 341.

98 U. S. 410-424, 25 L. 164, *SCULL v. UNITED STATES*.

Public lands.—In act of 1860, respecting Florida, etc., private land claims, Congress reserves the right to confirm or reject private land claims presented before the register of district land offices and approved by commissioner of general land office, pp. 416-417.

Reaffirmed in *United States v. Clamorgan*, 101 U. S. 827, 831, 25 L. 837, 838.

Public lands.—Under eleventh section, act of 1860, settling Florida, etc., private land claims, the party must have been out of possession for twenty years, and must claim by title complete and boundaries fixed prior to cession to United States; hence claim dismissed where there was no actual survey or any identifying description, p. 424.

Reaffirmed in *United States v. Clamorgan*, 101 U. S. 825, 830, 25 L. 836, 838. Cited and principle applied in *United States v. Baltimore*, 98 U. S. 424, 25 L. 167, holding mere permission by commandant to settle will not sustain a suit under eleventh section of act of 1860; *Dauterive v. United States*, 101 U. S. 706, 25 L. 871, dismissing petition where grant had not been surveyed before the cession; *Pinkerton v. Ledoux*, 129 U. S. 354, 32 L. 709, 9 S. Ct. 402, if, from the description in petition and writ of possession of a Mexican grant, jury cannot locate the boundaries, they must find for defendant; *Muse v. Hotel Co.*, 68 Fed. 641, 644, 646, rejecting grant and survey where it was not shown that legal requisites had been performed.

98 U. S. 424-425, 25 L. 167, UNITED STATES v. BALTIMORE.

Public lands.— Mere permission for possession and settlement in Florida from commandant will not sustain a claim under eleventh section of act of 1860, in absence of grant or survey, p. 425.

No citations.

98 U. S. 425-428, 25 L. 191, FOSTER v. MORA.

Ejectment.— In action of ejectment in Federal courts, a strict legal title prevails, p. 428.

Reaffirmed in *Schoolfield v. Rhodes*, 82 Fed. 155, 49 U. S. App. 490. Cited and principle applied in *Johnson v. Christian*, 128 U. S. 382, 32 L. 415, 9 S. Ct. 90, and *Burnes v. Scott*, 117 U. S. 588, 29 L. 993, 6 S. Ct. 868, both holding equitable defense cannot be set up in an action at law on promissory note; *Langdon v. Sherwood*, 124 U. S. 84, 31 L. 346, 8 S. Ct. 432, holding ejectment could not be maintained in Federal courts on entry made with register, though code of that State declares it proof of title equivalent to a patent; *Mora v. Nunez*, 7 Sawy. 464, 10 Fed. 640, holding patent issued upon confirmation of grant is conclusive against one having no patent; *Bouldin v. Phelps*, 12 Sawy. 312, 30 Fed. 560, holding party with equitable title cannot maintain ejectment against one with claim fraudulently confirmed; *Wilson v. Fine*, 14 Sawy. 35, 36, 38 Fed. 790, 791, holding prior possession is a sufficient legal estate to maintain ejectment; *Lerma v. Stevenson*, 40 Fed. 359, holding one filing location for pre-emption but not having patent cannot prevail against legal title in action at law; *Lake Superior, etc., Co. v. Cunningham*, 44 Fed. 832, holding defendant in ejectment can attack title claimed under a void certificate; *Carter v. Ruddy*, 56 Fed. 544, 15 U. S. App. 129, holding it proper to instruct jury to disregard the location and deed, as they did not vest the legal title; *Davis v. Davis*, 72 Fed. 83, 30 U. S. App. 723, holding statute, providing that Federal practice conform to that of State courts does not authorize Federal courts to permit equitable defenses in ejectment; *Harrett v. Kinney*, 44 Mich. 460, 7 N. W. 64, holding defendant in ejectment cannot interpose equitable defense of fraud; *Moran v. Moran*, 106 Mich. 12, 58 Am. St. Rep. 465, 63 N. W. 990, holding that mental competency of grantor cannot be assailed in ejectment.

98 U. S. 428-432, 25 L. 251, UNITED STATES v. PEROT.

Public lands.— Spanish grants of "neutral ground" in Texas, made between 1790 and 1800, are valid, p. 429.

Evidence.— Laws of Mexico, of force in Texas previous to the Texan Revolution, are not laws of a foreign but of an antecedent government, and will be judicially noticed, p. 430.

Reaffirmed in *United States v. Chaves*, 159 U. S. 459, 40 L. 218, 16 S. Ct. 60, *Bouldin v. Phelps*, 12 Sawy. 306, 30 Fed. 556, and *Loree v. Abner*, 57 Fed. 165, 6 U. S. App. 649. Approved in *Sullivan v. Richardson*, 33 Fla. 118, 14 So. 709, taking judicial notice of laws of Florida before its acquisition.

Public lands.—The uniform practice and usage of a country should be observed in the construction of all grants made therein, especially as to measurements, p. 432.

98 U. S. 433-439, 25 L. 209, *CARR v. UNITED STATES*.

Public lands.—Where San Francisco, prior to Van Ness ordinance, granted lands to United States, this barred one claiming under said ordinance, p. 435.

Cited, without particular application, in *Billgery v. Land Trust*, 48 La. Ann. 898, 19 So. 923.

United States is not estopped by judgment in action of ejectment against its officers or agents in possession, p. 436.

Reaffirmed in *Scranton v. Wheeler*, 57 Fed. 807, 16 U. S. App. 152, and *Stanley v. Schwalby*, 85 Tex. 354, 19 S. W. 266. Cited and principle applied in *United States v. Lee*, 106 U. S. 216, 27 L. 180, 1 S. Ct. 257 (see dissenting opinion in 106 U. S. 250, 27 L. 192, 1 S. Ct. 286), holding officers and agents of United States in possession of latter's property, may be sued; *Tindal v. Wesley*, 167 U. S. 223, 42 L. 144, 17 S. Ct. 778, holding judgment against officer in possession does not conclude the State; *United States v. Murphy*, 32 Fed. 383, that defendant was induced through wrongful representations of register to cut timber, does not estop the government from prosecuting him; *Lake Superior, etc., Co. v. Cunningham*, 44 Fed. 833, holding State not estopped by the act of its agent; *The John Shillito Co. v. McClung*, 51 Fed. 875, 6 U. S. App. 128, holding fact that collector of customs did not notify importer of an adverse decision by secretary of treasury does not prevent him from settling up ninety-day limitation; *Northern Bank v. Stone*, 88 Fed. 418, holding State not a party not concluded by appearance of attorney-general; *Chism v. Price*, 54 Ark. 271, 15 S. W. 1034, holding act of governor giving list of lands claimed by railroad does not estop State to claim swamp lands therein; *Peck v. State*, 137 N. Y. 376, 33 Am. St. Rep. 740, 33 N. E. 318, holding judgment against a board not conclusive upon the State.

Distinguished in *Lee v. Kaufman*, 3 Hughes, 149, 150, 151, F. C. 8,192, where there was no question of estoppel; *Head v. Porter*, 48 Fed. 487, 488, holding officer of United States, acting under orders, may be sued for infringement of patent; *King v. La Grange*, 61 Cal. 229, holding ejectment lies against United States officers in possession of governmental premises.

United States cannot be sued without its own consent, given by act of Congress, and its officer cannot waive this privilege; hence appearance in ejectment suit, authorized by treasury department, does not bind United States, p. 437.

Reaffirmed in *United States v. Wickersham*, 10 Fed. 510. Cited and principle applied in *James v. Campbell*, 104 U. S. 359, 26 L. 787, query, whether suit can be maintained against an officer of United States for using an invention solely in its behalf; *Stanley v. Schwalby*, 162 U. S. 270, 40 L. 965, 16 S. Ct. 760, holding no officer of United States is authorized to waive its exemption from judicial process; *Spring Valley, etc., Works v. Bartlett*, 3 Sawy. 565, 16 Fed. 622, holding board of supervisors could be enjoined from passing an ordinance; *In re Comingore*, 96 Fed. 562, holding State cannot require a collector of internal revenue to certify copies of his records; *Troy, etc., R. R. v. Commonwealth*, 127 Mass. 46, holding State cannot be impleaded in its own courts, except by its consent; *Sargent v. Gilford*, 66 N. H. 543, 27 Atl. 307, holding action not maintainable against town unless plaintiff has filed required statement; *Jones v. United States*, 48 Wis. 411, 4 N. W. 525, holding United States could sue in State court for compensation for overflowed lands; dissenting opinion in *United States v. Lee*, 106 U. S. 227, 248, 27 L. 184, 1 S. Ct. 266, majority holding officers in possession of property of United States may be sued.

United States.—Where United States seeks its right at hands of court, equity requires that rights of other parties be protected, p. 438.

Approved in *Cecil v. Clark*, 44 W. Va. 675, 30 S. E. 222, holding, where proceeding is instituted by a commissioner, the State cannot attack them collaterally.

United States.—Where it is made apparent by the pleadings that the possession to be assailed is that of the United States, the jurisdiction of the court ought to cease, p. 438.

Denied in *United States v. Lee*, 106 U. S. 216, 27 L. 180, 1 S. Ct. 257, holding officers and agents of United States in possession of latter's property may be sued; *Head v. Porter*, 48 Fed. 484, holding officer of United States, acting under orders, may be sued for infringement of a patent; *King v. La Grange*, 61 Cal. 230, holding ejectment lies against United States officers in possession of government premises.

98 U. S. 440-447, 25 L. 168, **THE ABBOTSFORD.**

Admiralty.—Decision of Circuit Court in admiralty cases under act of 1875, upon questions of law, is reviewable, its finding of facts is conclusive, p. 441.

Reaffirmed in *Simmons v. Wagner*, 101 U. S. 261, 25 L. 911, *The Benefactor*, 102 U. S. 218, 26 L. 150, *The Annie Lindsley*, 104 U. S. 187, 26 L. 718, *Sun Mutual Ins. Co. v. Insurance Co.*, 107 U. S. 500, 27 L. 342, 1 S. Ct. 591, *Watts v. Camors*, 115 U. S. 363, 29 L. 409, 6 S. Ct. 95, *Zeckendorf v. Johnson*, 123 U. S. 618, 31 L. 278, 8 S. Ct. 262, *The E. A. Packer*, 140 U. S. 363, 35 L. 456, 11 S. Ct. 795, *The City of New York*, 147 U. S. 76, 37 L. 87, 13 S. Ct. 213, and *The Louisville v. Halliday*, 154 U. S. 657, 25 L. 771, 14 S. Ct. 1190. Cited and principle applied in *The Clara*, 102 U. S. 201, 26 L. 146, holding court confined to facts in record; *Boogher v. Insurance Co.*, 103 U. S. 97, 26 L. 312, in order to give Supreme Court jurisdiction to determine whether facts found by referee are sufficient to support judgment, they must be treated as the finding of the court; *The Adriatic*, 103 U. S. 731, 26 L. 606, promulgating a rule declaring what record shall contain in admiralty cases, where reviewing power is limited to questions of law; *The Francis Wright*, 105 U. S. 386, 26 L. 1101, holding constitutional law limiting appellate jurisdiction of Supreme Court in admiralty cases to questions of law; *The Connemara*, 108 U. S. 359, 27 L. 754, 1 S. Ct. 591, declining to review decree for amount of salvage; *Martinton v. Fairbanks*, 112 U. S. 673, 28 L. 864, 5 S. Ct. 322, dismissing bill to review the general finding by court upon the evidence; *Merchants' Ins. Co. v. Allen*, 121 U. S. 72, 30 L. 860, 7 S. Ct. 824, discountenancing attempts by counsel in preparing bills of exception to have cause retried on the evidence; *The Gazelle*, 128 U. S. 484, 32 L. 499, 9 S. Ct. 141, holding omission of Admiralty Court to make findings can only be availed of by bill of exceptions; *Logan v. United States*, 144 U. S. 301, 36 L. 442, 12 S. Ct. 629, as to competency of witness in Federal courts in criminal cases; *Davis v. Schwartz*, 155 U. S. 637, 39 L. 293, 15 S. Ct. 239, holding same as to report of master; *Grayson v. Lynch*, 163 U. S. 473, 41 L. 232, 16 S. Ct. 1066, where jury trial is waived appellate court cannot set aside findings of fact; *Reed v. Stapp*, 52 Fed. 644, 9 U. S. App. 34, holding court, under statute, could not examine the evidence to ascertain whether it justified the findings; *Skinner v. Franklin Co.*, 56 Fed. 784, 9 U. S. App. 676, holding no appeal lies where no proposition of law was decided; *Walters v. Western, etc., R. Co.*, 69 Fed. 710, holding master's report conclusive; *United States Trust Co. v. Mercantile Trust Co.*, 88 Fed. 153, 59 U. S. App. 355, where judgment has been given for taxes, evidence of assessable value of land is inadmissible.

Distinguished in *The S. S. Osborne*, 104 U. S. 184, 26 L. 693, to justify Supreme Court in returning an admiralty cause for finding of facts, it must appear that omission was attributable to court.

Statutes.—Where words in a statute have acquired, through judicial interpretation, a well-understood legislative meaning, it

is presumed that meaning was intended in subsequent statute on same subject, p. 444.

Reaffirmed in *Stone v. Doster*, 7 Ohio C. C. 16. This principle has been applied by following cases in construing various statutes as follows: *Anderson v. Bowers*, 43 Fed. 322, and *Ex parte Byers*, 32 Fed. 409, statute as to admiralty criminal jurisdiction; *Davis v. Chicago, etc., Ry.*, 46 Fed. 309, provision for removal of cause for local prejudice; *Stokes v. United States*, 60 Fed. 598, 23 U. S. App. 289, statute giving criminal jurisdiction to Supreme Court to review "infamous crimes;" Opinion of the Justices, 66 N. H. 672, 33 Att. 1099, statute providing for taking of property; *Cortesy v. Territory*, 7 N. Mex. 98, 32 Pac. 507, 19 L. R. A. 356, law against Sunday labor; *United States v. Elliot*, 7 Utah, 393, 26 Pac. 1118, statute for fencing of lands.

Collision.—Where steamer undertook to pass between two sailing vessels, without any necessity for so doing, when a prudent navigator would have gone outside of them, she is liable for collision, p. 416.

Distinguished in *The Illinois*, 103 U. S. 300, 26 L. 563, where collision is due to unnecessary deviation of sailing vessel, steamer is not liable.

98 U. S. 447-450, 25 L. 192, UNITED STATES v. BENECKE.

Pensions.—Withholding back pay or bounty by an agent or attorney from a claimant is not an offense under acts of 1864, p. 449.

Pension.—In act of 1863 "claimant" means a claimant before the pension bureau, p. 449.

Pensions.—Statute of 1873, punishing attorney withholding pension money from claimant, does not apply to a case where the money had already been withheld five years, when the statute was passed, p. 449.

Miscellaneous.—Cited generally in *United States v. Irvine*, 98 U. S. 451, 25 L. 193.

98 U. S. 450-453, 25 L. 193, UNITED STATES v. IRVINE.

Pension.—To constitute an unlawful withholding of pension money by attorney, there must be an unreasonable delay, refusal to pay or intent to keep the money wrongfully, and from that time the statute of limitations begins to run, p. 452.

Distinguished in *Frisbie v. United States*, 157 U. S. 167, 39 L. 659, 15 S. Ct. 589, holding it unnecessary to aver demand for return of money wrongfully taken.

Pensions.— Within two years from time party withheld money and refused to pay pensioner, the crime was barred. It was not a continuous crime to time of indictment, p. 452.

Miscellaneous.— Cited generally in *United States v. Connally*, 9 Biss. 340, 1 Fed. 781.

98 U. S. 453-462, 25 L. 240, *JENNISON v. KIRK*.

Mines and minerals.— Discovery, followed by appropriation, is the foundation of possessor's title to mine, and development by working is the condition of its retention, p. 457.

Cited and principle applied in *O'Reilly v. Campbell*, 116 U. S. 423, 29 L. 670, 6 S. Ct. 424, holding location of claim not marked and not developed invalid as to latter claim; *Consolidated, etc., Mining Co. v. Mining Co.*, 9 Colo. 344, 12 Pac. 212, holding in 1865, development work, after posting discovery notice, was requisite; *Upton v. Larkin*, 7 Mont. 456, 17 Pac. 730, holding notice of location need not contain a detailed description of the claim; *Honaker v. Martin*, 11 Mont. 96, 27 Pac. 398, holding plaintiff had not in good faith "resumed work" on the claim, before its relocation; dissenting opinion in *Bullion, etc., Mining Co. v. Eureka Hill Mining Co.*, 5 Utah, 81, 11 Pac. 539, majority holding first locator, having apex, owns the entire lode within the lines.

Mines and minerals.— From 1848 to 1866, the regulations and customs of miners, as enforced by courts and sanctioned by legislation of California, constituted the law governing property in mines and in water on the public mineral lands, p. 458.

Approved in *Glacier Mining Co. v. Willis*, 127 U. S. 482, 32 L. 175, 8 S. Ct. 1217, holding mineral locations on public lands, made prior to the passage of any mineral laws by Congress, are governed by local rules; *Northern Pacific R. R. v. Sanders*, 166 U. S. 634, 41 L. 1144, 17 S. Ct. 676, holding lands in question were excluded from grant of 1864, because of the pendency of record, of applications to purchase them as mineral lands.

Statutes.— Statements of author of act in advocating its adoption, cannot control its construction where there is doubt, but they serve to indicate the intention of Congress, p. 460.

Approved in *American, etc., Twine Co. v. Worthington*, 141 U. S. 474, 35 L. 824, 12 S. Ct. 57, construing custom act.

Waters and water-courses.— Act of Congress, July 26, 1866, provided that owners and possessors of water rights recognized by local laws, customs and decisions should be protected. It confirmed recognized rights of way for ditches, but where ditches, subsequently constructed, injured possessions of others on public domain, the owners should be liable therefor, pp. 460-461.

Rule reasserted in *Jacob v. Lorenz*, 98 Cal. 336, 33 Pac. 120, and *Jones v. Adams*, 19 Nev. 87, 3 Am. St. Rep. 795, 6 Pac. 447. Cited and principle applied in *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 62, 18 S. Ct. 898, discussing legislation relating to mineral lands; *Broder v. Water Co.*, 101 U. S. 276, 25 L. 791, holding pre-emption title subject to mining company's right of way under act of 1866; *Rico-Aspen, etc., Mining Co. v. Mining Co.*, 53 Fed. 324, holding length of location is to be determined by local regulations; *Gillis v. Downey*, 85 Fed. 486, 56 U. S. App. 572, holding ownership of title not essential to maintenance of action to quiet title of mining lands; *De Necochea v. Curtis*, 80 Cal. 406, 20 Pac. 564, holding prior appropriator is protected under act of 1866, though not complying with code; *McGuire v. Brown*, 106 Cal. 669, 39 Pac. 1063, 30 L. R. A. 388, and n., holding act of 1866 does not authorize the construction of a new ditch; *Jacob v. Day*, 111 Cal. 578, 44 Pac. 245, holding adjoining mine passes subject to easement of right of way for tailrace; *Knoth v. Barclay*, 8 Colo. 303, 6 Pac. 926, one in naked possession of public land, taken by eminent domain, is only entitled to compensation for his improvements; *People v. District Court*, 11 Colo. 154, 17 Pac. 301, holding State statute, imposing an easement upon mining claims not in accord with State Constitution, unenforceable; *Tynon v. Despain*, 22 Colo. 247, 249, 43 Pac. 1041, 1042, construing acts of Congress relating to right of way for construction of ditch on public lands; *Jarvis v. State Bank*, 22 Colo. 313, 55 Am. St. Rep. 132, 45 Pac. 507, holding right of way for an irrigating ditch on public lands vests only upon completion of ditch and compliance with local laws; *Lehi Irrigation Co. v. Moyle*, 4 Utah, 340, 9 Pac. 875, where irrigating ditch upon public land is enlarged by others than owners, latter not objecting, the former become owners therein; *Garland v. Irrigation Co.*, 9 Utah, 361, 34 Pac. 370, holding mechanic's lien attaches in favor of one constructing canal upon public land; *Isaacs v. Barber*, 10 Wash. 181, 45 Am. St. Rep. 777, 38 Pac. 874, 30 L. R. A. 675, and n., holding persons acquiring title to portions of public domain before passage of act of 1866, took land subject to rights of prior appropriators of water; *Benton v. Johncox*, 17 Wash. 289, 61 Am. St. Rep. 922, 49 Pac. 499, 39 L. R. A. 112, holding territorial act of 1873 not applicable to riparian rights attached prior to its passage. See notes in 63 Am. Dec. 93, 97, 104.

Distinguished in *Druley v. Adam*, 102 Ill. 202, holding party causing artificial addition abandons right to waters flowing over lands of lower riparian owners.

Waters and water-courses.—In California, by custom, owner of mining claim and of a water-right enjoy their respective properties from dates of appropriation, first in time being first in right; where there is no interference or impairment of rights, the enjoyment of both is allowed, p. 461.

Approved in *Drake v. Earhart*, 2 Idaho, 723, 23 Pac. 543, holding prior appropriator was entitled to the whole stream; *Carson v. Gentner*, 33 Or. 517, 52 Pac. 507, 43 L. R. A. 132, holding local custom, that party first appropriating water acquires a superior right, is a modification of the common law, which has been confirmed by legislation; *Concord Co. v. Robertson*, 66 N. H. 6, 25 Atl. 720, 18 L. R. A. 683, without particular application.

Waters and water-courses.—Owner of water-right in California may not construct ditch across mining claim so as to prevent its working, and the cutting away of such a ditch in a reasonable manner is not an injury for which damages are recoverable, p. 462.

Approved in *Mining Debris Case*, 9 Sawy. 536, 18 Fed. 603, holding party had right of action for land destroyed by debris from hydraulic mines.

98 U. S. 463-470, 25 L. 253, *MINING CO. v. TARBET*.

Mines and minerals.—Acts of 1866 and 1872 provide that locations on veins and lodes shall be made lengthwise on surface of earth where they are discoverable, direction of side lines to correspond with course of the vein at its apex on or near the surface, p. 467.

Reaffirmed in *Walrath v. Champion Min. Co.*, 171 U. S. 302, 18 S. Ct. 913. Cited and principle applied in *Iron, etc., Mining Co. v. Mining Co.*, 118 U. S. 208, 30 L. 102, 6 S. Ct. 1184, holding parallelism of end lines essential to existence of right to follow vein outside of vertical planes drawn through side lines; *Elgin, etc., Smelting Co. v. Mining Co.*, 4 McCrary, 282, 14 Fed. 379, where end lines are not established, as required by statute, by locator, the courts cannot supply this defect; *Walrath v. Mining Co.*, 63 Fed. 556, under act of 1872, conferring on locator all other veins, the apex of which lay within his surface lines, his extralateral rights as to such veins are determined by his original end lines; *Doe v. Sanger*, 83 Cal. 209, 23 Pac. 367, holding end lines need only be substantially parallel. See note in 58 Am. St. Rep. 278.

Mines and minerals.—Owner of a mining right in a lode or vein cannot follow its course beyond the end lines, extending perpendicularly downwards, but he may follow the dip to an indefinite distance outside of his side lines, p. 467.

Reaffirmed in *Walrath v. Champion Min. Co.*, 171 U. S. 305, 18 S. Ct. 914. See note in 58 Am. St. Rep. 265, on this point.

Mines and minerals.—If party locates crosswise of the lode, his right to the lode only extends to the amount covered by his claim, and its side lines become end lines, p. 467.

Reaffirmed in *Tyler Mining Co. v. Sweeney*, 79 Fed. 280, 48 U. S. App. 210, *New Dunderberg Mining Co. v. Old*, 79 Fed. 606, 49 U. S.

App. 214, *Last Chance Mining Co. v. Mining Co.*, 157 U. S. 687, 39 L. 861, 15 S. Ct. 734, *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 65, 69, 86, 87, 90, 18 S. Ct. 899, 901, 907, 908. *Argentine Co. v. Terrible Co.*, 122 U. S. 485, 30 L. 1142, 7 S. Ct. 1359, *Walrath v. Champion Min. Co.*, 171 U. S. 308, 18 S. Ct. 915, and *Tyler Mining Co. v. Sweeney*, 54 Fed. 292, 293, 294, 7 U. S. App. 463. Cited and principle applied in *Colorado*, etc., *Mining Co. v. Turck*, 50 Fed. 896, 4 U. S. App. 290, where vein forks and passes out through side line, this fork belongs to owner of adjoining claim; *Tombstone Mining Co. v. Mining Co.*, 1 Ariz. Ter. 462, 25 Pac. 796, *Catron v. Old*, 23 Colo. 436, 58 Am. St. Rep. 258, 48 Pac. 688, holding owner of claim, the vein of which enters a side line, has no extralateral rights; *King v. Mining Co.*, 9 Mont. 564, 568, 574, 575, 576, 24 Pac. 201, 203, 205, 206, and *Fitzgerald v. Clark*, 17 Mont. 115, 118, 121, 125, 52 Am. St. Rep. 672, 674, 676, 680, 42 Pac. 276, 277, 278, 279, where vein crosses side line of a location, the right to follow dip is determined by vertical line parallel to end lines, drawn downward, and which takes effect at a point where apex intersects side line; *Eilers v. Boatman*, 3 Utah, 167, 2 Pac. 71, holding location upon apex not defeated by secret underground workings of parties with no right to the surface; *Bullion*, etc., *Mining Co. v. Mining Co.*, 5 Utah, 54, 11 Pac. 525, holding locator having apex entirely within surface lines of his claim, takes entire vein. See notes in 63 Am. Dec. 109, and 58 Am. St. Rep. 267, when side lines become end lines. Cited, without particular application, in *Upton v. Larkin*, 7 Mont. 462, 17 Pac. 733, and *South End Mining Co. v. Tinney*, 22 Nev. 62, 35 Pac. 104, dissenting opinion.

Distinguished in *Doe v. Mining Co.*, 54 Fed. 940, where end lines, as fixed in the government patent, are parallel, the patentee's right to follow dip cannot be defeated by showing original end lines were not; *Del Monte Mining*, etc., *Co. v. Mining Co.*, 66 Fed. 214, holding because vein passes through one end and one side line, it does not make them end lines; *Bullion*, etc., *Mining Co. v. Mining Co.*, 5 Utah, 70, 11 Pac. 533, dissenting opinion, majority holding locator having apex within surface lines of his claim, takes entire vein.

Mines and minerals.—Spanish law confined owner of claim to perpendicular lines on every side, p. 468.

Approved in *Del Monte Min. Co. v. Last Chance Min. Co.*, 171 U. S. 61, 18 S. Ct. 897, holding location made on surface determines extent of rights below.

Mines and minerals.—The most practical rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface workings, p. 469.

Approved in *Duggan v. Davey*, 4 Dak. 143, 26 N. W. 902, review of facts in locating the apex of vein of ore.

Miscellaneous.—Cited in *Stem-Winder Mining Co. v. Mining Co.*, 2 Idaho, 428, 21 Pac. 1042, to point that claim was only void as to the excess over legal limits.

98 U. S. 470-476, 25 L. 228, *AMY v. DUBUQUE*.

Limitation of actions.—Statute of limitations constitute a part of the *lex fori* of every country, p. 470.

Approved in *Burton v. Koshkonong*, 4 Fed. 374, holding coupons attached should bear interest at 7 per cent. from maturity; *Nonce v. Richmond, etc., R. Co.*, 33 Fed. 431, holding action for personal injury controlled by statute of forum; *Munos v. Southern Pacific Co.*, 51 Fed. 190, 2 U. S. App. 222, in action for wrongful death statute of limitations of the forum governs; *Williams v. St. Louis, etc., Ry.*, 123 Mo. 583, 27 S. W. 390, holding that *lex fori* governs as to statute of limitations.

Courts of United States, in absence of legislation by Congress, recognize statute of limitations of the several States, and follow the local construction, p. 471.

Reaffirmed in *Balkam v. Iron Co.*, 154 U. S. 188, 38 L. 957, 14 S. Ct. 1014. Cited and principle applied in *Michigan Ins. Bank v. Eldred*, 130 U. S. 696, 32 L. 1081, 9 S. Ct. 691, holding State statute that service of summons is to be deemed the commencement of the action is applicable to actions in Circuit Court; *Bauserman v. Blunt*, 147 U. S. 653, 654, 37 L. 318, 319, 13 S. Ct. 469, following State construction, though Circuit Court had previously decided differently; *Burleigh v. Rochester*, 5 Fed. 673, holding statute barred some of the coupons, but not the bond; *Butler v. Poole*, 44 Fed. 586, holding action by receiver of national bank against stockholders subject to State statute; *Van Vleet v. Sledge*, 45 Fed. 752, holding Federal courts will decline relief in equity because of laches, though action is not barred by statute.

Interest.—In Iowa, on contract with interest, payable at stated times, an action may be maintained for interest in advance of maturity of principal, and legal interest is recoverable upon such interest, p. 473.

Approved in *Greene Co. v. Kortrecht*, 81 Fed. 241, 52 U. S. App. 252, holding neither interest on bonds after maturity, nor interest on coupons, constitute a part of matter in dispute in action on bonds; *Humphreys v. Morton*, 100 Ill. 602, holding interest is properly allowed on coupons after maturity; *Mt. Mansfield Hotel Co. v. Bailey*, 64 Vt. 157, 24 Atl. 138, 16 L. R. A. 297, and n., holding indorser of promissory note liable for interest as it falls due before maturity of note. See note in 64 Am. Dec. 441.

Distinguished in United States, etc., *Co. v. Sperry*, 138 U. S. 341, 34 L. 980, 11 S. Ct. 330, holding interest warrants, signed by guar-
dian, do not bear interest after maturity; dissenting opinion in *Mt.*

Mansfield Hotel Co. v. Bailey, 64 Vt. 162, 24 Atl. 140, 16 L. R. A. 298, and n., majority holding indorser of promissory note liable for interest as it falls due before maturity of note.

Limitation of actions.—In Iowa statute begins to run against coupons attached to bonds, as they severally mature, p. 476.

Reaffirmed in *Nash v. El Dorado Co.*, 11 Sawy. 90, 24 Fed. 255, *Huey v. Macon Co.*, 35 Fed. 482, *Keene v. Five-Cent Sav. Bank*, 90 Fed. 536, *Threadgill v. Commissioners*, 116 N. C. 627, 21 S. E. 428, *Galveston v. Loonie*, 54 Tex. 526, and *Koshkonong v. Burton*, 104 U. S. 669, 673, 677, 26 L. 887, 888, 890, all holding similarly. Cited and principle applied in *Scovill v. Thayer*, 105 U. S. 153, 26 L. 973, holding statute does not begin to run in favor of a stockholder until assignee in bankruptcy has right to sue; *Edwards v. Bates Co.*, 163 U. S. 272, 41 L. 157, 16 S. Ct. 969, in determining jurisdictional amount of an action matured coupons are to be treated as separate promises; *Kershaw v. Hancock*, 18 Blatchf. 384, 10 Fed. 542, holding coupons governed by statute relating to sealed instruments; *Goldman v. Conway Co.*, 2 McCrary, 328, 10 Fed. 888, holding statute began to run against county warrants from date of issue; *Brickill v. Baltimore*, 52 Fed. 739, considering whether actions for infringement of patent is governed by State statute of limitations; *Conger v. New Orleans*, 32 La. Ann. 1255, holding payment of detached coupon is not an acknowledgment of debt represented by bond; *Sanborn v. Clough*, 64 N. H. 320, 10 Atl. 680, holding that detached coupons passed as bonds under the will; *Bailey v. Buchanan Co.*, 115 N. Y. 301, 22 N. E. 156, 6 L. R. A. 564, and n., holding coupons in hands of owner of bonds remain mere incidents thereof; *Broadfoot v. Fayetteville*, 124 N. C. 493, 70 Am. St. Rep. 619, 32 S. E. 808, without particular application. See note in 64 Am. Dec. 445, on this point.

Distinguished in *Burton v. Koshkonong*, 4 Fed. 375, in action upon bond, statute of limitations had no application to coupons falling due six years previous to commencement of action.

98 U. S. 476-479, 25 L. 237, **HARKNESS v. HYDE.**

Indians.—Reservation of the Shoshone in Idaho, by act of Congress of 1863, and by a subsequent treaty, was excepted out of Idaho Territory, p. 478.

Approved in *Maricopa, etc., Ry. v. Arizona*, 156 U. S. 351, 39 L. 449, 15 S. Ct. 393, holding railroad upon Indian reservation subject to territorial taxation; *United States v. Berry*, 2 McCrary, 67, 4 Fed. 786, holding Ute reservation remained within the sole jurisdiction of the United States; *State v. McKenney*, 18 Nev. 197, 2 Pac. 178, holding State courts cannot try Indian belonging to tribe recognized by United States; *Benson v. United States*, 44 Fed. 182, *arguendo*.

Distinguished in *Beekman v. Hudson River, etc., Ry.*, 35 Fed. 8, holding West Point reservation is in "Southern District of New York." Denied in *Langford v. Monteith*, 102 U. S. 146, 147, 26 L. 53, 54, holding, where act of Congress provides that Indian lands shall not be a part of a State or territory, the latter has no jurisdiction over them; *Utah, etc., Ry. v. Fisher*, 116 U. S. 30, 29 L. 542, 6 S. Ct. 247, holding Fort Hill reservation not excluded from limits of Territory of Idaho by act of 1863, and treaty of 1868; *Utah, etc., Ry. v. Fisher*, 2 Idaho, 58, 3 Pac. 6, holding railroad property in Indian reservation subject to taxation; *In re Wilbur*, 8 Wash. 39, 40 Am. St. Rep. 889, 35 Pac. 408, holding void, marriage of white man to squaw on reservation; *Torrey v. Baldwin*, 3 Wyo. 433, 434, 26 Pac. 909, holding cattle on reservation, belonging to white man, subject to county taxes.

Process of court of Idaho, served upon defendant within Indian reservation, was an unlawful act, and should have been set aside, p. 478.

Cited and principle applied in *Smith v. Woolfolk*, 115 U. S. 149, 29 L. 360, 5 S. Ct. 1180, holding decree could not be received in evidence against parties, where the only service was upon one not their attorney; *Brooks v. Dun*, 51 Fed. 145, holding statute authorizing service on agent, where corporation or individual has office there, does not apply to non-resident partners; *United States v. American Lumber Co.*, 80 Fed. 313, holding service of process without the jurisdiction will not stop running of the statute of limitations; *Laughlin v. Ice Co.*, 35 La. Ann. 1185, 1186, holding substituted service against a non-resident can only be effective where property is brought under control of the court; *McGehee v. McGehee*, 41 La. Ann. 661, 6 So. 255, holding administrator cannot exonerate himself from suit by heirs by removing to another State; *Hobson v. Peake*, 44 La. Ann. 386, 10 So. 763, holding proceedings against absent defendant, in personal action, by substituted services are nullities; *York v. State*, 73 Tex. 654, 11 S. W. 870, holding citation upon non-resident without State is insufficient to confer jurisdiction; *Franz, etc., Brewing Co. v. Hirsch*, 78 Tex. 196, 14 S. W. 451, holding foreign judgment, in personal action, without personal service, is void; *Texas, etc., Ry. v. Gay*, 86 Tex. 586, 26 S. W. 603, 25 L. R. A. 56, holding court cannot confer upon a receiver power outside of its jurisdiction; dissenting opinion in *Elsasser v. Haines*, 52 N. J. L. 29, 18 Atl. 1102, majority holding judgment founded on recognition, entered in State court on return of writs of *scire facias* and *nihil habet*, is conclusive in this State; *Swan Land, etc., Co. v. Frank*, 148 U. S. 614, 37 L. 581, 13 S. Ct. 695, *arguendo*.

Distinguished in *Rubel v. Cutlery Co.*, 22 Fed. 285, holding, whether party served was an agent of the foreign corporation, can only be raised by plea in abatement; *Union Pac. Ry. v. Novak*, 61

Fed. 578, 15 U. S. App. 400, where service was irregularly made on agent of foreign corporation.

Appearance.—Right of defendant to object to illegality of service is not waived by the special appearance by counsel to move to dismiss, nor when motion was overruled, by answering upon the merits. Objection to illegality of service is only waived where defendant pleads to merits in first instance, p. 479.

Reaffirmed in *Donahue v. Calumet Fire-Clay Co.*, 94 Fed. 27, *Mortgage Trust Co. v. Norris*, — Kan App. —, 54 Pac. 284, *Chesapeake, etc., R. R. v. Heath*, 87 Ky. 659, 9 S. W. 835, *York v. State*, 73 Tex. 655, 11 S. W. 870, and *Paxton v. Daniell*, 1 Wash. 22, 23 Pac. 442. Cited and principle applied in *York v. Texas*, 137 U. S. 20, 34 L. 604, 11 S. Ct. 10, holding constitutional, statute of Texas, converting an appearance for questioning jurisdiction into a general appearance; *Southern Pacific Co. v. Denton*, 146 U. S. 206, 36 L. 944, 13 S. Ct. 46, holding objection to jurisdiction not waived by answering to the merits when demurrer had been overruled; *Mexican, etc., Ry. v. Pinkney*, 149 U. S. 209, 37 L. 705, 13 S. Ct. 865, holding Texas statute giving to a special appearance to challenge jurisdiction the effect of a general appearance, is not binding on Federal courts; *Goldey v. Morning News*, 156 U. S. 520, 526, 39 L. 518, 520, 15 S. Ct. 560, 562, holding corporation, by petitioning to remove cause to Federal court, does not waive objection to jurisdiction; *Lung Chung v. Northern Pacific Ry.*, 10 Sawy. 20, 19 Fed. 256, holding defendant may appear specially to have illegal service set aside; *Graham v. Spencer*, 14 Fed. 607, holding appearance to plead to jurisdiction and its withdrawal not a waiver; *Romaine v. Insurance Co.*, 28 Fed. 638, declaring proper practice to be to obtain an order of court for leave to enter a special appearance; *United States v. Telephone Co.*, 29 Fed. 28, 45, holding plea in abatement that cause of action did not have its origin in Ohio, does not amount to an appearance of defendant; *Lockett v. Rumbaugh*, 45 Fed. 31, holding general appearance not a waiver of lack of jurisdiction of subject-matter; *First Nat. Bank v. Cunningham*, 48 Fed. 517, holding defendant moving to vacate a fraudulent judgment, and then withdrawing motion, may still impeach it in collateral suit; *Eddy v. Lafayette*, 49 Fed. 809, 4 U. S. App. 247, holding receiver, irregularly served, waived jurisdiction by answering on the merits, after motion to quash service was overruled; *Morris v. Graham*, 51 Fed. 54, 56, where defendant, specially appearing, removes cause to Federal court, this does not preclude court from examining legality of original service; *Brooks v. Dun*, 51 Fed. 139, 148, holding defendant, specially appearing, does not waive any irregularity in service by filing petition to remove case; *Baumgardner v. Fertilizer Co.*, 58 Fed. 4, holding one, specially appearing and taking exception to refusal of court to dismiss, does not waive his right to remove to Federal courts; *German Ins. Co. v. Frederick*, 58 Fed. 147, 19 U. S. App.

24, where, pending motion to quash summons, a new summons is served, and defendant enters a general appearance, he waives his right; *Standley v. Roberts*, 59 Fed. 844, 19 U. S. App. 407, one erroneously compelled to interplead does not waive his right to a dismissal; *The Willamette*, 70 Fed. 878, 44 U. S. App. 26, 31 L. R. A. 719, holding right of claimant to have libel begun in district of his residence, waived, by his appearing; *Insurance Co. v. Svendsen*, 74 Fed. 347, when objection to jurisdiction of court has been sustained, and there has been no general appearance, complainant can amend; *Miner v. Markham*, 28 Fed. 395, *Clews v. Iron Co.*, 44 Fed. 32, *Kinne v. Lant*, 68 Fed. 439, and *Hutton v. Bancroft, etc., Co.*, 77 Fed. 485, all holding defendant may enter a special appearance in order to petition for removal to Federal court; *Crawford v. Foster*, 84 Fed. 940, 56 U. S. App. 232, holding special appearance becomes general, if defendant then disputes the merits; *Arroyo, etc., Co. v. Superior Court*, 92 Cal. 52, 27 Am. St. Rep. 94, 28 Pac. 56, proceeding to trial after overruling of his objection to jurisdiction does not estop defendant from questioning the jurisdiction; *Lente v. Clarke*, 22 Fla. 518, 1 So. 150, where defendant, after appearing specially, submits cause for decision on demurrer, he gives the court jurisdiction; *Hughes v. Walker*, 25 Fla. 572, 6 So. 172, holding civil case cannot be transferred from one Circuit Court to another, except with consent of parties; *Epps v. Buckmaster*, 104 Ga. 702, 30 S. E. 961, holding judgment against non-resident defendant filing waiver of service, is valid; *Brotherhood, etc. v. Cramer*, 164 Ill. 13, 45 N. E. 167, holding error in sustaining demurrer to dilatory plea not waived by pleading over; *Meffitt v. Chicago Chronicle Co.*, 107 Iowa, 414, 78 N. W. 48, holding defendant appearing to set aside a default, and afterwards answering to the merits, the court under the code acquires jurisdiction of him; *Snelling v. Joffrion*, 42 La. Ann. 888, 8 So. 609, holding, foreign corporation cannot be cited through a curator ad hoc in a personal action; *Miner v. Francis*, 3 N. Dak. 553, 58 N. W. 345, holding general appearance, after a special appearance, did not waive jurisdiction; *Sealy v. Cal. L. Co.*, 19 Or. 95, 24 Pac. 198, holding defendant, after his special appearance, making full defense on the merits, waives jurisdiction; *Lower v. Wilson*, 9 S. Dak. 235, 62 Am. St. Rep. 867, 68 N. W. 546, where defendant, after motion to set aside summons is overruled, interposes counterclaim, he waives jurisdiction; *Petty v. Frick Co.*, 86 Va. 503, 10 S. E. 887, holding appearance to move to quash attachment no waiver of alleged defects. Cited, without particular application, in *Stephens v. Bradley*, 24 Fla. 206, 3 So. 417, and *Jones v. Jones*, 108 N. Y. 425, 2 Am. St. Rep. 452, 15 N. E. 709. See notes in 15 Am. St. Rep. 213, and 53 Am. St. Rep. 190.

Distinguished in *Porter Land, etc., Co. v. Baskin*, 43 Fed. 325, where service was valid; *Barber v. Briscoe*, 8 Mont. 220, 19 Pac. 591, holding defendant waived all rights of service of amended complaint by answering.

98 U. S. 479-485, 25 L. 233, RAILROAD CO. v. VARNELL.

Trial.—Where judge's charge is of a character to mislead jury, error is one of law, and may be corrected in an appellate court, p. 485.

Appeal and error.—Exceptions to charge of jury cannot be sustained unless the part excepted to is distinctly pointed out, p. 485.

Approved in *Lees v. United States*, 150 U. S. 483, 37 L. 1152, 14 S. Ct. 165, holding that exception was specific and proper, although incorporated with others; *Walker v. Collins*, 59 Fed. 73, 19 U. S. App. 307, holding exception to mistake in statement of fact should be taken directly; *Thom v. Pittard*, 62 Fed. 236, 8 U. S. App. 597, refusing to consider general exception to a charge; dissenting opinion in *Hicks v. United States*, 150 U. S. 458, 37 L. 1144, 14 S. Ct. 150, majority holding that the exception to the judge's charge did not embrace too large a portion of it.

Railroads are liable for the utmost care, skill and caution in the preparation and management of the vehicle of conveyance, p. 480.

Approved in *Louisiana, etc., R. R. v. Ritter*, 85 Ky. 372, 3 S. W. 592, holding railroad must keep engineer's view unobstructed.

98 U. S. 486-491, 25 L. 194, UNITED STATES v. THOMPSON.

United States is not barred by State statute of limitations, p. 488.

Approved in *United States v. Coal & Town Co.*, 5 McCrary, 573, 18 Fed. 279, holding same; *United States v. Nashville, etc., Ry.*, 118 U. S. 125, 30 L. 83, 6 S. Ct. 1008, holding statute did not run against bonds held by United States in trust for Indians; *United States v. Insley*, 130 U. S. 266, 32 L. 969, 9 S. Ct. 486, holding laches could not bar United States, not a party to foreclosure suit; *Redfield v. Parks*, 132 U. S. 249, 33 L. 331, 10 S. Ct. 86, while title to public lands is still in the United States, no adverse possession can confer a title which will prevail in ejectment against patentee; *United States v. Verdier*, 164 U. S. 219, 41 L. 409, 17 S. Ct. 44, in action in Court of Claims interest prior to the judgment cannot be allowed against the United States; *United States v. Little Miami, etc., R. R.*, 1 Fed. 701, holding limitation within which assessment may be made has no application in suit to collect taxes; *United States v. Adams*, 54 Fed. 116, holding laches of United States constitutes no defense to liability of sureties on official bond; *United States v. Winona, etc., R. Co.*, 67 Fed. 971, 32 U. S. App. 306, holding long delay of United States in bringing suit raises no equitable estoppel; *Brown v. Sneed*, 77 Tex. 474, 14 S. W. 251, holding statute of limitations does not run against a State upon an official bond; *Stanley v. Schwalby*, 85 Tex. 353, 19 S. W. 266, holding statute of limitations not applicable to United States, whether plaintiff or defendant. Cited, without particular application, in *Bartlett v. Ambrose*, 78 Fed. 843.

Distinguished in *United States v. Beebe*, 4 McCrary, 13, 17 Fed. 38, when lapse of time is so great as to raise the presumption that witnesses are dead, it is a good defense to suit by United States; *United States v. National Bank*, 28 Fed. 358, holding right of United States to recover money paid on forged instrument is conditional on giving notice.

United States cannot be sued without its consent, p. 489.

Approved in *United States v. Lee*, 106 U. S. 227, 27 L. 184, 1 S. Ct. 266, dissenting opinion, majority holding officer of United States, holding property for public uses, may be sued, and the right of the United States thereto adjudged.

United States.—Judiciary act of 1789, which declares that laws of the several States shall be regarded as rules of decisions in trials at common law in courts of the United States, in cases where they apply, does not authorize barring United States by State statute of limitations, p. 490.

Reaffirmed in *United States v. Belknap*, 73 Fed. 20. Cited and principle applied in *Carlisle v. Cooper*, 64 Fed. 474, 475, 26 U. S. App. 240, in absence of legislation by Congress, costs cannot be imposed against the United States.

Miscellaneous.—Cited in *Cook v. Auditor-General*, 79 Mich. 108, 44 N. W. 422.

98 U. S. 491-506, 25 L. 213, *AIRHART v. MASSIEU*.

War.—A citizen of Mexico, not a resident of Texas, did not lose his title to land there, by means of the revolution or by reason of subsequent legislation. p. 494.

Reaffirmed in *Williams v. Conger*, 125 U. S. 426, 31 L. 790, 8 S. Ct. 947.

International law.—Division of an empire works no forfeiture of a right of property previously acquired, p. 494.

Aliens.—Provision in Constitution of Texas that aliens shall not hold lands, did not divest a previously-existing title, pp. 494, 497.

Approved in *Hanrick v. Patrick*, 119 U. S. 169, 30 L. 404, 7 S. Ct. 153, holding, after passage of the British naturalization act of 1870, defeasible title of British alien heirs in Texas became indefeasible; *Gonzales v. Ross*, 120 U. S. 625, 30 L. 808, 7 S. Ct. 716, holding forfeiture of Mexican land grant can only be availed of by a private person after he has shown some right to the land; *Wunderle v. Wunderle*, 144 Ill. 64, 33 N. E. 200, 19 L. R. A. 89, holding, under act of 1887, non-resident aliens did not hold a defeasible title; *Hanrick v. Hanrick*, 54 Tex. 113, and *Hanrick v. Hanrick*, 61 Tex. 603, until 1854 alien heirs could take a defeasible title to real estate in Texas. Cited, without particular application, in *Kircher v. Murray*, 54 Fed. 621.

Aliens, when circumstances entitle them to hold land, can also vindicate their title in the courts, p. 500.

Records.—A bona fide purchaser, claiming under a Mexican title, is not bound to take notice of a prior Mexican title, neither recorded in proper county nor deposited in the land office, p. 503.

98 U. S. 507-513, 25 L. 171, REED v. McINTYRE.

Assignment for benefit of creditors at common law could not be impeached simply because it had the effect to prevent party, by means of execution levy, from securing priority over all other creditors, p. 511.

Cited and principle applied in *Boese v. King*, 108 U. S. 386, 387, 27 L. 763, 2 S. Ct. 770, 771, holding general assignment for benefit of creditors is valid, except as against subsequent proceedings under bankruptcy act; *Means v. Montgomery*, 23 Fed. 428, sustaining deed of trust executed for the benefit of creditors; *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. 507, 24 U. S. App. 145, holding invalid preference given by corporation by mortgage to its directors, also creditors; *Stowe v. Belfast Sav. Bank*, 92 Fed. 92, that assents of creditors to assignment which was subsequent to the recording of the deed, did not invalidate it; *Feltenstein v. Stein*, 157 Ill. 32, 45 N. E. 505, holding assignment not void because it delays particular creditors; *Torlina v. Trorlicht*, 6 N. Mex. 68, 69, 27 Pac. 798, holding that it is not sufficient grounds for an attachment that debtor is about to make an assignment which will delay creditors; *Pettit v. Parsons*, 9 Utah, 227, 33 Pac. 1039, holding preference of relative not of itself fraudulent.

Bankruptcy.—One levying on goods assigned for the benefit of creditors, which assignment was set aside in subsequent proceedings in bankruptcy, acquired no priority of right over the assignee in bankruptcy, pp. 512-513.

Reaffirmed in *Claridge v. Kulmer*, 1 Fed. 404. Cited and principle applied in *West v. Lea*, 174 U. S. 595, 19 S. Ct. 838, holding deed of general assignment is by bankruptcy act sufficient to justify an adjudication of involuntary insolvency; *In re Temple*, 6 Sawy. 77, W. C. 13,826, holding assignments for benefit of creditors are governed in California by the code; *In re Sievers*, 91 Fed. 368, holding that common-law assignments are not void, by reason of the existence merely of a bankruptcy law; *In re Curtis*, 91 Fed. 741, holding assignment under State insolvency law is void as against subsequent proceeding under national bankruptcy act.

Distinguished in *Akers v. Rowan*, 33 S. C. 476, 12 S. E. 173, 10 L. R. A. 716, and n., holding goods mortgaged in fraud of assignment act are subject to levy.

98 U. S. 514-517, 25 L. 256, **BRICK v. BRICK.**

Evidence.— Parol evidence is admissible to show that certificates of shares were issued to deceased as security for a loan and not upon a purchase, p. 516.

Reaffirmed in *Reeve v. Dennett*, 137 Mass. 316. Approved in *Walls v. Endel*, 20 Fla. 99, and *Brownlee v. Martin*, 21 S. C. 400, admitting parol proof to show deed, absolute on its face, was given as security; *Keithley v. Wood*, 151 Ill. 574, 42 Am. St. Rep. 268, 38 N. E. 151, in case of doubt deed will be treated as a mortgage.

Evidence.— Rule excluding parol testimony to vary or contradict a written instrument has reference to the language used and does not forbid an inquiry into the object of the parties in executing and receiving the instrument, p. 516.

Cited and principle applied in *Solenberger v. Gilbert*, 86 Va. 788, 11 S. E. 792, admitting parol evidence to show there was no delivery of written instrument; *Nash v. Fugate*, 32 Gratt. 609, 34 Am. Rep. 789, admitting parol proof that obligee had notice that other persons were to sign bond in order to make it effectual; *Harrington v. Samples*, 36 Minn. 202, 30 N. W. 672, admitting parol evidence to show real consideration in chattel mortgage and discharge of the obligation; *Jackson v. Lawrence*, 117 U. S. 681, 29 L. 1025, 6 S. Ct. 916, holding that transaction in equity was a mortgage.

Distinguished in *Marx v. Luling Co.-Op. Assn.*, 17 Tex. Civ. App. 416, 43 S. W. 600, rejecting parol evidence that directors signed with intent to create only a corporate liability.

98 U. S. 517-528, 25 L. 174, **DE TREVILLE v. SMALLS.**

Taxation.— Commissioner's certificate of tax sale, under act of Congress of 1863, is prima facie evidence not merely of the regularity of the sale but also of its validity and of the title of the purchaser, p. 522.

Reaffirmed in *Keely v. Sanders*, 99 U. S. 442, 445, 25 L. 327, 328, and *Sherry v. McKinley*, 99 U. S. 498, 25 L. 330. Cited and principle applied in *Springer v. United States*, 102 U. S. 594, 26 L. 256, holding Congress can enforce the distraint and sale of real or personal property for taxes; *Townsend v. Martin*, 55 Ark. 197, 17 S. W. 876, holding statute was limited to tax deed made by clerk; *Rollins v. Wright*, 93 Cal. 397, 29 Pac. 59, upholding statute making recitals in tax deed prima facie evidence of their truth; *Florida, etc., Bank v. Brittain*, 20 Fla. 514, impeaching deed where no tax had been imposed upon the property; *In re Douglas*, 41 La. Ann. 768, 769, 6 So. 676, holding legislature may make tax deed conclusive evidence of compliance with legal requirements; *Surget v. Newman*, 43 La. Ann. 878, 9 So. 564, holding irregularities in the

assessment were cured by the acts; *Henderson v. Ellerman*, 47 La. Ann. 313, 16 So. 824, affirming tax sale made in conformity with statute; *Cucullu v. Brakenridge Lumber Co.*, 49 La. Ann. 1450, 22 So. 411, holding deed prima facie valid does not relate to omissions antecedent to sale; *Tiblier v. Land Trust*, 49 La. Ann. 1477, 22 So. 413, holding that tax titles were legal; *Chauncey v. Wass*, 35 Minn. 23, 30 N. W. 835, in proceedings to enforce payment of taxes, jurisdiction as to a particular tract is not affected by fact that taxes have been previously paid; *State v. Central Pacific R. R.*, 21 Nev. 266, 270, 30 Pac. 691, 692, holding legislature can provide that a former recovery shall not constitute a defense to an action for taxes; *Caldwell v. Wilson*, 121 N. C. 456, 28 S. E. 557, holding action of governor in removing commissioner was conclusive; *Edwards v. Lyman*, 122 N. C. 746, 30 S. E. 330, holding tax deed misdescribing property inoperative; *State v. Pinckney*, 22 S. C. 501, 506, 509, admitting entries of surveys to show what was sold and admitting evidence to show land included in certificate of sale belonged to the State; dissenting opinion in *Cooper v. Freeman Lumber Co.*, 61 Ark. 48, 32 S. W. 496, majority holding that tax sale was for an excessive amount is a meritorious defense; *Magruder v. Esmay*, 35 Ohio St. 240, majority holding deed to purchasers at forfeited delinquent sale invalid. See 4 Am. St. Rep. 188, note on this point, and 36 Am. St. Rep. 687, note, on conclusive presumptions.

Distinguished in *Bannon v. Burnes*, 39 Fed. 897, holding it would be unconstitutional to make tax deeds conclusive evidence of jurisdictional facts; *Fox v. Stafford*, 90 N. C. 301, holding one claiming under tax deed must prove compliance with legal requisites.

Taxation.—Tax certificate, under act of Congress of 1863, certified to United States, is of same effect as one certified to an individual, p. 522.

Approved in *Van Brocklin v. Tennessee*, 114 U. S. 179, 29 L. 855, 6 S. Ct. 685, holding land purchased by United States at tax sale is exempt from State taxation while so held; *Collins v. Pettitt*, 124 N. C. 730, 32 S. E. 977, holding right of assignee of certificate of sale for taxes held by county to be that of mortgagee.

Taxation.—Act of Congress of 1862, providing penalty for default of voluntary payment of taxes in due time and allowing owner to take certificate of payment of the tax charged, and so discharge his lands, is constitutional, p. 527.

98 U. S. 528-541, 25 L. 219, *HOOPER v. ROBINSON*.

Insurance.—Policy in name of one party "on account of whom it may concern," will be applied to interest of the person for whom intended, if he authorized or subsequently adopted it, pp. 536-537.

Reaffirmed in *The Sidney*, 27 Fed. 125, *Duncan v. Insurance Co.*, 129 N. Y. 244, 29 N. E. 77, and *Sturm v. Boker*, 150 U. S. 333, 37 L. 1101, 14 S. Ct. 106. Cited and principle applied in *The Sidney*, 23 Fed. 93, holding payment to owners was the same as a payment to his agents effecting the insurance; *Scranton Steel Co. v. Ward's, etc.*, Line, 40 Fed. 872, holding that receipt and retention of certificates of insurance by agent of road estopped shipper from objecting to the form of the policies; *Steamship, etc., Co. v. Hall*, 55 Fed. 665, provision that in case of loss, payment should be made to company, latter could sue on it; *Phoenix Ins. Co. v. Hancock*, 123 Cal. 224, 55 Pac. 906, holding heir liable for premiums where, at time of insurance, property belonged to an estate; *Ward v. Tucker*, 7 Wash. 401, 35 Pac. 1086, holding that marine insurance broker may sue for recovery of the premium without showing it was actually paid by him; *Murdock v. Insurance Co.*, 33 W. Va. 412, 10 S. E. 778, 7 L. R. A. 574, holding owner of barge could recover where charterer insured.

Insurance.—Insurable interest, subsisting during the risk and at time of loss, is sufficient, though it did not exist at time policy was effected, p. 537.

Approved in *Boston Ins. Co. v. Globe Fire Ins. Co.*, 174 Mass. 232, 54 N. E. 544, holding valid contract of reinsurance upon policies to be subsequently issued; *Davis v. Fire Ins. Co.*, 70 Vt. 219, 39 Atl. 1095, it is sufficient that declaration allege existence of insurable interest at time of loss.

Insurance.—Where policy is "lost or not lost," the thing insured may be irrecoverably lost when contract is entered into, and yet the contract be valid, p. 537.

Insurance.—Anything which clearly evinces a purpose to adopt policy is sufficient, p. 537.

Reaffirmed in *Fire, etc., Assn. v. Transportation Co.*, 66 Md. 349, 59 Am. Rep. 165, 7 Atl. 908.

Insurance.—Contingent interest arising from injury from the loss or benefit from the preservation of the property is insurable, p. 538.

Approved in *The Sidney*, 23 Fed. 92, holding that consignee, carrier and *M. & Co.* had an insurable interest in cargo; *The Fern Holme*, 46 Fed. 123, holding managing owners in possession of ship had an insurable interest; *Dupuy v. Delaware Ins. Co.*, 63 Fed. 686, purchaser, in possession of real estate under a parol contract, has an insurable interest; *North British, etc., Ins. Co. v. Lathrop*, 70 Fed. 435, 25 U. S. App. 443, holding that party had an insurable interest; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 549, 46 Am. Rep. 796, holding husband in possession with wife of her property has an insurable interest; *Murdock v. Insurance Co.*, 33 W. Va. 411,

10 S. E. 778, 7 L. R. A. 574, holding charterer of barge has an insurable interest.

Insurance.—In action by underwriters to recover indemnity money paid, onus probandi is on them to show defendant had no insurable interest, p. 540.

Insurance.—Underwriters, guilty of laches, cannot recover from agent of assured money paid to his principal, he having received no notice of any adverse claim before paying it over, p. 541.

Approved in *The Sidney*, 23 Fed. 97, holding burden was on insurers to show loss was within the exception to the policy.

Miscellaneous.—Miscited in *Brown v. Marden*, 61 N. H. 20.

98 U. S. 541-546, 25 L. 196, **RAILROAD CO. v. COMMISSIONERS.**

Taxation.—Company charged upon tax lists, paying taxes without a demand, but under a general protest against their legality and notice of intention to sue, cannot recover same in absence of statute giving that right, p. 545.

Approved and relied upon in *Little v. Bowers*, 134 U. S. 554, 33 L. 1019, 10 S. Ct. 621, holding voluntary payment of tax, while suit is pending to determine its legality, leaves no existing cause of action; *Oceanic, etc., Navigation Co. v. Tappan*, 16 Blatchf. 301, F. C. 10,405, holding payments under protest to relieve corporation from an accumulation of penalties were voluntary; *Balfour v. Portland*, 12 Sawy. 124, 28 Fed. 739, holding legality of overvaluation could not be questioned in action to recover tax; *Granniss v. Cherokee Twp.*, 47 Fed. 429, holding voluntary payments upon invalid coupons cannot be set off against those maturing afterwards; *Bank of Kentucky v. Stone*, 88 Fed. 390, in *Kentucky*, to permit recovery of taxes, they must have been paid under duress of a distraint made by collectors; *Western Ranches v. Custer*, 89 Fed. 581, where a special remedy was given for the recovery of taxes illegally paid, presentation of claim was not a condition precedent; *Crawford v. Bradford*, 23 Fla. 406, 2 So. 784, holding insolvency of officer to whom an illegal tax has been paid does not give equity jurisdiction of action to recover same; *Hoke v. Atlanta*, 107 Ga. 420, 33 S. E. 414, holding payment of illegal assessment, under protest, to prevent levy on land, cannot be recovered; *Conkling v. Springfield*, 132 Ill. 423, 24 N. E. 67, holding payment of illegal taxes to save person or property may be recovered; *Connecticut, etc., Ins. Co. v. Stewart*, 95 Ind. 591, holding mortgagee could not recover money paid to redeem land from mechanic's lien; *Weston v. Luce Co.*, 102 Mich. 533, 61 N. W. 17, holding payment of taxes under protest to effect tax sale is voluntary; *Davis v. Otoe*, 55 Neb. 681, 76 N. W. 466, holding protest against payment of taxes must state the grounds specifically; *Prichard v. Sweeney*, 109 Ala. 658, 19 So. 732, *First Nat. Bank v. Americus*, 68 Ga. 123, 45 Am. Rep. 479, and

Bowman v. Boyd, 21 Nev. 290, 30 Pac. 826, all holding voluntary, payment under protest, with full knowledge of the facts; *Bradley v. Laconia*, 66 N. H. 270, 20 Atl. 332, the remedy against an illegal assessment is to appeal; *Richardson v. Denver*, 17 Colo. 402, 30 Pac. 334, and *Wilson v. Pelton*, 40 Ohio St. 310, both holding party could not recover illegal taxes paid without objection; *Union Ins. Co. v. Allegheny*, 101 Pa. St. 255, and *Peebles v. Pittsburg*, 101 Pa. St. 310, 47 Am. Rep. 717, both holding party paying under protest cannot recover in absence of compulsion; *Rumford, etc., Works v. Ray*, 19 R. I. 460, 34 Atl. 815, holding party paying tax need not specify the alleged illegality; *Commrs. Dickinson Co. v. Land Co.*, 23 Kan. 203, *Hopkins v. Butte*, 16 Mont. 108, 40 Pac. 172, *Dixon Co. v. Beardshear*, 38 Neb. 391, 56 N. W. 991, and *Galveston, etc., Co. v. Galveston*, 56 Tex. 494, all holding payment of an illegal demand knowingly, except in urgent necessity to protect property or person, is voluntary; *Houston v. Feeser*, 76 Tex. 368, 13 S. W. 268, holding payment of tax for privilege of selling a commodity is voluntary; *Laredo v. Loury*, 4 Tex. App. Civ. 562, holding payments under protest and fear of legal proceedings are voluntary; *Davie v. Galveston*, 16 Tex. Civ. App. 18, 41 S. W. 147, and *Walser v. Board of Education*, 160 Ill. 276, 43 N. E. 347, 31 L. R. A. 331, both holding payment to avoid a tax sale, made under protest, is not compulsory; *Raleigh v. Salt Lake City*, 17 Utah, 135, 53 Pac. 975, holding party could recover illegal taxes paid under compulsion and protest; *Rutledge v. Price Co.*, 66 Wis. 40, 27 N. W. 821, holding one redeeming land sold for illegal taxes cannot recover money though paid under protest; dissenting opinion in *Atchison, etc., R. R. v. Atchison*, 47 Kan. 716, 717, 28 Pac. 1001, majority holding that part of tax was involuntarily paid and could be recovered. See 45 Am. Dec. 165, note on this point.

Distinguished in *Indianapolis v. Vajen*, 111 Ind. 246, 12 N. E. 314, holding, under statute, taxpayer has right to have excess of taxes refunded, though paid voluntarily.

Taxation.—In Nebraska, no demand of taxes is necessary, but it was the duty of every person subject to taxation to attend at the treasurer's office and make payment, p. 542.

98 U. S. 546-555, 25 L. 176, HENDRIE v. SAYLES.

Patents.—Assignment of an invention is, like all other contracts, to be construed to carry out intention of parties, p. 554.

Approved in *May v. Saginaw Co.*, 32 Fed. 632, holding assignment of expired patent covered right to sue for past infringements.

Patents.—Assignment before patent is issued passes entire interest in invention, and patent is properly issued in name of assignee, who acquires right to obtain extended term held by assignor, p. 555.

Cited and principle applied in *Prime v. Brandon Mfg. Co.*, 16 Blatchf. 457, F. C. 11,421, holding that equitable right to extended term was in grantee; *Adams v. Iron Co.*, 26 Fed. 326, holding that at date of contract, assignee had entire right to patent for extended term, which could not be disturbed by patentee; *Harrison v. Morton*, 83 Md. 479, 35 Atl. 102, holding assignment, not containing a request to commissioner to issue patent, in name of assignee, conveys, only, an equitable interest *Lamson v. Martin*, 159 Mass. 562, 35 N. E. 80, holding that mental conception of an improvement, described orally, is not an "invention;" *Burton v. Burton Stock-Car Co.*, 171 Mass. 439, 50 N. E. 1029, holding license to use may be given before grant of patent; *Harrigan v. Smith*, 57 N. J. Eq. 640, 42 Atl. 579, holding mere lapse of time will not bar specific performance of oral contract to assign letters-patent when issued; *Fuller, etc., Mfg. Co. v. Bartlett*, 68 Wis. 80, 60 Am. Rep. 840, 31 N. W. 750, holding that there was no assignment of invention by employee, but only a license.

Distinguished in *Johnson v. Sewing Machine Co.*, 23 Blatchf. 532, 533, 27 Fed. 689, 690, holding assignment of "letters-patent, about to be issued," does not convey interest in extending term: *Fire-Extinguisher Mfg. Co. v. Graham*, 16 Fed. 555, 556, where rights to assigned patent have been lost by laches, and a special act revives same as to heirs of patentee, their title is not affected by the assignment.

Miscellaneous.—Cited generally in *Root v. Railway Co.*, 105 U. S. 204, 26 L. 980.

98 U. S. 555-559, 25 L. 212, *BARNET v. NATIONAL BANK.*

Actions.—Where a statute creates a new right or offense and provides a specific remedy, it is exclusive, p. 558.

Usury.—Under national currency act of 1864, where unlawful rate of interest has been stipulated for, only the principal can be recovered, but where it has been paid, twice the amount of illegal interest can be recovered, p. 558.

Reaffirmed in *Lebanon Nat. Bank v. Karmany*, 98 Pa. St. 75, and *Osborn v. First Nat. Bank*, 175 Pa. St. 499, 34 Atl. 859. Cited and principle applied in *Oates v. Nat. Bank*, 100 U. S. 250, 25 L. 585, holding courts could not superadd a penalty not prescribed; *Farmers, etc., Bank v. Hoagland*, 7 Fed. 162, holding no interest could be recovered upon renewal notes from date interest had been reduced to legal rate; *First Nat. Bank v. Denson*, 115 Ala. 666, 22 So. 524, holding limitation does not run until the bank has taken more than legal interest; *Pardoe v. Iowa State Nat. Bank*, 106 Iowa, 351, 76 N. W. 802, holding right to recover double interest cannot be transferred by an ordinary sale; *First Nat. Bank v. Grimes*, 49 Kan. 223, 30 Pac. 475, holding usurious interest included in

renewal note cannot be recovered; *Alves v. Nat. Bank*, 89 Ky. 130, 9 S. W. 506, holding national bank receiving more than State rate of interest forfeits the entire interest; *Marion Nat. Bank v. Thompson*, 101 Ky. 283, 40 S. W. 905, holding court should have rendered a judgment for face of note; *Peterborough Nat. Bank v. Childs*, 130 Mass. 522, 39 Am. Rep. 476, holding defense of usury given by Federal statute could be averted if in an action in State court; *Peterborough Nat. Bank v. Childs*, 133 Mass. 252, 43 Am. Rep. 512, holding party could recover only the face value of the note, without interest; *Moniteau Nat. Bank v. Miller*, 73 Mo. 191, holding limitation only applied where borrower had paid the usurious interest; *Carpenter v. Nat. Bank*, 50 N. J. L. 8, 11 Atl. 479, holding limitation begins to run against national bank from time it receives the usurious interest; *Scottish, etc., Investment Co. v. McBroom*, 6 N. Mex. 588, 30 Pac. 863, holding action to recover double amount of usurious interest would not lie until the interest has been paid; *Second Nat. Bank v. Morgan*, 165 Pa. St. 206, 44 Am. St. Rep. 656, 30 Atl. 959, holding affidavit of defense to a promissory note, sued on by national bank, that it was discounted at usurious rate, is insufficient.

Usury.—Remedy given by national currency act of 1864 for usury, is a penal suit, and party aggrieved can resort to no other redress, p. 559.

Reaffirmed in *Stephens v. Monongahela Bank*, 111 U. S. 198, 28 L. 400, 4 S. Ct. 337. Cited and principle applied in *Osborn v. First Nat. Bank*, 154 Pa. St. 137, 26 Atl. 289, holding sums to be recovered from national bank for taking usurious interest, under act of 1864, are penalties; *Aylsworth v. Curtis*, 19 R. I. 521, 61 Am. St. Rep. 788, 34 Atl. 1110, 33 L. R. A. 111, holding statute providing a remedy to recover damages for injury sustained is remedial; *Blaine v. Curtis*, 59 Vt. 124, 59 Am. Rep. 704, 7 Atl. 709, holding construction of State statute against usury as penal is controlling in other States.

Usury.—Under national currency act of 1864, usury cannot be applied as a set-off against action by national bank on bill of exchange, there being a specific statutory remedy for such usury in a penal suit, the latter is the exclusive remedy, p. 559.

Reaffirmed in *Driesbach v. Nat. Bank*, 104 U. S. 54, 26 L. 658, *Peterborough Nat. Bank v. Childs*, 133 Mass. 250, 43 Am. Rep. 511, *Nat. Bank v. Lewis*, 81 N. Y. 17, *Oldham v. First Nat. Bank*, 85 N. C. 245, *First Nat. Bank v. Gruber*, 91 Pa. St. 384, *Nat. Bank v. Dushane*, 96 Pa. St. 343, *Huggins v. Nat. Bank*, 6 Tex. Civ. App. 34, 24 S. W. 927, and *National, etc., Bank v. Boylen*, 23 W. Va. 556, 557, 53 Am. Rep. 114, 115. Cited and principle applied in *Walsh v. Mayer*, 111 U. S. 37, 28 L. 340, 4 S. Ct. 262, holding that, under the statute, a suit for recovery within twelve months after pay-

ment is the exclusive remedy; *Carter v. Carusi*, 112 U. S. 483, 28 L. 822, 5 S. Ct. 284, holding remedy given by statute in District of Columbia, to recover unlawful interest actually paid, is exclusive; *First Nat. Bank v. Stauffer*, 1 Fed. 188, holding receipt by national bank of usurious rate of interest works a forfeiture of all interest; *Farmers, etc., Bank v. Hoagland*, 7 Fed. 161, holding excessive interest, taken in the renewal of a series of notes, cannot be applied by way of set-off; *Danforth v. Nat. St. Bank*, 48 Fed. 276, 3 U. S. App. 7, 17 L. R. A. 625, where acceptor of draft makes a payment, bank cannot apply it to the forfeited interest; *Cox v. Beck*, 83 Fed. 274, holding payment of usurious interest not available as a defense in an equitable proceeding; *Florence, etc., Imp. Co. v. Nat. Bank*, 106 Ala. 369, 17 So. 721, and *Slaughter v. First Nat. Bank*, 109 Ala. 161, 19 So. 432, holding statute of Alabama did not apply to national banks; *Matthews v. Paine*, 47 Ark. 58, 14 S. W. 464, holding that excessive interest could not be recouped; *Farmers, etc., Bank v. Stover* 60 Cal. 393, holding usury no defense to action by national bank on note; *Rockwell v. Bank*, 4 Colo. App. 563, 36 Pac. 905, holding national bank may collect interest in this State at any agreed rate; *First Nat. Bank v. Moore* (appendix), 83 Iowa, 743, 48 N. W. 1073, holding defendant could not recover the forfeiture to himself by way of counterclaim; *Marion Nat. Bank v. Thompson*, 101 Ky. 281, 40 S. W. 904, holding separate note for an installment of usurious interest was properly cancelled by the court; *Hill v. Barre*, 56 Vt. 584, holding one having availed himself of remedy for usury, given by Federal statute, could not maintain suit in State court. Cited, without particular application, in *Bollong v. Nat. Bank*, 26 Neb. 286, 18 Am. St. Rep. 783, 41 N. W. 901, 3 L. R. A. 144. See note, 39 Am. Rep. 477.

Distinguished in *Louisville Trust Co. v. National Bank*, 87 Fed. 146, holding assignee for benefit of creditors, who, to get collaterals, pay usurious note held by national bank, can recover it; *McBroom v. Investment Co.*, 153 U. S. 331, 38 L. 734, 14 S. Ct. 857, generally.

Miscellaneous.—Seems to be miscited in *Commercial Nat. Bank v. Simpson*, 90 N. C. 477.

98 U. S. 559-565, 25 L. 222, *RAILWAY CO. v. LOFTIN*.

Taxation.—Charter of Cairo and Fulton railroad, exempting from taxation capital stock and dividends of the company, did not exempt, so long as they remained unsold, lands granted to state by Congress in 1853, to aid in the construction of the road, p. 563.

Reaffirmed in *Railroad Co. v. Loftin*, 105 U. S. 259, 26 L. 1043. Approved in *St. Louis, etc., Ry. v. Berry*, 113 U. S. 467, 28 L. 1056, 5 S. Ct. 530, holding that consolidated company took the property of old company subject to organic law of taxation at time of consolidation.

Taxation.—Exemptions from taxation are never presumed, p. 564.

Approved in *Central R. R., etc., Co. v. Wright*, 164 U. S. 335, 41 L. 457, 17 S. Ct. 83, if legislature uses dubious language the courts will not allow such implied exemption; *Railroad v. Harris*, 99 Tenn. 693, 43 S. W. 117, holding every presumption is against any surrender of the taxing power.

98 U. S. 565-568, 25 L. 235, **UNITED STATES v. SHERMAN.**

United States.—When a certificate of probable cause is given under acts of Congress of 1863 and 1866, claim of plaintiff in the suit is practically converted into a claim against the government, p. 567.

Approved in *Hedden v. Iselin*, 24 Blatchf. 461, 31 Fed. 269, holding statute penalizing officers for illegal fees applies only to extortions; *Commrs. Sinking Fund v. Buckner*, 48 Fed. 539, holding no interest could be recovered on illegal taxes.

United States is not under obligation to pay interest on a judgment obtained in Circuit Court against its officer from time when judgment was rendered until certificate of probable cause, issued under acts of 1863 and 1866, was given, p. 567.

Approved in *United States v. North Carolina*, 136 U. S. 217, 34 L. 339, 10 S. Ct. 922, holding State not liable for interest on bonds after maturity; *White v. Arthur*, 20 Blatchf. 239, 241, 242, 10 Fed. 81, 83, 84, holding that liability of government for interest must be created by statute; *Boott, etc., Mills v. Lowell*, 159 Mass. 387, 34 N. E. 368, holding city liable for interest only from demand for abated tax; *Carr v. State*, 127 Ind. 218, 22 Am. St. Rep. 636, 26 N. E. 783, 11 L. R. A. 375, and n., and *Flint, etc., R. R. v. Auditors*, 102 Mich. 503, 60 N. W. 972, holding, under section 1753, Howard's Statutes, State liable for costs.

Distinguished in *Schell v. Cochran*, 107 U. S. 627, 27 L. 544, 2 S. Ct. 829, where collector brings writ of error to review judgment, if it affirms same, it allows interest thereon under rule 23.

United States.—Federal and State statutes, providing that judgments shall bear interest, have no application to the government, p. 567.

Approved in *United States v. Verdier*, 164 U. S. 216, 41 L. 408, 17 S. Ct. 43, holding, in actions in Court of Claims, interest prior to judgment cannot be recovered against the United States; *District of Columbia v. Johnson*, 165 U. S. 338, 41 L. 737, 17 S. Ct. 365, holding claim for interest on claims, unless clearly proved, must be denied; *Marine v. Lyon*, 62 Fed. 156, 8 U. S. App. 573, in cases appealed from board of general appraisers, interest is not allowed in favor of importer; *United States v. North Carolina*, 136 U. S.

216, 34 L. 338, 10 S. Ct. 922, and *Hawkins v. Mitchell*, 34 Fla. 421, 16 So. 316, both holding State not obligated to pay interest except by express contract; *Flint, etc., R. R. v. Auditors*, 102 Mich. 502, 60 N. W. 971, holding State not liable for interest under general statute. See 22 Am. St. Rep. 648, note.

98 U. S. 569-620, 25 L. 143, UNITED STATES v. UNION PACIFIC R. R.

Courts.—Congress can enact that as to special cases, any Circuit Court shall, by process served anywhere in the United States, have power to bring the necessary parties before it, p. 604.

Reaffirmed in *United States v. Crawford*, 47 Fed. 565. Cited and principle applied in *The Hungaria*, 41 Fed. 112, holding court cannot obtain jurisdiction of vessel outside of its territorial limits by consent of master; *United States v. American Lumber Co.*, 80 Fed. 312, holding "warning order" for extra-territorial service may be the first process.

Equity.—A bill in equity is not objectionable as multifarious where it is expressly authorized by act of Congress. Congress having plenary power over inferior Federal courts, may modify, limit and control the rule of equity pleading as to multifariousness, p. 604.

Courts.—Congress can confer on a court a special jurisdiction to try a specific matter of a judicial nature; e. g., to forfeit charter or to wind up insolvent corporations, p. 605.

Statutes.—It will not be presumed that Congress, by a retrospective law, intended to create new rights in one party at expense of other parties, or to create new rights entirely, p. 606.

Equity.—Act of 1873, requiring attorney-general to file bill in equity against Union Pacific railroad, was intended not to change the substantial rights of the parties, but to provide a specific method of procedure, which would remove restrictions and give a more efficient remedy, and was constitutional, p. 608.

Equity.—Under act of 1873, authorizing special suit to adjust equities between United States and Union Pacific railroad and others, nothing other than what is found in that act, expressed or implied, can be introduced into such suit as a foundation for the action, p. 608.

Cited in *United States v. Wallamet Valley, etc., Road Co.*, 14 Sawy. 487, 42 Fed. 357, and *United States v. Wallamet Valley, etc., Road Co.*, 44 Fed. 239, both holding the same.

Mandamus.—Act of Congress of 1873, authorizing mandamus in proper court, compelled the Union Pacific railroad to operate its road, p. 609.

Cited in *Union Pacific Ry. v. United States*, 59 Fed. 833, 19 U. S. App. 531, without particular application.

Corporations.—Where suit was brought by government against Union Pacific railroad and others, under act of 1873, the bill alleging gross frauds practiced by the directors upon the railroad through construction companies, and the Union Pacific joined in demurrer to the bill, held, that as the Union Pacific sought no relief by cross-complaint or otherwise, none could be awarded in such suit, and demurrer must be sustained, p. 610.

Corporations.—Directors, unless under judicial prohibition or compulsion, have sole authority to bring suit for a supposed injury, p. 611.

Approved in *M'Mullen v. Ritchie*, 64 Fed. 262, holding mismanagement by directors gives no action to a stockholder for individual damages; *Southern Ry. v. North Carolina R. Co.*, 81 Fed. 599, holding State purchasing stock places itself on an equality with other stockholders.

Corporations.—Directors and stockholders of corporation, taking part in the fraudulent contracts, can have no relief, p. 612.

Approved in *Symmes v. Union Trust Co.*, 60 Fed. 857, holding stockholders subscribing part of their stock to reorganized company, cannot maintain suit on remaining stock to overthrow same for fraud; *Steger v. Davis*, 8 Tex. Civ. App. 29, 27 S. W. 1071, holding directors, receiving benefit of a fraudulent transaction, estopped to allege it was ultra vires.

Equity.—In suit by government against Union Pacific railroad and others under act of 1873, where the complainant's bill alleging various frauds by the directors against the company, was demurred to by all the defendants, no decree could be rendered in favor of the railroad for value of stock not paid, nor could the United States recover it, the company having declined to assert its rights thereto by filing a cross-bill or demanding relief, p. 612.

United States sustains two relations to the Union Pacific railroad, that of sovereign and that of creditor, p. 613.

Approved in *Sinking Fund Cases*, 99 U. S. 724, 25 L. 503, holding that establishment of a fund so as to require stockholders to contribute to payment of bonds, is constitutional.

Railroads.—United States had a first lien on the Union Pacific, but to promote the work, postponed this lien to another mortgage, p. 614.

Cited in *United States v. Stanford*, 70 Fed. 357, 44 U. S. App. 68, holding that acts of Congress waived the individual liability of stockholders in California for the bonds.

Creditor's suits.—To support a creditor's bill there must have been a judgment on execution issued, and a return of nulla bona;

hence in proceeding by government against Union Pacific railroad, under act of 1873, the complainant was entitled to no relief as a creditor, for the reckless conduct of the railroad's affairs by its directors, upon mere showing that company was in an insolvent condition, p. 615.

Cited in *Van Weel v. Winston*, 115 U. S. 245, 29 L. 387, 6 S. Ct. 26, dismissing bill by creditor, holder of mortgage bonds, alleging defendant had received money from their sale.

Corporations.—The government may maintain an action, through the attorney-general, against corporations: 1. Where they are eleemosynary, municipal, etc., and the suit is to correct abuses; 2. Where they are private corporations exceeding their powers, and it is sought to enjoin further violations thereof, pp. 617-618.

Cited in *People v. Lowe*, 117 N. Y. 191, 22 N. E. 1020, query, whether the attorney-general could maintain action.

Railroads.—Union Pacific railroad, while owing duties to the government, is a private corporation, and subject to the laws of the States where situate, so far as they do not destroy its usefulness as an instrument of the government, p. 619.

Approved in *Southern Pacific Co. v. Board of Commrs.*, 71 Fed. 439, 440, holding government could intervene in proceeding involving validity of order reducing rates.

Trust.—There is no trust set forth in the bill, by the government against the Union Pacific railroad. Under act of 1873, a trust does not exist when the legal right and the use are in the same party. p. 619.

Approved in *In re Pacific Ry. Commission*, 12 Sawy. 590, 597, 32 Fed. 261, 266, holding Congress had no power to investigate expenditures of Central Pacific Railroad Company.

Miscellaneous.—Cited in *Romaine v. Insurance Co.*, 28 Fed. 636, as instance of where an appearance was made *de bene esse*.

98 U. S. 621-630, 25 L. 188, NATIONAL BANK v. MATTHEWS.

Corporations.—Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is only voidable, and the sovereign alone can object, p. 628.

Cited and principle applied in *Reynolds v. Crawfordsville Bank*, 112 U. S. 413, 28 L. 736, 5 S. Ct. 217, that bank at mortgage sale purchased other than mortgaged property does not invalidate title to latter; *Fritts v. Palmer*, 132 U. S. 291, 293, 33 L. 320, 321, 10 S. Ct. 95, 96, holding the deed to foreign corporation was not absolutely void; *Farmers, etc., Trust Co. v. Green Bay, etc., R. Co.*, 11 Biss. 339, 12 Fed. 776, holding corporation, acquiring land for non-corporate purpose, can sustain action for injury to same; *Oregon, etc., R. Co. v. United States*, 67 Fed. 658, 29 U. S. App. 497, holding

it was a question for Oregon and not the United States; *Central Trust Co. v. Columbus, etc., Ry.*, 87 Fed. 828, holding mortgage by corporation, in excess of its capital stock, is not void; *Wallace v. Hood*, 89 Fed. 14, holding purchase and resale of its own stock by bank cannot be questioned by creditors; *Reorganized Church v. Church of Christ*, 60 Fed. 943, *Mapes v. Scott*, 94 Ill. 385, *Barnes v. Suddard*, 117 Ill. 242, 7 N. E. 480, and *C., B. & Q. R. Co. v. Lewis*, 53 Iowa, 113, 4 N. W. 852, power of corporation to hold real estate can only be questioned by the government; *Reinhard v. Mining Co.*, 107 Mo. 627, 28 Am. St. Rep. 446, 18 S. W. 19, holding grantor estopped to question validity of corporation; *Hall v. Bank*, 145 Mo. 425, 46 S. W. 1002, and *Missouri, etc., Land Co. v. Bushnell*, 11 Neb. 195, 8 N. W. 389, holding like cited case; *First Nat. Bank v. Roberts*, 9 Mont. 331, 23 Pac. 719, holding defense that national bank had no capacity to take was properly stricken out; *Butte Hardware Co. v. Cobban*, 13 Mont. 361, 34 Pac. 28, holding party claiming title to a mine through a corporation cannot question its right to take and hold it; *Carlow v. Aultman*, 28 Neb. 676, 44 N. W. 874, holding purchase by foreign corporation at judicial sale can only be attacked by the State; *Smith v. First Nat. Bank*, 45 Neb. 449, 63 N. W. 798, holding third person cannot attack for ultra vires a mortgage taken by bank; *Burden v. Burden*, 159 N. Y. 304, 54 N. E. 22, holding acquisition of real estate cannot be questioned by an assenting stockholder; *Oldham v. First Nat. Bank*, 85 N. C. 243, although the taking of the security was ultra vires, the mortgage was not void; *Anderson v. First Nat. Bank*, 5 N. Dak. 456, 67 N. W. 823, holding national bank selling notes of another, as his agent, to itself, to be guilty of conversion; *Central Ohio Gas, etc., Co. v. Capital City Dairy Co.*, 60 Ohio St. 107, 53 N. E. 713, holding corporation purchasing plant and outstanding claim acquired a valid title thereto; *Winton v. Little*, 94 Pa. St. 73, holding real estate taken by national bank as security for present or future debts is valid; *Russell v. Texas, etc., Ry.*, 68 Tex. 652, 5 S. W. 690, holding corporation created for public purposes cannot transfer its franchise; *Tarpey v. Salt Co.*, 5 Utah, 502, 17 Pac. 634, holding that it is not necessary to show that by laws of State where organized, said corporation was authorized to transfer real estate; *Fayette Land Co. v. Louisville, etc., R. Co.*, 93 Va. 287, 24 S. E. 1019, holding deed to or from corporation of land in excess of charter privilege carries its title. See 70 Am. St. Rep. 178, note. Cited, without particular application, in *Gilbert v. Hole*, 2 S. Dak. 168, 49 N. W. 2.

Distinguished in *Case v. Kelly*, 133 U. S. 28, 33 L. 515, 10 S. Ct. 220, holding rule not applicable when corporation, as plaintiff, seeks to acquire real estate.

Banks and banking.—Although statute impliedly prohibited a loan on real estate by national bank, it was held that bank having

loaned money on note, with deed of trust as security, could enforce the collection of the note by selling the lands, p. 629.

Reaffirmed in *Swope v. Leffingwell*, 105 U. S. 4, 26 L. 939, and *First Nat. Bank v. Elmore*, 52 Iowa, 549, 3 N. W. 553. Cited and principle applied in *John V. Farwell Co. v. Wolf*, 96 Wis. 14, 65 Am. St. Rep. 23, 70 N. W. 290, 37 L. R. A. 140, holding defense of ultra vires cannot be pleaded where corporation seeks to enforce a cause of action; *Farmers, etc., Saving Co. v. McCabe*, 73 Mo. App. 555, 556, holding loans by building associations on personalty were not void; *Jones v. Guaranty, etc., Co.*, 101 U. S. 623, 25 L. 1035, holding corporation was not prohibited from executing mortgage to secure future advances; *National Bank v. Whitney*, 103 U. S. 101, 26 L. 444, holding national bank may enforce mortgage for future advances; *Fortier v. New Orleans Bank*, 112 U. S. 451, 28 L. 768, 5 S. Ct. 240, holding national bank may loan on security of a mortgage if not objected to by United States; *Logan Co. Bank v. Townsend*, 139 U. S. 76, 35 L. 111, 11 S. Ct. 499, holding national bank could not hold bonds, and refuse to comply with terms of purchase; *McBroom v. Investment Co.*, 153 U. S. 326, 38 L. 732, 14 S. Ct. 855, holding statutes of Mexico made loan void only as to the usurious interest; *Wood v. Water Works*, 44 Fed. 151, 12 L. R. A. 171, and *n.*, holding corporation could not set up that mortgage was in excess of one-half of the capital stock; *Black v. Reno*, 59 Fed. 919, taking notes as collateral security for money loaned constitutes lender a holder for value; *Citizens' St. Bank v. Hawkins*, 71 Fed. 371, 34 U. S. App. 423, holding corporation doing lawful act for an unlawful purpose cannot set up ultra vires; *Wheeler v. Loan & Savings Bank*, 75 Fed. 787, holding statute subjecting director borrowing money to criminal prosecution does not make the other directors personally liable; *Cæsar v. Capell*, 83 Fed. 416, holding statute did not render void mortgage securing valid debt to foreign corporation; *American Button-Hole, etc., Co. v. Moore*, 2 Dak. 292, 8 N. W. 135, holding capacity of foreign corporation to sue to be unaffected by inhibition in code which relates only to ordinary transactions; *Neilsville Bank v. Tuthill*, 4 Dak. 301, 306, 30 N. W. 155, 158, holding bank could acquire title to such note, though the act be ultra vires; *Voltz v. National Bank*, 158 Ill. 541, 42 N. E. 72, 30 L. R. A. 158, holding ultra vires not available by drawers of check not a party to contract of guaranty; *Voris v. Star City Bldg., etc., Assn.*, 20 Ind. App. 643, 645, 50 N. E. 783, holding agent having negotiated school warrants cannot deny power of company to purchase; *Streeter v. First Nat. Bank*, 53 Iowa, 180, 4 N. W. 918, holding purchase by bank, second mortgagee, at first mortgage sale, not void; *State Nat. Bank v. Flathers*, 45 La. Ann. 80, 40 Am. St. Rep. 219, 12 So. 244, holding United States can alone complain that national bank took a mortgage; *Bowditch v. Life Ins. Co.*, 141 Mass. 295, 55 Am. Rep. 477, 4 N. E. 801, holding corporation, making loan to director,

which is forbidden by statute, acquires title to bonds given as security; *Butterworth v. Milling Co.*, 115 Mich. 3, 4, 72 N. W. 991, holding corporation contracting an unauthorized liability could not plead *ultra vires*; *Williams v. Bank of Commerce*, 71 Miss. 867, 42 Am. St. Rep. 507, 16 So. 240, holding corporation could not repudiate contract without restoring money received; *Hepburn v. Kincannon*, 74 Miss. 693, 21 So. 570, holding receiver of national bank can recover of a stockholder on note given for stock; *Scofield v. State Nat. Bank*, 9 Neb. 324, 31 Am. Rep. 415, 2 N. W. 891, holding national bank could maintain suit on note assigned by State bank; *Graham v. National Bank*, 32 N. J. Eq. 808, and *State v. Campbell*, — N. J. —, 44 Atl. 864, holding mortgage to secure contemporaneous loan by national bank is valid *inter partes*; *Probst v. Trustees, etc.*, Church, 3 N. Mex. 268, 5 Pac. 704, holding statute did not debar corporation from bringing suit to protect estate previously vested; *Thompson v. National Bank*, 113 N. Y. 334, 335, 21 N. E. 59, holding certification of check by national bank, without an equivalent amount of money on deposit, was not invalid; *Walden Nat. Bank v. Birch*, 130 N. Y. 228, 29 N. E. 129, 14 L. R. A. 214, holding lendee could not attack loan by national bank on its share; *Cleveland, etc., Co. v. Shoeman*, 40 Ohio St. 181, holding bank authorized to hold merchandise as security for the note; *Union Nat. Bank v. Rowan*, 23 S. C. 342, 55 Am. Rep. 28, holding national bank had power to purchase the draft; *First Nat. Bank v. Peavy Elevator Co.*, 10 S. Dak. 170, 72 N. W. 403, holding national bank can sell grain and acquire a seed-grain lien; *Bond v. Manufacturing Co.*, 82 Tex. 313, 18 S. W. 693, holding loan of money in excess of corporate powers was not illegal; *Howard Nat. Bank v. Loomis*, 51 Vt. 352, holding national bank may take a mortgage to secure pre-existing indebtedness; *Lycoming, etc., Ins. Co. v. Wright*, 55 Vt. 534, holding contract of foreign insurance company, before complying with State statute, is void; *First Nat. Bank v. Andrews*, 7 Wash. 263, 38 Am. St. Rep. 886, 34 Pac. 913, holding national bank could take an assignment of a note and mortgage for money loaned the mortgagee. Cited, without particular application, in *Dayton Nat. Bank v. National Bank*, 37 Ohio St. 217. See note in 6 Am. St. Rep. 106.

Distinguished in *Franklin Bank v. Commercial Bank*, 36 Ohio St. 357, 38 Am. Rep. 597, holding one corporation cannot buy up stock of another, and then interfere with its internal management; *Davis v. Old Colony R. R.*, 131 Mass. 272, 274, 41 Am. Rep. 235, 237, holding there could be no recovery on corporation's guaranty of a musical festival.

Corporations.—Where there is a simple question of authority of corporation to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity, p. 629.

Cited and principle applied in *Buffalo v. Balcom*, 134 N. Y. 535, 32 N. E. 8, one who has had the full benefit of an ultra vires contract with a municipality cannot question its validity; *Norton v. National Bank*, 61 N. H. 593, 60 Am. Rep. 339, if bank has received a benefit from the contract of guaranty, a recovery to that extent may be had; *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 220, holding president of corporation buying stock cannot set up ultra vires; *Weber v. National Bank*, 64 Fed. 210, 29 U. S. App. 97, holding debt contracted by bank, in violation of statute, is not void; *Whitney v. Wyman*, 101 U. S. 397, 25 L. 1052, holding subsequent recognition of contract was binding, although statute declared corporation could not commence business until articles were filed; *Taylor v. South*, etc., Ala. R. R., 4 Woods, 579, 13 Fed. 155, holding stockholder could not rescind executed contract because ultra vires; *Memphis*, etc., R. R. v. *Dow*, 22 Blatchf. 56, 19 Fed. 393, holding corporation retaining benefits cannot repudiate the transaction; *Holden v. Whiting*, 29 Fed. 883, holding purchaser obtained a good title by estoppel against the bank; *Boston*, etc., *Trust Co. v. Bankers*, etc., *Tel. Co.*, 36 Fed. 296, holding purchaser, while retaining stock, cannot attack validity of bonds; *Park Bros.*, etc., *Co. v. Manufacturing Co.*, 49 Fed. 626, 6 U. S. App. 26, holding failure to sign, as provided by statute, will not prevent partnership from suing on executed contract; *Board of Commrs. v. Cornell University*, 57 Fed. 153, 12 U. S. App. 551, holding county could not set up ultra vires because company was authorized to build only a narrow-gauge road; *Farmers*, etc., *Trust Co. v. Toledo*, etc., *Ry.*, 67 Fed. 55, holding stockholders of de facto corporation are estopped to deny its unauthorized existence to avoid bonds; *Lyon*, etc., *Co. v. First Nat. Bank*, 85 Fed. 122, 55 U. S. App. 753, holding corporation receiving benefit from accommodation indorsement is estopped to deny its validity; *Eastern Bldg.*, etc., *Assn. v. Bedford*, 88 Fed. 18, holding Federal courts will enforce a contract, non-enforceable in State courts, because of some administrative regulation; *Searcy v. Yarnell*, 47 Ark. 284, 1 S. W. 323, and *Monticello v. Cohn*, 48 Ark. 256, 3 S. W. 31, holding ultra vires no defense to executed contract; *Railway Co. v. Fire Assn.*, 60 Ark. 330, 30 S. W. 351, 28 L. R. A. 325, holding party could not defend because property was acquired by foreign corporation before complying with statute; *Camp v. Land*, 122 Cal. 169, 54 Pac. 840, holding grantor of trust deed to national bank cannot attack its corporate existence; *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 27, 59 Am. Rep. 142, 9 Pac. 780, disallowing defense of ultra vires where corporation has received the full benefit of the contract; *Beach v. Wakefield*, 107 Iowa, 586, 76 N. W. 694, holding corporation, exceeding statutory limit of indebtedness, cannot question mortgage given; *Brown v. Atchison*, 39 Kan. 50, 7 Am. St. Rep. 525, 17 Pac. 472, holding city must account for benefits received, although contract was void; *Hutchinson*, etc., R. R. v. *Board of*

Commrs., 48 Kan. 87, 30 Am. St. Rep. 288, 28 Pac. 1084, 15 L. R. A. 408, holding municipality subscribing to stock of railroad was estopped by denying validity of issue of bonds; *Booth v. Robinson*, 55 Md. 435, *United German Bank v. Katz*, 57 Md. 142, and *Heironimies v. Sweeney*, 83 Md. 159, 55 Am. St. Rep. 337, 34 Atl. 825, 33 L. R. A. 102, holding shareholders having enjoyed the benefit of contract could not set up ultra vires; *Kelley v. Newburyport, etc., R. R.*, 141 Mass. 498, 6 N. E. 747, holding railroad could not escape liability for the building of its road because required per cent. of capital had not been paid; *Slater Woolen Co. v. Lamb*, 143 Mass. 422, holding corporation could maintain action for goods sold ultra vires; *Burns v. Grand Lodge*, 153 Mass. 175, 26 N. E. 444, holding that a complete novation was effected by which grand lodge became indebted to the member; *Weyrich v. Grand Lodge*, 47 Mo. App. 398, holding corporation accepting benefits of a contract cannot plead ultra vires; *Goodland v. Bank*, 74 Mo. App. 376, holding defense of ultra vires not open to bank on executed contract; *Sherwood v. Alvis*, 83 Ala. 119, 3 Am. St. Rep. 697, 3 So. 308, and *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 145, 146, 148, 54 N. W. 546, 547, holding contract of foreign corporation not complying with statute not void; *Society Perun v. Cleveland*, 43 Ohio St. 497, 3 N. E. 364, admitting evidence of an attempted incorporation followed by user to prove a corporation de facto; *Texas, etc., Ry. v. Gentry*, 69 Tex. 632, 8 S. W. 102, holding corporation accepting benefits of a transaction cannot set up ultra vires; *Allis v. Jones*, 45 Fed. 150, *Gorrell v. Life Ins. Co.*, 63 Fed. 376, 24 U. S. App. 188, *Poock v. Lafayette Bldg. Assn.*, 71 Ind. 358, *St. Joseph, etc., Ins. Co. v. Hauck*, 71 Mo. 469, *Taylor v. Callaway*, 7 Tex. Civ. App. 469, 27 S. W. 938, and *Logan v. Building & Loan Assn.*, 8 Tex. Civ. App. 494, 28 S. W. 141, holding party receiving money from corporation on his note cannot set up defense of ultra vires; *Steger v. Davis*, 8 Tex. Civ. App. 29, 27 S. W. 1071, holding directors purchasing competing hotel property and receiving the benefit cannot allege ultra vires; *Wright v. Lee*; 2 S. Dak. 613, 51 N. W. 711, and *Toledo Tie, etc., Co. v. Thomas*, 33 W. Va. 571, 25 Am. St. Rep. 929, 11 S. E. 38, holding contract of foreign corporation not complying with the statute to be enforceable if a punishment by fine is prescribed; *Lewis v. American Sav., etc., Assn.*, 98 Wis. 224, 73 N. W. 799, 39 L. R. A. 567, holding corporation had waived its right to question the validity of the trust. Cited, without particular application, in *Nims v. Boys' School*, 160 Mass. 180, 39 Am. St. Rep. 471, 35 N. E. 778, 22 L. R. A. 367. See note in 94 Am. Dec. 385.

Distinguished in *McCormick v. Market Bank*, 165 U. S. 552, 41 L. 822, 17 S. Ct. 437, holding lease made by bank not authorized to commence business, is void; *California Bank v. Kennedy*, 167 U. S. 371, 42 L. 201, 17 S. Ct. 834, holding want of authority of national bank to purchase stock may be pleaded in action to enforce its liability as a stockholder.

Corporations.—The punishment for a violation of the charter is a judgment of ouster and dissolution, which is invoked by public authority, and cannot be usurped by private person, p. 629.

Cited and principle applied in *Thompson v. National Bank*, 146 U. S. 248, 251, 36 L. 960, 961, 13 S. Ct. 68, 69, where statute prohibits certain acts without imposing a penalty, their validity can only be questioned by the United States; *Lyons v. National Bank*, 19 Blatchf. 289, 8 Fed. 376, holding statute of New York as to interest on certain bonds is directory; *United States Mtge. Co. v. Sperry*, 24 Fed. 846, holding New York corporation could charge more than legal rate of interest of that State on loan made in another; *Chattanooga, etc., R. Co. v. Evans*, 66 Fed. 816, 31 U. S. App. 432, holding statute did not invalidate a purchase by foreign corporation not complying with it; *Sioux City, etc., Co. v. Trust Co.*, 82 Fed. 134, 49 U. S. App. 542, 543, holding mortgage to secure excessive indebtedness binding on the corporation; *Rogers v. Nashville, etc., Ry.*, 91 Fed. 317, 62 U. S. App. 82, after execution of purchase, the question of ultra vires can only be raised by the State; *Brittan v. Oakland Bank of Savings*, 124 Cal. 291, 71 Am. St. Rep. 66, 57 Pac. 87, holding prohibition of borrowing by bank can only be availed of by the sovereign power; *Water, etc., Co. v. Tenny*, 24 Colo. 355, 51 Pac. 509, holding power of corporation to buy water rights could only be questioned by State; *Ayres v. Produce Co.*, 101 Iowa, 143, 63 Am. St. Rep. 378, 70 N. W. 112, holding creditor of shipper cannot set up that bank could not take goods as security; *Bliss v. Winslow*, 80 Me. 277, 6 Am. St. Rep. 196, 13 Atl. 900, holding possession of custom officer of vessel which he was forbidden to buy is good against his vendor; *Prescott Nat. Bank v. Butler*, 157 Mass. 549, 32 N. E. 909, holding maker of note could not defend because of ultra vires; *Fifth Nat. Bank v. Pierce*, 117 Mich. 379, 75 N. W. 1059, taking of unauthorized security by national bank is not invalid; *Crolley v. Minneapolis, etc., Ry.*, 30 Minn. 544, 16 N. W. 424, holding landowner cannot question unauthorized transfer after condemnation; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 42, 53 Am. Rep. 6, 21 N. W. 850, *Baker v. Guaranty Loan Co.*, 36 Minn. 187, 30 N. W. 465, and *Hennessy v. St. Paul*, 54 Minn. 223, 55 N. W. 1125, that purchase by national bank was ultra vires can only be raised by the government; *Thornton v. National Exchange Bank*, 71 Mo. 228, where national bank avails itself of real estate as security, the remedy is with the government; *First Nat. Bank v. Gillilan*, 72 Mo. 82, holding one dealing with a national bank could not question its authority; *Wherry v. Hale*, 77 Mo. 25, if national bank does an ultra vires act the remedy is in the government; *Fredericktown v. Fox*, 84 Mo. 65, holding validity of incorporation of town could not be questioned in action to enforce payment of a fine; *Connecticut, etc., Life Ins. Co. v. Smith*, 117 Mo. 290, 38 Am. St. Rep. 664, 22 S. W. 628,

holding conveyance by corporation can only be collaterally assailed by private suit, when authorized by statute; *State v. Kansas City, etc., Ry.*, 140 Mo. 551, 62 Am. St. Rep. 749, 41 S. W. 957, holding proceeding in equity is not the proper remedy to enforce the forfeiture of a charter; *Welsh v. Brewing Co.*, 47 Mo. App. 619, if charter does not expressly declare the ultra vires acts to be void, the State alone can question them; *Trenton v. Devorss*, 70 Mo. App. 12, holding plaintiff's corporate existence cannot be collaterally questioned; *First Nat. Bank v. Smith*, 8 S. Dak. 9, 65 N. W. 438, holding want of authority in bank to purchase note cannot be set up by maker. Cited, without particular application, in *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 325, 13 N. W. 146.

Distinguished in *Burrows v. Niblack*, 84 Fed. 113, 53 U. S. App. 717, holding bank could sue to recover money paid for its own stock without tendering the stock; *Dresser v. National Bank*, 165 Mass. 122, 42 N. E. 568, holding bank could plead ultra vires to an unexecuted contract.

Miscellaneous.—Cited in *State v. Trust Co.*, 144 Mo. 586, 46 S. W. 593.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1878.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1878,

AND REPORTED HEREIN,

VOL. 99.

AS HAVE ALSO BEEN REPORTED IN

9 OTTO.

9 Otto.	Title.	Here in.	9 Otto.	Title.	Here in.
1	Wolf v. Stix, - - -	309	106-109	Grafton v. Cummings, - -	368
6-7	" " - - -	312	109-112	" " - - -	369
7-10	" " - - -	313	112	" " - - -	370
10	" " - - -	314	112-119	Town of Weyauwega v. Ayling, -	470
10	United States v. Farden, -	267	119	" " - - -	471
15-18	" " - - -	268	119	Case v. Beauregard, - -	370
18-20	" " - - -	269	124-125	" " - - -	371
20-23	Hussey v. Smith, - - -	314	125-128	" " - - -	372
23-25	" " - - -	315	128-129	" " - - -	373
25	Hussey v. Merritt, <i>Note</i> , -	315	130	Wilkerson v. Utah, - -	345
25-27	Mills v. Scott, - - -	294	130-133	" " - - -	346
27-30	" " - - -	295	133-135	" " - - -	347
30-31	Quinn v. United States, -	269	135-137	" " - - -	348
31-34	" " - - -	270	138	Burbank v. Semmes, - -	315
35	United States v. Ames, -	295	138-141	" " - - -	316
35-36	" " - - -	297	141-142	" " - - -	317
36-39	" " - - -	298	143-144	Biebinger v. Continental Bank, -	271
39-42	" " - - -	299	144-146	" " - - -	272
42-45	" " - - -	300	147	Railroad Company v. McKinley, -	272
45-47	" " - - -	301	147-149	" " - - -	273
48	Platt v. Union Pacific R. R. Co. -	424	149	Klein v. New Orleans, - -	430
56-57	" " - - -	426	150-151	" " - - -	431
57-59	" " - - -	427	152	United States v. Fort Scott, -	348
59-62	" " - - -	428	157	" " - - -	350
62-65	" " - - -	429	157-160	" " - - -	351
65-67	" " - - -	430	160-161	" " - - -	352
68	Lange v. Benedict, - - -	469	161-165	Harris v. McGovern, - -	317
71	" " - - -	470	165-166	" " - - -	318
72	Doggett v. Railroad Company, -	301	166-168	" " - - -	319
75-77	" " - - -	302	168-171	Gordon v. Gilfoil, - -	383
77-78	" " - - -	303	171-174	" " - - -	384
78	Transportation Line v. Cooper, -	382	174-176	" " - - -	385
79	" " - - -	383	176-179	" " - - -	386
80	Barrow v. Hunton, - - -	407	179	" " - - -	387
82-85	" " - - -	408	180	Burt v. Panjaud, - -	451
85	" " - - -	409	180-181	" " - - -	452
86	Hackett v. Ottawa, - - -	363	181-183	" " - - -	453
90-93	" " - - -	364	183-185	Atwood v. Weems, - -	471
93-96	" " - - -	365	185-188	" " - - -	472
96	" " - - -	366	188	" " - - -	473
97-99	Canal & Bkg. Co. v. N. Orleans, -	409	188-191	Ketchum v. Buckley, - -	473
99	" " - - -	410	191	Express Company v. Railroad Co. -	319
100	Grafton v. Cummings, - -	366	198-199	" " - - -	320

REFERENCE TABLE.

9 Otto.	Title.	Here in.	9 Otto.	Title.	Here in.
199-201	Express Company v. Railroad Co.,	321	371	Brooklyn v. Insurance Co.,	419
201-202	Godden v. Kimmell,	431	372-374	United States v. Winchester,	479
202-205	" " " "	432	374-377	" " " "	480
205-208	" " " "	433	377	" " " "	481
208-211	" " " "	434	378	Van Norden v. Morton,	453
211-212	" " " "	435	378-380	" " " "	454
212-214	Vansant v. Gas-Light Company.	265	381-382	" " " "	455
214	Supervisors v. Galbraith,	410	382-387	Ryan v. Railroad Company,	305
216-218	" " " "	411	387-389	" " " "	306
218-220	" " " "	412	389-392	Hale v. Frost,	419
221-224	Farrell v. United States,	321	392	" " " "	420
224	" " " "	322	393-394	Hartman v. Bean,	455
225-227	United States v. Glab,	273	394-397	" " " "	456
227-229	" " " "	274	397-498	" " " "	457
229-230	King v. United States,	373	398-400	Smith v. Railroad Company,	437
230-233	" " " "	374	400-401	" " " "	438
233-234	" " " "	375	402	Union Pacific R. R. Co. v. U. S.,	274
235	Fosdick v. Schall,	339	406-407	" " " "	277
249-250	" " " "	341	407-409	" " " "	278
250-253	" " " "	342	410-412	" " " "	279
253-256	" " " "	343	412-415	" " " "	280
256	" " " "	344	415-418	" " " "	281
256-257	Fosdick v. Car Company,	344	418-421	" " " "	282
258	Huidekoper v. Locomotive Works	344	421-423	" " " "	283
258-260	" " " "	345	413-426	" " " "	284
261	Campbell v. Rankin,	435	426-429	" " " "	285
261-264	" " " "	436	429-432	" " " "	286
264-265	" " " "	437	432-434	" " " "	287
265-268	United States v. Pugh,	322	434	Parsons v. Jackson,	457
268-270	" " " "	323	436	" " " "	458
270-272	" " " "	324	436-439	" " " "	459
273	Transportation Co. v. Wheeling,	412	439-441	" " " "	460
276-278	" " " "	413	441-443	Keely v. Sanders,	327
278-281	" " " "	414	443-446	" " " "	328
281-284	" " " "	415	446-449	" " " "	329
284-285	" " " "	416	449	" " " "	330
286-287	Tice v. United States,	352	449-450	United States v. Central Pacific	
287-290	" " " "	353		Railroad Company,	287
290	" " " "	354	450-453	" " " "	288
291	Myrick v. Thompson,	324	453-455	" " " "	289
291-294	" " " "	325	455-456	United States v. Kansas Pacific	
294-297	" " " "	326		Railway Company,	289
297	" " " "	327	456-459	" " " "	290
298	Phelps v. McDonald,	473	459-460	" " " "	201
302-303	" " " "	474	460-461	United States v. Denver Pacific	
304-306	" " " "	475		Railway Company,	291
306-309	" " " "	476	461-462	" " " "	292
309	University v. People,	387	463	Railway Company v. Alling,	
318-320	" " " "	388		Denver & R. G. Ry. Co. v. Cañon	
320-323	" " " "	389		City & S. J. Ry. Co.,	438
323-325	" " " "	390	470	" " " "	441
325	Bank v. Partee,	390	470-472	" " " "	442
326-328	" " " "	391	472-475	" " " "	443
328-331	" " " "	392	475-478	" " " "	444
331-333	" " " "	393	478-481	" " " "	445
333-334	" " " "	394	481-482	" " " "	446
334-336	Sage v. Central Railroad Co.	394	482-483	Montgomery v. Samory,	375
336-339	" " " "	395	483-486	" " " "	376
339-342	" " " "	396	486-489	" " " "	377
342-345	" " " "	397	489-491	" " " "	378
345-348	" " " "	398	491-492	United States v. Sioux City & Pa-	
348	" " " "	399		cific R. R. Co.,	292
348-352	Hoge v. Railroad Company,	303	493-494	Clark v. United States,	481
352-355	" " " "	304	494-496	" " " "	482
355	" " " "	305	496-498	Sherry v. McKinley,	330
355	Denver v. Roane,	476	499	Wilson v. Salamanca,	330
356-358	" " " "	477	501	" " " "	331
358-361	" " " "	478	505-507	Grigsby v. Purcell,	354
361	" " " "	479	507-508	" " " "	355
362	Brooklyn v. Insurance Co.,	416	508	Thomas v. Purcell, Note,	355
368-371	" " " "	418	508-509	United States v. Germaine,	482

REFERENCE TABLE.

9 Otto.	Title.	Here in.	9 Otto.	Title.	Here in.
509-511	United States v. Germaine,	483	614-617	Stringfellow v. Cain,	423
511-512	" " "	484	617-619	" " "	424
513	Jackson v. Ludeling,		619	Cannon v. Pratt,	446
	Vicksburg, S. & T. R. R. Co.,		619-622	" " "	447
	v. Jackson,	460	622-624	" " "	448
513-516	" " "	461	624	Commissioners v. Sellew,	333
516-519	" " "	462	624-625	" " "	334
519-522	" " "	463	625-628	" " "	335
522-525	" " "	464	628	" " "	336
525-527	" " "	465	628	National Bank v. Case,	448
527-530	" " "	466	629-632	" " "	449
530-533	" " "	467	632-634	" " "	450
533-536	" " "	468	634-635	" " "	451
536-539	" " "	469	635	Transportation Co. v. Chicago,	336
539	Yulee v. Vose, - - -	355	639-640	" " "	337
544-546	" " "	356	640-643	" " "	338
546	" " "	357	643-645	" " "	339
547-548	Hartell v. Tilghman, - - -	357	645	Spring Company v. Edgar,	487
548-551	" " "	358	651-652	" " "	488
551-554	" " "	359	652-655	" " "	489
554-557	" " "	360	655-658	" " "	490
557-560	" " "	361	658-659	" " "	491
560	" " "	362	660	Evanston v. Gunn,	306
560	Colby v. Reed, - - -	484	665-667	" " "	307
561-563	" " "	485	667-668	" " "	308
563-565	" " "	486	668	Lyon v. Pollock,	265
565-566	" " "	487	672	" " "	266
567	McBurney v. Carson, - - -	378	672-674	" " "	267
567	" " "	380	674	Lyon v. Hernandez, Note,	267
567-570	" " "	381	674-676	Perris v. Hexamer,	308
570-573	" " "	382	676	" " "	309
573	Elliott v. Railroad Company,	292	676-679	Orleans v. Platt,	404
575-577	" " "	293	679-682	" " "	405
578-580	Pence v. Langdon, - - -	420	682-683	" " "	406
580-582	" " "	421	684-686	Lyons v. Munson, - - -	451
582	United States v. County of Macon,	331	686	Block v. Commissioners, }	
589-590	" " "	332		Commissioners v. Block, }	491
590-592	" " "	333	691	" " "	492
592	County of Macon v. Huidekoper,		691-694	" " "	493
	Note, - - -	333	694-696	" " "	494
592	Terhune v. Phillips, - - -	293	696-699	" " "	495
593	" " "	294	700	Sinking Fund Cases:	
593	Alvord v. United States,	399		Union Pacific R. R. Co. v.	
594	Whiskey Cases:			United States,	
	United States v. Ford,			Central Pacific R. R. Co. v.	
	United States v. One Still,			Gallatin,	496
	United States v. 50 Barrels of	718-720		" " "	501
	Distilled Spirits,	720-723		" " "	502
	United States v. 319 Barrels	723-726		" " "	503
	of Whiskey,	726-728		" " "	504
	United States v. 400 Barrels	728-731		" " "	505
	of Distilled Spirits,	731-733		" " "	506
	United States v. 400 Packages	733-736		" " "	507
	of Distilled Spirits,	736-739		" " "	508
	United States v. 150 Barrels	739-742		" " "	509
	of Whiskey,	399		" " "	510
595-597	" " "	400	742-745	" " "	511
598-600	" " "	401	745-747	" " "	512
600-603	" " "	402	747-750	" " "	513
603-606	" " "	403	750-753	" " "	514
606	" " "	404	753-756	" " "	515
607	" " "	404	756-759	" " "	516
607	Whitney v. Cook, - - -	446	759-762	" " "	517
608-616	National Bank v. Bank of Com-		762-764	" " "	518
	merce, - - -	362	764-767	" " "	519
610	Stringfellow v. Cain, - - -	421	767-769	" " "	
611-614	" " "	422			

CASES REPORTED IN VOLUME 99.

A.

<i>Ætna L. Ins. Co., Town of Brooklyn v.</i>	416
<i>Alling, Denver & R. G. Ry. Co. v.</i>	438
<i>Alvord v. United States.</i>	399
<i>Ames, Exr., United States v.</i>	295
<i>Atwood v. Weems, Exrx.,</i>	471
<i>Ayling, Town of Weyauwega v.</i>	470

B.

<i>Bank, Canal of N. O., v. Partee,</i>	390
<i>Bank, Contl., Biebinger, Assignee v.</i>	271
<i>Bank, Germania Nat., of N. O., v. Case, Receiver,</i>	448
<i>Bank, Nat., in New York, Nat. Bk. in St. L. v.</i>	362
<i>Bank, Nat., in St. L. v. Nat. Bk. in N. Y.,</i>	362
<i>Barrow, Admr., v. Hunton,</i>	407
<i>Bean, Coll., Hartman v.</i>	455
<i>Beauregard, Case, Receiver, v.</i>	370
<i>Benedict, Lange v.</i>	469
<i>Biebinger, Assignee, v. Continental Bk., Block v. Comrs. of Bourbon County,</i>	491
<i>Bourbon Co. Comrs. v. Block,</i>	491
<i>Brooklyn, Town of, v. Aetna L. Ins. Co.,</i>	416
<i>Buckley, Ketchum v.</i>	473
<i>Burbank v. Semmes,</i>	315
<i>Burt v. Panjaud,</i>	451

C.

<i>Cain, Stringfellow, Exr., v.</i>	421
<i>Calhoun County, Suprs. of, v. Galbraith,</i>	410
<i>Campbell v. Rankin,</i>	435
<i>Canal Bank of N. O. v. Partee,</i>	390
<i>Canal & Banking Co., N. O. v. New Orleans,</i>	409
<i>Cannon, Exr., v. Pratt,</i>	446
<i>Cañon City & S. J. Ry. Co., D. & R. G. Ry. Co. v.</i>	438
<i>Carson, McBurney v.</i>	378
<i>Case, Receiver, v. Beauregard,</i>	370
<i>Case, Receiver, Germania Nat. Bk. of N. O. v.</i>	448
<i>Central Pacific R. R. Co. v. Gallatin,</i>	504
<i>Central Pacific R. R. Co., Ryan v.</i>	305
<i>Central Pacific R. R. Co., United States v.</i>	287
<i>Central R. R. Co. of Iowa, Sage v.</i>	394
<i>Chicago, Nor. Trans. Co. of Ohio v.</i>	336
<i>Chicago & N. W. Ry. Co. v. McKinley,</i>	272
<i>Clark v. United States,</i>	481
<i>Colby, Exr., v. Reed,</i>	484
<i>Comrs. of Bourbon Co. v. Block,</i>	491
<i>Comrs. of Leavenworth Co. v. Sellew,</i>	333
<i>Congress & Emp. Spring Co. v. Edgar</i>	487
<i>Continental Bk., Biebinger, Assignee v.</i>	271
<i>Cook, Whitney v.</i>	446
<i>Cooper, Admr., Transportation Line v.</i>	382
<i>County Court of Macon Co. v. Huidekoper,</i>	333
<i>County Court of Macon Co., U. S. ex rel., v.</i>	331
<i>Cummings, Grafton v.</i>	366

D.

<i>Dallas Co. v. Huidekoper,</i>	374
<i>Denver Pacific Ry. & T. Co., U. S. v.</i>	291
<i>Denver & R. G. Ry. Co. v. Alling,</i>	438

D.

<i>Denver & R. G. Ry. Co. v. C. C. & S. J. Ry. Co.</i>	438
<i>Denver v. Roane, Exr.,</i>	476
<i>Des Moines Valley R. R. Co., Dumont v.</i>	520
<i>Distilled Spirits, 50 Barrels, U. S. v.</i>	399
<i>Distilled Spirits, 400 Barrels, U. S. v.</i>	399
<i>Distilled Spirits, 400 Packages, U. S. v.</i>	399
<i>Doggett, Receiver, v. Florida R. R. Co.</i>	301
<i>Dumont v. Des Moines Valley R. R. Co.</i>	520

E.

<i>East Pa. R. R. Co., Elliott, Coll., v.</i>	292
<i>Edgar, Cong. & Emp. Spring Co. v.</i>	487
<i>Electro-Magnetic Gas Light Co., Vansant, Trustee, v.</i>	265
<i>Elliott, Coll., v. East Pa. R. R. Co.</i>	292
<i>Express Co., Southern, v. West. N. C. R. R. Co.</i>	319
<i>Evanston v. Gunn,</i>	306

F.

<i>Farden, United States v.</i>	267
<i>Farrell v. United States,</i>	321
<i>Florida R. R. Co., Doggett, Receiver, v.</i>	301
<i>Flournoy v. Lastrapes,</i>	406
<i>Ford, United States v.</i>	399
<i>Fort Scott, H. & W. R. R. Co., Smith v.</i>	437
<i>Fort Scott, Mayor, etc., of, U. S., ex rel. v.</i>	348
<i>Fosdick v. Schall,</i>	339
<i>Fosdick v. Southwestern Car Co.,</i>	344
<i>Frost, Trustee, Hale v.</i>	419

G.

<i>Galbraith, Suprs. of Calhoun County v.</i>	410
<i>Gallatin, Cent. Pacific R. R. Co. v.</i>	504
<i>Gas-Light Co., E. M., Vansant, Trustee, v.</i>	265
<i>Germaine, United States v.</i>	482
<i>Germania Nat. Bk. of N. O. v. Case, Receiver,</i>	448
<i>Gilfoil, Gordon v.</i>	383
<i>Glab, United States v.</i>	273
<i>Godden v. Kimmell, Admr.,</i>	431
<i>Gordon v. Gilfoil,</i>	383
<i>Grafton v. Cummings,</i>	366
<i>Grigsby, Admr., v. Purcell,</i>	354
<i>Gunn, Evanston v.</i>	306

H.

<i>Hackett, Exr., v. Ottawa,</i>	363
<i>Hale v. Frost, Trustee,</i>	419
<i>Harris v. McGovern,</i>	317
<i>Hartell v. Tilghman,</i>	357
<i>Hartman v. Bean, Coll.,</i>	455
<i>Hernandez, Lyon v.</i>	267
<i>Hexamer, Perris, Admr., v.</i>	308
<i>Hinckley Loco. Works, Huidekoper v.</i>	344
<i>Hoge, Comp. Gen. v. Rich. & D. R. R. Co.,</i>	303
<i>Huidekoper, County Court of Macon Co. v.</i>	333
<i>Huidekoper, Dallas Co. v.</i>	374
<i>Huidekoper v. Hinckley Locomotive Works,</i>	344
<i>Hunton, Barrow, Admr., v.</i>	407
<i>Hussey v. Smith,</i>	314 315

I.

<i>Ins. Co., Ætna L., Town of Brooklyn v.</i>	416
---	-----

J.		Q.	
'Jackson v. Ludeling,"	460	Quinn, Admr., v. United States,	269
Jackson, Parsons v.	457	R.	
Jackson v. Vicksburg, S. & T. R. R. Co.,	460	R. R. Co., Central of Iowa, Sage v.	394
K.		R. R. Co., Cent. Pacific v. Gallatin,	504
Kansas Pacific Ry. Co., United States, v.	289	R. R. Co., Central Pacific, Ryan v.	305
Keely v. Sanders,	327	R. R. Co., Central Pacific, United States v.	287
Ketchum v. Buckley,	473	R. R. Co., Des Moines Valley, Dumont v.	520
Kimmell, Admr., Godden v.	431	R. R. Co., East Pa., Elliott, Coll., v.	292
King v. United States,	373	R. R. Co., Florida, Doggett, Receiver, v.	301
Kinney, Leavenworth v.	336	R. R. Co., Fort Scott, H. & W., Smith v.	437
Klein v. New Orleans,	430	R. R. Co., Richmond & D., Hoge, Comp. Gen., v.	303
L.		R. R. Co., Sioux City & Pac., United States v.	292
Langdon, Pence v.	420	R. R. Co., Union Pacific, Platt v.	424
Lange v. Benedict,	469	R. R. Co., Union Pacific, v. United States,	274, 496
Lastrapes, Flournoy v.	406	R. R. Co., Vicksburg, S. & T., v. Jackson,	460
Leavenworth Co., Comrs. of, v. Sellew,	333	R. R. Co., Western N. C., Southern Exp. Co. v.	319
Leavenworth v. Kinney,	336	Ry. Co., Cañon City & S. J., D. & R. G. Ry. Co. v.	438
Locomotive Works, Huidekoper v.	344	Ry. Co., Chicago & N. W., v. McKinley,	272
"Ludeling, Jackson v."	460	Ry. Co., Denver & R. G., v. Alling,	438
Lyon v. Hernandez,	267	Ry. Co., Denver & R. G., v. C. C. & S. J. Ry. Co.,	438
Lyon v. Pollock,	265	Ry. Co., Kan. Pacific, United States v.	289
Lyons, Town of, v. Munson,	451	Ry. & T. Co., Denver Pacific, U. S. v.	291
M.		Rankin, Campbell v.	435
McBurney v. Carson,	378	Reed, Colby, Exr., v.	484
McDonald, Phelps, Assignee, v.	473	Richmond & D. R. R. Co., Hoge, Comp. Gen., v.	303
McGovern, Harris v.	317	Roane, Exr., Denver v.	476
McKinley, Chicago & N. W. Ry. Co. v.	272	Ryan v. Central Pacific R. R. Co.,	305
McKinley, Exr., Sherry v.	330	S.	
Macon County Court v. Huidekoper,	333	Sage v. Central R. R. Co. of Iowa,	394
Macon Co. Court, United States, ex rel., v.	331	Salamanca Township, Wilson v.	330
Mayor, etc., of Fort Scott, U. S., ex rel., v.	348	Samory, Montgomery v.	375
Mills, Admr. v. Scott,	294	Sanders, Keely v.	327
Montgomery v. Samory,	375	Schall, Fosdick v.	349
Morgan, United States, v.	519	Scott, Mills, Admr., v.	294
Morton, Van Norden v.	453	Sellew, Leavenworth Co. Comrs. v.	333
Munson, Town of Lyons v.	451	Semmes, Burbank, v.	315
Myrick v. Thompson,	324	Sherry v. McKinley, Exr.,	330
N.		"Sinking Fund Cases,"	504
National Bk. in N. Y., Nat. Bk. in St. L. v.	362	Sioux City & Pac. R. R. Co., U. S. v.	292
National Bk. in St. L. v. Nat. Bk. in N. Y.	362	Smith v. Ft. Scott, H. & W. R. R. Co.	437
New Orleans Can. & Banking Co. v. New Orleans,	409	Smith, Hussey v.	314, 315
New Orleans, Klein v.	430	Southern Express Co. v. West. N. C. R. R. Co.,	319
New Orleans, N. O. Can. & Banking Co. v.	409	Southwestern Car Co., Fosdick v.	344
Northern Trans. Co. of Ohio v. Chicago,	336	Spring Co., Cong. & Emp., v. Edgar,	487
Northwestern University v. People, ex rel.,	387	Still and Other Property, United States v.	399
O.		Stix, Wolf v.	309
Orleans, Town of, v. Platt,	404	Stringfellow, Exr., v. Cain,	421
Ottawa, Hackett, Exr., v.	363	Supervisors of Calhoun Co. v. Galbraith,	410
P.		T.	
Panjaud, Burt v.	451	Terhune v. Phillips,	293
Parsons v. Jackson,	457	Thomas v. Purcell,	355
Partee, Canal Bank of N. O. v.	390	Thompson, Myrick v.	324
Pence v. Langdon,	420	Tice, Admr., v. United States,	352
People, ex rel., Northwestern University v.	387	Tilghman, Hartell v.	357
People of U. S. in Utah, Wilkerson v.	345	Town of Brooklyn v. Aetna L. Ins. Co.,	416
Perris, Admr., v. Hexamer,	308	Town of Lyons v. Munson,	451
Phelps, Assignee, v. McDonald,	473	Town of Orleans v. Platt,	404
Phillips, Terhune v.	293	Town of Weyauwega v. Ayling,	470
Platt, Town of Orleans v.	404	Transportation Co. v. Chicago,	336
Platt v. Union Pacific R. R. Co.,	424	Transportation Co. v. Wheeling,	412
Pollock, Lyon v.	265	Transportation Line v. Cooper, Admr.,	382
Pratt, Cannon, Exr., v.	446		
Pugh, United States v.	322		
Purcell, Grigsby, Admr., v.	354		
Purcell, Thomas v.	355		

U.		U.	
Union Pacific R. R. Co., Platt v.	424	United States, Tillson v.	543
Union Pacific R. R. Co. v. United States,	274	United States, Union Pac. R. R. Co. v.	274, 496
Union Pacific R. R. Co. v. United States,	496	United States, Williams, Admr., v.	309
United States, Alvord v.	399	United States v. Winchester, Exr.,	479
United States v. Ames, Exr.,	295	"Utah, Wilkerson v."	345
United States v. Central Pacific R. R. Co.,	287	V.	
United States, Clark v.	481	Van Norden v. Morton,	453
United States v. Denver Pacific Ry. & T. Co.	291	Vansant, Trustee v. Electro-Magnetic Gas-	
United States, <i>ex rel.</i> , v. Co. Ct. of Macon Co.,	331	Light Co.,	265
United States v. Farden,	267	Vicksburg, S. & T. R. R. Co. v. Jackson,	460
United States, Farrell v.	321	Vose, Yulee v.	355
United States v. 50 Barrels Distilled Spirits,	399	W.	
United States v. Ford,	399	Weems, Exrx., Atwood v.	471
United States v. 400 Barrels Distilled Spirits,	399	Western N. C. R. R. Co., Southern Ex. Co. v.	319
United States v. 400 Packages Distilled		Weyauwega, Town of, v. Ayling,	470
Spirits,	399	Wheeling, P. & C. Trans. Co. v. Wheeling,	412
United States v. Germaine,	482	Wheeling, W. P. & C. Trans. Co. v.	412
United States v. Glab,	273	"Whisky Cases,"	399
United States v. Kan. Pacific Ry. Co.,	289	Whisky, 150 Barrels, United States v.	399
United States, King v.	373	Whisky, 319 Barrels, United States v.	399
United States, <i>ex rel.</i> , v. Mayor, etc. of Fort		Whitney v. Cook,	446
Scott,	348	Wilkerson v. People of U. S. in Utah,	345
United States v. Morgan,	519	"Wilkerson v. Utah,"	345
United States v. 150 Barrels of Whisky,	399	Williams, Admr., v. United States,	309
United States v. One Still and Other Prop-		Wilson v. Salamanca Township,	330
erty,	399	Winchester, Exr., United States v.	479
United States v. Pugh,	322	Wolf v. Stix,	309
United States, Quinn, Admr. v.	269	Y.	
United States v. Sioux City & Pac. R. R.		Yulee v. Vose,	355
Co.,	292		
United States v. 319 Barrels of Whisky,	399		
United States, Tice, Admr., v.	352		

THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1878.

JOHN VANSANT ET AL., Trustee for SUSAN
A. DUNCAN, *Appts.*,

v.

THE ELECTRO-MAGNETIC GAS-LIGHT
COMPANY ET AL.

(See S. C., 9 Otto, 213, 214.)

Citation on appeal.

A citation is necessary to an appeal, except when the appeal is allowed in open court during the term at which the decree is rendered. When not so allowed and there is no citation, the appeal will be dismissed.

[No. 109.]

Argued Jan. 8, 1879. Decided Jan. 13, 1879.

APPEAL from the Supreme Court for the District of Columbia.

On motion to dismiss.

The case is sufficiently stated in the opinion of the Court.

Messrs. J. Hubley Ashton and Nathaniel Wilson, for appellees.

Messrs. T. J. Durant & C. W. Hornor, for appellants.

Mr. Chief Justice Waite delivered the opinion of the court:

No citation has been issued in this cause. A citation only becomes unnecessary when the appeal is allowed in open court during the term at which the decree is rendered. This implies some action of the court while in open session, and, to be regular, should be entered on the minutes. Here, although an appeal bond was approved by the *Chief Justice* of the court and filed with the clerk during the term, it does not appear to have been done while the court was actually in session. So far as the record shows, it was the act of the *Chief Justice* alone out of court. The entry on the order book is simply a direction to the clerk, by the solicitor of the appellant, to enter an appeal. It in no way indicates any action whatever either in or by the court.

The motion to dismiss for want of citation is granted.

ISAAC L. LYON, *Appt.*,

v.

FRANZ POLLOCK ET AL.

(See S. C., 9 Otto, 668-674.)

Contract of sale—what sufficient.

1. Where a person, on leaving a State, left his property in the care of an agent, with power to sell it, who transferred its care to a third person, and the owner wrote to the latter, "I wish you to manage my property as you would your own," "If a good opportunity offers, I would be glad to sell," "It may be parties will be glad to purchase;" this was sufficient authority to contract for the sale of it.

2. A deed, although invalid as a conveyance, may be good as a contract for the sale of the property described in it.

[No. 78.]

Submitted Nov. 21, 1878. Decided Jan. 13, 1879.

APPEAL from the Circuit Court of the United States for the Western District of Texas.

Statement of the case by Mr. Justice Field.

The appellant, Lyon, in 1873, recovered judgment in the Circuit Court of the United States against the appellees, Pollock and wife, in an action for two parcels or lots of land situated in the City of San Antonio, in the State of Texas. Thereupon the appellees brought the present suit on the equity side of the court to enjoin the enforcement of the judgment, and to compel a conveyance to them of the title to the land; or, if that relief could not be granted, to obtain a decree for the value of their improvements, in accordance with a statute of the State.

The bill of complaint states, as grounds for relief, that the judgment was obtained upon the trial of the legal title, and that their rights are of an equitable nature, constituting an equitable title to the land. It sets forth that on the 24th of August, 1865, Lyon, being owner of the lots, executed an instrument, a copy of which is appended and made part of the bill, authorizing one I. A. Paschal to sell any and all real estate of which he, Lyon, was then seised in the County of Bexar, in Texas, and that the premises in controversy are a portion of this property; that previously, and up to the first of July, 1865, one W. A. Bennett had been the attorney and agent of Lyon, having full power to manage, control and sell all or any portion of his property, real or personal; that about this time Bennett transferred the business of his agency to Paschal, and communicated the fact to Lyon; that the latter thereupon executed the instrument mentioned; that after this transfer and the delivery of the instrument, Paschal was treated and recognized by him as his duly authorized agent and attorney; and, as such, he sold the premises in controversy to the complainants in October, 1865, for the sum of \$425, and executed a conveyance to them.

The bill further states that Lyon subsequently made no claim to the lots, but acquiesced in

their sale, and did not attempt to exercise any control over them, nor pay any taxes on them; that the complainants at once took possession of the lots, and have since been in their undisturbed use and enjoyment, claiming the same as their own, and have paid the State, city and county taxes, and have made permanent improvements on them of the value of \$6,250; that the lots sold for their full value; and that Paschal used the money received from the sale, with Lyon's consent, in part payment of assessments on stock owned by him in the San Antonio Gas Company, a corporation existing in the County of Bexar.

The instrument mentioned in the bill as authorizing Paschal to sell Lyon's real estate is a letter of Lyon, of which the following is a copy, omitting immaterial portions:

"MONTEREY, August 24th, 1865.

I. A. PASCHAL:

MY DEAR SIR, I am just in receipt of a letter from Mr. Bennett, informing me that he has placed all my papers for safe-keeping in your possession. In better or safer hands he could not have given them. The position you have occupied during the past four years of the war is a very enviable one, as glorious as it has been dangerous. I congratulate you upon the issue. I am sure you have no reason to regret your decision to abide by the Union. * * * I am unable to go to San Antonio at present. My family are sick in the North, and demand my presence there. Mr. Kinney's death leaves a large business in my hands to be settled. I wish you to manage as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate. I shall be glad if you find time to write to me. If you will, give me a description of affairs as they exist at present. I shall probably remain here two months yet. * * * I enclose a letter for my wife. It is impossible to send letters by Matamoras. The road has been blockaded for a long time. If you have a regular mail, I shall be greatly obliged if you will mail this letter; if no mail, will you do me the favor to send by private hands to New Orleans?

Most resp'y yours,

I. L. LYON."

The previous power of attorney to W. A. Bennett authorized him to take charge of and control all Lyon's property of every kind, real and personal, in the County of Bexar, in Texas, and to sell and convey the same upon such terms and upon such conditions as he might deem best, and to collect and receipt for all debts, rents and profits due or to become due to Lyon, and to represent him in all matters relating to the stock of the gas company.

The answer of Lyon to the bill admits that on the 24th of August, 1865, he was the owner of the lots in controversy; that prior to the 1st of August of that year, W. A. Bennett was his lawful agent and attorney, authorized to manage his property, and sell it or any part of it; and that prior to the 24th of that month he transferred his papers to Paschal for safe-keeping; but it denies that the letter of attorney from him to Bennett contained any power of substitution. It admits the writing of the letter by him to Paschal acknowledging the receipt of Bennett's

letter, informing him of the transfer of the papers; but denies that he conferred, or intended by it to confer, any authority to sell the property, or that he afterwards treated or recognized Paschal as his agent or attorney with such authority. It also denies that Lyon ever ceased to regard the lots as his property, or that he has ever acquiesced in their sale; and avers that he was prevented from taking possession of the property after the sale only from fear of bodily harm. It also avers ignorance by Lyon of the payment of taxes on the property or of the alleged improvements; and that the payment of the taxes, and the improvements, if made, were without his knowledge or consent.

In explanation of his absence from Texas, the answer states that, when the rebellion broke out, it was known that he was a Union man, opposed to the secession movement, and that his life was in consequence threatened by a secret combination of men known as "The Knights of the Golden Circle," and that he was compelled to leave the country secretly and in haste; that after the war was at an end he believed that his life would have been in imminent danger had he returned to Texas and attempted to recover his property. It avers that if the money received by Paschal were appropriated for the payment of assessments upon stock of the San Antonio Gas Company, such disposal of it was unauthorized and without his knowledge or consent. It also refers to the judgment at law recovered by him in the Circuit Court of the United States for the lots in controversy, and insists that it settled all questions between the parties as to the property in suit.

To the answer a replication was filed and proofs were taken, which showed that rumors had reach Lyon as early as 1867 that sales of some of his real estate had been made by Paschal, and that assessments had been levied on his stock in the gas company, and generally tended to establish the allegations of the bill. In the opinion of the court below they sufficiently established the equitable right of the complainants to a conveyance of the premises from Lyon. A decree directing such conveyance, with a perpetual injunction against the enforcement of the judgment for the possession of the lands, was accordingly entered, from which the present appeal is taken.

Messrs. P. Phillips, W. Hallett Phillips and Jno. Hancock, for appellant.

No counsel appeared for appellees.

Mr. Justice Field, after stating the case, delivered the opinion of the court, as follows:

This case turns upon the construction given to the letter of Lyon to Paschal, of the 24th of August, 1865. That letter clearly did not authorize the execution of a conveyance by Paschal in the name of Lyon to the purchaser. Its insufficiency in that respect was authoritatively determined in the action at law for the lands; the instrument executed by Paschal as the deed of Lyon being held inoperative to pass the legal title. The question now is, was the letter sufficient to authorize a contract for the sale of the lots? To determine this, and give full effect to the language of the writer, we must place ourselves in his position, so as to read it, as it were, with his eyes and mind. It appears from his answer, as well as his testimony, that

he was in great danger of personal violence in San Antonio, shortly after the commencement of the rebellion, owing to his avowed hostility to secession, or at least that he thought he was in such danger. He apprehended that his life was menaced, and was in consequence induced to flee the country. He possessed at the time a large amount of property, real and personal, in San Antonio. This he confided to the care of his partner, Bennett, to whom he gave a power of attorney, authorizing him to take charge of and control the same, and sell it for whatever consideration and upon such terms as he might judge best, and execute all proper instruments of transfer; and also to collect and receipt for debts due to him. Bennett took possession of Lyon's property and managed it until July, 1865, when he transferred it, with the business and papers in his hands, to Paschal, and at once informed Lyon by letter of the transfer. It was under these circumstances that the letter of Lyon to Paschal, which is the subject of consideration, was written. Its language is: "I wish you to manage [my property] as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate."

Situated as Lyon then was, a fugitive from the State, it could hardly have been intended by him that if propositions to purchase his property or any part of it were made to Paschal, they were to be communicated to him, and to await his approval before being accepted. He was at the time at Monterey in Mexico and communication by water between that place and San Antonio was infrequent and uncertain; and he states himself that it was impossible to send letters by Matamoras, as the road was blockaded.

Writing under these circumstances, we think it clear that he intended by his language, what the words naturally convey, that if an opportunity to sell his property presented itself to Paschal, he should avail himself of it and close a contract for its sale.

His subsequent conduct shows, or at least tends to show, that such was his own construction of the letter, and that he approved, or at least acquiesced in, the disposition made of his property. He must have been aware, from the laws of the State, which he is presumed to have known, that taxes were leviable upon his property, and that unless they were paid the property would be sold for their payment; yet he confessedly took no steps from 1865 to 1873 to meet them, and thus prevent a forced sale of his property; a course perfectly natural if it be conceded that the property was in charge of an agent, with power to manage and sell it as his judgment might dictate. His indifference, also, after rumors reached him that a sale of his property had been made by Paschal in 1867, can scarcely be explained upon any other hypothesis. The same may be said of his inattention to the payment of the assessments upon his stock in the San Antonio Gas Company, of which he had received intimations. From the time Paschal took charge of his property, in 1865 to 1873, a period of eight years, he certainly manifested, if his own story be accepted, a most extraordinary want of interest in regard to his real property, of great value, situated in

See 9 OTTO.

an unfriendly community, subject to taxation, and liable to be sold if the taxes were not promptly paid; and also in regard to his personal property, consisting of shares in the San Antonio Gas Company, of great value, liable to assessments, and to sale if the assessments were not paid when due. It is much more reasonable to suppose that he knew of the sales made of the real property and of the assessments on the shares, and that he was undisturbed by the reports which reached him, because he considered that the sales were made and the assessments paid from the proceeds, by his authorized attorney.

The testimony of Bennett tends also to corroborate this view. He states that he knew from his correspondence with Lyon that he treated Paschal as his agent for the sale of his property. The conduct of Lyon, as expressive almost as any language which he could use, cannot, of course, change the construction to be given to the words contained in his letter to Paschal, but it tends to strengthen the conclusion as to the intention of the writer.

Holding the letter to confer sufficient authority to contract for the sale of Lyon's real property in San Antonio, there can be no doubt of the right of the complainants to the relief prayed. The deed executed to them by Paschal in the name of Lyon, though invalid as a conveyance, is good as a contract for the sale of the property described in it; and is sufficient, therefore, to sustain the prayer of the bill for a decree directing Lyon to make a conveyance to them and enjoining the enforcement of the judgment at law.

Decree affirmed.

NOTE—Lyon v. Hernandez, No. 49, was argued by the same counsel and decided with the foregoing as follows: This case involves the same question decided in Lyon v. Pollock and wife, and on the authority of that decision the decree herein is affirmed.

UNITED STATES, *Appt.*,

v.

JOSEPH S. FARDEN.

(See S. C., 9 Otto, 10-20.)

Deputy-Collector, pay of—suspension from office.

1. A Deputy-Collector of Internal Revenue, who performs the duties of the office of the collector during suspension from office of such collector, is entitled to receive the compensation of a collector.

2. Such suspension from office created such a vacancy, within the meaning of the Act of Congress, as to entitle the deputy to that compensation.

[No. 789.]

Submitted Jan. 8, 1879. Decided Jan. 20, 1879.

APPEAL from the Court of Claims.

The appellee filed his petition in the court below, for compensation for services as a collector. Judgment having been given in his favor, the defendants appealed to this court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellant.

Mr. I. G. Kimball, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Compensation of the Collector of Internal Revenue for the district, as fixed by the Secretary of the Treasury in lieu of the salary and commissions prescribed by law, is the annual sum of \$3,000. 13 Stat. at L., 231.

Such collectors may appoint as many deputies as they may think proper, to be by them compensated for their services. R. S., sec. 3148.

Deputy-collectors who, under the authority of law, perform the duties of a collector, in consequence of a vacancy in the office of collector, are entitled to receive the salary and commissions allowed by law to such collector, or the allowance fixed by the Secretary of the Treasury, as compensation to the collector, in lieu of the salary and commissions prescribed by Congress. R. S., sec. 3150; 15 Stat., at L., 282.

Charges of fraud were made against the Collector of Internal Revenue for the district, and he was suspended from his office by the supervisor, who made due report of his action in the premises to the commissioner. Pursuant to the Act of Congress, the Secretary of the Treasury, on the 26th of September, 1873, gave the plaintiff, who was the deputy-collector of the district, the following instructions: "You are hereby directed to perform the duties of the office of Internal Revenue Collector for the district, *vice* Francis Widner, suspended," which was accompanied with the statement that the order should take effect from the 23d instant, and that it would continue in force until some person should be designated or appointed to the office and duly qualified according to law.

By the finding of the court it also appears that the plaintiff as such acting collector performed the duties of collector of the district from the 23d of September, 1873, to and including nine days in the month of December following. From the 23d of September to the 15th of October he was only paid the compensation allowed to him as deputy-collector, and from that time to the 30th of the succeeding month he was paid the full compensation allowed to the collector, and for the remainder of the time of his service as collector he was paid nothing.

Appended to the findings of the court is their conclusion of law, which is that the claimant is entitled to recover \$163.05, in conformity with the opinion of the court as published in the transcript. Judgment was rendered in favor of the claimant for that amount, and the United States appealed to this court.

Appellants do not deny that the claimant performed the services alleged in the petition, but they allege that he is only entitled to compensation as Internal Revenue Collector for the period from October 15 to December 1, and that he has been fully paid for his services as such collector during that whole period, which proposition is sustained by the finding of the court below; but they assign for error that there was no vacancy in the office of collector for any other portion of the time during which the claimant performed the duties of collector.

Attempt is made in argument to support that theory by the third finding of the court from which it appears that the suspended collector died on the 16th of October next after he was suspended from office, and that his successor was appointed on the first day of the succeeding December, which is conceded; but the same

finding of the court shows that the new collector did not take possession of the office until ten days later, from which it appears that the finding of the court in respect to the first nine days of that month is correct to a demonstration.

Suppose that is so; still it is insisted in behalf of the appellants that there was no vacancy in the office of collector during the lifetime of the suspended collector, and that the judgment of the court below in allowing the claimant compensation as collector during the period from the suspension of the collector to his death is erroneous, which is the principal question in the case presented for decision. He was paid for his services during that period as deputy-collector, but the court below held that he was entitled to the compensation allowed by law to a collector, and gave judgment in his favor for the difference, adding thereto a collector's compensation for the nine days which elapsed after the new collector was appointed before he took possession of the office.

Two contingencies arise when the deputy-collector may perform the duties of such collector: (1) When the collector is sick, or is temporarily unable to discharge the duties of the office, the provision is that he may devolve the same upon one of his deputies, but the collector and his sureties in that case remain responsible for the official acts and defaults of the deputy. (2) In case of a vacancy in the office of the collector, when the senior deputy shall discharge all the duties of the collector, unless the Secretary of the Treasury shall direct that his duties shall be performed by some other one of the deputies, the enactment being that the deputy who performs the duty of the collector in consequence of a vacancy shall be entitled to receive the salary and commissions allowed by law to such collector. R. S., sec. 3149, 3150.

Supervisors at that period were empowered by notice in writing to suspend any collector of internal revenue from duty for fraud, or gross neglect of duty, or abuse of power, and it was made his duty immediately to report his action to the commissioner, with his reasons therefor, in writing. R. S., sec. 3163. Fraud was the accusation against the collector in this case, and it was for fraud that he was suspended from the office of collector, and it appears that the supervisor made due report in writing of his action to the commissioner.

Difficulties would attend the effort to define with precision precisely what relation the suspended individual bore to the office of collector or of internal revenue after the order of suspension went into practical effect, nor is it necessary, in the judgment of the court, to make any such attempt in the present case. Whatever the legal relation of the individual may have been in the strict technical sense, it is clear, we think, that for all practical purposes, during the continuance of the order of suspension, the office was vacant, and without any incumbent to discharge the duties which the law requires to be performed by the collector of the internal revenue. Plainly it was not a case of sickness, or temporary disability and, consequently, the duties were not devolved upon the deputy, as in that case made and provided.

Prompt report in writing was made by the supervisor to the commissioner; and the finding

of the court below shows that he immediately despatched a telegram to the agent of the Treasury Department to designate the claimant as acting collector from that date, and to put him in possession of the office. Exactly the same view of the subject was taken by the Secretary of the Treasury, as appears by his communication to the claimant, in which he said, "You are hereby directed to perform the duties of the office of collector of internal revenue, *vice* Francis Widner, suspended, and to continue in office until some person shall have been designated or appointed to the office and duly qualified according to law."

Nothing can be plainer in legal decision than the proposition that, unless the Secretary of the Treasury assumed that a vacancy existed in the office, he could not and would not have given the directions which are contained in that communication.

Under the Tenure of Office Act the President had the power at that time, which was during the recess of the Senate, to suspend the collector until the next session of the Senate, and the act of the Secretary, as the head of the Treasury Department, is presumed to be the act of the President. *Wilcox v. Jackson*, 13 Pet., 498.

Some support to the opposite theory, it is supposed, may be derived from the last clause of the 1st section of the original Act regulating the compensation to deputy-collectors in such cases, but the court here is entirely of a different opinion. By that clause it is provided that no such payment shall in any case be made where the collector has received or is entitled to receive compensation for services rendered during the same period of time. 15 Stat. at L., 282.

Grave doubts are entertained whether this provision can be construed to give any support to the theory of the defendants, that the collector is entitled to compensation for services rendered during the same period of time, as he rendered none; and inasmuch as he was suspended for fraud, it is difficult to see what claim he can have for the salary attached to the office during the period of his suspension, when the duties were performed by the deputy-collector. Even if the original provision could be interpreted as supposed, still the better opinion is that it is not in force. It was left out of the Act of Congress passed the next year to define the true intent and meaning of the provision, and is not contained in the Revised Statutes. 16 Stat. at L., 179; R. S., sec. 3150.

Suffice it to say that the court, in view of the whole case, is of the opinion that the claimant is entitled to receive the salary and commissions allowed by law to the Collector of Internal Revenue during the period that he performed those duties under the direction of the Secretary of the Treasury, as found by the court below, and that the suspension by the Supervisor of Internal Revenue, and the action of the Secretary of the Treasury directing him to continue in the office until a successor to the suspended officer was appointed and qualified, created such a vacancy, within the meaning of the Act of Congress, for all practical purposes in the administration of the duties of the office as entitles the claimant to that compensation. Assume that to be so, and it follows that there is no error in the record.

Judgment affirmed.

See 9 OTTO.

JANE QUINN, Admrx. *de bonis non* of DAVID QUINN, Deceased, Appt.,

v.

UNITED STATES.

(See S. C., 9 Otto, 30-34.)

Government contract—termination of—payment.

1. Where a government contractor failed to do his work within the time stipulated, and his contract was rightfully terminated by the officer in charge, he cannot recover from the Government the difference between the price at which he was to do it and the lower price at which it was relet.

2. It will be presumed that the officer in charge rightfully terminated the contract, unless it is impeached by satisfactory evidence, especially as the time limited for the completion of the work had passed.

3. But the Government must pay to the contractor the ten per cent. of the price of the work completed, retained by the Government as security, as the Government sustained no loss, but relet the work at a lower price.

[No. 110.]

Argued Jan. 8, 9, 1879. Decided Jan. 20, 1879.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Mr. T. D. Lincoln, for appellant.

Messrs. Charles Devens, Atty-Gen., and S. F. Phillips, Solicitor-Gen., for appellee.

Mr. Justice Miller delivered the opinion of the court:

On the 10th day of August, 1867, David Quinn, the appellant's intestate, entered into a written contract with J. B. Wheeler, of the engineer corps for the United States, to remove the rock at the entrance of Eagle Harbor, Michigan, and deposit it at such point as the engineer in charge should direct; and he agreed to commence the work on or before the first day of September thereafter, and complete the removal of the rock on or before October 1, 1868. "It was also agreed that if, in any event, the contractor shall delay, or be unable to proceed with the work in accordance with its terms, the engineer officer in charge shall have full right and authority to take away the contract, and employ others to complete the work, deducting the expenses from any money that may be due and owing him, and the contractor will be responsible for any damages caused to others by his delay or non-compliance."

He was to be paid for his work as sections of it were completed to the required depth, the Government reserving ten per cent. from such payments until the whole was completed and accepted.

Quinn having failed to complete the work by the first of October, it was taken from him on the 9th of November, 1868, and, after advertising, let to other parties. For all the work completed he was paid at the contract price, except that the Government retained ten per cent. on the estimated sum.

He brings this suit in the Court of Claims on the contract, and his petition being dismissed he appeals to this court.

He claims that he was wrongfully prevented from completing his work, and is entitled to the profits he would have made, to wit: \$58,682; or, if not this, that the United States, by letting the contract to other parties, had the work done

for \$33,060 less than they agreed to pay him, and he claims that sum. He claims, in any event, the ten per cent. retained, amounting to \$1,740.

In support of the claims for profits on work not performed by him, two propositions are advanced:

1. That although the time had elapsed within which claimant was bound by the contract to complete the work, and it was unfinished, the engineer had no lawful authority to terminate the contract, because the fault in the delay was in the Government and its officers.

2. That conceding the authority to terminate the contract was lawfully exercised, the consequence was that when the work was done by the Government, or by other contractors at its instance, such work was done at his risk of loss or of profit, and if, when finished, it cost the United States more than it would if done under his contract, he was responsible for the loss, and if done for less, the gain was his.

We cannot concur in this latter proposition.

It seems very doubtful if, in the event of the termination of his contract under the clause authorizing the engineer to do so, the contractor is liable to the United States for anything beyond the ten per cent. retained. This ten per cent. is retained, in the language of the contract, until the whole shall be completed. It is retained as security for that end. The work is to be completed by others, and the expenses deducted from any money that may be due him. He is to be responsible for damages caused to others by the delay. If, therefore, he is responsible to the United States beyond the sum due him at the time the contract is taken from him, it is not by the express terms of the contract, but on the general doctrine of damages on failure to fulfill any contract.

So, on the other hand, we think it equally clear that when his contract is rightfully terminated, he is entitled to no further rights in regard to its performance by others. The Government does not, by reason of being compelled by his failures to resume control of the work, do so for his benefit, but for its own. They do not thus become his agents to do the work for him which he failed to do, and let him reap the profits of a work which he refused or neglected to perform.

Nor are we able to see that the contract was wrongfully taken from him.

It may very well be contended that the engineer in charge is, by the agreement of the parties, made the judge of the existence of "such delay or inability to proceed with the work in accordance with the contract" as justifies him in taking it away, and that his action in that regard is conclusive. But the counsel for the United States have not assumed that ground here and it is not necessary to the decision of the case.

It may be safely asserted however, that it will be presumed that his action was well founded until it is impeached by satisfactory evidence, and especially where, as in this case, the time limited for the completion of the work had passed. Such evidence is wanting in this case. It is true that there was some delay in the autumn of 1867 on the part of the engineers in locating the precise point where the rock was to be excavated and in determining the low water-

mark with reference to which all the work was to be done, and this was not perfected until February, 1868. But there is no evidence that Quinn demanded that this should be done sooner, or that he desired to commence his work earlier.

There is satisfactory evidence that his delay was caused mainly, if not solely, by his inability to procure the nitro-glycerine which, under his plan of working, was the only explosive that he could use. He had the entire work honey-combed with cells drilled for the reception of this explosive in due time, and if he could have procured it, would have completed the work in time, or at least his contract would not have been taken away. The excuse is that the party who had contracted to deliver the nitro-glycerine failed in business and failed to deliver. But the authority of the engineer to terminate the contract did not depend on the value of excuses or the difficulty of performance. He had "full right and authority" to do this for inability to proceed with the work according to the contract, as well as for delay.

There was both delay and inability in this case, and we do not see that they were due to any failure on the part of the Government.

In this connection it is said that Quinn should receive pay for the holes drilled for reception of the explosive in that part of the work not completed when it was taken from him. But the finding of the Court of Claims is that this was not used by the Government or by the subsequent contractor, because the latter used gunpowder, which could not be profitably exploded in the holes drilled for the nitro-glycerine.

We think that the Court of Claims was right in rejecting the first two items of the claim as we have mentioned them.

But it is otherwise with regard to the ten per cent. of the price of the work completed, retained by the Government.

We have already seen that this was retained for the purpose of securing the completion of the work, and that if not completed by the contractor it was to be used in paying the expenses of such completion. In our view, it is a fair construction of this part of the agreement that the money retained under it is for security that the contractor will not abandon his work, but will proceed in it with due vigor, and for indemnity to the United States in case he fails to do this. Unless, therefore, the Government has sustained some loss, some pecuniary or legal damage by his failure, the money which he has fairly earned should be paid to him when the work which he agreed to do has been completed, though by others. In the case before us the United States made a clear gain of \$33,000 by taking away his contract and making a new and more advantageous one with another person. Under such circumstances, the United States no longer has a right to the money withheld for indemnity and security, because the risk is over, the event has occurred, and instead of loss or damage there has been a gain by the transaction.

The judgment of the Court of Claims dismissing the petition is, therefore, reversed and the case remanded to that court, with directions to render a judgment for claimant for the sum of \$1,740.

FREDERICK W. BIEBINGER, Assignee of
YEAGER & Co., *Appl.*,
v.
THE CONTINENTAL BANK OF ST.
LOUIS.

(See S. C., 9 Otto, 143-146.)

Pledge, how may be released.

Where a bank, as collateral security for a debt due it, holds a note secured by mortgage, and the debtor who has thus pledged them, procures them from the bank for the purpose of foreclosing and collecting them, and gives the bank a receipt, agreeing to return them, or their proceeds, the payment of the amount of the debt to the bank discharges the receipt, and releases the note and mortgage from the pledge.

[No. 107.]

Argued Jan. 8, 1879. Decided Jan. 27, 1879.

A PPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Messrs. J. O. Broadhead, Slayback and Haessler, for appellant.

Messrs. Hitchcock, Lubke and Player, for appellee.

Mr. Justice Miller delivered the opinion of the court:

The partnership firm of Yeager & Co., composed of Yeager and Crandall, were declared bankrupts October 24, 1873, by the District Court of the Eastern District of Missouri, and the appellant duly appointed assignee. At the time of their failure Yeager and Company had the legal title to a mill in Washington County, Illinois, and the Continental Bank, the appellee, filed its bill in chancery in the Circuit Court for the Eastern District of Missouri, against the assignee, alleging a large indebtedness of the bankrupts to the Bank, for the security of which they were entitled to an equitable lien on the mill property in Illinois, above mentioned.

The facts as recited in the bill, out of which this lien is said to arise, are shortly these: For several years prior to 1871 the bankrupts had been doing business with the Bank and had a line of discounts amounting generally to up-

wards of \$50,000. There had also been on deposit with the Bank as collateral security for this current indebtedness, among other paper of the same kind, a note of Harriman & Co. to Yeager & Co. for \$20,000, secured by a mortgage on the mill. This note being overdue and unpaid, Yeager & Co. applied to the Bank for its delivery to them that they might foreclose the mortgage and collect the money, promising to pay the money if collected, or return to the Bank whatever might be recovered in the foreclosure proceeding. The Bank complied with this request, taking a receipt from Yeager & Co., which will be presently considered, dated February 11, 1871. The mortgage was foreclosed, the property sold and bought in by Yeager & Co., who on the 6th of December, 1872, received in their own name the master's deed, which was duly recorded in Illinois, December 20, 1872.

It is further alleged that shortly after this deed was made to Yeager & Co., it was, at the suggestion of the Bank, delivered to it, and remained there until suspicion was excited that this deposit might not give them a lien on the property. A mortgage of the property to the Bank was drawn up by its attorney, which one of the bankrupts promised should be executed, but which was not done; and matters remained in this condition when the bankruptcy proceeding was instituted, at which time, as the bill states, the bankrupts were indebted to them over \$40,000.

Pending the litigation, the property was sold under a stipulation for \$7,369.90, and the money paid into court; and for this sum a final decree was rendered in favor of the bank, from which this appeal is taken.

The assignee filed an answer, which is an affirmation of ignorance of the facts alleged, and putting them in issue.

Most of the matters stated in the bill are supported by the evidence. The original pledge of the note and mortgage of Harriman, their withdrawal under a promise to return them or their proceeds, or to supply their places by some equivalent, seem fairly established. The purchase of the mill property under foreclosure proceedings, the deposit of the master's deed with the Bank, and the indebtedness of Yeager

NOTE.—Equitable mortgage by deposit of title deeds.

In England, a deposit of the title deeds of an estate as security for a debt, creates a lien which is considered an equitable mortgage. *Hales v. Van Berchem*, 2 Vern., 618; *Ex parte Coming*, 9 Ves., 117; *Natl. Bk. v. Cherry*, 3 L. R. P. C., 299; *Ex parte Holthausen*, 9 L. R. Ch. App., 728; *Whitbread v. Jordan*, 1 Young & C., 303; *Russell v. Russell*, 1 Bro. C. C., 269; *Lon., etc., Bk. Co. v. Ratcliffe*, 6 App. Cas., 722; *Lacon v. Allen*, 3 Drew, 579; *Fitzjames v. Fitzjames*, Finch, 10; *Ex parte Whitbread*, 19 Ves., 212; *Ex parte Haigh*, 11 Ves., 403.

The deposit will create an equitable mortgage for the debt actually due, although not a word passes at the time of the delivery. *Ex parte Langston*, 17 Ves., 230; *Monkhouse v. Corp. of Bedford*, 17 Ves., 331; *Ex parte Kensington*, 2 Ves. & B., 83.

If the deposit was accompanied by a written document, the terms of that document govern. *Shaw v. Foster*, 5 Law R. H. L., 321; S. C., 2 Moak's Eng., 1; See *Baynard v. Woolley*, 20 Beav., 563.

The deposit must be for a present and immediate security. *Norris v. Wilkinson*, 12 Ves., 192.

The deposit may be with the creditor or with some third person not connected with the depositor. *Ex parte Coming*, 9 Ves., 115; *Ex parte Whitbread*, 19 Ves., 212.

See 9 OTTO.

The deposit and lien may be transferred by delivering over the deeds to another party. *Ex parte Smith*, 1 Ves. & B., 518.

The doctrine of equitable mortgage by deposit of title deeds, has been in many instances rejected in the United States as having no application under the registry laws. *Sidney v. Stevenson*, 11 Phila., 178; *Vanmeter v. McPaddin*, 3 B. Mon., 437; *Gardner v. McClure*, 6 Minn., 250; *Shitz v. Dieffenbach*, 3 Pa. St., 233; *Probasco v. Johnson*, 2 Disn., 96; *Meador v. Meador*, 3 Heisk., 562.

There are instances, however, where mortgages thus created have been sustained. *Carpenter v. Black Hawk Min. Co.*, 65 N. Y., 51; *Carey v. Rawson*, 8 Mass., 159; *Griffin v. Griffin*, 18 N. J. Eq., 104; *Gale v. Morris*, 29 N. J. Eq., 222; *Jackson v. Parkhurst*, 4 Wend., 369; *Rockwell v. Holby*, 2 Sand. Ch., 9.

By deposit of title deeds, mortgagor contracts that his interest shall be liable for the debt, and that he will make the necessary conveyance to vest his interest in the mortgagee, but not that he will make a perfect title. *Pryce v. Berry*, 2 Drew, 41.

An equitable mortgage created by deposit of title deeds must be foreclosed by a suit in equity to establish the lien. *Jarvis v. Dutcher*, 16 Wis., 307.

& Co. at the time of their failure, to the Bank, are sufficiently proved. It would seem, under these circumstances, that the equitable lien asserted by complainants in their bill is established. But there is one fatal defect in the grounds on which this equity rests.

It is established, we think, by the evidence of complainant's witnesses, the officers of the Bank, that every dollar of the indebtedness of Yeager & Co., existing at the time they withdrew the note and mortgage of Harriman, was fully paid off and discharged before they purchased the mill and received the title, and that a total interruption or suspension of loans or discounts took place in the summer of 1872.

It is impossible to hold, under these circumstances, that for a new debt made on a renewal of business relations, the Bank retained any lien on the note and mortgage which had been delivered up, or on the proceeds of the foreclosure sale. All that it stood for when so delivered up had been paid. By this payment the lien was released or discharged. To test this proposition, let us suppose that when the master's deed came to the hand of the bankrupts there had been \$10,000 due the Bank, for which the original note and mortgage had been pledged to the Bank, and the Bank had demanded of Yeager & Co. a compliance with their promise to place in their hands the proceeds of the foreclosure. Can it be doubted for a moment that Yeager & Co. by paying the \$10,000 due would have fulfilled their promise, and would have been released from any obligation to give a lien on the mill property?

The language of the receipt given by Yeager & Co. when the original note and mortgage were delivered to them show this very clearly. It says: "Whereas, the subscribers being indebted to the National Loan Bank of St. Louis (afterwards the Continental) to a considerable amount on sundry notes and drafts, and having given said Bank the following described notes, secured by a deed of trust to secure said Bank against loss, which have been delivered to said Yeager & Co. for the purpose of disposing of them," they agree if they do not return them in a reasonable time to replace them by others of equal value.

Now, what was secured by the notes and mortgage? Clearly the amount they then owed, evidenced and identified by notes and drafts then in existence. Not only is there here no allusion to security for any future transactions, but the parties acted on this idea; for during the two years they were engaged in foreclosing the mortgage, not only were all these notes and drafts paid, but there was a period of some months in which the bankrupts owed the Bank nothing, and in which there was no business transacted between them. This is sworn to clearly by the cashier of the Bank, who says there was quite a number of months we did not see the bankrupts in the Bank. Mr Yeager, the bankrupt, testifies to the same thing, namely: that for a long time during this period the Bank stopped taking paper from them, and it was all paid up. Mr. Crandall declares that none of the paper held by the Bank at the date of their failure was for money discounted in 1872, and that they owed them nothing which they owed them in 1872. It is true the president of the Bank suggested rather than affirmed that renewals

ran into the present time, but refused on request to produce the books or transcripts from them to show this fact. The cashier, whose deposition was taken a second time, after full opportunity to examine the books, did not retract or modify his first declaration on this subject.

We are of opinion, therefore, that there was no lien for the Bank's debt growing out of the original pledge of the note and mortgage of Harriman, or of any promise made when it was returned to Yeager & Co.

As regards the subsequent transactions, there are no allegations in the bill which would bring the case within the principle of an equitable mortgage by deposit of title deeds, if that doctrine is recognized in the State of Illinois, where the land lies, or of Missouri, where the transaction occurred. There is no allegation of money loaned or debt created on the faith of the deposit of this deed. On the contrary, the allegation is that the bankrupts owe complainants over \$30,000, which will be wholly lost unless the assignee be compelled to perform the contract of February 11, 1871, which was the date of the receipt taken from Yeager & Co. when the note of Harriman was returned to them. And the prayer of the bill is for specific performance of that contract. No such suggestion is made in argument, and no proper foundation for relief on that ground being found in the bill, it is unnecessary to consider it here.

The decree of the Circuit Court is, therefore, reversed and the case remanded, with directions to dismiss the bill.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, *Plff. in Err.*,

v.

SEYMOUR J. MCKINLEY.

(See S. C., 9 Otto, 147-149.)

Removal of causes—second trial—rehearing.

1. Under the Act of March 2, 1867, a cause can be removed from a state court to the circuit court after a trial and judgment in the state court if, before the removal, the first judgment had been set aside or vacated and the right to a new trial perfected.

2. After one trial, the right to another must be perfected before a demand for removal can be made.

3. Where, after a judgment was reversed and new trial granted in the state court, and a petition for removal to the circuit court had been filed, a rehearing was had in the state court and the judgment modified, the proceedings operated as a revocation of the order for a new trial and took the case out from under the petition for removal.

[No. 145.]

Argued Jan. 23, 1879. Decided Jan. 27, 1879.

IN ERROR to the Supreme Court of the State of Iowa.

The case is fully stated by the court.

Messrs. B. C. Cook and N. M. Hubbard, for plaintiff in error.

Messrs. O. P. Shiras, and D. B. Henderson, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

In *Ins. Co. v. Dunn*, 19 Wall., 214 [86 U. S., XXII., 68], it was held that under the Act of March 2, 1867, 14 Stat. at L., 558, a cause could be removed from a state court to the circuit court after a trial and judgment in the state court, if before the removal the first judgment had been set aside or vacated, and the right to a new trial perfected, and in *Vannevar v. Bryant*, 21 Wall., 41 [88 U. S., XXII., 476], that after one trial the right to another must be perfected before a demand for removal could be made.

In this case there had been one trial and a judgment in the state court before the petition for removal was filed. Upon appeal to the Supreme Court of the State an order was obtained reversing this judgment, and remanding the cause for a new trial. As soon as this order of reversal was made, the Company obtained from the clerk of the Supreme Court a writ of *procedendo*, and filed it in the clerk's office of the court below, that court not being at the time in session. This being done, the Company filed in the clerk's office below, the court still not being in session, a petition under the Act of March 3, 1875, 18 Stat. at L., 470, accompanied by the necessary bond, for the removal of the cause to the circuit court.

Under the practice in Iowa, a petition for rehearing may be presented to the Supreme Court at any time within sixty days after the filing of the opinion in the case; and when presented, the court if in session, or a judge if in vacation, may order a suspension of the decision until the next term. In this case, before the expiration of the sixty days, but after the filing of the writ of *procedendo* and the petition for removal in the clerk's office below, a petition for rehearing was filed in the Supreme Court, and an order suspending the decision until the next Term obtained. At the next Term the Railroad Company appeared and moved to dismiss the petition for rehearing, on the ground that the cause had been removed to the circuit court before the petition was filed, and the Supreme Court had, consequently, no longer any jurisdiction. This motion was denied, and afterwards upon the rehearing, McKinley the plaintiff below having consented to a reduction of the verdict in his favor from \$12,000 to \$7,000, a judgment was entered in the Supreme Court for the reduced amount, in accordance with the opinion originally filed.

We think this brings the case within the rule as laid down in *Vannevar v. Bryant*, *supra*. A right to a new trial had not been perfected absolutely when the petition for removal was filed. The Supreme Court still retained jurisdiction of the cause for the purpose of a rehearing; and when it did rehear and set aside its former order of reversal, the case occupied the same position it would if the final judgment of that court had been the one originally entered. The subsequent judgment operated as a revocation of the order on the court below to proceed, and consequently took the case out from under the petition for removal.

We think, therefore, that the Supreme Court had jurisdiction of the cause when its final judgment was entered and, consequently, that there is no error in the record which we can re-examine. The view we have taken of the case makes it unnecessary to consider whether the filing of the petition for removal in the clerk's office, the

court not being in session, was sufficient of itself to effect a removal.

Affirmed.

Mr. Justice Strong did not sit in this case.

Cited—6 N. W. Rep., 201.

UNITED STATES, *Plff. in Err.*,

v.

ADAM GLAB.

(See S. C., 9 Otto, 225-229.)

Tax on brewers.

Where a firm of brewers consisting of two partners have paid the special tax imposed by Congress, and one of the firm purchases the interest belonging to the other, such one may carry on the same trade or business at the same place for the balance of the term for which the tax is paid, without further payment of tax.

[No. 566.]

Submitted Jan. 13, 1879. Decided Jan. 27, 1879.

ERROR to the Circuit Court of the United States for the District of Iowa.

The case is fully stated by the court.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. T. S. Wilson and *D. B. Henderson*, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Brewers are properly regarded as included within the prohibition that no person, firm, company or corporation shall be engaged in or carry on any trade, business or profession until he or they shall have paid a special tax therefor in the manner provided in the Act containing that prohibition. 14 Stat. at L., 113; R. S., sec. 3232.

Persons engaged in business subject to such special tax, are required to register with the collector of the district their names, style, place of residence, trade or business, and the place where such trade or business is to be carried on; and the provision is that in case of a firm or company the names of the partners or persons constituting the same and their places of residence shall also be given, but that only one special tax shall be required of a partnership doing business at only one place.

By the record it appears that the suit in this case was commenced in the district court, and that it was submitted and tried upon an agreed statement of facts, which is, in substance and effect, as follows: that the defendant was the senior member of the firm named in the record; that the firm, prior to May, 1873, had been engaged in the business of brewing, and that they on that day paid the special tax as brewers of the first class for one year from that date, and took the proper receipt for the payment of the same; that they continued to prosecute the business for about three months thereafter, when the firm dissolved, and the defendant, having purchased the interest of the junior partner in the business, carried on the same in his own name at the same place for the balance of the year covered by the receipt, without again paying a special tax. Hearing was had, and the district

court rendered judgment for the defendant; and the plaintiffs excepted to the ruling, and removed the cause into the circuit court, where the parties were again heard, and the circuit court affirmed the judgment of the district court.

Cases of the kind do not require a new bill of exceptions in the circuit court, as the hearing in this court, when the cause is removed here, is upon the bill of exceptions filed in the district court. Pursuant to that rule, the cause was removed into this court by the present writ of error, and the plaintiffs assign for error that the judgment which was for the defendant should have been in favor of the plaintiffs.

Licenses were granted in such cases by the prior Act, which in substance and legal effect was the same as the Act under consideration, except that the term "special tax" is used in the place of the word "license." 13 Stat. at L., 248; 14 Stat. at L., 113; R. S., sec. 3232.

Persons, firms, companies or corporations who manufacture fermented liquors of any name or description, for sale, from malt wholly or in part, or from any substitute therefor, shall be deemed brewers; and the provision is that brewers shall pay a special tax of \$100, subject, of course, to the rule that no partnership doing business only at one place shall be required to pay more than one tax. When any person who has paid the special tax for any trade or business dies, his wife or child, or executors or administrators or other legal representatives, may occupy the house or premises and in like manner carry on, for the residue of the term for which the tax is paid, the same trade or business as the deceased before carried on in the same house and upon the same premises, without the payment of any additional tax.

Exemption from any additional tax is also allowed when any person removes from the house or premises, for which any trade or business was taxed, to any other place; and in such event the provision is that he may carry on the specified trade or business in the place to which he removes without paying any additional tax under the regulations set forth in the proviso to the same section. R. S., sec. 3241.

Enough appears in those provisions to show beyond all controversy that it is not the policy of the Legislative Department of the Government to require the honest manufacturer to pay the special tax twice. Concede that, and still it is contended that the case of the defendant is not within the words of those exemptions, which may be safely admitted; but it is equally clear that the words of the Act do not provide that in a case where a firm consisting of two partners have paid the special tax, and one of the firm purchases the interest belonging to the other, that the one who becomes the sole and exclusive owner of the trade or business may not carry on the same trade or business at the same place for the balance of the term for which the tax is paid.

Difficulty, undoubtedly, would arise if the partner remaining should associate with him another in the place of the outgoing partner, or if any change should be made in the trade or business, or if any change should be made in the place or premises where the trade or business was carried on, or where there was any just ground to conclude that it would open the door to any fraud or imposition, or to any loss

of revenue or inconvenience to the revenue officers.

Nothing of the kind is charged in this case, nor is there any ground to suspect anything of the kind in view of the facts exhibited on the agreed statement. No new member was admitted into the firm when the junior partner went out, nor is it pretended that the retiring partner ever attempted to pursue the business or trade in any other place, which it seems to the court brings the case within the equity of the provision that the firm, though consisting of several members, may do business at one place without being required to pay more than one special tax.

Suppose the outgoing partner had died before the partnership had been dissolved, no one, it is supposed, would contend that the survivor would be required to pay another special tax for the balance of the term covered by the receipt held by the firm for the tax paid while both partners were in full life, and the court is of the opinion that the equity of the case disclosed in the record is equally strong in favor of the defendant.

Viewed in the light of these suggestions, it is clear that the United States lost nothing by the transaction, and the court is of the opinion that there is no error in the record.

Judgment affirmed.

THE UNION PACIFIC RAILROAD COMPANY, *App't.*,
v.

UNITED STATES.

(See S. C., 9 Otto, 402-434.)

Union Pacific Railroad bonds—earnings of road—priority of payment of bonds.

*1. The Act of Congress, passed July 1, 1862, to aid in the construction of a railroad to the Pacific Ocean, after granting certain lands and a loan of government bonds to be received by the Union Pacific and other railroad companies from time to time as successive sections of road should be completed, required the companies to perform all government transportation, of mails, troops, etc., and to credit the compensation therefor on the government loan; and then added that "After the road is completed, until said bonds and interest are paid, at least five per cent. of the net earnings of said road shall also be annually applied to the payment thereof."

Held: That the road was completed for the purpose of this payment to begin, when reported by the Company to be completed, and accepted by the President of the United States for the purpose of issuing the government bonds, though the acceptance was provisional and security was required that all deficiencies in construction should be supplied.

2. The Company, having duly presented its road as completed, and having obtained the subsidy and agreed that certain security should be retained by the Government for the ultimate completion of defective parts, was held to be estopped from denying that the road was completed.

3. The "earnings" of the road include all the receipts arising from the Company's operations as a railroad company, but not its receipts from the public lands granted, nor fictitious receipts for the transportation of its own property. "Net earnings," within the meaning of the law, are ascertained by deducting from gross earnings all ordinary expenses of organization and of operating the road, and expenditures *bona fide* made in improvements,

* Head notes by Mr. Justice BRADLEY.

and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the Company.

4. The government bonds issued to the Company were declared to be a first lien on the road and property; the Act of 1864 authorized the Company to issue an equal amount of first mortgage bonds, to have priority over the government bonds. *Held*, that this priority authorized the payment of the interest accruing on these first mortgage bonds out of the net earnings of the road, in preference to the five per centum payable to the Government, which is only demandable out of the excess in each year.

[No. 736.]

Argued Dec. 3, 4, 1878. Decided Jan. 27, 1879.

A PPEAL from the Court of Claims.
The case is stated by the court.

In addition, is here given the 18th finding of the court below, to certain items of which reference is made in the opinion.

"XVIII. The total amount of the earnings, and the total amount of the expenditures of the Union Pacific Railroad Company, annually and for each year, from November 6, 1869, to November 5, 1875, both inclusive, were as shown in this finding. And the respective amounts which should be deducted from such total amounts respectively, as one theory or another may be adopted for ascertaining net earnings, were also, during each and all the said periods, as shown in this finding, either in the tables or in the statements herein contained.

A.—Earnings.

	Nov. 6, 1869, to Nov. 5, 1870.	Nov. 6, 1870, to Nov. 5, 1871.	Nov. 6, 1871, to Nov. 5, 1872.	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
1 Commercial passenger earnings.....	\$3,643,228.01	\$2,991,881.47	\$2,949,582.94	\$3,616,344.61	\$3,635,157.54	\$4,179,364.69
2 United States passenger earnings.....	271,811.24	198,291.64	297,632.63	282,543.94	275,952.22	161,486.64
3 United States mail earnings.....	271,352.04	285,019.98	283,855.00	283,855.01	339,450.11	325,142.99
4 Express earnings.....	284,841.75	308,472.23	323,772.75	408,383.13	377,179.20	447,026.41
5 Commercial freight earnings.....	2,668,143.60	2,906,005.48	3,870,402.07	4,773,303.86	4,760,947.74	5,743,020.10
6 United States freight earnings.....	236,047.98	227,985.40	156,701.59	218,140.45	286,555.40	224,046.61
7 Company freight earnings.....	482,387.43	362,414.58	403,591.90	485,734.02	506,098.53	657,641.92
8 Telegraph earnings.....	9,380.01	1,819.86				
9 Ferry earnings.....	65,347.61					
10 Omaha Bridge earnings.....			218,176.46	378,421.23	393,654.62	464,328.07
11 Car service earnings.....	58,243.38	48,409.30	16,309.20	14,835.35		27,931.63
12 Miscellaneous.....	116,300.14	94,610.20	112,920.09	140,039.31	218,942.15	166,696.94
13 Rent of buildings at <i>terminal</i> , or on line of road.....	18,129.25	16,915.06	16,930.54	16,165.01	17,502.90	24,652.98
14 Surplus in fuel and material accounts.....		121,181.41	9,156.49	68,351.34	22,611.08	59,865.50
Totals.....	\$ 8,125,212.40	\$ 7,563,006.59	\$ 8,659,031.66	\$ 10,666,117.26	\$ 10,834,651.49	\$ 12,481,204.48

Items—10 and 14 are not in dispute.

As to item 7, fifteen per cent. should be deducted from the several items of earnings from company freight, in case the items for tenement houses and hotels, new station buildings, tanks and water tanks, "Laramie rolling-mills, and expenditures for station buildings, shops and fix-

tures," etc., which are included below in expenditures, be disallowed.

Item 11, "Car service earnings," was the amount received for the use of cars by other companies. Item 12 includes, among others, the following earnings:

	Nov. 6, 1869, to Nov. 5, 1870.	Nov. 6, 1870, to Nov. 5, 1871.	Nov. 6, 1871, to Nov. 5, 1872.	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
Switching freight cars and hauling special cars for other roads.....	\$ 24,147.49	\$ 24,362.43	\$ 16,376.33	\$ 22,956.50	\$ 19,337.99	\$ 23,033.84
Received from other railroad companies for use of sidings, labor of men, selling tickets, handling baggage, transferring freight, etc.....	5,737.34	13,945.56	29,100.42	17,026.48	16,753.51	16,514.38
Rental of engines and cars.....	10,909.99	5,619.52	11,822.38	25,213.24	14,738.03	15,721.00
Dividends from stock of Pullman Pacific car company.....	23,400.00					
Totals.....	\$ 64,194.82	\$ 43,927.51	\$ 57,299.13	\$ 65,196.22	\$ 50,829.53	\$ 55,269.22

And item 13 was the amount received for rent of tenement houses and eating houses. It is in dispute whether these several amounts in

items 11, 12 and 13 should be included in gross earnings.

B.—Expenditures. Same time.

1	Conducting transportation expenses	\$ 829,771.15	\$ 671,194.53	\$ 746,950.28	\$ 759,426.61	\$ 760,646.38	\$ 917,250.86
2	Motive power expenses	1,778,601.44	1,229,048.51	1,681,610.17	1,754,271.78	1,585,962.21	1,811,629.48
3	Maintenance of cars expenses	608,622.90	302,225.09	367,584.14	436,332.64	429,562.89	567,566.25
4	Maintenance of way expenses	1,403,090.28	995,683.49	1,551,999.92	1,700,434.97	1,700,481.14	1,910,420.20
5	General expenses, including taxes	445,119.88	397,651.07	353,556.19	263,976.69	405,813.19	446,519.10
6	Ferry expenses	54,714.88					
7	Deficiency in fuel and material acct.	75,577.54					
8	Legal expenses	85,508.81	48,807.41	57,698.94	12,852.55	25,246.43	53,016.88
9	United States Revenue stamps	6,639.32	926.02	1,866.72	326.85		
10	Salary account	16,355.90	53,522.39	28,725.86	24,866.69	54,218.18	32,750.83
11	Government Directors	3,655.80	3,115.00	6,047.00	4,561.00	3,301.75	4,180.45
12	Government Commissioners	2,391.15					722.40
13	Expense account	20,057.18	24,241.41	12,194.07	21,237.90	26,873.24	17,971.73
14	Telegraph earnings refunded			3,294.23			
15	Omaha Bridge, expenses of operating			89,621.97	247,680.10	201,814.87	234,683.12
16	Car service					21,780.78	
17	Discount and interest on floating debt	409,668.66	188,136.73	142,267.54	340,506.40	308,765.60	61,545.17
18	Expenses of land and town lot departments	41,524.47	60,824.89	87,795.12	89,768.58	104,888.00	141,482.34
19	Taxes on lands and town lots	35,778.90	85,105.49	88,610.97	1,066.88	1,262.64	169,773.68
20	Interest on first mortgage bonds	2,015,326.23	1,715,200.96	1,657,386.75	1,633,020.00	1,633,410.00	1,634,100.00
21	Interest on land grant bonds	553,947.91	601,647.34	641,209.01	585,061.53	576,765.00	546,175.00
22	Interest on income bonds	673,233.41	882,306.95	935,550.00	935,641.06	778,348.00	450.00
23	Interest on sinking fund bonds					157,912.00	1,021,388.88
24	Interest on Omaha Bridge bonds			98,480.00	196,957.24	194,841.01	190,278.38
25	Premium on gold to pay coupons		117,569.84	149,278.18	264,963.27	235,971.97	301,786.53
26	Construction of Omaha Bridge				24,334.25	4,390.00	
27	Expenditures for station buildings, shops and fixtures, etc., as per statement attached	896,977.03	66,849.73	497,875.85	155,739.72	117,124.57	2,810.17
28	Requirements of sinking funds for the redemption of funded debts: Omaha Bridge bonds			38,000.00	41,000.00	44,000.00	47,000.00
	Sinking Fund Mortgage bonds						144,000.00
29	Premium on Omaha Bridge bonds redeemed				12,218.00	10,762.50	12,513.32
30	United States interest half transportation accounts charged during the year	324,697.40	527,799.06	335,181.24	562,569.93	364,971.73	358,193.39
	Totals	\$ 10,287,954.25	\$ 7,942,755.88	\$ 9,572,784.15	\$ 9,968,854.70	\$ 9,809,105.08	\$ 10,628,208.16

Detail of expenditures for station buildings, etc., constituting item 27 above. Same time.

1	Station buildings	\$ 249,384.74	\$ 48,286.40	\$ 119,795.14	\$ 14,580.81		
2	Shops and fixtures	40,618.27	94,855.51	106,067.83	2,744.02	\$ 1,718.32	
3	Equipment	109,933.18		47,598.03	8,380.72	93,213.18	
4	Government Commissioners	91.80					
5	Fencing	72,763.20	956.50	505.44			
6	Snow sheds and fences	200,147.90	5,787.67	116,770.54	66,969.23		
7	Express outfit	7,136.41					
8	Engineering	13,880.90	11,599.75	8,247.98	102.87		\$ 2,810.17
9	Bridging	124,047.59			11,480.85		
10	Car shops and sheds	12,938.08	6,661.86	23,234.63	1,020.26		
11	Roadway and track	64,426.30		31,885.19	16,550.09		
12	Hotels	1,548.66					
13	Tenements		15,759.26	40,775.37	403.00		
14	Coal sheds			2,905.70	11,006.63		
15	Omaha depot buildings				7,821.07	37,255.16	
16	Omaha general offices				14,977.55	6,896.46	
17	Real estate					12,525.00	
18	Laramie rolling-mill					16,550.33	
19	Water works					8,966.12	
		896,977.03	183,906.95	497,875.85	156,088.10	177,124.57	2,810.17
	Less receipts and expenditures.						
20	Equipment		111,430.40				
21	Fencing				298.38		
22	Roadway and track		5,626.82				
			117,057.22		298.38		
	Totals of Item No. 27	\$ 896,977.03	\$ 66,849.73	\$ 497,875.85	\$ 155,739.72	\$ 177,124.57	\$ 2,810.17

Items 5—12, 14 and 15 are not in dispute.

Item 1, "Conducting transportation expenses," is liable to be reduced by the amounts shown in line 1 of the tables below, as expended for tenement houses and hotels, and by the amounts shown in line 2 as expended for new station buildings. Item 2, "Motive power expenses," is liable to be reduced by the amounts shown in line 3 as expended for engine equipment, and by the amount shown in line 4 as expended for tanks and water works. Item 3, "Maintenance of cars expenses," is liable to be reduced by the amounts shown in line 5 as expended for car equipment. Item 4, "Maintenance of way expenses," is liable to be reduced by the amounts shown in line 6 as expended for the "Laramie rolling-mills," in case such several and respective outlays are regarded as not proper to be deducted from gross earnings in order to arrive at net earnings.

	Nov. 6, 1872, to Nov. 5, 1873.	Nov. 6, 1873, to Nov. 5, 1874.	Nov. 6, 1874, to Nov. 5, 1875.
1 Tenement houses and hotels.....	-----	\$ 1,659.96	\$ 21,229.53
2 New station buildings.....	\$ 6,909.98	18,146.77	78,589.57
3 Engine equipment.....	-----	25,398.69	63,277.70
4 Tanks and water works.....	-----	734.99	12,450.13
5 Car Equipment.....	-----	3,600.00	206,930.36
6 Laramie rolling-mills.....	-----	43,716.01	149,859.30

Item 13, "Expense account," is subject to be reduced by the following amounts in case such outlays are regarded as not proper to be deducted from gross earnings in order to arrive at net earnings, viz.: in the year, November 6, 1869, to November 5, 1870, expenses relating to an issue of bonds, \$10,339.76; March 13, 1871, cost of a plate for the bridge bonds, \$1,500; June 5, 1874, all expense relating to the issue of sinking fund bonds, \$6,579.10.

The disputed expenditures in items 1-4 were for new construction. Item 27 was also for new construction.

Item 16 was for the use of the cars of other companies.

Items 17, 20-25 show payments of interest on debts.

Items 18 and 19 show payments made on account of the land department of the Company's business.

Item 26 shows payments in the construction of the Omaha bridge above the amounts received from the sale of the mortgage bonds secured by it.

Items 28 and 29 show expenditures made for a sinking fund for the redemption of the Company's debt.

Item 30 shows an assumed payment of a portion of the interest on the government subsidy bonds, by the application to it of half the government transportation account.

The court, in ascertaining the gross earnings of the road, deducted from the table of earnings, as shown by finding 18, fifteen per cent. from item 7 in each year, also \$23,400 from item 12 in the year 1869-70, being dividends from stock of Pullman Pacific Car Co.

In ascertaining expenses, items 17 to 30 in-

clusive were disallowed, together with certain amounts for printing bonds in item 13, for tenements and new stations, in item 1; for engines, etc. in item 2; for cars in item 3; and for Laramie rolling-mills in item 4.

Judgment was given for the Company in the sum of \$808,975.18, from which this appeal was taken.

Mr. Sidney Bartlett, for appellant.

Messrs Charles Devens, Atty-Gen., and Jos. K. McCammon, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

This case is in some respects supplemental to that of *U. S. v. R. R. Co.*, reported in 91 U. S., 72 [XXIII., 234]. That was a suit brought by the Union Pacific Railroad Company against the United States in the Court of Claims, to recover one half of the compensation due to it for services rendered to the Government between the dates of February, 1871, and February, 1874, against which claim the United States set up a counter claim for the interest which had been paid on the subsidy bonds advanced by the Government to the Company. This court held that, by the terms of the Acts of Congress granting said subsidies, the Company was not required to pay the interest of said bonds until the maturity of the principal thereof; and therefore, the counter claim of the Government was overruled. The present case arises upon a like suit brought by the Railroad Company in the Court of Claims for the recovery of one half of the compensation due to it for services rendered to the Government during the remainder of the year 1874, and the whole of the year 1875, including certain services performed prior to 1874, not included in the first suit.

To this suit the United States has put in a counter claim for five per cent. of the net earnings of the Company, under that provision of the 6th section of its charter, Act of July 1, 1862, which declares as follows: "After the said road is completed, until said bonds and interest are paid, at least five per cent. of the net earnings of said road shall also be annually applied to the payment thereof."

The United States in its counter claim alleges that the road was completed on the 6th of November, 1869, and that since that time a large amount of net earnings has been realized by the Company, which it has failed to pay or apply to the said bonds. The Railroad Company denies this allegation, alleging that the road was not finished until October 1, 1874, and that it has not realized any net earnings in any year, since either the 6th of November, 1869, or the 1st of October, 1874; and denies that it was its duty to pay to the United States annually any sum of money whatever, as and for five per cent. upon its net earnings, to be applied in the manner aforesaid.

The Court of Claims decided that the road was completed on the 6th of November, 1869, and that the Company did, after that period, annually realize net earnings to a large amount, for the six years from November 6, 1869, to November 6, 1875, amounting in the aggregate to the sum of \$28,052,045.67; and that five per cent. thereof, to wit: the sum of \$1,402,602.28, was payable to the Government; whilst one half

of the compensation due for the services rendered by the Company to the Government, for the period covered by the petition, amounted to only \$593, 627.10; and, therefore, that the Government was entitled to recover from the Company the difference between these two sums, amounting to the sum of \$808,975.18. From this decree the Company has appealed, and the question is now before this court for its decision.

The general history of the legislation of Congress in reference to the Union Pacific Railroad Company and the associated enterprises, and of the policy of the Government respecting the same, is fully stated in our opinion in the former case, and need not be repeated here. We shall only advert to the several acts and to the proceedings and negotiations which have taken place between the parties, so far as may be necessary to an understanding of the specific questions which are raised in this suit. The facts are fully set forth by the Court of Claims in its findings. Three principal questions are raised by the Acts of Congress and the facts found by the court, which it is necessary for us to determine.

First. When was the road completed?

Second. What is included in net earnings?

Third. How and under what conditions are they to be paid?

I. First, as to the completion of the road.

In one sense, a railroad is never completed. There is never, or hardly ever, a time when something more cannot be done, and is not done, to render the most perfect road more complete than it was before. This fact is well exemplified by the history of the early railroads of the country. At first, many of them were constructed with a flat rail, or iron bar, laid on wooden string-pieces, resulting in what was known, in former times, as snake-heads—the bars becoming loose, and curving up in such a manner as to be caught by the cars, and forced through the floors amongst the passengers. Then came the T rail; and finally the H rail, which itself passed through many successive improvements. Finally, steel rails in the place of iron rails have been adopted as the most perfect, durable, safe and economical rails on extensive lines of road. Bridges were first made of wood; then of stone; then of stone and iron. Grades originally crossed and, in most cases, do still cross, highways and other roads on the same level. The most improved plan is to have them, by means of bridges, pass over or under intersecting roads. A single track is all that is deemed necessary to begin with; but now, no railroad of any pretensions is considered perfect until it has at least a double track. Depots and station houses are at first mere sheds, which are deemed sufficient to answer the purpose of business. These are succeeded, as the means of the Company admit, by commodious station and freight houses, of permanent and ornamental structure. And so the process of improvement goes on; so that it is often a nice question to determine what is meant by a complete, first class railroad; and if a question of right or obligation between parties depends upon the completion of such a structure, courts are obliged to spell out, from the circumstances of the case, and the language and acts of the parties, what they mean when they use such terms.

In the present case, we have for our guidance several clauses in the charter of the Union Pacific Railroad Company (the Act of 1862, 12 Stat. at L., 489), in which the terms referred to are used, as well as the acts of the parties in reference thereto. One of these clauses is in the 4th section of the Act, which contains an engagement on the part of the Government to grant certain sections of land to the Company on the completion of a certain number of miles of its road. The 3d section having granted to the Company every alternate section of the public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the railroad, on the line thereof, and within the limits of ten miles, not otherwise disposed of by the United States, the 4th section proceeds as follows:

"Sec. 4. That whenever said Company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this Act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this Act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said Company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners; * * * *Provided, however,* that no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said Company, that such forty miles have been completed in the manner required by this Act, and setting forth with certainty the points where such forty miles begin and where the same end, which oath shall be taken before a judge of a court of record."

By the Act of 1864, 13 Stat. at L., 365, the amount and extent of the grant is doubled.

Again, by the 5th section of the Act of 1862 it is enacted as follows:

"Sec. 5. That, for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this Act, issue to said Company bonds of the United States of \$1,000 each, payable in thirty years after date, bearing six per centum per annum interest, * * * to the amount of sixteen of said bonds per mile for each section of forty miles, and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said Company, together with all interest thereon which shall have been paid by the United

States, the issue of said bonds and delivery to the Company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued."

(By the 11th section the amount of bonds granted was to be \$48,000 per mile for 150 miles through the Rocky Mountains, and for the same distance including the Sierra Nevada Mountains, and \$32,000 per mile between those points; and by the Act of 1864 the completed sections were reduced to twenty miles instead of forty.)

By the 6th section of the Act it is further enacted as follows:

"Sec. 6. That the grants aforesaid are made upon condition that said Company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores, upon said railroad for the Government whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said Company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par, and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

Reading these sections together, it seems hardly possible to conceive that the word "completed," in the last clause of the 6th section, has any other or different meaning from that which it has in the 4th and 5th sections; or that the five per cent. of the net earnings should not be demandable by the Government as soon as the whole line was completed in the same manner in which any forty [or twenty] miles was to be completed in order to entitle the Company to bonds. This conclusion is so obvious and self-evident that it hardly needs a word of argument to maintain it.

Now, the findings of fact show that the Company began to claim the subsidy of lands and bonds for completed sections of the railroad and telegraph line in June, 1866; and from that time forward made similar successive applications nearly or quite every month, tendering the affidavit of the president of the Company as to the completion of the several sections, as required by the Act. The first of these affidavits was made on the 25th of June, 1866, and was in the words following:

"John A. Dix, being duly sworn, depose and saith, that he is president of the Union Pacific Railroad Company, and in pursuance of the requirements of section 4 of the Act of Congress approved July 1, 1862, entitled 'An Act to Aid in the Construction of the Railroad and Telegraph Line from the Missouri River

to the Pacific Ocean,' etc., he now states, under oath, that one hundred and five consecutive miles of said railroad, beginning at Omaha and ending at a point one hundred and five miles westward thereof, on the line designated by the maps of said Company on file in the Department of the Interior, have been completed and equipped in all respects as required by the Act referred to, as he is informed by the engineer charged with the construction of said line, and as he verily believes to be true; and he further states, under oath, that one hundred and five miles of telegraph have been completed for the said one hundred and five consecutive miles, as he is also advised by the engineer in charge.

JOHN A. DIX, *President.*

Sworn to, June 25, 1866."

The last affidavit, relating to the completion of the last section of the road (and, indeed, extending some fifty miles beyond the point of division finally agreed upon between the Union and Central Pacific Railroad Companies), was made on the 13th of May, 1869, and was in the words following:

"Oliver Ames, being duly sworn, depose and saith that he is president of the Union Pacific Railroad. And in pursuance of the requirements of section 4 of the Act of Congress approved July 1, 1862, entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean,' etc., he now states, under oath, that another section of eighty-six miles, commencing at 1,000 mile and ending at 1,086 mile-post, was completed on the 10th day of May, 1869, making in all 1,086 consecutive miles of said road, beginning at the initial point on section 10, opposite western boundary of the State of Iowa, as fixed by the President of the United States, and ending at a point 1,086 miles westward therefrom on the line designated by the maps of said company on file in the Department of the Interior, that have been completed and equipped in all respects as required by the Act referred to, as he is informed by the engineer charged with the construction of said line, and as he verily believes to be true. And he further states, under oath, that 1,086 miles of telegraph have been completed for the said 1,086 consecutive miles, as he is also advised by the engineer in charge.

OLIVER AMES,

President Union Pacific Railroad Company.

Sworn to, May 13, 1869."

The Court of Claims finds as a matter of fact that "On the 10th of May, 1869, the last rail of the claimant's road was laid, and about a week afterwards the road was opened over the entire length to public use for the transportation of passengers and freight, and for the service of the Government; and this service was from that time forward performed continuously."

It further found that on the 23d of December, 1865, the President of the United States, under the authority of section 4 of the said Act of July 1, 1862, appointed commissioners to examine and report upon the first section of 40 miles of said road; and some time prior to April 30, 1866, he appointed other commissioners to examine and report upon the second section of twenty-five miles of said road; and after the making of each of the foregoing affidavits, he

appointed other commissioners to examine the sections of the road as successively completed, and report to him in relation thereto. The reports of the commissioners so appointed were made in the first instance to the Secretary of the Interior, who transmitted them to the President, who approved the recommendations of the Secretary of the Interior by writing his approval thereon. The following is the first letter of the said secretary, with the President's indorsement thereon:

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., January 24, 1866.

SIR,—I have the honor to submit herewith enclosed, for your action, the report of the commissioners appointed by you on the 23d December, 1865, to examine the first section of forty miles of the Union Pacific Railroad, extending west from the City of Omaha, Territory of Nebraska. The Company authorized to build this road having, as shown in the report of the commissioners, obligated itself to remedy, within a reasonable time, the deficiencies in the construction of said section, I respectfully recommend that the same be accepted, and proper steps be ordered for the issue of the bonds and land-grants due the Company agreeably to law.

I am, sir, with much respect, your obedient servant,

JAS. HARLAN, *Secretary.*"

"THE PRESIDENT."

"EXECUTIVE MANSION, January 24, 1866.

The within recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

ANDREW JOHNSON."

Similar reports were made by the Secretary of the Interior, as the successive sections were completed and reported on by the commissioners, down to and including the 9th day of February, 1869, and were severally approved by the President; and the Company received the subsidy bonds of the Government in accordance therewith.

As it appeared by the reports of some of the commissioners that the several sections of road were not, and could not, under the circumstances, be fully completed, up to the ultimate standard of a first-class railroad, though they might be, and actually were, completed, section by section, so as to admit of transportation and travel over the same, the Railroad Company, on the 12th of February, 1869, being thereby required by the Attorney-General of the United States, as a guaranty for the ultimate full completion and equipment of the road, executed an agreement of the last mentioned date to deposit in the Treasury Department their own first-mortgage bonds (which by the Act of July 2, 1864, they had been authorized to issue, and which were to be preferred to the lien of the United States) to the amount of \$3,000,000, to be held by the Government as security for the completion of the road according to the provisions of the statutes in that behalf, and until the President, on a proper examination of the same, should be satisfied that it was so completed. At the same time, the Company also agreed, by way of further security, to leave their land-grants with the Government, without taking out patents for the same, until the President should be satisfied as aforesaid, *or pro*

tanto to such extent as he might not be satisfied.

On the 10th of April, 1869, a Joint Resolution was passed by Congress, by which, amongst other things, it was declared that the common *terminus* of the Union Pacific and the Central Pacific railroads should be at or near Ogden. And that the President was thereby authorized to appoint a board of eminent citizens, not exceeding five in number, to examine and report upon the condition of the two roads (the Union Pacific and the Central Pacific), and what sum, if any, would be required to complete each of them. And the President was further authorized and required to withhold from them an amount of subsidy bonds sufficient to secure the full completion of the roads as first-class roads, or to receive an equal amount of the first-mortgage bonds of the companies. A Board of five eminent citizens was appointed under this resolution in the month of August following.

In the meantime, two additional reports were made by the Secretary of the Interior to the President, one on the 27th of May, 1869, and the other on the 15th of July, 1869, in each case recommending the acceptance of the sections referred to therein, and also recommending the issue of bonds therefor, in accordance with the agreement aforesaid, to the effect that the Company should deposit its first-mortgage bonds with the Secretary of the Treasury to such amount as might be deemed necessary to secure the ultimate completion of the road.

The last of these reports, with the President's indorsement thereon, is in the words following, to wit:

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., July 15, 1869.

Sir—I have the honor to transmit herewith, for your action, five reports, dated the 9th ultimo, of the commissioners, Messrs. Gouverneur K. Warren and James F. Wilson; also the report of Isaac N. Morris, the other commissioner, dated May 28, 1869, appointed by you to examine and report upon a section of $85\frac{8.8}{10.0}$ miles of the road and telegraph line, constructed by the Union Pacific Railroad Company, commencing on the road of said Company at the 1,000 mile-post west from Omaha and terminating at the $1,085\frac{8.8}{10.0}$ mile-post.

The majority of said commissioners, in their report, represent the said section of $85\frac{8.8}{10.0}$ miles ready for present service, and completed and equipped as a first-class railroad, and that the telegraph line is completed for the same distance; and as the Company have paid the per diem and mileage due them under the 21st section of the Act of Congress approved July 27, 1866, on account of their examination of said section of road and telegraph line, I, therefore, respectfully recommend the acceptance of the same and the issue of bonds and of patents for lands due on account of said section, agreeably to the Act approved July 1, 1862, entitled, 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes,' and the Acts amendatory thereof. Said bonds and patents to be issued to the Union Pacific Railroad Company on account of the work from said 1,000th mile-post to the 'common *terminus* of the Union Pacific and Central Pacific Railroads,' 'at or near

Ogden,' and the bonds and patents on account of said work from said common *terminus* to Promontory Summit to be issued to such Company as the proper authority, after full investigation of the respective claims of the Union Pacific Railroad Company and the Central Pacific Railroad Company of California shall determine to be thereunto lawfully entitled: *Provided*, however, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure the ultimate completion of the road, agreeably to the Acts mentioned in my letter to you of the 27th of May last.

I am, sir, very respectfully, your obedient servant,

J. D. Cox, Secretary."

"THE PRESIDENT."

"EXECUTIVE MANSION, July 15, 1869.

The within recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

U. S. GRANT."

It is found by the Court of Claims that on the 22d of July, 1869, in partial performance of this last order of the President, \$640,000 of subsidy bonds were issued to the Company, being the subsidy for the section of twenty miles extending from the 1,000th to the 1,020th mile from Omaha, the subsidy bonds on all the previous sections having been received by the Company before that time.

As before stated, in August, 1869, the President, in accordance with the Joint Resolution of April 10, 1869, appointed a Board of five eminent citizens, to examine and report upon the condition of the road, and what sum would be required to complete it as a first-class railroad. This Board made a detailed examination, and on the 30th of October, 1869, made an elaborate report, specifying a number of particular things at various points, such as ballasting, embankment, masonry, trestle-work, etc., which required perfecting to put the road in first-class condition; estimating the aggregate expense of such improvements on the whole line from Omaha to Ogden at \$1,586,100. They conclude their report as follows: "This great line, the value of which to the country is inestimable, and in which every citizen should feel a pride, has been built in about half the time allowed by Congress, and is now a good and reliable means of communication between Omaha and Sacramento, well equipped and fully prepared to carry passengers and freight with safety and despatch, comparing in this respect favorably with a majority of the first-class roads in the United States."

This report being made and accepted, on the 3d of November, 1869, the Secretary of the Interior issued directions to the Commissioner of the General Land-Office to commence patenting lands to the companies, and to issue patents for one half of the lands which they were to receive; the patents for the other half to be suspended until further directions, in addition to the bonds retained, as security for the completion of the roads in the matters reported deficient or not up to the standard by the said committee.

Up to the 6th of November, 1869, the point at which the Union Pacific and Central Pacific

roads should meet was not settled; but assuming that the former would go no further west than Ogden, 1,033.⁶⁸/₁₀₀ miles from Omaha, the Secretary of the Treasury on that day ordered that bonds at the rate of \$32,000 per mile for the distance of 13.⁶⁸/₁₀₀ miles from the 1,020th mile-post to Ogden should be issued, but ordered that the Register of the Treasury should hold \$323,488 thereof as security for the over-issue of first-mortgage bonds by the Company, and deliver the balance to it. The reason of withholding these bonds was, that the Company, having been authorized by the Act of July 2, 1864, supplementary to its charter, to issue the same amount of first-mortgage bonds as it was entitled to receive from the Government, and which was accorded a priority over the lien of the government bonds, and having actually constructed the road fifty-three miles west of Ogden, had issued a larger amount of its own bonds than the amount of subsidy to which it was entitled as the point of division between its road and that of the Central Pacific was finally settled. By a subsequent arrangement with the Central Pacific Railroad Company, the point of junction between the two roads was fixed at a point five miles west of Ogden, which entitled the Union Pacific Company to bonds for such five additional miles, amounting to \$160,000, which it received in July, 1870, making the total amount of subsidy bonds which it was entitled to, and did receive, the sum of \$27,235,760.

It thus appears that prior to the 6th day of November, 1869, the entire road of the Company had, in separate sections, been reported by it, under the oath of its president, as being completed and furnished as a first-class railroad, in accordance with the requirements of the Act, and that, upon the strength of these representations and the corresponding reports of the commissioners appointed to examine the several sections, it had been accepted by the President; and that the Company, with the exception of the last \$160,000 of bonds, the claim to which arose from a mutual arrangement between the two companies, had received its entire subsidy of government bonds; and had received an order for the issuing of patents for its grant of public lands to the extent of one half thereof; the patents for the other half being suspended, by virtue of the agreement made in April, 1869, as security for the more perfect completion of certain parts of the work.

It is urged that the acceptance of the road by the President up to this period was only provisional, and not final. We cannot perceive that this makes any difference. It was an acceptance by which the Company was enabled to receive its subsidy of government bonds; and was sought by it in order that it might obtain them.

It seems to us unnecessary to look further, or to review the subsequent proceedings which took place between the President and the Company, in reference to the fulfillment of the conditions by the latter, on which the issue of the patents for the remaining lands depended. It appears that another commission was appointed to examine the road in 1874, and that, on their report, the President was satisfied that all the imperfections, as a security for the removal of which any patents had been suspended, were removed. The Company insists that this was the

period which should be taken for the completion of the road in reference to the payment of five per cent. of its net earnings—a period five years after it had reported the last section completed according to the Act of Congress, and after the President, by virtue of the agreement aforesaid, had consented to accept it as completed for the purpose of enabling the Company to draw its subsidy of government bonds, and after it had received said bonds.

Can a stronger case of estoppel than this well be presented? The plea that the Government still retained a portion of the public lands which the Company was to receive, as security for the supply of certain deficiencies in the road, cannot avail to diminish the strength of the estoppel. This was done by the voluntary agreement of the Company itself. And as, by making this concession, it succeeded in obtaining the formal acceptance of its road for the sake of the benefit to accrue therefrom, to wit: the procurement of the subsidy bonds, the Company ought to be willing to bear the burden of such acceptance, to wit: the payment annually of five per cent. of the net earnings of the road on account of the bonds. It would be an unfair construction of the acts of the parties under the law, to hold that the road was completed for one purpose and not for the other. We think, therefore, that the Court of Claims was right in deciding that the road was completed on the 6th day of November, 1869, so far as the duty of the Company to account for five per cent. of its net earnings is concerned.

II. The question next arising is: what are the "net earnings" for five per cent. of which the Company became liable to account, and in what manner are they payable?

In the first place, they are the "net earnings of the road;" that is, the net earnings of the road as a railroad, including the telegraph. They have nothing to do with the income or profits of the Company as a holder of public lands. The proceeds of this source of income are no part of the earnings of the road. These earnings, however, must be regarded as embracing all the earnings and income derived by the Company from the railroad proper, and all the appendages and appurtenances thereof, including its ferry and bridge at Omaha, its cars, and all its property and apparatus legitimately connected with its railroad.

In the present case, but little difficulty is presented in determining what are the proper earnings of the road, except in one particular. The Company insists that the compensation accruing to it for services performed for the Government, under the 6th section of the Act of 1862, should not be estimated amongst the earnings of the road, in taking an account of net earnings upon which to calculate the five per cent. in question. That compensation is not receivable by the Company—does not come into its hands—at least was not receivable by it according to the Act of 1862, but was directed by the 6th section to be applied to the payment of the subsidy bonds. After giving this direction, the section proceeds to add, that after the road is completed, "Until said bonds and interest are paid, five per centum of the net earnings of said road shall also be annually applied to the payment thereof." It is contended that the net earnings here referred to are intended to be ex-

clusive of said compensation for government service, no part of which the Company was to receive. It must be admitted that there is some force in this view. But the majority of the court is of opinion that the plain letter of the statute cannot be thus varied by construction. The compensation accruing by means of services performed for the Government is unquestionably earnings of the road and telegraph; and as there are no words in the Act which go to show any intention to except this portion of earnings from the other earnings of the road in estimating the amount of net earnings, the conclusion arrived at is, that no such exception can be made. The fact that by a subsequent law the Company is allowed to receive in money one half of the compensation referred to, removes to a great extent the practical difficulties that have been suggested in this behalf.

There is another item in the table of earnings set forth in the 18th finding of the Court of Claims which may require consideration. We refer to the 7th item, entitled "company freight." If this means freight for the transportation of the Company's own property over its own road, it ought not to be put down as a receipt, unless the same amount is also embraced amongst the expenses on the other side of the account. How this fact may be we have not before us the means of knowing. The evidence which the Court of Claims has in its possession will enable it to determine this matter. We only decide that if the item appears only as a receipt or earning, and is of the character we have supposed, it ought to be excluded from the account.

Having considered the question of receipts or earnings, the next thing in order is the expenditures which are properly chargeable against the gross earnings in order to arrive at the "net earnings," as this expression is to be understood within the meaning of the Act. As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the Company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. With regard to the last mentioned class of expenditures, however, namely: those which are incurred in enlarging and improving the works, a difference of practice prevails amongst railroad companies. Some charge to construction account every item of expense, and every part and portion of every item, which goes to make the road, or any of its appurtenances or equipments, better than they were before; whilst others charge to ordinary expense account, and against earnings, whatever is taken for these purposes from the earnings, and is not raised upon bonds or issues of stock. The latter method is deemed the most conservative and

beneficial for the company, and operates as a restraint against injudicious dividends and the accumulation of a heavy indebtedness. The temptation is, to make expenses appear as small as possible, so as to have a large apparent surplus to divide. But it is not regarded as the wisest and most prudent method. The question is one of policy, which is usually left to the discretion of the directors. There is but little danger that any Board will cause a very large or undue portion of their earnings to be absorbed in permanent improvements. The practice will only extend to those which may be required from time to time by the gradual increase of the company's traffic, the dispatch of business, the public accommodation, and the general permanency and completeness of the works. When any important improvement is needed, such as an additional track, or any other matter which involves a large outlay of money, the owners of the road will hardly forego the entire suspension of dividends in order to raise the requisite funds for those purposes; but will rather take the ordinary course of issuing bonds or additional stock. But for making all ordinary improvements, as well as repairs, it is better for the stockholders, and all those who are interested in the prosperity of the enterprise, that a portion of the earnings should be employed. We think that the true interest of the Government, in this case, is the same as that of the stockholders; and will be subserved by encouraging a liberal application of the earnings to the improvement of the works. It is better for the ultimate security of the Government in reference to the payment of its loan, as well as for the service which it may require in the transportation of its property and mails that \$100 should be spent in improving the works, than that it should receive \$5 towards the payment of its subsidy. If the five per cent. of net earnings, demandable from the Company, amounted to a new indebtedness, not due before, like a rent accruing upon a lease, a more rigid rule might be insisted on. But it is not so; the amount of the indebtedness is fixed and unchangeable. The amount of the five per cent. and its receipt at one time or another is simply a question of earlier or later payment of a debt already fixed in amount. If the employment of any earnings of the road in making improvements lessens the amount of net earnings, the Government loses nothing thereby. The only result is, that a less amount is presently paid on its debt; whilst the general security for the whole debt is largely increased.

We are disposed to agree, therefore, with the Judge who delivered the concurring opinion in the court below, that the 27th item of expenditure, as stated in the table of expenses in the 18th finding, entitled "expenditures for station buildings, shops, etc.," is a charge that may properly be made against earnings, since, as the fact is, such expenditures were actually paid therefrom, and were not carried to capital account. Should the Company ever attempt to make a stock or bond dividend in consideration of such expenditure, the Government would be entitled to demand its due proportion thereof by way of payment on account of its debt. But as long as such expenditures are fairly and in good faith charged to account of earnings,

we see no good reason for disallowing the charge.

Of course, the allowance of this item will supersede the deduction of fifteen per cent. from the 7th item of earnings; which item, however, is subject to the observations that have already been made upon it.

Expenses of the same kind as those included in item 27, which are contained in other items, and were disallowed by the Court of Claims, are to be allowed in like manner as those in item 27, including the expenses for issuing bonds.

We agree with the Court of Claims in its rejection of the expenditures contained in items 17 to 30 in the table referred to, excepting item 27. All payments of interest on the bonded indebtedness of the Company should be charged to capital interest account, and not to current expenditures. Though payable out of earnings before any dividend can be made to stockholders, they cannot be deducted for the purpose of ascertaining the "net earnings" of the road, as that term is to be understood in the 6th section of the Act. The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the nature of a dividend on such capital. It has nothing to do with and cannot affect the amount of the net earnings of the road.

So the expenses of land and town-lot departments, and taxes on lands and town lots, are expenses properly belonging to the land department of the Company's property. They are entirely distinct from its expenses as a railroad company; and form no proper charge, in the accounts, against the earnings of the road.

The other items disallowed by the court require no particular remark. Their irrelevancy in the account of net earnings is obvious.

III. We have still to consider the manner in which, and the conditions subject to which, the five per cent. of net earnings is payable and demandable.

We have seen that by the 5th section of the Act of 1862 the issue to the Company of the subsidy bonds was to constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description [and], in consideration of which said bonds should be issued. By the Act of July 2d, 1864, this priority of the Government claim was relinquished in favor of a certain amount of first-mortgage bonds which, by that Act, the Company was authorized to issue. The provision referred to is contained in the 10th section of the Act of 1864, which is as follows:

"Sec. 10. *And be it further enacted*, that section 5 of said Act [of July 1, 1862] be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this Act, and the Act to which this Act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity-rate

and character of interest, with the bonds authorized to be issued to the said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments, except as to the provisions of the 6th section of the Act to which this Act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States."

It is found by the Court of Claims that the Union Pacific Railroad Company did issue its first-mortgage bonds as authorized by this section, and to the full amount allowed thereby. The Company contends that the interest of these bonds, if not its other interest, should be charged as an expenditure against the earnings of the road in taking an account of its net earnings, which would reduce the net earnings of each year by the amount of said interest. We have already expressed an opinion that this claim cannot be sustained. The interest on these bonds do not, any more than the interest of any other bonds of the Company, form any proper portion of the expenditures of the road to be considered in estimating the net earnings mentioned in section 6 of the Act of 1862.

But whilst we decide against the Company on this point, we are clearly of opinion that the annual interest accruing on these particular bonds are to be first paid out of the net earnings, before the Government can demand its five per cent. thereof. We conceive this to be the legitimate effect of the concession by the Government of its priority. It can hardly be pretended that, notwithstanding this concession, the five per cent. to be applied in payment of the government bonds is to be first paid. It seems to us an absurdity to say that these bonds are entitled to a priority, but that the Government must be first paid. This would be to grant a priority, and, in the same breath, to take it back again. It will not do to say that both must be paid, if there is not enough to pay both. It is a question between two parties having a claim against a common fund, and one of them having a priority over the other.

It may, perhaps, be urged that the first-mortgage bond holders have no lien on the net earnings. But they have the same lien that the Government has. Both liens are co extensive with the whole property of the Company, so far at least as relates to the railroad and telegraph lines and their equipment and all property appurtenant thereto. There is a direction, it is true, that, if the Company makes net earnings, it shall pay five per cent. thereof on its debt to the Government. But that direction was contained in the Act of 1862; the authority to issue the first mortgage bonds, and the concession of priority thereto, was given two years afterwards, and is the controlling enactment. It cannot be supposed, after this transaction, that the Company is bound to pay the Government first, and to allow the interest on the first-mortgage bonds to go unpaid, or, in order to pay it, to go out in the money market and make a new loan. Such could never have been the intention of the law. Not to pay the interest on the first mortgage would expose the road and works to be seized

and sold—a result, certainly, that could not be to the interest of the Government, when we consider that its entire debt is postponed to the first mortgage, and would be liable to be lost by such a proceeding. Borrowing money to pay the interest (if it could be borrowed) would only be to put off the evil day.

The interest accruing on the first mortgage is as much payable out of the net earnings as the five per cent. payable to Government is. It is the proper fund out of which to pay both; and if but one can be paid, the former has the precedence; or else the whole government debt might be paid to the exclusion of the first mortgage, which is admitted to have the priority. Such a result would be manifestly absurd.

The truth is, that the provision for paying five per centum of the net earnings on the subsidy debt was a provision for payment out of a particular fund. If by voluntary agreement on the part of the Government a portion of that fund is appropriated to another purpose, which we think it is, then the Government is entitled to go against the balance only. The provision created no new obligation or indebtedness, but only entitled the Government to anticipate part payment of a fixed indebtedness out of a particular fund, if there should be such a fund. If the fund should not arise, or should be exhausted by claims to which the Government gave priority over its own claim, there would clearly be nothing for the Government to demand.

It is not like the case of two mortgages, one prior to the other, and both having claims for interest coming due. In such case, if both claims are not paid, the one which is not paid becomes a cause of action, and may be put in suit. Here, the claim of the Government is on the fund alone. If that is exhausted by its own consent, no cause of action arises. There is simply nothing left of the fund to which it has a right to resort.

The Government, however, may contend that if there is not a sufficient surplus of net earnings in one year to pay the five per cent. due for that year, it may be carried over to a succeeding year, and taken out of the surplus thereof. We do not think that this position is more tenable than the other. Each year is to stand by itself. If there is a deficit in any year instead of net earnings, such deficit cannot be carried over into the next year's accounts by the Company; and if there are net earnings which are absorbed by the interest due on the first mortgage, the claim of five per cent. cannot be carried over into the next year by the Government. The one is no more a debt than the other is a credit. The statute makes the application an annual one. If the year produces net earnings sufficient for the purpose, the Government gets its five per cent.; if it does not produce sufficient, the Government does not get its five per cent.; and there the account ends for that year. It was never intended that this account should be carried on from one year to another.

This seems to us to be the fair and reasonable construction of the statutes, and one that does no injustice to either of the parties. The object of Congress in all of them was to extend a liberal hand in aid of the enterprise which the Company undertook to carry out, and

not to exact in addition to the amount of service which the Company was required to perform, the payment of any part of its loan before maturity, except a small portion of the net earnings of the road which the Company would be presumed to have in its hands. So far as these were otherwise disposed of by the Government's own consent, the application to its debt must be regarded as intended to be waived.

The fact that by the Act passed March 3, 1871, 16 Stat. at L., 525, the Secretary of the Treasury is required to pay over in money to the companies one half of the compensation for the services performed by them for the United States, has no bearing on the question now under consideration. The statutes out of which this question arises were all passed long before, and are to be construed as if the Act of 1871 had never been passed.

We may add, in conclusion, that Congress, by the Act passed May 7, 1878, 20 Stat. at L., 56, supplementary to the Acts of 1862 and 1864, has expressly directed that, in estimating the net earnings of the roads, the interest of the first mortgage bonds, as well as the current expenses, is to be deducted from the gross earnings. Whilst this enactment cannot be invoked as furnishing any decisive rule for the construction of the statutes under review, it at least shows that Congress deems the interest of said first-mortgage bonds as fairly entitled to priority of payment out of the earnings of the road, before the payment of any portion thereof on the government debt. We think, therefore, that we are justified in supposing that our conclusion is in harmony with the views of the Legislature, as to the justice and right of the case.

The conclusions to which we have come on the whole case will require the following modifications of the decree appealed from:

First. In estimating the amount of gross earnings, no deduction will be made from the earnings included in items 7 or 12, as set forth in the table contained in the 18th finding of the Court of Claims, unless it be found that item 7, entitled "company freight," is for transporting the Company's own property on its road, and is not balanced by being also contained among the expenditures. If this be the case, then the whole of item 7 should be struck out.

Second. In estimating the amount of expenditures to be deducted from gross earnings, the claimant should be credited with the expenditures contained in item 27 of the table of expenditures, and the other expenses which are disallowed by the Court of Claims, except items 17 to 26 inclusive, and items 28, 29 and 30, which are properly disallowed.

Third. If with these modifications it should be found that the net earnings, in any one year, were not more than sufficient to pay the interest on the first-mortgage bonds accruing in said year, then the Company will not be decreed to pay any portion of the said five per cent. of net earnings for that year. But if the net earnings were more than sufficient to pay said interest, the excess will be subject, as far as it will go, to the payment of said five per cent.; but the Company will not be decreed to pay any more than said excess.

The decree will be reversed, with instructions to enter a decree in accordance with this opinion.
See 9 OTTO.

Mr. Justice Strong, dissenting:

I concur with the majority of the court in holding that the railroad was completed, within the meaning of the 6th section of the Act of 1862, on the 6th day of November, 1869. I concur also in the definition of "net earnings," as the term was used in that section. But the majority now express the opinion that if the net earnings in any one year are not more than sufficient to pay the interest on the first mortgage bonds of the Company in that year, the United States is not entitled to any portion of five per cent. of those earnings for that year, though, if they are more than sufficient to pay that interest, the excess or surplus is subject, so far as it will go, to the payment of the five per cent. This is substantially holding that the claim of the Government to the annual payment of five per cent. of the Company's net earnings, after the completion of the road, is postponed to the annual interest on the first mortgage bonds. To this I cannot assent. It is, I think, based upon an entire misconstruction of the Acts of Congress which gave existence to the Company, and to which alone we can look for the contract between the Company and the Government. A very few words will indicate my opinion, and show the reasons upon which it rests. By the 5th section of the Act of 1862, the Secretary of the Treasury was required to issue to the company bonds of the United States to an amount therein specified. The bonds were to be issued as a loan, and the section provided as follows: "And to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said Company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the Company shall, *ipso facto*, constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued." This clause describes the lien, and the only lien, reserved by the United States. It covers the railroad and telegraph, the rolling stock and fixtures, and property of every kind and description. It does not cover income from the property, either gross receipts or net receipts derived from its use, while it remains in the possession of the Company and before any forfeiture for breach of the conditions of the mortgage. A mortgage of a property is a very different thing from a mortgage of its income. A mortgagor, so long as he remains in possession, or until actual entry by the mortgagee, may receive the rents and profits to his own use, and is not accountable for them to his mortgagee. *Man. Corp. v. Melvin*, 15 Mass., 268; *Bk. v. Reed*, 8 Pick., 459. Indeed, it is clear law that a mortgagee has no specific lien upon the rents and profits of mortgaged premises until condition broken. *Bk. v. Arnold*, 5 Paige, 38. I think it very apparent that in the reservation of the lien Congress did not intend to interfere with or assert rights over the earnings of the railroad, or to prevent their appropriation to the general uses of the Company. They were not intended to be covered by the lien, or embraced within it. And I am confirmed in this belief by the fact that, immediately following the clause in

the 5th section describing the lien, a right was reserved to the United States to take possession of the road on failure of the Company to redeem the bonds loaned.

Assuming that I am correct in this, I pass to the 6th section of the Act, which makes no reference to the lien, though it imposes duties upon the Company. It enacts that the grants aforesaid are made upon condition that said Company shall pay said bonds at maturity, and shall keep said Railroad and Telegraph in repair and use, shall transmit dispatches at all times over said telegraph line, and transport mails, troops, etc., for the Government when required, giving to the Government the preference in the use of the road and line for all the purposes aforesaid. The section then declares that all compensation (subsequently changed to one half thereof) for services rendered for the Government shall be applied to the payment of the bonds and interest, so as aforesaid named, until the whole amount is fully paid. Then follows the clause which the United States is seeking in this action to enforce. It is as follows: "And after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." The grants referred to in this section, and declared to be conditional, are probably those of the right of way and alternate sections of land given previously in the 2d, 3d and 4th sections. They can hardly refer to the loan of bonds. This, however, is not very material. While it is true the section refers to payment of the debt due to the United States, it contains no allusion to the lien for the security of the debt reserved in the 5th section. And it can hardly be pretended that performance of the duties thereby imposed upon the Company is secured by the statutory mortgage. The mortgage is not a security for having the road and telegraph kept in order, nor for the transmission of dispatches, or the transportation for the Government, nor for priority of use by the Government, nor for the application to the payment of the bonds of half the compensation for services to the Government. Nor is it any more a security for the required payment of a percentage of the net earnings. These duties are secured by the condition attached to the land grants, and by the implied assumption of the Company. They are entirely collateral to the obligation of the mortgage and to its lien. They are not a part of it. It is no uncommon thing that a creditor has several securities for one debt. He may have a bond and a mortgage to secure its payment; he may have also a promissory note, or an assignment of stock. Nobody would claim that in such a case the note and the assignment are included in the lien of the mortgage.

Having thus shown, as I think, what the lien of the Government was, what it covered, and what it did not, I pass to the 10th section of the amending Act of 1864, which, a majority of the court holds to postpone the claim of the United States for a percentage annually of the net earnings of the road, to the rights of what is called the first-mortgage of the Company. That section authorized the Company, and other companies, to issue their first-mortgage bonds on the roads and telegraph lines to an amount

not exceeding the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to them. It then declared thus: "And the lien of the United States shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments (except as to the provisions of the 6th section of the Act to which this Act is an amendment, relating to the transmission of dispatches, and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States)."

The first mortgage thus authorized was less comprehensive than the statutory mortgage of the United States. It did not include the lands of the Company, nor any of its property, except the road and the telegraph line. It certainly did not include the earnings of the Company. What, then, was subordinated to it? I think nothing but the lien of the United States bonds—that lien which was reserved in the 5th section of the Act of 1862. This is the express language of the section. Whatever right to the railroad and telegraph line the United States had by virtue of its mortgage, that right was postponed to the mortgage bonds authorized by this 10th section, and issued under it. Nothing else was postponed. Subordination of the lien of the United States to the Company's first mortgage could not have the effect of enlarging the operation and scope of that mortgage and bringing additional subjects within it. Surely it did not make the mortgage a lien upon any other property than that which the Company was authorized to mortgage. It did not make it a lien, either prior or subsequent, upon the lands of the Company, or the income or earnings of its road. And as I think I have shown the duty of the Company to apply annually five per cent. of its net earnings, after the completion of its road, to the payment of its debt to the United States, was collateral to its other obligations—a cumulative duty, not embraced in the lien or mortgage reserved by the United States in the 5th section of the Act of 1862—it cannot be affected by the 10th section of the Act of 1864. Whatever else was postponed, it was not.

It has been argued on behalf of the appellant that the exception from the subordinating clause of those provisions of the 6th section of the Act of 1862, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the Government of the United States, implies that the other provisions of that section, or at least the five per cent. provision, were intended to be subordinated to the lien of the first-mortgage company bonds. This supposed implication is the principal reason urged in support of the position taken by a majority of the court. It is, however, in my judgment, entirely unfounded. The purpose of the exception appears to me to be very plain. As I have noticed, the section authorized the Company to issue their first-mortgage bonds upon the railroad and the telegraph line, and enacted that the lien of the United States bonds should be subordinate to the Company's first-mortgage bonds; subordinate, clearly, only in its effect upon that which was covered by the Company's mortgage, namely: the road and the telegraph line. But if the

Company's mortgage was permitted to be without exception the paramount lien upon the road and telegraph line, the right secured to the United States by the 6th section of the Act of 1862 to the transmission of dispatches and transportation of the mails, etc., might be totally destroyed by a foreclosure of the mortgage and a sale under it. To guard against this possibility was evidently the sole purpose of the exception, and its necessity is manifest. I repeat, if the Company's authorized mortgage on the railroad and the telegraph line were permitted to be, without restriction, a paramount lien, the preferential right secured to the United States by the conditions of the 6th section of the Act of 1862—the right to the transmission of dispatches and transportation of mails, stores, munitions of war, etc., in preference to others—would have been at the mercy of the Company's mortgagees. That right of priority Congress was not willing to endanger. The exception was introduced to avert the danger of its loss. It was, in effect: Congress said to the Company, "Though we agree that your mortgage shall be the first lien upon the road and the telegraph line, yet no foreclosure of it, no taking possession under it, and no sale shall interfere with the right of the United States to the transmission of dispatches and to transportation in preference to all others." To save that right the exception was necessary. It had reference solely to the operation of the Company's mortgage upon the road, upon which a preferential right to transportation had been reserved, and to the telegraph line, along which Government dispatches were first to be carried. I cannot believe it had any other purpose or intent, much less that it was intended to operate as a grant, or to postpone the other rights assured to the United States in the 6th section. The implication that every duty in that section imposed upon the Company, except the one expressly mentioned, was intended to be subordinated to the lien of the Company's bonds is too unreasonable to be accepted, and it will not be claimed. Yet such must be the extent of the implication, if the exception means what the majority of the court think it means. If the duty of the Company to apply to the payment of its bonds a percentage of its net earnings annually after the completion of its road is postponed to the rights of the first-mortgage bond holders, so is the duty to apply one half the compensation for services rendered for the Government, and so is the duty to keep the railroad and telegraph line in repair, by parity of reason. Those rights of the Government and the right to the percentage of the earnings stand alike. They are all reserved by the 10th section of the Act of 1864.

My conclusion, therefore, is that nothing in the 10th section of the Act of 1864 postpones the right of the Government to recover five per cent. of the net earnings of the road before any thing is deducted from those earnings for either principal or interest of the first mortgage bonds of the Company.

It may be that the construction of the Acts of Congress for which I contend, if adopted by the court, would not increase the amount recoverable by the United States in the present suit, of the Union Pacific Railroad Company, but it may have an important effect on future claims against the Company for the five per cent.

cent. and it has upon the claims of the United States against the other companies to which the 6th section of the Act of 1862 was applicable.

I am authorized to say that *Mr. Justice Harlan* concurs in this dissent.

Cited—99 U. S., 450, 456, 492; 110 U. S., 207.

UNITED STATES, *Plff. in Err.*,

v.

THE CENTRAL PACIFIC RAILROAD COMPANY.

(See S. C., 9 Otto, 449-455.)

Decision followed—net earnings.

1. This case involves the questions disposed of in the preceding case of U. S. v. U. P. R. R. Co., *ante*, 274. The decision of this court with regard to the time of completion of the road is the same in this case as in that.

2. This court has indicated its views in the other case, as to the principles on which the amount of net earnings is to be ascertained, and in what manner they are to be paid; which views govern this case.

[No. 703.]

Argued Dec. 12, 1878. Decided Jan. 27, 1879

IN ERROR to the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Messrs. Chas. Devens, Atty-Gen., and Jos. K. McCammon, for plaintiff in error.

Messrs. S. W. Sanderson and J. H. Storrs, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This case was an action brought in the Circuit Court of the United States for the District of California, by the United States, against the Central Pacific Railroad Company, to recover from said Company five per centum of the net earnings of the railroad belonging to said Company, from the 16th day of July, 1869, the date at which it is alleged that the said railroad was completed, to the 31st day of October, 1874. The road extends from the termination of the Union Pacific Railroad, at or near Ogden in the Territory of Utah, to the waters of the Pacific; and was constructed under the provisions of the Pacific Railroad Act of July 1, 1862, 12 Stat. at L., 489, and the several Acts supplementary thereto. It was originally constructed by two corporations of California, namely: the Central Pacific Railroad Company of California, and the Western Pacific Railroad Company; which companies, however, accepted the terms of the said Acts of Congress, received subsidies from the Government under the same, and were finally consolidated into one corporation under and by virtue of the said Acts, by the name of the Central Pacific Railroad Company, which succeeded to all the rights and duties under said Acts of Congress which belonged or appertained to the original companies.

On the trial, a jury was waived, and the court found the facts specially; and upon such findings gave judgment for the defendant. The United States brought a writ of error, and the case is now here for review.

The case, in all material respects, involves

the same questions which have just been disposed of in the case of *U. S. v. R. R. Co.* [*ante*, 274]. The same subsidies were granted to the companies in this case, and upon the same terms and conditions, as in that of the Union Pacific Railroad Company; the same Acts of Congress, in the main, applying to both. The claim of the Government is founded upon that clause in the 6th section of the Act of July 1, 1862, which declares that "After said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." The allegation of the Government is that the railroad was completed on the 16th day of July, 1869; and that the net earnings of the road from that time to the 31st day of October, 1874, amounted to the sum of \$36,732,702. The defendant denies the allegations of the bill; and the principal issue at the trial was the time of the completion of the road. The conclusion of the court from its findings of fact was that the road was not completed until the 1st day of October, 1874, and, hence, that the Government was not entitled to recover.

It is unnecessary to review all the findings. The course of proceedings was in all respects similar to what took place in the case of the Union Pacific Railroad Company: similar reports of completed sections by the Company, under the oath of its president, similar examination and reports of commissioners, and similar acceptances by the President of the United States. The 7th finding of the court is as follows:

"VII. That as each section of twenty miles or more of the road was constructed, the president of the Company filed a statement, under oath, in pursuance of the statute, to the effect that the section, describing it, had been completed as required, specifying the particulars in the language of the statute, and asking that the commissioners appointed under the statute might be notified, and that they might examine and report upon such section. Upon a favorable report by the commissioners, the President accepted the section provisionally, and issued to the Company the bonds authorized by the statute. This was the course of proceeding till 1868, when it was found that the Government might advance all the subsidies upon a road only provisionally accepted in sections, and have no security for its absolute completion, as a whole, up to the standard of a first-class road. The question of the propriety of this course was submitted to the Attorney-General, who rendered an opinion on September 5, 1868, which was to the effect that the course before pursued by the Government was in accordance with the law, and that the President had authority to appoint commissioners to review that portion of the road which had been accepted provisionally, and to refuse a final acceptance of the road as a whole until all the deficiencies should be supplied, and that sufficient subsidies might be withheld or other guaranties required of the Company to secure absolute completion. The opinion is reported in 12 Ops. Attys-Gen., at page 477, and is referred to and made a part of this finding. The President thenceforth acted upon this opinion of the Attorney-General, and accepted each section when provisionally completed, leaving the question of the absolute com-

pletion of the road, as a whole, to be determined upon examination and report of commissioners to be specially appointed for that purpose."

This opinion had respect both to the Union Pacific and the Central Pacific roads.

The court then finds that on the 25th of September, 1868, the President, in pursuance of the opinion of the Attorney-General, appointed a commission of civil engineers to examine the entire road, so far as then provisionally completed, and report upon it in accordance with instructions to be furnished by the Secretary of the Interior; that these commissioners made their report on the 14th of May, 1869, pointing out many particulars in which the road as constructed failed to come up to the standard of a first-class road, and estimating that to supply such deficiencies would require a further expenditure of \$4,493,380; that the Secretary suspended the grant of lands to the Company until further orders, and required it to deposit with the Secretary of the Treasury \$4,000,000 of its first mortgage bonds, to secure the proper completion of the road, under a similar agreement to that made by the Union Pacific Railroad Company; that on the 11th of May, 1869, the connecting rail uniting the Central and Union Pacific railroads was laid, and soon thereafter regular through passenger and freight trains were placed upon the roads between San Francisco and Omaha, and have run regularly between said points ever since; and that on the 16th day of July, 1869, and ever since, said roads have been in fact operated as railroads, and have been able to carry, and have in fact carried, all passengers, freights, mails, troops, supplies and munitions of war offered for transportation between the eastern terminus of the Central Pacific Railroad and the Pacific Ocean. The 14th finding is as follows:

"XIV. That on July 15, 1869, the Secretary of the Interior transmitted to the President the report, dated May 15, 1869, of the commissioners appointed to examine and report upon a section of twenty and three tenths miles of the Central Pacific Railroad, this being the last section constructed by said defendant. In his letter transmitting said report to the President for his action, the Secretary says: 'I respectfully recommend the acceptance of the same, and that bonds be issued to the Company thereon in accordance with the agreement made with the Company, which is to the effect that they deposit their first-mortgage bonds with the Secretary of the Treasury to such amount as may be deemed necessary to secure the ultimate completion of the road agreeably to the provisions of the Act approved July 1, 1862.'

Recommendations in all respects similar to the last had been made by the Secretary of the Interior to the President as to the reports made upon the several preceding sections of the roads, and a similar approval was indorsed thereon by the President. Upon the same day, July 15, 1869, the Secretary of the Interior made a similar recommendation as to the section commissioner's reports upon the last sections of the Union Pacific Railroad, in which he recommends a similar provisional acceptance of the section, and adds: '*Provided, however*, that no bonds or patents shall in any event be issued until such security shall be deposited with the Secretary of the Treasury necessary to secure

the ultimate completion of the road, agreeably to the Acts mentioned in my letter to you of the 27th of May last.'

This recommendation was approved by the President, and the Secretaries of the Treasury and Interior directed to carry the same into effect. These constitute the last conditional acceptances of sections as provisionally completed."

By the 24th and 25th findings it is found as follows:

"XXIV. That, in pursuance of the provisions of said Acts of Congress hereinbefore mentioned, and at the time of the construction, equipment and provisional acceptance, as hereinbefore stated, of each and every section of said railroad by either of said railroad companies, the plaintiff issued and delivered to the said Central Pacific Railroad Company of California and to its assignee, the Western Pacific Railroad Company (where the latter was entitled thereto under said Acts), except as in these findings otherwise indicated, when some portions were temporarily withheld as security for the ultimate completion of the road, bonds of the United States of \$1,000 each to the amount of forty-eight of said bonds per mile for each such section for one hundred and fifty miles eastwardly from the western base of the Sierra Nevada mountains, and thirty-two of said bonds per mile for all of said railroad constructed east of said last mentioned point, and sixteen of said bonds per mile for all of said railroad constructed west of the western base of the Sierra Nevada mountains.

XXV. That between the 1st day of July, 1862, and the 27th day of January, 1870, this plaintiff, in pursuance of said Acts of Congress, caused to be issued and delivered to said railroad companies, in the mode and manner and at the times herein set forth, all except five of said \$1,000 bonds. That the bonds so delivered by plaintiff to said companies amounted in the aggregate to the sum of \$27,850,620."

It was further found that, in pursuance of the Joint Resolution of Congress, passed April 10, 1869, 16 Stat. at L. 56 (as in the case of the Union Pacific Railroad Company), the Board of eminent citizens referred to in that case, on the 3d day of November, 1869, made their report respecting the Central Pacific roads, in which they stated that the amount required to supply deficiencies and complete the work up to the required standard had been reduced since the last commissioners' report from \$4,498,380, to \$576,650; and the Secretary of the Interior thereupon modified his former order suspending the issue of patents to lands so as to allow patents for one half the lands to be issued, and soon after allowed the withdrawal of said first mortgage and other bonds, still retaining as security the other half of the lands.

It thus appears that the work of the Central Pacific roads went on *pari passu* with the Union Pacific, and on the same terms and conditions; and that the roads were completed and the subsidy bonds received, and the collateral securities for the ultimate supply of deficiencies given up at the same time in each case.

We do not propose to repeat the views which have already been expressed in the case of the Union Pacific Railroad Company. Our conclusion, with regard to the time of completion of the road is the same in this case as in that. As this is the only question raised by the record, it is unnecessary

to add anything further. The question of the amount of earnings and expenditures, and of net earnings deductible therefrom, was not reached by the court below, and is not presented to us for the expression of any opinion. But as we have indicated our views in the other case, as to the principles on which the amount of net earnings is to be ascertained, and in what manner they are to be paid, the court below, on a retrial, will be governed by our opinion in that case.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Dissenting, **Mr. Justice Strong** and **Mr. Justice Harlan**.

UNITED STATES, *Plff. in Err.*,

v.

KANSAS PACIFIC RAILWAY COMPANY

(See S. C., 9 Otto, 455-460.)

Earnings of Pacific Railway—net earnings.

1. Only such part of the annual net earnings of the Kansas Pacific Railway as are due to the first 393 15-16 miles, are in any event subject to the payment to the United States of the five per cent. of the net earnings, under section 6 of the Act of July 1, 1862.

2. Items which should be allowed as proper charges, and items which should be disallowed, in the account of net earnings, stated.

[No. 418.]

Argued Dec. 12, 13, 1878. Decided Jan. 27, 1879.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Messrs. Charles Devens, Atty-Gen., and Jos. K. McCammon, for plaintiff in error.

Messrs. John P. Usher, S. W. Sanderson and Chas. E. Bretherton (and A. J. Poppleton), for the U. P. R. R., by permission of the court, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This case was a suit brought in the court below by the United States against the Kansas Pacific Railway Company, to recover five per cent. of the net earnings of the road belonging to that Company from the time of the completion thereof, alleged to be the 2d day of November, 1869, to the 31st day of October, 1874; the said five per cent. being claimed under the last clause of section 6 of the Pacific Railroad Act, passed July 1, 1862, 12 Stat. at L. 489, which has already received consideration in the cases of the Union Pacific and the Central Pacific Railroad Companies, in the opinions just delivered [*ante*, 274, 287]. The cause was tried by the court, the facts were specially found, and the conclusion arrived at that nothing was due to the Government upon the alleged claim; and judgment was rendered for the defendant.

The Kansas Pacific Railway Company was originally chartered in 1855, by the Territory of Kansas, under the name of the Leavenworth, Pawnee and Western Railroad Company, mentioned in the 9th section of the Act of 1862, and

afterwards, in 1863, received the name of the Union Pacific Railway Company, Eastern Division, and finally, in 1869, 15 Stat. at L., 324, that which it now bears. By the section referred to, it was authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, so as to connect with the Union Pacific at the initial point on the one hundredth meridian, "Upon the same terms and conditions in all respects as are provided in this Act for the construction of the railroad and telegraph line first mentioned" (that is, the Union Pacific).

The Company accepted the terms of the Act, and proceeded to construct its road, receiving subsidy bonds therefor at the rate of \$16,000 per mile for the whole length of its road to the one hundredth meridian, being 393 $\frac{1}{4}$ miles; all of which bonds were delivered as the work progressed. The road was completed to Sheridan, 405 miles west from the Missouri State line (the point of commencement), on the 2d day of November, 1869, which is the date at which the government alleges that the road was completed. The authority of the company to extend its road west of the one hundredth meridian was derived from the 9th section of the Act of 1864, which declared as follows:

"And provided further, that any company authorized by this Act to construct its road and telegraph line from the Missouri River to the initial point aforesaid, may construct its road and telegraph line so as to connect with the Union Pacific Railroad at any point westwardly of such initial point, in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this Act: *Provided further, however*, that the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided."

It thus appears that, whilst the Company was authorized to extend its road west of the one hundredth meridian, if it saw fit so to do, it was entirely in its option; and if it did, it was not to expect, or have, any subsidy of government bonds for such extension. It is found by the court that the Company actually extended its road westward as far as Denver, 245 miles beyond the one hundredth meridian; but did not complete the same to that point, so as to be accepted by the President, until the 19th of October, 1872.

A material question in this case is, whether the whole line to Denver, or only the line which the Company was first authorized to construct (which terminated at the one hundredth meridian), is liable to the lien for the government subsidy, and the payment of five per cent. of net earnings. If only the latter, then the time of completion was that which is claimed by the Government, namely: the 2d day of November, 1869; but the net earnings liable to the claim of five per cent. would be only those produced on the

first 393 $\frac{1}{4}$ miles, or if these cannot be ascertained, then a *pro rata* amount of the whole net earnings of the road.

From a careful examination of the statutes relating to this subject, we are of opinion that, whilst, as to its entire line, the Company, in the words of the 9th section of the Act of 1864, is "Entitled to all the benefits and subject to all the conditions and restrictions of the Act;" and is bound to furnish transportation and telegraphic accommodations to the Government on the usual terms; yet that the subsidy bonds granted to the Company, being granted only in respect of the original road, terminating at the one hundredth meridian, are a lien on that portion only; and that the five per cent. of the net earnings is only demandable on the net earnings of said portion. This deduction, we think, is clearly demonstrated by the words of the 5th section of the Act of 1862, which creates the government lien for the payment of the subsidy bonds. Those words are that "The issue of said bonds and delivery to the Company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, with the rolling-stock, fixtures and property of every kind and description [and], in consideration of which said bonds may be issued." It is the road and appurtenances, in consideration of which, or in respect of which, the bonds are issued, that is subjected to the lien. This can apply, in the present case, only to the first 394 miles of the defendant's road. And as the lien only applies to this portion, the stipulation for payment out of net earnings cannot reasonably be applied to any other portion of the line.

This view is strengthened by the terms of the 3d section of the Act of March 3, 1869, 15 Stat. at L., 324, authorizing the defendant Company to assign and transfer to the Denver Pacific Company that portion of its line between Denver and Cheyenne. By that section, the said companies were authorized to mortgage their respective portions of said road (referring to the extension of the Kansas Pacific from the one hundredth meridian to Denver, and thence to Cheyenne) to the amount of \$32,000 per mile; a privilege which would hardly have been conceded if the lien of the government bonds was deemed to extend over those portions of the line.

The result of this conclusion is, that only such part of the annual net earnings of the road as are due to the first 393 $\frac{1}{4}$ miles are in any event subject to the payment of the five per cent. in question.

But inasmuch as the court below, in estimating the net earnings, credited the Company for expenditures which are not allowable according to the principles announced by us in the case of the Union Pacific Railroad Company; and as, upon a proper accounting, it may appear that, in some years, the defendant Company realized a sufficient amount of net earnings from its first 394 miles of road to pay the interest on the first mortgage bonds, and leave a surplus applicable to the five per cent. payable to the Government, it will be necessary to reverse the judgment, in order that a new trial may be had between the parties. It is proper, however, before concluding, that we should indicate our opinion with regard to certain classes of expenditures on which the Government and the Company are at issue.

The former insists that certain items should be excluded from the account which are claimed by the latter to be legitimate. These items are designated in Schedule C, annexed to the findings of the court below, and are as follows:

First. "Depreciation account, or expense not charged up." This is explained to be the amount necessary to put the road in proper repair, but which was not actually expended for that purpose. We are clearly of opinion that it is not a proper charge. Only such expenditures as are actually made can with any propriety be claimed as a deduction from earnings.

Second. "Construction account, or improvements and additions to track," etc. This item, according to what we have said in the *Union Pacific Railroad* case, ought to be allowed.

Third. "Equipment account, or replacing and rebuilding rolling stock, machinery," etc. This item should also be allowed as an expenditure properly chargeable to the earnings of the road, when actually paid out of the earnings and not raised by the issue of bonds or stock.

Fourth. "Real estate purchased for depot grounds, etc., and expenses of same." This item is a proper charge if actually paid out of the earnings, and not raised by bonds or stock.

Fifth. "Expenses of Land Department." This item is not allowable.

Sixth. "Interest on funded debt prior to government lien." For the reasons expressed in the case of the *Union Pacific Railroad Company*, this item is not allowable, though the interest annually accruing on the first mortgage bonds issued upon the first $393\frac{1}{8}$ miles of the road is payable out of the net earnings before the five per cent. due the Government.

Seventh. "Fifty per cent. government earnings withheld." This, as explained in the previous opinion, is not allowable to be charged as an expense.

The judgment of the Circuit Court is reversed, and the cause ordered to be remanded for a new trial.

Dissenting, *Mr. Justice Strong.*

Cited—99 U. S., 460, 462.

UNITED STATES, *Appt.*,
v.
DENVER PACIFIC RAILWAY AND
TELEGRAPH COMPANY.

(See S. C., 9 Otto, 460-462.)

Pacific Railway—government service.

1. The decision in this case is controlled by U. S. v. K. P. Ry. Co., *ante*, 289. This court there held that the lien of the bonds referred to, only extends to the road in respect of which they were granted and not to the extension of it west of the one hundredth meridian.

2. The Denver Pacific Railway Company is bound to perform the government service stipulated for by the 6th section of the Act of 1862, being paid therefor at the rates therein prescribed; and is bound by such other provisions of the Act of 1862, and the various supplementary and amendatory Acts, as are applicable to it.

[No. 781.]

Argued Dec. 12, 13, 1878. Decided Jan. 27, 1879.

APPEAL from the Court of Claims,

See 9 OTTO.

The appellee filed a petition in the court below, claiming compensation for services rendered to the United States in carrying mails. A demurrer to the petition was overruled; and thereupon the United States filed a counter claim, alleging the liability of the Company to pay 5 per cent. of its net earnings to the United States, and the right of the United States to retain one half of the compensation due for services rendered by the claimant, by reason of the terms and conditions of the grants to the Kansas Pacific R. R. Co., of which the claimant is alleged to be, by operation of law, the assignee; that the bonds issued to the Kansas Pacific R. R. Co. remain unpaid, and that the 5 per cent. and the one half compensation are to be applied to their repayment, according to law.

The court rendered judgment for the Denver Pacific R. R. Co. in the sum of \$58,260; whereupon the defendants took this appeal.

Messrs. Charles Devens, Atty-Gen., and **Jos. K. McCammon**, for appellant.

Messrs. J. P. Usher, Henry Beard and **S. W. Sanderson**, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

The decision in this case is controlled by that just made in the case of the *U. S. v. R. R. Co.*, [*ante*, 289]. By virtue of the Act of March 3, 1869, 15 Stat. at L., 324; the latter Company, under the name of the *Union Pacific Railroad Company*, Eastern Division, was "Authorized to contract with the Denver Pacific Railway and Telegraph Company, a Corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the *Union Pacific Railroad*, which point shall be at Cheyenne, and to adopt the road-bed already graded by said *Denver Pacific Railway and Telegraph Company* as said line, and to grant to said *Denver Pacific Railway and Telegraph Company* the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations, pertaining to said part of its line."

By the same Act it was further enacted, as follows:

"Sec. 2. *And be it further enacted*, that the said *Union Pacific Railway Company*, Eastern Division, shall extend its railroad and telegraph to a connection at the City of Denver, so as to form with that part of its line herein authorized to be constructed, operated and maintained by the *Denver Pacific Railway and Telegraph Company*, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne." * * *

"Sec. 3. *And be it further enacted*, that said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding \$32,000 per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the *Union Pacific Railway Company*, Eastern Division;

Provided, that neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under provisions of this Act."

The arrangement which was thus provided for and authorized, having been made between the two companies, and each having constructed its particular portion of the road, the Government claims that the subsidy bonds granted to the Kansas Pacific Railway Company upon the first 393 $\frac{1}{8}$ miles of its road, are a lien upon the whole line to Cheyenne, no matter who built it, if built under the authority and powers given to the Kansas Pacific Railroad Company; and that 5 per cent. of the net earnings of the entire line are applicable to the payment of said bonds.

In the case of the last named company [*ante*, 289], we held that the lien of the bonds referred to only extends to the road in respect of which they were granted, and not to the extension of it west of the one hundredth meridian. Of course, that decision controls the present case.

Other reasons might be assigned why the Denver Pacific Railroad Company is not liable to pay the five per cent. in question, but it is unnecessary to adduce them. The Company is bound, of course, to perform the government service stipulated for by the 6th section of the Act of 1862, 12 Stat. at L., 489, being paid therefor at the rates therein prescribed; and is bound by such other provisions of the Act of 1862 and the various supplementary and amendatory Acts, as are applicable to it.

The decree of the Court of Claims is affirmed.

Addendum to foregoing opinion in No. 781 by Mr. Justice Bradley.

Since delivering the opinion in this case, our attention is called to the fact that, whilst affirming generally the decree of the court below, we did not expressly pass upon the question of the right set up by the Government to retain one half of the amount of compensation due from it to the claimant for the transportation of mails and other public property. This point was not overlooked in rendering our judgment in the case. We cannot conceive on what principle the retention can be claimed, since the object of retaining the compensation for such services, or any portion thereof, as expressed in the 6th section of the Act of 1862, was to apply the amount so retained to the debt due to the Government for subsidy bonds granted to the companies that should receive the same. But the claimants in this case received no such bonds, and we decided that neither the Company nor its railroad or property is liable in any way for the payment of any debt incurred for such bonds received by the Kansas Pacific Railroad Company. Consequently, there is no room for the application of the right of retention in this case, and the decree of the Court of Claims was properly rendered for the whole amount of such compensation due.

UNITED STATES, *Plff. in Err.*,

v.

THE SIOUX CITY AND PACIFIC RAILROAD COMPANY.

(See S. C., 9 Otto, 491-492.)

Railroad subsidy.

Where the net earnings of the Company, defendant in this action, were all absorbed by the interest accruing on its first mortgage bonds, under the decision of this court in *U. P. R. Co. v. U. S.*, *ante*, 274, the Government cannot claim the five per

cent. which would otherwise be applicable to its subsidy.

[No. 590.]

Submitted Dec. 4, 1878. Decided Jan. 27, 1879.

IN ERROR to the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. Charles Devens, *Atty-Gen.*, for plaintiff in error.

Messrs. Wallis I. Hayes and S. Bartlett, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This was an action brought by the United States against the defendant in the court below to recover five per cent. of its net earnings.

The facts of the case were admitted by the parties and, amongst others, the following:

"5. That if the amount paid by the Company, as hereinbefore stated, for interest on its first mortgage bonds during said time should, under the law, be deducted from the receipts of the Company in order to ascertain the net earnings thereof, then there were no net earnings during said time; but if, on the other hand, the said payments of interest should not be deducted from the earnings of the road to ascertain the net earnings, then the net earnings of the road during said period amounted to the sum of four hundred and seven thousand, seven hundred and ninety-nine 50-100 dollars (\$407,799.50)."

It thus appears that, although the Company made net earnings to the amount of \$407,799.50, during the period covered by the time in respect of which the suit was brought, yet that they were all absorbed by the interest accruing on the first mortgage bonds. According to the principles laid down in our decision in the case of the *U. P. R. Co. v. U. S.*, just determined [*ante*, 274], the Government cannot claim the five per cent. which would otherwise be applicable to its subsidy, *therefore, the judgment of the Circuit Court is affirmed.*

Dissenting, Mr. Justice Strong.

WILLIAM B. ELLIOTT, COLLECTOR OF INTERNAL REVENUE, *Plff. in Err.*,

v.

THE EAST PENNSYLVANIA RAILROAD COMPANY.

(See S. C., 9 Otto, 573-577.)

Penalty for failure in making return or paying tax—Act of Congress.

1. The only penalty to which a corporation is liable for default under section 122 of the Internal Revenue Act of June 30, 1864, as amended July 13, 1866, for failure in making a return or in payment of a tax, is that of \$1,000, specially provided for in that section.

2. Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced.

3. In the Act of July 14, 1870, there was no intention on the part of Congress to add to the penalties imposed by section 122, while that section was in force.

[No. 725.]

Argued Jan. 22, 23, 1879. Decided Jan. 27, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The defendant in error brought suit in the District Court of Philadelphia, for the recovery of certain penalties alleged to have been illegally collected under the internal revenue laws. The case was removed to the court below, and judgment there given for the plaintiff. Hence this writ of error.

The case is fully stated by the court.

Messrs. Charles Devens, Atty-Gen., and Edwin B. Smith, Asst. Atty-Gen., for plaintiff in error.

Mr. James E. Gowen, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

In *Erskine v. R. R. Co.*, 94 U. S., 619 [XXIV., 133], we decided that the only penalty to which a corporation was liable for default under section 122 of the Internal Revenue Act of June 30, 1864, 13 Stat. at L., 284, as amended July 13, 1866, 14 Stat. at L., 138, was that of \$1,000, specially provided for in that section. We are now asked to review that ruling; but after a careful consideration of the elaborate arguments which have been submitted, we are satisfied that it was right. The language of the section to be construed is as follows: "And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of \$1,000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect and refusal." In *Erskine's* case we were asked to hold the company liable in case of default, for the penalty of five per cent. and interest at the rate of one per cent a month, provided for in section 119, as amended, 13 Stat. at L., 283; 14 Stat. at L., 480; but we decided that this provision applied only to cases of default in payment of the duties imposed by that section. The correctness of that ruling is now conceded; but it is claimed that the company is liable for a penalty of five per cent. and interest at the rate of one per cent. a month, under section 28 of the Act of June 30, 1864, as amended July 13, 1866, 14 Stat. at L., 106; section 11 of the Act of July 13, 1866, 14 Stat. at L., 150, and section 8 of the Act of March 2, 1867, 14 Stat. at L., 473. The last named Act simply provides that when for a failure to pay a tax at the time and in the manner provided by law a penalty of ten per cent. additional upon the amount of the tax so due and unpaid had been exacted, the person or persons so failing or neglecting to pay the tax, instead of paying ten per cent., should pay five per cent. and interest at the rate of one per cent a month. The sections of the other Acts referred to were evidently intended to apply to taxes and duties included in the regular annual and monthly lists required by law to be made out and placed in the hands of collectors, and not to the taxes on interest and dividends collected through or from the corporations, under the provisions of section 122. Pen- See 9 OTTO. U. S., Book 25.

alties are never extended by implication. They must be expressly imposed or they cannot be enforced. Full power is given in section 122, by reference to the other provisions of the internal revenue law, for the collection of the tax and penalty there provided for; but it nowhere appears, by reference or otherwise, that it was the intention of Congress to add to the one penalty which is expressly given for the failure to do what that section requires. As has been said, it is conceded that the addition of five per cent. and interest provided for in section 119 applies only to individual incomes. In this connection it is a noticeable fact that although by section 8 of the Act of March 2, 1867, 14 Stat. at L., 473, a reduction was made from ten per cent. to five per cent. and interest at the rate of one per cent. a month in all cases where a penalty of ten per cent. had been imposed for any failure to pay any internal revenue tax, it was deemed necessary in section 13 of the same Act, 14 Stat. at L., 480, to amend section 119 specially, so as to reduce in the same way the additional per centage of ten per cent. imposed by that section. If it had been supposed that the penalties prescribed in the other parts of the Act for failure to pay taxes applied to taxes upon incomes, this special amendment would not have been necessary. But if they did not apply to section 119, it is difficult to see how they can to section 122. As it was supposed to be necessary to make express provision in section 119 for the payment of this additional percentage in order to charge the tax payer, and it was omitted in section 122, the conclusion is irresistible, that it was the intention of Congress to impose no other penalty for a failure to comply with the requirements of this section than the one which is specifically given.

We see nothing in the Act of July 14, 1870, 16 Stat. at L., 260, under which a portion of the taxes paid by the defendant in error was assessed, to manifest any intention on the part of Congress to add to the penalties imposed by section 122 while that section was in force. The penalty of \$1,000 is confined to a default in making the required return, instead of default in making the return or in making the payment, as it was in section 122. In other respects the provisions as to penalties in the two Acts are substantially the same.

The judgment is affirmed.

MATHIAS TERHUNE, *Appt.*,

v.

JOHN PHILLIPS ET AL.

(See S. C., 9 Otto, 592, 593.)

Patent law—judicial notice—invention.

1. This court will take judicial notice that a thing patented was known and in general use long before the issuing of the patent.

2. The substitution of metal for wood is destitute both of patentable invention and utility.

[No. 106.]

Submitted Dec. 24, 1878. Decided Jan. 27, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The appellant brought suit in the court below,

for the alleged infringement of a certain patent for metallic corner sockets of show cases. The defense alleged a lack of novelty in the patent. The court entered a decree dismissing the bill, from which the complainant appealed.

The case is sufficiently stated by the court.

Messrs. J. W. Merriam and L. L. Coburn, for appellant.

No counsel appeared for appellees.

Mr. Justice Swayne delivered the opinion of the court:

The determination of this case is controlled by *Brown v. Piper*, 91 U. S., 37 [XXIII., 200]. We cannot fail to take judicial notice that the thing patented was known and in general use long before the issuing of the patent. The substitution of metal for wood was destitute both of patentable invention and utility. The admission of improper testimony, if it occurred, was, therefore, immaterial. The case of the appellant as it appears in the record, without any testimony, is clear and conclusive against him.

The decree of the Circuit Court is affirmed.

Cited—109 U. S., 101, 102; 111 U. S., 606; 17 Blatchf., 401; 19 Blatchf., 207.

THOMAS R. MILLS, JR., Admr., etc., of the
Estate of GEORGE HALL, Deceased, *Plff. in Err.*,

v.

LEVI H. B. SCOTT.

(See S. C., 9 Otto, 25-30.)

Georgia Statute of Limitations—action against stockholder—action of debt—excessive judgment.

1. The Georgia Statute of Limitations of Mar. 16, 1869, does not commence to run against administrators until twelve months from the date of their appointment and qualification.

2. In that State an action of debt will lie against a stockholder of an insolvent bank, or his administrator, to recover the amount he is liable to pay for the debts of the bank, where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder can be stated.

3. Actions for debt will always lie where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation.

4. Where the recovery in such action is for too great an amount, the cause will be remanded to the court below with directions to grant a new trial, unless the plaintiff consent to remit from the judgment the excess.

[No. 119.]

Argued Jan. 16, 1879. Decided Feb. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Southern District of Oregon.

The case, which arose in the court below, is fully stated in the opinion.

Messrs. Walter S. Chisholm, Julian Hart-ridge and C. D. Willard, for plaintiff in error.

Mr. A. T. Akerman, for defendant in error:

Mr. Justice Field delivered the opinion of the court:

This is an action at law against the administrator of the estate of George Hall, deceased, upon bills of the Merchants' and Planters' Bank

of Savannah, Georgia, amounting to over \$100,000. The deceased was, on the first of January, 1860, and up to the time of his death the owner of one thousand shares of the capital stock of that bank, of the nominal value of \$100 a share. A clause in the charter of the bank provided that "The persons and property of the stockholders" should be liable for the redemption of its bills and notes at any time issued, in proportion to the number of shares held by them. The plaintiff was the owner of the bills in suit, and as they were not paid on presentation, he brought an action upon them against the bank in the Circuit Court of the United States for the Southern District of Georgia, and recovered judgment, upon which execution was issued and returned unsatisfied. He then brought this action to charge the estate of the deceased, Hall, under the provision of the charter mentioned.

To the declaration the defendant pleaded the general issue and the Statute of Limitations of March 16, 1869, requiring actions for the enforcement of rights of individuals under Acts of incorporation or by operation of law, which accrued prior to June 1, 1865, to be brought before the first of January, 1870, or be forever barred. To the special plea the plaintiff interposed a demurrer, and it was agreed in arguing it that the following facts should be considered as set forth in the plea, namely: that George Hall was domiciled in Connecticut, and died there in 1868, leaving a will; that there was no administration in Georgia on his estate until August 9, 1869, when letters of administration *ad colligendum* were granted to the defendant, Mills; and that permanent letters of administration, with the will annexed, were granted to him on June 7, 1869.

The court sustained the demurrer and struck out the plea. The case was then tried upon the general issue, and the plaintiff obtained a verdict for the sum of \$100,000, of which sum \$31,354 was to be made out of the property of the deceased, then in the hands of the administrator, and the remainder out of property which might subsequently come into his hands. Upon this verdict, judgment being entered, the defendant brought the case to this court on a writ of error.

The principal questions presented for our consideration are: 1, whether the Statute of March 16, 1869, is a bar to the action; and, 2, whether an action at law by a bill-holder to charge a stockholder will lie under the charter of the bank; and, if so, whether the declaration will sustain the finding of the jury.

The Statute of March 16, 1869, was intended to bring all claims to an early determination. It was passed, as recited in its preamble, on account of the confusion which had "grown out of the disturbed condition of affairs during the late war," and because of doubts entertained relative to the law of limitation of actions "which should be put to rest." It was a measure well calculated to bring disputed controversies to a speedy settlement. The time prescribed within which actions were to be brought was only nine months and fifteen days. In the case of *Terry v. Anderson*, 95 U. S., 628 [XXIV., 365], it was held by this court that the Act was not open to any constitutional objection because of the shortness of this period. The question

in such cases, the court said, was, whether the time allowed was, under all the circumstances, reasonable; and of this the Legislature of the State was primarily the judge, and its decision would not be overruled unless a palpable error had been committed. Looking at the circumstances under which the Legislature had acted, amidst the disasters which had affected the fortunes, property and business of almost every one in the State, the court could not say that the time mentioned was unreasonable. "Society demanded," observed the *Chief Justice*, "that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things;" and for that purpose, whilst the obligations of old contracts could not be impaired, "their prompt enforcement could be insisted upon or an abandonment claimed."

There is in the statute no exception in terms of any class of cases; yet such a construction must be given to its provisions as not to impair the operation of other laws, which it is not reasonable to suppose the Legislature intended to repeal. The law of the State relating to the administration of the estates of deceased persons contains various provisions, which, in many particulars, would be defeated if the Statute of March 16, 1869, was held applicable to actions in behalf of the estates or against them. Thus, administrators are allowed twelve months from the date of their qualification to ascertain the condition of the estates confided to their charge; creditors are required to present their claims within this period; and no suits to recover a debt of the decedents can be brought until its expiration. Secs. 2530, 2548, 3348. The Supreme Court of the State has accordingly held that the Statute of 1869 does not affect this exemption from suit for the period designated, but that its spirit and equity require that suits against administrators upon the claims mentioned should be brought within a similar period after twelve months from the grant of administration; that is, within nine months and fifteen days afterwards. Such is the purport of its decision in *Moravian Seminary v. Atwood*, 50 Ga., 382; and that decision has since been followed in several cases. *Edwards v. Ross*, 53 Ga., 147. In conformity with them we must hold that the statute was not a bar to the present action. There was no administrator of the estate of Hall appointed in Georgia, even for temporary purposes until April 9, 1869, and this action was commenced December 30, 1870, which was within the period required after the expiration of the year of exemption.

Whether the present action can be maintained, it being an action at law by a bill holder to charge the estate of a deceased stockholder, depends upon the construction given to the clause of the charter of the bank, prescribing the personal liability of the stockholders. The language of the clause, so far as it bears upon this case, is that "The persons and property of the stockholders shall at all times be liable, pledged and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess." This provision is held by the Supreme Court of the State to create a personal liability on the part of the stockholder for all the notes of the bank in the See 9 OTTO.

proportion that the shares held by him bear to all the shares of its capital stock, which any bill holder can enforce, upon the insolvency of the bank, by separate action to the extent of his claim. *Lane v. Morris*, 8 Ga., 468; *Addins v. Thornton*, 19 Ga., 325. Such liability may, undoubtedly, be enforced by a suit in equity, and in many cases such a proceeding would seem to be the only appropriate one, as was held by this court in *Pollard v. Bailey*, 20 Wall., 520 [87 U. S., XXII, 376]; see also, *Terry v. Tubman*, 92 U. S., 156 [XXIII, 537]. The proportion of the indebtedness with which the stockholder is to be charged can be ascertained only upon taking an account of the debts and stock of the bank, and a court of equity is the proper tribunal to bring before it all necessary parties for that purpose. But by the law of the State, as declared by its highest tribunal, an action for debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder can be stated. In such cases, the extent of the latter's liability is fixed, and the amount with which he should be charged is a matter of mere arithmetical calculation. Actions for debt will always lie where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation. Here the declaration states the number of shares of the capital stock of the bank to be twenty thousand, and that one thousand were held by the deceased. His liability, therefore, was fixed at one twentieth of the entire indebtedness of the bank on the bills issued by it, which is averred to be \$800,000. The only recovery, therefore, which the declaration permitted was for \$40,000 and not for \$100,000, which the jury found. This error in the record is not specifically pointed out in the brief of counsel for the defendant, who was not present at the argument; but it is evident that it was at the erroneous apportionment of the indebtedness to the estate of the deceased that he aimed, when insisting that the remedy of the plaintiff should have been by a bill in equity, and not in this form of action.

Bethis as it may, where an error in the amount recovered is apparent upon the record, and it could not have been remedied by an amendment of the pleadings, this court will, of its own motion, in the interests of justice, direct that it be corrected, and, if necessary, order a new trial or further proceedings for that purpose.

This cause will, therefore, be remanded to the court below, with directions to grant a new trial, unless the plaintiff, within a period to be designated by the court, consent to remit from the judgment the excess over \$40,000.

UNITED STATES, *Appt.*,

v.

OAKES A. AMES AND OLIVER AMES,
EXRS. of OAKES AMES, Deceased, ET AL.

(See S. C., 9 Otto, 35-47.)

Bond in admiralty—recall of property—judgment—joint contractors—partnership—demurrer—relief in equity.

1. Where property is seized in admiralty, as forfeited, and a bond is given by its claimant for its return to him, such bond becomes the substitute

for the property; and in case the property is condemned, the remedy is transferred from the property to the bond.

2. The question, whether a case is made for the recall of property released under bond in such a case, must be determined by the courts empowered to hear and determine the matter in controversy in the pending suit.

3. The property released cannot be recalled after it has been condemned and the libelants have proceeded to final judgment against the principal and sureties in the bond given for its release.

4. A judgment against one of two or more joint contractors is a bar to an action against the others.

5. Where the property was partnership property, and the release was obtained for the benefit of the partnership, those partners who did not sign the bond cannot be rendered liable for its value.

6. Mere legal conclusions are never admitted by a demurrer.

7. Relief in equity will not be granted merely because a security in an admiralty suit becomes ineffectual if it appears that it became so without fraud, misrepresentation or accident, which might have been prevented by due diligence.

[No 133.]

Argued Jan. 17, 1879. Decided Feb. 3, 1879.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is fully stated by the court.

Messrs. G. A. Somerby, E. S. Mansfield and George P. Sanger, for appellant:

The demurrers admits all the facts averred in the bill to be true, so far as they are well pleaded. If the United States has a right to recover the value of its property which the deceased partner has, immediately after its delivery and the execution of the release bond or stipulation, with knowledge of the entire cause of condemnation and forfeiture, and who, with his copartners, sold it and received the proceeds of the sale, then his executors are properly proceeded against by this bill, and the circuit court, as a court of equity, has original and plenary jurisdiction.

The case presented is that of a trust fund, a trustee holding and a *cestui que trust* claiming it. This gave the circuit court original and plenary jurisdiction. That the fund arose and the trustee was appointed under the Bankrupt Act, did not affect the right of the United States to pursue both by the exercise of the jurisdiction invoked. The same remedies are applicable as if the fund had arisen and the trustee had been appointed in any other way.

Lewis v. U. S., 92 U. S., 618, 622 (XXIII., 513, 514); citing *Beaston v. Bk.*, 12 Pet., 134; *Thelussou v. Smith*, 2 Wheat., 425.

In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them in favor of creditors, legatees and heirs, in reference to the proper execution of the trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate, without taking a general account of the testator's debts. *Atty-Gen. v. Cornthwaite*, 2 Cox, Eq., 43; *Adams, Eq.*, 257.

The existence of this jurisdiction has been acknowledged in this court, and in several of the courts of chancery in the States.

Green v. Creighton, 23 How., 90, 106 (64 U. S., XVI., 419, 423).

That a single creditor may maintain a bill against an administrator of a deceased debtor, for a discovery of assets and the payment of his debt, there can be no doubt.

Hagan v. Walker, 14 How., 29, 34, 35; *Hunter v. U. S.*, 5 Pet., 172.

That the United States, upon the averments of this bill, is entitled to the remedy therein prayed for, or to other and further relief, not inconsistent with the specific prayer, clearly appears from the nature of the original cause against The Rob Roy and cargo, the principles applicable to such cause, and to the averment in the bill.

What was that cause?

Certainly not an action at common law in which A recovered judgment against B on a promissory note made by B, and afterwards, discovering that C was a dormant partner of B, at the time the note was given, brought an action at common law against C and B.

Certainly not an action of *assumpsit* or debt at common law.

Certainly not an action at common law.

Certainly not a bill in equity brought by A after he had recovered judgment in an action at common law against B, against C and B or against C alone; the bill simply setting forth as the sole ground for equitable relief, the naked fact, that A did not know C was B's partner until after his judgment at law against B had been rendered.

Certainly not an admiralty cause of collision, where the ship had been released on bail. Certainly not an admiralty cause to enforce payment of a bottomry bond, where the ship had been discharged on the usual stipulation for value.

It was a cause of forfeiture to the United States of The Rob Roy, and her cargo of 1,120 bales of cotton, as enemies' property, because the cargo had been sought for, obtained and brought on board The Rob Roy, from within territory of the United States, declared by the President of the United States to be in a state of insurrection.

"The Government seized the steamer Rob Roy and her cargo, as liable to forfeiture for acts done during the war. These acts were in violation of the rules of war, as adopted by the United States. The title of the Government rested on such unlawful acts. * * * * *

The Government proved the unlawful acts." *Mr. Justice Bradley* in *U. S. v. Rob Roy*, 1 Woods, 42, 44.

Are the rights of the United States, after a condemnation, to be measured by and confined to the stipulation or release bond given in such a cause? If so, then if the stipulation or release bond proves to be insufficient, and final process thereon is returned wholly unsatisfied and the proceeds of the property condemned as forfeited to the United States for violation of its rules of war, can be traced to the hands of persons not *bona fide* purchasers, within the jurisdiction of its courts, the United States and its courts will be powerless to touch those proceeds. The rules of war will, in such cases be mere nullities, and the very object sought to be accomplished by those rules, the reduction of the enemies of the United States, will be entirely defeated.

Such a stipulation in such a cause is a mere incident and attendant upon the original cause, and the decree rendered on such a stipulation is not a distinct independent judgment at common law, but is interlocutory, and a mere incident and attendant upon the original cause.

Smart v. Wolfe, 3 T. R., 323; *The Nied Elwin*, 1 Dods., 50; *The Pomona*, 1 Dods., 25; *Roberts, Adm. and Prize*, 434; *Upton, Mar. Warfare*, 2d ed., 432, 433.

Additional security and the interlocutory decree thereon fixing the value of the cotton at the time of the unlivery, did not in any way strip from the United States its claim against Ames, Butler and Mansfield, as having had and sold and received the proceeds of the property of the United States, with perfect knowledge at the time of the unlivery, property condemned for violating the rules of war adopted by the United States.

It cannot be that the death of either of the co-partners has stripped from the United States its claim and annihilated the debt of that deceased partner if it shall be proved.

Messrs. George O. Shattuck and Oliver W. Holmes, Jr., for appellees:

If Oakes Ames had ever been a party to the bond, his liability was concluded, both at law and in equity, by the judgment entered upon it.

Mason v. Eldred, 6 Wall., 231 (73 U. S., XVIII., 783); *Wann v. McNulty*, 2 Gilm. Ill., 355; *U. S. v. Price*, 9 How., 83, 94; *Cabell v. Vaughan*, 1 Wms. Saund., 291, *e*; *Beltzhoover v. Com.*, 1 Watts., 126.

If a party obtains a judgment against certain members only of a firm, when there were other members who were jointly liable, and who might have been held liable by him, the fact that the plaintiff did not know of the parties not included in his judgment until after it was rendered, gives him no standing in equity.

Penny v. Martin, 4 Johns. Ch., 566; *Wilkins v. Consequa*, Pet. (C.C.), 301, 306; *Sedam v. Williams*, 4 McL., 51, 52; *Spear v. Gillet*, 1 Dev. Eq., 466, 469 (top); *Moale v. Hollins*, 11 Gill. & J. (Md.), 11; *Wann v. McNulty*, 2 Gilm. (Ill.), 355; *Ward v. Motter*, 2 Rob. (Va.) 536, 545; *Ward v. Johnson*, 13 Mass., 148; *Anderson v. Levan*, 1 Watts & S., 334, 339; *Smith v. Black*, 9 S. & R., 142; *Robertson v. Smith*, 18 Johns., 459, and other cases cited and approved in *Mason v. Eldred* (*supra*).

If Ames had been a party to the bond, he might have been made a party to the judgment upon it.

McLellan v. U. S., 1 Gall., 227; *The Alligator*, 7 Gall., 145.

It has been held by this court in the case of a bond made expressly joint and several, on which a joint judgment was taken, that even a party to the judgment was discharged by death, and that his estate could not be followed in equity.

U. S. v. Price, 9 How., 83.

Mr. Justice Lindley evidently holds the same opinion. *Lind. Partnership*, 4th ed., 371, 451, 454.

If the *res* itself, the cotton, had been within reach of the process of the court of Louisiana at the time of bringing this suit, it would not have been within the power of the court to order the arrest.

Coote, Adm. Pr., 2d ed., 19; *Boyd, Adm.*, 39; *Wms. & Br.*, 228; *Roscoe, Adm.*, 6, 112; *The Union*, 4 Blatchf., 90; *The White Squall*, 4 Blatchf., 103; *The T. P. Leathers*, Newb., 432, 433, 435, 437, *n.*; *The Thales*, 3 Ben., 327, 329; *S. C.*, 10 Blatchf., 203; *The Jack Jewett*, 2 Ben., 353, 355, 356; *The Old Concord*, 1 Brown, Adm., 270; *The Kalamazoo*, 15 Jur., 885; *S. C.*, 9 Eng.

See 9 OTTO.

L. & E., 557; *The Wild Ranger*, Bro. & Lush., 84, 87, 88; *S. C.*, Lush., 553; *The Hero*, 13 W. R., 927; *S. C.*, Bro. & Lush., 447; *The Webb*, 14 Wall., 406, 418 (81 U. S., XX., 774, 777); *The Ann Caroline*, 2 Wall., 538, 549 (69 U. S. XVII., 833, 835); *The Lady Pike*, 96 U. S., 461, 465 (XXIV., 672, 673); *The Virgo*, 13 Blatchf., 255.

The law in question creates a forfeiture of a specific thing in terms, and does no more. It is penal in its nature, and should not, therefore, be extended to forfeit proceeds of the forfeited thing, which are not mentioned in the act.

U. S. v. Weed, 5 Wall., 62, 68 (72 U. S., XVIII., 531, 533); *The Reform*, 3 Wall., 617, 629 (70 U. S., XVIII., 105, 109); *U. S. v. The Malek Adhel*, 2 How., 210, 235; *U. S. v. Huckabee*, 16 Wall., 414 (83 U. S., XXI., 457).

Equity never lends its aid to enforce a forfeiture, and the law in question creates a forfeiture in terms.

Stevens v. Gladding, 17 How., 447, 453-455 (58 U. S., XV., 155, 157, 158); *Story, Eq. Pl.*, sec. 521; *Story, Eq. Pl.*, secs. 1391, 1494; *U. S. v. McRae*, L. R., 4 Eq., 327, 388, *et seq.*

Mr. Justice Clifford delivered the opinion of the court:

Judicial cognizance of prize cases is derived from that article of the Constitution which ordains that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; and the district courts for many years exercised jurisdiction in such cases without any other authority from Congress than what was conferred by the 9th section of the Judiciary Act, 1 Stat. at L., 73, which gave those courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including the seizures therein mentioned, the rule adopted being, that prize jurisdiction was involved in the general delegation of admiralty and maritime cognizance, as conferred by the language of that section. *Glass v. The Betsy*, 3 Dall., 6; *The Admiral*, 3 Wall., 603 [70 U. S., XVIII., 58]; *Jennings v. Carson*, 1 Pet., Adm., 7; 1 Kent, Com., 12th ed., 355; 2 Stat. at L., 761, sec. 6.

Admiralty courts proceed according to the principles, rules and usages which belong to the admiralty as contradistinguished from the courts of common law. *Manro v. Almeida*, 10 Wheat., 473; 1 Stat. at L., 276.

Seizure of the property and the usual notice precede the appearance of the claimant; but when those steps are taken, the owner or his agent, if he desires to defend the suit, must enter his appearance in the case, and the court may, in its discretion, require the party proposing to appear and defend the suit to give security for costs as a preliminary condition to the granting of such leave.

Due appearance having been entered, the claimant, if he wishes to avoid the inconvenience and expense of having the property detained until the termination of the suit, may apply to the court at any time to have the property released on giving bond, which application it is competent for the court to grant or refuse.

Bail in such a case is a pledge or substitute for the property as regards all claims that may be made against it by the promoter of the suit. It is to be considered as a security, not for the amount of the claim, but simply for the value of the property arrested, to the extent of the

claim and costs of suit, if any, beyond the preliminary stipulation. *Williams & Bruce, Prac.*, 210.

Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court which the tribunal could properly exercise if the thing itself were still in the custody of the court. *The Palmyra*, 12 Wheat., 1; *The Wanata*, 95 U. S., 611 [XXIV., 464]; *The Webb*, 14 Wall., 406 [81 U. S., XX., 774].

Fees and expenses of keeping the property having been paid, it is the duty of the marshal to surrender the property as directed in the order of release; and it is settled law that if any one, in defiance of the order, unlawfully detains the same he is liable to be proceeded against by attachment. *The Towan*, 8 Jur., 223; *The Tritonia*, 5 N. of Cas., 111.

Concisely stated, the material facts as derived from the allegations of the bill of complaint are as follows: (1) That a certain steamboat with her cargo, consisting of eleven hundred and twenty bales of cotton, was seized as enemy property. (2) That proceedings, on the 23d of March, 1865, were commenced against the property in the District Court for the Eastern District of Louisiana, to procure a decree of forfeiture of the property, the charge being that the cargo was obtained within territory occupied by armed public enemies. (3) That the person named in the bill of complaint appeared in the suit as claimant of the cargo, and obtained an order of the court that the cargo of cotton might be released to the claimant, he, the claimant, giving bond to the complainants in the sum of \$350,000, with good and solvent security. (4) That the claimant on the following day, in pursuance of the order, filed the required bond to the amount specified in open court, duly executed by the claimant as principal and with sureties accepted by the court as satisfactory. (5) That the marshal on the same day, in compliance with the order of the court, released and delivered the cargo to the claimant. (6) That on the 10th of May following, the district court entered a decree in the suit dismissing the libel and ordered that the cargo seized be restored to the claimant, from which decree the complainants appealed to the circuit court. (7) That the circuit court on the 8th of June then next, reversed the decree of the district court and entered a decree condemning the steamboat and her cargo as forfeited to the United States, and condemning the claimant to pay to the complainants \$204,982.28, with interest, and a decree in the usual form against the sureties. (8) That the decree last named is in full force, and that neither the claimant nor sureties have ever paid the same or any part thereof to the complainants. (9) *Nulla bona* having been returned upon the execution, the present bill of complaint was filed in the name of the United States; and the prayer is that the executors of Oakes Ames may be decreed to admit assets in their hands sufficient to pay and satisfy the aforesaid decree and interest, and that it be decreed that they shall pay the amount of the decree and interest to the complainants.

Certain other matters are also set forth in the

bill of complaint which, it is alleged, entitle the complainants to the relief prayed, of which the following are the most material: (1) That at the time of the seizure of the steamboat and her cargo, and at the time the bond for the release of the cargo was given, and at the time the decree was entered against the claimant and his sureties in the bond, the testator of the executors named as respondents and the other respondent named were partners of the claimant under the firm and style alleged in the bill of complaint; and that the partners in the course of the partnership business purchased the cargo of the steamboat for the benefit of the partnership; and that the other two partners well knew of the commencement of the suit by the complainants to procure a decree of forfeiture of the property; and that they directed the claimant to give the release bond in the name and style of the partnership as obligors; and that the copartners obtained possession of the cargo and sold the same, and received the proceeds to their own use as copartners. (2) That large sums of money, to wit: \$21,963.72, paid for storage, internal revenue, and the charges of the treasury agent, were paid with the funds of the partnership with full knowledge of all the said copartners, as well as counsel fees and the expenses of defending the suit to condemn the property. (3) That the complainants at the time the release bond was executed had no knowledge that these parties were partners, and that neither the partnership nor the partner last named in the bill of complaint have sufficient goods or estate to pay the amount of the decree against the claimant and his sureties.

Service was made, and the respondent executors appeared and demurred to the bill of complaint, and on the same day the other respondent appeared, and he also filed a demurrer to the bill. Continuance followed, and at the next session of the court in the same term the circuit court entered a decree sustaining the demurrers and dismissing the bill of complaint. Prompt appeal was taken by the complainants in open court, and they now assign for error that the circuit court erred in sustaining the demurrers and in dismissing the bill of complaint.

Equitable relief is claimed by the complainants chiefly upon three grounds, each of which is attempted to be supported upon the theory that they have suffered a loss and that they have not an adequate and complete remedy at law. Irrespective of the course pursued by counsel in the argument of the cause, the respective grounds of claim will be examined by the court in the following order, as the one best calculated to exhibit the controversy in its true light.

Throughout it may be considered that the complainants admit that they have no remedy at law, but they contend that they are entitled to equitable relief for at least three reasons: (1) Because the property seized as forfeited to the United States has been legally condemned, and that the principal and sureties in the stipulation for value given for the release of the same at the commencement of the proceedings in the admiralty court have become insolvent and unable to pay the amount of the decree recovered by the complainants in the admiralty court. (2) Because the other two partners named in the bill of complaint were each equally interested

with the claimant in the property seized and condemned, of which the complainants had no knowledge; and that inasmuch as the property when released went into the possession of the partnership and was sold for the benefit of all the partners, the claim of the complainants is that they are entitled to equitable relief. (3) Because the estate of the deceased partner is liable for the whole decree; and inasmuch as his estate is insufficient to pay all his debts the United States are entitled to maintain the bill of complaint to secure their preference.

Due seizure of the property was made and due proceedings were instituted in the Admiralty Court for its condemnation, and the allegations of the bill of complaint show that the person named was duly admitted to appear as claimant, and that the Admiralty Court on his motion passed the order that the property should be released upon his giving a bond to the complainants in the sum of \$350,000, with good and solvent security, which is the usual order given in such cases.

Proceedings of the kind are usually adopted in all seizures under the revenue and navigation laws, as is well known to every practitioner in such cases. 1 Stat. at L., 696, sec. 89; R. S., 938. Bond or stipulation with sureties for the discharge of the property seized is allowed in all revenue cases, except for forfeiture, and the better opinion is that even in seizures for forfeiture the bond may be executed in the same manner by the claimant. R. S., secs. 940, 941.

Pursuant to the known and well recognized practice, the court allowed the claimant to give the bond with sureties approved by the court, and thereupon directed the marshal to surrender the property to the principal in the bond. Beyond all doubt, therefore, the claimant acquired the possession of the property lawfully and in pursuance of the order of the Admiralty Court.

Hearing was subsequently had; and the Admiralty Court entered a decree in the case dismissing the libel, and ordered that the property, consisting of the cargo of the steamboat, be restored to the claimant. Due appeal to the circuit court was entered by the libelants; and the record shows that the circuit court reversed the decree of the district court, and adjudged and decreed that the steamboat and her cargo be condemned as forfeited to the United States. No appeal was ever taken from that decree, and the allegations of the bill of complaint also show that the circuit court entered a decree against the claimant and his sureties in the release bond or stipulation for value in the sum of \$204,982.28, with interest and costs of suit.

Attempt is not made to call in question the jurisdiction of the Admiralty Court, nor of the circuit court in the exercise of its appellate power in the case. Nothing can be better settled, said Judge Story, than the proposition that the admiralty may take a *fidejussory* caution or stipulation in cases *in rem*, and that they may in a summary manner render judgment and award execution to the prevailing party. Jurisdiction to that effect is vested in the district court, and for the purposes of appeal is also possessed by the circuit courts, both courts in such cases being fully authorized to adopt the process and modes of process belonging to the admiralty, and the district courts have an undoubted right

See 9 Otto.

to deliver the property on bail and to enforce conformity to the terms of the bailment. Authority to take such security is undoubted, and whether it be by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Having jurisdiction of the principal cause, the court must possess the power over all its incidents, and may by monition, attachment or execution enforce its decree against all who become parties to the proceedings. *Brig Alligator*, 1 Gall., 145; *Nelson v. U. S.*, Pet. (C. C.), 235.

Bonds given in such cases, says Dunlap, are to all intents and purposes stipulations in the admiralty, and must be governed by the same rules. Original cognizance in such cases is exclusive in the district courts; but the circuit courts, in the exercise of their appellate jurisdiction, possess the same power to the extent necessary in re-examining the orders and decrees of the subordinate court. Dunlap, Prac., 174; *The Peggy*, 4 C. Rob., 305; *The Ann Caroline*, 2 Wall., 538 [69 U. S., XVII., 333].

Such security was taken for the cargo seized in the district court, and no review of that order was asked in the circuit court. Where an appeal is taken from the decree of the district court, the *res* if not released, or the bond or stipulation for value, follow the cause into the circuit court, where the fruits of the property if not released, or the bond or stipulation for value, may be obtained in the same manner as in the court of original jurisdiction, the bond or stipulation being, in fact, nothing more than a security taken to enforce the final decree. *McLellan v. U. S.*, 1 Gall., 227.

It matters not, says the same magistrate, whether the security in such a cause be a bond, recognizance, or stipulation, as the court has an inherent right to take it and to proceed to render judgment or decree thereon according to the course of the admiralty, unless where some statute has prescribed a different rule. *The Octavia*, 1 Mas., 150; *The Wanata*, *supra*.

Securities of the kind are taken for the property seized for the value of the same when delivered to the claimant, and the stipulation will not be reduced if the property when sold brings less than the appraised value, nor can the court award any damages against the sureties beyond the amount of the stipulation, even if the amount of the stipulation is less than the decree. *The Hope*, 1 W. Rob., 155.

Authorities may be found which deny the power even of the Admiralty Court to recall the property for any purpose after the stipulation for value has been given and the property has been delivered to the claimants. *The Wild Kangaroo*, Bro. & L., 671 [see, Lush., 553]; *Kalamazoo*, 9 Eng. L. & E., 557; *S. C.*, 15 Jur., 885; *The Temiscouata*, 2 Spinks, 211; *The White Squall*, 4 Blatchf., 103; *The Thales*, 10 Blatchf., 203.

Other decided cases, perhaps for better reason, hold that in case of misrepresentation or fraud, or in case the order of release was improvidently given without any appraisal or any proper knowledge of the real value of the property, it may be recalled *before judgment* where the ends of justice require the matter to be reconsidered. *The Hero*, Bro. & L., 447; *The Union*, 4 Blatchf., 90; *The Duchesse*, Swab., 264; *The Flora*, L. R., 1 Adm. & Eccl., 45; *The Virgo*, 13 Blatchf., 255.

Suppose the power, in case of fraud, misrepresentation, or manifest error in the court, exists in the court of original jurisdiction, or even in the circuit court, inasmuch as the stipulation for value follows the appeal into that court, still it is clear that no other court possesses any such jurisdiction nor any power to re-examine the discretionary ruling of the admiralty courts in that regard. *Smart v. Wolfe*, 3 T. R., 340; *Cambden v. Home*, 4 T. R., 382; *The Wanata* [supra]; *Houseman v. The North Carolina*, 15 Pet., 40.

Even if the rule were otherwise, it would not avail the complainants in this case, as they never made any application either to the district court or to the circuit court to recall the property, nor is it now pretended that the amount of the stipulation is not fully equal to the value of the cargo released, nor that the sureties were not perfectly solvent at the time the bond was executed. Nothing of the kind is alleged, and of course nothing of the kind is admitted by the demurrer.

Suitors in cases of seizures on waters navigable from the sea by vessels of ten or more tons burthen are saved the right of a common law remedy where the common law is competent to give it. 1 Stat. at L., 77.

Given as the bond was on the release of the cargo of cotton in a suit *in rem* for its condemnation, it became the substitute for the property; and the remedy of the libelants, in case they prevailed in the suit *in rem* for condemnation, was transferred from the property to the bond or stipulation accepted by the court as the substitute for the property seized. Common law remedies in cases of seizure for forfeiture or to enforce a lien are not competent to effect the object for which the suit is instituted and, consequently, the jurisdiction conferred upon the district courts, so far as respects that mode of proceeding, is exclusive. Parties in such cases may proceed *in rem* in the admiralty; and if they elect to pursue their remedy in that mode, they cannot proceed in any other forum, as the jurisdiction of the admiralty courts is exclusive in that mode of proceeding, subject of course, to appeal to the circuit court. *Leon v. Galceran*, 11 Wall., 185 [78 U. S., XX., 74]; *Steamboat Co. v. Chase*, 16 Wall., 522 [83 U. S., XXI., 369]; *The Belfast*, 7 Wall., 624 [74 U. S., XIX., 266].

Proceedings *in rem* are exclusively cognizable in the admiralty, and the question whether a case is made for the recall of property released under bond or stipulation in such a case must, beyond all doubt, be determined by the courts empowered to hear and determine the matter in controversy in the pending suit. Nor is there anything unusual in the fact that other parties beside the claimant were interested in the property seized at the time the property was released and the bond for value taken in its place. *Matter of Stover*, 1 Curt., 201; *The Adeline*, 9 Cranch, 244.

Whenever a seizure takes place, it is the right of the owner to appear and file his claim, if he complies with the preliminary order of the court as to costs; but the claim is often made by the master of the vessel or the managing owner, and it may be made by an agent or the consignee, and in the case of a foreign ship it may be filed by the consul of the Nation to which the ship belongs. Experience has approved the practice, as the

security is rendered sufficient by the sureties; nor is the danger of loss from their insolvency much if any greater than what arises where the property is retained, from liability to decay or to destruction by fire or flood. Admiralty courts everywhere favor the practice, and the same is sanctioned to a very large extent by the Acts of Congress. 9 Stat. at L., 181; R. S., sec. 941.

2. Many of the preceding observations made to prove that the first ground of claim set up by the complainants cannot be sustained are equally applicable to the second, for the same purpose; but there is another answer to the second, which is even more conclusive than anything before remarked to show that the decree of the circuit court is correct.

Although the claimant is the sole principal in the bond, yet the allegations in the bill of complaint are that the other two partners were equally interested in the property, and that the claimant procured the release of the property, for the benefit of the copartnership; and the complainants allege that the transaction should be viewed in all respects as if all the members of the firm had been principals in the bond, inasmuch as the property when released went into the possession of the firm and was sold for the benefit of all the partners. Concede what is not admitted, that evidence to prove that theory may be admissible, it is, nevertheless, true that the theory must be examined in view of the established fact that the circuit court entered a final decree on the bond against the principal and sureties for the whole value of the cargo which was seized and condemned, and the bill of complaint alleges that the decree of the circuit court is in full force and unreversed.

None of the authorities afford any countenance whatever to the theory that the property released can be recalled for any purpose after the property has been condemned and the libelants have proceeded to final judgment against the principal and sureties in the bond or stipulation for the release of the property seized. Difficulties of the kind, it would seem, must be insuperable; but if they could be overcome, there is still another, which of itself is entirely sufficient to show that the second ground of claim is no better than the first.

Judgment has already been rendered against the claimant; and even admitting that the other two partners may be treated as if they were joint principals in the bond given for the value of the property released, it is quite clear that the judgment against the claimant would be a bar to an action against the other partners upon the bond. Even without satisfaction, a judgment against one of two or more joint contractors is a bar to an action against the others, within the principle of the maxim *transit in rem judicatam*, the cause of action being changed into matter of record. *King v. Hoare*, 13 Mees. & W., 494.

Judgment in such a case is a bar to a subsequent action against the other joint contractors, because the contract being joint and not several, there can be but one recovery. Consequently, the plaintiff, if he proceeds against one *only* of the joint contractors, loses his security against the others, the rule being that by the recovery of the judgment, though against one only, the contract is merged and a general security substituted for the debt. *Sessions v. Johnson*, 95 U.

S., 347 [XXIV., 596]; *Mason v. Eldred*, 6 Wall., 231 [73 U. S., XVIII., 783]. From which it follows, if the theory of the complainants is correct that the bond is to be regarded as the joint bond of the three partners, that they are without remedy against the other two, as they have proceeded to final judgment against the claimant.

Neither of the other partners signed the bond but the complainants allege that the firm directed the claimant to give the bond for and in the name and style of their said partnership as obligors; to which it may be answered that if the firm gave such directions the claimant did not follow them, as the bond set forth in the record as an exhibit to the bill of complaint shows that it is the individual bond of the alleged senior partner. Nor do the complainants pretend that the other partners ever signed the instrument, but they contend that the demurrer admits everything which they have alleged.

Matters of fact well pleaded are admitted by a demurrer, but it is equally well settled that mere conclusions of law are not admitted by such a proceeding. *Dillon v. Barnard*, 21 Wall., 430 [88 U. S., XXII., 673]; *Ford v. Peering*, 1 Ves., Jr., 72; *Lea v. Robeson*, 12 Gray, 280; *Redmond v. Dickerson*, 1 Stockt., 507; *Murray v. Clarendon*, L. R., 9 Eq., 17; *Nesbitt v. Berridge*, 8 L. T. (N. S.), 76; Story, Eq. Pl., 7th ed., sec. 452.

Facts well pleaded are admitted by a demurrer; but it does not admit matters of inference or argument, nor does it admit the alleged construction of an instrument when the instrument itself is set forth in the record, in cases where the construction assumed is repugnant to its language. Authorities to that effect are numerous and decisive; nor can it be admitted that a demurrer can be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding. *Beckham v. Drake*, 9 Mees. & W., 79; *Humble v. Hunter*, 12 Q. B., 315; *McArdle v. Iodine Co.*, 15 Irish C. L., 146; *Sprigg v. Bk.*, 14 Pet., 201.

Mere legal conclusions are never admitted by a demurrer; now would it benefit the complainants even if it could be held otherwise, as it must be conceded that the theory of the bill of complaint is that the liability of the three partners is a joint liability, and it is equally well settled that a judgment against one in such a case is a bar to a subsequent action against either of the others, as appears from the authorities already cited, to which many more may be added. *Robertson v. Smith*, 18 Johns., 459; *Ward v. Johnson*, 13 Mass., 148; *Cowley v. Patch*, 120 Mass., 137; *Smith v. Black*, 9 Serg. & R., 142; *Beltzhoover v. Com.*, 1 Watts, 126.

Where the contract is joint and several the rule is different, to the extent that the promisee or obligee may elect to sue the promisors or obligors jointly or severally; but even in that case the rule is subject to the limitation that if the plaintiff obtains a joint judgment he cannot afterwards sue the parties separately, for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one of the parties, as the prior judgment is a waiver of his right to pursue a joint remedy. *Sessions v. Johnson* [supra].

See 9 OTTO.

Concede that, and still the complainants aver that they did not know, when they obtained their decree against the claimant and his sureties, that the property belonged to the partnership, or that the bond for value was in fact given by the claimant pursuant to the direction of the other partners.

Averments in a bill of complaint that the parties to a judicial proceeding understood that the legal effect would be different from what it really is, amounts merely to an averment of a mistake of law against which there can be no relief in a court of equity. *Hunt v. Rousmaniere*, 1 Pet., 1.

Courts of equity may compel parties to execute their agreements, but they have no power to make agreements or to alter those which have been understandingly made; and the same rule applies to judgments duly and regularly rendered and in full force. 1 Story, Eq., 9th ed., sec. 121; *Bilbie v. Lumley*, 2 East, 469.

Fraud is not imputed, nor is it charged that there was any mistake or misrepresentation. Where there is neither accident nor mistake, misrepresentation nor fraud, there is no jurisdiction in equity to afford relief to a party who has lost his remedy at law through mere ignorance of a fact, the knowledge of which might have been obtained by due diligence and inquiry or by a bill of discovery. *Penny v. Martin*, 4 Johns. Ch., 566; *Anderson v. Levan*, 1 Watts & S., 334.

Courts of equity will not grant relief merely upon the ground of accident where the accident has arisen without fault of the other party, if it appears that it might have been avoided by inquiry or due diligence. 1 Story, Eq., 9th ed., sec. 105.

Ignorance of the facts is often a material allegation, but it is never sufficient to constitute a ground of relief, if it appears that the requisite knowledge might have been obtained by reasonable diligence. *Id.*, sec. 146.

Relief in equity will not be granted merely because a security in an admiralty suit becomes ineffectual, if it appears that it became so without fraud, misrepresentation, or accident, which might have been prevented by due diligence. *Hunt v. Rousmanier*, 2 Mas., 366; *Sedam v. Williams*, 4 McLean, 51.

Having come to the conclusion that the alleged claim of the United States is not well founded, the question of priority becomes wholly immaterial.

Decree affirmed.

Dissenting, *Mr. Justice Bradley.*

Cited—87 N. Y., 256; 66 How. Pr., 369; 5 N.W. Rep. 63.

ARISTIDES DOGETT, RECEIVER, ETC.,
Appt.,
v.

THE FLORIDA RAILROAD COMPANY.

(See S. C., 9 Otto, 72-78.)

Florida railroad—tax on bonds.

1. In Florida, where a railroad was sold and the proceeds applied to the extinguishment of the bonds issued by the Company, the purchaser was not

bound thereafter to pay to the Receiver of the Internal Improvement Fund of Florida, the one half of one per cent., semi-annually, upon the entire amount of the bonds issued by the Company, but only to make such payment upon the amount of such bonds as were still outstanding, pursuant to the Act of Florida to provide for internal improvements in such State, passed Jan. 6, 1855.

2. Where the receiver brought an action to compel such payment, owners of the bonds should not be joined as complainants in the action.

[No. 124.]

Argued Jan. 14, 1879. Decided Feb. 3, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Florida. The case is fully stated by the court.

Messrs. P. Phillips, W. A. Maury, J. B. C. Drew, T. G. Strong and Matt. H. Carpenter, for appellant.

Mr. W. M. Merrick, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

This is a case in equity. The bill was filed by Doggett, as a receiver appointed in another case in the same circuit court whence this case came, and by Vose and Wagner, as co-complainants with him. The defendant demurred upon the grounds, among others, that the bill does not make a case that entitles the complainants to any relief, and that there is a fatal misjoinder of parties with respect to Vose and Wagner. The circuit court sustained the demurrer and dismissed the bill. Doggett thereupon removed the case to this court by appeal. With respect to the merits, the case presents but a single question; that is, whether the appellee is bound to pay Doggett, as the Receiver of the Internal Improvement Fund of Florida, the one half of one per cent., semi-annually, upon the entire amount of the bonds issued by the Company, or only to make such payment upon the amount of such bonds as are still outstanding. The bonds were issued pursuant to an Act of the Legislature of Florida, entitled "An Act to Provide for and Encourage a Liberal System of Internal Improvements in this State," passed January 6, 1855. The road was sold, and the proceeds applied, as far as they would go, to the extinguishment of the bonds. The whole number issued was 1518, of \$1,000 each. Twelve hundred and ninety have been retired. Two hundred and twenty-eight are still unredeemed and outstanding.

The determination of the question before us depends upon the construction and effect of the 2d, 3d and 12th sections of the Act before mentioned.

The 2d section, after making the Governor and other designated officers of the State, Trustees of the Internal Improvement Fund, proceeds to define their powers and duties. They are empowered "To receive and demand semi-annually the sum of one half of one per cent. (after each separate railroad is completed) on the entire amount of the bonds issued by said Railroad Company, and invest the same in the stocks of the United States or state securities, or in the bonds herein provided to be issued by said Company."

The 3d section provides that the bonds shall contain "A certificate on the part of the Trustees of the Internal Improvement Fund that said bonds are issued agreeably to the provisions of this Act, and that the Internal Improvement

Fund, for which they are trustees, is pledged to pay the interest as it may become due on said bonds." Provision is then made for the seizure and sale of the road in default of payment as required. The section thus concludes: "The proceeds arising from such sale shall be applied by said trustees to the purchase and canceling of the outstanding bonds issued by said defaulting Company, or incorporated with the sinking fund: *Provided*, that in making such sale it shall be conditioned that the purchasers shall be bound to continue the payment of one half of one per cent. semi-annually to the sinking fund until *all the outstanding bonds* are discharged, under the penalty of an annulment of the contract of purchase and forfeiture of the purchase money paid in."

Under these provisions the road was sold and the proceeds applied, as before stated.

The 12th section is as follows:

"Every railroad company accepting the provisions of this Act shall, after the completion of the road, pay to the Trustees of the Internal Improvement Fund at least one half of one per cent. on the amount of indebtedness on bond account, every six months, as a sinking fund, to be invested by them in the class of securities named in section 2, or to be applied to the purchase of the outstanding bonds of the Company; but it shall be distinctly understood that the purchase of said bonds shall not relieve the Company from paying the interest on the same, they being held by the trustees as an investment on account of the sinking fund."

By the proviso in the 3d section it is declared that after a sale the payment of the semi-annual half per cent. shall continue "until all the outstanding bonds are discharged." It is clear that it was to continue no longer. Before the sale, if the trustees should purchase the bonds as an investment for the sinking fund the Company was to continue to pay the interest upon them. This was right and reasonable. After the sale and the discharge of a part of the bonds by the proceeds of the sale, as occurred here, there is no provision for the payment of any interest. It would be wrong as to the bonds discharged by means derived from the Company, and absurd as to all other bonds, the Company being deprived of all means of payment by the loss of their road. Hence, after the sale, the exaction is only that the semi-annual half per cent. shall be paid, and that by the purchasers of the road; and it is expressly declared by the 12th section that it shall be "on the amount of indebtedness on bond account." This is the requirement, and it goes no further. Upon what ground, then, can the purchasers be required to pay anything more? There is no warrant for such a demand in the letter, meaning or reason of the statute. The primary requirement is that the payment shall be made upon all the bonds issued, and to cease when they are all discharged. The extent of the burden assumed by the State was graduated as to each road by the total amount of its bonds. Why should not the burden of the Company be diminished in the same ratio with the burden of the State? The former is to cease wholly when *all* the bonds are discharged. Why should it not be lessened in the exact proportion that the amount of the outstanding bonds is reduced? The contrary, we think, cannot be supported. As well might a

creditor, where payments at different times have been made by the debtor, demand interest upon the whole amount of the original debt until the last dollar is paid. This, in effect, is the case made by the bill. But there is a short and conclusive answer to the claim. It is, that the 12th section constituted a contract with the purchasers of the road. That contract was that they should pay "on the amount of indebtedness on bond account." This was made a condition of the sale; and they so agreed, and they agreed to nothing else. This contract is binding upon both parties, and cannot be changed without their mutual consent. The language of the Act is too clear to admit of doubt. In a statute "where the intent is plain, nothing is left to construction." *U. S. v. Fisher*, 2 Cranch, 386.

There is no complaint that payment upon the bonds outstanding has not been regularly made.

We have no doubt as to the merits of the bill. We think the objection of misjoinder was also well taken. The case was purely ancillary in its character. The receiver represented the court which appointed him and the Trustees of the Internal Improvement Fund. Vose and Wagner claimed to own a part of the outstanding bonds. But that gave them no standing place in the litigation. As well might every other holder of any of the bonds, however small the amount, or how numerous such holders might be, have been made co-complainants with the receiver, as Vose and Wagner. The presence of the latter as such parties was unwarranted, and if permitted, and the suit had gone on, would have incumbered the record unnecessarily and have led to confusion.

The demurrer was properly sustained, and the decree of the Circuit Court is affirmed.

Cited—99 U. S., 199.

SOLOMON L. HOGE, COMPTROLLER-GENERAL of the STATE OF SOUTH CAROLINA,
Appt.,

v.

THE RICHMOND AND DANVILLE RAILROAD COMPANY.

(See S. C., 9 Otto, 348-355.)

Exemption from taxation—property of corporation—construction of law—Atlanta and Richmond Railway.

1. The power of the Legislature of a State to exempt particular parcels of property of individuals or of corporations from taxation, not merely during the period of its own existence, but so as to be beyond the control of the taxing power of succeeding Legislatures, has been asserted in several cases by this court.

2. But this power is accompanied with the qualification, that the intention of the Legislature to grant the immunity must be clear, beyond a reasonable doubt.

3. It cannot be inferred, from uncertain phrases or ambiguous terms. If a doubt arise as to the intent of the Legislature, it must be solved in favor of the State.

4. The Atlanta and Richmond Air Line Ry. Co. is not entitled to the exemption from taxation enjoyed by the Greenville and Columbia R. R. Co.

[No. 134.]

Argued Jan. 17, 20, 1879. Decided Feb. 3, 1879.

See 9 OTTO,

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The case, which arose in the court below, is fully stated by the court.

Mr. Le Roy F. Youmans, Atty-Gen. of S. C., D. H. Chamberlain and Wm. Stone, for appellant:

All grants of special powers or exemptions to individuals or corporations, are construed strictly as against the grantees and in favor of the State.

Jackson v. Lamphire, 3 Pet., 289; *Beatty v. Knowler*, 4 Pet., 168; *Bk. v. Billings*, 4 Pet., 514; *Charles River Bridge v. Warren Bridge*, 11 Pet., 544.

And more especially where the State's right of taxation is concerned, implication is never admitted to create or continue an exemption from taxation.

Tomlinson v. Jessup, 15 Wall., 458 (82 U. S., XXI., 205).

Such exceptions are uniformly and emphatically restricted to clear and unambiguous grants in express words.

R. R. Co. v. Supervisors, 93 U. S., 597 (XXIII., 815).

Whatever exemption the Air Line R. R. Co. may have had does not inure to the Atlanta and Richmond Air Line R. Co.

Morgan v. La., 93 U. S., 217 (XXIII., 860).

Messrs. Skipwith Wilmer, Wm. E. Earle and Jas Lowndes, for appellee:

The case of *Humphrey v. Pegues*, 16 Wall., 247 (83 U. S., XXI., 326) sustains a claim for exemption, which was granted in the same manner and in almost the same terms.

When the Air Line R. R. Co. in South Carolina was consolidated to form the Atlanta and Richmond Air Line R. Co., it carried to the consolidated Company the exemption which attached to the property in South Carolina.

This is established by the decision of this court in *Tomlinson v. Branch*, 15 Wall., 460 (82 U. S., XXI., 189).

Mr. Justice Field delivered the opinion of the court:

The Richmond & Danville Railroad Company, a corporation created under the laws of Virginia, is the owner of 22,000 shares of the capital stock of the Atlanta and Richmond Air Line Railway Company, a corporation created under the laws of South Carolina and Georgia, and brings the present suit to enjoin the collection of taxes assessed upon its road and other real property in that State, alleging that they are exempt from taxation. Its claim to exemption arises in this wise: A company known as the Air Line Railroad Company in South Carolina was incorporated in 1856 by the Legislature of that State and authorized to construct a railroad between certain designated points, and to equip, use and enjoy the same, "With all the rights, privileges and immunities granted to the Greenville and Columbia Railroad Company, under the Act incorporating the same and the several Acts amendatory thereof," so far as they were applicable. The company was also empowered to unite with any other railroad company and to consolidate their management, and by an amendment to its charter, to adopt any other corporate name which it should deem best. In pursuance of this authority, it united

in 1870 with a company incorporated under the laws of Georgia, known as the Georgia Air Line Railroad Company, and took the name of the Atlanta & Richmond Air Line Company.

The Greenville & Columbia Railroad Company was incorporated in December, 1845, and, by a provision in its charter, the stock of the Company and the real estate it might purchase, connected with or subservient to its works, were exempted from taxation for the period of thirty-six years. At the time of its incorporation there was a law of the State in force, enacted in 1841, establishing the principles on which charters of incorporation were thereafter to be granted, the 41st section of which provides "That it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment or modification thereof (unless the Act granting such charter, renewal, amendment or modification shall, in express terms, except it), that every charter of incorporation granted, renewed or modified as aforesaid shall at all times remain subject to amendment, alteration or repeal by the legislative authority."

The Act incorporating the Greenville & Columbia Railroad Company excepted its charter, in express terms, from the operation of the Act of 1841; but the Act incorporating the Air Line Railroad Company in South Carolina made no such exception with respect to its charter. It is contended, however, that by the provision conferring the same rights, privileges and immunities which the Greenville & Columbia Railroad Company possessed, the Air Line Company not only acquired immunity from taxation for the same period, but that such immunity was placed beyond legislative repeal. The Constitution of the State adopted in 1868, having required that the property of corporations then existing or thereafter created should be subject to taxation, except in certain cases, not applying here, subsequent legislation, passed in conformity with this requirement, imposed a tax upon the property of railroad companies, including that of the Atlanta & Richmond Air Line Railway Company, notwithstanding the exemption mentioned. The present suit was thereupon brought to enjoin its enforcement. The court below held that the property of the Company was exempt from taxation for the period of thirty-six years from the date of its charter, and enjoined the officers of the State from collecting the tax assessed. From its decree the present appeal is taken.

By the Law of 1841 every charter of a corporation in South Carolina subsequently granted, amended or modified, was subject to repeal, amendment or modification by the Legislature; unless specially excepted from such legislative control in the Act granting the charter, amendment or modification. Such is evidently the meaning of the 41st section of that law, though the intention is inaptly expressed. This construction is somewhat different from that placed upon it in *Tomlinson v. Jessup*, reported in the 15th Wallace, 459 [82 U. S., XXI., 206], and gives the Legislature a more extended control. But it is the construction to which a more careful examination of the language has led us. By it the Legislature said, that subsequent charters

should be subject to repeal or amendment, unless they were, in express terms, excepted from its control in the Acts granting them; and that existing charters, if subsequently amended or modified, should stand in the same position. Its provisions constituted the condition upon which every charter was afterwards granted, amended or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it. They did not of course operate as a limitation upon the power of succeeding Legislatures so as to control any repugnant legislation, but so long as they remained unrepealed, subsequent legislation, not repugnant in its terms, was to be construed and enforced in accordance with them. *R. R. Co. v. Me.*, 96 U. S., 499 [XXIV., 836].

As the Act incorporating the Air Line Company in South Carolina in 1856 contained no clause excepting its charter from the provisions of the Law of 1841, they must be held applicable to it. To include in that charter an exemption from legislative control because such exemption was possessed by the Greenville & Columbia Company would be to thwart the declared will of the Legislature, that such exemption should not exist, unless the Act granting the charter excepted it *in express terms* from that law. Its charter must, therefore, be read as if it declared that its capital stock and the real property purchased by it and connected with or subservient to its works should be exempt from taxation for the period of thirty-six years, unless the Legislature should in the mean time withdraw the exemption. Its stock and real property were thus exempted for that period from the general tax levied upon property of that kind, unless the Legislature should specifically direct otherwise.

If it be assumed, however, that by the Act incorporating the Air Line Company it acquired not only the immunity from taxation which the Greenville & Columbia Company possessed, but also its original exemption from future legislative control, this exemption ceased when the Company obtained an amendment to its charter in September, 1868, before its consolidation with the Georgia Company. By that amendment the charter of the Company was at once brought under the control of the Legislature by virtue of the Act of 1841, the Act granting the amendment containing no clause excepting the charter from the provisions of that Act.

In whichever way the legislation of the State may be viewed, the same result follows: that the Legislature of South Carolina was not inhibited from subjecting the property of the Company to taxation, to restrain the collection of which this suit is brought.

The power of the Legislature of a State to exempt particular parcels of property of individuals or of corporations from taxation, not merely during the period of its own existence, but so as to be beyond the control of the taxing power of succeeding Legislatures, has been asserted in several cases by this court, although against this doctrine there have been earnest protests by individual judges. But though this power is recognized, it is accompanied with the qualification that the intention of the Legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The

power of taxation is an attribute of sovereignty, and is essential to every independent Government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise as to the intent of the Legislature, it must be solved in favor of the State.

It follows that the decree of the court below must be reversed and the cause be remanded, with directions to dismiss the suit; and it is so ordered.

MICHAEL RYAN, *Appt.*,

v.

THE CENTRAL PACIFIC RAILROAD
COMPANY.

(See S. C., 9 Otto, 382-389.)

Railroad grant—lands included.

1. Where there was not enough of the alternate odd sections within the primary limits to satisfy a grant to the railroad company, lands within the indemnity limits prescribed in the Act, selected by the company, and a patent issued therefor, cannot be entered under the Homestead Act of 1862.

2. The patent to the railroad company conveys a better title than one under a patent subsequently issued under the Homestead Act.

[No. 983.]

Argued Jan. 27, 28, 1879. Decided Feb. 3, 1879.

APPEAL from the Circuit Court of the United States for the District of California.

The case is fully stated by the court.

Messrs. John Currey, Charles Devens, Atty-Gen., E. B. Smith, Asst. Atty-Gen., and E. M. Marble, Asst. Atty-Gen., for appellant. Mr. S. W. Sanderson, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

After this case was submitted to the court upon printed arguments by the counsel of the parties, the Attorney-General expressed a wish to be heard in behalf of the United States, and an oral argument was thereupon ordered. The case was argued in that way, fully and ably, by that officer and by the counsel for the appellee, and I am directed now to deliver the opinion of the court.

There is no controversy about the facts.

By the Act of Congress of July 25, 1866, Congress granted certain lands to the California and Oregon Railroad Company. The appellee claims under that grantee, and has succeeded to its rights. At the date of the Act there was pending a claim for the confirmation of a Mexican grant, which embraced within its boundaries the premises in controversy between these parties. The appellant insists that he has a paramount title, not under, but by reason of this claim, as will hereafter appear.

The 2d section of the Act referred to is as follows:

“Sec. 2. And be it further enacted, that there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line, of said

railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of the said first named alternate sections,” etc. 14 Stat. at L., 239.

Under this statute, when the road was located and the maps were made, the right of the Company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the “lieu lands,” as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed.

On the 3d of March, 1873, the alleged Mexican grant was declared invalid by this court and finally rejected. On the 30th of October, 1874, it was found there was not enough of the alternate odd sections within the twenty mile limits to satisfy the grant to the Railroad Company. On that day the appellee selected the land in question. Though not within the primary limits, it was within the ten mile indemnity limits prescribed in the Act, and was intended in so far to supply the deficiency within the former. The selection was approved by the local land-officers on the 26th of December, 1874. This approval was confirmed by the Secretary of the Interior, and a patent in due form was issued to the appellee on the 17th of March, 1875. At the time of the selection the premises were public land. The Mexican claim had been rejected by this court more than a year and a half before, and the land was not within any exception expressed or implied in the Act. Afterwards, on the 14th of July, 1876, the appellant being in all respects qualified, filed an application in due form to be allowed to enter the land in question under the Homestead Act of 1862. He paid the proper fees and received a duplicate receipt from the register and receiver of the land-office of the district. He filed this bill to restrain the appellee from availing itself of the patent, upon the ground that the land was not subject to selection in lieu of the deficit of odd sections within the twenty mile limits specifically granted by the Act.

After this plain statement of the case, it is difficult to imagine any defect that can exist in the title of the appellee, or any right, legal or equitable, that the appellant can have.

But it is said the case is within the principle established in *Newhall v. Sanger*, 92 U. S., 761 [XXIII., 769], and must be controlled by that adjudication. This is the sole objection to the appellee's title, and it is founded in a mistake. The two cases are distinguishable by a broad line of demarcation.

In the former case, the lands covered by the false Mexican claim were situated within the limits of the territory where the right of the Company attached to the odd designated sections granted when the road was located and the requisite maps were made. At that time the

claim was in litigation, and *sub judice*. The court held that under these circumstances the premises were not "*public land*," within the meaning of the law, and could not become such until the title of the government was vindicated by the defeat of the claim, and that the patent issued to the Railroad Company was, therefore, void.

After the Mexican claim was disposed of and before a new appropriation was made or attempted to be made by the Company, the junior patent was issued to another party, and it was held that he had a valid title. The Mexican claim was finally rejected by this court on the 13th of February, 1865. It was insisted by the Company that the judgment should be held to relate back to the first day of the Term, so as to disembarass the title of the claim as of that date. This was refused. The court said, "To antedate the rejection of a claim so as to render operative a grant which would be otherwise without effect, does not promote the ends of justice, and cannot be sanctioned." It was admitted by clear implication that if the lands had been thus disembarassed at the date of the grant or their withdrawal from sale, the elder patent would have been valid.

Again; speaking of lands embraced in such a claim the court says expressly, "They were regarded as forming a part of our public domain only after the claim covering them had been finally rejected. * * * They then became *public* in the just meaning of that term, and were subject to the disposing power of Congress."

Here the land was not a part of the alternate odd sections specifically granted. It was not within the limits of that territory. There, there was a deficiency.

It was within the secondary or indemnity territory where that deficiency was to be supplied. The Railroad Company had not and could not have any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican or other claim impending over it. It had ceased to be *sub judice*, and was no longer in litigation. It was as much "*public land*" as any other part of the national domain. The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. The Mexican claim when condemned lost its vitality. From that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed. In this state of things the appellee acquired its title, and that title is indefeasible.

Newhall v. Sanger applies only where the adverse claim is undisposed of when the grant would otherwise take effect. It has no application to the future after the claim has ceased to exist.

The decree of the Circuit Court is affirmed.

Mr. Justice Harlan concurred in the opinion that the bill should have been dismissed, because Ryan, upon the face of his bill, was not entitled to any relief from a court of equity. The dismissal should have been ordered with-

out any consideration of the merits of the case, about which he expressed no opinion.

Cited—110 U. S., 39; 112 U. S., 731; 7 Sawy., 473; 11 N. W. Rep., 334.

VILLAGE OF EVANSTON, *Plff. in Err.*,
v.

JESSIE GUNN.

(See S. C., 9 Otto, 660-668.)

Official record, as evidence—specific objection—duty of village as to its streets—charge to jury.

1. A record, kept by a person employed by the United States Signal Service, is admissible in evidence.

2. Where a party objected to evidence and specified his objection, it must be considered that all others are waived, or that there was no ground upon which others could stand.

3. Where a village has ample authority to keep the streets and walks in a safe condition at all times for passage, the power carries with it the duty of exercising it.

4. Where the instruction given to the jury was full, and strictly accurate and the jury could not have been misled, the judgment will not be reversed, because detached sentences of it, if read alone, need qualification.

[No. 164.]

Submitted Jan. 13, 1879. Decided Feb. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The defendant in error brought suit and obtained judgment in the court below, for personal injuries caused by a defective sidewalk.

The case is sufficiently stated by the court.

Messrs. Geo. O. Ide and C. F. Peck, for plaintiff in error:

Under certain Acts of Congress, law-books may be evidence of the facts they state, but only as to the matters designated by those Acts, and they must be identified as duly kept.

U. S. v. Mitchell, 2 Wash. (C. C.), 478; *U. S. v. Sharp*, Pet. (C. C.), 118.

So, letters of administration upon the estate of a deceased person, issued by the proper probate court, do not afford legal evidence of the death of such person.

Mut. Ben. L. Ins. Co. v. Tisdale, 91 U. S., 238 (XXIII., 314).

Neither is a certificate of naturalization evidence of the residence, age or good character of the applicant. Nor is the certificate of steamboat inspectors, under the Act of Congress of 1852, evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts.

See, cases cited in 91 U. S., 245 (XXIII., 317).

In *Ins. Co. v. Schwenk*, 94 U. S., 593 (XXIV., 294), this court held, that "An entry in the minute book of a Lodge of Odd Fellows, of which the deceased assured was a member, made prior to the issue of the policy, and showing his age as recorded by the Secretary of the Lodge in

NOTE.—The common law liability to repair highways. See note to *City of Providence v. Clapp*, 58 U. S., XV., 72.

Liability to repair highways in U. S.; safety and convenience a mixed question of law and fact. See note to *Fitch v. Creighton*, 65 U. S., XVI., 596.

the usual manner of keeping its records, is not admissible as evidence of such age. It is merely hearsay."

See, also, *Chaffee & Co. v. U. S.*, 18 Wall., 516 (85 U. S., XXI., 908).

Messrs. Wirt Dexter and Stephen Sibley, for defendant in error:

A record is defined as "A written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done."

Bouv. L. Dic., tit. Record; *Olivot's Champagne*, 3 Wall., 139 (70 U. S., XVIII., 119); *Whitcher v. McLaughlin*, 115 Mass., 168; *R. R. Co. v. Morgan*, 69 Ill., 492; *R. S. U. S.*, secs. 221, 222.

Facts of universal notoriety need not be proved. Courts will take notice of whatever is generally known within the limits of their jurisdiction.

Brown v. Piper, 91 U. S., 42 (XXIII., 201); 1 Greenl. Ev., sec. 6.

This court has judicial knowledge of the extended system of the Signal Service. These observations, made with every appliance and test of accuracy which liberal appropriations can afford, are made the basis of scientific observation and study.

Such documents are entitled to an extraordinary degree of confidence, and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth.

1 Stark. Ev., 195; 1 Greenl. Ev., sec. 483.

There are many familiar illustrations of the character of such evidence. Thus, parish registers, *Lewis v. Marshall*, 5 Pet., 472; prison registers, *Salte v. Thomas*, 3 Bos. & P., 188; the register of vessels in the custom-house, *U. S. v. Johns*, 4 Dall., 415; the record of the Land-Office, *Galt v. Galloway*, 4 Pet., 332; custom-house registers, *Tomkins v. Atty-Gen.*, 1 Dow., 404; and registers of voters, *Reed v. Lamb*, 6 Hurl. & N., 75, have all been held admissible as evidence of the facts which they record.

In *Galt v. Galloway*, 4 Pet., 331, the entries in the record of a land-office were admitted.

In *Merriam v. Mitchell*, 13 Me., 439, the record kept at a local postoffice, of mails received and sent, was admitted in evidence.

In *Gurney v. Howe*, 9 Gray, 404, a record kept, of registered letters received at a postoffice, was held admissible.

In *De Armond v. Neasmith*, 32 Mich., 231, a record of the weather kept at the Insane Asylum was received.

So in the *Catharina Maria*, L. R., 1 Adm. & Eccl., 53, in a case of collision, the books containing the entries made by the coast-guard, and sent to the coast guard office, to prove the state of the wind and weather.

In *Sisson v. R. R. Co.*, 14 Mich., 497, for the purpose of showing the state of the market at a given time, the market reports in the newspapers of the date in question.

Lush v. Druse, 4 Wend., 317; and *Fennerstein's Champagne*, 3 Wall., 145 (70 U. S., XVIII., 121.)

Mr. Justice Strong delivered the opinion of the court:

The admission in evidence of a record kept by a person employed by the United States Signal Service at Chicago was objected to at the See 9 OTTO.

trial, not because it had not been properly made, identified and proved, but for the alleged reason that "There was no law authorizing such records to be used, and because it was not competent testimony." The defendants having thus specified their objection, it must be considered that all others were waived, or that there was no ground upon which others could stand. *Turnpike Co. v. Myers*, 6 Serg. & R. (Pa.), 12; *R. R. Co. v. Morgan*, 69 Ill., 492. We have then only to consider the objections that were made, the only ones that appear in the bill of exceptions, and they present the question whether the record, conceding it to be properly proved, was competent evidence. It may be admitted there is no statute expressly authorizing the admission of such a record, as proof, of the facts stated in it, but many records are properly admitted without the aid of any statute. The inquiry to be made is, what is the character of the instrument? The record admitted in this case was not a private entry or memorandum. It had been kept by a person whose public duty it was to record truly the facts stated in it. Sections 221 and 222 of the Revised Statutes require meteorological observations to be taken at the military stations in the interior of the Continent and at other points in the States and Territories, for giving notice of the approach and force of storms. The Secretary of War is also required to provide, in the system of observations and reports in charge of the chief signal officer of the army, for such stations, reports and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these Acts a system has been established and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rules of the Signal Service, and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits in evidence "Official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observation." Taylor, Ev., sec. 1429; 1 Greenl. Ev., sec. 483. To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty. 1 Greenl. Ev., sec. 496. Nor need they be kept by a public officer himself, if the entries are made under his direction by a person authorized by him. *Galt v. Galloway*, 4 Pet., 332. It is hardly necessary to refer to judicial decisions illustrating the rule. They are numerous. A few may be mentioned. *De Armond v. Neasmith*, 32 Mich., 231; *Gurney v. Howe*, 9 Gray, 404; *The Catharina Maria*, L. R. 1 Adm. & Eccl., 53; *Olivot's Champagne*, 3 Wall., 114 [70 U. S., XVIII., 116]. We think, therefore, that there was no error in admitting the records kept by the person employed for the purpose by the United States Signal Service.

The exceptions to the charge, though numer-

ous, in our opinion point to no error. Without going through in detail the statute under which the village was organized and the powers conferred upon it, it is enough to say that it had ample authority to keep the streets and walks in a safe condition at all times for passage. And the power carried with it the duty of exercising it. Nothing could have been a more palpable violation of that duty than permitting the continuance of such a trap as that into which the plaintiff below fell. And this duty was not suspended during the changes from a township to a village organization. The identity of the Corporation was not destroyed by the change, and its obligations in regard to the streets, avenues, sidewalks, drains, etc., continued in full force. The fact that the Board of Trustees of the Village were not authorized to make their annual appropriation for the year in which the plaintiff's injury occurred, if it was a fact, and that they, as well as every department and officer of the Corporation, were prohibited by law from adding to the corporate expenditures in any one year anything above the amount provided for in the annual appropriation bill for that year, is quite immaterial. The power to borrow money sufficient to provide for making any improvements, the necessity for which was caused by any casualty or accident happening after the annual appropriation, was expressly given. Besides, the Village succeeded to all the property and funds of the township, as well as to its liabilities. It was organized in October, 1872, and the accident to the plaintiff occurred on the 22d of April, 1873, six months afterwards.

We see no error in the instruction given to the jury respecting contributory negligence of the plaintiff. It was full, all the case demanded, and strictly accurate. Sentences may, it is true, be extracted from the charge, which if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled. Upon the whole, we think the case was submitted in a manner of which there is no just cause of complaint.

The judgment is affirmed.

Cited—13 N. W. Rep., 770; 15 N. W. Rep., 39.

WILLIAM G. PERRIS, for Himself and as
Admr. of WILLIAM PERRIS, Deceased, ET
AL., *Appts.*,

v.

ERNEST HEXAMER.

(See S. C., 9 Otto, 674-676.)

Copyright of a map.

1. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. To infringe this right, a substantial copy must be produced.

2. A copyright of a map does not give the publisher an exclusive right to the use upon other maps of the particular signs and key which he saw fit to adopt for the purposes of his delineations.

[No. 93.]

Argued Dec. 17, 18, 1878. Decided Feb. 3, 1879.

A PPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The appellants were the complainants below, where the case arose.

The facts of the case are fully stated in the opinion.

Messrs. J. Van Santvoord, Francis Forbes, George Gifford and J. J. Coombs, for appellants.

Mr. Joshua Pusey, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

The complainants are the owners of a copy-right of a series of maps of the City of New York, prepared for the use of those engaged in the business of fire insurance, the title of which is as follows: "Maps of the City of New York, surveyed under the direction of insurance companies of said city, by William Perris, civil engineer and surveyor, 1852. Volume 1, comprising the 1st, 2d, 3d and 4th wards. The maps exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference." The maps were made after a careful survey and examination of the lots and buildings in the enumerated wards of the city, and were so marked with arbitrary coloring and signs, explained by a reference or key, that an insurer could see at a glance what were the general characteristics of the different buildings within the territory delineated, and many other details of construction and occupancy necessary for his information when taking risks. They are useful contrivances for the dispatch of business, but of no value whatever except in connection with the identical property they purport to describe.

The defendant made the necessary examination and survey, and published a similar series of maps for Philadelphia. At first he used substantially the same system of coloring and signs and, consequently, substantially the same key that had been adopted by the complainants, but afterwards he changed his signs somewhat, and, of course, changed his key.

The question we are to consider is, whether the publication of the defendant infringes the copyright of the complainants, and we think it does not. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy must be produced. It needs no argument to show that the defendant's maps are not copies, either in whole or in part, of those of the complainants. They are arranged substantially on the same plan, but those of the defendant represent Philadelphia, while those of the complainants represent New York. They are not only not copies of each other, but they do not convey the same information.

The complainants have no more an exclusive right to use the form of the characters they employ to express their ideas upon the face of the map, than they have to use the form of type they select to print the key. Scarcely any map is published on which certain arbitrary signs, explained by a key printed at some convenient place for reference, are not used to designate objects of special interest, such as rivers, railroads, boundaries, cities, towns, etc.; and yet

we think it has never been supposed that a simple copyright of the map gave the publisher an exclusive right to the use upon other maps of the particular signs and key which he saw fit to adopt for the purposes of his delineations. That, however, is what the complainants seek to accomplish in this case. The defendant has not copied their maps. All he has done at any time has been to use to some extent their system of arbitrary signs and their key.

The decree of the Circuit Court is affirmed.

JOHN G. WILLIAMS, Admr. *de bonis non*,
of the Estate of CHARLES TAYLOR, Deceased,
Appl.,

v.

UNITED STATES.

Surgeon in Continental Army—claim for pay.

1. A surgeon in the Continental Army, who did not continue in service until the end of the war, is not entitled to five years' pay, under the Resolutions of Congress of Oct. 21, 1780, and March 22, 1783.

2. An acceptance of an appointment in the new regiment of guards, authorized by the Resolution of Jan. 9, 1779, of the Continental Congress, took supernumerary officers out of their former position in the line.

[No. 1058.]

Submitted Jan. 24, 1879. Decided Feb. 3, 1879.

A PPEAL from the Court of Claims.

The appellant's intestate filed his petition in the Court of Claims, claiming compensation for services in the Continental Army.

The facts found are, in substance, that in 1776, Dr. Taylor, the appellant's intestate, was surgeon's mate in the Second Virginia Regiment, in the Continental service, and that upon the reduction and consolidation of the regiments of that State, in 1778, he became a supernumerary. While he continued as supernumerary, he was appointed surgeon's mate in the temporary regiment of guards authorized by the Resolution of Congress of January 9, 1779, and he accepted the same and afterwards was promoted to be surgeon in the same regiment, and so continued, receiving pay, etc., until it was discharged, June 13, 1781. It also appears that the State of Virginia has recognized Dr. Taylor as having been a supernumerary surgeon of the Continental Line of that State until the end of the war, by granting his heirs bounty land warrants, and that he died after Jan. 4, 1821.

The question is whether, under the above state of facts, Dr. Taylor continued in service to the end of the war, within the meaning of the Resolutions of the Continental Congress of Oct. 21, 1780, and Mar. 22, 1783, granting five years' pay, etc.

The court below having dismissed the claim, appeal was taken to this court.

Messrs. P. E. Dye and John Pool, for appellant.

Messrs. Edwin B. Smith, Asst. Atty-Gen., and S. F. Phillips, Solicitor-Gen., for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

From the finding of facts sent up with this
See 9 OTTO. U. S., Book 25.

appeal, we are clearly of the opinion that Dr. Taylor did not "Continue in service until the end of the war," within the meaning of the Resolutions of Congress of October 21, 1780, and of March 22, 1783, under which the claim in this case is made. When he accepted his appointment in the regiment of guards, January 9, 1779, he ceased to be a supernumerary surgeon's mate and became an active officer in the new regiment. Consequently, when that regiment was discharged because its term of enlistment had expired, he was out of service. When the new regiment was raised, the Governor and Council of Virginia were authorized by Congress to appoint its officers out of those in the Virginia line who were then supernumerary. Although it is said in one of the additional findings, that Dr. Taylor was assigned to active duty, this is to be construed in connection with the Resolution to which reference is made; and that being done, it is apparent there was no intention by that language to modify the previous finding that "He was appointed surgeon's mate of the regiment of guards authorized by the Resolution of January 9, 1779, of the Continental Congress." By the Resolution, Congress permitted the supernumerary officers in the line to accept appointments in the new regiment. Such an acceptance took them out of their former position in the line and put them into the new organization.

The judgment of the Court of Claims is affirmed.

M. WOLF, ELIAS LOWENSTEIN, ET AL.,

Appls.,

v.

LOUIS STIX ET AL., as LOUIS STIX & Co.

(See S. C., 9 Otto, 1-10)

Fraud, under Bankrupt Law—positive fraud—bond in replevin—effect of discharge—of principal—of surety.

1. Fraud, as used in the section of the Bankrupt Law, which provides that "no debt created by fraud * * shall be discharged in bankruptcy," means: positive fraud or fraud in fact, involving moral turpitude or intentional wrong.

2. It does not include such fraud as the law implies from the purchase of property from a debtor, with the intent thereby to hinder and delay his creditors in the collection of their debts.

3. A debt not created by the purchase of goods, but by a bond given in a replevin suit to pay their value if the party failed to sustain his title, is not created by fraud, but is a contingent debt provable under the Bankrupt Act.

4. As the debt was not created by fraud and was provable under the Act, the obligor's discharge released him from his liability on the bond.

5. Although the principal in such bond is discharged from liability thereon by his discharge in bankruptcy, such discharge does not discharge the surety on the bond.

[No. 810.]

Submitted Jan. 13, 1879. Decided Mar. 3, 1879.

A PPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The case fully appears in the opinion of the court.

Messrs. Henry Craft, Fillmore Beall and W. M. Randolph, for appellants:

Unless Mr. Wolf can, in this proceeding, plead his discharge in bankruptcy, it is evident that he cannot do so at all. The decree of the Chancery Court was in his favor, and was prior in date to the filing of his petition in bankruptcy. The date of this decree was Dec. 13, 1872. The petition was filed Jan. 5, 1874. The complainants in the chancery suit prosecuted an appeal to the Supreme Court of the State, and not until Apr. 28, 1877, was the cause heard in that court. Wolf's discharge was granted Mar. 28, 1874, pending the appeal. For reasons shown in the record, he did not attempt to plead his discharge in the Supreme Court until after the decree of that court had been rendered. If he had attempted to plead it in that court at an earlier day, he would not have been allowed to do so, because it is the settled practice of that court not to receive such a plea.

Ward v. Tunstall, 2 Baxt. (Tenn.), 319.

In the case just cited, the Supreme Court of Tennessee declares in effect, that a discharge granted pending an appeal to that court, can only be pleaded in Tennessee, in the mode which is here adopted.

If the discharge can be made available to protect Wolf from liability on the replevin bond, it will be conceded that it will be equally available to protect the complainants, Lowenstein and Helman, as the sureties in that bond. Section 5118, Revised Statutes, does not apply in such a case. Without doubt, it has been correctly said: "A careful perusal of this section will show that it only applies to a surety who contracted to become liable for the payment of the debt, and not for the payment of the judgment which might be entered in a particular action. It clearly contemplates a case where the surety contracts to become liable with the principal for the payment of the debt. Where a discharge is pleaded in the appellate court, so that no judgment can be rendered against the defendant, a surety on an appeal bond, conditioned to pay such judgment as might be entered in the appellate court, is released. As no judgment was rendered against his principal, no liability attaches to him."

Odell v. Wootten, 4 Bk. Reg., 183; *S. C.*, 38 Ga., 225.

"This clause applies to persons who are liable for the debt of the bankrupt, which existed before and is discharged by the proceedings in bankruptcy. A bond given to dissolve an attachment is not such a debt. It does not become of the nature of the debt until the contingency arises, upon which it is to be made operative, to wit: a judgment valid against the principal and which he is bound to pay. When a judgment is rendered for the defendant upon a plea of a discharge in bankruptcy, the bond is discharged; not by the proceedings in bankruptcy but by the determination of the contingency upon which the obligation of the bond is made to depend."

Carpenter v. Turrell, 100 Mass., 450.

Such is also the ruling of the Supreme Court of Tennessee.

Martin v. Kilbourn, 1 Cent., L. J. 94.

And of many other courts.

Payne v. Able, 4 Bk. Reg., 220; *S. C.*, 7 Bush., 344.

Then does the discharge operate to release Wolf from liability upon the replevin bond? Section 5115, Revised Statutes, prescribes the

bond, as did section 32 of the original Act, of the discharge and defines its extent. The discharge which Wolf pleads follows this form. It must operate a release from liability upon the replevin bond, if that liability was a debt or claim provable against his estate, and was not a debt excepted from the operation of a discharge in bankruptcy.

But it is insisted that the liability of Wolf upon this bond, even if provable, is "excepted from the operation of a discharge in bankruptcy," under section 5117 Rev. Stat., old sec. 33, because, it is insisted, that it is a "debt created by fraud, etc., of the bankrupt," "Debts and claims" are mentioned in section 5115 as provable, and as affected by the discharge, but the excepting clause is only as to debts, both in section 5115 and 5117. The effort has been made herein, to show that M. Wolf, the bankrupt, did not owe Louis Stix and Co. any debt, either created by fraud or otherwise. They charged him with a fraudulent holding of their debtor's property, and attached that property in his hands. His bond dissolved that attachment, and constituted a contract between them and him as aforesaid.

In *U. S. v. Rob Roy*, 1 Woods, 42, Bradley, Circuit Judge, said: "Now, the appearance of the claimant in court, and his bonding the property, are the transactions on which the present claim is based. They cannot be regarded as fraudulent. Every person is entitled to come into courts, and prosecute and defend his suits in the ordinary way."

The fraud contemplated by the Statute is actual, not constructive nor implied.

Neal v. Clark, 95 U. S., 704 (XXIV., 586).

The liability of Wolf to Louis Stix & Co., if any, does not grow in any way, was not created, by Wolf's fraudulent purchase of the goods attached. They were attached and in the custody of the law, notwithstanding that fraud, just as fully as if they had been found in possession of Marks, Pump & Co. Under the authority and with the sanction of law, Wolf received these goods back; took them to his own use, upon a contract made with Louis Stix & Co. The debt, if it can be called a debt, was created by their contract. "If the record shows that the debt was created by contract, the plaintiff cannot, when a discharge is pleaded in bar to a judgment, be allowed to show that the debt sought to be collected was created by fraud."

Palmer v. Preston, 45 Vt., 154; *Shuman v. Strauss*, 10 Bk. Reg., 300; *S. C.*, 52 N. Y., 404; *Brown v. Broach*, 52 Miss., 536; *Fowles v. Treadwell*, 24 Me., 377; *Jones v. Knox*, 46 Ala., 53.

Under the other head of "excepted debts," in section 5117, viz.: "fiduciary," it has been held: "If the guardian gives his note under seal to the ward's husband, in settlement of his account, and receives a release from them, he is not liable thereon in a fiduciary capacity."

Coleman v. Davies, 45 Ga., 489.

Messrs. Gantt & Patterson and Josiah Patterson, for appellees:

Is M. Wolf discharged?

His liability originated in fraud, in fact. This conclusively appears from the allegations and charges of the original and amended bills, and the decree of the Supreme Court of the State, which adjudges the liability of said Wolf.

The inquiry, then, is: does the discharge in

bankruptcy, release the bankrupt from such a liability?

The object of the law was to relieve the honest citizen from hopeless insolvency; but it was not intended to relieve those who were guilty of moral turpitude, or intentional wrong.

Neal v. Clark, 95 U. S., 709 (XXIV., 587).

Neal and the sureties, in the above case, were exonerated, because Neal was guilty only of constructive fraud, without intentional wrong.

Complainant, Wolf, and his sureties, must be held, on the authority of that case, as remaining liable, notwithstanding Wolf's discharge in bankruptcy, because Wolf was guilty of positive fraud and intentional wrong.

But it is contended that the judgment eliminates the wrong and purges the case of the taint of fraud and, therefore, Wolf is released. The law is just the reverse. The court will look back to the "root of the matter," and see if it had its origin in positive fraud.

Bump, Bankruptcy, 10th ed., 742, 743; *In re Robinson*, 6 Blatchf., 253; *In re Patterson*, 1 Bk. Reg., 307; *Hawkins v. Bk.*, 2 Bk. Reg., 108; *Sampson v. Burton*, 4 Bk. Reg., 15-63; *Warner v. Cronkhite*, 13 Bk. Reg., 52.

These authorities also show that giving a delivery bond does not vary the case. The court will go back to the origin of the liability.

It is urged that the word "debt," used in section 33 of the Bankrupt Law of 1867, means a liability which arises *ex contractu*.

The authorities are all against this view.

Bump, Bankruptcy, 10th ed., 728, notes; *Stokes v. Mason*, 12 Bk. Reg., 498; *S. C.*, 10 R. I., 261.

The case of *Neal v. Clark* (*supra*) is, necessarily, against it.

See, also, further, in this connection, *Stewart v. Emerson*, 52 N. H. 301; *Horner v. Spelman*, 78 Ill., 207; *Warner v. Cronkhite*, 13 Bk. Reg., 52; *Broadnax v. Bradford*, 50 Ala., 270.

It is a cherished doctrine of the law, never to let one thus offending escape under cover of the wrong he has done. He shall take no benefit from his wrong. He will be treated as a trustee for the injured party, if necessary.

Bump, Fraudulent Conveyances, 588; *Bean v. Smith* 2 Mas., 252; *Strike v. McDonald* 2 Har. and G. (Md.), 191; *Townshend v. Duncan* 2 Bland, 56; 2 Whart., Ev., sec., 1088 and notes.

Assuming that Wolf's discharge releases him, does it follow that the sureties are also released?

All the conditions have happened, upon which the liability of the sureties depends:

1. Said Wolf has been cast in the suit.

2. He has failed to pay the \$10,000 and interest, as the court has ordered and directed.

3. The goods and other property have been found and decreed, subject to the attachment and liable thereunder to the satisfaction of the debts of complainants, Louis Stix & Co., against Marks, Pump & Co.

Suppose Wolf's discharge is effectual as to him, does it relieve the goods? His release does not settle that they are not still liable. The attachment created a specific lien upon the goods for complainant's benefit. The bond stands for the goods. If the goods had not been replevied, the discharge of Wolf, if effectual to work his release, would not have set the goods at liberty.

On the 8th of December, 1866, Louis Stix & Co., commenced a suit in the Chancery Court of Shelby County, Tennessee, against Marks, Pump, & Co., and M. Wolf, to recover a debt owing by Marks, Pump, & Co., and to set aside a sale of goods by the latter firm to Wolf, on the ground, as alleged that it had been made to defraud creditors. In accordance with the practice in that State, a writ of attachment was sued out and levied upon the goods in the possession of Wolf.

By the Code of Tennessee, sec. 3509, "The defendant to an attachment suit may always replevy the property attached by giving bond with good security, payable to the plaintiff, in double the amount of the plaintiff's demand, or, at defendant's option, in double the value of the property attached, conditioned to pay the debt, interest and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit;" and, sec. 3514, "The court may enter up judgment or decree upon the bond, in the event of recovery by the plaintiff, against the defendant and his sureties for the penalty of the bond, to be satisfied by delivery of the property or its value, or payment of the recovery, as the case may be." As soon as the attachment was served, Wolf moved the court to ascertain the value of the goods and fix the amount of the bond to be given in replevying them. This was done, and the value ascertained to be \$10,000; and on the 24th of December, 1866, Wolf, as principal, and Lowenstein and Helman, as his sureties, filed in the cause their bond, a copy of which is as follows:

"We, M. Wolf, as principal, and Elias Lowenstein and Leon Helman, as sureties, hereby bind ourselves unto Louis Stix & Co. in the sum of \$20,000.

The condition of the above bond is that, whereas, in the suit now pending in the Chancery Court at Memphis, in favor of said Louis Stix & Co. and against Marks, Pump & Co., and in which said Wolf is joined as a defendant, an attachment has been issued against said Marks, Pump & Co. for \$18,699.54, besides interest and costs, and has been levied upon a stock of goods and other property as the property of said Marks, Pump & Co., which were in the possession of said M. Wolf, and were and are claimed by him as his property; and this bond is given by him for the purpose of replevying said stock of goods and other property attached, being, altogether, as it is agreed by the parties, of the value of ten thousand (\$10,000) dollars. Now, in the event said M. Wolf shall be cast in said suit, and said stock of goods and other property shall be found and decreed by the court to have been subject to said attachment, and liable thereunder to the satisfaction of the debts of complainants against Marks, Pump & Co., then and in that event, should said Wolf pay to complainants, as the court may order and direct, the said sum of \$10,000, the value of said stock of goods and other property, with interest thereon from this date, this bond shall be void, otherwise to remain in full force and effect.

Witness our hands and seals this—day of December, 1866.

M. WOLF.

ELIAS LOWENSTEIN.

L. HELMAN."

[L. S.]

[L. S.]

[L. S.]

Mr. Chief Justice Waite delivered the opinion of the court:

See 9 OTTO.

The property attached was thereupon surrendered to Wolf. All the members of the firm of Marks, Pump & Co. were afterwards discharged in bankruptcy, and in due time, by leave of the court, they severally filed formal pleas setting up their respective discharges. Wolf put in his answer, claiming title to the goods and denying all fraud. Testimony was taken; and on the 13th December, 1872, after hearing, the Chancery Court found and decreed that there was no fraud in the sale to Wolf, and dismissed the suit as to him. As Marks, Pump & Co. had been discharged in bankruptcy, it was also dismissed as to them. From this decree Stix & Co. appealed to the Supreme Court on the 21st of March, 1873. On the 28th of March 1874, Wolf obtained a discharge under the bankrupt law. On the 28th of April, 1877, the Supreme Court, upon hearing, reversed the decree of the Chancery Court, and, after finding the amount due from Marks, Pump, & Co., and ordering a recovery, concluded as follows:

"And this court being of opinion, as before recited, that said sale was fraudulent and void, and that said stock of goods, fixtures, etc., so attached and replevied, were subject to said attachment, and liable for complainants' said debt. And it further appearing from simple calculation that said sum of \$10,000, with interest from the date of said bond, December 24, 1866, to the present time, amounts to the sum of \$16,200; it is, therefore, further ordered, adjudged, and decreed by the court, that said fraudulent sale be and is hereby set aside, and for naught held, as to complainants' said debts herein against defendants Marks, Pump & Co., and that the complainants Louis Stix & Co. in their own right, and also for the use of Rinskoﬀ Bros. & Co., do have and recover of and from the defendant M. Wolf, and Elias Lowenstein and L. Helman, his sureties on the aforesaid replevin bond, the said sum of \$16,200, the value of the property replevied, and interest thereon to this date, for which execution may issue. And it further appearing from the record that the said defendants, Marks, Pump & Co., have been since the filing of complainants' bill discharged in bankruptcy, no execution is awarded against them for complainants' recoveries herein; and the cost of this cause, and the court below, will be paid out of the said recovery of \$16,200, against defendant, M. Wolf, and his aforesaid sureties on replevin bond."

On the 3d day of May, 1877, after this decree was rendered, Wolf and his sureties petitioned the court for leave to come in and plead in that court the discharge of Wolf in bankruptcy; but this was denied, as no new defense could be made in that court, and it was not allowable to set up the defense of bankruptcy by any proceedings there for that purpose.

On the 26th of May, 1877, these appellants filed this bill in the Chancery Court of Shelby County, setting forth the facts substantially as above stated, and praying that the judgment or decree of the Supreme Court might be decreed to be satisfied, and of no force and effect by reason of the discharge of Wolf in bankruptcy, and that Stix & Co. might be enjoined from enforcing the collection.

The case was afterwards removed to the Cir-

cuit Court of the United States for the Western District of Tennessee. The answer of Stix & Co. does not deny any of the material facts alleged in the bill, but sets up as a defense:

1. That the discharge of Wolf does not release him from his liability upon the decree of the Supreme Court, because the decree is founded upon a debt created by fraud;

2. That if Wolf is discharged, his co-complainants, the sureties upon his bond, are not; and,

3. That the appellants have been guilty of such laches as to cut them off from relief in a court of equity.

The circuit court dismissed the bill, and from a decree to that effect this appeal has been taken.

This cause may be considered as supplementary to that of *Wolf v. Stix*, 96 U. S., 541 [XXIV., 640]. It is in fact the suit in chancery referred to in the opinion in that case as furnishing the complainants an appropriate remedy for enforcing their rights growing out of the discharge of Wolf in bankruptcy during the pendency of the original cause on appeal in the Supreme Court, and before the final judgment as rendered in that court. In addition to the case of *Anderson v. Reeves*, cited in the argument of the other case, we are now referred to *Ward v. Tunstall*, 58 Tenn. (2 Bax.), 319; *Riggs v. White*, 4 Heisk. (Tenn.), 503; and *Longley v. Swayne*, 4 Heisk. (Tenn.), 506, n., as establishing the same practice. In *Ward v. Tunstall* the rule is thus stated: "On the record when presented, to which we can alone look, in our view of the case, a judgment can be rendered, and then if the debtor desires to be relieved he will find no difficulty in being protected from payment of improper judgments in the bankrupt court, or by an original proceeding in the state court, where he can make such issues as will raise the question, and as he is precluded from interposing his defense arising out of his bankruptcy, the judgment will not interfere with his case in any way." But it is unnecessary to pursue this branch of the case further, as we do not understand that the position assumed by the appellants is disputed.

The two questions which have alone been argued here in behalf of the appellees are:

1. Whether the liability of Wolf was one created by fraud, within the meaning of sec. 5117, R. S., which provides that "No debt created by fraud * * * shall be discharged in bankruptcy." And,

2. Whether if Wolf was discharged his sureties were also.

1. As to Wolf.

In *Neal v. Clark*, 95 U. S., 704 [XXIV., 586], it was decided that "fraud," as used in this section of the Bankrupt Law, "means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud or fraud in law, which may exist without imputation of bad faith or immorality." With this definition we are content. It is founded both on reason and authority. Clearly it does not include such fraud as the law implies from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors in the collection of their debts. But if it did, such a purchase does not create a debt from the purchaser

to the creditors. As between the debtor and the purchaser the sale is good, but as between a creditor and the purchaser it is void. The purchaser does not by his purchase subject himself to a liability to pay to creditors the value of what he buys. All the risk he runs is that the sale may be avoided, and the property reclaimed for the benefit of creditors. To come within this exception in the Bankrupt Act the debt must be created by fraud. The debt of Wolf in this case was not created by his purchase of the goods, but by his bond to pay their value if he failed to sustain his title. In this there was no fraud. It was a right the law gave him as the claimant of the property, and he availed himself of it in a lawful way. He thus perfected his title to the goods by agreeing to pay their value if his original purchase should be held to be invalid. A debt thus incurred cannot be said to be created by fraud. It occupies in this respect the same position it would if Wolf, acknowledging the invalidity of his original purchase, had, without suit, given his note to the creditors for the value of the goods in order to perfect his title.

The debt thus created was provable under the Bankrupt Act. It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event would ever occur which would require the payment was uncertain; but if it did occur, the amount to be paid was fixed. This clearly is such a case as was provided for in sec. 5068, R. S., which is, that "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, * * * the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend." There is nothing in the case of *Ruggin v. Maguire*, 15 Wall., 549 [82 U. S., XXI., 232] in conflict with this. That case arose under the Bankrupt Law of 1841, 5 Stat. at L., 440, which was somewhat, though perhaps not materially, different from that of 1867, 14 Stat. at L., 517, in this particular, and not only the happening of the event on which payment was to be made, but the amount to be paid, was uncertain and contingent. The amount to be paid depended materially upon the time when the event happened. Everything was uncertain. The obligation in this case is to pay \$10,000 and interest, if, upon the trial of the suit in the progress of which the bond was executed, it should be adjudged that the goods attached were subject to the attachment, and liable thereunder to the satisfaction of the debt sued for. As, therefore, the debt of Wolf was not created by fraud, and was provable under the Act, it follows that his discharge released him from his liability on the bond. The discharge would have been a bar to a judgment against him, if, before the judgment, it could have been pleaded as a defense to the action. It follows that, under the practice which prevails in Tennessee in this class of cases, Wolf is entitled to the relief he asks for himself.

2. As to the sureties.

Sec. 5118, R. S., provides that "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, See 9 OTTO.

either as partner, joint contractor, indorser, surety, or otherwise." The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was made to depend. Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like. But here the bond was not given to dissolve the attachment. That was issued against the property of Marks, Pump & Co.; and in order to get possession of the goods which had been attached, and which Wolf claimed as his own, he subjected his bond to the operation of the attachment which was to continue in force, and took the goods away. In legal effect, he purchased the interest of the creditors in the goods, and, with Lowenstein and Helman as his sureties, agreed to pay the creditors \$10,000, if, upon the trial of the suit in which the attachment was issued, it should appear that they had any interest to sell. In this obligation Lowenstein and Helman were jointly bound with Wolf, and their liability was made to depend, not upon the recovery of a money judgment against him, but upon a judgment that the title he acquired by his purchase from Marks, Pump & Co., was void as against the attaching creditors. The case stands precisely the same as it would if Wolf and his sureties had entered into a contract with the attaching creditors, in a form authorized by law, to take the goods from the sheriff and pay \$10,000, if on the trial it should be determined that the attachment was valid, and this was a suit on that contract. Clearly, under such circumstances, it could not be successfully contended that Wolf's bankruptcy released his sureties.

As we understand the practice in Tennessee, the parties are to have the same relief in this action they would have been entitled to in the original suit, if, before the judgment, Wolf's discharge in bankruptcy could have been pleaded. This proceeding performs the office of such a plea, and enforces the same rights.

Had the plea been filed, it would have shown a discharge of Wolf from his liability, but not that of his sureties. They were bound not to pay any judgment which might be rendered against him, but to pay the debt he had agreed to pay in a certain event, which had happened. The judgment which the Code of Tennessee authorizes in such cases is upon the bond according to its tenor and effect, and if the principal debtor is discharged his sureties must respond, as in other cases of joint liability. They are no more released by his discharge than they would be from a note or ordinary money bond which they had signed as his sureties.

No question has been raised as to the effect of the bankruptcy of Marks, Pump, & Co., and it is unnecessary, therefore, to take time to consider it.

Our conclusion is, that as to Wolf the judgment is erroneous, and should be reversed, but as to Lowenstein and Helman, that it was right, and should be affirmed.

The cause is remanded, with instructions to

modify the decree below in such manner as to give to Wolf the benefit of his discharge in bankruptcy, as stated in this opinion, but to leave it in all other respects in force. The costs in this appeal must be paid by the appellees.

Cited—82 N. Y., 117; 90 N. Y., 37.

MARY G. HUSSEY, *Appl.*,

v.
JOB SMITH.

(See S. C., 9 Otto, 20-25.)

Mortgage by occupant of land—deed on sale by U. S. Marshal.

1. Under the Act of Congress of Mar. 2, 1867, the occupant of land in a city, entered by the mayor thereof in trust for the occupants thereof, had an equitable interest in such land which he could sell and convey.

2. Such occupant may mortgage the land, and a foreclosure and sale under the mortgage carried his title to the purchaser at such sale.

3. That the original process in the foreclosure case was served, the sale made and the deed to the purchaser executed by the United States Marshal, and that this court afterwards decided that the Marshal of the Territory was the proper person to perform such acts, do not invalidate the sale.

4. Such United States Marshal was an officer *de facto*, and his acts were valid.

[No. 131.]

Submitted Jan. 16, 1879. Decided Mar. 3, 1879.

A PPEAL from the Supreme Court of the Territory of Utah.

The case fully appears in the opinion of the court.

Messrs. **Z. Snow** and **E. D. Hoge**, for appellant:

NOTE.—*Acts of officer de facto, when valid.*

An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. *Rex v. Bedford Level*, 6 East, 356.

One who exercises the duties of an officer under color of an appointment or election to that office is an officer *de facto*. *Plymouth v. Painter*, 17 Conn., 585; S. C., 44 Am. Dec., 574.

The ministerial acts of a sheriff *de facto*, though ineligible to office, are valid. *State v. Anderson*, *Coxe*, 318; S. C., 1 Am. Dec., 207.

The acts of officers *de facto* are as valid and effectual, when they concern the public or the rights of third persons, as though they were officers *de jure*. *People v. Collins*, 7 Johns., 549; *Potter v. Luther*, 3 Johns., 431; *Reed v. Gillet*, 12 Johns., 296; 4 T. R. 366; 16 Vin., 114; 2 Camp., 131; *Ring v. Grout*, 7 Wend., 344; *People v. Stevens*, 5 Hill, 630; *People v. Cook*, 14 Barb., 287; *People v. Tiernan*, 30 Barb., 196; *People v. Brennan*, 30 How. Pr., 420; *Read v. City of Buffalo*, 3 Keyes, 449; *Wilcox v. Smith*, 5 Wend., 231; S. C., 21 Am. Dec., 213; *Buckman v. Ruggles*, 15 Mass., 180; 8 Am. Dec., 98; *Police Jury v. Haw*, 2 La., 41; S. C., 20 Am. Dec., 294; *Farms & Mechs. Bk. v. Chester*, 6 Humph., 453; S. C., 44 Am. Dec., 318; *Burke v. Elliott*, 4 Ired. L., 355; S. C., 42 Am. Dec., 142; *Brown v. O'Connell*, 36 Conn., 432; S. C., 4 Am. Rep., 89; *Culver v. Eggers*, 63 N. C., 630; *Sheehan's Case*, 122 Mass., 445; S. C., 23 Am. Rep., 374.

In an action between other parties, the court will not decide whether a person claiming to be sheriff and discharging the duties of the office, be sheriff *de jure*. *Fowler v. Bebee*, 9 Mass., 231; S. C., 6 Am. Dec., 62; *Com. v. Hawkes*, 123 Mass., 629.

Contract of officers *de facto* with innocent parties, good, but it is not so when contracting party knows defect in title to office. *St. Luke's Ch. v. Mathews*, 4 Des., 578; S. C., 6 Am. Dec., 619.

The acts of officers of private corporations illegally elected or ineligible to office, are valid and binding as acts of officers *de facto*. *Savage v. Ball*,

The Marshal was an officer *de facto*.

State v. Carroll, 38 Conn., 449; S. C., 9 Am. Rep., 409; *Fowler v. Bebee*, 9 Mass., 231; *Com. v. Fowler*, 10 Mass., 290; S. C., 11 Mass., 338.

Messrs. **J. B. Rosborough**, **Samuel A. Merritt** and **R. P. Lowe**, for appellee.

Mr. Justice **Swayne**, delivered the opinion of the court:

There can be no question that under the Act of Congress of March 2, 1867, 14 Stat. at L., 541, Smith had an equitable interest in the premises in controversy which he could sell and convey. *Phyfe v. Wardell*, 5 Paige, 268; *Armour v. Alexander*, 10 Paige, 571; *Thredgill v. Pintard*, 12 How., 24. Until the Mayor of Salt Lake City made the entry at the proper land-office, which he was authorized to make, the legal title was in the United States. By the entry it became vested in the Mayor. He held the entire tract so entered "In trust for the several use and benefit of the occupants thereof, according to their respective interests." Such is the language of the statute. The Act does not prohibit a sale, but is silent upon the subject. Smith mortgaged to Bernhisel, and subsequently to Linforth. Bernhisel foreclosed, making Smith and Linforth defendants. Under a decree of the proper court, the premises were sold by the United States Marshal. Jennings became the purchaser, and thereafter sold and conveyed to the appellant. His deed to her bears date March 9, 1872. On the 24th of May, 1872, the appellant filed her claim pursuant to law in the proper probate court, for a judgment to enable her to obtain a deed from the Mayor for the premises. Smith had before filed a claim also. On the 10th of July, 1872, the probate court decided in favor of Smith. She

17 N. J. Eq., 142; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.), 124; *In re County Life Ass. Co.*, 5 L. R. Ch. App., 238; *Mahony v. East Holyford Min. Co.*, 7 L. R. H. L., 894; *Rockville v. Andrews*, 2 Cranch, C. C., 449; *Bk. of U. S. v. Dandridge*, 25 U. S. (12 Wheat.), 64; *Minor v. Mechs. Bk.*, 26 U. S. (1 Pet.), 46; *Djs. L. of Packets v. Bellamy Mfg. Co.*, 12 N. H., 223; *Matter of Directors of M. & H. R. R. Co.*, 19 Wend., 135; *Matter of Chenango C. M. Ins. Co.*, 19 Wend., 635; *Atl. R. R. Co. v. Johnston*, 70 N. C., 349; *O. & M. R. R. Co. v. McPherson*, 35 Mo., 13; *P. & K. R. R. Co. v. Dunn*, 39 Me., 587; *Baird v. Bk. of Washington*, 11 S. & R., 411; *D. & H. Can. Co. v. Pa. Coal Co.*, 21 Pa. St., 131; *Doremus v. Dutch Ref. Ch.*, 2 Green Ch. (N. J.), 332; *Tustees of Vernon Soc. v. Hills*, 6 Cow., 23.

The acts of a *de facto* officer cannot be attacked collaterally as invalid, but only in a direct proceeding by the proper authority. *Aulanier v. Governor*, 1 Tex., 653; *People v. Sassovich*, 29 Cal., 480; *Com. v. Kirby*, 2 Cush., 577; *Gumberts v. T. A. B. Co.*, 28 Ind., 181; *Coles Co. v. Allison*, 23 Ill., 437; *Creighton v. Piper*, 14 Ind., 182; *Callison v. Hedrick*, 15 Gratt., 244; *People v. Stevens*, 5 Hill, 616; *Comrs. v. McDaniel*, 7 Jones L., 107; *People v. Albertson*, 8 How. Pr., 363; *Neale v. Overseers*, 5 Watts, 538; *Hooper v. Goodwin*, 48 Me., 79; *Plymouth v. Painter*, 17 Conn., 585; *Hagner v. Heyberger*, 7 Watts & S., 104; S. C., 42 Am. Dec., 220; *Petersilea v. Stone*, 119 Mass., 465; S. C., 20 Am. Rep., 335.

But the mere exercise of the functions of an office will not be sufficient where there is no claim of election or appointment to it, unless there has been open exercise of it, without interference by the public, long enough to justify presumption of appointment. *Burke v. Elliott*, 4 Ired. L., 355; S. C., 42 Am. Dec., 142; *State v. Carroll*, 38 Conn., 449; *Wilcox v. Smith*, 5 Wend., 231; S. C., 21 Am. Dec., 213; *Gilliam v. Reddick*, 4 Ired. L., 368.

The judgment of a judge *de facto* is valid. *State v. Carroll*, 38 Conn., 449; S. C., 9 Am. Rep., 409; *Sheehan's Case*, 122 Mass., 445; S. C., 23 Am. Rep., 374.

thereupon appealed to the district court. The decision of the probate judge was affirmed. She then appealed to the Supreme Court of the Territory. The judgment of the probate court was again affirmed, and she thereupon removed the case by appeal to this court.

The validity of the mortgage to Bernhisel is not controverted, nor is it denied that, if the foreclosure and sale divested Smith's title, the judgment of the Supreme Court of the Territory was erroneous, and must be reversed.

It was held by that court that the foreclosure proceedings were void, for two reasons:

First. That the mortgage was not sufficiently described in the complainant's petition to warrant the decree *pro confesso*, which was taken.

Second. That the United States Marshal, by whom the original process in the case was served, the sale made and the deed to the purchaser executed, had no authority to act in anywise in the premises.

The first objection is clearly untenable, and has not been insisted upon here. We, therefore, pass it by without further notice.

The second objection is necessary to be considered.

There were two marshals in the Territory, one appointed by the National Government, the other under a territorial law. The former was called the Marshal of the United States, the latter, Marshal of the Territory.

A question arose which officer was entitled to serve the processes issuing from the local courts. A case was brought in the proper district court to settle their respective claims. On the 12th of May, 1870, that court decided that the right and authority belonged exclusively to the Marshal of the United States. The Supreme Court of the Territory, at its October Term in the same year, affirmed this judgment. Such was then understood to be the law, and the Marshal of the United States proceeded in the performance of his official functions, having the field to himself, until the subject came under the consideration of this court in *Clinton v. Englebrecht*, 13 Wall., 434 [80 U. S., XX., 659]. It was then held (on the 15th of April, 1872) that the Marshal of the United States had such authority only in cases where the United States were concerned.

It will thus be seen that the period of his recognized right and of its uninterrupted exercise extended from May 12, 1870, to April 15, 1872. Within that time all the proceedings in the Bernhisel foreclosure case were had. The petition to foreclose was filed, the process was issued and served upon Smith, the decree was taken, the sale was made and the Marshal's deed was executed to Jennings. During all this time the Marshal's acts were valid, as being those of an officer *de facto*. They were *as much so* as if they had been done by him *de jure*. These remarks apply with full force to his acts as a ministerial officer in the Bernhisel case. An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Wilcox v. Smith*, 5 Wend., 231; *Gilliam v. Reddick*, 4 Ired. L., 368; *Brown v. Lunt*, 37 Me., 423. Judicial as well as ministerial officers may be in this position. Freeman, Judgments, sec. 148. The acts of

See 9 OTTO.

such officers are held to be valid because the public good requires it. The principle wrongs no one. A different rule would be a source of serious and lasting evils.

The Marshal's sale and deed to Jennings extinguished the entire right of Smith to the premises. Thereafter he stood to them in the relation of a stranger. All the title which he possessed when the mortgage was executed passed from him to Jennings, and from Jennings to the appellant.

The territorial law of Utah of February 6, 1869, Comp. L. of Utah, 379, authorized to be passed by the Act of Congress before mentioned, gave to the party "entitled to the occupancy or possession," as well as to the "occupant or occupants," the right to apply for the judgment by the probate court, upon which, when rendered, the Mayor was to execute his deed. If this were not so, the right would be clearly within the equity of the Act of Congress, and conferred by it.

The rejection of the appellant's claim and the adjudication in favor of Smith, who had not then a shadow of right to the premises, by the probate court was, therefore, a gross error, and the Supreme Court of the Territory repeated it by affirming the judgment.

The judgment of the latter court is, therefore, reversed and the cause will be remanded, with directions to proceed in conformity to this opinion.

* NOTE.—*Joseph G. Hussey et al., Appts., v. Job Smith et al.*, No. 132. Appeal from the Supreme Court of the Territory of Utah; argued by the same counsel at same time as preceding.

Mr. Justice SWAYNE delivered the opinion of the court.

The opinion of this court in the preceding case, No. 131] *ante*, 314], is decisive of this case. The cardinal question here, as there, is as to the validity of the proceedings touching the sale, under the Bernhisel mortgage, and the result must be the same. The decree of the Supreme Court of Utah is reversed and the cause will be remanded, with directions to proceed in conformity to this opinion.

Cited—99 U. S., 615.

EDWARD W. BURBANK, *Plff. in Err.*,
v.

THOMAS J. SEMMES.

(See S. C., 9 Otto, 138-142.)

Confiscation Act—marshal's deed.

In the proceedings to condemn land under the Confiscation Act, where a particular parcel of the same is not mentioned either in the information, the monition or the decree of condemnation, the marshal's deed on the sale conveyed no title to such parcel, although purporting to convey the same.

[No. 169.]

Argued Jan. 31, 1879. Decided Mar. 3, 1879.

ERROR to the Supreme Court of the State of Louisiana.

The history and facts of the case are fully stated by the court.

Messrs. T. J. Durant, O. W. Horner and J. Q. A. Fellows, for plaintiff in error.

Mr. Thos. J. Semmes, *pro. per.*, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Seizure of the estate, property, money, stocks, credits and effects of certain persons engaged in rebellion was authorized to be made by the Act of Congress to suppress insurrection, and it was made the duty of the President to apply the proceeds of the same when condemned to the support of the army. 12 Stat. at L., 590.

Proceedings *in rem*, on the 7th of August, 1863, were instituted in the District Court for the Eastern District of Louisiana, under the said Confiscation Act, against six certain lots of land, as the real property of the original plaintiff in the present suit, which resulted, on the 5th of April, 1865, in the decree of that court condemning the property described in the information. On the 11th of the same month a writ of *venditioni exponas* was issued, commanding the Marshal to sell the property on the day named in the writ; but the Marshal did not sell the same on that day, for the want of bidders. Unable to comply with the order in that respect, he withdrew the property from sale, and gave a new notice, as directed by the prior order of the court.

Two lots of land were embraced in the information and in the decree of condemnation, which in fact were not the property of the present plaintiff. Both of those lots belonged to an innocent third person, and the true owner of the same in the meantime, to wit: on the 2d of May in the same year, filed a petition in the same court setting up his right to the two lots, and stating that they were improperly advertised for sale by the Marshal, and prayed the court to open the decree to enable him to assert his title. Consent in writing to that effect having been given by the district attorney, the court granted the prayer of the petitioner, and opened the decree for the purpose of enabling the intervenor to submit his claim to those two lots, as shown by the evidence. Pursuant thereto, the court, on the 31st of May in the same year, rendered judgment restoring those two lots to the intervenor, as claimed in his petition. Due correction of the decree of condemnation having been made, the return of the Marshal shows that he sold the residue of the lots described in the information, pursuant to the second advertisement for the amount specified in the record, and that he paid the money into the registry of the court.

Subsequent application was made by the present plaintiff to set aside the default against him, and for leave to file his claim and answer. Leave to that effect was granted; and due notice to the purchaser of the lots having been given, he appeared and filed exceptions to the proceedings. Both parties were heard, and the court overruled the exceptions of the purchaser, set aside the default of the defendant, and finally rendered judgment dismissing the information, and restored the property to the original owner.

Proper steps were taken in behalf of the United States to remove the cause into the circuit court, where the judgment of the district court was in all things reversed and judgment rendered, that the original judgment rendered by the district court should stand and remain in full force and effect, and that the sale made by the Marshal do stand confirmed, which decree of the circuit court was subsequently affirmed in this court. *Semmes v. U. S.*, 91 U. S., 21 [XXIII., 193]; *U. S. v. Six Lots of Ground*, 1 Woods, 234.

None of the foregoing proceedings are now controverted by either of the parties to the present controversy; but the plaintiff instituted the present suit in the Fourth District Court for the Parish of Orleans, in which he alleges that he is the sole owner and absolute proprietor of the lot of land described in the complaint as No. 15 on the plan therein referred to, and he avers that the defendant, on the 17th of June, 1865, unlawfully obtruded himself into and took possession of the said lot, with the buildings thereon, and has ever since withheld and now withholds possession of the same from the petitioner.

Service was made; and the defendant appeared and filed an answer, in which he admits that he is in possession of the premises, but alleges that he is the owner and possessor of the same in good faith, by virtue of an adjudication to him at the Marshal's sale under the before mentioned writ of *venditioni exponas*, and he makes profert of the Marshal's deed to him of the premises as evidence of his title. Proofs were taken, hearing had, and the court of original jurisdiction entered a decree that the plaintiff is the lawful owner of the lot, with the improvements described in the complaint.

Conclusive proofs were introduced by the plaintiff showing that he was the lawful owner of the lot in question prior to the confiscation proceedings, and that he acquired the fee simple title to the same by exchanging part of lot 18 for the same with the former owner of the lot in question.

Beyond all doubt the title of plaintiff to the same is perfect, unless the lot was condemned and the title to the same conveyed to the defendant by virtue of the Marshal's sale under the confiscation proceedings. Suffice it to say that the defendant claims title to the premises upon no other ground, and in respect to that the subordinate court remarked, that neither in the information nor the motion, or the decree of condemnation, is there any reference whatever to the lot in question, or to the fractional part thereof purchased by the complainant, from which it follows to a demonstration, that the property was never condemned as forfeited to the United States. Nor has the defendant any other evidence of title than what is exhibited in the deed of the Marshal; and it is clear that inasmuch as the decree of condemnation did not apply to the lot in controversy, the Marshal's sale of the same was utterly without warrant or authority of law, and that as against the plaintiff it can have no effect to change the ownership of the premises.

Application for new trial was made by the defendant, which was overruled, and he appealed to the Supreme Court of the State, where the parties were again heard, and the Supreme Court of the State affirmed the judgment of the subordinate court. Immediate steps were taken by the defendant to remove the cause into this court for re-examination.

Of the errors assigned three only need be noticed, as the others are deemed immaterial: (1) That the court decided that the confiscation proceedings did not include the lot in question, upon insufficient grounds. (2) That the property was condemned as a whole, and not the particular lots of which it was composed. (3) That the owner, inasmuch as he did not point out the defect of description at the trial, is estopped

to claim the property. *Semmes v. Burbank*, 28 La. Ann., 694.

Propositions of like character, it seems, were presented to the State Supreme Court, and it is difficult to see what better answer can be given to them than that found in the opinion of that court.

Half of lot 15 is the subject of the present controversy, which fronts on Edward Street in the Square bounded as described in the petition. Title to the same is claimed by the defendant under the decree of confiscation and the sale by the Marshal under writ of *venditioni exponas*. He admits that the property belonged to the plaintiff prior to those proceedings, but contends that the title was conveyed to him by the Marshal's deed. On the other hand, the plaintiff concedes that the confiscation proceedings were regular, but avers that the property in question was not embraced in those proceedings.

Six lots were described in the information, two of which, sometimes described as one, did not belong to the accused party, and were in the course of the proceedings restored to the true owner. By the decree of condemnation the title of the plaintiff, as the accused party, was divested of lots 14, 16, 17, and part of 18. Lot 15, which is the lot in question, was not mentioned either in the information, the monition, or the decree of condemnation. Nor did the *venditioni exponas* authorize the sale of any other property than that described in the information and decree of condemnation. Nothing, therefore, in the semblance of title is possessed by the defendant except the Marshal's deed, and it is clear that the Marshal could only make a valid title to the property described in the decree of condemnation, as that was all that became vested in the United States; and it is equally clear that he could not sell property not authorized by the writ placed in his hands for execution.

Viewed in the light of these suggestions, it is clear that the decision of the State Supreme Court rests upon sufficient and solid foundations, and that it deserves to be affirmed, for the reasons which the court gave for its conclusions. Nor is it correct to suppose that the property was condemned as a whole, as the proposition is refuted by the information, the monition, and the decree of condemnation. Specific lots being mentioned in the information and the monition, the accused party had no ground to suppose that any other portion of his real estate was embraced in the proceeding and, of course, cannot be held to have acquiesced in its condemnation.

Certain other errors are assigned, but the court is of opinion that there is no error in the record.

Judgment affirmed.

EDWARD HARRIS ET AL., *Plffs. in Err.*,

v.

JOHN MC GOVERN ET AL.

(See S. C., 9 Otto, 161-168.)

Statute of Limitations—subsequent disability—limitation of ejectment in California.

1. Where a cause of action has accrued, and the Statute of Limitations has commenced to run during 9 OTTO.

ing the lifetime of a person, the running of the Statute is not interrupted by his subsequent decease and the descent of the right of action to his heirs, though minors at the time and under disability to sue.

2. When the Statute of Limitations once begins to run, it will continue to run without being impeded by any subsequent disability.

3. In California, continuous adverse possession of land, for a period of more than five years subsequent to the time when the Statute began to run and before the action was commenced, bars an action of ejectment.

[No. 168.]

Submitted Jan. 31, 1879. Decided Mar. 3, 1879.

ERROR to the Circuit Court of the United States for the District of California.

The case, which arose in the court below, is fully stated by the court.

Mr. D. Wm. Douthitt for plaintiffs in error.

Mr. S. M. Wilson, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Actual title to the lot in controversy is claimed by the plaintiffs as devisees and heirs of Stephen Harris, deceased, by virtue of an ordinance of the city, which, as they allege, was subsequently ratified by an Act of Congress. Opposed to that, the theory of the defendants is, that the city ordinance granted the lot to Stephen A. Harris, under whom they derived title, and that inasmuch as they have been in the open adverse possession of the same, claiming title, for more than five years, the title of the plaintiffs, if any they or their testator ever had, is barred by the Statute of Limitations.

Possession being in the defendants, the plaintiffs brought ejectment, and the defendants appeared and pleaded as follows: (1) The general issue. (2) That they were seised in fee simple of the premises. (3) That the title and right of possession of the plaintiffs were barred by the Statute of Limitations.

Pursuant to the Act of Congress, the parties waived a jury and submitted the evidence to the court. Special findings were filed by the judge presiding, with his conclusions of law, as exhibited in the record. Hearing was had, and the court rendered judgment in favor of the defendants, and the plaintiffs sued out the present writ of error.

Three errors are assigned, as follows. (1) That the court erred in the conclusion of law that the Statute of Limitations began to run as early as July 1, 1864, as found in their first conclusion of law. (2) That the court erred in the conclusion that the defendants were in possession of the premises for more than five years subsequent to the time when the Statute of Limitations commenced to run. (3) That the court erred in their fourth conclusion of law, that the defendants were entitled to judgment.

Actions of the kind cannot be maintained in that State, unless it appears that the plaintiff,

NOTE.—*What necessary to constitute adverse possession; requisites of; occupancy necessary.* See note to Ricard v. Williams, 20 U. S. (7 Wheat.), 59; and note to Ewing v. Burnet, 36 U. S. (11 Pet.), 41.

Effect of disability occurring after Statute of Limitations begins to run.

Death of the debtor does not, as a general rule, stop the running of the Statute of Limitations. *Wenman v. Mohawk Ins. Co.*, 13 Wend., 267; *S. C.*, 28 Am. Dec., 464; *Nicks v. Martindale*. *Harper's L. Rep.*, 135; *S. C.*, 18 Am. Dec., 646.

his ancestor, predecessor or grantor, was seised or possessed of the premises in question within five years before the commencement of such action. Stats. Cal., 1863, 326; 2 Code, sec. 318.

From the findings of the circuit court it appears that the lot in controversy is within the corporate limits of the city, and that it is situated west of Larkin Street and northwest of Johnson Street, as they existed prior to the passage of the ordinances, which were afterwards ratified by the Act of the Legislature of the State. Stats. Cal., 1858, 53. Said land is also within the boundaries designating the lands to which the right and title of the United States were relinquished and granted to the city and its successors. 13 Stat. at L., 333, sec. 5.

Prior to the incorporation of San Francisco the locality was known as the *pueblo* or town by that name; and the findings of the court show that on September 25, 1848, the alcalde of the *pueblo* made a grant in due form of the land in controversy to a party designated in the instrument by the name of Stephen A. Harris, which grant was duly recorded in the official book of records kept for that purpose; that at that date there was a man residing in that *pueblo* by the name of Stephen A. Harris and another man by the name of Stephen Harris; that the grant was intended for and delivered to the latter and not to Stephen A. Harris; and that Stephen Harris, to whom the grant was delivered, acquired all the title that passed or was conveyed by the grant of the alcalde. It also appears that Stephen Harris, two years later, left California, and that he never returned to that State; that he went to New Jersey, where he remained several years, and then removed to Illinois, where, on the 5th of November, 1867, he died, leaving a will, by which he devised his property, including the land in controversy, to the plaintiffs, who are his children.

By the fifth finding of the court it appears that there was no evidence introduced tending to show that the deceased, or the plaintiffs, or any person claiming through or under them, ever improved the land, or was ever in the actual possession or occupation of the land or any part of the same. On the other hand, it appears that Stephen A. Harris, May 1, 1854 conveyed the land to the person named in the sixth finding, by deed in due form, which was duly

recorded, and that all the right, title and interest thus acquired by the grantee by sundry *mesne* conveyances subsequently vested in the defendants for a valuable consideration, without notice of the claim of the plaintiffs or their testator.

There was no evidence to show that any party was in actual occupation of the land January 1, 1855, or at any time between that date and the first day of July of the same year; but the seventh finding of the court shows that one of the grantors of the defendants, in the spring of 1864, took actual possession of the land, claiming title under one of the said *mesne* conveyances, and that he fenced and occupied the lands, and that he and his several grantees, including the defendants, have since that time to the present been in the actual, peaceable, open, continuous, exclusive and adverse possession of the land, claiming title thereto in good faith against all the world, under the said several *mesne* conveyances.

Section 5 of the Act of Congress of July 1, 1864, relinquished to the city all the right and title of the United States to the lands within the corporate limits of the city, as defined in the Act of incorporation passed by the State Legislature and, of course, the title of the city to those lands became absolute on that day. *Lynch v. Bernal*, 9 Wall., 316 [76 U. S., XIX., 714]; *Montgomery v. Bevans*, 1 Sawy., 653; 13 Stat. at L., 333.

Infancy is not set up in this case, and if it were, it could not avail the plaintiffs, as the ninth finding of the court shows that the minor plaintiffs arrived at full age more than a year before the suit was commenced.

Lands lying west of Larkin Street and southwest of Johnson Street were relinquished to the possessors, subject to the right of the city to take possession of the same if wanted for public purposes, without compensation; but the lot in controversy is not within that reservation, as the first finding of the court shows that it is situated northwest of Johnson Street.

Appended to the findings of fact are the conclusions of law pronounced by the circuit court. They are as follows: (1) That the adverse possession of the grantors of the defendants commenced in the spring of 1864, and that the Statute of Limitations began to run as early

Subsequent disability does not stop the running of the Statute of Limitations when it has once begun to run. *Partridge v. Mitchell*, 3 Edw. Ch., 181; *Christophers v. Garr*, 6 N. Y., 62; *Sanford v. Sanford*, 62 N. Y., 556; *Quivey v. Hall*, 19 Cal., 100; *Fitzhugh v. Anderson*, 2 Hen. & M., 289; S. C., 3 Am. Dec., 625; *Faysoux v. Prather*, 1 Nott & McC., 296; S. C., 9 Am. Dec., 691; *Ruff v. Bull*, 7 Har. & J., 14; S. C., 16 Am. Dec., 290; *Harvey v. Tobey*, 15 Pick., 99; S. C., 25 Am. Dec., 430; *Weilborn v. Weaver*, 17 Ga., 267; *Doe v. Jones*, 4 T. R., 300; *Dugan v. Gittings*, 3 Gill, 138; S. C., 43 Am. Dec., 306.

When the statute once begins to run, neither insanity nor any other supervening disability arrests its progress. *Adamson v. Smith*, 2 Mill, 269; S. C., 12 Am. Dec., 665; *Clark v. Trail*, 1 Met., 35; *Allis v. Moore*, 2 Allen, 306; *Lincoln v. Norton*, 36 Vt., 679; *Smilie v. Biffle*, 2 Pa. St., 52; S. C., 44 Am. Dec., 156.

Death of party having a cause of action against which the statute has commenced to run, will not impede the statute. *Swearingen v. Robertson*, 39 Wis., 462; *Bozeman v. Browning*, 31 Ark., 394; *Rogers v. Brown*, 6 Mo., 101.

An infant heir can claim no protection against statute which began to run in lifetime of ancestor. *Jackson v. Moore*, 13 Johns., 513; S. C., 7 Am. Dec., 389; *Daniel v. Day*, 51 Ala., 431; *Haynes v. Jones*, 2

Head, 372; *Rogers v. Brown*, 61 Mo., 187; *Henry v. Carson*, 59 Pa. St., 297. *Contra*, *Ladd v. Jackson*, 43 Ga., 288; *South v. Thomas*, 7 B. Mon., 59; *Maclin v. May*, 4 Bibb., 43; *Sentney v. Overton*, 4 Bibb., 445.

Party cannot take advantage of successive or cumulative disabilities. He can only avail himself of those which existed when the right first descended or accrued. *Angell, Limitations*, secs. 477-479; *Bensell v. Chancellor*, 5 Whart., 371; S. C., 34 Am. Dec., 561; *Fritz v. Joiner*, 54 Ill., 101; *Rankin v. Tenbrook*, 6 Watts, 388; *DeKay v. Darrah*, 2 Green (N. J.), 294; *Lynch v. Cox*, 23 Pa. St., 265; *Rogers v. Brown*, 61 Mo., 187; *McFarland v. Stone*, 17 Vt., 165; *Harris v. McGovern*, *supra*, 2 Sawy., 615; *Mercer v. Selden*, 42 U. S. (1 How.), 37; *Hogan v. Kurtz*, 94 U. S., XXIV., 317; *Demarest v. Wynkoop*, 3 Johns. Ch., 129; S. C., 8 Am. Dec., 467.

The plaintiff, to prove a disability exempting him from effect of Statute of Limitations, must show that it was a continuing one from the time the cause of action first accrued. *Edwards v. University*, 1 Dev. & B. Eq., 325; S. C., 30 Am. Dec., 170.

Statute of Limitations does not run against an heir who was under one or more disabilities at the time his right accrued, until all such disabilities are removed. *McFarland v. Stone*, 17 Vt., 165; S. C., 44 Am. Dec., 325.

at least as the first day of July of that year, when the title of the city to the municipal lands within its boundaries became perfect under the Act of Congress, to which reference has already been made.

Authorities to show that the facts stated in the seventh finding of the court amount to an adverse possession of the lot in controversy, within the meaning of the state statute, are quite unnecessary, as the proposition is too plain for argument. Ang. Lim., 6th ed., sec. 394; *Green v. Litter*, 8 Cranch, 239.

Cases frequently arise where the property is so situated as not to admit of use or residence, and in such cases neither actual occupation, cultivation, nor residence are absolutely necessary to constitute legal possession, if the continued claim of the party is evidenced by such public acts of ownership as the owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Ewing v. Burnet*, 11 Pet., 41; *Jackson v. Howe*, 14 Johns., 405; *Arrington v. Liscom*, 34 Cal., 365; *Prop. of Ken. Purchase v. Springer*, 4 Mass., 416.

Apply the rule to the case which the foregoing authorities establish, and it is clear that the first conclusion of law adopted by the circuit court is correct, as the seventh finding of facts shows that the defendants, from the date of the Act of Congress, confirming the title of the city to her municipal land to the date of the judgment, were in the actual, peaceable, open, continuous, exclusive and adverse possession of the land, claiming title thereto in good faith against all the world, which is certainly a bar to the plaintiffs' right of action under the statute of the State.

Nor is there any valid objection to the second conclusion of law adopted by the circuit court, which was that the cause of action having accrued and the Statute of Limitations having commenced to run during the lifetime of the deviser of the plaintiffs, the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the plaintiffs, though minors at the time and under disability to sue.

Decided cases of a standard character support that proposition, and the court is of the opinion that it is correct. *Jackson v. Moore*, 13 Johns., 513; *Jackson v. Robins*, 15 Johns., 169; *S. C.* 16 Johns., 537; *Fleming v. Griswold*, 3 Hill., 85; *Becker v. Van Valkenburgh*, 29 Barb., 319.

When the statute once begins to run, says Angell, it will continue to run without being impeded by any subsequent disability. *Smith v. Hill*, 1 Wils., 134; Ang. Lim., 6th ed., sec. 477; *Currier v. Gale*, 3 Allen, 328; *Duroure v. Jones*, 4 T. R., 301; *Jackson v. Wheat*, 18 Johns., 40; *Welden v. Gratz*, 1 Wheat., 292.

Decisive support to the third conclusion of the circuit court is also derived from the authorities cited to sustain the second. Continuous adverse possession of the land, say the court in their third conclusion, having been held by the defendants and their grantors for a period of more than five years subsequent to the time when the statute began to run and before the action was commenced, the action is barred, as there was no disability to sue when the cause of action first accrued.

See 9 OTTO.

Suppose that is so; then clearly the defendants were entitled to judgment, and there is no error in the record.

Judgment affirmed.

THE SOUTHERN EXPRESS COMPANY,

Appt.,

v.

THE WESTERN NORTH CAROLINA
RAILROAD COMPANY AND W. W.
ROLLINS ET AL., COMMISSIONERS in
possession of the road.

(See S. C., 9 Otto, 191-201.)

Corporation—contract by—receiver of railroad—specific performance.

1. The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear.
2. A receiver of a railroad appointed in a foreclosure action is the only necessary party defendant in an action to compel the specific performance of a contract made by the railroad company.
3. Such receiver cannot be compelled to perform a contract for the transportation of persons and property over the road made by the railroad company.
4. The enforcement of contracts not relating to realty by a decree for specific performance, is not an unusual exercise of equity jurisdiction. A court of equity never interferes where the power of revocation exists.

[No. 153.]

Argued Jan. 28, 1879. Decided Mar. 3, 1879.

APPEAL from the Circuit Court of the United States for the Western District of North Carolina.

The appellant filed a bill in the court below, for the specific performance of an alleged contract. A decree of dismissal having been entered, the complainant appealed to this court.

Messrs. Clarence A. Seward and Edwin M. Shepherd, for appellants:

The contract created, as between the R. R. Co. and the Express Co., an equitable lien upon the right of occupancy of transportation, and upon an accruing fund which equity will enforce as against all parties having notice thereof.

In *Groton Mfg. Co. v. Gardiner*, 11 R. L., 626, the parties had made a lease, in which they pledged and bound all improvements in machinery which they might put upon the premises, and the stock of goods which they might have on the premises, for the payment of the rent and for the due performance of all covenants in their lease contained. It was held that this covenant was a contract for a lien when the rent was in arrear, and constituted an equitable lien in favor of the lessors, on personality thereafter put on the leased premises, which took precedence of an attachment laid on such personality by creditors of the lessees.

The same principle was enforced in *Smith-hurst v. Edmunds*, 14 N. J. Eq., 408; in *Butt v. Ellett*, 19 Wall., 544 (86 U. S., XXII., 183); as against a growing crop of cotton; and in the cases of *Pennock v. Coe*, 23 How., 117 (64 U. S., XVI., 436); and in *Dunham v. Ry. Co.*, 1 Wall., 254 (68 U. S., XVII., 584), where the court held that a railroad company, authorized to borrow money, may mortgage as security, not only the

then acquired property, but such as might be acquired in future. If it may mortgage the property *per se*, no good reason is perceived why it may not create an equitable lien upon the use of the property which it may incur by an absolute mortgage, which equitable lien the court has power to enforce against all persons subsequently acquiring the property, with notice of the existence of the lien.

The contract between the two Companies was a license for the enjoyment of the occupancy of way and terminal stations, and of the vehicles of the Railway Co. while in transit. Such license was executed by the Express Co., so far as an advance payment of rent was concerned. The payment is called "rent" in the contract. Such license could not be revoked by the R. R. Co., nor could it be revoked by those who purchased, or had notice prior to the attachment of their interest, of the existence of such license.

Winter v. Brockwell, 8 East, 308; *Taylor v. Waters*, 7 Taunt., 374; *Wood v. Lake*, Sayers, 3; *Ameriscoggin Bridge v. Bragg*, 11 N. H., 108; *Van Rensselaer v. R. R. Co.*, 1 Hun, 507; *Parker v. Nightingale*, 6 Allen, 344.

This being a valuable contract for a right of occupancy of stations and of vehicles in transit; and it appearing satisfactorily from the bill that the road is not in operation; and it also appearing that the trustees had express notice of the existence of this contract and of the claim of the Express Company thereunder, a court of equity can grant the complainant the relief which it prays for in its bill.

The principle of a court of equity in regard to cases of specific performance concerning mere chattels is, that where courts of law, by awarding damages, can give adequate compensation, courts of equity will not interfere; and, therefore, that principle cannot apply where the defaulting party has become insolvent, and the court of review acts upon this principle.

Ex parte Masterman, 4 L. J. (N. S.), Bankruptcy, 54; *Barnes v. Barnes*, 65 N. C., 261; *Clark v. Flint*, 22 Pick., 231; 2 Story, Eq. Pl., 31; *Doloret v. Rothschild*, 1 Sim. & S., 590; *Bk. v. Seton*, 1 Pet., 305.

So this court, in *Parker v. Cotton & W. Co.*, 2 Black, 551 (67 U. S., XVII., 337), said:

"A remedy at law, in order to defeat a suit in equity, must be as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity."

See, also, *Brown v. Pacific Mail Co.*, 5 Blatchf., 525; *Kirkpatrick v. Peshine*, 24 N. J. Eq., 206; *Trustees v. Lynch*, 70 N. Y., 440.

Mr. A. S. Merrimon, for appellees:

The contract does not stipulate for any interest in the road, nor can it be construed like a contract of covenant running with the land.

The parties to the contract did not contemplate that the complainant should have a lien of any kind on the road, or any of the property of the R. R. Co. Any lien intended as against creditors would have been void, unless the instrument creating the same had been duly registered under the laws of North Carolina. The contract was not a mortgage; it created no laborers' lien, or indeed, any lien. And if it had been so intended, the registry laws of North Carolina rendered the same nugatory without registration.

See, *Vattel's Revisal*, pp. 354, 563.

There is nothing in the nature of the contract that creates an equitable lien. There is no more an equitable lien in this case, than A would have upon the land or railroad of B, where he had loaned the latter \$1,000 for general purposes.

The bill does not show by averment that the contract can be performed on the part of the R. R. Co. *in specie*. What may be the condition of the Company now, as to the rights of other creditors does not appear. The inference is, that the R. R. Co. has ceased to have control of the road; that all its property has passed into the hands and control of others; and who such persons are, does not appear.

The remedy at law is adequate, and the complainant is not, on that ground, entitled to the relief sought by the bill. The mere fact that the R. R. Co. may be insolvent raises no equity. There is no ground of advantage in favor of the complainant as against other creditors, who advanced money by loan or otherwise, to build and repair the road. Other creditors took the mortgage of the Company's property to secure the debt. This they had a right to do.

Mr. Justice Swayne delivered the opinion of the court:

The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was by the consent of the court. Without this latter fact the bill could not have been filed or maintained. The suit would have been a contempt of the court which had appointed the receiver, and punishable as such. *Davis v. Gray*, 16 Wall., 203 [83 U. S., XXI., 447].

The citizenship of the complainant Corporation is sufficiently averred. *Express Co. v. Kountze*, 8 Wall., 342 [75 U. S., XIX., 457]. Such a complainant need not prove its existence, unless the fact is directly put in issue by the defendant. *Soc. for Prop. Gosp. v. Paulet*, 4 Pet., 480.

To the objection that the requisite corporate power of the complainant is not shown, there are two answers. The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear. 2 Waite, Act. and Def., 334.

The charter is set out in the record, and forms a part of it. That leaves no room for doubt upon the subject.

Adequate capacity on the part of the Railroad Company to make the contract is to be presumed in like manner.

No party defendant was necessary but the receiver. He was in the possession of the property and effects of the Railroad Company, subject to the order of the court, and could have specifically performed the contract, or paid back the money loaned if the court had so directed. The presence of the other parties was immaterial, and the bill might well have been dismissed as to them *Davis v. Gray*, *supra*; *Doggett v. R. R. Co.*, recently decided by this court and not yet reported [*ante*, 301].

The contract between the Express Company and the Railroad Company was that the latter should give to the former the necessary facilities for the transaction of all its business upon the road, forward without delay by the passenger trains both ways all the express matter that should be offered, do all in its power to promote

the convenience of the Express Company, both at the way and terminal stations, and carry free of charge the messengers in charge of the express matter, and the officers and agents of the Express Company passing over the road on express business. The consideration for these stipulations was a loan by the Express Company to the Railroad Company of \$20,000, to be expended in repairs and equipments for the road, the loan to bear interest at the rate of six per cent. per annum, and the payment of fifty cents per hundred pounds for all express matter carried over the road. The latter was to be applied in discharge of the loan and interest. The contract was to continue for one year from the first day of January, 1866, and until the principal and interest of the debt were fully paid. The bill avers that the receiver had refused to carry out the contract, and that the principal of \$20,000 and a part of the interest were unpaid.

The enforcement of contracts not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous in both English and American jurisprudence. They proceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice, that it would be less beneficial than relief in equity, that the damages would not be an accurate satisfaction, that their extent could not be exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty.

Judge Story, after an elaborate examination of the subject, thus lays down the general rule: "The just conclusion in all such cases would seem to be that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy." 2 *Story, Eq. Jur.*, sec. 728; see, also, *Stuyvesant v. Mayor of N. Y.*, 11 Paige, 414; *Barr v. Lapsley*, 1 Wheat., 151; *Storer v. Ry. Co.*, 2 You. & C. (N. R.), 48; *Wilson v. Furness R. R. Co.*, L. R., 9 Eq., 28.

But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. *Fry, Specif. Perform.*, 64.

The contract stipulates that after the first year it shall cease upon the payment of the \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity.

There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit brought by the bond holders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien holders, and neither can be thus diverted.

See 9 OTTO.

The appellant can, therefore, have no *locus standi* in a court of equity.

Both these objections appear by its own showing. It was, therefore, competent and proper for the court below, *sua sponte*, to dismiss the bill for the want of equity upon its face. *Brown v. Piper*, 91 U. S., 37 [XXIII., 200].

The decree of the Circuit Court is affirmed.

Cited—11 N. W. Rep., 268; 47 Mich., 455; 41 Am. Rep., 722.

DEWITT C. FARRELL ET AL., *Plffs. in Err.*,
v.

UNITED STATES.

(See S. C., 9 Otto, 221-224).

Tax on liquors.

That the high wines or distilled spirits mentioned in a distiller's warehousing bond were entirely destroyed by fire, without any fault, negligence, or carelessness on his part, does not relieve the obligors in the bond from liability to pay the government tax upon the liquors thus destroyed.
[No. 816.]

Submitted Jan. 13, 1879. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The United States sued and obtained judgment in the court below, upon a certain distiller's bond.

The case sufficiently appears in the opinion of the court.

Messrs. E. B. McCagg and S. D. Puterbaugh, for plaintiffs in error.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

The evidence given in the court below we cannot consider. It is improperly brought before us. The circuit court made no special finding of facts. All the finding it made was, that the high wines or distilled spirits mentioned in the distiller's warehousing bond were entirely destroyed by fire, without any fault, negligence or carelessness on the part of the distiller, or of any person in charge of the distillery and bonded warehouse in the employment of the distiller; that they were so destroyed while in the bonded warehouse connected with the distillery, and that the warehouse was in the charge of an internal revenue storekeeper. The single question, therefore, is, whether these facts thus found relieve the obligors in the bond from liability to pay the government tax upon the liquors thus destroyed. We think they do not. The bond was dated on the 13th of June, 1870. It bound the obligors in a penal sum, conditioned to pay the taxes on the spirits deposited in the warehouse before their removal, and within one year from the date thereof. The obligation was unconditional, and it was exactly that which the distiller and his sureties were by the Act of Congress required to assume. Act of July 20, 1868, sec. 23; 16 Stat. at L., 135, 136. Depositing distilled spirits in a government warehouse did not make them the property of the Government, or cause them

to be held at the risk of the bailee. The property remained in the distiller, and the risk of loss by fire or any other casualty was, consequently, his. He and his sureties undertook to pay the government tax upon the spirits in the warehouse within one year, with no exception for any possible contingency. The judgment of the circuit court, was, therefore, correct. The case of the distiller may be a hard one; but his misfortune is not the fault of the Government. He might have protected himself by insurance, and possibly he did; or he might have obtained relief under the Act of Congress of May 27, 1872, 17 Stat. at L., 162. By that Act Congress has provided a way in which a remission of the tax upon distilled liquors, casually destroyed while in the custody of a revenue officer in a bonded warehouse, may be obtained. The provision of such a mode of relief indicates a purpose to exclude any other.

The judgment of the Circuit Court is, therefore, affirmed.

UNITED STATES, *Appt.*,

v.

WALTER PUGH.

(See S. C., 9 Otto, 265-272.)

Abandoned and captured property, recovery for—review of judgment—findings—money presumed in treasury.

1. The Abandoned and Captured Property Act, as extended by the Act of July 2, 1864, authorizes a recovery in the Court of Claims for the proceeds of property captured and sold by the military authorities, without judicial condemnation, after July 17, 1862, and before Mar. 12, 1863, but accounted for and credited by the Secretary of the Treasury to the abandoned and captured property fund in the treasury.

2. The judgment of the Court of Claims, as to the legal effect of the ultimate circumstantial facts in a case, may be reviewed in this court.

3. When the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the Court of Claims, when requested, to so frame its findings as to put the doubtful question into the record.

4. The money sued for will be presumed to be in the treasury, within the meaning of the Abandoned and Captured Property Act, when the property in question was sold, and an account of sales stated by the Sequestration Commission, and the Chief Quartermaster received, at various times, from the commission, the proceeds of property sold, which were duly accounted for to the treasury.

[No. 227.]

Submitted Dec. 6, 1878. Decided Mar. 3, 1879.

APPEAL from the Court of Claims.

The petition filed in the court below by the appellee claims the proceeds of certain sugar and molasses. That court found the facts to be as follows:

I. In December, 1862, the claimant was in possession as owner, of a plantation in Louisiana. The sugar and molasses described in the petition were a part of the products of such plantation, and were stored thereon and in the possession of the claimant's agents.

II. In December, 1862, the said sugar and molasses were seized by the military forces of the United States and turned over to a military commission known as the Sequestration Commission, Jan. 12, 1863. The commission was directed by General Order No. 8, Department

of the Gulf, "To sell, at public auction, all property in its possession that has not been or may not be claimed or released, except such as may be required for the use of the army, and turn over the proceeds thereof to the Chief Quartermaster." The said sugar and molasses were then in the possession of the commission. On the 4th February, 1863, the commission caused the same to be sold, with other property, at public auction in New Orleans. By the accounts kept by the commission, it appears that the net proceeds of the sugar and molasses amounted to \$4,362.23. It does not appear specifically that the proceeds were paid over to the Chief Quartermaster of the Department of the Gulf, but it appears, and the court finds the fact to be, that he received money at various times in the year 1863, from the sales of sugar and molasses in New Orleans, to the amount of \$33,796.02. For this amount the chief quartermaster accounted on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury to the "Abandoned and Captured Property Fund" in the Treasury.

Upon the foregoing facts and those found on the requests of parties, the conclusion of law is, the claimant is entitled to recover \$4,362.23.

The defendant appealed to this court.

Mr. Edwin B. Smith, *Asst. Atty.-Gen.*, for appellant.

Mr. Edward Janin, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

Two questions are presented by the finding of facts in this case, to wit:

1. Does the Abandoned and Captured Property Act, as extended by the Act of July 2, 1864, 13 Stat. at L., 375, authorize a recovery in the Court of Claims for the proceeds of property captured and sold by the military authorities, without judicial condemnation, after July 17, 1862, and before March 12, 1863, but accounted for and credited by the Secretary of the Treasury to the Abandoned and Captured Property Fund in the Treasury?

2. Does it appear that the proceeds sued for in this case were actually paid into the Treasury?

The first of these questions has been often the subject of consideration in the Court of Claims, but has never, until now, been brought here for determination. It was first decided adversely to the United States as early as 1867, in *Bar-ringer's Case*, 3 Ct. of Cl., 358; and although that court has ruled the same way many times since, no appeal was taken by the Government until the rendition of this judgment in 1876. Under these circumstances, we ought not to disturb what may fairly be considered a rule of decision in that court acquiesced in by the United States, unless the error is manifest.

The Abandoned and Captured Property Act was, undoubtedly, intended to be prospective only in its operation. It provided the mode by which that class of property was thereafter to be collected and disposed of, and directed what should be done with the proceeds. By the Act of July 17, 1862, 12 Stat. at L., 589, the seizure of certain kinds of property owned by those engaged in the rebellion, and an application of the property or its proceeds to the support of the Army of the United States, were authorized.

This Act contemplated, however, a condemnation of the property by judicial proceedings *in rem*, instituted in the name of the United States in some court having jurisdiction of the territory within which the property was found, or to which it might be removed. The title did not pass by a seizure under the authority of this Act until a decree of condemnation was rendered.

The 6th section of the Abandoned and Captured Property Act made it the duty of every officer or soldier of the Army of the United States, who took or received any abandoned property, or cotton, sugar, rice or tobacco, from persons in the insurrectionary districts, or who had it under his control, to turn it over to the treasury agent provided for in the Act, and take a receipt therefor. As the property captured in this case had been sold by the Sequestration Commission before this Act took effect, no question arises as to whether, after the Act did take effect, the property should have been turned over to the proper treasury agent, or proceeded against for condemnation under the Act of 1862. Having been converted into money by the action of the capturing military authorities, without judicial condemnation, there was nothing left for the treasury agent to do; and as the property had been released from custody, there could be no proceeding against it *in rem*.

By section 3 of the Act of July 2, 1864, 13 Stat. at L., 375, sections 1 and 6 of the Abandoned and Captured Property Act were extended so as to include every description of property mentioned in the Act of 1862. This has been supposed by the Court of Claims to give that court jurisdiction over cases for the recovery of money actually paid into the treasury as the proceeds of property captured after July 17, 1862, 12 Stat. at L., 589, and before March 12, 1863. *Barringer's Case*, *supra*; *Mrs. Minor's Case*, 6 Ct. of Cl., 393; *Terry & Carne's Case*, 8 Ct. of Cl., 277; *Miss Moore's Case*, 10 Ct. of Cl., 375. It is also understood to have been the practice of the Executive Departments of the Government from the beginning, to credit the abandoned and captured fund in the treasury with the proceeds of all property captured after July 17, 1862, and before March 12, 1863, paid over to the quartermasters, and accounted for by them in their settlements with the Treasury Department. No distinction was made in this particular between captures after March 12, 1863, and those before. It is a familiar rule of interpretation, that in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *Edward v. Darby*, 12 Wheat., 210. While, therefore, the question is one by no means free from doubt, we are not inclined to interfere, at this late day, with a rule which has been acted upon by the Court of Claims and the Executive for so long a time. Besides, the interpretation which has been given the Act, is in strict accordance with the well settled policy of the Government not to enforce the right of capture during the late war against the property of the inhabitants of the insurrectionary districts, without giving the owners an opportunity of proving in a court of justice that, although they were in law enemies, they were in fact friends of the United States. Under the

See 9 OTTO.

Act of 1862 this proof might be made in the suit for condemnation, and under the Abandoned and Captured Property Act, in a suit instituted to recover the proceeds in the Treasury. Under these circumstances, it can hardly be considered a forced construction of the Act of 1864 to hold, as has been done, that it was intended to subject the proceeds in the Treasury, of property captured after July 17, 1862, and sold without judicial condemnation before March 12, 1863, to the same suits that were allowed in cases of captures and sales after that date. If this practice is not supported by the exact letter of the law, it is by the spirit, and is certainly just. We are not disposed to change it.

The second question presents for consideration a subject of much importance connected with the practice under our rule, in reference to appeals from the Court of Claims, which requires "a finding" by that court, "of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them." The ultimate fact to be determined in this case is, whether the proceeds of the sale of the captured property belonging to the claimant have been paid into the Treasury. No direct proof to that effect has been given, but if shown at all, it is by way of inference from certain circumstantial facts which have been established by the evidence. These circumstantial facts are set forth in the finding which has been sent here as the finding upon which alone the judgment was rendered, and as the case stands, the question we are to decide is, whether those facts are sufficient to support the judgment. Confessedly, the court has found all the facts which have been directly established by the evidence. These facts are not evidence, in the sense that evidence means the statements of witnesses or documents produced in court for inspection. They are the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law. If what has been found is, in the absence of anything to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the Treasury, the judgment is right; otherwise, it is wrong. The inquiry thus presented is as to the legal effect of facts proved, not of the evidence given to make the proof; and the question of practice to be settled is, whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal.

From what is said by the Court of Claims in *Ross's Case*, 12 Ct. of Cl., 565, and by the reporters in a *note*, 11 Ct. of Cl., 344, we are led to suppose that the Court of Claims understands that our decisions in *U. S. v. Ross*, 92 U. S., 281 [XXIII., 707] and *Intermingled Cotton Cas.*, 92 U. S., 651 [XXIII., 756], leave this question somewhat in doubt. To avoid misapprehension in the future, we take this opportunity to say, that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the

facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on the appeal to decide upon the weight of evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped, and their legal effect as a whole determined. If the case could come here in such a form as to require us to consider the evidence, we should be required to trace the evidence to its logical results, find in this way all the facts that had been proven, and then declare the final legal conclusion. The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal. The position which the case occupies when it comes here under such circumstances is precisely the same as it would be if the facts, instead of being found by the court, had been agreed upon by the parties, and their agreement embodied in the record.

In *U. S. v. Crussell*, 14 Wall., 1st [81 U. S., XX., 821], the question was, whether the particular facts found justified the conclusion that the money sued for had been paid into the Treasury; and inasmuch as the legal presumption is, in the absence of anything to the contrary, that the officers of the Government perform their duties when called upon to act in their official capacities, we thought that the law would infer from the facts found that the money which ought to have been paid over by a quartermaster to his superior officer was actually paid over, and that in this way it had reached the Treasury. So in the *Intermingled Cotton Cases*, *supra*, when it was found that the cotton of the several claimants contributed to and formed part of the captured mass from which the cotton sold was taken, we concluded that the claimants were entitled to their respective shares of the money in the Treasury as the proceeds of the sale. In *U. S. v. Ross* [*supra*], however, we thought a similar conclusion from the particular facts there found was too remote, and so reversed the judgment and sent the cause back for a new trial. The premises we considered too uncertain to justify the inference that had been drawn. We thought independent and material facts were wanting, and that the law would not raise the presumption from what did appear, that the plaintiff was entitled to recover. The difficulty in that case was not as to the power of this court to act upon the facts as found, but as to the sufficiency of the facts to support the judgment.

Upon the facts found in this case we have no difficulty in presuming that the money sued for is in the Treasury, within the meaning of the Abandoned and Captured Property Act. The Sequestration Commission was directed to

sell captured property, and turn the proceeds over to the Chief Quartermaster. The property in question was sold, and an account of sales stated by the commission. The case shows that at various times during the year 1863 the Chief Quartermaster received from the commission the proceeds of sugar and molasses sold, amounting in the aggregate to \$33,796.02, and that this amount was all duly accounted for to the Treasury, and there passed to the credit of the fund. This has always been treated in that department as equivalent to an actual payment into the Treasury. In June, 1863, the commission refused the application of the wife of the claimant for a restoration of the proceeds. This raises the presumption that down to that time the money had not been released; and as it is specially found that it does not appear what did become of the money unless it was paid over, as it should have been, to the Chief Quartermaster, we think the law will presume it was disposed of as the order of the commanding general required it should be. If any evidence to the contrary exists, the burden was cast upon the United States to produce it. Until the presumption in favor of the claimant is repelled, the law gives him the right to the judgment he has obtained.

The judgment is affirmed.

Cited—105 U. S., 695; 107 U. S., 406, 503; 110 U. S., 485.

NATHAN MYRICK ET AL., *Plffs. in Err.*,
v.

BENJAMIN THOMPSON.

(See S. C., 9 Otto, 291-297.)

Sale of land scrip—Indian lands—location—federal questions.

1. An agreement made by a holder of certificates or scrip for land in Minnesota Territory, set apart for the Sioux half-breeds, issued by the President in pursuance of a law of Congress, that he would secure the title to the land located under such certificates or scrip, to be lawfully vested in another, for a consideration agreed upon, is not void under the Treaty of July 15, 1830, made at Prairie du Chien, or the Act of Congress approved July 17, 1854.

2. The provision authorizing the scrip to be located upon unoccupied lands, was for the benefit and protection of occupants of the land, which such occupant might waive; and if he did, the effect would be to restore the premises occupied by him to the condition of unoccupied land.

3. That the holders of such certificates or scrip were forbidden to transfer the same does not render such an agreement invalid.

4. Where the federal questions involved in a case were correctly decided by the State Supreme Court, the judgment of that court must be affirmed, without determining any other questions not of a federal character.

[No. 147.]

Submitted Jan. 24, 1879. Decided Mar. 3, 1879.

ERROR to the Supreme Court of the State of Minnesota.

The case, which arose in the District Court of Ramsey County, Minnesota, is fully stated by the court.

Mr. C. K. Davis and Morris Lamprey, for plaintiffs in error.

Mr. E. C. Palmer, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Lands in the Territory of Minnesota had been set apart for the use and benefit of the Sioux half-breeds, and the President was empowered to make a new arrangement with them, and for that purpose was authorized to issue to such of them as would relinquish to the United States their title to the reservation, certificates or scrip for an amount of land equal to what they would be entitled in case the reservation should be divided among them, and the Act provided that the certificates or scrip might be located upon any of the lands within the reservation not occupied by actual and *bona fide* settlers of the tribe, * * * or upon any other unoccupied lands subject to preemption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements. 10 Stat. at L., 304.

Certificates or scrip of the kind were held by the defendant as attorney in fact of the half-breeds named in the petition, and it appears that he placed the same with his powers of attorney in the hands of the plaintiff, with the view to the location of the same for the benefit of the beneficiaries. Contemporaneous with the delivery of those papers the plaintiff and defendant entered into the written agreement set forth in the petition, in which the defendant agreed that upon the location of the scrip he would secure the title to the land located to be lawfully vested in the plaintiff, in consideration of which the plaintiff agreed to pay the defendant the sum of \$2,800 in one year from the date of the note, and to secure the payment of the same upon the land located as soon as he, the plaintiff, shall acquire the title to the same.

Difficulties attended the location, which were overcome in the manner set forth in the petition; and the plaintiff avers that he made all the locations as stipulated in the written agreement, and alleges that the defendant neglects and refuses to comply with his part of the agreement; that, instead of doing so, he has fraudulently caused the lands located to be conveyed to his wife, the other defendant in the case, and that she now holds the same, or the principal part thereof, without consideration and in fraud of the just rights of the plaintiff in this action. Many other matters are alleged in the complaint, which, being immaterial in this investigation, are omitted.

What the plaintiff demands against the defendants is the judgment and decree of the court for a specific performance of the said written agreement, that the defendants convey to him one-fourth part of the lands first described and the entire fee in all the parcels last described, and that the decree of the court shall stand and be effectual to convey the title to the plaintiff.

Service was made, and the defendants appeared and filed an answer setting up several defenses, no one of which involves any federal question. They admit the execution of the written agreement, and that the certificates or scrip were located by the plaintiff. Nothing of the kind is in controversy; but they deny that the quantity of land located is correctly set forth, or that the fees and expenses paid by the plaintiff exceeded \$50. Sales and deeds of the lands located they admit were made by the first named defendant as alleged, but they aver in the answer that they first and in repeated instances requested the plaintiff to pay the note and take

the title, and that he refused so to do, alleging as a reason that he could not raise the money; and they deny that the sales were made with intent to cheat or defraud the plaintiff. Every such imputation is denied; and the defendants set up as a defense that the arrangement contracted in the written agreement was, by the mutual consent and understanding of the parties, abandoned, and that the defendants have ever since and now hold the note as canceled, and are ready and willing to surrender the same to the plaintiff.

Sundry explanations are also given in respect to the several conveyances through which the title to the lands passed into the hands of the wife of the principal defendant, from which it appears that the deed to her was a voluntary conveyance; but the defendants allege that she subsequently purchased the same of the beneficiaries, for which deeds she paid a valuable consideration to the respective grantors.

Proofs were taken, and the parties heard by the court without a jury; and the record shows that the court made a special finding of the facts, and rendered judgment in favor of the plaintiff, to the effect that the defendants convey to the plaintiff, his heirs and assigns forever, the land and lots therein described, to which description of the land and lots is appended the following: "And that this decree shall stand in place of a conveyance of said premises to said plaintiff by said defendants, and be effectual to convey the title to said land and lots to the plaintiff, his heirs and assigns forever."

Due appeal was taken by the defendants to the Supreme Court of the State, where the parties were again heard upon the finding of facts, certified from the subordinate court, and the State Supreme Court affirmed the judgment of the State District Court. Proceedings in these courts being at an end, the defendants sued out a writ of error and removed the cause into this court.

Appended to the writ of error is the assignment of errors filed by the defendants, which is that the plaintiff has no ground of action except upon the agreement set out in his complaint, which is void under the Act of Congress approved July 17, 1854, and under the Treaty of July 15, 1830, made at Prairie du Chien. 7 Stat. at L., 330; 10 Stat. at L., 304.

Sufficient appears to show that the theory of defense presented in the assignment of errors was not set up in the answer, nor does the record furnish any support to the proposition that any such question was raised or decided in the court of original jurisdiction. Evidence to support the theory that the question stated in the assignment of errors was discussed and decided in the Supreme Court of the State is found in the opinion of that court as published in the record, and inasmuch as that question is raised in the assignment of errors exhibited in the brief, the court is of the opinion that the case to that extent is properly here for re-examination.

Enough has already been remarked to show that the parties waived a jury in the court where the action was commenced, and submitted the evidence to the determination of the court invested with that jurisdiction. Special findings were made by the court as the basis of their conclusions of law, and on appeal the Supreme Court of the State adopted the findings of the

subordinate court as the basis of fact for their judgment. Viewed in the light of these suggestions, it is quite clear that the findings of fact exhibited in the record are not the proper subject of review in this court, nor will it be necessary to reproduce those findings, as they are fully set forth in the record and in the official volume of the State Reports. *Thompson v. Myrick*, 20 Minn. 207.

Reference either to the record or to that case will show that the subordinate court found as a conclusion of law that the plaintiff below was entitled to judgment, directing and decreeing that the defendants should convey to the plaintiff, his heirs and assigns forever, the one undivided fourth part of the lands so located by the plaintiff as aforesaid in the name of the said beneficiaries, and the whole of the seventeen lots otherwise described; and that in case the defendants should fail to convey the lands as directed, the decree of the court shall stand in place of such conveyance.

From the opinion of the Supreme Court it also appears that the defendants, through their counsel, made several points to show that the judgment of the subordinate court was erroneous, the first of which was that the agreement set out in the complaint is void under the said Act of Congress and the Treaty made at Prairie du Chien. By the 9th article of the Treaty a certain tract of land was set apart for the half-breeds of the Sioux Nation, and the United States agreed to suffer said half-breeds to occupy said tract of country, they holding by the same title and in the same manner that other Indian titles are held. 7 Stat. at L. 330.

Certain rights of occupancy were, doubtless, guarantied to the half-breeds by that article of the Treaty; but the record furnishes no ground to suppose or even to suspect that the agreement in the case did or could interfere with or impair any right which the Treaty conferred, which is all that need be said upon that subject. Congress, by the Act referred to, authorized the President to make an exchange with the half-breeds for their rights in that reservation, by issuing to them certificates or scrip for the amount of land before described, which said certificates or scrip the Act provided might be located upon any of the lands within the reservation, * * * or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by the government, upon which they have respectively made improvements.

Attempt, it seems, was made in the argument of the case in the Supreme Court of the State to show that the terms of the agreement were in conflict with the provisions of the Act of Congress; but the answer which that court made to the proposition, though brief, is satisfactory and decisive. Outside of the pleadings, the defendants, it seems, contended in the Supreme Court of the State that, by the terms of the agreement between the parties to it, the scrip was to be located on land occupied by the plaintiff and, consequently, that the agreement was void as contravening the regulations which the Act of Congress prescribed; to which the court responded, that the provision authorizing the scrip to be located upon "unoccupied lands" was evidently framed for the benefit and protection of occupants of the land, and that if the occupant saw

fit, as the plaintiff did in this case, to locate the scrip upon land occupied by himself, there could be no objection to the location, as the occupant might waive his right to object and abandon his occupancy; and that if he did, the effect would be to restore the premises to the condition of unoccupied land.

Plain as that proposition is, it is not deemed necessary to pursue the argument, as the statement of it is sufficient to secure for it universal assent.

Suppose that is so; still it is insisted by the defendant that the agreement is repugnant to the provisions of the Act of Congress, because it contemplates that the location of the scrip may be made upon land other than that upon which the beneficiaries "have respectively made improvements;" to which the State Supreme Court answered, that the clause of the Act referred to qualifies the phrase "other unsurveyed lands," instead of the phrase "other unoccupied lands," as is supposed by the defendants, which, in the judgment of the court, is the correct construction of the provision in the Act of Congress applicable to the subject.

Support to that view is also derived from the contemporaneous construction given to it by the Commissioner of the General Land-Office, as appears from the circulars issued by him for the guide and direction of all engaged in making such locations under the Act of Congress authorizing the President to issue such certificate or scrip to the half-breeds therein mentioned. 1 Lester, Land L., 628; 2 Lester, Land L., 369.

Holders of such certificates or scrip were forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the State Supreme Court overruled the defense, and referred to one of their former decisions, assigning the reasons for their conclusion that the defense was not well founded. *Gilbert v. Thompson*, 14 Minn., 544.

Since the cause was submitted, the opinion of the court in that case has been carefully examined, and the court here concurs with the state court that the case is applicable to the present case, and that the reasons given for the conclusion are satisfactory and conclusive. For these reasons the court is of the opinion that the federal questions involved in the record as set forth in the assignment of errors were decided correctly by the State Supreme Court.

Six other defenses were set up by the defendants, as appears by the opinion of the State Supreme Court, no one of which involves any federal question. They are as follows: (1) That the agreement is void on common law ground on account of the relation which the principal defendant bore to the grantees of the scrip. (2) That, by the terms of the agreement, the payment of the note by the plaintiff is a condition precedent to the right to specific performance. (3) That the contract is not one which a court of equity will enforce, because it is not a contract for a conveyance, but for services to be rendered by the plaintiff to procure a conveyance from the said beneficiaries. (4) That the findings of the court show that the agreement was abandoned by mutual consent. (5) That the circumstances disclosed show that it would be inequitable to enforce the agreement. (6)

That the action is barred by the Statute of Limitations.

Remarks are not necessary to show that none of these several defenses present any federal question for re-examination; and having already decided that the federal questions involved in the case were correctly decided by the State Supreme Court, the settled rule of this court is that the judgment must be affirmed, without determining the other questions not of a federal character. *Murdock v. Memphis*, 20 Wall., 590 (87 U. S., XXII., 429).

Judgment affirmed.

THOMAS KEELY, *Plff. in Err.*,

v.

XENOPHON B. SANDERS ET AL.

(See S. C., 9 Otto, 441-449.)

Commissioner's certificate of sale of lands—taxes—state injunction—description of lands—sale—notice to owners—presumption of regularity—City of Memphis.

1. A certificate of tax sale, given in accordance with section 7 of the Act of June 7, 1862, as amended by the Act of Feb. 6, 1863, is *prima facie* evidence of the regularity and validity of the tax sale and of the title of the purchaser under it.

2. It can only be affected, as evidence of the regularity and validity of the sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previously to the sale, or that the property had been redeemed.

3. No state court can, by injunction or otherwise, prevent federal officers from collecting federal taxes.

4. In describing lands to be sold at a tax sale, the description is sufficient if it identifies the land, and informs the owner of the claim made upon his property.

5. It is no objection to the validity of the sale that, while the taxes due bore but a small proportion to the value of the property, the commissioners sold it as an entirety without subdivision.

6. The proceeding to collect a tax is a proceeding *in rem*, of all stages of which the owners have legal notice; the commissioners are not bound to hunt them up.

7. The law presumes, until the contrary is shown that persons acting in a public office have been duly appointed and are acting with authority.

8. The City of Memphis was an insurrectionary district within the meaning of section 6 of the Act of 1862.

[No. 108.]

Submitted Jan. 8, 1879. Decided Mar. 3, 1879.

IN ERROR to the Supreme Court of the State of Tennessee.

The bill in this case was filed by the defendants in error in the Chancery Court of Shelby Co., Tenn., to amend a certain tax sale. A decree having been given in their favor and affirmed by the Supreme Court of the State, the defendant sued out this writ of error.

The case is fully stated by the court.

Messrs. Wm. M. Randolph and Fillmore Beall, for plaintiff in error.

No counsel appeared for defendants in error.

Mr. Justice Strong delivered the opinion of the court:

In the courts of the State this was a bill to

NOTE.—Sale of land for taxes—strict compliance with the statute necessary. See note to *Williams v. Peyton*, 17 U. S. (4 Wheat.), 77.

See 9 OTTO.

quiet title to a parcel of ground in the City of Memphis, filed against the appellant, who claims to be the owner by virtue of a sale for direct taxes made on the 24th day of June, 1864. The appellant holds a certificate of tax sale, No. 1054, given to him in accordance with the Act of June 7, 1863. The force and effect of that certificate we have had occasion to consider recently in the case of *De Treville v. Smalls*, not yet reported [*ante*, 174]. By the Act of Congress it is made *prima facie* evidence of the regularity and validity of the tax sale and of the title of the purchaser under it, and it is enacted that it shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previously to the sale, or that the property had been redeemed according to the provisions of the Act. The bill assails the title of the appellant, and charges that the sale made to him was null and void, for ten different reasons, which it assigns. Most of them are assertions of fact, denied in the answer and sustained by no proof. Among the charges is one that at the time of the tax sale the property was in *custodia legis*, and that under orders of the state court in which the *lis* was pending, all creditors, individual, state and federal, were enjoined from selling or interfering with the same. This, of course, was susceptible of proof only by the record. But no such record was produced. All that was submitted was the parol testimony of a witness, that the Chancery Court and the Supreme Court had both taken jurisdiction of the property, and ordered sales of the same, or parts thereof, to pay the debts of the decedent owner. Waiving, however, objection to this mode of proof, we do not perceive that the fact charged, if it was a fact, had any tendency to impair the validity of the tax sale. Such a sale did not disturb any possession which the state court had of the property; and no state court could, by injunction or otherwise, prevent federal officers from collecting federal taxes. The Government of the United States, within its sphere, is independent of state action; and certainly it would be a strange thing if a state court by its action could relieve property subject to federal taxation from liability to pay the taxes, when they are due.

Secondly, the bill charges that the property was misdescribed in the publication, orders of sale, and in the sale itself, and that no legal or proper notice of the sale was ever given by advertisement or otherwise. There is, however, no proof of any material misdescription. The lot was described as follows: "Market Street and Thornton Avenue part of country lot five hundred and six (506) two acres, assessed to Sanders and Perkins in 1860, fifth civil district, City of Memphis." That this was a true description, quite sufficient to identify the property, is not denied. Nor is it denied that it is the same as that made in the state assessment of 1860. But it is charged that though the property was part of lot 506, as described, the part sold was known as portions of lots 19 and 3, allotted to the heirs and devisees of Sanders. It was not, however, described in the state assessment by those numbers, and mentioning those numbers in the description made by the tax commissioners would have added nothing to its certainty.

The purposes in describing lands to be sold at a tax sale, says *Judge Cooley*, in his *Law of Taxation*, p. 284, "are: first, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and, third, that the purchaser may be enabled to obtain a sufficient conveyance." "If the description is sufficient for the first purpose, it will ordinarily be sufficient for the others also." There can be no doubt that the description in this case was all that was needed to identify the land, and to inform Sanders' heirs or devisees, who are the complainants in the bill, of the claim made upon their property.

As to the objection that the property was not advertised for sale legally and properly, it is sufficient to say that the Act of Congress makes the commissioners' certificate of sale *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser. Even if it is not conclusive of the existence of everything antecedent necessary to such regularity and validity, except liability for taxes and their non-payment, it is affirmative evidence controlling until rebutted. In this case, so far from there being any evidence to rebut the *prima facie* of the certificate, or any evidence to support the allegation of the bill, there is positive testimony that the property was advertised for sale in a newspaper then published in Memphis.

Thus far we have not considered the effect of the proviso to the 7th section of the Act of 1863. That should not be overlooked. After having declared that the commissioners' certificate should be *prima facie* evidence both of the regularity and validity of the sale, as well as of the title of the purchaser, Congress went further, and enacted that it should be affected as evidence of such regularity, validity and title, only by establishing one or more of three facts: non-liability of the property for taxes; or that the taxes had been paid before the sale; or that the property had been redeemed. Of what possible use was this proviso, unless it was intended to make the certificate conclusive of the validity of the sale and the title of the purchaser, unless it should be impeached by establishing one of the three facts mentioned? If it meant only that proof of the existence of one of those facts should destroy the *prima facie* effect of the certificate, it was quite superfluous. Without it, if either of those facts existed, a sale would have been invalid, and the certificate good for nothing, no matter how regularly the sale might have been conducted, or how fully and correctly it might have been advertised, or how accurate might have been the assessment. Congress must have had a purpose in the proviso, and what that was it is not difficult to discover. It was not to repeat what had been enacted in the same section. The provisions of the whole Act were designed to enforce the collection of direct taxes in insurrectionary districts, avowedly so. Governmental disturbance in such districts must have been anticipated, as well as only a partial restoration of the ordinary forms of governmental rule, while the districts were under military control, and consequent irregularities in the processes of collecting taxes. Substance therefore, not form, was to be required. Hence the proviso. It secured to land-owners

every substantial defense against sales for taxes, and made the sale certificate conclusive of everything else. Such was our opinion expressed in the case of *De Treville v. Smalls*, and we adhere to it now.

The fourth and fifth objections to the validity of the sale are, that while the taxes due bore but a small proportion to the value of the property, the commissioners sold it as an entirety without subdivision. If this was so, it was a mere irregularity, and by no possibility could it affect the validity of the sale. But it was not even an irregularity. The 7th section of the Act of 1863 required the commissioners to sell the "lot or parcel of land" upon which the tax was assessed, not such parts of it as on trial might prove sufficient to pay the tax. It was not made their duty to subdivide the property.

Another objection urged in the bill against the title acquired by the appellant at the commissioners' sale is, in effect, that the complainant resided in Texas; did not know of the sale until after it was made; that some other person who was interested could not get to Memphis in time to redeem before the commissioners' had left; and that there was no safe communication by travel or otherwise outside the City to Nashville or elsewhere. All this is only asserted as hearsay, and there is no proof that there was ever any attempt to redeem, or any purpose to redeem. On the contrary, the proof is that one of the owners was in the City of Memphis before the commissioners left, and was told he could redeem the property if he wished; but he refused, expressing the opinion that "As soon as the courts got organized it would all be upset." But at best, the objection is wholly unimportant. The law charged the tax upon the land. The proceeding to collect it was a proceeding *in rem*, of all stages of which the owners had legal notice. It was their duty to pay the tax when it was due. The commissioners were not bound to hunt them up. *Turner v. Smith*, 14 Wall., 553 [81 U. S., XX., 724]. And it is not claimed that either the commissioners or the purchaser at the sale had any agency in preventing a redemption, or that there was any obstacle in the way thereof that could not easily have been overcome. While it may be admitted that a statutory right of redemption is to be favorably regarded, it is, nevertheless, true, that it is a statutory right exclusively, and can only be claimed in the cases and under the circumstances prescribed. Courts cannot extend the time, or make any exceptions not made in the statute. Redemption cannot be had in equity, *Mitchell v. Green*, 10 Metc., 101, except as it may be permitted by statute, and then only under such conditions as it may attach. *Craig v. Flanagan*, 21 Ark., 319. Thus it has been held that the pendency of the civil war, and the fact that the owner resided in another State then in rebellion, cannot enlarge his right to redeem. *Fenley v. Brown*, 22 Iowa, 538. It is enough, however, for the present case that there was no attempt or even offer to redeem.

There are several other matters charged by the bill as objections to this sale unsustained by evidence, and immaterial.

One more only requires consideration. It is the averment that when the tax sale was made, the military authority of the United States was not established in and over the County of Shelby,

State of Tennessee, nor was it established in any one county, as required by law.

The 6th section of the Act of June 7, 1862, 12 Stat. at L., 422, to which the Act of Feb. 6, 1863, 12 Stat. at L., 640, was a supplement, enacted that the Board of Tax Commissioners should "Enter upon the discharge of the duties of their office whenever the commanding general of the forces of the United States, entering into an insurrectionary State or district, should have established the military authority throughout any parish or district or county of the same." Manifestly, this was only directory to the commissioners. It was neither a grant nor a limitation of power. By previous sections the tax had been charged upon every parcel of land in the State, and the commissioners had been authorized to fix the amount and receive payment. The 6th section merely directed when their duties should commence.

Further than this, whether the military authority had been established throughout Shelby County before the commissioners entered upon the discharge of their duties, is a political question, to be answered by the executive branch of the government and not by the courts. In its nature it was incapable of being determined by the latter. Successive juries might give to it different and contradictory answers.

That, before the commissioners undertook to enforce the collection of the tax upon the lot in controversy, it had been determined by the Executive that military authority had been established in the district, is plain enough. We know, historically, that the President had appointed a Military Governor of the entire State, and he was in active service as such. No other and civil authority existed. The commissioners themselves were executive officers, and their entering upon the duties of their office was an assumption that the military authority had been established throughout the district. The Act of Congress required no express and formal determination that it had been so established and, therefore, whether it had or not may be inferred from any executive action that assumed it had. Hence, opening an office for the collection of the tax, and proceeding to enforce collection, raised a presumption of the legality of the commissioners' action. The law presumes that persons acting in a public office have been duly appointed, and are acting with authority, until the contrary is shown. And it has been said that if officers of corporations openly exercise a power which presupposes a delegated authority for the purpose, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. *Bk. v. Dandridge*, 12 Wheat., 64.

This is not all of the case in hand. Not only is the averment of the bill that the military authority of the United States was not established in the County of Shelby when the tax sale was made denied by the answer, but the averment is unsustained by proof. The City of Memphis, it is conceded, was in full and undisputed possession of the Federal Army. All that is proved is that the military lines were around the city, at a distance of a mile or so from its corporate limits, and that the remaining part of the county was not in federal occupation. All that is quite consistent with the fact that federal military authority was established over the whole

county. No conquering army occupies the entire territory conquered. Its authority is established when it occupies and holds securely the most important places, and when there is no opposing governmental authority within the territory. The inability of any other power to establish and maintain governmental authority therein is the test.

But if it should be conceded that federal military authority had not been established throughout the entire County of Shelby, undeniably it had been over Memphis, where the sale was made and where the lot sold is situated. That city had territorial limits and a municipal organization, with taxing power and assessments distinct from the county of which it was a part. It was in a very proper sense a "district," and, we think, a district within the meaning of the Acts of Congress. Those Acts manifestly had in view not merely the larger civil divisions of a State or Territory, but "portions of a State," "sections of country," or "conquered territory." The title of the Act of 1862 is, "An Act for the Collection of Direct Taxes in Insurrectionary Districts Within the United States, and for Other Purposes," and the 1st section enacted that "When in any State or Territory, or in any portion of any State or Territory, by reason of insurrection or rebellion, the civil authority of the Government of the United States is obstructed, etc., * * * the said direct taxes * * shall be apportioned and charged in each State or Territory, or part thereof, wherein the civil authority is thus obstructed, upon all the lands and lots of ground situate therein, etc." The 2d section required the President to declare by proclamation in what States or "parts of States" the insurrection existed. These provisions make no reference to civil divisions of a State. And when we pass to the 6th section, it is observable that it speaks of an entry of a commanding general into "any such insurrectionary State or district." Here it is plain the word "district" means simply a "part" or "portion" of a State, such as has been previously mentioned. The section then proceeds to direct the commissioner to open offices when the military authority shall have been established throughout any county or parish or district of the same; that is, throughout any district of an insurrectionary district or State. It seems almost an inevitable conclusion that "taxing districts" was meant, and not alone the large divisions, such as counties or Louisiana parishes. "Taxing districts" were in view, as appears also from the 13th section, which contemplated a reference by the commissioners to the records of assessments and valuations previously made; and such districts for taxation had a well known meaning when Congress passed the law. They are portions of a State's territory, described for the purpose of assessment, not necessarily political subdivisions for any other purposes. Our conclusion, therefore, is, that the City of Memphis was a district, within the meaning of the 6th section of the Act of 1862; and for the various reasons we have given, we hold that the objection which we are now considering to the validity of the appellant's title, is without foundation. Upon this mainly, if not alone, the court below appears to have rested its judgment.

The judgment of the Supreme Court of Ten-

nessee is reversed and the record remitted, with instructions to order a dismissal of the bill.

Dissenting, *Mr. Justice Field.*

Cited—99 U. S., 456, 497.

PATRICK SHERRY ET AL., *Plffs. in Err.*,

v.

ANDREW MCKINLEY AND LUTHER H. THURSTON, Exrs. and Trustees of JOHN MCKINLEY, Deceased, ASHLEY MCKINLEY ET AL.

(See S. C., 9 Otto, 496-498.)

Case followed—military authority—sale for taxes—presumption.

1. Most of the questions presented in this case were decided in *Keely v. Sanders*, *ante*, 327.
2. The military authority of the United States had been established throughout Shelby Co., Tenn., when the tax sales mentioned in this case took place, and the lots were then subject to sale, according to the provisions of the Act of Congress.
3. The effect of the commissioners' certificate of sale was determined in *Keely v. Sanders*, as also in *De Treville v. Smalls*, *ante*, 174.
4. It is to be presumed that the sales were adjourned from day to day until the sale of the land in question. If not, there was but an irregularity which the Act of 1863 rendered ineffective to defeat the title of the purchaser.

[No. 116.]

Submitted Jan. 10, 1879. Decided Mar. 3, 1879.

IN ERROR to the Supreme Court of Tennessee.

The case arose in the Chancery Court of Shelby Co., Tenn., upon a bill to annul a certain tax sale. A decree was rendered in favor of the complainants, and affirmed by the Supreme Court of the State; whereupon the respondents sued out this writ of error.

Messrs. **Wm. M. Randolph** and *Fillmore Beall*, for plaintiffs in error.

Mr. J. B. Heiskell, for defendants in error.

Mr. Justice Strong delivered the opinion of the court:

Most of the questions presented in this record received our consideration in the case of *Keely v. Sanders*, heretofore decided, to which we refer. We shall not repeat what was there said. The sole ground upon which the Supreme Court of the State rested its judgment, that the tax sales were invalid, was, that the military authority of the United States had not been established throughout the County of Shelby when the sales took place and, therefore, that the land was not then subject to sale according to the provisions of the Act of Congress. That this ground cannot be maintained, we held in the former case.

That both the lots sold by the tax commissioners were subject to the tax and that the taxes had not been paid or the land redeemed, is not controverted; and it is also in evidence and not denied, that the Commissioners gave a certificate of sale of each of the lots to Sherry, the purchaser. What the effect of that certificate is, we determined in the case of *Keely v. Sanders* [*ante*, 327], as also in that of *De Treville v. Smalls*, decided a few weeks since [*ante*, 174]. If it be suggested, though it has not been dur-

ing the argument, that the sale of lot 32 was of a different lot from that claimed by the plaintiffs, it may be replied that the suggestion is in conflict with the proof.

It is true it was mentioned as "part of Manly tract," which was an obvious mistake that could have misled no one; for there was no such tract, and the remaining portion of the description clearly identified the property. It was as follows: "Lot 32 * * * Six and fifty-eight one hundredths acres (6 $\frac{58}{100}$) assessed to heirs of McKinley (the complainants) in 1860. Fifth civil district (country)."

It is a fair presumption that the description was taken from the state assessment of 1860, and followed it, since there is no evidence to the contrary. The number and the designation of owners are correct. No doubt the description would be sufficient in a deed, since it afforded the owners the means of identification, and could not have misled them. *Cooley*, Const. Lim., 282.

The objection that the sale was not sufficiently advertised, is met in the cases we have heretofore decided. But in truth it was advertised four weeks before it was made. The tax sales in the district were advertised to commence on the 13th of June, and to continue from day to day until all the lands not redeemed from forfeiture were sold. The sale of the lot now in controversy was made on the 25th day of June, confessedly more than a month after it had been advertised for sale. *Lorain v. Smith*, 37 Iowa, 67.

It is to be presumed that the sales were adjourned from day to day until June 25th. At most, there was but an irregularity which the Act of 1863 rendered ineffective to defeat the title of the purchaser.

The judgment of the Supreme Court is reversed and the record is remitted, with instructions to order a dismissal of the bill.

Dissenting, *Mr. Justice Field.*

Cited—102 U. S., 594.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the opinion of the court in the case of *P. Sherry and D. Seaton, Plffs. in Err., v. Andrew McKinley et al., Exrs., etc.*, et al., No. 116, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 7th day of May, A. D. 1885.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

WILLIAM C. WILSON, *Plff. in Err.*,

v.

SALAMANCA TOWNSHIP, CHEROKEE COUNTY.

(See S. C., 9 Otto, 499-504.)

Coupons of town bonds—defenses to.

1. In Kansas it is not a defense to an action on coupons, by a *bona fide* holder for value without notice, that the amount of bonds issued by the town was in excess of the amounts prescribed by the Acts of the State in relation to the taxable property of the town.

2. It is not a defense to such action, that, after a favorable vote of the qualified electors of the township according to law, to subscribe stock in the railroad company, the subscription of stock and the issue of bonds without any further election were made to another company, with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of said election, to form a continuous line.

3. *Harshman v. Bates Co.*, 92 U. S., distinguished. [No. 101.]
Argued Dec. 20, 1878. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

Suit was brought in the court below upon certain bonds. Certain questions arising, upon which the opinions of the Judges were opposed, judgment was given for the defendant, and the questions certified to this court as follows:

First. Whether or not, in said action by a *bona fide* holder of the interest coupons sued on for value, and without notice, the fact that the amount of bonds, to wit: \$75,000, issued by the defendant, was in excess of the amounts prescribed by the Acts of the Legislature of Kansas, approved Feb. 25, 1870, and Mar. 2, 1872, in relation to the assessed taxable property of the defendant at the times of the voting and issuing said bonds, constitute a defense in bar of the plaintiff's causes of action.

Second. Whether or not, in said action by a *bona fide* holder of the interest coupons sued on for value, without actual notice, the fact that after the order of the Board of County Commissioners for an election, and after a favorable vote by a three fifths majority of the qualified electors of Salamanca Township according to law to subscribe stock in the State Line, Oswego and Southern Kansas R. R. Co., payable in negotiable bonds, to aid in the construction of the railroad, the subscription of stock and the issue of bonds without any further election were made to the Memphis, Carthage and Northwestern R. R. Co., with which said prior company, in whose favor the vote was had, had become merged and consolidated under a law existing at the time of said election, to form a continuous line, is a sufficient defense in bar of the plaintiff's causes of action.

Messrs. **Joseph Shippen** and **T. K. Skinner**, for plaintiff in error.

Mr. Wallace Pratt, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The first question certified is answered in the negative upon the authority of *Marcy v. Oswego*, 92 U. S., 637 [XXIII., 748], decided in this court since the trial below.

The second question is likewise answered in the negative upon the authority of *Scotland Co. v. Thomas*, 94 U. S., 682 [XXIV., 219], also decided here since the trial below. The power of the State Line, Oswego & Southern Kansas Railroad Company to consolidate with other companies existed when the vote for subscription was taken in the Township. When the consolidation took place there was a perfected power in the Township to subscribe to the stock of that company, and there was also an existing privilege in the company to receive the subscription. That privilege, as we held in the *Scotland County Case*, passed by the consolidation to the consolidated company.

See 9 OTTO.

The township trustee and the township clerk who made the subscription and issued the bonds in this case were the officially constituted authorities of the Township, and when they subscribed to the stock and issued the bonds they acted in their official capacity as the legal representatives of the Township, and not as mere agents. In this particular they occupied the position of the county court in the *Scotland County Case*. They were to all intents and purposes the township in its corporate capacity. In *Harshman v. Bates Co.*, 92 U. S., 569 [XXIII., 747], the case was different. There the county court was the mere agent of a corporation, with which it had no official connection. The difference between the two cases is precisely that between a principal and an agent, and it is so expressly said in the *Scotland County Case*. In the one case the corporation is bound if the action of the officers is within their corporate powers, while in the other the action must be within the corporate powers delegated to the agent.

The judgment of the Circuit Court is reversed and the cause remanded for such further proceedings, not inconsistent with this opinion, as may appear to be necessary.

Cited—102 U. S., 95; 103 U. S., 533; 105 U. S., 76; 109 U. S., 737; 110 U. S., 687.

UNITED STATES, *ex rel.* ALFRED HUIDEKOPER, *Plff. in Err.*,
v.
COUNTY COURT OF MACON COUNTY.

(See S. C., 9 OTTO, 582-592.)

Municipal bonds—levying tax to pay—mandamus.

1. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require it.

2. This court has no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize.

3. A judgment does not give the creditor any right to a levy of taxes which he did not have before the judgment.

[No. 98.]

Argued Dec. 19, 20, 1878. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

This was a *mandamus* proceeding instituted in the United States Circuit Court for the Western District of Missouri, by Alfred Huidekoper, the plaintiff in error, against the County Court of Macon Co., Mo., to compel the levy and collection of a tax to pay his judgment for \$6,656.79, recovered in said court against Macon Co. upon certain interest coupons.

An execution had been issued and returned *nulla bona*, and a demand made had been refused.

NOTE.—Mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds. See note to *The Mayor v. U. S.*, 76 U. S., XIX., 704.

The case further appears in the opinion.

Messrs. Joseph Shippen and T. K. Skinner, for plaintiff in error:

The bonds issued under this charter are a debt of the County as fully as is any other liability.

The clause of section 13, "And levy a tax to pay the same, not to exceed one twentieth of one per cent. upon the assessed value of all the taxable property for each year," was a conferring of power to levy a special tax to enhance the credit and value of the bonds, in addition to the taxes otherwise authorized for their payment.

In *U. S. v. Clark Co.*, 96 U. S., 211 (XXIV., 628), this court in passing on this 13th section, has already expressed itself in a clear and emphatic manner, thus decided:

"That was a special tax, distinct from and in addition to the ordinary tax, which, by other statutes, the county court was authorized to levy."

The special tax authorized by said clause was intended to provide for the payment of the principal of the bonds by creating a sinking fund for their gradual extinction. It had no reference or application to current interest. This interpretation harmonizes with the decision of this court in *U. S. v. Clark Co.*, *supra*.

It does not conflict with the points actually presented of record and decided by the Supreme Court of Missouri on this subject, because both of those cases involved not simply the interest, but chiefly the principal debt itself.

State v. Shortridge, 56 Mo., 126; *State v. Walker* (see pamphlet).

The intention of the Missouri Legislature in 1865, when chartering a railroad corporation with \$4,000,000 of capital stock, to construct a great public improvement, and authorizing counties to aid in such construction, was that the bonds to be issued therefor, should be of an amount to render substantial aid and be of negotiable character.

Both these ends would have been frustrated by adopting the construction now sought to be given.

Such was the construction given in 1870 and prior:

1. By the Supreme Court compelling the first issue to be made.

State v. Macon Co. Court, 41 Mo., 453 (1867).

2. By the defendant, in making its two subscriptions and issues, and subsequently for years levying a tax of one half of one per cent., adequate to pay the interest and part of the principal thereof.

3. By the Railroad Company, which, receiving the bonds, issued \$350,000 of its capital stock therefor to the defendant.

4. By the purchasers of the bonds.

Contemporanea expositio est optima et fortissima in lege.

Broom, Leg. Max., 456, (marg.) 608 (532, 4th ed.); Dwarr. St., 562; *State v. The Mayor*, 49 Mo., 401.

An instrument whose payment is contingent or uncertain, is non-negotiable.

1 Pars. Bills & N., 42; 1 Dan. Neg. Inst., 34.

"In construing a statute, reference must be had to the object to be attained and the means to be employed. It will not be presumed that the Legislature attempted to authorize a proceeding unreasonable in itself."

Neenan v. Smith, 50 Mo., 525.

"A construction of law that would impute to the Legislature a design to perpetrate an unconscionable and barefaced fraud, ought to be avoided, if it can be fairly and reasonably done."

Milner v. Pensacola, 2 Wood, 633.

The estoppel created in favor of the *bona fide* purchaser against the defendant by the facts admitted of record, protects such purchaser, not only in the recovery of judgment, but also in its payment.

Messrs. James Carr, W. P. Hall and Jas. O. Broadhead, for defendant in error:

The following words, in the 13th section of the charter, viz.: "And levy a tax to pay the same, not to exceed one twentieth of one per cent. upon the assessed value of the taxable property for each year," were a limitation upon the power of the County Court to levy a tax; and this limitation was enacted, not for the bond holders, but for the benefit of the tax payers, so that they might not be harassed with a railroad tax in any one year, too grievous to be borne."

State v. Shortridge, 56 Mo., 126; *U. S. v. Clark Co.*, 95 U. S., 769 (XXIV., 545).

Statutes in derogation of common right and charters of incorporation, are always strictly construed; and if there is any doubt about the power conferred, that doubt is always resolved against the power claimed under the charter, and in favor of the public.

R. R. Co. v. Canal Co., 20 Pa., 9; *Bailey v. Magwire*, 22 Wall., 215 (89 U. S., XXII., 850); *Rice v. R. R. Co.*, 1 Black, 380 (66 U. S., XVII., 153).

Notice was given by the charter and the bonds issued under and by authority thereof, that there was a limitation upon the power of the county court to "levy a tax to pay the same, not to exceed one twentieth of one per cent. upon the assessed value of taxable property for each year."

This court follows the decisions of the highest court of a State construing its own Constitution and statutes.

Green v. Neal, 6 Pet., 291; *U. S. v. Morrison*, 4 Pet., 124; *Leffingwell v. Warren*, 2 Black, 599 (67 U. S., XVII., 261).

Mr. Chief Justice Waite delivered the opinion of the court:

In *U. S. v. Clark Co.*, 96 U. S., 211 [XXIV., 628], we decided that bonds issued by counties under section 13 of the Act to Incorporate the Missouri and Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest after the application of the proceeds of the special tax authorized by that section, the holders were entitled to payment out of the general funds of the county. In *Loan Co. v. Topoka*, 20 Wall., 660 [87 U. S., XXII., 460], we also decided that "It is to be inferred, when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

When the Act to Incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties in the State to tax for

general purposes was limited by law to one half of one per cent. on the taxable value of the property in the County. R. S. Mo., 1865, p. 96, sec. 7; p. 121, sec. 76. This limit has never since been increased, and the Constitution of 1875, which is now in force, provides that this tax shall never exceed that rate in counties of the class of Macon. Art. X, sec. 11. If there had been nothing in the Act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the Legislature to grant full power to tax for the payment of the extraordinary debt authorized, to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one twentieth of one per cent. and the case is thus brought directly within the maxim, *expressio unius est exclusio alterius*.

Thus, while the debt was authorized, the power of taxation for its payment was limited, by the Act itself and the general statutes in force at the time, to the special tax designated in the Act, and such other taxes applicable to the subject as then were or might thereafter by general or special Acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt was incurred. The difficulty lies in the want of original power. While there has, undoubtedly, been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the County was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order.

Our attention has been directed to the general Railroad Law in force when the Missouri and Mississippi Railroad Company was incorporated and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions

authorized by that Act, which require the assent of two thirds of the qualified voters of the County. Under such circumstances, it seems to have been considered proper to allow substantially unlimited power of taxation to pay a debt which the voters had directly authorized. In this case no such assent by the voters was required, and the tax payers were protected against the improvident action of the official authorities by a limit upon the amount they should be required to pay in any one year. The general Railroad Act was in force when this company was incorporated, but its provisions seem not to have been satisfactory to the corporators. They wanted authority for counties to subscribe without an election, and on that account accepted the terms which were offered. As the bond holders claim under the corporation, they must submit to the conditions as to taxation which were substituted for those that would otherwise have existed.

We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment.

This disposes of the case, and without answering specifically the questions that have been certified, *we affirm the judgment*.

COUNTY COURT OF MACON COUNTY, *Plff. in Err.*, v. ALFRED HUIDEKOPER, No. 858, argued at same time and by same counsel as No. 98. This case arose upon Huidекoper's petition for a writ of *mandamus* to compel the plaintiff in error to cause a warrant to be drawn on the County Treasurer of Macon County, for the amount of his judgment, interest and costs, payable out of the general funds of the County that are now, or may hereafter be in said Treasury. The judgment was the same that was mentioned in the preceding case. A writ of peremptory *mandamus* having been granted, the respondent sued out this writ of error. Mr. Chief Justice WAITE announced the judgment of the court as follows: A majority of the court adheres to the decision in *U. S. v. Clark Co.*, 96 U. S., 211 [XXIV. 628], and I am directed to announce the affirmation of this judgment upon the authority of that case.

Cited—105 U. S., 736, 738; 109 U. S., 230.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LEAVENWORTH, *Plff. in Err.*,

v.

RALPH SELLEW.

(See S. C., 9 Otto, 624-628.)

Counties in Kansas—service of process on—mandamus.

1. In Kansas, counties are bodies corporate and politic, capable of suing and being sued. The name by which they can sue or be sued is the "Board of County Commissioners of the County of —."

2. When a copy of a writ of *mandamus* is served upon the clerk of the Board, it is service on the corporation, and equivalent to a command that the persons who may be members of the Board shall do what is required.

3. A peremptory writ of *mandamus* is properly directed to the Board in its corporate capacity.

[No. 743.]

Submitted Jan. 10, 1879. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Messrs. **Matt H. Carpenter** and **Taylor and Gillpatrick**, for plaintiff in error:

Two recent and well considered decisions of this court, *Secretary v. McGarrahan*, 9 Wall., 298 (76 U. S., XIX., 579), and *U. S. v. Boutwell*, 17 Wall., 607 (84 U. S., XXI., 722), condemn the proceedings in the case at bar as erroneous.

The Commissioners are not federal officers. They can in no way interfere in execution of a judgment on the bonds rendered by the Federal Court. They are to proceed, not in the performance of a duty cast upon them by the judgment, but under the obligation which the state law lays upon them as state officers.

"A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty."

U. S. v. Clark, Co., 95 U. S., 773 (XXIV., 546).

The proceedings by *mandamus* are no more a part of the original suit than is a judgment creditor's bill filed on the equity side of a court to enforce a judgment at law; or than is a judgment creditor's bill filed in a state court to enforce a judgment at law rendered in a Federal Court, a part of the suit in which such judgment was rendered.

What the law seeks to enforce by the writ of *mandamus*, is the personal obligation of the officer.

The same principle was declared in *Downs v. Supervisors of R. I. Co.*, 4 Biss., 508, where the court decided that an alternative writ of *mandamus* must be served upon the individual members of the Board, and that service on the clerk of the Board and service admitted by such clerk by order of the Board, was not a good service.

See, also, *Badger v. U. S.*, 93 U. S., 599 (XXIII., 991); *U. S. v. Supervisors of Lee Co.*, 2 Biss., 80.

Mandamus cannot compel the levy of a tax at any other time or in any other manner than that designated by law.

Supervisors v. Klein, 51 Miss., 807; *People v. Westford*, 53 Barb. (N. Y.), 555.

Where the relator does not controvert the return, but moves for peremptory writ, he admits the return to be true.

Beard v. Supervisors, 51 Miss., 542.

II. The proceeding by writ of *mandamus* is a civil action between the real parties thereto. Anciently the writs of *mandamus* and *quo warranto* were considered as prerogative writs, to be issued only in the name and for the benefit of the Crown. But in modern practice both are treated as civil actions between the parties in interest.

Mandamus: Kendall v. Stokes, 3 How., 100; *Com. v. Dennison*, 24 How., 98 (65 U. S., XVI., 726); *State v. Comrs.*, 11 Kan., 69; *State v. Marston*, 6 Kan., 524; *Dove v. School Dist.*, 41 Ia., 689.

Quo warranto: Rex v. Francis, 2 T. R., 484; *Bk. v. State*, 1 Blackf., 272; 2 Kyd, Corp., 439; *State v. Lingo*, 26 Mo., 496; *Ensminger v. People*, 47 Ill., 384; *Com. v. Browne*, 1 Serg. & R., 382.

334

By the practice in the State Courts of Kansas, *mandamus* proceedings must be in the name of the party interested, and not in the name of the State on relation, etc.

State v. Comrs., 11 Kan., 66; *State v. Marston*, 6 Kan., 524.

The mere fact claimed, that the party has no other remedy, will not authorize proceedings by *mandamus*.

Ex parte Ostrander, 1 Den., 679; High, Extr. Rem., sec. 19; *Ex parte Newman*, 14 Wall., 152 (81 U. S., XX., 877); *Lewis v. Barclay*, 35 Cal., 213.

Messrs. **E. Stillings**, **T. A. Hurd** and **L. B. Wheat**, for defendant in error:

The writ in this case was properly ordered to be directed to the Board of County Commissioners, whether its direction was to be governed by the Statute of Kansas, prescribing the manner of such proceeding, or by the common law. See, 3 Steph. *N. F.*, 2322, 2323, and last case referred to on p. 2329; see, also, *Moses, Mandamus*, ch. 20, and *Knox Co. v. Aspinwall*, 24 How., 376 (65 U. S., XVI., 735), and Tapp. Mand., 341, 384, etc.

The decision of the court in *U. S. v. Boutwell*, 17 Wall., 607 (84 U. S., XXI., 722), was in an entirely different case. There was no Board or body of persons to whom the writ could run. See, also, section 914 U. S. Rev. Stat.

Here we have a law, making it the duty of a certain body, composed of individuals, to levy certain taxes. It does not levy them. The court has allowed a writ against that body in its collective capacity, that is the Board of County Commissioners, a body composed of divers individuals. Now, if that is proper and it compels just what the contract calls for; that is, the levy of a tax by the tax levying power, resignations and successions cannot avail. The new incumbent, when he takes his place, will take it subject to the performance of the duties imposed on the office.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In the State of Kansas, counties are bodies corporate and politic, capable of suing and being sued. Their powers are exercised by Boards of County Commissioners, chosen by the electors. The name by which they can sue or be sued is the "Board of County Commissioners of the County of ——" In legal proceedings against a county, process is served on the clerk of the Board. 1 Dassler, Kan. Stat., 217-221, secs. 1, 3, 5, 6, 9.

The Boards of County Commissioners are authorized "To apportion and order the levying of taxes as provided by law;" 1 Dassler, Kan. Stat., 224, sec. 16, sub. 4; and they are required to meet on the first Monday in August of each year to "Estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes they may be required by law to levy." 2 Dassler, Kan. Stat., 1024, sec. 83.

Whenever a judgment is rendered against the Board of County Commissioners of a county, no execution shall issue, but the judgment "Shall be levied and collected by tax, as other county charges, and, when so collected, shall be paid by the county treasurer to the person to whom the same shall be adjudged, upon the delivery

99 U. S.

of the proper voucher therefor." 1 Dassler, Kan. Stat., 221, sec. 8.

By an Act of the Legislature of the State, approved February 10, 1865, and proceedings thereunder, the Board of County Commissioners of the County of Leavenworth were authorized to subscribe to the capital stock of the Leavenworth and Missouri Pacific Railroad Company, and to issue bonds in payment of the subscription. Under this authority a subscription was made and bonds issued, bearing date July 1, 1865, and falling due July 1, 1875.

On the 29th of November, 1875, Sellaw, the defendant in error, recovered judgment in the Circuit Court of the United States for the District of Kansas against the Board of County Commissioners of Leavenworth County upon part of the bonds so issued for \$19,923.40 and costs of suit. On the 9th of October, 1877, he made known to the court, by affidavit, that on the 6th of August previous he had demanded of the Board of County Commissioners that they should levy a tax to pay his judgment, and that they had failed to do so. He then obtained from the court an alternative *mandamus* directed to the Board of County Commissioners and to John S. Van Winkle, Ebenezer W. Lucas and William S. Richards, individual members of the Board, directing that they levy the tax immediately, or show cause, on the 26th of November, 1877, why it had not been done. Copies of this writ were in due form served on the clerk of the Board and upon each of the individual members. On the return day the Board, appearing for the purpose of the motion only, moved to quash the alternative writ because it did not state facts sufficient to authorize the issue of a peremptory writ, and the several individual members answered, stating that the Board met on the first Monday in August, 1877, and estimated and determined the amount of money to be raised by taxation for all purposes for the year 1877; that having completed their labor, they adjourned *sine die*; that in due time afterwards the tax lists were made out, and on the 1st of November put in the hands of the treasurer for collection; that a part of the taxes so levied and collected had already been paid; that the judgment mentioned in the alternative writ was not rendered on any of the kinds of indebtedness mentioned in the proviso of section 1, ch. 90, of the Session Laws of 1876; and that on the 6th of November, at the general election of county officers, Van Winkle and Lucas were not re-elected as members of the Board, but that other persons were elected in their places, and that by reason thereof they would not be members of the Board after their present term expired.

Chapter 90 of the Session Laws of 1876 was an Act relating to Taxation in Leavenworth County, and did not specially authorize a levy of taxes to pay this judgment, but it declared that no more taxes than were therein provided for should be levied.

On the 6th of December, 1877, a peremptory writ of *mandamus* was ordered "To and against the Board of County Commissioners of the County of Leavenworth, * * * commanding it to levy, on or before the first Monday in the month of August next, and collect at the same time and in the same manner that general taxes are levied and collected, * * * a tax on all taxable property * * * in said Coun-

ty of Leavenworth * * sufficient in amount to pay the judgment," etc.

To reverse this judgment this writ of error has been sued out.

In *U. S. v. Boutwell*, 17 Wall., 604 [84 U. S., XXI., 721], it was decided that as a *mandamus* was used "To compel the performance of a duty resting upon the person to whom the writ is sent," if directed to a public officer, it abated on his death or his retirement from office, because it could not reach the office. That principle does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was "aimed exclusively against him as a person." Here the writ is sent against the Board of County Commissioners, a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the Board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the Corporation alone. As the Corporation can only act through its agents, the courts will operate upon the agents through the Corporation. When a copy of the writ which has been ordered is served upon the clerk of the Board, it will be served on the Corporation, and be equivalent to a command that the persons who may be members of the Board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the Board, it may be enforced against those through whom alone it can be obeyed. One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in *Boutwell's* case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The Board is in effect the officer, and the members of the Board are but the agents who perform its duties. While the Board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the Corporation.

We think, therefore, that the peremptory writ was properly directed to the Board in its corporate capacity. In this way the power of the writ is retained until the thing is done which is commanded, and it may at all times be enforced, through those who are for the time being charged with the obligation of acting for the Corporation. If, in the course of the proceedings, it appears that a part of the members have done all they could to obey the writ, the court will take care that only those who are actually guilty of disobedience are made to suffer for the wrong that is done. Those who are members of the Board at the time when the Board is required to act will be the parties to whom the court will look for the performance of what is demanded. As the Corporation cannot die or retire from the office it holds, the writ cannot abate as it did in *Boutwell's* case. The decisions in the state courts in which this practice is sustained are numerous. *Maddox v. Graham*, 2 Met. (Ky.), 56; *Soutter v. Madison*, 15 Wis., 30; *Pegram v.*

Cleveland Co. Comrs., 65 N. C., 114; *People v. Collins*, 19 Wend., 56.

This disposes of the only question which has been argued here. It is not contended that the Law of 1876 presented any valid objection to the levy of the tax. The cases of *Von Hoffman v. Quincy*, 4 Wall., 535 [71 U. S., XVIII., 403]; and *Butz v. Muscatine*, 8 Wall., 575 [75 U. S., XIX., 490], are decisive of this point.

The judgment of the Circuit Court is affirmed, but as during the pendency of this writ of error the time has gone by when by the terms of the order for the peremptory writ the Board was directed to levy the tax in question, *the cause is remanded with authority, if necessary, to so modify the order which has been entered, in respect to the time for the levy and collection of the tax, as to make the writ effective for the end to be accomplished.*

Cited—103 U. S., 484; 2 McCrary, 31; 13 N. W. Rep., 260.

CITY OF LEAVENWORTH, *Plff. in Err.*,
v.

J. N. KINNEY.

Mandamus.

1. A peremptory writ of *mandamus* may be directed to the Mayor and Common Council of a City in their corporate capacity, and need not be directed to the individual persons who were Mayor and Councilmen.

2. Comrs. v. *Sellew*, *ante*, 333, followed.

[No. 744.]

Submitted Jan. 10, 1879. Decided Mar. 3, 1879.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is stated by the court.

Messrs. Matt. H. Carpenter and Taylor & Gillpatrick, for plaintiff in error.

Messrs. T. A. Hurd, E. Stillings and Clough & Wheat, for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case is substantially disposed of by that of *Board of County Commissioners of the County of Leavenworth v. Sellew*, just decided [*ante*, 333]. A peremptory writ of *mandamus* has been or-

dered against the Mayor and Council of the City of Leavenworth in their corporate capacity, and the objection is that it should have been directed to the persons who were mayor and councilmen. The principle upon which the decision in the other case rests is conclusive of this, and *the judgment of the Circuit Court is, consequently, affirmed and the cause remanded, with authority, if necessary, to so modify the order which has been entered, in respect to the time for the levy and collection of the tax, as to make the writ effective for the end to be accomplished.*

THE NORTHERN TRANSPORTATION
COMPANY OF OHIO, *Plff. in Err.*,

v.

CITY OF CHICAGO.

(See S. C., 9 Otto., 635-645.)

Nuisance—defect in highway—city improvement in street—riparian owner—right of lateral support—extent of.

1. That which the law authorizes cannot be a nuisance, such as will give a common law right of action.

2. Persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill.

3. Acts, done in the proper exercise of governmental powers and not directly encroaching upon private property, although their consequences may impair its use, do not entitle the owner of such property to compensation from the State or its agents nor give him any right of action.

4. A city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the Legislature.

5. A riparian owner on a navigable stream, cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream in pursuance of legislative authority.

6. An adjoining owner, excavating on his own land, must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land.

7. But this right of lateral support extends only to the soil in its natural condition; it does not protect whatever is placed upon the soil increasing the downward and lateral pressure.

[No. 144.]

Argued Jan. 22, 1879. Decided Mar. 3, 1879.

NOTE.—*Lateral support of soil of adjoining lands, right to.*

Party digging upon land is liable for the damages caused by depriving the adjoining soil of lateral support, to the extent of the injury to the soil in its natural condition, but not for injuries to buildings or improvements thereon without proof of actual negligence. *Gilmore v. Driscoll*, 122 Mass., 199; S. C., 23 Am. Dec., 312; *Thurston v. Hancock*, 12 Mass., 220; S. C., 7 Am. Dec., 57; *Foley v. Wyeth*, 2 Allen, 131; *Farrand v. Marshall*, 21 Barb., 409; *Mamer v. Lussem*, 65 Ill., 484.

One has a right to have his soil stand in its natural condition, and anyone who infringes that right is a wrong-doer, independently of any question of negligence. *Foley v. Wyeth*, 2 Allen, 131; *Hay v. Cohoes Co.*, 2 N. Y., 159; *Richardson v. Vt. Cent. R.*, 25 Vt., 465; *Humphries v. Brogden*, 12 Q. B., 739; *McGuire v. Grant*, 1 Dutch., 363; *Wilde v. Minsterly*, 2 Rolle Abr., 565.

If it appear that the falling of the soil of the adjacent lot was the result of weighty erections on the adjoining soil, the liability is removed. The party making the erections has contributed to the cause of the loss, and, in order to recover, must show a carelessness, negligence or want of due skill

on the part of one digging upon his own land. *Washburn on Easements*, sec. 444; *Charles v. Rankin*, 22 Mo., 566; *Beard v. Murphy*, 37 Vt., 99; *Gilmore v. Driscoll*, 122 Mass., 199; S. C., 23 Am. Dec., 312; *Panton v. Holland*, 17 Johns., 92; *Lasala v. Holbrook*, 4 Paige, 169; S. C., 25 Am. Dec., 524; *Dodd v. Holme*, 1 Ad. & El., 493; *Eliot v. Northeastern Ry. Co.*, 10 H. L. Cas., 333; *Hide v. Thornborough*, 2 Car. & K., 250.

Owner of property adjoining a street has no right to the lateral support of the soil of the street, and can acquire none by prescription. *City of Quincy v. Jones*, 76 Ill., 231; S. C., 20 Am. Rep., 243; *O'Connor v. Pittsburgh*, 18 Pa., 187.

The owner of a building erected on the line of his lot, cannot by lapse of time acquire a prescriptive right to the lateral support of the adjacent soil. *Mitchell v. The Mayor, etc., of Rome*, 49 Ga., 19; S. C., 15 Am. Rep., 669.

Owner of land about to excavate it must give adjoining owner notice to shore up his building, and must exercise care and skill in improving his own lot. *Eno v. Del Vecchio*, 4 Duer, 66; 6 Duer, 17; *Charles v. Rankin*, 22 Mo., 572; *Massey v. Goyder*, 4 Car. & P., 161.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case, which arose in the court below, sufficiently appears in the opinion of the court.

Messrs. Horace F. Waite & Clark and R. P. Spalding, for plaintiff in error:

Under the decisions of the State of Illinois, the plaintiff being in possession of the property bounded by Chicago River, became and was the owner of the water and soil to the center or thread of the stream.

Chicago v. Laftin, 49 Ill., 176; *Braxton v. Bressler*, 64 Ill., 488; *Ensminger v. People*, 47 Ill., 384; *Middleton v. Pritchard*, 3 Scam., 510; *Canal Trustees v. Havens*, 11 Ill., 554; *R. R. Co. v. Stein*, 75 Ill., 45.

By the construction of the coffer-dam in the river, so as to interfere with the plaintiff's access to its dock, in the manner proved, the plaintiff has been deprived of its property by the City and has suffered damages; and for such damages it is entitled to just compensation. This is so, first, under the decisions of the Supreme Court of the State of Illinois.

Middleton v. Pritchard, *R. R. Co. v. Stein*, *Chicago v. Laftin*, *Braxton v. Bressler*, *Ensminger v. People*, *Canal Trustees v. Havens* (*supra*); *People v. St. Louis*, 5 Gilm., 351.

The same rule prevails, under the decisions of the Federal Courts, and by such decisions our proposition is fully sustained.

Yates v. Milwaukee, 10 Wall., 504 (77 U. S., XIX., 986); *Avery v. Fox*, 1 Abb., 246; *Boston v. Leetaw*, 17 How., 436 (58 U. S., XV., 122); *Richardson v. Boston*, 19 How., 270 (60 U. S., XV., 642); *S. C.*, 24 How., 188 (65 U. S., XVI., 625); *Pa. v. Bridge Co.*, 13 How., 518; *S. C.*, 18 How., 431 (59 U. S., XV., 437); *Jolly v. Bridge Co.*, 6 McLean, 237; *Ins. Co. v. Curtenius*, 6 McLean, 209; *Georgetown v. Canal Co.*, 12 Pet., 98; *Bozman v. Wathen*, 2 McLean, 382; see, also, *Rose v. Groves*, 5 Man. & G., 612; *Baron v. Baltimore*, 2 Am. Jur., 203; *Stetson v. Faxon*, 19 Pick., 158; *Brayton v. Fall River*, 113 Mass., 218; *Lyon v. Fishmonger Co.*, L. R., 10 Ch. App., 679; *Clark v. Peckham*, 10 R. I., 35-38; *Rose v. Miles*, 4 Maule & S., 101; *Clement v. Burns*, 43 N. H., 609; *Pierce v. Dart*, 7 Cow., 611; *Davis v. Bangor*, 42 Me., 522; *Re v. Russell*, 6 East, 427; *Hughes v. Heiser*, 1 Binn., 463; *Bacon v. Arthur*, 4 Watts, 437; *Harrison v. Sterett*, 4 Har. & McH., 540; Ang. High., 567; *Haskell v. New Bedford*, 108 Mass., 208; *Bell v. Hull & Selby R. R. Co.*, 6 Mees. & W., 699; *E. & W. India Dock and R. R. Co. v. Gatlke*, 15 Jur., 261; *McCarthy v. Board of Pub. Works*, L. R., 7 Com. P., 508; *S. C. on appeal to the H. of L.*, L. R., 8 Com. P., 191; *Gerrish v. Brown*, 51 Me., 256; *Atty-Gen. v. Birmingham*, 4 Kay & J., 528; *Enos v. Hamilton*, 27 Wis., 256; *Hickok v. Hine*, 23 Ohio St., 523; *Duke of Buccleuch v. Board of Pub. Works*, L. R., 5 H. L., 418; *Board of Pub. Works v. McCarthy*, L. R., 7 H. L., 243; *Chamberlain v. West End of London R. Co.*, 2 B. & S., 605; *Rickett v. Metrop. R. Co.*, L. R., 2 H. L., 175; *Dobson v. Blackmore*, 9 Q. B., 991.

Mr. Joseph F. Bonfield, for defendant in error, cited *Chicago v. Rumsey*, 10 Chic. Leg. N., 333.

Mr. Justice Strong delivered the opinion of the court:

See 9 OTTO.

We are of opinion that no error has been shown in this record, though the assignments are very numerous. The action was case to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passage-way along the line of La Salle Street and under the Chicago River, where it crosses that street. The plaintiffs were the lessees of a lot bounded on the east by the street, and on the south by the river, and the principal injury of which they complain is, that by the operations of the City they were deprived of access to their premises, both on the side of the river and on that of the street, during the prosecution of the work. It is not claimed that the obstruction was a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some twenty-five or thirty feet in front of the plaintiff's lot, was not necessary, indeed indispensable, for the construction of the tunnel.

The case has been argued on the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large; and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. That cannot be a nuisance, such as to give a common law right of action, which the law authorizes. We refer to an action at common law such as this is. A Legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the Legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction.

Here the tunnel of which the plaintiffs complain, or rather its construction, was authorized by an Act of the Legislature of the State, and directed by an ordinance of the city councils. This we do not understand to be denied, and it certainly cannot be. The State, and the city councils, as its agents, had full power over the highways of the city, to improve them for the uses for which they were made highways, and the construction of the tunnel was an exercise of that power. Since La Salle Street was extended across the river, the City not only had the power but it was its duty to provide for convenience of passage. This it could do either by the erection of a bridge, or by the construction of a tunnel under the river and along the line of the street. And the grant of power by the Legislature to build a bridge or construct a tunnel carried with it, of course, all that was

necessary for the exercise of the power. We do not understand this to be controverted by the plaintiffs in error. Their argument is, that though the city had the legal right to construct the tunnel, and to do what was necessary for its construction, subject to the condition that in doing the work there should be no unnecessary interference with private property, yet it was liable to make compensation for the consequential damages caused to persons specially injured. To this we cannot assent.

It is immaterial whether the fee of the street was in the State or in the City or in the adjoining lotholders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

It is undeniable that in making the improvement of which the plaintiffs complain the City was the agent of the State, and performing a public duty imposed upon it by the Legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country. It was asserted unqualifiedly in *British Cast-Plate Manufacturers v. Meredith*, T. R., 794; in *Sutton v. Clarke*, 6 Taunt., 29; and in *Boulton v. Crompton*, 2 Barn. & C., 703. It was asserted in *Green v. Reading*, 9 Watts, 382; *O'Connor v. Pittsburgh*, 18 Pa., 187; in *Callender v. Marsh*, 1 Pick., 418; as well as by the courts of numerous other States. It was asserted in *Smith v. Corp. of Washington*, 20 How., 135 [61 U. S., XV., 588], in this court; and it has been held by the Supreme Court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Charta* and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes.

The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Co.*, 13th Wall., 166 [80 U. S., XX., 557], and in *Eaton v. R. R. Co.*, 51 N. H., 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

The present Constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be "taken or damaged" for public use without just compensation. This is an extension of the common provision for the protection of private property. But it has no application to this case, as was decided by the Supreme Court of the State in the case of *Chicago v. Rumsey*, recently decided and reported in Vol. X., Chicago Legal News, p. 333 [87 Ill., 348]. That case also decides that the City is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the City, provided the improvement had the sanction of the Legislature. It also decides that La Salle Street is such a street, and declares that a recovery of such damages by an adjacent lotholder has been denied by the settled law of the State up to the adoption of the present Constitution. There would appear, therefore, to be little left in this case for controversy.

It is insisted, however, that the plaintiffs may recover for the obstruction to the access of their lot, caused by the coffer-dam in the river. It is admitted that the dam was necessary to enable the City to construct the tunnel under the river; and it is not complained that it was unskillfully built, or that it was kept in the stream longer than the necessities of the work required, but it is contended that neither the State nor the City had any right to obstruct passage on the river at all. Yet the river is a highway, a state highway as well as a national. It has long been held that navigable rivers wholly within a State are not outside of state jurisdiction so long as Congress does not interfere. An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the Government of the State and its citizens, of which this court can take no cognizance. *Wilson v. Black Bird Cr. M. Co.*, 2 Pet., 250. In numerous instances, States have authorized obstructions in navigable streams. They have authorized the erection of bridges, the piers of which have been more or less impediments to navigation. In this case the coffer-dam was only a temporary obstruction. It was no physical encroachment upon the plaintiffs' property, and it was maintained only so long as it was needed for the public improvement. The tunnel could not have been constructed without it. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the Legislature, the obstruction not

having been permanent or unreasonably prolonged.

We have examined the decisions of the courts of Illinois, and others to which we have been referred by the plaintiffs in error, but in none of them was it decided that a riparian owner on a navigable stream, or that an adjoiner on a public highway, can maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream or highway in pursuance of legislative authority, unless that authority has been transcended, or unless there was a wanton injury inflicted, or carelessness, negligence or want of skill in causing the obstruction.

Very many of the decisions relied upon were cases in which it appeared that the acts complained of as having wrought injurious consequences were done by private individuals, for their own benefit, and without sufficient legislative authority. The distinction between cases of that kind and such as the present is very obvious. It was well stated by Gibbs, *Ch. J.*, in *Sutton v. Clarke*, *supra*, which, as we have seen, was decided on the ground that the defendant was acting under the authority of an Act of Parliament, deriving no advantage to himself personally, and acting to the best of his skill and within the scope of his authority, and so was not liable for consequential damages. "This case," said the *Chief Justice*, "is totally unlike that of the individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor, he is liable. The resemblance fails in this most important point, that his act is not done for a public purpose but for private emolument. Here the defendant is not a volunteer; he executes a duty imposed upon him by the Legislature, which he is bound to execute."

The observations we have made cover the whole case as made for the plaintiffs in error, except the point presented by the 16th assignment. That was not mentioned in the argument, but we will not overlook it.

There was evidence at the trial that during the progress of the necessary excavation of La Salle Street a portion of the walls of the plaintiffs' buildings on the lot cracked and sunk. This was caused by the caving in of the excavation in the street, the timbers used for bracing the sides having given way. In reference to this testimony the court instructed the jury that if they were satisfied from the evidence that the sinking of the wall, or rather the cracking of the wall, was due to the weight of the wall upon the selvaige or portion of the earth which was left, and not to the removal of the material which was taken out of the street, that is, from the pit, the defendants were not liable. If they were satisfied that if the wall had not stood upon the plaintiffs' lot where it did there would have been no change in the level of the ground there, but that the change in the level which caused the deflection of the wall was due to the weight of the wall resting upon the earth after the excavation was made, then the defendant was not liable for that.

We think this instruction was entirely right. The general rule may be admitted that every landowner has a right to have his land pre-

served unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did, it would put it in the power of a lotowner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter. *Wyatt v. Harrison*, 3 B. & Ad., 871; *Lasala v. Holbrook*, 4 Paige, 169; Wash. Easements, ch. 4, sec. 1.

The judgment is, therefore, affirmed.

Cited—2 McCrary, 346; 3 McCrary, 265; 90 N. Y., 184, 185; 11 N. W. Rep., 453; 18 N. W. Rep., 462, 572; 79 Ind., 499; 41 Am. Rep., 624; 90 N. Y., 176; 43 Am. Rep., 158; 16 W. Va., 420 37 Am. Rep., 783.

WILLIAM R. FOSDICK ET AL., *Appts.*,

v.

MICHAEL SCHALL, INTERVENER.

(See S. C., 9 Otto, 235-256.)

Cars sold, title to remain in vendor until paid for—not subject to lien of mortgage—vendor only a general creditor for amount unpaid.

1. Where one sold and delivered cars to a railroad company under an agreement that they were to remain his property until paid for, a prior mortgage given by the company upon all the property which it then owned or possessed or might afterwards acquire, did not attach as a lien upon the cars, but they remained the property of the vendor until paid for, and he might reclaim them, on default of payment.

2. When a court of chancery appoints a receiver of railroad property, it may impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable.

3. It is within the power of the court to use the income of the receivership to discharge obligations for labor, supplies and the like, which, but for the diversion of funds, would have been paid in the ordinary course of business.

4. The owner of the cars, for the balance due upon such contract, occupies the position of a general creditor only, and cannot receive from the funds arising from the mortgage sale, such balance.

[No. 631.]

Argued Jan. 7, 8, 1879. Decided Mar. 10, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Messrs. Henry Crawford and Ashbel Green, for appellants.

Mr. R. Biddle Roberts (argument of *John M. Butler* being also filed), in support of discretionary power of court of equity to order payment of operating expenses of railway, prior to appointment of receiver, for Schall, intervenor.

NOTE.—The lien of a mortgage on after-acquired property. See note to *Pennock v. Coe*, 64 U. S., XVI., 436.

Mr. Chief Justice Waite delivered the opinion of the court:

The Chicago, Danville and Vincennes Railroad Company, an Illinois corporation, on the 10th of March, 1869, executed a mortgage to William R. Fosdick and James D. Fish, Trustees, to secure an issue of \$2,500,000 of bonds. This mortgage covered all the franchises, issues and profits of the company, and all the property it then owned or possessed, or might thereafter acquire, either in law or equity. Provision was made to the effect that, in case of default in the payment of interest on the bonds continuing for six months, the trustees in the mortgage, on demand of the holders of at least one half the bonds then outstanding and unpaid, might take possession of all the mortgaged property, together with all the books, records, papers, accounts and money of the company, and enter into the management and control thereof, paying all the expenses of taking, holding, managing and operating the property from the income and profits thereof, or, if the property should be sold, from the sale thereof. The property might be sold as an entirety, and the proceeds, after deducting the expenses of sale, applied to the payment of the interest and principal of the bonds.

On the 12th of March, 1872, a second mortgage was executed to the same trustees, to secure a further issue of bonds to the amount of \$1,500,000.

On the 1st of February, 1873, after both these mortgages were executed, the railroad company and Michael Schall entered into a contract in writing, a copy of which is as follows:

"NEW YORK, February 1, 1873.

Sold this day for account of Mr. Michael Schall, of York, Penn., To the Chicago, Danville, and Vincennes Railroad Co. Office
38 Pine Street, New York:

Two hundred (200) eight-wheel gondola coal cars, as per specifications and agreement made by J. E. Young, and herewith attached.

Price, delivered on the track at Pittsburg, at depot of P. C. & St. L. R. R., seven hundred dollars per car. Cars to remain the property of Michael Schall until paid for.

Delivery to commence, and cars to be taken, on or before March 1, and at least twenty-five (25) cars in each week thereafter until all are delivered, the seller having the option of increasing the number of cars to be delivered per week, if desired.

Settlement to be made on delivery of each twenty-five (25) cars or more, at the option of sellers, with the notes of the Chicago, Danville and Vincennes Railroad Company, payable in the City of New York, and adding interest at the rate of ten per cent. per annum. The first notes are to be drawn at sixty days from date of delivery, and for twenty (20) dollars on each car, and the balance for a like amount and payable monthly thereafter.

Cars to be lettered and numbered as per directions of Mr. Young.

Invoice and shipping receipts to be sent to the railroad company's office, No. 38 Pine Street, New York.

It is understood the sellers shall not be responsible for the acts of Providence, strikes of workmen, or other causes beyond their control, which may retard and delay the manufacturing

and delivery of the said cars as above stated.

Shipping receipts to be evidence of delivery.

(Signed) MICHAEL SCHALL.

I hereby accept the above proposition for the R. R. Co.

(Signed) J. E. YOUNG, *Gen. Manager.*"

Under this contract 225 cars were delivered into the possession of the railroad company by Schall, numbered from 0141 to 0365, both inclusive, and lettered, "This car is the property of Michael Schall, York, Pa." Notes were executed by the company, according to agreement, for the price of the cars as they were delivered. Of these notes \$44,323.43 have been paid by the company, and \$110,334.04 are outstanding. The cars were used by the company in the usual course of business.

On the 22d of February, 1875, Stephen Osgood, who held \$9,000 of the bonds secured by the mortgage of 1869, and \$2,000 of those secured by that of 1872, filed a bill in chancery in the Circuit Court of Will County, Illinois, against the railroad company and Fosdick and Fish, trustees, with others, for a foreclosure of the two mortgages and a sale of the mortgaged property for the benefit of the bond holders, according to their respective priorities; and on the same day the court appointed Henry B. Hammond and John B. Brown receivers in the cause with authority to take the moneys, property and effects of the company into their possession, and run and operate the railroad under the orders of the court until discharged. In the order making the appointment it was specially provided that, out of the moneys which should come into the hands of the receivers by reason of the operation of the road, the collection of debts, or the sale of the property, they should pay without further order as to particular demands:

1. The necessary current expenses of carrying out the duties of the trust;

2. "All debts now [then] due and owing by said railroad company for labor and services rendered in operating the railroad within the [then] last three months, and all indebtedness for engines, iron, wood, supplies, cars, or other property purchased within said period of three months for the use of the company;"

3. Taxes, insurance, and charges of litigation; and,

4. Liabilities for animals killed by engines or cars upon the line of the road.

On the 5th of May, 1875, the cause was removed to the Circuit Court of the United States for the Northern District of Illinois on the application of Fosdick and Fish, trustees, two of the defendants, and on the 17th of the same month the receivers appointed by the state court filed in the circuit court an account of their receivership for the months of February, March and April.

On the 20th of May, Fosdick & Fish, as trustees, filed in the same Circuit Court of the United States their bill against the railroad company and certain other defendants, for the foreclosure of the two mortgages of which they were trustees; and on the same day an order was entered in that court appointing Adna Anderson receiver, with authority to take possession of all the books, papers, vouchers and evidence of indebtedness, moneys and assets of the company, and all other effects of every kind, name and nature which belonged to the company, or

were held for its use and benefit, or in which it had any beneficial interest. He was also authorized to run, operate and manage the road and pay the expenses thereof, and manage and control all the property and affairs of the company. Authority was also given him to use the moneys of the company for any and all the purposes specified in the order, and he was required, as speedily as possible, to examine into the condition of the property and assets of the company, its contracts, leases, running arrangements, its business affairs, and take an inventory of its movable property and make a schedule of its floating indebtedness for labor and supplies, and report the same, as soon as might be, with his recommendation as to the proper disposition of the same and payment thereof. Under this order Anderson took possession of the property, and on the 11th of June the receivers appointed by the state court filed their final accounts, and asked to be discharged from their trust.

The cars delivered under the Schall contract were in use by the company when the receivers appointed by the state court took possession. Those receivers also continued to use the cars during all the time they operated the road, and Anderson took the possession when he entered upon his receivership. On the 27th of November, 1875, Anderson having ascertained what the claim of Schall was, and finding that the cars were necessary for the use of the road, entered into an arrangement with him, subject to the approval of the court, by which they were valued at \$420 each; and it was agreed that Schall should be paid \$7 a month for each car as rent. The aggregate of payments at this rate for five years would equal the value of the cars; and it was further agreed that if the rent was paid promptly, and in addition an amount which would be equal to interest at the rate of seven per cent. per annum on the deferred installments, the cars should, at the end of that time, become the property of the company.

On the 19th of July, 1875, the circuit court denied a motion of Osgood to consolidate his suit removed from the state court with that of Fosdick & Fish, but made an order allowing him and his associates to intervene in the latter suit for the protection of their respective interests, upon taking the necessary steps therefore. Accordingly, on the 6th of January, 1876, Stephen Osgood, Frederick W. Huidekoper, Thomas W. Shannon, John M. Dennison, George W. Gill, Alanson A. Sumner, Chandler Robbins and William T. Hickok, owners and holders of a large amount of bonds secured by the several mortgages which were in the process of foreclosure, with the permission of the court, filed their petition of intervention.

On the 27th of January, 1876, Schall filed an intervening petition, in which, after setting forth the facts of his claim substantially as they have already been given, and averring that he had been paid at the rate of \$7 a month as rental during all the time the cars had been in use by the present receiver, he asked that the balance, his due, might be paid him out of any funds to the credit of the cause not otherwise appropriated, or that the cars might be returned to him.

Fosdick & Fish and the intervening bond-
See 9 OTTO. U. S., Book 25.

holders answered this petition, claiming that the title of the cars had passed to the company under its contract with Schall, and that consequently the lien of the mortgages had attached to the cars as after-acquired property. They denied the right of Schall to payment for the cars out of the income of the road or out of the proceeds of the sale, and they denied his right to a return of the cars.

On the 5th of December, 1876, the court entered a decree in the suit of Fosdick & Fish for a sale of the mortgaged property, not, however, including the cars of Schall; and on the 7th of February, 1877, the property was sold in accordance with the provisions of the decree to Huidekoper, Shannon and Dennison for \$1,450,000. On the 13th of April the sale was approved by the court, and the master ordered to convey the property to the purchasers.

On the 28th of April, 1877, the master, to whom the matter of the intervening petition of Schall had been referred, reported the facts as they have already been stated, and also that the cars were necessary for the use of the road, and that the arrangement which had been made by the receiver was a beneficial one, whether the road remained in the hands of the receiver or passed into the possession of other parties.

To this report Fosdick & Fish and the intervening bond holders excepted, in substance, because the master found the title to the cars to be in Schall, and not in the company. Upon the final hearing, the court held that Schall had not parted with his title to the cars, and was entitled to the possession. Accordingly, it was ordered that the receiver, if in possession, or the purchasers at the sale, should restore the cars to Schall, and that the clerk of the court, out of the funds standing to the credit of the cause, should pay him the sum of \$9450, as rental for the cars, at the rate of \$7 each per month for the six months preceding the 22d of February, 1875, the date when the receivers of the state court were appointed and took possession, and the further sum of \$5,118.75, for a like rental during the time the cars were used by the receivers of the state court. It nowhere appears from the record that there are any funds in court to the credit of the cause except such as arose from the sale of the mortgaged property.

From this decree Fosdick & Fish and the intervening bondholders have appealed.

Two questions are presented by the assignment of errors in this case:

1. Did the lien of the mortgages attach to the cars of Schall on their delivery to the company under his contract, so as to prevent their reclamation as against the mortgagees if the price was not paid according to agreement?

2. Was the order for the payment out of the fund in court of the rental of the cars, during the time they were used by the receivers appointed by the state court and for six months before, justifiable under the circumstances of this case?

As to the first question, it is contended that the mortgage created a subsisting and paramount lien on the cars as soon as they were put into the possession of the railroad company under the contract, and that the reservation of the title was void under the laws of Illinois, because the contract was not recorded.

It must be conceded that contracts like this

are held by the courts of Illinois to be, in effect, so far as the Chattel Mortgage Act of that State is concerned, the same as though a formal bill of sale had been executed and a mortgage given back to secure the price. We had occasion to consider that question in *Hervey v. Locomotive Works*, 93 U. S., 664 [XXIII., 1003], and there held, following the Illinois decisions, that if such an instrument was not recorded in accordance with the provisions of the Chattel Mortgage Act, R. S., Ill., 1874, 711, 712, a lien like that of Schall would have no validity as against third persons. Whatever may be the rule in other States, this is, undoubtedly, the effect of the Illinois Statute as construed by the courts of that State. In *Green v. Van Buskirk*, 5 Wall., 307 [72 U. S., XVIII., 599], this court also held that "Where personal property is seized and sold under an attachment, or other writ issuing from a court of the State where the property is, the question of the liability of the property to be sold under the writ must be determined by the law of that State, notwithstanding the domicile of all the claimants to the property may be in another State." *Hervey v. Locomotive Works* [supra], was also a case of seizure and sale under judicial process; and the language of the court, as expressed in its opinion delivered by Mr. Justice Davis, is to be construed in connection with that fact.

As between the parties, notwithstanding the Illinois Statute, the transaction is just what, on its face, it purports to be, "A conditional sale, with a right of rescission on the part of the vendor, in case the purchaser shall fail in payment of his installments—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of his losing his lien" if it works a legal wrong to third parties. *Murch v. Wright*, 46 Ill., 488. The question, then, is whether these mortgagees occupy the position of third parties within the meaning of that term as used in this statute.

They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are "after-acquired" property of the company; but as to that class of property it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were "loose property susceptible of separate ownership and separate liens," and "such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto." *U. S. v. R. R. Co.*, 12 Wall., 363 [79 U. S., XX., 434]. The title of the mortgagees in this case, therefore, is subject to all the rights of Schall under his contract.

The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.

It follows that the decree ordering a return of the cars to Schall was right. Whether, if

the property is worth more than is due upon the contract of purchase, the mortgagees can obtain the benefit of the overplus, is a question we are not called upon to consider.

As to the second question, we have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgages are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken

or something equivalent done, the whole earnings belong to the company and are subject to its control. *R. R. Co. v. Cowdrey*, 11 Wall., 459 [78 U. S., XX., 199]; *Gilman v. Telegraph Co.*, 91 U. S., 603 [XXIII., 405]; *Amer. Br. Co. v. Heidelberg*, 94 U. S., 798 [XXIV., 144].

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mold his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in re-

spect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act.

The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervener has brought himself within the rule fixed by the state court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the state court, he contracted to sell his cars to the company at an agreed price, payable in installments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale and, consequently, have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rental already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.

The decree of the Circuit Court is reversed so far as it directs the payment of the sum of \$14,568.75 to Schall, the appellee, from the fund in court; but in all other respects it is *affirmed*, and the cause remanded with instructions to so modify the decree appealed from, as

to make it conform to this judgment. The costs of the appeal must be paid by the appellee.

Cited—99 U. S., 256, 257, 260, 345, 392; 102 U. S., 9; 107 U. S., 594; 111 U. S., 780, 782, 783; 9 Biss., 331; 3 McCrary, 140, 495-496; 5 Hughes, 383; 7 N. W. Rep., 421.

WILLIAM R. FOSDICK ET AL., *Appts.*,
v.
THE SOUTHWESTERN CAR COMPANY,
INTERVENER.

(See S. C., 9 Otto, 256, 257).

Cars sold, to remain vendor's property until paid for—R. R. mortgage.

1. Where cars were sold and delivered to a railroad company, and the price was secured by the notes of the company on long time, but the title of the cars was to remain in the vendor until the notes were paid, the contract was a valid one, and the cars were not subject to a prior mortgage given on the present and future acquired property of the company.

2. Where such cars were sold as part of the railroad on the foreclosure of such prior mortgage, an order to pay from the fund in court arising from such sale the price of said cars to the vendor thereof, was proper

[No. 630.]

Argued Jan. 7, 8, 1879. Decided Mar. 10, 1879.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois. The case is fully stated by the court.

Mr. Henry Crawford and **Ashbel Green**, for appellants.

Messrs. R. Biddle Roberts, John M. Butler and **J. H. Ford**, for Southwestern Car Co., intervenor.

Mr. Chief Justice Waite delivered the opinion of the court:

This appeal presents another petition of intervention filed in the suit of *Fosdick v. R. R. Co.* The general facts appearing in that suit are stated in the case of *Fosdick v. Schall*, just decided [*ante*, 339].

The claim of this intervenor, like that of *Schall*, arises out of a contract for the sale of cars, made with the Railroad Company on the 10th of January, 1875, a few days before the appointment of the receivers in the state court. The price was secured by the notes of the Company on long time, but the title of the cars was to remain in the vendor until the notes were paid. The cars all had upon them marks indicating the ownership of the intervenor.

The petition of intervention was filed January 27th, 1876. It set out the particulars of the contract, and asked that the receiver might be authorized to pay the price and keep the cars, as they were necessary for the profitable equipment of the road. *Fosdick & Fish* and the intervening bond holders answered, and without denying the material averments in the petition, claimed that notwithstanding the conditions of the sale the lien of the mortgages was paramount to the title of the intervenor. The petition was referred to a master to take testimony and report; but before any report was brought to the attention of the court, if, indeed,

any had been filed, a decree of sale was entered in the principal cause in such form as to direct a sale of the cars in question as part of the railroad. After the sale had been made and confirmed, a report under the order of reference in the petition of intervention was filed. This report was to the effect that the title of the cars had never passed out of the vendor; that the price agreed to be paid, \$12,750, was reasonable; that no part of it had been paid; that the cars had been in use on the road since January, 1875, for which no compensation had been made; and that these cars, or similar ones, were needed for the business of the railroad.

Fosdick, Fish and the intervening bond holders excepted on the ground that the lien of the mortgages was paramount to the title of the intervenor. Upon the hearing the exceptions were overruled; and as the cars had been included in the foreclosure sale, the clerk was directed to pay the purchase price to the intervenor from the fund in court. From this decree the present appeal has been taken.

According to the decision just made in the case of *Schall*, the lien of the mortgages upon the cars now in question was subject to the paramount claim of the car company for the price. The intervening petition on file when the foreclosure sale was made, was notice to the purchasers that the rights they acquired under the sale would be subject to the claim of the car company, as finally determined in the further progress of the cause. A restoration of the cars might, therefore, have been decreed to the intervenor, notwithstanding the sale. Instead of that, the payment of the price from the fund in court has been ordered. We do not understand that objection is made to this if the claim of the intervenor is superior to that of the mortgages, as we hold it to be.

The decree of the Circuit Court is affirmed.

FREDERICK W. HUDEKOPER ET AL.,
Appts.,
v.

THE HINCKLEY LOCOMOTIVE WORKS.

(See S. C., 9 Otto, 258-260.)

Contract of sale of locomotives—title reserved—respective rights of vendor and bondholders.

1. Where locomotive engines were sold and delivered to a railroad company, notes to be given for the price, the title to the locomotives to remain in the vendor until the notes were paid, and the receiver of the company subsequently surrendered them to the vendor, the amount due for their use and injured condition when returned is only a general debt of the company, with no special equities in its favor.

2. Such debt is not entitled to be paid from the proceeds of the sale on a prior mortgage as against the claims of the bondholders; the bondholders had a paramount lien on the earnings of the road and the proceeds of the sale.

[No. 573.]

Argued Jan. 7, 8, 1879. Decided Mar. 10, 1879.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois. The case is stated by the court.

Messrs. Henry Crawford and **S. P. McConnell** (arguments on the questions involved being also filed by **Ashbel Green, R. E. Williams** and **J. Aug. Johnson**), for appellants.

NOTE.—The lien of a mortgage on after-acquired property. See note to *Pennock v. Coe*, 64 U. S., XVI., 436.

Messrs. R. Biddle Roberts, John M. Butler and J. H. Ford, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

This is also an appeal from a decree upon a petition of intervention filed in the case of Fosdick & Fish against the Chicago, Danville & Vincennes Railroad Company. On the first of September, 1873, the Hinckley Locomotive Works entered into a contract with the railroad company for the sale of three locomotive engines, and on the 8th of October, 1873, for the sale of two more. By the terms of these contracts, notes were to be given for the price, payable at stated periods, which might be renewed if required. The title to the locomotives was to remain in the vendors until the notes were paid.

On the 8th of October, 1875, Anderson, the receiver in the cause, filed his petition in court, setting forth the contracts between the Railroad Company and the Locomotive Works, with a statement of the notes for the price then outstanding and unpaid; that on account of the peculiar construction of the engines they were not adapted to the business of the road, and could not be economically used, and that the Locomotive Company claimed title to the engines under their contract. He, therefore, asked authority from the court to surrender the engines to the Locomotive Company, and to adjust, settle and pay for their use during and from the date of the receivership. On the same day the necessary authority for the restoration of the engines was granted, and the receiver was instructed, if it was done, to receive the outstanding notes given for the price, and deposit them with the clerk, subject to the further order of the court.

On the 25th of October, the Locomotive Company filed its petition in the cause, setting forth that the engines had been taken back and the notes deposited with the clerk, in accordance with the instructions which had been given the receiver. It then asked that the contracts and notes be referred to a master to ascertain and report the balance due upon them. On the same day the reference was made as asked, and on the 29th of November, 1876, the master reported that the engines were accepted by the Railroad Company under the contracts, and used continuously until the fall of 1875, when they were returned to the Locomotive Company in an injured condition; that they had since been sold to other companies at reduced rates, and were worth when surrendered about one half what they were when put into the possession of the Company. He also stated his inability to ascertain definitely the amount to which the Locomotive Company was entitled, except upon the basis of a suggestion made by the receiver, that a payment should be made by way of compromise of an amount which would be fifty per cent. of the original contract price after deducting the amount received from the sale of the engines to other parties. He thereupon recommended the payment of \$18,000 as a compromise settlement of the claim.

On the 14th of December, 1876, which was subsequent to the decree of foreclosure sale, but before the sale, after reading the report of the master, on motion of the solicitor of the Loco-

motive Company, and with the consent of Fosdick & Fish and the Railroad Company, the court found due from the Railroad Company, "for the use of and repairs to locomotives, the sum of \$15,793.75," and ordered the receiver to pay it to the Locomotive Company out of the moneys in his hands as soon as it could be done consistently with the operation of the road and the payment of claims theretofore ordered. At the time this order was made the intervening bond holders had been admitted as parties to the cause, and it does not appear that their consent was obtained. On the 5th of January, 1877, they filed objections to the allowance of the claim on the ground that it was in the nature of a mere claim for money due on an account closed before the appointment of a receiver for the Railroad Company, and that the bond holders had a paramount lien on the earnings of the road and the proceeds of the sale. At the same time they filed a motion to set aside the order made December 14, for the payment of the claim. No payment was made by the receiver under the order, and on the 28th of April, after the sale under the foreclosure and its confirmation, the matter came on again for hearing upon the motion to set aside. This motion was overruled, and a further order made for the payment of the amount which had been found due "out of the proceeds in * * * court." From this last and final decree the intervening bondholders took this appeal.

We think this case is settled by that of *Fosdick v. Schall*, just decided [*ante*, 339]. The amount found due the Locomotive Company is not in reality for the use and repairs of the engines, but on account of what was agreed to be paid for the purchase. The Railroad Company contracted to buy the engines and pay a certain price. The Locomotive Company retained a paramount lien to secure the sum to be paid. The debt so incurred was not paid. The lien of the Locomotive Company has been in effect foreclosed, and a balance of the debt still remains due. Whatever may have been the form of the transaction, this is its substance. So far as we can see, no equitable claim upon any fund in court has been established as security for this debt. The Locomotive Company occupies the position of a general creditor with no special equities in its favor. As no question is presented for our consideration except that arising upon the payment of the money decree, *that decree is reversed and the cause remanded for such further proceedings, not inconsistent with this opinion, as may seem to be proper.*

Cited—111 U. S., 783.

WALLACE WILKERSON, *Plff. in Err.*,
v.

PEOPLE OF THE UNITED STATES IN
THE TERRITORY OF UTAH.

(See S. C., "*Wilkinson v. Utah*," 9 Otto, 130-137.)

Utah law as to capital punishment.

The law of Utah provided that whenever any person was convicted of a capital offense, he should suffer death by being shot, hanged or beheaded, as the court should direct. This law was repealed by the Code, which provided that every person guilty of murder should suffer death, but did not provide

the mode of executing the sentence, but which devolved a duty upon the court authorized to pass sentence for the crimes declared punishable therein, to determine and impose the punishment prescribed: *held*, that a sentence for murder, that the prisoner be shot, was within the authority of the court to prescribe the mode of execution.

[No. 686.]

Submitted Jan. 8, 1879. Decided Mar. 17, 1879.

ERROR to the Supreme Court of the Territory of Utah.

The case is fully stated by the court.

Messrs. E. D. Hoge and P. L. Williams for plaintiff in error.

Messrs. Chas. Devens, Atty-Gen., Edwin B. Smith, Asst. Atty-Gen., and S. F. Phillips, Solicitor-Gen., for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Duly organized Territories are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. R. S., sec. 1851.

Congress organized the Territory of Utah on the 9th of September, 1850, and provided that the legislative power and authority of the Territory shall be vested in the Governor and Legislative Assembly. 9 Stat. at L., 454.

Sufficient appears to show that the prisoner named in the record was legally charged with the willful, malicious and premeditated murder of William Baxter, with malice aforethought, by indictment of the grand jury in due form of law, as fully set forth in the transcript; and that he, upon his arraignment, pleaded that he was not guilty of the alleged offense. Pursuant to the order of the court, a jury for the trial of the prisoner was duly impaneled and sworn; and it appears that the jury, after a full and fair trial, found by their verdict, that the prisoner was guilty of murder in the first degree.

Regular proceedings followed, and the record also shows that the presiding justice in open court sentenced the prisoner as follows: that "You be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the 14th day of December next; that between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the last named day, you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead."

Proceedings in the court of original jurisdiction being ended, the prisoner sued out a writ of error and removed the cause into the Supreme Court of the Territory, where the judgment of the subordinate court was affirmed. Final judgment having been rendered in the Supreme Court of the Territory, the prisoner sued out the present writ of error, the Act of Congress providing that such a writ from this court to the Supreme Court of the Territory will lie in criminal cases where the accused is sentenced to capital punishment or is convicted of bigamy or polygamy. 18 Stat. at L., 254.

Appended to the proceedings is the assignment of error imputed to the court below, which is repeated in the same words in the brief of his counsel filed since the case was removed into this court. No exception was taken to the proceedings in either court prior to the sentence,

the assignment of error being that the court below erred in affirming the judgment of the court of original jurisdiction and in adjudging and sentencing the prisoner to be shot to death.

Murder, as defined by the Compiled Laws of the Territory, is the unlawful killing of a human being with malice aforethought, and the provision is that such malice may be express or implied. Comp. L. Utah, 1876, 585. Express malice is when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and it may be implied when there is no considerable provocation, or when the circumstances attending the killing show an abandoned or malignant heart.

Criminal homicide, when perpetrated by a person lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any one of the offenses therein enumerated, and evidencing a depraved mind, regardless of human life, is murder in the first degree. Comp. L. Utah, 1876, 586.

Provision is also made that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and that every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years. Comp. L. Utah, 1876, 586.

Duly convicted of murder in the first degree, as the prisoner was by the verdict of the jury, it is conceded that the existing law of the Territory provides that he "shall suffer death;" nor is it denied that the antecedent law of the Territory which was in force from March 6, 1852, to March 4, 1876, provided that "When any person shall be convicted of any crime the punishment of which is death, he shall suffer death by being shot, hung, or beheaded, as the court may direct," or as the convicted person may choose. Sess. Law Utah, 1852, p. 61; Comp. L. Utah, 1876, 564.

When the Revised Penal Code went into operation, it is doubtless true that it repealed that provision, as section 40 provides that "All Acts and parts of Acts" heretofore passed "inconsistent with the provisions of this Act, be and the same are hereby repealed." Comp. L. Utah, 651.

Assume that section 124 of the prior law is repealed by the Revised Penal Code, and it follows that the existing law of the Territory provides that every person guilty of murder in the first degree shall suffer death, without any other statutory regulation as to the mode of executing the sentence than what is found in the following enactment of the Revised Penal Code. Section 10 provides that, "The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed." Comp. L. Utah, 1876, 567.

Construed as that provision must be in connection with the enactment that every person guilty of murder in the first degree shall suffer death, and in view of the fact that the laws of the Territory contain no other specific regulation as to the mode of executing such a sentence,

the court here is of the opinion that the assignment of error shows no legal ground for reversing the judgment of the court below. Authority to pass such a sentence is certainly not possessed by the Circuit Courts of the United States, as the Act of Congress provides that the manner of inflicting the punishment of death shall be by hanging. R. S., sec., 5325.

Punishments of the kind are always directed by the circuit courts to be inflicted in that manner, but organized Territories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. By virtue of that power the legislative branch of the Territory may define offenses and prescribe the punishment of the offenders, subject to the prohibition of the Constitution that cruel and unusual punishments shall not be inflicted. Story, Const., 3 ed., sec. 1903.

Good reasons exist for supposing that Congress never intended that the provision referred to, that the punishment of death shall be by hanging, should supersede the power of the Territories to legislate upon the subject, as the congressional provision is a part of the first Crimes Act ever passed by the National Legislature. 1 Stat. at L., 114. Different statutory regulations existed in the Territory for nearly a quarter of a century, and the usages of the army to the present day are that sentences of the kind may in certain cases be executed by shooting, and in others by hanging.

Offenses of various kinds are defined in the Rules and Articles of War, where the offender, if duly convicted, may be sentenced to the death penalty. In some of those cases the provision is that the accused, if convicted, shall suffer death, and in others the punishment to be awarded depends upon the finding of the court-martial; but in none of those cases is the mode of putting to death prescribed in the articles of war or the military regulations. Article 96 provides that no person shall be sentenced to suffer death except by the concurrence of two thirds of the members of a general court-martial, and in the cases specified in the Rules and Articles enacted by Congress. R. S., p. 238.

Repeated instances occur where the death penalty is prescribed in those articles; but the invariable enactment is that the person guilty of the offense shall suffer death, without any specification as to the mode in which the sentence shall be executed, and the regulations of the army are as silent in that respect as the Rules and Articles of War. Congress having made no regulations in that regard, the custom of war, says a learned writer upon the subject, has, in the absence of statutory law, determined that capital punishment be inflicted by shooting or hanging; and the same author adds to the effect that mutiny, meaning mutiny not resulting in loss of life, desertion, or other military crime, if a capital offense, is commonly punished by shooting; that a spy is always hanged, and that mutiny, if accompanied by loss of life, is punished in the same manner; that is, by hanging. Benet, Courts-M., 5th ed., 163.

Military laws, says another learned author, do not say how a criminal offending against such laws shall be put to death, but leave it entirely to the custom of war; and his statement is that shooting or hanging is the method determined

by such custom. De Hart, Courts M., 196. Like the preceding author, he also proceeds to state that a spy is generally hanged, and that mutiny, unaccompanied with loss of life, is punished by the same means; and he also concurs with Benet, that desertion, disobedience of orders, or other capital crimes are usually punished by shooting, adding, that the mode in all cases, that is, either shooting or hanging, may be declared in the sentence.

Corresponding rules prevail in other countries, of which the following authorities will afford sufficient proof: Simmons, Courts-M., 5th ed., sec. 645; Griffith, Mil. L., 86.

Capital punishment, says the author first named, may be either by shooting or hanging. For mutiny, desertion or other military crime it is commonly by shooting; for murder not combined with mutiny, for treason and piracy, accompanied with wounding or attempt to murder, by hanging, as the sentence in England must accord with the law of the country in regard to the punishment of offenders. Exactly the same views are expressed by the other writer, which need not be reproduced.

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the 8th Amendment. Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial. Simmons, secs. 759, 760; De Hart, pp. 247, 248.

Where the conviction is in the civil tribunals, the rule of the common law was that the sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. 4 Bl. Com., 377.

Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was emboweled alive, beheaded and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive, in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect. Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Arch. Tr. Arch. Crim. Pr. and Pl., 8th ed., 584.

Many instances, says Chitty, have arisen in which the ignominious or more painful parts of the punishment of high treason have been remitted, until the result appears to be that the King, though he cannot vary the sentence so as

to aggravate the punishment, may mitigate or remit a part of its severity. 1 Chit. Cr. L., 787; 1 Hale, P. C., 370.

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim., 4th ed., 408; Whart. Cr. L., 7th ed., sec. 3405.

Concede all that, and still it by no means follows that the sentence of the court in this case falls within that category, or that the Supreme Court of the Territory erred in affirming the judgment of the court of original jurisdiction. Antecedent to the enactment of the Code which went into operation March 4, 1876, the Statute of the Territory passed March 6, 1852, provided that when any person was convicted of any capital offense, he shall suffer death by being shot, hanged, or beheaded, as the court may direct, subject to the qualification therein expressed, to the effect that the person condemned might have his option as to the manner of his execution, the meaning of which qualification, as construed, was that the option was limited to the modes prescribed by the statute, and that if it was not exercised, the direction must be given by the court passing the sentence.

Nothing of the kind is contained in the existing Code, and the Legislature in dropping the provision as to the option failed to enact any specific regulation as to the mode of executing the death penalty. Instead of that, the explicit enactment is that every person guilty of murder in the first degree shall suffer death, or upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court.

Beyond all question, the first clause of the provision is applicable in this case, as the jury gave no such recommendation as that recited in the second clause, the record showing that the verdict was unconditional and absolute, from which it follows that the sentence that the prisoner shall suffer death is legally correct. Comp. L. Utah, 1876, p. 586.

Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual, within the meaning of the 8th Amendment to the Constitution, which is not pretended by the counsel of the prisoner. Statutory directions being given that the prisoner when duly convicted shall suffer death, without any statutory regulation specifically pointing out the mode of executing the command of the law, it must be that the duty is devolved upon the court authorized to pass the sentence to determine the mode of execution and to impose the sentence prescribed. Comp. L. Utah, 1876, p. 567.

Persons guilty of murder in the first degree "shall suffer death," are the words of the territorial statute; and when that provision is construed in connection with section 10 of the Code previously referred to, it is clear that it is made obligatory upon the court to prescribe the mode of executing the sentence of death which the Code imposes where the conviction is for murder

in the first degree, subject, of course, to the constitutional prohibition, that cruel and unusual punishment shall not be inflicted.

Other modes besides hanging were sometimes resorted to at common law, nor did the common law in terms require the court in passing the sentence either to prescribe the mode of execution or to fix the time or place for carrying it into effect, as is frequently if not always done in the Federal Circuit Courts. At common law, neither the mode of executing the prisoner nor the time or place of execution was necessarily embodied in the sentence. Directions in regard to the former were usually given by the judge in the calendar of capital cases prepared by the clerk at the close of the term; as, for example, in the case of murder, the direction was "let him be hanged by the neck," which calendar was signed by the judge and clerk, and constituted in many cases the only authority of the officer as to the mode of execution. 4 Bl. Com., 404; Bish. Cr. Proc., 2d ed., secs. 1146-1148; Bish. Cr. L., 6th ed., sec. 935.

Reference is made to the cases of *Hartung v. People*, 22 N. Y., 95; *People v. Hartung*, 23 How. Pr., 314; *Hartung v. People*, 26 N. Y., 154, and *Hartung v. People*, 28 N. Y., 400, as supporting the theory of the prisoner, that the court possessed no authority to prescribe the mode of execution; but the court here is entirely of a different opinion, for the reasons already given.

Judgment affirmed.

UNITED STATES, *ex rel.* CONCORD SAVINGS BANK, *Plff. in Err.*,

v.

THE MAYOR AND COUNCILMEN OF THE CITY OF FORT SCOTT.

(See S. C., 9 Otto, 152-161.)

City bonds.

Where a city was authorized to issue its bonds for public improvements, to be paid by assessment upon the property specially improved and benefited, an owner of such bonds who has recovered judgment on them is not confined to a special assessment on the property benefited, but is entitled to have a levy of a general tax on all the taxable property within the city, to pay such judgment.

[No. 829.]

Submitted Jan. 6, 1879. Decided Mar. 17, 1879.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Mr. James D. Campbell, for plaintiff in error:

The Legislature contemplated the issuance of general obligations.

The language of the Act is quite clear and explicit. "But the Mayor and Council shall have the power to issue the bonds of the City for the cost of paving, macadamizing, curbing and guttering streets and alleys, and excavating, grading and filling the same," etc.

The history of cities and towns, as well as that of municipal bonds, furnishes many instances where general public obligations have

NOTE.—Mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds. See note to *The Mayor v. U. S.*, 76 U. S., XIX., 704.

been issued for particular local improvements. Such, indeed, has been the policy of nearly every State in the Union; certainly of nearly every western State. That it has been the policy of this State of Kansas, this court too well knows. The improvement of particular streets and highways must always be regarded as of general advantage to the whole population. The use of highways is never confined to the owners of property abutting upon them; they are for the general use of the public.

The latter clause of section 17 of the Act, providing for special assessments for the payment of the principal and interest of these bonds has nothing to do and does not purport to have anything to do with the remedy of the holders of these bonds against the City, and it cannot be extended by interpretation beyond the plain meaning of the words. There is no requirement that this provision shall be incorporated in the bonds, nor is there any requirement that the bonds shall be only payable out of this fund.

The sole object and purpose of the provision under consideration is to provide a fund for the indemnity of the general revenue against the obligations about to be incurred, in case they should be called upon. If the Legislature meant more than that, it should have said so.

The principle laid down by the majority of this court in *U. S. v. Clark Co.*, 96 U. S., 211 (XXIV., 628), is conclusive on this point, that the provision contained in the Act in question, for special assessments for the payment of the bonds, limits neither the obligation of the bond nor the remedy of the holder. The case of the *Com., ex rel. Henry Whellen, v. Common Council of Pittsburgh*, Sup. Ct. Pa., Nov., 1878 (*Pittsburgh Legal News*, Nov. 28, 1878), seems also in point.

The bonds are, in form and substance, absolute general obligations.

The recital of the ordinance is a mere reference to its title and does not contain the slightest intimation of the supposed limitation. Here there is no notice of the claim of defendants that the bonds are not general obligations, for they are absolute and unconditional promises to pay.

We admit the propriety, in proper cases, of controlling the operation of the judgment by limiting the execution, but, in all such cases to which our attention has been called, the judgment expressly limits the execution to particular assets.

See, *Jordan v. Cass Co.*, 3 Dill., 194, approved and followed by this court in *Cass Co. v. Johnston*, 95 U. S., 370 (XXIV., 418).

Mr. J. D. McCleverty, for defendants in error:

The plaintiff in error claims, in effect, that there is no difference in the nature of the liability of the City upon the special improvement bonds, issued under section 17, and upon the general improvement bond, issued under section 19, nor in the kind of tax to be levied to pay them. The language of the two sections is in sharp contrast. Section 17 provides:

"And for the payment of said bonds, assessments shall be made * * * upon the taxable property chargeable therewith, as is provided in the 3d clause of the 2d subdivision of the preceding section (section 16)."

See 9 OTTO.

While section 19 provides: "The Council shall levy taxes on all the taxable property within the City * * * to pay said bonds at their maturity."

As well might a holder of bonds issued under section 19, claim that he was entitled to the levy of the special assessment provided for in section 17.

Another evidence that the law intends a difference between these two classes of bonds, and in the nature of the liability of the City upon them, is the fact that section 19, and every other section of the law governing cities of the second class, which authorizes the issue of bonds creating a general liability and made payable by the levy of general taxes, prohibits so doing, except when authorized thereto by a vote of the People (see sections 19, 46, L. of Kan., 1871, pp. 150, 157), while section 17 does not require the vote of the People.

The City Council, too, has given section 17 the same practical construction, by enacting in the ordinance above quoted, that these bonds "Shall be paid, principal and interest, solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting," etc.

The question of the general liability of municipal corporations under similar laws has been frequently before the courts, and the uniform ruling has been, that the only liability is, the special liability created by law, and that the creditor must look to that only.

McCullough v. Mayor, etc., of Brooklyn, 23 Wend., 458; *Lake v. Trustees of Williamsburgh*, 4 Den., 520; *Hunt v. Utica*, 18 N. Y., 442; *Eilert v. Oshkosh*, 14 Wis., 586; *Whalen v. La Crosse*, 16 Wis., 271; *Silkman v. Milwaukee*, 31 Wis., 555; *Finney v. Oshkosh*, 18 Wis., 209; *People v. Milwaukee*, 10 Mich., 274; *Goodrich v. Detroit*, 12 Mich., 279; *Bk. v. Lansing*, 25 Mich., 207; see, also, *New Albany v. Sweeney*, 13 Ind., 245; *Casey v. Leavenworth*, 17 Kan., 189.

Mr. Justice Harlan delivered the opinion of the court:

A statute of Kansas, approved March 2, 1871, confers upon cities of the second class authority to enact ordinances for certain defined purposes. By the 16th section authority is given:

1. To levy and collect taxes for general revenue purposes, not to exceed five mills on the dollar in any one year, on all the real, mixed and personal property within their limits, taxable according to the laws of the State; 2. To open and improve streets, avenues and alleys, make sidewalks and build bridges, culverts and sewers, the cost of which may be met by assessment in the following manner, to wit: first, for opening, widening and grading all streets and avenues, for building bridges, culverts and sewers, and for footwalks across streets, assessments shall be made on all taxable property within the corporate limits of the City, not exceeding five mills on the dollar in any one year; second, for making and repairing sidewalks, assessments shall be made on all lots and pieces of ground abutting on the improvement, according to front feet; third, for paving, macadamizing, curbing and guttering streets, alleys and avenues, and excavating, grading and filling same, and for improvements of the squares

and areas formed by the crossing of streets, assessments shall be made on all lots and pieces of ground to the center of the block extending along the street or avenue, the distance improved or to be improved, according to the assessed value of the lots or pieces of ground, without regard to the buildings or improvements thereon, which value must be ascertained by three disinterested appraisers, appointed by the Mayor and Council.

By the 17th section it is declared that assessments made pursuant to the third clause of the second subdivision of the preceding section shall be known as "special assessments for improvements," and, except as thereafter provided, shall be levied and collected as one tax, in addition to taxes for general revenue purposes. But the Mayor and Council are empowered to issue bonds of the City for the costs of paving, macadamizing, curbing and guttering streets and avenues, and excavating, grading and filling for same, to be made payable as follows: one third of the aggregate amount of bonds of any issue in one year, one third in two years, and one third in three years, with interest from date, at the rate of ten per cent. per annum, payable annually. "And for the payment of said bonds, assessments shall be made in each year to pay the principal and interest maturing on said bonds during said fiscal year, upon the taxable property chargeable therewith, as is provided in the third clause of the second subdivision of the preceding section, and such tax shall be certified by the city clerk to the county clerk, and placed upon the tax roll for collection, subject to the same penalties and collected in like manner as other taxes." L. of Kan., 1871, p. 148.

The 18th section provides that "The Council may appropriate money and provide for the payment of the debts and expenses of the City and, when necessary, may provide for issuing bonds for the purpose of funding any and all indebtedness now existing or hereafter created of the City, now due or to become due." And for the payment of any coupons of bonds issued under that section the Council is required to levy taxes, payable in cash, on all the property in the City, in addition to other taxes. L. of Kan., 1871, p. 148.

The 19th section declares that the Council may provide for making any and all improvements of a general nature in the City, and to pay for same may, from time to time, borrow money and issue bonds. In the payment of such bonds, with their interest coupons, at maturity, the Council is required to levy taxes, payable in cash, on all taxable property within the City, in addition to other taxes. Bonds authorized by that section cannot, however, be issued unless the Council is previously instructed to do so by a majority of all the votes cast at an election held for that purpose.

By section 21 the Council is required "To make provision from time to time for a sinking fund to redeem at maturity the bonded indebtedness of the City," the taxes levied for that purpose being payable only in cash.

By section 22 the Council is authorized and required to levy annually, taxes, payable in cash only, on all the taxable property within the City, in addition to other taxes, and in amount sufficient to pay the interest and coupons as

they become due "on all the bonds of the City" then (1871) issued or thereafter to be issued by the City.

These sections seem to be the only portions of the Statute of March 2, 1871, which have any direct bearing upon the question presented for consideration.

In the year 1872, the City Council of Fort Scott, being a city of the second class, by ordinance required one of its streets to be graded, paved, guttered and macadamized, within prescribed limits, the cost of the work to be paid for in bonds of the City, to be registered and classified as special improvement bonds, and which might be made payable in New York. The ordinance provides that the bonds "Shall be paid, principal and interest, solely from special assessments to be made upon and collected solely from the lots and pieces of ground fronting upon and extending along the street the distance improved, in the manner provided in sections 16 and 17 of an Act of the Legislature of Kansas relating to the powers and government of cities of the second class, approved March 2, 1871."

In accordance with that ordinance, bonds with coupons attached were issued and negotiated to the amount of several thousand dollars.

Upon the margin of each bond is this statement: "Issued in accordance with sections 16 and 17 of an Act of the Legislature of Kansas, entitled an Act Relating to the Powers and Government of Cities of the Second Class, and to Repeal Certain Sections of Chap. 19 of the General Statutes of 1868, approved March 2, 1871, and in pursuance of an ordinance of the City of Fort Scott, entitled An Ordinance Ordering the Grading, Curbing, Guttering and Macadamizing a Part of Wall Street." Upon each bond also was indorsed the official certificate of the Auditor of the State, to the effect that such bond "had been regularly and legally issued, that the signatures thereto were genuine," and that the bond had been duly registered in his office in accordance with the Statute of March 2, 1872.

The Concord Savings Bank having become the holder and owner, for a valuable consideration and before maturity, of some of these bonds, and failing to obtain payment, sued the City, and recovered judgment for the amount thereof in the Circuit Court of the United States for the District of Kansas. The judgment is in the ordinary form, except that the court adds: "And it is further ordered and adjudged that the judgment now here rendered be enforced and collected pursuant to law in such case made and provided."

Subsequently, the bank sued out an alternative writ of *mandamus*, commanding the City Council to levy and collect a sufficient tax upon all the taxable property within the City to pay the judgment, interest and costs. But, upon demurrer, the court below held that the relator was only entitled to a levy of special assessments upon the property benefited and improved, and upon that ground the writ was set aside and the relator's information dismissed, with costs to the City.

The vital question upon this writ of error is, whether the City is under a legal obligation to impose, in satisfaction of the relator's judgment, a tax upon all the taxable property of the City.

If so, the judgment dismissing the information should be reversed; otherwise, it must be affirmed.

It is contended by counsel for the Bank that as the judgment for the debt has never been modified or reversed, the City is estopped, in this proceeding, to say that the relator was entitled only to a levy upon the property specially benefited. A determination of that question does not seem absolutely necessary in view of our conclusions upon other issues presented in the case. We, therefore, waive its consideration, and proceed to an examination of the Statute of March 2, 1871, under which the bonds were issued. We are the more inclined to pursue this course because of the frank concession by counsel of the relator that perhaps the purpose of the learned judge who framed the order of dismissal was to reserve the real question in controversy for determination when proceedings for *mandamus* should come before him.

In our examination of the Statute of March 2, 1871, we are impressed with a strong conviction that the Legislature intended to confer upon cities coming within its provisions the amplest authority, not only to incur obligations for all legitimate municipal purposes, but to meet promptly every obligation thus incurred. Unusual care seems to have been taken to guard the financial credit of such cities by provisions which, if enforced, would not only give confidence to creditors, but render municipal repudiation impossible. This care is manifested in the section which requires the Council to establish a sinking fund for the redemption, at maturity, of "the bonded indebtedness of the City," that fund to be supplied by taxes, payable only in cash. It is further shown in the section which both authorizes and requires sufficient taxation annually on all taxable property within the City to meet the interest as it matures "on all the bonds of the City." It is still further indicated in the section which declares that the Council "may * * * provide for the payment of the debts and expenses of the City." No express restriction is imposed as to the mode in which such provision may be made, except that, when necessary, "any and all indebtedness of the City" may be met by issuing funding bonds, the interest upon which may be paid by taxation "on all the property of the City, in addition to other taxes." A faithful exertion of the powers thus conferred would seem to be sufficient to secure the prompt satisfaction of any municipal indebtedness incurred in accordance with the provisions of the Statute of 1871. That the bonds for the amount of which the relator obtained judgment constitute a "debt," or a portion of "the bonded indebtedness" of the City, within the meaning of the statute, cannot well be doubted. The ordinance which required the improvements in question, in terms directs that the cost thereof "Shall be paid for in the bonds of the City," to be signed by the Mayor, attested by the City clerk under the corporate seal of the City, and countersigned by the City treasurer. Further, each bond declares upon its face that it is a "Special improvement bond of the City of Fort Scott, Kansas;" and that the City, "for value received, acknowledges itself to owe, and promises to pay to the holder" the amount thereof. Still further, the statute under which the ordi-

nance was framed authorizes the council to pay the cost of such special improvements by issuing "the bonds of the city." Finally, the bonds were negotiated by the city authorities, by whom the proceeds were received and expended under the direction of the Council. They constitute, therefore, in every just sense, debts which the City, in its corporate capacity, is under a statutory and legal obligation to provide for in some effectual, substantial manner.

But, in behalf of the City, it is urged that the holder of these bonds must, by the terms of the statute, and the ordinance of January, 22, 1872, look for payment exclusively to assessments upon the property specially improved and benefited. It is contended that such was the purpose of the City, of which the purchaser had constructive notice in the reference, in the marginal statement upon the bonds, both to sections 16 and 17 of the Act of March 2, 1871, and to the ordinance passed by the Council. To that interpretation of the contract we cannot yield our assent. It is true that section 17 declares that "For the payment of said bonds" assessments shall be made "Upon the taxable property chargeable therewith;" that is, "on all lots and pieces of ground to the center of the block, extending along the street or avenue, the distance improved." But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the City will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonds, with interest, at maturity. As between the City and its tax payers, it was certainly its duty, through the Council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. *Hitchcock v. Galveston*, 96 U. S., 341 [XXIV., 659].

The main difficulty comes from the peculiar phraseology of the city ordinance prescribing the source from which the means for the payment of the bonds should be obtained. The statement in the ordinance that the bonds "Shall be paid, principal and interest, solely from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon or extending along the street the distance improved," should be regarded only as an expression, in emphatic terms, of the purpose and duty of the City, as between all its tax payers, to impose the cost of the proposed improvements upon the property specially benefited. There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted. The general reference, upon the margin of the bonds, to the ordinance under which the improvement was projected should not, in view of the general powers of the Council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the City, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is, that the City shall pay the interest and principal at maturity. There is no res-

ervation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the City should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment. Experience informs us that the City would have met with serious, if not insuperable, obstacles in its negotiations had the bonds upon their face, in unmistakable terms, declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and pervades the Statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language, brought home to the purchaser, which could neither mislead nor be misunderstood.

In this case, it is alleged by the City that the special assessments required by the 17th section of the Act of 1871 were duly made before the maturity of the bonds, and that all amounts collected in that mode have been promptly paid over by the City to holders of such bonds. But the unquestioned fact remains, that the bonds, with some interest, held by the relator, were not met at maturity as the City agreed that they should be. They are still unpaid. The special assessments made have, from some cause not explained in the answer of the City, proven wholly insufficient. Nor does it appear that they will ever prove sufficient for the payment of the relator's judgment. The corporate authorities repudiate all legal obligation upon the part of the City to provide payment in any other mode or from any other source, a position which we hold to be untenable and in violation of a plain duty imposed by statute. We are of opinion that the Council has the power, under this statute, to provide for the payment of the relator's judgment by taxation upon all the taxable property within the City, and such should have been the judgment of the court below. A discharge of that duty will in no wise interfere with the right of the Council to reimburse the City, if that be now possible, for all amounts thus paid, out of special assessments upon the property primarily chargeable with the cost of the work on account of which the bonds were issued.

The judgment is reversed, with directions for further proceedings in conformity with this opinion.

Cited—112 U. S., 162.

AMELIA MARY TICE AND HENRY T. CHAPMAN, JR., Admsrs. of ISAAC P. TICE, Deceased, Appls.,

v.

UNITED STATES.

(See S. C., 9 Otto, 286-290.)

Distillers' meters—contract for.

Where the Commissioner of Internal Revenue made a contract for distillers' meters for the Gov-

ernment, and, by the contract, the commissioner had the right at any time to revoke the order adopting the meter and to direct the discontinuance of its manufacture on behalf of the Government, and the power of revocation and discontinuance was exerted by an order of June 8, 1870, reserving the rights of the manufacturer as to all meters in process of construction, not exceeding twenty sets, the Government was not liable to pay for the meters on hand June 8, 1871, when their further use was discontinued.

[No. 1034.]

Submitted Jan. 30, 1879. Decided Mar. 17, 1879.

A PPEAL from the Court of Claims.

The case is fully stated by the court.

Mr. J. W. Douglass, for appellants.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellee

Mr. Justice Harlan delivered the opinion of the court:

By an Act approved March 2, 1867, 14 Stat. at L. 481, the Secretary of the Treasury was authorized to "adopt, procure and prescribe" for use hydrometers, weighing and gauging instruments, meters or other means for ascertaining the strength and quality of spirits subject to tax, or for preventing or detecting frauds by distillers of spirits.

On the 18th April, 1867, the Secretary adopted the Tice meter, and prescribed its use in distilleries, upon certain agreed conditions fully set forth in a letter to the inventor. Among those conditions were these:

"The Secretary of the Treasury holds himself at liberty at any time to adopt any improvement or modification of the meter or system, or at any time to revoke the order adopting the meter, and to discontinue their manufacture on behalf of the Government. If the first meter shall prove successful when subjected to the test above set forth, and the Government shall subsequently revoke the adoption of the meter and order a discontinuance of proceedings, you will be paid such sum as may be determined upon in the manner hereinafter stated, for all instruments which you may have completed or have in process of completion at the time of such revocation: *Provided*, That at no time shall you have more than twenty sets in process of manufacture at any one time, unless directions shall be given hereafter for the manufacture of a larger number."

By Joint Resolution, passed February 3, 1868, 15 Stat at L., 246, Congress directed the appointment, by the Secretary of the Treasury, of a commission which, in connection with the then existing Commission of the Academy of Science, should examine all meters and mechanical contrivances or inventions presented to them which were intended to measure, test and ascertain the productiveness of grain or other articles prepared for distillation, or the actual quantity and strength of distilled spirits subject to tax, produced therefrom, the result of such examination to be communicated to Congress. The Act declared "That *pending* the action of said commission, and *until* their report be made, and a meter shall be by law adopted, all work on the construction of meters, under the direction of the Treasury Department, be and is hereby *suspended*." "And in the meantime no further contract shall be made by the Secretary of the Treasury" under the Act of March 2, 1867.

By an Act approved July 20, 1868, 15 Stat.

99 U. S.

at L., 125, power to "adopt and prescribe" meters was conferred upon the Commissioner of Internal Revenue. That officer, on September 16, 1868, decided to adopt and prescribe the Tice meter, and upon certain conditions, to which the inventor assented, he directed the latter "to proceed with their construction." Among the conditions were these:

"Third. The 117 meters now finished will be immediately made ready for delivery, and 36 now in process of manufacture will be completed as soon as possible. The manufacture of others, to the number of 500 in all, is to be proceeded with as rapidly as possible, and thereafter not more than twenty sets are to be in process of construction at one time, unless a greater number is directed by the Commissioner of Internal Revenue.

Fourth. The Commissioner reserves to himself, or his successor in office, the right at any time to adopt any improvement of the meter or system, or to revoke the order adopting the meter, and to direct on the part of the Government a discontinuance of its manufacture."

On the 7th June, 1870, the Commissioner ordered the discontinuance of that kind of Tice meter known as the second or "credit" meter, and required distilleries to use thereafter the Tice sample meter, and the Tice automatic meters adapted for use as sample meters.

On the succeeding day, June 8, 1870, the Commissioner addressed to Tice a letter, in which, among other things, he gave notice that instructions and regulations in force prior to October 8, 1869, "Relating to the ordering and shipment and payment for the meters invented by you and prescribed for use in distilleries, remain in force only in respect to meters heretofore delivered, and also those you may now have on hand or in process of construction, not exceeding twenty sets." In that letter the commissioner further says: "Any regulations heretofore prescribed, addressed to you by or from this office, directing or authorizing you to construct, or proceed with the construction of, or to furnish, meters, especially those of September 16, 1868, are revoked, except as aforesaid. New rules, regulations and orders have been prescribed, a copy of which is herewith inclosed, it being distinctly understood that neither the Government of the United States, nor any department or officer thereof, is or will be responsible for or on account of any spirit meters, or the attachment or adjustment thereof."

By a formal order made on June 8, 1871, the further use of Tice's spirit meters was finally discontinued, and all existing orders prescribing the same were revoked. At the date of that order Tice had on hand fourteen and one half sets of meters, worth \$25,000, for which sum, and for storage up to April 8, 1873, the estate of Tice rendered an account against the Government on the 12th of April, 1873. The amount was approved by the then Commissioner; but payment being refused, this action was brought against the Government for the recovery of the sum claimed.

From the judgment of the Court of Claims in favor of the Government this appeal is prosecuted.

We concur with the learned counsel for appellants in the proposition that the contract made on the 18th of April, 1867, by the Secretary of

the Treasury with Tice, was not abrogated by the Joint Resolution of February 3, 1868. By the terms of the Resolution it was only suspended until final action by the commission, whose report was designed as the foundation of a statute which would designate the kind of meters which should be adopted. But express authority to make a new contract was conferred by the Act of July 20, 1868, 15 Stat. at L., 125, upon the Commissioner of Internal Revenue. That officer was empowered to adopt and prescribe for use such hydrometers, saccharometers, weighing and gauging instruments or meters, as he might deem necessary. The extent of the authority intended to be conferred upon him is manifested by the 3d section of the Act of July 20, 1868, which required every owner, agent or superintendent of a distillery to furnish and attach, at his own expense, such meter as the Commissioner might adopt and prescribe for use. It was by virtue of its provisions that the agreement of September 16, 1868, was made. According to any fair construction of its terms, in the light of attendant circumstances, the Government was bound, as under the agreement of September 18, 1867, to pay for such sets, not exceeding twenty, as Tice might have on hand at the time their use should be discontinued. The provision to that effect in the contract of September 18, 1867, is so reasonable and just, that we shall not presume that the contract of September 16, 1868, was intended to establish a different rule of compensation to the inventor. But we do not perceive, however, that all this justifies the conclusion that the Government was under any legal obligation to pay for the meters which Tice had on hand on June 8, 1871, and for the value of which the account in question was presented. By the express words of the agreement of September 18, 1867, the Commissioner had the right at any time to revoke the order adopting the meter, and to direct the discontinuance of its manufacture on behalf of the Government. That power was partially exerted by the order of June 7, 1870, which dispensed with the further use of all Tice meters except the sample meters, or the automatic meters, adopted for use as sample meters. But the power of revocation and discontinuance was fully exerted by the sweeping order of June 8, 1870, which, reserving the rights of Tice as to all meters theretofore delivered, and as to such as were then on hand or in process of construction, not exceeding twenty sets, revoked all previous regulations which directed or authorized the inventor to construct, or proceed with the construction of, or to furnish, meters, and especially the regulation of September 16, 1868. By that order distinct notice was given to the patentee that neither the Government of the United States, nor any department or officer thereof, was or would be responsible for or on account of any spirit meters, or the attachment or adjustment thereof. The order of June 8, 1870, did not, perhaps, discontinue the use of meters altogether, but it clearly furnished notice that the patentee could not look to the Government for protection or re-imbursement as to any meters *thereafter* constructed by him and used by distilleries. The meters for which the account was rendered were on hand on June 8, 1871, when all existing orders prescribing the same for use were absolutely revoked, and the

further use of Tice meters discontinued. Had they been on hand and in the process of construction at the date of the order of June 8, 1870, we would not doubt the liability of the Government for their value. But no such fact is found, and we suppose no such fact could have been established.

While we do not agree with the court below in all the reasons assigned in support of the conclusion reached, we think its judgment is in accordance with the law, and it is affirmed.

SUSAN P. GRIGSBY, Admrx. of J. WARREN GRIGSBY, Deceased, ET AL. *Appts.*,

v.

C. W. PURCELL, & CO., D. J. SAUNDERS, Receiver, etc., ET AL.

(See S. C., 9 Otto, 505-508.)

Cause when dismissed—waiver.

1. If a transcript is not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal becomes inoperative, and the cause will be dismissed.

2. This objection may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error, at any time before hearing. Mere appearance does not amount to a waiver.

[No. 136.]

Submitted, Mar. 4, 1879. Decided, Mar. 17, 1879.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

On motion to dismiss.

The case is fully stated by the court. With this case, was argued and decided No. 984. See note hereto appended.

Messrs. W. O. Harris, Linden Kent and H. C. Pindell, for appellees.

Messrs. Hoadley, Johnson & Colston and John W. Stevenson, in No. 136, *Jas. B. Beck* and *H. C. Pindell* in No. 984, for appellants.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit to enforce the provisions of a trust-deed executed by J. Warren Grigsby to secure "All the debts of the house of Taylor, Shelby, & Co., created since the fourteenth day of July, 1857," for which he was liable. The bill was filed by part of the creditors for themselves and such others as should come in and prove their claims. In the progress of the cause a reference was had to a master, who in due time made his report. At the hearing before the master, the appellant, Susan P. Grigsby, the wife of J. Warren Grigsby, appeared as a creditor and proved her claim. To the report of the master she excepted; and upon the hearing the court decreed in her favor to the amount of \$21,753.05, and directed the payment of that amount to her from the fund in court. The remainder of her claim was rejected. This decree was rendered at the February Term, 1875, of the Circuit Court, and on the 15th day of the month of February. On the 23d of the same

month, and during the term, an entry was made in the cause granting an appeal prayed by J. Warren Grigsby and Susan P. Grigsby; but it does not appear that any bond for costs or for a *superseas* was ever executed.

On the 19th of April, 1875, Mrs. Grigsby receipted to the receiver in the cause for the amount of the decree in her favor, and on the 6th of May, still during the February Term, an appeal prayed by W. H. Thomas was granted; but, so far as appears, no bond executed.

The October Term, 1875, of this court closed by adjournment on the 8th of May, 1876. Neither of these appeals were docketed during that term, and the transcript of the record was not filed in court. So far as appears, no attempt was made to do so, and no excuse has been given for the delay; but on the 12th of August, 1876, before the commencement of the next term, the transcript was filed by Mr. and Mrs. Grigsby, and their appeal docketed. That of Thomas was not docketed until during the present Term. Nothing further was done in the case by either party until December 14, 1878, when the appellees moved to dismiss the appeal of Grigsby and wife because it was a joint appeal, the appellants not being united but opposed in interest. Printed briefs for and against this motion were filed by the respective parties, and on the 23d of December the motion was overruled. The attention of the court was not called to the delay in filing the transcript and docketing the appeals until Jan. 19, 1879, when the causes were reached in their regular order on the docket. The counsel for the appellees then suggested the delay, and moved to dismiss on that account.

Section 997 of the Revised Statutes, which is a substantial re-enactment of a similar provision in section 23 of the Judiciary Act of 1789, 1 Stat. at L., 84, requires that "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party." Appeals are subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error. R. S., sec. 1012; 2 Stat. at L., 244.

Under this legislation it has long been held that if the transcript was not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal became inoperative, and the cause might, on that account, be dismissed. *Hamilton v. Moore*, 3 Dall., 371; *Blair v. Miller*, 4 Dall., 21; *The Virginia v. West*, 19 How. 182 [60 U. S., XV. 594]; *Castro v. U. S.*, 3 Wall., 47 [70 U. S., XVIII. 163]; *U. S. v. Gomez*, 3 Wall., 752 [70 U. S., XVIII. 212]; *Mesa v. U. S.*, 2 Black, 721 [67 U. S., XVII. 350]; *Mussina v. Cavazos*, 6 Wall 355 [73 U. S., XVIII. 810]; *Edmonson v. Bloomshire*, 7 Wall., 306 [74 U. S., XIX., 91].

After the cases of *Hamilton v. Moore* and *Blair v. Miller*, an attempt seems to have been made in *Wood v. Lide*, 4 Cranch, 180, to adopt a less stringent rule, but the uniform current of decisions since is all the other way; and in *Edmonson v. Bloomshire* we considered the practice so well established as to make it better "To resort to the Legislature for its correction,

than that the court should depart from its settled course of action for a quarter of a century." There are, however, exceptions to the rule, as in *U. S. v. Gomez, supra*, where there was fraud, and in *U. S. v. Booth*, 21 How., 506 [62 U. S., XVI., 169], where the State Court to which the writ was directed ordered the clerk to disregard the writ and make no return; but in all such cases it must appear that the appellant or the plaintiff in error has not himself been guilty of laches or want of diligence.

These appellants bring themselves within none of the exceptions which have ever been recognized. There has been no fraud or circumvention, and the whole difficulty arises from their own negligence alone. It does not appear that the clerk was called upon to make the transcript until after the term of this court to which the appeal was returnable had closed. No security for costs ever was given, and in fact nothing was done towards the prosecution of the appeal until it had become inoperative by lapse of time, except to obtain an order of the court for its allowance. To entertain the cause under such circumstances would be to encourage an addition to the already burdensome delay necessarily attendant upon litigation in this court on account of the crowded state of the docket. Instead of this, we should, as we do, insist on promptness and activity by all who come here to obtain a re-examination of judgments and decrees against them.

It by no means follows, as seems to be supposed by counsel who resist this motion, that if parties appear and without objection go to a hearing in a cause docketed after the return term, our judgment will be void for want of jurisdiction. The real objection is not that this court has no jurisdiction, but that the plaintiff in error, or the appellant, as the case may be, has failed to duly prosecute his suit; and this objection may be taken advantage of by the court upon its own motion, or by the appellee or the defendant in error, at any time before hearing. Mere appearance does not amount to a waiver. In this case the objection was taken in time.

The appeal is dismissed.

NOTE. *Thomas v. Purcell*, No. 984. This appeal is also dismissed, for the reasons stated in the foregoing opinion.

Cited—105 U. S., 451; 108 U. S., 168; 109 U. S., 117; 110 U. S., 401; 111 U. S., 784.

DAVID L. YULEE, *Piff. in Err.*,

v.

FRANCIS VOSE.

(See S. C., 9 Otto, 539-546.)

Removal of causes—time of—by one defendant.

1. Under the Act of 1866, a cause may be removed from a State Court to the Circuit Court at any time before trial.

2. When the cause was called for trial and after the jury was sworn in the State Court, the counsel of defendant directed the attention of the court to the petition for removal, and asked that the complaint be dismissed for want of jurisdiction: *held*, that the application was in time.

3. Where Y., a citizen of Florida, had been sued with other defendants by a citizen of New York, in the courts of the State of New York, and a part of the

other defendants with whom he had been joined were then citizens of that State, and the controversy, so far as it concerned Y., had been by judicial determination, separated from that of the other defendants; it gave Y. a right to the transfer of his part of the suit to the Circuit Court, and required the State Court to proceed no further.

[No. 166.]

Argued Jan. 30, 1879. Decided Mar. 17, 1879.

IN ERROR to the Court of Appeals of the State of New York.

The case is fully stated by the court.

Messrs. Edward N. Dickerson and Wm. M. Merrick, for plaintiff in error.

Messrs. P. Phillips, E. W. Stoughton and Theron G. Strong, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit commenced February 16, 1868, in the Supreme Court of New York, by Francis Vose against the Florida Railroad Company, David L. Yulee, Edward N. Dickerson, Marshall O. Roberts and Isaac K. Roberts. The prayer of the complaint was that Edward K. Dickerson, Marshall O. Roberts and all other associates of Edward N. Dickerson, who, when discovered, should be made parties, might be required to pay a judgment which had been rendered in favor of Vose against the Florida Railroad Company, in the Supreme Court of New York, on which there was due \$136,534.63, and interest from February 1, 1867; that Dickerson, Yulee, Marshall O. and Isaac K. Roberts, and their associates, who it was alleged held all the franchises and property of the company, might be required to hold the income of the railroad, in trust for the payment of the amount of the judgment; that certain securities alleged to be in the hands of Yulee might be also subjected to the payment of the debt; and for other relief. It further appeared from the averments in the complaint, that Yulee was liable as indorser on part of the notes on which the judgment was rendered; and this allegation was not denied in his answer, but no judgment was specifically asked against him on that account.

On the trial of the cause, the complaint was dismissed as to all the defendants. This judgment was affirmed in all respects by the Supreme Court in General Term; but in the Court of Appeals it was reversed as to Yulee, and the cause remanded for a new trial as to him, on account of his liability as indorser of the notes. As to all the other defendants and all other relief asked there was an affirmance.

On the 6th of June, 1873, after the mandate came down from the Court of Appeals, Yulee filed in the trial court his petition, accompanied by the necessary bond, for the removal of the suit as against him to the Circuit Court of the United States for the Southern District of New York, under the Act of July 27, 1866, 14 Stat. at L., 306. That statute provides that if in any suit already commenced, or which might thereafter be commenced, in any State Court, against an alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, a citizen of the State in which the suit is brought is or shall be a defendant; and if the suit, so far as it relates to the alien defendant, or to the defendant who is the citizen of a State other than that in which the suit is brought, is one in which

there can be a final determination of the controversy so far as it concerns him, without the presence of the other defendants as parties, "Then and in every such case the alien defendant, or the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for removal of the cause as against him into the next Circuit Court of the United States to be held in the district where the suit is pending, * * * and it shall thereupon be the duty of the state court * * * to proceed no further in the cause as against the defendant so applying for its removal." The petition for removal set forth, in sufficient form and with sufficient particularity, the citizenship of Vose in New York, and of Yulee in Florida, both then and at the time of the commencement of the suit; but it made no mention of the citizenship of the other defendants. In all other respects the petition met fully the requirements of the statute. The accompanying bond was also correct in form, and no objection was made to its sufficiency. Notice of an intention to make the application for the removal was served on the attorneys of Vose on the 17th of April, 1873. Accompanying the petition was an affidavit of Dickerson, under date of June 4, 1873, to the effect that he, Dickerson, and the defendants Roberts, *were* citizens of the State of New York.

The cause came on for trial June 9, 1873, and a jury was sworn, when the counsel for Yulee called the attention of the court to the proceedings which had been taken for the removal, and moved to dismiss the complaint for want of jurisdiction. This motion was overruled, and the trial proceeded, resulting in a verdict, by order of the court, against Yulee for \$168,589.30 on which judgment was rendered. Exception to the ruling of the court on the question of removal was duly taken. Upon this state of the record, the case was taken by proper proceedings to the Court of Appeals, where the judgment was affirmed, on the ground that the suit was not removable under the Act of 1866 when the petition for removal was filed, because the defendant Yulee was then the only defendant. This ruling of the Court of Appeals is now assigned for error.

When this suit was commenced in the state court, Vose, the sole plaintiff below, was a citizen of New York, and Yulee a citizen of Florida. If there had been no other defendant but Yulee, he could then have removed the cause to the circuit court, under section 12 of the Judiciary Act of 1789, 1 Stat. at L., 79, on filing his petition to that effect, and giving the necessary security at the time of entering his appearance. His joinder with other defendants, however, prevented this at that time; and as the suit then stood, it was impossible for him to proceed under the Act of 1866, because, although his liability as indorser, in which his co-defendants had no interest, was shown, he was united with them in respect to other matters where there could be no final determination of the controversy, so far as it concerned him, without their presence. When the Court of Appeals decided that there could be no relief in the action, except so far as it related to the liability of Yulee as indorser of the notes, the other parts of the case were disposed of, and that

which related to Yulee alone left for final determination. This action of the Court of Appeals separated the controversy in which Yulee was alone concerned as defendant from the rest of the case, and put him for the first time in a condition to invoke the aid of the Act of 1866, 14 Stat. at L., 306. It is true he was then the sole remaining defendant, but it was in a suit which had been commenced against him and others, and which was still pending undisposed of as to him. Under these circumstances, we are clearly of the opinion that the case was removable, notwithstanding the final judgment in favor of all the other defendants in respect to all the other matters in controversy.

This disposes of the question on which the Court of Appeals based its decision; but as the state court was not bound to surrender its jurisdiction until a case had been made which, upon its face, gave Yulee a right to the transfer, it remains to consider whether the record shows that what was done had that effect.

The petition and accompanying affidavits and bond were filed in court June 5, 1873. This was before the trial and thus in time, under the Act of 1866, which in this respect differs from the Act of 1789. When the cause was called for trial and after the jury was sworn, the counsel of Yulee directed the attention of the court to the petition for removal, and asked that the complaint be dismissed for want of jurisdiction. This was in effect asking the court to proceed no further in the cause, as it had been withdrawn from the jurisdiction by reason of the proceedings for removal. As no objection was made specifically to the bond which was offered, we are to presume that the security was satisfactory, and that the court refused to withhold further proceedings because a case for removal had not been made.

We think the application was made in time. The trial had not commenced. The most that can be said is that preparations were being made for a trial.

The petition and the affidavits which accompanied it are to be taken together as part of the same instrument. They are also to be considered in connection with the other parts of the record to which they belong.

The evident purpose of the Act of 1866 was to relieve a person sued with others in the courts of a State of which he was not a citizen, by one who was a citizen, from the disabilities of his co-defendants in respect to the removal of the litigation to the courts of the United States, if he could separate the controversy, so far as it concerned him, from the others, without prejudice to his adversary. In view of the fact that sometimes in the progress of a cause circumstances develop themselves which made such a transfer desirable, when at first it did not appear to be so, the right of removal in this class of cases was kept open until the trial or final hearing, instead of being closed after an entry of appearance, as was the rule under the Act of 1789. We think this gives such a party the right of removal at any time before trial, when the necessary citizenship of his co-defendants is found to exist, and the separation of his interest in the controversy can be made. There is nothing in the Act to manifest a contrary intention, and this construction does no more than give the party to whom this new privilege is

granted an opportunity of availing himself of any circumstances that may appear in his favor previous to the time when he is called upon finally to act. In *Ins. Co. v. Pechner*, 95 U. S., 183 [XXIV., 427], we held that the Act of 1789 clearly had reference to the citizenship of the parties when the suit was begun, because the party entitled to the removal was required to make his election when he entered his appearance. But here a party otherwise entitled to a removal is embarrassed by the presence of those whom he cannot control. In view of this, the time of making his election is extended until he is brought to trial; and it is not at all in conflict with *Pechner's* case to say that he may avail himself of his release from the operation of the disabilities growing out of his joinder in the action with other defendants, whenever that release occurs, if before trial or final hearing as to him.

When the application for removal was made it appeared on the face of the record that Yulee, a citizen of Florida, had been sued with other defendants by Vose, a citizen of New York, in the courts of the State of New York, and that a part of the other defendants with whom he had been joined were then citizens of the State of New York. It also appeared that the controversy, so far as it concerned Yulee, not only could be, but actually had been, by judicial determination, separated from that of the other defendants. This, as we think, gave Yulee a right to the transfer of his part of the suit to the circuit court, and required the state court to proceed no further. Inasmuch as the Court of Appeals has sustained the judgment given after the refusal to permit the transfer to be made, *the judgment of the Court of Appeals is reversed and the cause remanded for such further action in accordance with this opinion as may be necessary.*

Cited—100 U. S., 474; 16 Blatchf., 317; 42 N. J. L., 318; 5 N. W. Rep., 749; 9 N. W. Rep., 320.

THOMAS R. HARTELL ET AL., *Appls.*,

v.

BENJAMIN C. TILGHMAN.

(See S. C., 9 Otto, 547-560.)

Patent laws—jurisdiction of action.

*1. A suit between citizens of the same State cannot be sustained in a Circuit Court of the United States, as arising under the patent laws, where there is no denial of the validity of plaintiff's patent, where its use is admitted and where a subsisting contract is shown governing the rights of the parties in the use of the invention.

2. Relief in such an action is founded on the contract, and not on the patent laws of the United States.

[No. 172.]

Argued Mar. 4, 5, 1879. Decided Mar. 17, 1879.

APPPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is fully stated by the court.

Messrs. M. D. Connelly and William Henry Rawle, for appellants:

When the conflict between the parties grows

out of their contract relating to a patent, or out of their license, or the terms of a license to be thereafter granted to use a patent, and does not arise from the patent itself, the Federal Courts will not entertain jurisdiction of the suit.

Slemmer's Appeal, 58 Pa., 164; *Wilson v. Sandford*, 10 How., 99, 100; *Hartshorn v. Day*, 19 How., 211 (60 U. S., XV., 605); *Goodyear v. Rubber Co.*, 4 Blatchf., 63; *Blanchard v. Sprague*, 1 Cliff., 288; *Goodyear v. Day*, 1 Blatchf., 565; *Mersevole v. Paper Collar Co.*, 6 Blatchf., 357; *Burr v. Gregory*, 2 Paine (C. C.), 426; *Hill v. Whitcomb*, 1 Holmes, 317, 822; *Pulte v. Derby*, 5 McLean, 328, 336; *Curt. Pat.*, sec. 496.

Nor does the case of *Brooks v. Stolley*, 3 McLean, 523, conflict with these views. It is expressly stated in the report, that "The defendant admitted his failure to make payment," and defended on the ground of the invalidity of the patent.

Mr. Geo. Harding, for appellee:

In the case under consideration, the complainants have licensed the defendant to use the patented right on certain conditions. If the use go beyond these conditions, there is an infringement, which must stand upon the general ground, unaffected by the contract.

Brooks v. Stolley, 3 McLean, 525, 529.

In *Bloomer v. Gilpin*, 4 Fish., 50, it is said by Judge Levitt: "But if an infringement is proved, jurisdiction is conferred; and, having power to protect the right of a party under a patent, the court will take cognizance of other matters as incidental to the infringement."

"An action which raises a question of infringement, is an action arising under the law, and one who has the right to sue for the infringement, may sue in the circuit court. Such a suit may involve the construction of a contract as well as the patent; but that will not oust the court of its jurisdiction. If the patent is involved it carries with it the whole case."

Littlefield v. Perry, 21 Wall., 222 (88 U. S., XXII., 579).

In *Hartshorn v. Day* (*supra*), the case of *Brooks v. Stolley*, is cited and distinguished without interrogatory comment. In all reported cases where it is in point, *Brooks v. Stolley*, is cited approvingly and built upon.

The rule, then, upon which all these cases may be harmonized, is so plain that it cannot be mistaken, and it is one by which the state courts as well as those of the United States have uniformly governed themselves, viz: that where the main issue in the suit relates to a contract between the parties, the circuit court has no jurisdiction, although the subject-matter of the contract may be a patent-right, but that where a question of contract arises incidentally in a suit for infringement, the court is not ousted of its jurisdiction, but may pass upon such collateral issue.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the Eastern District of Pennsylvania, in which Tilghman, the appellee, describes himself in his bill as a citizen of that State, and the defendants as citizens of the same State. It thus appears affirmatively that, if the court had jurisdiction of the case, it was for some other reason than the citizenship of the parties; and

* Head notes by Mr. Justice MILLER.

it is argued by appellants that there is no such other ground for the jurisdiction.

The counsel for appellee, however, insists that it is "a case arising under the patent laws of the United States" and, therefore, cognizable in the Circuit Courts of the United States, on account of the subject-matter of the suit.

Subdivision 9 of section 629 of the Revised Statutes, which section is devoted to a definition of the powers of that court, gives it original jurisdiction "Of all suits at law or in equity arising under the patent or copyright laws of the United States."

This section of the revision is founded on section 55 of the Act of July 8, 1870, 16 Stat. at L., 206, which declares that all actions, suits, controversies and cases arising under the patent laws of the United States "Shall be originally cognizable, as well at law as in equity, in the Circuit Courts of the United States;" and that those courts shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and on a decree for infringement complainant shall be entitled, in addition to profits, to the damages he has sustained thereby. The language of the Act of 1836 is substantially the same, except as to the damages to be recovered. We are, therefore, to decide whether this suit is one arising under the patent laws of the United States, within the meaning of the clause we have cited.

If a man owning a tract of land, his title to which is a patent from the United States, should sell or lease that land, and a controversy should arise between him and his vendee or lessee as to their rights in the premises, it could not be said that any suit brought by the vendor to assert his rights was a suit arising under the land laws of the United States; and this would be beyond question if the defendant, admitting the title of plaintiff to the land, should make no other defense than such as was founded in rights derived from plaintiff by contract. That is the case before us, with the variance that plaintiff's title is to a patent for an invention instead of a patent for land.

His bill begins by a statement that he is the original inventor and patentee of a process for cutting and engraving stone, glass, metal and other hard substances. It is the one known as the sand-blast process.

He then sets out what we understand to be a contract with defendants for the use by the latter of his invention. He declares that defendants paid him a considerable sum for the machines necessary in the use of the invention, and also paid him the royalty which he asked, for several months, for the use of the process, which he claims to be the thing secured to him by patent. He alleges that after this defendants refused to do certain other things which he charges to have been a part of the contract, and thereupon he forbade them further to use his patent process, and now charges them as infringers.

The defendants admit the validity of plaintiff's patent. They admit the use of it and their liability to him for its use under the contract. They set out in a plea the contract as they understand it, and the tender of all that is due to plaintiff under it, and their readiness to perform it.

What is there here arising under the patent laws of the United States? What controversy that requires for its decision a reference to those laws or a construction of them? There is no denial of the force or validity of plaintiff's patent, nor of his right to the monopoly which it gives him, except as he has parted with that right by contract.

The complainant's view of the case is that there was a verbal agreement that he should prepare and put up in defendants' workshop, ready for use, such parts of the machinery as were of special use in his invention, for which defendants were to pay him at all events. That after this was done defendants should take a license for the use of his invention; that this license was to be the same in its terms as that given to all other persons who used the process, and among these were the right on the part of the patentee to visit the works of the defendants at all times, as well as to inspect their books, with a view to ascertain the amount of work done on which royalty was due. Also, that once every year the complainant had a right to fix the tariff of rates to be paid by defendants, by increasing it if he so determined, with no other limitation than that the increase of rates should apply equally to all licensees of the patent.

It is established by evidence of which there is no contradiction that complainant did furnish and put in place the machines, for which defendants paid him \$649. That complainant also furnished a schedule of the rates of royalty to be paid on the different kinds of work to which the patented process was to apply, and that defendants made monthly returns and monthly payments according to this schedule, which were received by plaintiff without objection. That besides the machinery purchased of plaintiff, the defendants had expended about \$3,000 in erecting a blower for the use of the sand-blast of complainant's process.

At this stage of the affair complainant tendered to defendants two blank forms of license to be signed by both parties, containing the two conditions we have mentioned. After some fruitless negotiations, defendants refused to sign these papers, and complainant thereupon, as we have said, forbade them to use the process, and on their disregard of this admonition brought his bill in chancery for an injunction, and for an account of profits and additional damages.

The argument of counsel is that defendants, having refused to sign the papers tendered them, are without license or other authority to use his invention, and are naked infringers of his rights under the Acts of Congress.

The defendants say that they never agreed to accept a license with the conditions we have mentioned in them; that they never agreed to permit complainant's agents to inspect all the processes of their own works, some of which were valuable secrets, nor, after they had expended thousands of dollars in preparations for the use of his process, to place themselves under his arbitrary control as to the prices they should pay for the use of his invention. And they say that when the machines were in full operation and paid for, and the schedule of rates had been furnished by complainant and accepted by them, the contract was complete, and needed no such written agreement as the one tendered them for signature.

Such were the pleadings and the principal conceded facts on which the court was called to act, and we pause here to consider the question of jurisdiction on the case thus stated.

One of the earliest cases on this subject was decided by *Mr. Justice Thompson* in the New York Circuit. It was a bill to procure a decree that the assignment of a patent by Burnap to Gregory was to the extent of three fifteenths for the benefit of complainant, Burr, and to have a conveyance executed accordingly. The court said that if the validity of the patent or of the assignment could be drawn in question, the circuit court might have jurisdiction. But as it was a matter which grew out of the contract, and there was no averment of citizenship, the amount prayed for, growing out of the profits, did not vary the case so as to give jurisdiction. *Burr v. Gregory*, 2 Paine, 426. This decision was made before the Act of 1836, but is indicative of the sound doctrine that controversies arising out of contracts concerning patent-rights did not necessarily belong to the Federal Courts.

The next case in chronological order was founded on the Act of 1836, 5 Stat. at L., 117, the language of which, as we have seen, was on this point preserved in the Act of 1870, and is embodied in the Revised Statutes. It is the only authoritative construction of the statute on that point made by this court, except *Littlefield v. Perry*, 21 Wall., 205 [8 U. S., XXII., 577], which is in accord with it, and we think it covers the case under consideration. It is the case of *Wilson v. Sandford*, 10 How., 99, and the opinion was delivered by *Chief Justice Taney*.

The complainant was assignee of the Woodward planing-machine patent, and had licensed the defendants to use one machine upon payment of \$1,400, of which \$250 was paid down, and notes payable in nine, twelve, eighteen and twenty-four months given for the remainder. This license contained a provision that if either of the notes was not punctually paid at maturity, all the rights under the license ceased and reverted to "Wilson, who became re-invested in the same manner as if the license had never been made." Upon failure to pay the first two notes, Wilson brought his bill, charging that, notwithstanding this, the defendants were using the machine and thus infringing his patent. He prayed an injunction, an account, etc.

The bill was dismissed in the court below, and on appeal to this court the appeal was dismissed because the amount in controversy did not exceed \$2,000. If, however, it had been a case arising under the patent laws of the United States, no sum was necessary to give jurisdiction.

The precise question, therefore, to be decided was, whether the suit arose under the patent laws of the United States; and the *Chief Justice*, after reciting the clause in the Act of 1836 which gives the circuit courts jurisdiction *in all* such cases, proceeds to discuss that question in this manner; "The peculiar privilege," he says, "given to this class of cases was intended to secure uniformity of decision in the construction of the Act of Congress in relation to patents. Now, the dispute in this case does not arise under any Act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract

stated in the bill, and there is no Act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, 'that the appellant's re-investiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,' and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction, unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not in a court of chancery depended altogether upon the rules and principles of equity, and in no degree whatever upon any Act of Congress concerning patent-rights. And whenever a contract is made in relation to them, which is not provided for and regulated by Congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal."

Let us see how closely these remarks and the case to which they related apply to the present case. In that case a contract was made under which the defendant entered on the use of the invention. This is also true of the case before us. In that case it is charged that an act to be performed by the defendant and licensee under the contract was not performed, to wit: payment of the notes. In the case before us it is alleged in like manner that the defendants failed to perform part of the contract, to wit: to sign a license.

In that case plaintiff asserted, as in this, that all right under the contract had ceased, and he was remitted to his original rights under the patent, and could, therefore, sue in the Federal Court under the statute; but the court held this to be erroneous, and that the rights of the parties depended on the contract and not on the statute. Why does not the same rule apply to the present case? *Wilson's* case was stronger than *Tilghman's* case, for two reasons:

1. Because the contract was all in writing, and there was no dispute about its meaning. Here it was in parol, and there is not only dispute about its meaning, but the rights of the parties depend almost wholly upon the points in dispute, which have no relation to the patent laws of the United States.

2. In *Wilson's* case there was an express provision in writing that a failure to pay any note when due, forfeited the license and re-invested Wilson with all his original rights. No such provision is set up in the contract between Tilghman and defendants.

In this case, as in that, the defendants had bought the machine and paid for it and used it. In this case, as in that, the right to its further use depended upon the contract, and was to be determined by its construction and effect. In this, as in that, the case in *Judge Taney's* language, "Does not arise under an Act of Congress, nor does the decision depend upon the construction of any law in relation to patents. The rights of the parties depend altogether upon common law and equity principles."

In *Goodyear v. India rubber Co.*, where the

licensees had neglected for three years to pay the royalty which they had agreed to pay, and refused to permit their books to be inspected, and where one of the prayers of the bill was that until they had so accounted and paid the royalty due they should be enjoined from the use of the invention, *Judge Ingersoll* held that the bill stated no case arising under the patent laws of the United States, but did make a case for relief on the contract. 4 Blatchf., 63. And *Judge Blatchford* stated the doctrine still more strongly in *Mersevole v. Paper Collar Co.*, 6 Blatchf., 356.

In the case of *Blanchard v. Sprague*, decided by *Mr. Justice Clifford* in 1859, he said: "No dispute arises in the case under any Act of Congress, nor does the decision depend in any respect on any law of Congress in relation to patents. On the contrary, it arises entirely out of the agreement, express or implied, for a license, and the rights of the parties depend altogether upon the ordinary rules of law. * * * What the complainant really claims is, that he terminated or revoked the license under the agreement which previously existed between the parties, by giving the notice, and that the defendant subsequently continued the use of the machine without any stipulation as to the rate of tariff." How precisely descriptive of the case under consideration, in which *Tilghman*, claiming that he has terminated at his own option the arrangement under which the defendants had been operating, can now sue in the Federal Court for an infringement in violation of the Acts of Congress. In the case mentioned *Judge Clifford* held otherwise. 1 Cliff., 288.

To the same purport is *Hill v. Whitcomb*, decided by *Judge Shepley*, and reported in 1 Holmes, 317.

It may be conceded that the case of *Brooks v. Stolley* [3 McLean, 523], decided that *Mr. Justice McLean* on the circuit prior to the Act of 1836, is, in some respects, opposed to the authorities we have cited. But in them it stands alone, and is not supported by the better reason.

We may be asked, if we concede the complainant's statement of the verbal agreement to be correct, what remedy has he on it? The answer is very easy. He can establish his royalty once every year, and sue plaintiff at law and recover every month or every year for what is due. If he desires to assert his right of examining defendants' works, he can, in a proper case made, compel them to submit to this examination. If he desires to enforce the agreement for executing a written contract of license, he can bring a suit in equity for specific performance, and with or without that specific relief he can ask the court to enjoin defendants from using the patented process until they execute the agreement and comply with its requirements. All these and perhaps other remedies are open to him to enforce the contract. He may also file a bill in chancery to have it annulled or set aside because of the difficulties placed in the way of its fair execution by defendants.

Not content, however, with all these remedies, complainant assumes that he has, under the condition of things he has proved, the right in himself to abandon the contract, to treat it as a nullity, and to charge the defendants as infringers, liable as trespassers under the Act of Congress to pay both profits and damages.

The analogy of an action of ejectment to recover possession of land in cases of a broken contract of sale is referred to. The analogy, however, is imperfect and deceptive. That action is one at law, depending on the existence of the strict legal title to land in plaintiff, and the doctrine that the right of possession follows the title. It is a peculiar action, founded on a peculiar doctrine limited to real estate, and liable to be defeated in equity by a bill for specific performance and an injunction.

In the case of a patent, plaintiff does not recover any specific property, real or personal. He recovers damages or compensation for the use of his monopoly; and if he has made a bargain with the defendant, his right to rescind or annul it must depend on all the equitable circumstances of the case.

Here, where he has sold and received a considerable sum for a machine of no use for any other purpose: where the defendants have spent several thousand dollars on other machinery, which is also valueless except in connection with the use of this process; where defendants have paid and plaintiff received for many months the royalty which plaintiff established, and are still ready and willing to continue payment; and where the contract being in parol the parties differ about one or two of its minor terms, we do not agree that either party can of his own volition declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can be done only by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him, or damages can be recovered for its violation. But until so rescinded or set aside, it is a subsisting agreement, which, whatever it is, or may be shown to be, must govern the rights of these parties in the use of complainant's process, and must be the foundation of any relief given by a court of equity.

Such a case is not cognizable in a court of the United States by reason of its subject-matter, and as the parties could not sustain such a suit in the circuit court by reason of citizenship, this bill should have been dismissed.

The decree of that court is, therefore, reversed, with directions to dismiss the bill without prejudice.

Mr. Justice Bradley, dissenting:

I dissent from the opinion of the court in this case. I cannot see the slightest room for doubt as to the jurisdiction of the circuit court. The suit is a bill in equity, which sets up letters patent issued to the complainant for a new and useful improvement in cutting and engraving stone, metal and glass; and complains that the defendants are infringing said patent by using the said process without any license therefor, and praying an injunction, and decree for profits and damages. The bill also states the fact that negotiations had passed between the complainant and the defendants for a license to use the said invention, but that the defendants had failed to comply with the conditions, and hence had no right to continue the use, but persisted in doing so. This is the substance of the bill. It is a clear case, it seems to me, "arising under the patent laws of the United States," and is, therefore, properly cognizable

by the Circuit Court of the United States under the 629th section, article 9, and sections 4919 and 4921 of the Revised Statutes, and the laws from which that article and those sections were compiled. The cause of action, or ground of relief, is the infringement of the patent. The plaintiff chooses to place himself on that ground alone. By doing so he runs the risk of any defense which would show a right to use the invention, whether license from himself, invalidity of the patent, non-infringement, or any other proper defense to a suit on a patent. He states in his bill, as he had a right to do by the rules of equity pleading, what the supposed defense would be, and answers it. This anticipation of the defense does not change the nature of the suit in the least. Perhaps he need not have anticipated the defense, but might have left the defendants to develop it in their answer. Certainly in that case the character of the defense would not have ousted the court of its jurisdiction. If a cause of action is cognizable by the United States Court, the defendant cannot oust that jurisdiction by his defense to the action. He may defeat the action, but he cannot destroy the jurisdiction.

It will not do to say that the remedy of the plaintiff was a bill for a specific performance of the parol agreement that the defendants would take a license. Perhaps the plaintiff had such a remedy. But he did not choose to pursue it. He waived it by suing as for an infringement. He chose to take the responsibility of having a right to put an end to the agreement without juridical aid. Having done this, his only remedy was to sue on the patent as for an infringement. He certainly had a right to do this. He was not bound to sue for specific performance. Nor was he bound to sue for the avoidance of the supposed agreement. It may be that it would have been his better remedy. It may be that the result of the negotiation is to create a defense to the suit for infringement, amounting to a parol leave and license, or a license in law. If so, the plaintiff has only made a mistake in suing as for an infringement of his patent, and may fail in his action. How that may be it is unnecessary now to inquire, since the majority of this court has decided the case on the question of jurisdiction. But whether it be so or not, the character of the present suit is not changed, as a suit for injunction and damages for the alleged infringement.

How, I would ask, could a state court have determined this suit? Suppose the defense of license, express or implied, had failed, what would the state court have done? Could it have taken an account of profits? Could it have assessed damages for the infringement? Could it have granted an injunction to restrain the defendants in the use of the invention? This would have been a new branch of jurisdiction and inquiry for a state court to have assumed. It is too obvious for argument, as it seems to me, that no state court has, or could rightfully take, jurisdiction of the suit.

It is perfectly well settled, I admit, that where a suit is brought on a contract, of which a patent is the subject-matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws. But where infringement of the patent is the ground of action, and redress is

sought therefor, the case does arise under the patent laws, and is cognizable in the Federal Court, no matter what collateral issues may be raised by the defendant. He may set up that the patent is void, that he does not infringe, that he has a license, or a release, or what not; the Federal Court is fully competent to try any of the issues thus made.

The case principally relied on by the majority of the court is that of *Wilson v. Sandford*, 10 How., 99. But there the bill prayed to have the license declared void. The *Chief Justice* said: "The object of the bill is to have this contract set aside and declared to be forfeited, and the prayer is that the appellant's re-investiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by this court, and for an injunction." In such a case it may be that relief is properly to be sought in the state court. But if the question were a new one, I should think that where the complainant seeks damages for infringement and an injunction against the use of the invention, making that the basis of his suit, it would not be improper, nor oust the jurisdiction of the Federal Court, to join in such a bill, as ancillary to the principal relief sought, an application to avoid an inequitable license held by the defendant. I see nothing incongruous in the joinder of such matters in the bill. It seems to me that the views of *Mr. Justice McLean* on this subject as expressed in *Brooks v. Stolley*, 3 McLean, 523, are perfectly sound and just. There the complainant had given a license to use a patented invention, determinable on non-payment of the royalty. On failure to pay he filed his bill for an injunction and damages, at the same time stating the granting of the license and the failure to perform the conditions of it. *Mr. Justice McLean* said: "It is suggested that, as the whole controversy in the case arises under the contract of license, the parties to which being citizens of this State, the Federal Court cannot take jurisdiction. This objection would be unanswerable, if no right were involved in the controversy except what arises out of the contract, as, for instance, the circuit court could take no jurisdiction under the contract of an action, merely to recover the sums agreed to be paid by the defendant; but in the present aspect of the case, it is not limited to the contract. The complainants set up their right under the patent, and allege that the defendant is infringing that right; that the license affords no justification whatever to the defendant. The right, then, of the complainants to an injunction is not founded by them on the contract, but on the assignment of the patent. If the object of the bill were merely to enforce the specific execution of the contract, the Circuit Court of the United States could exercise no jurisdiction in the case." See, also, *Curt. Pat.*, sec. 496, to the same purpose, citing this opinion.

It seems to me, with all due submission, that if we are to have regard to "the better reason," we shall find it expressed in these remarks of *Justice McLean*.

It may be laid down, I think, as a general principle, that where a case necessarily involves a question arising under the Constitution or laws of the United States, and cannot be decided without deciding that question, it is a case arising under said Constitution and laws, and may be

brought, as the law now stands, in the Circuit Court of the United States, although other questions may likewise be involved, which might be tried and decided in the state courts. I do not believe in the doctrine that the presence of a question of municipal law in a case which necessarily involves federal questions can deprive the Federal Courts of their jurisdiction. It is too narrow a construction of the judicial powers and functions of the Federal Government and its courts.

But in this case the complainant asks no relief in relation to the supposed agreement between him and the defendants. He places himself solely on his rights accruing under the patent and on the defendant's infringement of those rights. I think, therefore, the jurisdiction of the Circuit Court of the United States was undoubted. I am authorized to say that the *Chief Justice* and *Justice Swayne* concur in this opinion.

Mr. Justice Strong and *Mr. Justice Hunt* did not sit in this case, nor participate in its decision.

Cited—106 U. S., 619; 16 Blatchf., 467.

THE NATIONAL BANK OF COMMERCE IN ST. LOUIS, *Plff. in Err.*,

v.

THE NATIONAL BANK OF COMMERCE IN NEW YORK.

(See S. C., 9 Otto, 608-610.)

Amending writ of error—new citation.

1. This court may allow a writ of error to be amended in its return day. The fact that thirty days could not elapse between the date of the writ and the return day presents no objection.

2. Where the return day of the writ is changed, a new citation should issue to notify the defendant in error of what has been done.

Submitted Mar. 3, 1879. Decided Mar. 17, 1879.

ON motion to amend writ of error to the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Mr. P. Phillips, in support of motion.

No counsel appeared in opposition.

Mr. Chief Justice Waite delivered the opinion of the court:

The judgment below was rendered October 5, 1878, and the present Term of this court commenced October 15. A writ of error returnable on the "second Monday in October next" was sued out and served the day the judgment was rendered. A citation returnable on the same day with the writ was duly signed and served before the first day of the Term.

Rule 8 of this court provides that in cases when the judgment is rendered less than thirty days before the first day of the next term of this court, the writ of error and citation may be made returnable on the third Monday of the

term, and be served before that day. By section 1005 of the Revised Statutes this court is authorized at any time, in its discretion and upon such terms as it may deem just, to allow an amendment of a writ of error when it is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, provided the defect has not prejudiced, and the amendment will not injure, the defendant in error. Section 999, R. S., provides that the adverse party shall have at least thirty days' notice of a writ of error by citation.

The plaintiff in error now moves to amend the writ so as to make the return day the first day, or the third Monday of the present Term; for the issue of a new citation to conform to the amended writ, and for leave to file the transcript and docket the cause.

We think the motion should be granted. Section 1005 clearly authorizes us, in our discretion, to allow the amendment of the writ, and we cannot see that the defect has prejudiced, or that the amendment will injure, the defendant in error. The fact that thirty days could not elapse between the date of the writ and the return day presents no objection. Section 999 of the Revised Statutes is but the re-enactment of a similar provision in section 22 of the Judiciary Act of 1789, 1 Stat. at L., 84, and until the promulgation of the present rule at the December Term, 1867 [Book XX], all writs of error were made returnable on the first day of the term next after their date, no matter how short the time between the day of the issue and that of the return. The citation followed the writ, and service was required before the return day. By a rule entered as early as the February Term, 1803, if the writ issued within thirty days before the meeting of the court, the defendant in error was at liberty to enter his appearance and proceed to trial, or otherwise the cause was continued. Rule 16, Feb. Term, 1803. 1 Cranch, xviii. At the same Term, in *Lloyd v. Alexander*, 1 Cranch, 365, the reason for the adoption of the rule is stated, and in *Welsh v. Mandeville*, 5 Cranch, 321, the court decided that when the citation was not served thirty days before the term, defendant in error would not be required to go to a hearing without his consent. The meaning of the statute is not that the citation shall be served thirty days before the return day, but that the defendant in error shall have at least thirty days' notice before he can be compelled to go to a hearing. We do not understand that the case of *Yeaton v. Lenox*, 7 Pet., 220, holds otherwise. Certainly there was nothing in the facts to require any such decision.

As the return day of the writ is changed, a new citation should issue to notify the defendant in error of what has been done. This is clearly within the rule as stated in *Dayton v. Lash*, 94 U. S., 112 [XXIV., 33].

The transcript may be filed and the cause docketed upon a compliance by the plaintiff in error with the rules in that particular.

An order will be entered allowing the plaintiff in error to amend the writ by inserting the third Monday of the present Term as the return day, in lieu of the "second Monday in October," and requiring him to cause a new citation, returnable on the first Monday in May next, to be issued and served on the defendant in error.

WILLIAM H. HACKETT ET AL., EXRS. OF

WILLIAM H. Y. HACKETT, Deceased, *Plffs.**in Err.,*

v.

CITY OF OTTAWA.

(See S. C., 9 Otto, 86-96.)

City bonds—recitals in—estoppel.

1. Where a city, when instructed by a majority of its voters, had authority by its charter to borrow money and to issue its bonds therefor, and bonds issued by it by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city; the city is estopped to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes.

2. A corporation is held to a careful adherence to truth in its dealings, and cannot, by its representations or silence, involve others in onerous engagements, and then defeat the calculations and claims which its own conduct had superinduced.

[No. 880.]

Submitted Jan. 6, 1879. Decided Mar. 24, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case, which arose in the court below, is fully stated by the court.

Messrs. Frank W. Hackett and George S. Eldredge, for plaintiffs in error:

The City is estopped by the recitals upon the face of the bonds, as against the plaintiffs, to deny that they are valid obligations and issued for proper purposes under its charter.

Knox Co. v. Aspinwall, 21 How., 539 (62 U. S., XVI., 208); *Bissell v. Jeffersonville*, 24 How., 287 (65 U. S., XVI., 664); *Van Hook v. Madison*, 1 Wall., 291 (68 U. S., XVII., 538); *Mercer Co. v. Hackett*, 1 Wall., 83 (68 U. S., XVII., 548); *St. Joseph Township v. Rogers*, 16 Wall., 644 (83 U. S., XXI., 328); *Superior v. Schenck*, 5 Wall., 772 (72 U. S., XVIII., 556); *Grand Chute v. Winegar*, 15 Wall., 356 (82 U. S., XXI., 170); *Coloma v. Eaves*, 92 U. S., 434 (XXIII., 579); *Marcy v. Osuego*, 92 U. S., 637 (XXIII., 748); *Moultrie Co. v. Bk.*, 92 U. S., 631 (XXIII., 631); see, also, *Cromwell v. Sac Co.*, 96 U. S., 51 (XXIV., 681); *Comrs. v. Bolles*, 94 U. S., 104 (XXIV., 46); *Warren Co. v. Marcy*, MS. Op.; *San Antonio v. Mehaffy*, 96 U. S., 313 (XXIV., 817); *Dill. Mun. Bonds*, p. 33; see, *Nicolay v. St. Clair Co.*, 3 Dill., 163; *Aller v. Cameron*, 3 Dill., 198; *Mygatt v. Green Bay*, 1 Biss., 292.

Messrs. C. B. Lawrence, Campbell & Lawrence and Charles Blanchard, for defendant in error:

There is no question in this case, of municipal purchasers of negotiable paper, for two reasons: first, the bonds were issued without statutory authority, and for a purpose for which no statute authority would have been availing; and second, the bonds showed this defect on their face.

E. Oakland v. Skinner, 94 U. S., 258 (XXIV., 126); *S. Ottawa v. Perkins*, 94 U. S., 260 (XXIV., 154); *Marsh v. Fulton Co.*, 10 Wall., 683 (77 U. S., XIX., 1042); *McClure v. Oxford*, 94 U. S., 432 (XXIV., 129); *Harshman v. Bates Co.*, 92 U. S., 575 (XXIII., 748).

NOTE.—Recitals in negotiable bonds or securities evidence of the facts recited; estoppel by; recitals in. See note to *Mercer Co. v. Hackett*, 68 U. S., XVII., 548.

See 9 OTTO.

Mr. Justice Harlan delivered the opinion of the court:

This action is upon certain bonds issued by the City of Ottawa, Illinois, in the year 1869, and of which the testator of plaintiffs in error became the holder and owner, for value, before maturity. They are in the usual form of municipal bonds, and, besides pledging the faith of the City irrevocably for their payment, contain these recitals:

"This is one of one hundred and twenty bonds of like amount and even date herewith, numbered one to one hundred and twenty respectively, issued by the City of Ottawa by virtue of the charter of said City; wherein it is provided that the City Council shall have power to borrow money on the credit of the City, and to issue bonds therefor, and pledge the revenue of the City for the payment thereof, provided that no sum or sums of money shall be borrowed at a greater interest than ten per cent. per annum."

Art. V., sec. 3.

"No money shall be borrowed by the City Council until the ordinance passed therefor shall be submitted to and voted for by a majority of the voters of said City attending an election for that purpose. Art. X., sec. 20. And also in accordance with a certain ordinance passed by the City Council of said City on the 15th day of June, A. D. 1869, entitled 'An Ordinance to Provide for a Loan for Municipal Purposes,' which ordinance was ratified by a majority of all the qualified voters of said City at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the City Council of said City on the 30th day of July, 1869, entitled 'An Ordinance to carry into Effect the Ordinance of June 15, 1869, entitled An Ordinance to Provide for a Loan for Municipal Purposes.'

Witness the signatures of the mayor and clerk of said City, and the corporate seal thereof, this 20th day of August, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL] HENRY A. SCHULER, Mayor.
R. N. WATERMAN, Clerk."

The City, upon grounds which will sufficiently appear in the course of the opinion, denied all liability upon the bonds, and to its pleas a demurrer was interposed. The demurrer was overruled; and the plaintiffs in error electing to stand by the demurrer, judgment was rendered for the City. From that judgment the present writ of error is prosecuted.

The Illinois Constitution of 1848 declares that "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." Art. 9, sec. 5.

The charter of the City of Ottawa, granted in 1853, confers upon its Council the power to establish hospitals; to provide the City with water; to open, widen, extend and otherwise improve and repair streets and other public highways; to establish, erect and keep in repair bridges; to erect market-houses; to provide all needful public buildings for the use of the City; and various other municipal powers, the exertion of which necessarily involves the raising and disbursement of large sums of money. Laws of Ill., 1853, p. 296.

Among the powers expressly delegated to the Council, is the power "To appropriate money

and provide for the payment of the debts and expenses of the City," and, with the sanction of a majority of voters attending at an election for that purpose, "To borrow money on the credit of the City, and to issue bonds therefor, and pledge the revenue of the City for the payment thereof."

The bonds in suit upon their face import: 1. That the faith of the City is irrevocably pledged for their payment. 2. That they were issued in pursuance of the power which the Council possessed to borrow money on the credit of the City and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever for the supposition that the Council in issuing them transcended its authority, or issued them for other than municipal or corporate purposes. They justify the opposite conclusion.

The City, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in nowise connected with or under the control of the City; all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

The ordinance of June 15, 1869, authorizes the mayor to borrow, in the name, for the use, and upon the bonds of the City, the sum of \$60,000, "to be expended in developing the natural advantages of the City for manufacturing purposes," and provides "That no application shall be made of the proceeds of the said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be duly passed for that purpose by the City Council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the City." It further provides that a sufficient sum to pay interest on the loan should be annually provided by taxation, and set apart as a separate fund, to be applied solely to payment of the interest on the bonds. That ordinance was ratified at an election held on the 20th of July 1869, by a majority of all the legal voters of the City. The ordinance of July 30, 1869, was to carry into effect the one of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, "To be used by him in developing the natural resources of the surroundings of the City, and that the said Cushman is authorized and directed to expend the sum in the improvement of the water-power upon the Illinois and Fox Rivers within the City and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the City and its immediate vicinity." It provided that Cushman should execute and deliver to the mayor his obligation that he would, with out unreasonable delay, and by proper appliances, bring into use all the available water of the two rivers at Ottawa, as fast as it might be required for actual use, and as fast as it could be leased at fair and reasonable rates—"The intent of this ordinance being to secure the improvement and development of said water-power in this City by appropriating the loan

obtained under the ordinance aforesaid for that purpose, or *pro rata* so far as said water-power shall be made available for practical use." The ordinance of July 30, 1869, further provided that Cushman should bind himself to return the bonds, and save the City harmless from all loss if the work shall not be constructed.

The City avers that the franchises and powers referred to in the ordinance of July 30, 1869, were those granted to the Ottawa Manufacturing Company by an Act approved February 15, 1851, and by an Act amendatory thereof, approved February 16, 1865. The first Act created certain persons therein named a corporation under the style of "The Ottawa Manufacturing Company," with authority to erect a dam across Fox River at a designated point, "For the purpose of creating a water-power," and to "use, lease or otherwise dispose of the same, and construct such other works, buildings and machinery as may be deemed necessary or proper to use such water-power to promote the interests and objects of the company." The second Act conferred the additional right to build a dam across the Illinois River, and to construct races so as to introduce the water into the pool of the dam authorized to be erected across the Fox River. And for all the purposes indicated in the original and amendatory Act the company was authorized to "take and use such portion of any highway, street, alley or public ground as may be deemed necessary." But neither of the ordinances, it will be observed, designates, by name, that or any other private company. Nor is it distinctly alleged by the City, nor asserted in argument, that the plaintiff understood the ordinances as referring to that company, or that he read them or had any actual knowledge of their terms at the time of his purchase. If the Council intended the general public and, particularly, purchasers of its bonds to know that the proposed development of the natural advantages of the City for manufacturing purposes was to be made under the franchises and powers, or for the benefit of that or any other private corporation, common fairness required that it should have so declared in the ordinances, and thereby distinctly informed all who should examine them, of what it now avows was its real purpose, viz.: by a simple donation to give aid to a particular private corporation, established for business ends exclusively. If by reason of the general reference, in the bonds, to the two ordinances of June and July, 1869, the purchaser is chargeable with notice of their provisions (a proposition to be hereafter examined), the utmost which the City in view of the indefinite language of the ordinances, can claim is that he had notice that the bonds were issued for the purpose of "Developing the manufacturing resources of the City for manufacturing purposes." Nothing more. This brings us to a question which counsel have discussed with some elaboration in their printed arguments.

We have seen that the charter of the City confers upon the Council power to borrow money, upon the credit of the City, and to issue bonds therefor. No limitation is prescribed as to the amount which may be borrowed. Nor is any express restriction imposed as to the objects or purposes for which bonds may be issued. It is clear, therefore, that the Council, having

secured the assent of the requisite majority of voters, might rightfully borrow money upon bonds of the City for every purpose which could fairly be deemed municipal or corporate. But the specific contention of the City is that the development of the natural resources of the City for manufacturing purposes is not, upon principle or within the meaning of the Illinois Constitution of 1848, a corporate purpose. After a careful examination of the decisions of the Supreme Court of Illinois to which our attention has been called, we find this question by no means free from difficulty. The leading case, *Taylor v. Thompson*, 42 Ill., 9, involved the question whether a tax levied, under the authority of an Act of the Legislature passed in 1865, upon the property of a township, to pay bounties to persons who should thereafter enlist or be drafted into the Army of the United States, was for a corporate purpose, within the meaning of the State constitution. The person who complained of the tax, in that case, was a non-resident of the township, but he owned taxable property within its limits. The Supreme Court of Illinois, through Judge Lawrence, in an opinion of marked ability, sustained the validity of the tax, defining the phrase "corporate purposes" to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." It is suggested, by learned counsel for the City, that that and similar decisions, rendered during the late civil war, were exceptional, and were made almost *ex necessitate*, because the courts were unwilling to cripple the power of the government to raise troops by denying to counties, cities and towns the right to offer bounties when authorized by the Legislature. An answer to this suggestion is found in the fact that the same court reaffirmed the doctrine of *Taylor v. Thompson* in the cases of *Briscoe v. Allison*, 43 Ill., 293; *Misner v. Bullard*, 43 Ill., 470; and *Johnson v. Campbell*, 49 Ill., 317. In the subsequent case of *R. R. Co. v. Smith*, 62 Ill., 268, decided in 1871, the court referring to the definition of corporate purpose as given in *Taylor v. Thompson*, announced their acceptance of it. In *People v. Dupuyt*, 71 Ill., 651, the same definition was referred to without disapproval. The court, declaring that it had gone far enough in upholding that tax, said: "It may be difficult to determine with precision what is a corporate purpose, in the sense of the Constitution, but it is less difficult to determine what is not such a purpose. The true doctrine is, such purposes, and such only, as are germane to the objects of the welfare of the municipality, at least such as have a legitimate connection with these objects, and a manifest relation thereto." Again; in *Burr v. Carbondale*, 76 Ill., 455, *Ch. Justice* Breese, the court sustained a tax imposed by the City in support of the Southern Illinois Normal University, to which the people of that City had voted a tax and, referring to *Taylor v. Thompson*, said that a corporate purpose was there "held to mean a tax to be expended in a manner which should promote the general prosperity and welfare of the municipality which levied it. But in that case a vote of the people authorizing the tax was first to be taken, and the people, in fact, voted the tax. This was an important fact in determining that case. We

thought it difficult to determine with precision what was a 'corporate purpose,' in the sense of the Constitution, but came to the conclusion that it was such a purpose, and such only, as might have a legitimate connection with objects and purposes promotive of the welfare of the municipality, and a manifest relation thereto."

In view of the course of decisions in Illinois, we should hesitate to declare that money borrowed by the City of Ottawa and expended in developing its natural resources for manufacturing purposes, was not, in the sense of the Illinois Constitution of 1848, as interpreted by the Supreme Court of that State, expended "To promote the general prosperity and welfare of the municipality."

But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois Constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the City that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the City to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the Council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the City, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for *municipal* purposes, with the previous sanction, duly given, of a majority of the legal voters of the City. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances "providing for a loan for *municipal* purposes." Such a representation by the constituted authorities of the City, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially a declaration by the City, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The City is, therefore, estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against such holder, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the City, or recited only those provisions which empowered the Council to borrow money upon the credit of the City and to issue bonds therefor, the liability of the City to a *bona fide* holder could not be questioned. Much

less can it be questioned, in view of the additional recital in the bonds that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors v. Schenck*, 5 Wall., 772 [72 U. S., XVIII., 556]. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the City, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money centers of the country, in either case, the City, both upon principle and authority, is cut off from any such defense. What this court declared, through Justice Campbell, in *Zabriskie v. R. R. Co.*, 23 How., 381 [64 U. S., XVI., 488], as to a private corporation, and repeated, though *Mr. Justice Clifford*, in *Bissell v. Jeffersonville*, 24 How., 287 [65 U. S., XVI., 664], as to a municipal corporation, may be reiterated as peculiarly applicable to this case: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." What we have said disposes of the second plea filed by the City. As to the third plea, it is scarcely necessary to say that it does not present a defense to the action. The questions raised by that plea have not been alluded to or discussed in the printed arguments of counsel.

The judgment is reversed, with directions to sustain the demurrer to the second and third pleas, and for such further proceedings as may be consistent with this opinion.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the opinion of the court in the case of *Wm. H. Hackett et al., Exrs., etc., Plffs. in Err. v. The City of Ottawa*, No. 880, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said [L. S.] Supreme Court, at the City of Washington, this 5th day of May, A. D. 1885.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

Cited—103 U. S., 260; 105 U. S., 343; 108 U. S., 115, 118.

JOSEPH GRAFTON, *Plff. in Err.*,

v.

STEPHEN H. CUMMINGS.

(See S. C., 9 Otto, 100-112.)

Statute of Frauds—requirement of memorandum.

*The memorandum in writing, necessary to make a valid contract within the meaning of the Statute

*Head notes by *Mr. Justice MILLER*.

NOTE.—*Statute of Frauds, what is sufficient note or memorandum under.* See note to *Barry v. Coombe*, 26 U. S. (1 Pet.), 640.

of Frauds, though signed by the defendant and describing with sufficient distinctness the property sold and the consideration to be paid, is not sufficient to sustain an action, unless the other party to the agreement is either named in the memorandum or so designated in some paper signed by the defendant that he could be identified without parol proof.

[No. 179.]

Argued Mar. 12, 1879. Decided Mar. 24, 1879.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is fully stated by the court.

Messrs. A. J. Vanderpoel and James W. Gerard, for plaintiff in error:

The paper relied on as the agreement was invalid, for that no vendor was named in it.

Sherburne v. Shaw, 1 N. H., 157; *Boyce v. Greene*, Batty, 608; *Williams v. Lake*, 2 El. & El., 349; *Williams v. Byrnes*, 9 Jur. (N. S.), 363; Privy Council; *Potter v. Duffield*, L. R., 18 Eq., 4; *Champion v. Plummer*, 1 B. & P., N. R., 252; *Wain v. Warlters*, 5 East, 10.

The memorandum of the auctioneer, to bind the purchaser, must be contemporaneous with the sale.

Smith v. Arnold, 5 Mas., 414; *Potter v. Duffield*, *supra*, A. D. 1870.

The case of *Salmon Falls Mfg. Co. v. Goddard*, 14 How., 446, is commented on in *Browne* on Frauds, section 875, and the author shows how, on its special facts, it is saved from conflict with the general rule.

In *Rossiter v. Miller*, 48 L. J. Ch. (N. S.), at p. 17, Lord Chancellor Cairns, commenting on the maxim, *Id certum est quod certum reddi potest*, says, a writing, "I enter into a contract," "on behalf of my client," "on behalf of my principal," "on behalf of my friend," "on behalf of those whom it may concern," has no such certainty, and in none of those cases would the note satisfy the requirement of the Statute of Frauds.

Parol testimony will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which, by a reference to the signed memoranda, are made parts of it.

Johnson v. Buck, 35 N. J. L., 344; *Boydell v. Drummond*, 11 East, 142; *Coles v. Trecothick*, 9 Ves., 250; *Clinan v. Cooke*, 1 Sch. & L., 22; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 273; 1 *Smith L. C.*, 465; *Dovell v. Hutchinson*, 3 Ad. & El., 355; *First Bap. Ch. v. Bigelow*, 16 Wend., 28-31; *O'Donnell v. Leeman*, 43 Me., 158; *Peek v. N. Staffordshire R. R. Co.*, 10 H. L. Cas., 472; *Knox v. King*, 36 Ala., 367.

A contract, as originally entered into, cannot at law be altered by evidence of a parol variation, in favor of either plaintiff or defendant.

Dart, Vend., 451; *Sugd. Vend.*, 171; *Goss v. Nugent*, 2 Nev. & Man., 33; *Emmet v. Dewhurst*, 8 Eng. L. & E., 88; *Blood v. Goodrich*, 9 Wend., 68; *Sanderson v. Graves*, L. R., 10 Exch., 234.

Messrs. Henry Heywood, Thomas H. Hubbard and Wm. Allen Butler, for defendant in error:

It seems to us that the case of *Sal. Falls Mfg. Co. v. Goddard*, 14 How., 446, is conclusive upon this point. There it was held that it was competent to show that Mason signed for the

firm of Mason & Lawrance, and that that house was acting as agent for the plaintiffs. In that way the sellers' name was shown in the memorandum relied upon in that case, which is carrying the rule far beyond anything claimed by it. The case arose upon the Massachusetts statute in relation to the sale of goods. The statute of New Hampshire under which our case comes up, is, in every material particular, the same as the Massachusetts statute.

The cases of *Lerned v. Wannemacher*, 9 Allen, 412, and *Lerned v. Johns*, 9 Allen, 419, are directly in point. *Coddington v. Goddard*, 16 Gray, 436.

The case of *Gowen v. Klous*, 101 Mass., 449, is upon a contract of the same form as that in the case at bar, and in our view is, in all respects, a parallel case with this.

Hunter v. Giddings, 97 Mass., 41.

It is sufficient if the memorandum, taken in connection with the evidence of the surrounding circumstances, shows the seller. In the advertisement the names of James W. Weeks and S. H. Cummings appear, and the evidence properly admitted shows them to be the sellers of the property.

Neuell v. Radford, L. R., 3 C. P., 52; *Beckwith v. Talbot*, 95 U. S., 289 (XXIV., 496).

Mr. Justice Miller delivered the opinion of the court:

On the 16th day of May, 1871, the hotel known as the Glen House, at the foot of the White Mountains in New Hampshire, together with its furniture, was bid off at an auction sale by Grafton, the plaintiff in error, at the price of \$90,000. At the end of the ten days allowed by the terms of the sale for examination of the title, three deeds were tendered him which were supposed to convey the title. He refused to accept the deeds, or pay the purchase money, or otherwise complete the contract of purchase. The property was again advertised for sale and sold for \$61,000; and the present suit was brought to recover the difference in the amounts for which the property sold at these two sales, as damages for failure to perform the first contract.

The suit was brought in the Circuit Court for the Southern District of New York, and a verdict and judgment recovered against Grafton, to which he prosecutes this writ of error.

The bill of exceptions is voluminous, containing, apparently, everything said and done on the trial. Sixty-one errors are assigned in this court.

We shall confine ourselves to the examination of one of them. That one presents the question, as it occurs in various forms in the record, whether there was a sufficient memorandum of the contract in writing, under the Statute of Frauds of New Hampshire, to sustain the action.

That Statute is in these words: "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing." The agreement given in evidence on the trial by Cummings, the sole plaintiff, consisted of a paper in writing signed by Grafton, certain printed matter on the margin of that

writing, and the advertisement mentioned in the writing so signed. They are as follows:

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's grant, New Hampshire, and sold at auction, Tuesday, May 16th, 1871, at 11 o'clock A. M., and for the sum of \$90,000, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

JOSEPH GRAFTON."

Upon the margin of said agreement were written and printed the following:

"TERMS OF SALE.

"Ten days will be allowed to examine the title, within which time the property must be settled for. Five thousand dollars will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one half of the purchase money to be paid Sep. 1, 1871, the remaining balance to be paid Sep. 1, 1872.

"The property is sold subject to the conditions of the sale of the stage-route, stages, etc., which are that the proprietors of the route shall have the exclusive business of the house."

The advertisement referred to in the foregoing paper as being thereunto affixed was as follows:

"GLEN HOUSE AT AUCTION.

"The famous summer resort at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill and out-buildings, will be sold at public auction at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock A. M.

May 2, 1871.

"VALUABLE HOTEL PROPERTY FOR SALE.

"The favorite summer resort known as the Glen House, situated at the foot of Mount Washington and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered), all the out-buildings, stables and mill on the same, also the furniture, staging, mountain carriages, horses, etc. The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the first of May, will be sold at public auction to close the estate of the late J. M. Thompson. Notice of the time and place of sale will be given hereafter. Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine."

The bill of exceptions adds, that when this paper was put in evidence it was indorsed "A. R. Walker, auctioneer and agent for both parties." It is not satisfactorily shown when this indorsement was made, and there is some evidence to show that it was not there at the time the deeds were tendered and Grafton refused to accept

them. The court, however, instructed the jury that if it was done at any time before the commencement of this action it was sufficient.

Evidence was admitted to show that at the time of the sale another paper was read by the auctioneer, affecting the terms of the sale; but as this was not among the papers subscribed by defendant, we will first consider whether these were sufficient to sustain the action.

It is proper to observe that the objection to these papers is not that they were *not signed by Grafton, the party charged*, for he signed himself the principal instrument and the reference to the others, and their annexation to that are sufficient to make them a part of the paper which he did sign. We shall, also, for the purpose of this inquiry, take it that Walker was the auctioneer, and that his name indorsed on the instrument gives it all the value which it could have if signed at any time necessary for that purpose.

The distinct objection to the instrument, as so presented, is, that the other party to the contract of sale is not named in it, and can only be supplied by parol testimony.

The statute not only requires that the agreement on which it [the action] is brought, or some memorandum thereof shall be signed by the party to be charged, but that the *agreement or memorandum shall be in writing*. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing, that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and to deliver the consideration for the price so paid.

There can be no bargain without two parties. There can be no valid *agreement in writing* without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that if a vendor was named in this paper, the offer to perform on *his* part would bind the party who did sign. But Grafton did not agree to buy this property of *anybody* who might be found able and willing to furnish him a title. He was making a contract which required a vendor and a vendee at the time it was made, and he is liable only to *that* vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity.

It is alleged that Stephen H. Cummings, the plaintiff in this action, was the vendor, and that this sufficiently appears in the papers, of which we have given copies.

The first ground on which it is sought to

maintain this proposition is, that Walker's indorsement is sufficient for that purpose.

It is very clear that Walker did not intend to hold himself out as the vendor in this case, because he describes himself as auctioneer and agent for both parties. If he had been sued on this contract by Grafton for failing to tender sufficient deeds of conveyance, it would have been a good answer to the action that he describes himself in the paper on which he was sued as merely an auctioneer in the matter, and in that sense as agent, and not principal. He could not in the act of signing that paper be the agent of Grafton, for Grafton signed it for himself. The statement, therefore, did not mean that he *signed* for both parties, because he did not, and could not, sign as agent for Grafton.

What did he mean by putting his name there? It can have no *other fair* meaning than simply to say, as he does, I was the auctioneer who struck off this property.

But concede that he meant to represent the other party in that contract, a contract in which he takes care not to bind himself, who is that other party. What light does the writing of his name as auctioneer and agent throw on that question? Literally none. An anxious reader of the whole paper and its attachments would know as little who sold, or for whom Mr. Walker was selling, after his signature as he did before. To say agent for both parties may show he was agent for the one party whose name is not there, but it does not show who was that party. The paper without Walker's indorsement shows who was the purchaser, but neither with nor without it does it show who was the seller.

It is next argued that the reference to Cummings's name in the advertisement annexed to the paper signed by defendant is sufficient for this. The statement is that the sale is made to close out the estate of the late Mr. Thompson; and "Any person desirous of seeing the property, which is in thorough repair, or wishes to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N.H., or S. H. Cummings, Falmouth Hotel, Portland, Maine." Three persons are here mentioned. One, Mr. Thompson, was dead and could not be the vendor. Another, Mr. Weeks, though not mentioned as a party selling, it may be inferred had some interest in the sale as administrator of Thompson. But Weeks does not sue, and if his name had been inserted in the contract as vendor, it would not have sustained the present action. But the true intent of that advertisement was not to describe the vendors, or even the owners of the land, but to designate persons who might give any information about the property, which one thinking of purchasing would need. This did not require that the person referred to should be the owner of the land or the party selling it. Such inquiries could as well be answered by a lawyer, a real estate agent, the latest keeper of the hotel, or one who had been his clerk, as by the owner. There did not arise, therefore, any implication from the reference to Mr. Cummings that he was owner, or even part owner, or that he was holding himself out as the party selling.

The next effort to sustain the instrument sued on as valid, may be said to be a vague effort to show, by the verbal history of the transaction, that

defendant recognized Cummings as vendor by subsequent interviews and negotiations with him on the subject of the sale. And special importance in this part of the case is attached to a letter written by Davis, a lawyer, to Cummings.

The letter is liable to three objections, as a recognition by defendant of Cummings as the party of whom he had purchased.

1. No such recognition is to be found in the letter. It consists of suggestions on the part of Davis of what had better be done with the property; that Cummings, Mrs. Thompson and Grafton ought to take it; and that Grafton really don't wish to have anything to do with it. It is not even a recognition of the validity of the purchase, and nowhere speaks of Cummings as the vendor, but he might rather be supposed to be a purchaser with Grafton.

2. Davis does not profess to be speaking or acting for Grafton. He writes in his own name. It is shown by other evidence that, either as attorney or for himself, he controlled the larger part of the debts against Thompson's estate, which made the sale necessary, and it may be fairly inferred that it was in this character he spoke.

3. There is no satisfactory evidence that he was authorized to act for Grafton in that transaction, and none whatever that he was authorized by him to write that letter. The New Hampshire statute requires that the authority of an agent to charge a party shall be in writing, and there is no pretense that Davis had any such authority from Grafton.

These views of the proper construction of the statute are amply sustained by authority.

In the leading case of *Wain v. Warlters*, 5 East, 10, decided by Lord Ellenborough under the English statute, the same as that of New Hampshire on the point in question, that eminent judge said: "The question is, whether that word (agreement) is to be understood in a loose, incorrect sense in which it may be sometimes used as synonymous to *promise* or *understanding*, or in its more correct sense of signifying a *mutual contract on consideration between two or more parties*." He held the latter to be the true construction, and that all its essential elements must appear in the memorandum, including the consideration, which in that case was absent. This has been held to be the law in England ever since.

In the case of *Williams v. Byrnes*, before the Privy Council, reported in 9 Jur. N. S., 363, decided in 1863, the defendant had, in a letter to one Hardy, told him that he would furnish the funds to pay for a steam-engine, if the latter would find and purchase a suitable one. Hardy made a verbal contract for the engine, and the vendor sued defendant on this memorandum. Jessel, M. R., in delivering the judgment of the Privy Council, said: "The language of the statute cannot be satisfied unless the existence of a bargain or contract appear in evidence in writing; and a bargain cannot so appear unless the parties to it are specified, either nominally or by description or reference;" and the ruling of the *Chief Justice* that this could be done by extrinsic proof as to who was the vendor, was reversed. It is precisely in point with the one before us.

The case of *Sule v. Lambert*, Law Rep., 18 Eq., 1, was a sale of real estate, in which the See 9 OTTO.

party charged was the vendor. The memorandum was signed by Sale, the purchaser, for himself, and by George Jackson, the auctioneer, *for the vendor*. This memorandum was indorsed on a bill of particulars of the conditions of the sale, in which it was said that the property was sold by the proprietor. The court held that the word proprietor sufficiently described the vendor, and ascertained who was the party for whom the auctioneer signed. But in the very next case in the volume, *Potter v. Duffield*, the same court, by the mouth of the same judge, held that the words "confirmed on the part of the vendor," and signed "Beadels," did not sufficiently designate who the vendor was, and that a suit against the owner could not be sustained on the memorandum. The Master of the Rolls said: "If you could go into evidence, as to the person who is described as vendor, the answer would be that Polly was that person. But that is exactly what the Act says shall not be decided by parol evidence."

In the case before us, Mr. Walker, the auctioneer, does not even say that he signed for the vendor, as Beadels did in the last case cited.

But the case which should have most weight in informing our judgment is that of *Sherburne v. Shaw*, 1 N. H., 157, because it is an authoritative construction of the statute of the State where this contract was made, and where the land is situated, to which the contract relates, made by the highest court of that State sixty years ago and never overruled. The case is so perfectly parallel to the one under consideration that its circumstances need not be repeated. It is sufficient to say, that the want of the vendor's name in the memorandum was held fatal to any right of action, though the auctioneer's name was signed to a memorandum otherwise sufficient. The concluding language of the court is, that "The written evidence which hath been offered to prove the contract declared on, as it fails to give any intimation that plaintiffs were one of the parties to that contract, must itself be considered fatally defective and inadmissible."

The same doctrine is laid down in the excellent work of Mr. Browne on the Statute of Frauds, secs. 372-375, and the authorities fully cited. He also speaks of the case of *Mfg. Co. v. Goddard*, decided by this court and reported 14 How., 446, as one which might be saved from conflict with the general rule, on the ground that a bill of parcels detailing the purchase was made out and sent to the purchaser, and accepted by him as such. In that case *Mr. Justice Curtis*, *Mr. Justice Catron* and *Mr. Justice Daniel* dissented in an able opinion by the judge just named. It may be doubted whether the opinion of the majority in all it says in reference to the case of parol proof in aid of even mercantile sales of goods by brokers is sound law. It certainly furnishes no rule to govern us in the exposition of the statutes of New Hampshire, concerning contracts of sale of real estate within its own borders, where it conflicts with the decisions of the courts of that State on the subject.

Defendant in error relies mainly on that case and the later one of *Beckwith v. Talbot*, 95 U. S., 289 [XXIV., 496]. The latter case, however, affords no support to the argument of counsel. The defendant in that action was charged, it is true, on a memorandum in which his name was

not found. But he produced that memorandum from his own possession on the trial, and letters of his written to plaintiff while the agreement was so in his possession were given in evidence, which referred to the agreement and acknowledged its obligatory force on himself, in terms that required no parol proof to identify it as the agreement to which he referred. This was within all the cases a sufficient signing of the memorandum, though found in another paper, written by the party to be charged, to comply with the Statute of Frauds, and so this court held.

We are of opinion that there was no sufficient memorandum in writing of the agreement on which this suit was brought to sustain the verdict of the jury.

The judgment of the Circuit Court is, therefore, reversed and the case remanded to that court, with instructions to set aside the verdict.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the opinion of the court in the case of *Joseph Grafton, Plff. in Err., v. Stephen H. Cummings*, No. 179, October Term, 1878, as the same remains upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said [L.S.] Supreme Court, at the City of Washington, this 7th day of May, A. D. 1884.

JAMES H. MCKENNEY,
Clerk, Supreme Court, U. S.

FRANK F. CASE, RECEIVER OF THE FIRST
NATIONAL BANK OF NEW ORLEANS, *Appt.*,

v.

GUSTAVE T. BEAUREGARD ET AL.

(See S. C., 9 Otto, 119-129.)

Partnership debts—relief—creditor's equity.

1. So long as a partner retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it, the application of those assets primarily to payment of the debts due them.

2. It is indispensable, however, to such relief, when the creditors are simple contract creditors, that the partnership property should be within the control of the court and in the course of administration.

3. If, before the interposition of the court, the property has ceased to belong to the partnership; if by a *bona fide* transfer, it has become the several property, either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.

[No. 167.]

Argued Jan. 31. 1879. Decided Mar. 24, 1879.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The bill in this case was filed in the court below by the appellant. The partnership property which it was filed to reach, consisted of a lease of a certain horse railroad with its equipments, and also of certain real estate bought with partnership funds, but held in the name of Beauregard.

The case is further stated by the court.

Messrs. Chas. Case and J. D. Rouse,
for appellant:

Mr. Justice Strong said in *Bank v. Carrollton R. R. Co.*, 11 Wall., 628 (78 U. S. XX., 83): "It has repeatedly been determined, both in the British

and American courts, that the property or effects of a partnership belong to the firm, and not to the partners, each of whom is entitled only to a share of what remains after payment of the partnership debts, and after a settlement of accounts between the partners;" therein following *West v. Ship*, 1 Ves., 239, and *Field v. Taylor*, 4 Ves., 396.

That the creditors of a firm are entitled to the preference of having their debts paid out of the partnership funds before the private creditors of either of the partners, is a doctrine well settled by courts of chancery. 1 Story, Eq., 675.

And any transfer or sale of the property or the effects of a firm, which defeats and destroys the preference, cannot be sustained in equity.

Collins v. Hood, 4 McLean, 186; see, also, *Murrill v. Neill*, 8 How., 414.

Said Lord Eldon in *Ex parte Ruffin*, 6 Ves., 119, "a *bona fide* transmutation of the property, is understood to be the act of men, acting fairly, winding up the concern, and binds the creditors."

But where there has been no *bona fide* transmutation of partnership property into separate property, the equitable right of the partners to have the partnership funds applied to the joint debts still exists, and enures to the benefit of the joint creditors.

Story, Part. secs. 97, 261, 326.

That partnership assets constitute a trust fund in cases of insolvency, for the payment of partnership debts, and the substitution of the joint creditors, to the equities of the partners, as being the ultimate *cestui que trust*, is expressly recognized in *Allen v. Center Valley Co.*, 21 Conn., 130; *Witter v. Richards*, 10 Conn., 37; see, also, *Brewster v. Hammet*, 4 Conn., 540; *Ex parte Elton*, 3 Ves., 238; 3 Kent, Com., p. 59, n. 2; *Collins v. Hood*, 4 McLean, 188.

The Louisiana Code, art., 2823, provides that the partnership property is liable to the creditors of the partnership in preference to those of the individual partner.

Morgan v. His Creditors, 8 Mart. N. S., 606.

Nor can this privilege be defeated by the acts of the partners. Herein the law of Louisiana differs from the common law. Says *Chief Justice Merrick* in *Succession of Beer*, 12 La. Ann., 698: "On general principles, we think it ought not to be in the power of the partners by arrangements among themselves, to defeat the rights of their creditors."

The case of *Priestley v. Bisland*, 9 Rob. (La.), 425, enforces this view with great vigor.

The doctrine recognized by the 2794th Article of the Civil Code, is fully developed by Pardessus, *Droit Commercial*, Vol. 4, No. 1089, whose opinion on this subject is in accordance with that of Troplong, *Privileges et Hypothèques*, Vol. 2, No. 434.

A conveyance of partnership property by a partner, in payment of his separate debt, is a fraudulent conversion thereof, and the separate creditor, whether he has notice or not, takes no title.

Rogers v. Batchelor, 12 Pet., 221; *Shirriff v. Wilks*, 1 East, 48; *Dwight v. Simon*, 4 La. Ann., 496.

Where real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial in a court of equity, in whose name or names the legal title is taken; whether

in the name of one partner or all the partners, it is equally deemed partnership property.

2 Story's Eq. Sec., 1207; 5 Wait's Actions and Defenses, 120; *Clagett v. Kilbourne*, 1 Black, 349 (66 U. S., XVII., 213); *Fairchild v. Fairchild*, 64 N. Y., 471.

Equity will give the complainant a remedy.

Said Chief Justice Marshall, in *Russell v. Clark's Exrs.*, 7 Cranch, 69, "It is also true, that if a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

O'Brien v. Coulter, 2 Blackf., 423; *Lawton v. Levy*, 2 Edw. Ch., 201; *Russell v. Hammond*, 1 Atk., 13; *Taylor v. Jones*, 2 Atk., 600.

It is well settled that the creditor of a deceased debtor may, in the first instance, resort to equity and assail a fraudulent conveyance, without having recovered a judgment at law, especially when the debtor's estate is insolvent.

Hagan v. Walker, 14 How., 33; *Frazer v. Western*, 1 Barb. Ch., 223. See also, *Offutt v. King*, 1 MacArthur., 312; *Hills v. Sherwood*, 48 Cal., 386.

The real object of requiring judgment at law and execution returned unsatisfied, in any case, preliminary to a creditor's bill, is to show that the creditor is without legal remedy.

The fact may be established as well by other evidence.

Terry v. Tubman, 92 U. S., 160 (XXIII., 539).

Even after judgment, if it appears that the judgment debtor is insolvent, and that the issuing of the execution would be of no practical utility, it may be dispensed with.

Turner v. Adams, 46 Mo., 95; *Postlewait v. Houses*, 3 Ia., 365; *Payne v. Sheldon*, 63 Barb., 169.

The following cases hold that a creditor may, without having first obtained a judgment at law, come into a court of equity to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering or delaying creditors, and subject the property, by sale or otherwise, to the satisfaction of his debt.

Thurmond v. Reese, 3 Ga., 449; *Croone v. Bivens*, 2 Head (Tenn.), 339; *Cornell v. Radway*, 22 Wis., 260; *Sanderson v. Stockdale*, 11 Md., 563; *Cook v. Johnson*, 12 N. J., Eq. (1 Beas.), 51; *Innes v. Lansing*, 7 Paige, Ch., 583.

Messrs. **J. A. Campbell** and **Henry C. Miller**, for appellees, and **Mr. Edwin B. Smith**, Asst. Atty-Gen., in behalf of the United States:

The partners were not liable *in solido*, but only for their individual shares respectively.

Beauregard v. Case, 91 U. S., 134 (XXIII., 263).

The conveyances by May to the Treasury Agent in 1867, was a dissolution of the partnership.

Bank v. Carrollton R. R. Co., 11 Wall., 624 (78 U. S., XX., 82).

The principle that the creditors of a partnership have a privilege or preference of payment out of the effects of a firm in the course of liquidation, to the exclusion of the creditors of the several members of the firm, is acknowledged.

When the property ceases to belong to the
See 9 OTTO.

partnership, the privilege is extinguished for the want of a subject.

C. C., 3277; *Skillman v. Purnell*, 3 La., 494; *Baca v. Ramos*, 10 La., 418; *Lallande v. McRae*, 16 La. Ann., 193; 40 Dalloz Jurisp. Gen., tit. Société, No. 632, p. 498.

But it cannot be denied that the conveyance of Beauregard, May & Graham would transfer the property to any *bona fide* purchaser, discharged from any claim of any general creditor of the partnership, or of the partnership itself.

McNutt v. Strahorn, 39 Pa., 269; *Beer's Succession*, 12 La. Ann., 698; *Backus v. Murphy*, 39 Pa., 397; *Skillman v. Purnell*, 3 La., 494; *Ketchum v. Durkee*, 1 Barb. Ch., 480; *Reese v. Bradford*, 13 Ala., 837; *Lallande v. McRae*, 16 Ann., 193; *Pars. Comm.*, 503; *Sage v. Chollar*, 21 Barb., 596; 3 Kent Comm. side p. 65, 12th ed; *Young v. Parsons*, 2 Met. (Ky.), 499; *Ely v. Hair*, 16 B. Mon., 237.

In Louisiana, a commercial partnership is limited to personal property, and land is not a partnership asset. The partners hold it by distinct and separate titles.

Skillman v. Purnell, 3 La., 497; *Poydras v. Laurans*, 6 La. Ann., 771; *Thomas v. Scott*, 3 Rob. La., 256; *Willey v. Carter*, 4 La. Ann., 56; *Lee v. Ferguson*, 5 La. Ann., 532.

There is no foundation for this claim.

Stroud v. Guyer, 28 Beav., 130; *Willett v. Blanford*, 1 Hare, 353; *Simpson v. Chapman*, 4 De Gex M. & G., 154.

It was a question among French jurists, whether one partner in an ordinary partnership can use a credit belonging to another, in compensation of a debt claimed against the partnership. The decisions in Louisiana are that he may employ it for the purpose.

Dick v. Byrne, 7 Rob. La., 465; *Bliss v. Patrick*, 6 La. Ann., 546.

Mr. Justice Strong delivered the opinion of the court:

The object of this bill is to follow and subject to the payment of a partnership debt property which formerly belonged to the partnership, but which, before the bill was filed, had been transferred to the defendants. There is little if any controversy respecting the facts, and little in regard to the principles of equity invoked by the complainant. The important question is, whether those principles are applicable to the facts of the case.

No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose the firm. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. They are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of the several members of the firm. Their equity, however, is a derivative one. It is not held or enforceable

in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. *Rice v. Barnard*, 20 Vt., 479; *App. of York Co. Bk.*, 32 Pa., 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.

So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished and, consequently, the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin*, 6 Ves., 119, where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not *mala fide*. *Kimball v. Thompson*, 13 Met., 283; *Allen v. Centre Val. Co.*, 21 Conn., 130; *Ladd v. Griswold*, 9 Ill. (4 Gilm.), 25; *Smith v. Edwards*, 7 Humph., 106; *Robb v. Mudge*, 14 Gray, 534; *Baker's Appeal*, 21 Pa. 76; *Sigler v. Bk.*, 8 Ohio St., 511; and [*Wilcox v. Kellogg*], 11 Ohio, 394.

The joint estate is converted into the separate estate of the assignee by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone. These principles are settled by very abundant authorities. It remains, therefore, only to consider whether, in view of the rules thus settled and of the facts of this case, the complainant, through any one of the partners, has a right to follow the specific property which formerly belonged to the partnership, and compel its application to the payment of the debt due from the firm to the bank of which he is the receiver.

The partnership, while it was in existence,

was composed of three persons, May, Graham and Beauregard, but it had ceased to exist before this suit was commenced. It was entirely insolvent, and all the partnership effects had been transferred to others for valuable considerations. None of the property was ever within the jurisdiction of the court for administration.

On the 8th of May, 1867, Graham, one of the partners, assigned all his right and interest in any property and effects of the partnership, and whatever he might be entitled to under the articles thereof, together with all debts due to him from the partnership or any member thereof, to the Fourth National Bank of the City of New York. By subsequent assignments, made on the 14th and 16th of May, 1869, May, the second partner, transferred all his interest in the partnership property to the United States, and by the same instruments transferred to the United States, by virtue of a power of attorney which he held, the interest of Graham. On the 21st of August, 1867, the United States sold and transferred their interest obtained from May and Graham in all the partnership property, including real estate, to Alexander Bonneval, Joseph Hernandez and George Binder. On the 15th of October next following, an act of fusion was executed between the New Orleans and Carrollton Railroad Company, Beauregard, Bonneval, Hernandez and Binder, by which the rights of all the parties became vested in the railroad company, subject to the debts and liabilities of the company, whether due or claimed from the lessee or the stockholders.

The effect of these transfers and act of fusion was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. *Baker's Appeal* [*supra*]. That was a case where a firm had consisted of five brothers. Two of them withdrew, disposing of their interest in the partnership estate and effects to the other three, the latter agreeing to pay the debts of the firm. Some time after, one of the remaining three sold his interest in the partnership property to one of the remaining two partners. The two remaining, after contracting debts, made an assignment of their partnership property to pay the debts of the last firm composed of the two; and it was held that the creditors of the first two firms had no right to claim any portion of the fund last assigned, and that it was distributable exclusively among the creditors of the last firm. So in *McNutt v. Strayhorn*, 39 Pa., 269, it was ruled that though the general rule is that the equities of the creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and, therefore, there is no case for the application of the rule. See, also, *Coover's*

App., 29 Pa., 9. Unless, therefore, the conveyances of the partners in this case and the Act of fusion were fraudulent, the bank of which the complainant is receiver has no claim upon the property now held by the New Orleans and Carrollton Railroad Company, arising out of the facts that it is a creditor of the partnership, and was such when the property belonged to the firm.

The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors, a fraud which those partners could waive, and which was subsequently waived by the act of fusion. Besides, that Act made provision for some of the debts of the partnership. And it has been ruled that where one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sale and conveyances are not *prima facie* void, as against creditors of the firm, but are *prima facie* valid against all the world, and can be set aside by the creditors of the firm only by proof that the transactions were fraudulent as against them. *Kimball v. Thompson*, 13 Met., 283; *Flack v. Charron*, 29 Md., 311. A similar doctrine is asserted in some of the other cases we have cited; and, see, *Allen v. Center Val. Co.* [*supra*]. In the present case we find no such proof. We discover nothing to impeach the *bona fides* of the transaction, by which the property became vested in the railroad company.

Thus far we have considered the case without reference to the provisions of the Louisiana Code, upon which the appellant relies. Article 2823 of the Code is as follows: "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner." We do not perceive that this provision differs materially from the general rule of equity we have stated. It creates no specific lien upon partnership property, which continues after the property has ceased to belong to the partnership. It does not forbid *bona fide* conversion by the partners of the joint property into rights in severalty, held by third persons. It relates to partnership property alone and gives a rule for marshaling such property between creditors. Concede that it gives to joint creditors a privilege while the property belongs to the partnership, there is no subject upon which it can act when the joint ownership of the partners has ceased. Article 3244 of the Code declares that privileges become extinct "by the extinction of the thing subject to the privilege."

What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

The bank has, therefore, no specific claim upon the property, nor is there any trust which a court of equity can enforce; and it was well said by the Circuit Justice, that, without some constituted trust or lien, "A creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding" in equity.

The decree of the Circuit Court is affirmed.

Cited—106 U. S., 655; 16 N. W. Rep., 509; 3 McCrary, 371.

FRANCIS A. KING ET AL., *Plffs. in Err.*,

v.
UNITED STATES.

(See S. C., 9 Otto, 229-234.)

Collector and sureties, liability of—assessment—bond.

*1. Where taxes long past due to the United States are paid to the Collector of Internal Revenue, he and his sureties are liable on his bond for the amount so paid, though it had not then been returned to the assessor's office, or passed upon by him, nor the return, handed to the collector by the tax payer, sworn to.

2. The case of *Bk. v. U. S.*, 19 Wall., 227 [36 U. S., XXII., 80], decides explicitly that the obligation to pay the tax on dividends or interest does not depend on an assessment by any officer and a suit for such tax can be sustained without it. That case governs the present. The tax so paid is public money covered by the terms of the bond.

[No. 161.]

Argued Jan. 30, 1879. Decided Mar. 24, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio.

The case is fully stated by the court.

Messrs. Richard Waite, E. T. Waite, Haynes, Potter & Beckwith, and Bissell & Gorrell, for plaintiffs in error.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court against Harry Chase and his sureties on his official bond as Collector of Internal Revenue for the Tenth District of Ohio.

The sureties alone join in the writ, and the case having been submitted to the court below without a jury, the principal error assigned is that on the facts found by that court the judgment should have been in their favor.

The substance of the facts so found is, that while Chase was in office as collector, and while the defendants were liable on his bond for his official acts, he received from the treasurer of the Toledo, Wabash and Western Railroad Company, as and for the tax on interest paid on their mortgage bonds, the sum of \$24,923.87, which he did not pay into the Treasury of the United States, and of which he neglected to render any account to the Government. As it is on the particular circumstances of this payment to Chase that the defendants rely, it is necessary to state them with some care as they appear in the findings of the court.

* Head notes by *Mr. Justice MILLER*.

It thus appears that on the first day of June, 1868, the railroad company was indebted to the United States, for the five per cent. tax on interest paid by it on its mortgage bonds, the sum of \$112,778, which was on that day paid to Chase in three checks of the treasurer of the railroad company on two different banks of Toledo, on which the money was paid to Chase by the banks.

The taxes for which this sum was paid, included the whole amount of the taxes for the years 1865, 1866 and 1867. Of this sum there was due:

For the year 1865, - -	\$19,422.50
For the year 1866, - -	44,821.25
For the year 1867, - -	48,534.75

This entire sum, as we have said, was paid at the same time by two different checks of that date.

At the time of this payment there was delivered to Chase six separate returns of the taxes so due in the form prescribed by law to be made to the assessor of taxes, which were subscribed by the treasurer of the company, but not sworn to, and which had not then been filed with or delivered to said assessor, but all of which were delivered by Chase to the assessor, except the returns for the months of August, September and October, 1867, which were the latest returns so delivered to Chase at the time the money was paid. These returns he did not deliver to the assessor, nor did he make any mention of them in his report to the Government at any time, and he retained the amount of them out of the money received from the treasurer of the company.

It was five years after this before the officers of the Government discovered that he had received this sum above what he had accounted for, and in the meantime he had become insolvent.

The proposition of defendants' counsel is, that because this money was not received by Chase on any return made to the assessor, or on any assessment made by him or by the Commissioner of Internal Revenue, for such taxes, and because the return delivered to Chase was not verified by oath, it was a voluntary deposit of the money in his hands by the treasurer of the company, and was not received by him in his official character. That it was not his duty to receive it for the Government under such circumstances, and his sureties are not liable because it was an unofficial act. The argument has been pressed with great ingenuity and skill, and with many illustrations; but in all its forms it amounts to the averment that Chase had no legal authority as Collector of Internal Revenue to receive the money for the Government under the circumstances named, and the payment was not a lawful or valid payment.

There can be no question that Chase understood himself as receiving the money for the Government, and in payment of the taxes due. Nor is there any question that the treasurer of the railroad company intended it as payment to Chase in his official character as collector, and supposed he had paid the taxes by so doing; for Chase gave him three separate receipts in which the taxes for each of the years we have mentioned are set out, and also the months of the year in which they accrued, which he signed officially as collector, and declared in

each receipt that it was in full of the account. Nor can there be any doubt that these taxes were owing and then due to the United States; for the blank form used by the treasurer in making these returns shows that such returns were, by law, to be made to the assessor on or before the 10th day of the month following that in which the interest became due and payable, and were to be paid to the collector on or before the last day of that month. The latest of the taxes in the case before us had long been due. Part of them had been detained by the railroad company over two years. All of them over six months. The company, by the returns which were handed to the collector, acknowledged the sums therein stated to be due, and tendered him the money. There can be no question raised as to the validity of the tender (because it was in bank checks indorsed good by the bank instead of money), unless objection had been made to the character of the tender.

The narrow question, then, is, whether, when a corporation presents to the collector a statement of taxes long past due, which taxes must in the end be paid to him, and tenders him the full payment of said taxes, he may not receive them and give a valid acquittance for the amount so received.

It is not necessary to decide that such transaction would bar a recovery by the United States of any sum in excess of that paid, which might afterwards be found to be owing for the same period and for the same tax. The simple question is: was it a valid payment for that amount, and to that extent, which the collector might lawfully receive and be bound to pay to the Government.

To hold the contrary is to decide that a debt long past due and acknowledged to be due by the debtor cannot be paid, when he is willing to pay, and the proper officer of the Government ready to receive it, because the debtor has neglected to report the same facts to some other officer, or that officer has neglected to make report of the facts. Of the duty of the railroad company to pay the money as speedily as possible there can be no doubt. When it admitted the obligation and offered to pay it, was there no one to whom it could pay it?

Section 3142, Revised Statutes, then in force, provides for the appointment of a Collector of Internal Revenue for every collection district. Section 3143, in prescribing the conditions of his official bond, makes it his duty to account for and pay over to the United States all public money which may come into his hands or possession, and this condition is in the bond which is the foundation of the present suit. Money paid for taxes past due and received by the collector as such, and for which he gives a receipt as collector, specifying with precision the taxes for which it is paid, is public money. If it is not, whose money is it? The tax payer has parted with it, in voluntary payment of a debt due the United States. The collector appointed by the United States has received it as money paid to the United States on a debt due the United States. It is not, therefore, his money. It is the property of the United States, and within the meaning of the bond it is public money.

The answer made to this by counsel is that the debt was not *due*, or, at least, not *payable*, until the assessor had received and acted on the

return made by the corporation. There is nothing in the statute which says this in terms. If it be sound it must be an implication, and we do not not see how such an implication can arise. That such an assessment was not made long before was owing to the neglect of the company to make proper returns. Did that neglect make the taxes, which should have been paid a year before, any less a debt from that time? And can it be said they were not due at the time the statute says they should be paid, because the company failed to make the report which it was its duty to make?

If there could be any doubt upon this point, it was set at rest by the decision of this court in *Bk. v. U. S.*, 19 Wall. 227 [86 U. S., XXII., 80], where the same objection was taken to a suit to recover the tax. The court held explicitly that the obligation to pay the tax did not depend on an assessment made by any officer whatever, but that the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it though no officer had made an assessment. So that, both on principle and authority, we are of opinion that the judgment, for the sum received by the collector and not paid over, with interest, is right and must be affirmed. See also, *U. S. v. Ferrary*, 93 U. S., 625 [XXIII., 832].

Section 825, Revised Statutes, enacts that "There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding."

The court in this case, after a motion for re-taxation, ordered that this two per cent. on the sum recovered, amounting to \$712.77, be taxed against defendants. In this we think there was error.

1. The section applies only to cases where the money is collected or realized. This cannot be told until it is done, and the sum cannot, therefore, be taxed in the judgment against defendant. Suppose in the present case half the judgment is realized and no more, then the sum taxed is twice as much as the law allows.

2. This two per cent. is to be in lieu of all costs and fees in such proceeding. If it be costs taxable against defendants, then where, after a long litigation, the defendant is adjudged to pay \$10 and costs, he escapes by paying \$10.20 in full. This is obviously not the purpose of the statute, but must be its results if the word "taxed" in the section means taxed in court against the defendant.

The section was no doubt intended to establish a rule of compensation as between the Government and its attorney, by which, when he has been successful, he gets a commission of two per cent. for collection, but leaves him his ordinary statutory fee where nothing is realized.

So much of the judgment, therefore, as relates to this sum taxed in the costs is reversed, and the remainder of the judgment is affirmed.

Mr. Chief Justice Waite did not sit in this case, nor participate in its decision.

Cited—107 U. S., 130; 1 McCrary, 7; 7 N. W. Rep., 706.

See 9 OTTO.

MARY R. MONTGOMERY, by ROSELLA MONTGOMERY, her Tutrix, Next Friend and Guardian, *Plff. in Err.*,

v.

HENRY SAMORY.

(See S. C., 9 Otto, 482-491.)

Decision by court—Louisiana law—judicial sale—supersedes.

1. A court does not err in not submitting a case to a jury where the issues to be tried are issues of law, or where the parties waived a jury trial.

2. In Louisiana, definitive judgments, where the court has jurisdiction and due notice is given to the defendant, bear the force of *res judicata* and are conclusive of the rights of the parties.

3. A judgment confirming and homologating a judicial sale has the force of *res judicata* and operates as a bar against all persons.

4. A devolutive appeal never operates as a *superseas*.

[No. 178.]

Argued Mar. 11, 1879. Decided Mar. 24, 1879.

ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Mr. Thomas Hunton, for plaintiff in error.
Messrs. Henry C. Miller and P. Phillips, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Courts and jurists everywhere agree that the title to real estate is governed by the laws of the place where it is situated; the universal rule being that the title to such property can only be acquired, passed, or lost according to the *lex loci rei sitæ*. Story, Conf. L., 6th ed., sec. 424; Wharton, Conf. L., sec. 273.

Enough appears in the record to show that the father of the minor plaintiff owned the property in controversy, and that he being indebted to the defendant in the sums expressed in the four promissory notes referred to in the transcript, executed to his creditor the two mortgages under which the defendant claims that he ultimately acquired his title to the premises. Under the law of the State, where the property is situated, the mortgages imported a confession of judgment for the amount which they were executed to secure, less what should be paid before breach of condition.

Default of payment having subsequently been made, the mortgagee filed his petition in the third district court, praying that the mortgagor might be summoned to answer and that he should be decreed to pay the amount of the debt secured, with mortgage privilege upon the property described in the mortgages. Process was issued, and the sheriff returned "Not found," and that the mortgagor was out of the State. Due proceedings followed, which were, that the mortgagee filed a supplementary petition setting forth the return of the sheriff, and prayed that a *curator ad hoc* might be appointed, and that he should be served with a proper citation. Pursuant to the prayer of the petition, the court made the requested appointment, and the curator having been duly served, appeared and filed an answer. Hearing was had, and judgment was

NOTE.—*Conclusiveness of judgment.* See note to Bank of U. S. v. Beverly, 42 U. S. (1 How.), 134.

entered for the mortgagee in accordance with the prayer of the petition.

Two years later the mortgagor filed his petition in the court, complaining that the judgment had been rendered against him without his having been previously cited to appear, as the law directs, and prayed for a devolutive appeal, which was seasonably granted by the court. Both parties appeared in the Supreme Court of the State, and the appellant having suggested the death of the mortgagor and that his widow had been confirmed as natural tutrix of her minor child, she, the tutrix, was made a party to the appeal.

More than a year had elapsed from the date of the judgment before the petition for an appeal was filed, but it was obtained under that provision of the Code which makes an exception in favor of absentees, to whom a delay of two years is granted. *Lambert v. Conrad*, 18 La. Ann., 145.

Record proof showed that the mortgagor was an absentee, and the appeal was taken to enable the appellant to contest the point that the service on the *curator ad hoc* was sufficient to put the rights of the absentee in issue in the foreclosure proceedings. All matters of the kind were necessarily in issue and, the parties having been fully heard, the court affirmed the judgment of the subordinate court.

Pending the appeal, which was devolutive only, the property was sold under an execution issued on the judgment rendered in the court of original jurisdiction, and the mortgagee became the purchaser at the sheriff's sale. By the record it also appears that on the 10th of March of the next year, and before the appeal was determined, the mortgagee and purchaser at the sale applied to the same district court for a monition to protect his title thus acquired, as he was authorized to do under the law and jurisprudence of the State. R. S. La., 469. Publication as required by law was duly made, and such regular proceedings followed as terminated in a judgment in favor of the mortgagee and purchaser, that the said sale be confirmed and homologated according to law.

Seven years subsequently, to wit: on the 29th of March, 1871, the widow of the mortgagor, as tutrix of the minor plaintiff, filed her petition in the Circuit Court of the United States, praying the court to enter a decree that the title to the property acquired by the "mortgagee and purchaser at the sheriff's sale is null and void." Due process was served; and the respondent appeared and filed an exception to the jurisdiction, which having been overruled by the court, the respondent filed an answer, setting up several defenses.

Eight peremptory exceptions were also filed by the respondent at a later period. Testimony was not taken by either party, and they, having waived a trial by jury, submitted the cause to the court. Arguments of counsel followed the agreement to submit the cause; and the court, the District Judge presiding, rendered judgment in favor of the plaintiff, holding that the judgment of the third district court of the city is null and void. Immediate application for a new trial was made, and the same court at a subsequent session, the Circuit and District Judges presiding, granted the application. Leave being granted, the plaintiff filed an amended and sup-

plemental petition, in which she alleged two other grounds of claim: (1) That the property, at the date of the judgment in favor of the mortgagee and at the time of the sale, was in possession of the United States as abandoned property. (2) That there never was any valid or legal seizure of the property.

Four peremptory exceptions were filed by the defendant to the supplemental and amended petition: (1) That it changes entirely the cause of action and the demand set forth in the original petition. (2) That it alters the plaintiff's pleadings and the basis and foundation of the suit. (3) That it is vague and general, without any clear and precise statement of the claim. (4) That it changes the substance of the demand, the ground of claim, and the defense.

Those exceptions were heard separately from the other questions in the case, and having been overruled by the court, the defendant filed what is denominated in the record an exception and answer to the supplemental and amended petition, as follows: (1) That the petition sets forth no cause of action. (2) That the cause of action is barred by the prescription of five years. (3) That the exceptions pleaded to the original petition are a bar to the supplemental petition. (4) That it is not true that the property was in the possession of the United States, as alleged. (5) That the sheriff did legally seize the property, and that the title of the defendant is just and legal.

Formal application was made to set aside the agreement to waive a trial by jury, but it does not appear that it was pressed, and it was never granted. Instead of that, the record shows that the questions involved were reargued by the counsel on each side, and that the court entered judgment that the exceptions filed by the defendant be sustained, and that the plaintiff's suit be dismissed with costs. Exceptions in the usual form as at common law were filed by the plaintiff to the rulings and decisions of the court, and she sued out the present writ of error. Two errors are formally assigned, to the effect as follows: (1) That the court, in view of the facts alleged in the pleadings, erred in deciding the cause without the intervention of a jury. (2) That the court erred in maintaining the peremptory exception of *res judicata*, and the peremptory exception that the judgment of the third district court confirming and homologating the sale made to the defendant operate as a complete bar to the plaintiff's claim.

Beyond question, both of these peremptory exceptions were filed before the new trial was ordered; but, inasmuch as they were subsequently sustained by the circuit court, and are embodied in the bills of exceptions exhibited in the record, they are properly here for re-examination under the present writ of error.

Viewed in that light, it follows that there are three questions presented for decision: (1) Whether the court erred in not submitting the case to a jury. (2) Whether the court erred in holding that the judgment of the third district court is conclusive that the sale was made according to law, and that such a judgment cannot be incidentally and collaterally attacked or annulled. (3) Whether the court erred in holding that the judgment of the third district court pursuant to the process of monition, operated as a complete bar to the present suit.

Other questions were litigated in the progress of the suit; but, inasmuch as these three are the only ones included in the formal assignment of errors, none other will be much considered.

Peremptory exceptions, in the jurisprudence of that State, are of two classes, of which the first is equivalent in import to a demurrer at common law, and of course must in all cases be adjudged by the court. Somewhat different rules apply in the second class, which, without going into the merits of the cause, show that the plaintiff cannot maintain the action either because it is prescribed or because the cause of action has been destroyed or extinguished. Code, Pr., 1870, art. 345. Such an exception may be pleaded in every stage of the litigation previous to the definitive judgment, but the rule is that it must be pleaded specially, and that sufficient time must be allowed to the adverse party to make defense. Code, Pr., 1870, art. 346.

Nothing can be plainer in legal decision than the proposition that the two exceptions mentioned were well pleaded in the circuit court, as appears by the sixth and seventh articles of the answer which the defendant filed to the suit of the plaintiff. Conclusive support to that proposition is also found in the opinions of the Supreme Court of the State, set forth in the transcript and officially reported. *Samory v. Montgomery*, 19 La. Ann., 333; *S. C.*, 27 La. Ann., 50.

Much discussion of the first assignment of error is unnecessary, for two reasons: (1) Because the issues presented under the peremptory exceptions were issues of law for the determination of the court. (2) Because the parties waived a jury trial by consent, and stipulated that the case should be tried by the court.

Two judgments properly certified were introduced by the defendant in support of his peremptory exceptions, of which the first was the judgment of the third district court foreclosing the mortgages, as affirmed in the Supreme Court. Attempt is made to assail that judgment upon the ground that the absence of the mortgagor under the circumstances did not justify the appointment of a *curator ad hoc* and the subsequent proceeding which followed that appointment.

Good reasons exist to conclude that the question argued here is the exact question which was presented to the Supreme Court of the State to which the case was appealed from the third district court. In disposing of the case, the Supreme Court said that the only question presented was whether the mortgagor, at the time the service was made, was an absentee in legal contemplation, to whom a *curator ad hoc* could be appointed, and contradictorily with whom a suit might be prosecuted and a valid judgment obtained against the absent person. Such is the statement of the Judge who gave the opinion, and the facts disclosed confirm the statement and show to a demonstration that the exact question presented here was fully and expressly decided by that court. *Samory v. Montgomery* [*supra*.]

2. Proof of a conclusive character is exhibited in the record to show that the parties in this case waived a trial by jury; but it is not necessary to rest the case upon that proposition, as it is clear that the issue presented by the peremptory exception was one of law and not of

fact; nor does it make any difference that the parties stipulated that the court should find the facts, as the record shows that the Judge presiding when the first judgment was rendered complied with that part of the stipulation. His finding of facts was before the two Judges when the new trial was granted, and constituted the foundation of the court's action.

New pleadings were subsequently filed by both parties, which presented issues of law for the determination of the court, arising out of the duly certified copy of the judgment rendered in the third district court foreclosing the mortgage as affirmed by the Supreme Court of the State, and the motion judgment of the same court, from which no appeal was ever taken.

Viewed in any light, it is clear that the first assignment of error must be overruled.

Res judicata, as pleaded in the sixth peremptory exception of the defendant, is, in substance and effect, the same as the plea in bar of a former recovery at common law, in respect to which, in order that it may be a valid defense and incapable of collateral attack, it must appear that the opposite party had notice of the suit, and that the court rendering the judgment had jurisdiction of the case. Judgments, in the jurisprudence of that State, as well as elsewhere, are open to inquiry as to the jurisdiction of the court and notice to the defendant. *Christmas v. Russell*, 5 Wall., 290 [72 U. S., XVIII., 475]; *Webster v. Reid*, 11 How., 437.

Definitive judgments, where the court has jurisdiction and due notice is given to the defendant, bear the force of *res judicata* and, of course, are conclusive of the rights of the parties. *Civ. Code*, art. 539.

Jurisdiction of the third district court is admitted, and sufficient has already been remarked to show that the defendant was an absentee, and that the notice given to the *curator ad hoc* was a sufficient compliance with the requirement of law. Decisive proof of that proposition is found in the fact that he went voluntarily out of the jurisdiction, under circumstances that show that he cannot complain of legal proceedings regularly prosecuted against him in his absence. *Ludlow v. Ramsey*, 11 Wall., 581 [78 U. S., XX., 216]; *University v. Finch*, 18 Wall., 106 [85 U. S., XXI., 818].

3. When judgment was rendered for the mortgagee in the third district court, the mortgagor appeared and filed a petition for a devolutive appeal to the Supreme Court, which was granted for the reasons set forth in the petition, which plainly showed that the prior action of the court in appointing the *curator ad hoc* was correct.

Such an appeal does not operate as a *superseas*, and the mortgagee and purchaser of the property, in the meantime applied to the clerk of the court, in whose office the deed of sale was recorded, for a motion or advertisement in conformity to an Act of Legislature of the State, entitled "An Act for the Further Assurance to Purchasers at Judicial Sales," and praying that the process might be granted requiring all parties alleging any informality or irregularity in the said sale to show cause, if any they had, why the sale should not be confirmed and homologated. Advertisements as required were duly published; and, no opposition appearing, the

court rendered judgment that the said sale be confirmed and homologated according to law, as authorized by the legislative Act, from which judgment no appeal was ever taken, and the record shows that the said judgment is in full force and unreversed. *Mc Waters v. Smith*, 25 La. Ann., 515.

Purchasers at judicial sales may protect themselves from eviction of the property so purchased, or from any responsibility as possessors of the same, by pursuing the rules prescribed in that enactment. They must sue out the monition and advertise as required, calling on all persons who set up any right to the property in consequence of any informality or irregularity in the order, decree or judgment, or in the appraisal, advertisement or proceedings of the sale, or any defect whatsoever, to show cause within thirty days why the sale so made should not be confirmed and homologated.

Monitions of the kind must state the judicial authority under which the sale took place, and must contain the same description of the property purchased as that given in the judicial conveyance to the buyer, and must also state the price at which the object was bought. Buyers may apply for the process; and the judges of the courts from which the orders, decree or judgment were issued may grant the same in the name of the State, and affix to it the seal of the court. Thirty days having expired, the party may apply to the judge of the court out of which the monition issued, to confirm and homologate the sale; and, if no cause is shown to the contrary, it shall be the duty of the judge to enter such a judgment or decree.

Provision is also made that the judgment of the court shall be in itself conclusive evidence that the monition was regularly made and advertised; nor shall any evidence be received thereafter to contradict the same, or to prove any irregularity in the proceeding. Evidence to prove any such irregularity is declared to be inadmissible; and the further provision is that the judgment of the court confirming and homologating the sale shall have the force of *res judicata*, and that it shall operate as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property in consequence of any illegality or informality in the proceeding, whether before or after judgment. Appended to that is the further provision that the judgment of homologation shall in all cases be received and considered as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced in the interest of parties duly represented. R. S. La., 1870, 469, arts. 2370-2376, inclusive.

Irregularities in the suit of foreclosure under which property is sold for breach of condition may be conclusively validated by such proceeding, if the court which rendered the decree had jurisdiction of the case and the record shows that the party defendant was duly notified of the suit; but the better opinion is, that if the court had no jurisdiction in such a case, or if the process was not duly served, the proceeding under the statute authorizing the monition will not cure the defect. *Willis v. Nicholson*, 24 La. Ann., 545; *Fitz v. Dierker*, 30 La. Ann., 175; *Frost v. McLeod*, 19 La. Ann., 69.

Concede that, and still the concession will not change the conclusion in this case, as the jurisdiction of the court in the foreclosure proceeding is beyond question, and the decisions of the state court prove incontestably that the notice to the *curator ad hoc* was sufficient to support the judgment or decree against the defendant as an absentee from the State.

Apply those rules to the case before the court, and it is clear that the judgment in the monition proceeding affords conclusive proof that the judicial conveyance of the property vested a complete title in the purchaser at the sheriff's sale. Should it be suggested that the judgment rendered in the monition proceeding was subsequent to the appeal from the third district court, the conclusive answer to the objection is that the devolutive appeal never operates as a *supersedeas*. *Arrowsmith v. Durell*, 21 La. Ann., 295; *Walker v. Hays*, 23 La. Ann., 176; *Samory v. Montgomery*, 27 La. Ann., 50; Code of Pr., arts. 578, 595; R. S. La., art. 3392.

Tested by these authorities, it is clear that the appeal constituted no legal obstacle to the subsequent jurisdiction of the subordinate court in rendering the judgment in the monition proceeding, from which it follows that there is no error in the record brought here by the present writ of error.

Judgment affirmed.

Mr. Justice Field and *Mr. Justice Bradley* did not sit in this case, nor participate in its decision.

WILLIAM MCBURNEY ET AL., *Appts.*,

v.

CAROLINE CARSON.

(See S. C., 9 Otto, 567-573.)

Parties to action—objection as to—payment in confederate currency—executor and trustee—sureties.

1. The Act of June 1, 1872, 17 Stat. at L., 198, sec. 13, applies to a suit pending when it was passed as to parties sought to be brought into the case after its passage.

2. An objection as to parties, not taken in the court below, cannot be taken here.

3. A valid payment could not be made to an agent in the Confederate States during the rebellion, in anything but lawful money of the United States, or bank-notes of the current value of their face, without the consent of the creditor.

4. An executor guilty of a *devastavit* and a trustee guilty of a breach of trust, are held liable upon the same principle and to the same extent.

5. Where a trust is created by a will and no trustee appointed, the executor is bound to act as such trustee. In such case the sureties in the bond of the executor are liable for his defaults, whether in one sphere of duty or the other.

[No. 780.]

Submitted Jan. 20, 1879. Decided Mar. 24, 1879.

APPPEAL from the Circuit Court of the United States for the District of South Carolina.

The case is fully stated by the court.

The decision of this court upon this case, as presented at a former term, is reported in 86 U. S., XXII., 178.

Messrs. Edward McCrady and *Edward McCrady, Jr.*, for appellants:

The rule in South Carolina is, that where an

executor has authority to sell, a purchaser is not bound to see to the proper application of the proceeds of sale.

Laurens v. Lucas, 6 Rich. Eq., 226.

The same rule is held by this court. *Potter v. Gardner*, 12 Wheat., 498.

The executors had power to sell on such terms as they deemed judicious and, having sold on credit, they had authority to receipt, in payment of the credit, part of the purchase money when paid.

More than a hundred and fifty years ago it was held by Sir Joseph Jekyll, M. R., that where one possessed of a term, devises it to A, and makes B. his executor, and leaves some debts, if the executor sells the term, the purchaser shall hold it against the devisee.

Ewer v. Corbet, 2 P. Wms., 148; *Court v. Jeffery*, 1 Sim. & St., 105; *Forbes v. Peacock*, 11 Sim., 152; *Pierce v. Scott*, 1 Y. & Col. Eq. (Ex.), 257; *Stroughill v. Anstey*, 1 De G. M. & G. 652.

In the case of *Charlton v. Earl of Durham*, L. R., 4 Ch. App., 438 (which is a case remarkably similar to this, in many particulars), Lord Hatherly, L. C., says: "The persons with whom the executors are dealing are not bound to know the state of the testator's assets, and it may be many years before all his debts are paid and his estate wound up.

There are good reasons why the receipt of one executor should suffice, as he may be called upon to pay debts, and this rule, therefore, prevails until you can fix the debtor with much more precise notice than we have here, that the estate has been all administered."

In *Lowry v. Com. & Farmers' Bank*, Camp. (Taney), 332, *Ch. J.* Taney says: "Undoubtedly this stock, although thus specifically bequeathed, was yet liable to be sold, if necessary, for the payment of the debts of the testator, and if the bank did not know, or had no reasonable ground for supposing that the executor was misapplying the assets, it would not be responsible, notwithstanding its implied knowledge of the will."

Mr. Perry, in his work, commenting on the case of *Stroughill v. Anstey*, 1 De G. M. & G., 652, says, sec. 797: "This rule thus stated proceeds upon the ground that in all cases where a testator has given his trustees a power of sale to pay debts generally, or to pay particular debts, or to pay legacies only, he has reposed a special confidence in the trustees for those purposes, and has declared that they shall execute the trusts, and that purchasers have nothing to do with its execution, and need not look to the application of the purchase money, whether it is to pay debts generally, or debts and legacies, or particular debts named, or legacies only."

"A release of a debt by one of several executors is valid and shall bind the rest. So a grant or a surrender of the term by the executor shall be equally available. So the attornment of one shall be the attornment of the other." See authorities cited. 2 William's Exrs., 310.

Simpson v. Gutteridge, 1 Mad. Ch., 616; *Am. ed.*, 327, at p. 330, 331; *Bogert v. Hertell*, 4 Hill, 504.

The case of *Charlton v. Earl of Durham* (L. R., 4 Ch. App., 438), above quoted, is identical with this case in all its essential particulars.

But, says the complainant, granting that

Robertson and Blacklock were still to be regarded as executors, and that one of them could receipt for the debts due the estate, they paid but Confederate currency, which was not a lawful payment.

It will be observed that, in point of fact, no confederate currency passed between the appellant and Ball. They gave their checks to Ball for the purchase money; one of these checks was for \$84,207.56, and the other for \$16,000. The first was deposited by Robertson and Blacklock to their credit in the same bank. Now, suppose that Robertson and Blacklock had left their money on deposit in bank. They would then have had a credit at the end of the war in that bank to the amount of the value of the confederate currency reduced to the value of United States currency as of the date of deposit; *Whaley v. Bank of Charleston*, 5 Rich. (N. S.), 199, and, by the rule of computation, adopted in *Mayer v. Mordecai*, 1 Rich. (N. S.), 383, the \$100,000 estimated in confederate currency at the time of this transaction was worth \$33,333.33.

When these proceedings were commenced, it was supposed that the court would refuse to recognize or to sanction any transaction whatever which had been based on confederate currency; but in the cases of *Thorington v. Smith*, 8 Wall., 1 (75 U. S., XIX., 361); *Delmas v. U. S.*, 14 Wall., 661 (81 U. S., XX., 757), and *Planter's Bank v. Union Bank*, 16 Wall., 483 (83 U. S., XXI., 473), the court refused to set aside contracts made upon such a consideration.

The language of Mr. Justice Field, in the *Confederate Note Case*, 19 Wall., 555 (86 U. S., XXII., 199), is most appropriate to our position: "Contracts thus made, not designed to aid in insurrectionary Government, could not, therefore, without manifest injustice to the parties, be treated as invalid between them."

Hanauer v. Woodruff, 15 Wall., 448 (82 U. S., XXI., 227).

Subsequent to these cases two others have been decided, upon which the complainant greatly relies:

Horn v. Lockhart, 17 Wall., 570 (84 U. S., XXI., 657), and *Fretz v. Stover*, 22 Wall., 198 (89 U. S., XXII., 769).

These decisions might be applicable to the liability of Robertson and Blacklock, if the complainants had them before the court, answering and admitting that they had drawn in confederate currency the checks which the appellee had given Ball, and had invested the proceeds in confederate bonds. But in the present pleadings they have made no answer, and the court is left to conjecture. But if it had been proved, so as to conclude the appellants, that Robertson and Blacklock had drawn the checks in question in confederate currency and invested in confederate bonds, the court is asked to go a step further than *Horn v. Lockhart* and *Fretz v. Stover*. It is asked to say that it would hold the purchasers from Lockhart responsible for paying him in currency he was willing to receive. It is asked to say that if Stover had sold the farm covered by the mortgage to Fretz, had produced Chilton's power of attorney from Fretz to receive payment, and Chilton's receipt and discharge of the mortgage, as such attorney in fact, that this court would

not only have held Stover liable on his bond but would have also held the farm in the hands of the purchaser, still subject to the mortgage so satisfied by Fretz's attorney. We do not think that this court is prepared to go to this extent.

The distinction which we take has been declared as law in South Carolina, by a court by no means indulgent towards confederate investments: the case of *Mayer v. Mordecai*, 1 Rich. (S. C.), N. S., 383.

Messrs. *Edward M. Shepherd, Clarence A. Seward* and *James Lowndes*, for appellee:

I. It is a preliminary question, whether Robertson and Blacklock were, in 1863, trustees or executors. Their accounts show that they had then paid the debts and transferred the bonds to themselves as trustees. Without this act they were trustees by presumption of law on the payment of the debts.

Gray v. Brown, 1 Rich. L., 351; *Lewin, Trustees*, 246.

If Robertson and Blacklock were trustees, these consequences follow:

1. Robertson alone could not in equity discharge the mortgage.

Lewin, Trusts, 297; *Hill, Trust.*, 307, 308; *Mayrant v. Guignard*, 3 Strob. Eq., 128; *Lee v. Sankey*, L. R., 15 Eq., 204.

2. The trustees had under the will no power of sale, the power being attached by the will solely to the office of the executors.

The difference is not of practical importance, for if Robertson and Blacklock were executors in 1863, what they did was not an exercise of the power of sale; because

1. Surrender of a security by the creditor to the debtor, is not a sale.

2. A sale is the transfer of the title for money. But if the transaction had been technically a sale for confederate notes, it would have been as much a breach of trust as acceptance of those notes by way of payment.

Whether they were executors or trustees, their only power was to accept payment in money.

II. The trustee, Robertson, committed a breach of trust in accepting payment of the bonds in confederate treasury notes.

There have been so many decisions on this point, that it is unnecessary to argue it on principle.

Mayer v. Mordecai, 1 S. C., 383; *Creighton v. Pringle*, 3 S. C., 96; *Dunn v. Dunn*, 1 S. C., 350; *Workman v. Bolling*, 2 S. C., 458; *Blackwell v. Tucker*, 7 S. C., 387; *Fretz v. Stover*, 22 Wall., 207 (89 U. S., XXII., 771); *Horn v. Lockhart*, is a case of executors; *Fretz v. Stover*, of trustees.

It is clear from these authorities, that Robertson's discharge of the bond and mortgage was in breach of his trust and void in equity.

III. McBurney not only had notice that the trustee had discharged the bonds for confederate treasury notes, in breach of his trust, but furnished Ball with notes before Ball's conveyance to him, to enable Ball to get the bonds discharged. Having purchased Dean Hall, with full knowledge of the breach of trust and of the complainant's equities, he took Dean Hall subject to those equities.

The general principle of the liability of property in the hands of a purchaser, with notice of an equity, is too familiar to need argument.

It would indeed be an anomaly in equity jurisprudence to refuse to enforce this principle against a purchaser, with notice of this particular equity, while enforcing it in all other cases. *Duncan v. Jaudon*, 15 Wall., 165 (82 U. S., XXI., 142).

The principal question involved in this suit is *res judicata* in this court. In *Fretz v. Stover*, *supra*, it was held that a lien on land was not discharged by the payment to the trustee of confederate treasury notes.

Under the principle of that decision, the bond and mortgage would be valid and subsisting against Ball.

It is perfectly plain that they are equally so as against McBurney, he being a purchaser from Ball with notice.

The *cestui que trust* is not bound, as argued, to go first against the trustee.

Oliver v. Piatt, 3 How., 333.

Nor, as argued, is there a question of seeing to the application of purchase money. Mrs. Carson is not seeking to charge McBurney's lands because he paid the trustee money which the latter misapplied, but because McBurney did not pay the trustee any money at all.

IV. The assignments of William and James Carson to their mother, the complainant, give her the right to bring her bill as to their shares.

Such assignments, evidently made for the benefit and support of the mother by sons, in fulfillment of their natural duty to support her, do not stand on the footing of a voluntary assignment, but should be encouraged. But voluntary assignments will be enforced in equity. *Lewin*, 93, 600.

The distinction is between enforcing a voluntary assignment against the assignor at the suit of the assignee, and enforcing it as between assignee and third parties.

The cases cited by the appellants all belong to the former class. The case of *Marsh v. Whitmore*, 21 Wall., 184 (88 U. S., XXII., 485), has no bearing on the subject; that of *The Mohawk*, 8 Wall., 162 (75 U. S., XIX., 408), confirms the appellee's views of the question.

In *Prosser v. Edmonds*, 1 You. & C., 481 and *Hill v. Boyle*, L. R., 4 Eq., 260, no points were made on the consideration, but on the nature of the right assigned. In the former case, Lord Abinger distinguished between the assignment of a mere right of action and of an equitable interest; and held that the right to call one to account for a fraud was not assignable. In *Hill v. Boyle*, the right assigned was to bring suit against the trustees to make them account for profits made out of a trust fund. That, like the assignment in *Prosser v. Edmonds*, was simply the transfer of a right of action in equity. The assignment here is of an equitable title, and is not within the principles of these cases.

Mr. Justice *Swayne* delivered the opinion of the court:

This case was before us at a former time. It will be found reported in *Robertson v. Carson*, 19 Wall., 94 [86 U. S., XXII., 178]. The decree of the circuit court was reversed and the cause was remanded for further proceedings. Such proceedings have been had, and it is again before us by appeal. A brief statement of the

facts and of the further history of the case are necessary.

William Carson, of South Carolina, died in August, 1856, leaving a widow, Caroline, and two minor sons, William and James. He left considerable personal property, and a plantation known as Dean Hall. By his will he appointed Robertson and Blacklock his executors, and directed all his estate to be sold on such terms as they should deem proper. The proceeds, after the payment of his debts, were to be divided into three parts, to be held in trust by his executors. The interest of one third was to be paid to the widow. The interest of the other two thirds was to be devoted to the education and support of the two sons until they should come of age. The principal was then to be paid over to them.

The executors sold Dean Hall to Elias N. Ball, and took his bonds and mortgage for a part of the purchase money. In 1863, Ball sold the property to Hyatt, McBurney & Co., a firm consisting of Hyatt, McBurney, Gillespie, Hazletine and McGhan. The conveyance was made to Gillespie and McBurney. The firm paid for the property in confederate treasury notes. Out of the proceeds Ball paid his bonds to Robertson, and took them up and discharged the mortgage. Blacklock, the other executor, was then absent from the country, and upon his return refused to recognize the transaction. Hyatt sold his interest in the plantation to the other members of the firm, and Gillespie and McBurney gave him a lien upon it to secure the payment of the purchase money. When the executors sold this property to Ball, they sold to him also a considerable amount of personal property on credit, and took his bond, with W. J. Ball as surety, for the price.

As the sons of the testator came of age they transferred their entire interest in the estate of their father to their mother. She filed the bill to set aside the cancellation of the mortgage upon Dean Hall as fraudulent and void, and to charge Elias N. Ball and his surety with the amount due upon their bonds given for the personal property. The bill did not make any member of the firm of McBurney & Co. a party, except McBurney. Hyatt, it appeared, was a resident of New York, of which State the complainant was also a resident and citizen. Elias N. Ball was made a party, but was not served with process. The circuit court decreed in favor of the complainant. This court held that Hyatt was not an indispensable party, as the decree would not affect his rights; but that Ball and Gillespie were such parties. The decree was therefore reversed, and the cause remanded for further proceedings.

After the cause was re-instated in the circuit court, the complainant filed an amended bill. In the meantime, Elias N. Ball had removed to the State of New Jersey, had there gone into bankruptcy, and Elias N. Miller had been appointed his assignee. Ball afterwards received his discharge and died. The defendants named in the bill were Robertson and Blacklock, the executors, McBurney, McGhan, Gillespie and Hazletine, being all the members of the firm of Hyatt, McBurney & Co., except Hyatt and Elias N. Miller, the assignee in bankruptcy of Ball. We hold, as we held before, that Hyatt is not an indispensable party. Hazletine could not be

found. He was thereupon notified pursuant to the Act of Congress of June 1, 1872, 17 Stat. at L., 198, sec. 13. It is objected that the Act could not apply to a suit pending when it was passed. It was not applied retrospectively, but only as to parties sought to be brought into the case more than a year after its passage. Such a result is consistent with its terms. There is no reason why it should not be so applied. It is a remedial statute, and should be liberally construed to accomplish the end in view. This construction is abundantly supported by well considered authorities. *Southwick v. Southwick*, 49 N. Y., 510; *Ex parte Lane*, 3 Met., 213; *Holyoke v. Haskins*, 9 Pick., 259; *Rader v. Southeasterly Road*, etc., 36 N. J. L., 273; *Tilton v. Swift*, 40 Iowa, 78; *People v. Mortimer*, 46 Cal., 114; Cooley, Const. Lim., 381.

But as we held before and still hold, that Hazletine was not an indispensable party, we forbear to pursue the subject further. He is sufficiently represented by his copartners, Gillespie and McBurney, in whom is vested the legal title of the Dean Hall property. Both of them appeared and answered. Miller, the assignee in bankruptcy of Ball and Gillespie, was ordered to appear and plead, answer or demur to the bill. Both acknowledged service of the order. This brought them effectually before the court. In McBurney's answer he insisted that Miller, as assignee, and the facts of Ball's bankruptcy, discharge and death, could be brought into the case only by a supplemental bill. The court thereupon ordered such a bill to be filed for that purpose, and it was filed accordingly. It made Miller alone a defendant. Here it has been insisted that all the other defendants to the amended bill should have been made parties to the supplemental bill also. To this objection it is a sufficient answer that it does not appear to have been taken below. It cannot, therefore, be taken here. Were we to hold otherwise, we should in this respect exercise original instead of appellate jurisdiction. There are other answers equally conclusive, but it is needless to consume time by adverting to them.

It is also objected that William Carson and James Carson, the sons of William Carson, deceased, had only a right of action, and that this right could not be transferred to the complainant. This is an inverted view of the subject. The bill charges fraud, conspiracy and spoliation. If the charge is untrue, the bill should be dismissed. If otherwise, there is a recoil upon the wrong-doers, and those intended to be despoiled are unaffected. Their rights are just what they would have been if the scheme had been neither conceived nor executed. A different result would be a legal solecism.

All the obstructions are thus removed from our way to the examination of the merits of the case.

The last amended bill is silent as to the sale of the personal property, and the decree relates only to the bonds of Ball for the purchase money of the plantation and the mortgage securing them upon that property. The decree charges upon the property the amount due on the bonds, and directs the mortgage to be enforced in all respects as if the bonds had not been surrendered and the mortgage had not been canceled. McBurney and McGhan are

the only appellants. Our further remarks will be confined to the subject of the decree.

The executors sold the property to Ball in the spring of 1857 for \$50,000. He paid \$15,000 down, and gave his bonds for the balance, secured by a mortgage upon the premises, as before stated. The property was valuable, and the amount due was well secured. The debt was payable only in lawful money of the United States, and the executors had no right to take anything in payment but such money or its equivalent. Such was the condition of things in the spring of the year 1863.

The civil war was then flagrant in South Carolina. McBurney says that, having a large quantity of cotton on hand and the city being blockaded, his firm "were willing to change some of their investments into real estate until peace should be restored." This was shrewd and wise. The sole currency there was confederate money. The Dean Hall property lay invitingly before them, but was incumbered by a heavy mortgage for the benefit of the widow and the orphans. The plan was conceived of acquiring the title and getting rid of the mortgage, both by means of confederate currency. They thus executed it: they gave Ball \$100,000 in confederate notes for the property, and took a conveyance from him. They placed a part of the confederate money in his hands, as McBurney says, "to enable him to pay off his bonds to said executors and to satisfy said mortgage." Robertson received payment in this paper and thereupon gave up the bonds, and as soon as he could get access to the record entered satisfaction of the mortgage. He invested the notes in confederate bonds which became utterly worthless at the close of the war.

McBurney & Co. and the Carsons thus changed places. The former still hold the broad acres, while the latter have lost every dollar of their investment, so well secured at the outset, upon the property. They became, as it were, the insurers of the fate of battles and of the result of war. There was evidently a plot. McBurney & Co. were its contrivers, Ball was their instrument, Robertson was their dupe, and the Carsons were the victims.

If the case stopped here we could not hesitate as to what our judgment should be. But in its strictly legal aspect it is equally free from doubt.

In *Ward v. Smith*, 7 Wall., 451 [74 U. S., XIX., 209], this court held that a valid payment could not be made to an agent in the Confederate States during the rebellion in anything but lawful money of the United States or banknotes of the current value of their face, without the consent of the creditor.

In *Horn v. Lockhart*, 17 Wall., 570 [84 U. S., XXI., 657], an executor had sold property, invested the proceeds in confederate bonds, and his conduct had been approved and ratified by a decree of the probate court. It was held by this court that the investment was void, that the decree of the probate court was a nullity, and that the executor was liable to the distributees in good money for the full amount involved.

Fretz v. Stover, 22 Wall., 198 [89 U. S., XXII., 769], in its most prominent features is not unlike the case before us. There, a citizen of Pennsylvania, just before the breaking out of

the war, took the bond of a citizen of Virginia, secured by a deed of trust upon real estate. The attorney of the creditor was the trustee in the deed. During the war the attorney received payment in confederate notes, and Virginia banknotes of no greater value, the entire capital of the bank having been converted into confederate bonds. After the close of the war the creditor sued for his debt. This court adjudged that the transaction between the attorney and the debtor was illegal, fraudulent and void, and decreed the enforcement of the bond and deed of trust.

The question has been raised whether Robertson acted, touching the bonds and mortgage of Ball, as executor or trustee. The matter is immaterial in this case. An executor guilty of a *devastavit*, whereby assets are diverted from their proper application, and a trustee guilty of a breach of trust, and their accomplices, if they have any, are held liable upon the same principle and to the same extent. *Field v. Schieffelin*, 7 Johns. Ch., 150; *Hill v. Simpson*, 7 Ves., 152.

There can, however, be no doubt upon the point suggested. "Where the will contains express directions what the executors are to do, an executor who proves the will must do all which he is directed to do as executor, and he cannot say that though executor he is not clothed with any of those trusts." 3 Wms. Exrs., 1796.

Proving the will is an acceptance of the trust. *Mucklow v. Fuller*, Jacob, 198. Where a trust is created by a will and no trustee appointed, "the executor is bound to act as such trustee." *Holbrook v. Harrington*, 16 Gray, 102. In such case the sureties in the bond of the executor are liable for his defaults, whether in one sphere of duty or the other. *Newcomb v. Williams*, 9 Met. (Mass.), 525; *Prior v. Talbot*, 10 Cush., 1; *Dorr v. Wainwright*, 13 Pick., 328; *Towne v. Ammidown*, 20 Pick., 535.

The decree of the Circuit Court is affirmed.

THE EASTERN TRANSPORTATION LINE, *Plff. in Err.*,

v.

HOBART COOPER, as Admr., etc.

(See S. C., 9 Otto, 78, 79).

Passenger barge.

A canal-boat laden with coal for transportation, having on board the wife and children of the captain, is not "a barge carrying passengers," within the meaning of sec. 4492, Rev. Stat., which requires such a barge, while in tow of a steamer, to be provided with "fire-buckets, axes, life-preservers and yawls."

[No. 1089.]

Submitted Mar. 31, 1879. Decided Apr. 7, 1879.

IN ERROR to the Supreme Court of the State of New York.

On motions to dismiss and to affirm.

Judgment was obtained in the court below by the defendant in error, for the loss of the life of Mary Ann Cooper, his wife, caused by a certain collision. The collision occurred off the Battery in the Port of New York, while the

plaintiff with his wife and daughters were upon a canal-boat, of which plaintiff was captain, and which was there in tow of a steam-tug. The plaintiff in error now claims that the canal-boat was, under such circumstances, "a barge carrying passengers," and was, therefore, in fault in not being supplied with the life-saving apparatus required of such barges by Act of Congress.

Messrs. Childs & Hull, and **William Stanley**, for defendant in error.

Messrs. Benedict, Taft and **R. D. Benedict**, for plaintiff in error.

Mr. Chief Justice Waite announced the judgment of the court:

The only federal question presented in this case is one upon which we are not inclined to hear an argument. A canal-boat laden with coal for transportation, having on board the wife and children of the captain, is not "a barge carrying passengers," within the meaning of section 4492, Revised Statutes, which requires such a barge, while in tow of a steamer, to be provided with "fire-buckets, axes, life-preservers and yawls." The motion to dismiss is denied, but that to affirm is granted.

Judgment affirmed.

MARY C. GORDON, wife of WILLIAM ALEXANDER GORDON, *Appl.*,

v.

JAMES H. GILFOIL.

(See S. C., 9 Otto, 168-179.)

Mortgage debt—Louisiana law—setting aside proceedings—prescription—action—heir.

1. If seizure and sale of mortgaged property do not result in full satisfaction of the debt, suit may be brought on the primary security in order to recover the balance.

2. In Louisiana, an order for seizure and sale, served on the debtor, is a judicial demand, the same as an ordinary suit; and it continues in operation as such until it has been rendered effective by a valid sale.

3. The setting aside of the sale for irregularity does not affect the order of seizure and sale; but a new writ may issue upon it.

4. Proceedings on an order of seizure and sale interrupt the prescription of the personal action for the same debt.

5. Although proceedings in the order of seizure and sale were pending in the state court, the debt could be prosecuted in the Circuit Court of the United States. The pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a Federal Court.

6. Under the Louisiana Code, an heir by taking possession of his father's undivided half of the mortgaged property, did not make himself liable for the mortgage debt.

[No. 1050.]

Submitted Jan. 6, 1879. Decided Apr. 7, 1879.

A PPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. Henry B. Kelley, Henry L. Lazarus and *W. Alex. Gordon*, for appellant.
Mr. Samuel R. Walker, for appellee.

NOTE.—Plea of another suit pending in abatement; when good. See note to *Cook v. Burnley*, 78 U. S., XX., 29.

See 9 OTTO.

Mr. Justice Bradley delivered the opinion of the court:

In January, 1867, Patrick Gilfoil, of Madison Parish, La., being indebted to Gordon & Castillo, of New Orleans, in the sum of \$4,500, or thereabouts, gave them his promissory notes therefor, payable on the 1st of January, 1868, and 1st of January, 1869, secured by a mortgage on his cotton plantation in the Parish of Madison. The property was in fact community property, and Gilfoil's wife had died the year preceding this transaction, leaving a minor son, James H. Gilfoil, as her only heir at law. The notes not being paid, Mary Cartwright Gordon, the holder thereof, in February, 1869, filed a petition in the District Court for the Parish of Madison for an order of seizure and sale of the mortgaged premises, and executory process was issued accordingly, and on the 3d of July, 1869, the sheriff sold the property to Mrs. Gordon for the sum of \$600, and executed to her a deed thereof; but no possession was delivered.

In January, 1872, Mrs. Gordon instituted a suit in the District Court of the Parish against Patrick Gilfoil, to recover the land, and the rent thereof from the time of the sheriff's sale. This suit was known as No. 772.

To the petition in this suit Patrick Gilfoil filed an answer containing a general denial, and specially denying that the plaintiff had any good and valid title. By a supplemental answer, he particularized the cause of nullity of plaintiff's title to be, that the executory proceeding was in every respect illegal; that no service of notice of the order of seizure and sale, nor any notice of seizure, nor any appraisal, was legally made, nor any of the forms of law observed by the sheriff in making the sale; and that no due and valid advertisement was made.

Patrick Gilfoil died October 2, 1872. Before his death, in May, 1872, his son, James H. Gilfoil, by petition intervened in the suit, claiming that the property was community property, and that he was the legal owner of one undivided half thereof by inheritance from his deceased mother; and praying judgment accordingly.

In April, 1874, Mrs. Gordon filed an amended and supplemental petition, alleging the death of Patrick Gilfoil, and that James H. Gilfoil had possessed himself of the property, claiming to be the legitimate heir of Patrick, and refused to deliver possession thereof. Wherefore the petitioner prayed that James H. Gilfoil be made a party to the suit; and that petitioner recover of him judgment as prayed for in her original petition, and the rents since the death of Patrick Gilfoil; and for general relief. She also filed an answer to James H. Gilfoil's petition of intervention.

James H. Gilfoil filed an answer to the supplemental petition, as well as to the original petition, denying all the allegations thereof, and specially denying any legal sale of the land. By a further answer he pleaded prescription of three and five years, and prescription generally; alleging that the debt was prescribed when Patrick Gilfoil acknowledged it.

The case having gone to trial in November, 1874, the district court decided in favor of the plaintiff, Mrs. Gordon, as to one half of the property, and as to the other half, decided in favor of the defendant; but on appeal to the Supreme Court of Louisiana, the judgment in favor

of the plaintiff was reversed, the court deciding that the sale by the sheriff under the executory process was void, because the sheriff at no time had the mortgaged property in his possession. They held that an actual corporal possession of property seized must take place in order to make a sheriff's sale valid, and to render a compliance with the law complete; that the sheriff must have the property in his own possession and under his own control, or in the possession and under the control of some person duly authorized by him. The judgment in favor of the defendant was affirmed, and judgment was given in his favor generally. The case is reported in 27 La. Ann., 265.

This judgment of the Supreme Court was rendered March 8, 1875.

Thereupon, on the 19th of October, 1876, the present suit was commenced in the Circuit Court of the United States, against James H. Gilfoil, charging him on the notes, as universal heir of Patrick Gilfoil, and praying judgment for the amount of the debt, with mortgage lien and privilege out of the mortgaged premises.

The defendant pleaded as follows: "1. That the said petition discloses no cause of action against this respondent. 2. That this court is without jurisdiction, for the reason that said plaintiff, having elected to sue in the court of the State of Louisiana, the 13th district court, in and for the Parish of Madison, and jurisdiction of this cause has already vested in the said state court. 3. That the obligations sued on are prescribed by the lapse of more than five years."

The court, upon argument, ordered that the plea of prescription be referred to the merits, and that the plaintiff be allowed to amend her petition, by setting up the facts upon which she relied to interrupt prescription.

This she did by setting up the order of seizure and sale; and she claimed that James H. Gilfoil was liable for the debt, because he, as heir of Patrick Gilfoil, took possession of his estate and property.

The defendant filed an answer, denying the supplemental petition generally, denying the plaintiff's ownership of the notes, and setting up the order of seizure and sale as a merger of the original debt; and further, that as said proceedings had never been discontinued, the circuit court was without jurisdiction.

By a supplemental and amended answer he set up his ownership in one undivided half of the mortgaged property as heir of his mother; and as to the other half he averred that, as administrator and sole beneficiary heir of his father (Patrick Gilfoil), he became possessor thereof as belonging to his father's succession; but denied that he had taken such possession as would make him liable personally for any debt or mortgage claim against the property, or for any of the rents and revenues thereof. He again set up the order of seizure and sale as a merger of the debt; and averred that the said executory proceedings were still pending in the district court. He also set up and annexed to his answer the proceedings and judgment in the suit No. 772, by virtue of which he insisted that the matters in controversy in this suit had become *res judicata*; and the cause came on for trial upon the issues thus presented by the pleadings.

The proceedings on the order of seizure and

sale, and in the suit No. 772 in the district court and in the Supreme Court of Louisiana, as also the mortgage and sheriff's deed, were either admitted or proved. Certain evidence taken in the latter case, and certified with the other proceedings, was also admitted by stipulation of the parties. This was all the evidence adduced at the trial in the circuit court.

The evidence admitted by stipulation was to the effect, amongst other things, that James H. Gilfoil resided with his father on the property in question at the time of the latter's death, and still resided there in November, 1874, and had possession of the said property; that Patrick Gilfoil died October 2, 1872; that Catharine, his wife, died April 13, 1866, that the defendant was her son and only heir; that he was fifteen years of age in 1867; but that he was emancipated before his intervention was filed in the suit No. 772 (being a minor).

The circuit court gave judgment for the defendant, but on what ground does not appear. The ground taken in this court by the appellee in support of the judgment is, first, the point of *res judicata*; and, second, the prescription of five years. The appellant attempts to controvert these grounds of defense by showing, as to the first, that the question presented in the present suit is not the same question which was decided between the parties in the suit No. 772, and that the order of seizure and sale is no merger of the original debt; as to the second, that the alleged prescription was interrupted and suspended by the order of seizure and sale, and the subsequent proceedings in reference thereto.

The first matter to be considered, therefore, is, whether the question endeavored to be raised in this suit was or was not passed upon or necessarily involved in suit No. 772.

The object of the present suit is to charge the defendant, as universal heir of his father, Patrick Gilfoil, with the entire debt, on the ground that the defendant as such heir possessed himself of his father's interest in the plantation. Was this question passed upon or necessarily involved in suit No. 772? From the recital of the pleadings in that case it is apparent that the primary and main object was to maintain the plaintiff's title to, and to recover, the land itself under the sheriff's sale, made by virtue of executory process in 1869. The defense of Patrick Gilfoil, prior to his death, was that the sale was absolutely void by reason of non-compliance with the forms of law required in such cases. The defense of James H. Gilfoil, as intervener, was, as to one undivided half of the land, that it belonged to his mother by right of community, and was inherited by him from her; and as to the other undivided half, that the sheriff's sale was void for want of possession, and that the debt for which it was sold was prescribed. The decision of the Supreme Court was with the defendant on both points, namely: first, that the defendant was owner of one undivided half of the land by virtue of his inheritance from his mother, who was decreed to have been the undivided half owner or partner in community with her husband; secondly, that the sheriff's sale was void for want of actual service and possession. From all that appears by the record, there was no adjudication on the question of defendant's liability as arising from his taking and keeping possession of one undivided half of the

property as heir of his father, unless such adjudication is to be implied from the pleadings. A more particular examination of these is necessary to determine this matter.

The original petition simply claimed ownership of the property, alleged that Patrick Gilfoil was in unlawful possession of it as a trespasser, and prayed that the petitioner's title might be recognized, that she might have judgment for the property, and a judgment against Patrick Gilfoil for the rents and revenues. It was almost the exact equivalent of the common law action of ejectment, or rather of a real action involving the question of title only.

After the intervention of James H. Gilfoil, and the death of Patrick, the plaintiff answered the intervenor's claim by denying that he was the legal heir either of Patrick or his wife, and denying any right of community in the latter, alleging that the property was the separate property of Patrick; but if there was any community, alleging that the debt for which the property was sold was a community debt, and as such the property was liable for it, and was properly and legally sold to pay the same.

And by her supplementary petition against James, the plaintiff alleged that he was then in possession of the property, and claimed to be the legitimate heir of Patrick, and refused to deliver the possession; and that if Patrick left any succession at his death, it was taken possession of by James without any process of law, and used for his own purposes, whereby he became an intermeddler; thereby rendering himself liable for all the debts of the succession, and especially personally bound for the rents and revenues of the property in question from the date of the unlawful possession thereof by Patrick. But the prayer was only that the petitioner might recover, of James, judgment as prayed for in the original petition, and the rents and revenues since the death of Patrick. The petition contained no prayer for a personal judgment against him; and the debt itself was not set up as a ground of claim or action, in either the original or supplemental petition.

It seems plain, therefore, that the character of the suit was consistently maintained throughout as a petitory suit for the property, and for an account of its rents and revenues. No judgment was sought by the plaintiff against the defendant for the debt. His supposed liability for the debts of the succession, on account of possessing himself thereof without any process of law, was only stated incidentally, by way of rebutting his pretension of being other than a mere trespasser on the property. His liability for the debt was not put in issue by the pleadings, and was not considered by the court. The question of the title alone was the burden of the action, and was all that was decided in the judgment.

We are of opinion, therefore, that the plea of *res judicata* is not maintained.

We are also of opinion that the order of seizure and sale effected no merger of the debt. That order was made upon the act of mortgage as an authentic instrument importing confession of judgment. Code of Pr., arts. 732, etc. The order was a mere award of executory process, and did not affect in the slightest degree the nature or dignity of the primary securities for the debt. If seizure and sale of mortgaged

property do not result in full satisfaction of the debt, suit has to be brought on the primary security in order to recover the balance. *Harrod v. Voorhies*, 16 La., 254; *Humphries v. Brown*, 19 La. Ann., 158.

The next question is, whether the plea of prescription has been sustained in this case. Five years is the regular time of prescription against bills of exchange and promissory notes payable to order or bearer. Civ. Code, art. 3540. And this prescription runs against minors and interdicted persons. Art. 3541. The last of the notes upon which the defendant is sought to be made liable matured on the 1st of January, 1869. The claim, therefore, became prescribed on the 1st of January, 1874, unless the prescription was interrupted by some lawful cause. A legal interruption takes place by a judicial demand made upon the debtor. The plaintiff alleges that prescription in this case was interrupted by service of notice of the order of seizure and sale upon Patrick Gilfoil, on the 25th day of March, 1869, and that such interruption continued at least until the death of Patrick Gilfoil, October 2, 1872, because the plaintiff could at any time, after the writ had expired, or after the sale under it had been set aside, issue an *alias* writ without a new order. The plaintiff contends, in other words, that an order for seizure and sale, served on the debtor, is a judicial demand, the same as an ordinary suit; and that it continues in operation as such until it has been rendered effective by a valid sale. This position seems to be sustained by several decisions of the Supreme Court of Louisiana. *Stanborough v. McCall*, 4 La. Ann., 322; *Fortier v. Zimpel*, 6 La. Ann., 53; *Rhea v. Taylor*, 8 La. Ann., 23; *Walker v. Lee*, 20 La. Ann., 192; *D'Ile Roupe v. Carradin*, 20 La. Ann., 244; *Hebert v. Chastant*, 22 La. Ann., 152; *Williams v. Douglass*, 23 La. Ann., 687. In *D'Ile Roupe v. Carradin*, the note matured in January, 1858, and an order of seizure and sale was made and served in June, 1858, a writ was issued and a levy was made, but no sale took place. In 1867, nine years afterwards, a new writ was issued, on which an injunction was obtained on two grounds: first, a claim of homestead; second, prescription. Both of these grounds were overruled. As to the latter, the court say: "The plea of prescription cannot avail; it was interrupted by the order of seizure and sale, duly notified to the plaintiff, as we have recently decided in *Walker v. Lee*."

Numerous authorities also show that the setting aside of a sale for irregularity does not affect the order of seizure and sale, but a new writ may issue upon it. In *Bk. v. Dixey*, 21 La. Ann., 32, the court say: "This is an appeal from an order of seizure and sale. It is well settled that on such an appeal the only question is, whether there was before the judge a *quo* sufficient evidence to authorize the fiat. The order cannot be set aside on appeal, on account of subsequent irregularities in the execution of it, as by not notifying the proper parties or otherwise. *Dodd v. Crain*, 6 Rob. (La.), 60." In *Fortier v. Zimpel*, 6 La. Ann., 54, there were three successive writs issued upon the same order. The first was stayed by the plaintiff, and an *alias* issued. This was annulled, on the ground of being issued for too large a sum. Plaintiff, considering the original petition still in court, then ap-

plied for a *pluries* writ, which was granted. A sale made under this writ, though strenuously contested, was homologated and confirmed. In *Riddell v. Ebinger*, 6 La. Ann., 407, the sale was sought to be annulled. The court, amongst other things, say: "The writ under which the sale was made was an *alias*, and it is contended that the order of seizure was a judgment only so far as the original writ was concerned; that it expired when the writ was returned, and that no other writ could issue without a new order of court. This objection has so often been held unfounded by our predecessors and ourselves, that we deem it unnecessary to do more than to refer to some of the cases in point." The court then refers to *Ursuline Nuns v. Depassau*, 7 Mart. (N. S.), 646; *Mader v. Fox*, 15 La., 132; *Harrod v. Voorhies*, 16 La., 254; *Portier v. Zimpel*, 6 La. Ann., 53. In *Stanborough v. McCall*, 4 La. Ann., 327, the court explain the reason why proceedings on an order of seizure and sale interrupt the prescription of the personal action for the same debt. They say: "The rule harmonizes with the theory of prescription, which has its basis in the presumption of renunciation on the part of him who neglects his rights, and which presumption cannot be entertained against a party who is struggling to collect a debt, and is not *sui juris contemptor*. The interruption, then, created by the institution of one species of action must also be considered as continuous, and as preserving the personal action while the hypothecary action is in course of prosecution.

These cases, with others that might be cited, seem fully to establish the position of the plaintiff, and we think that the position is clearly applicable to the present case. In 1869, soon after the debt became due, the plaintiff filed her petition for an order of seizure and sale. The order was granted and served on the debtor, then in possession of the mortgaged premises, and the property was sold. From that time to the debtor's death in October, 1872, and afterwards, until judgment was given against her in March, 1875, she was engaged in a continuous struggle in the courts to obtain the fruits of that order and sale. The sale was held to be void by the irregular proceedings of the sheriff; and according to the decisions of the state courts, her petition and the order made thereon were still in force and, if she pleased, she could have applied for the issue of another writ thereon. It may be that it would have been necessary to have the petition and order amended; but that would not disaffirm the pendency of the proceedings or the jurisdiction of the court.

We think, therefore, that the proceeding for seizure and sale interrupted the prescription of the personal action on the notes; and that this interruption continued up to the time when the final judgment of the Supreme Court of Louisiana was rendered against the plaintiff. The present action was commenced about a year and a half afterwards; and, therefore, in our judgment, the plea of prescription must fail.

It may be proper here also to observe, although the point was not pressed in the argument, that the exception to the jurisdiction of the circuit court is destitute of foundation. The suggestion was, that, as the proceedings in the order of seizure and sale were still pending in the district court, the debt could not be prose-

cuted in the Circuit Court of the United States. But it has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a Federal Court. What effect the bringing of this suit, *via ordinaria*, may have had on the order of seizure and sale, it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, cannot affect the validity of the proceedings in this suit, nor the jurisdiction of the court in respect thereof.

The only remaining question is, whether the defendant has rendered himself liable for the notes by taking possession of the plantation and receiving to his own use the rents and revenues thereof. At the time of his father's death the defendant was only nineteen, or, at most, twenty years of age. Article 977 of the Civil Code declares that "It shall not be necessary for minor heirs to make any formal acceptance of a succession that may fall to them; but such acceptance shall be considered as made for them with benefit of inventory by operation of law, and shall in all respects have the force and effect of a formal acceptance." Heirs having the benefit of inventory are called beneficial heirs, and are not personally liable for the debts of the succession. This shows that the defendant, though he took possession of his father's property, did not thereby make himself personally liable for the notes in suit, unless the fact that he was emancipated before his father's death, and while yet a minor, renders him so liable. Article 370 of the Code declares that "The minor who is emancipated has the full administration of his estate, and may pass all acts which are confined to such administration, grant leases, receive his revenues and moneys which may be due him, and give receipts for the same." But article 371 adds, that "He cannot bind himself legally by promise or obligation for any sum exceeding the amount of one year of his revenue." The position of the plaintiff is, that the defendant, by taking possession of his father's undivided half of the mortgaged property, made himself liable for the whole debt in suit. It seems to us that this would be in contravention of the spirit, if not the letter, of articles 371 and 977 of the Code.

Besides, the defendant was owner of one undivided half of the property as heir of his mother; and he could not possess himself of his own property without, at the same time, possessing himself of the other half. Under these circumstances, considering his *status* as a minor at the time of his father's death, the sort of possession which he assumed ought not to be turned to his disadvantage as any evidence of an intention to accept his father's succession as universal heir.

The conclusion to which we have come is, that the plaintiff cannot have any personal decree against the defendant for the amount of the debt; but that he is entitled to a decree for the foreclosure and sale of one undivided half part of the plantation covered by the mortgage.

The decree of the Circuit Court is reversed and the cause remanded to that court, with directions to render a decree in accordance with this opinion. Each party should be decreed to pay his and her

own costs, both in this court and in the Circuit Court.

THE NORTHWESTERN UNIVERSITY,

Plff. in Err.,

v.

THE PEOPLE, *ex rel.* HENRY B. MILLER,
COUNTY TREASURER, COOK COUNTY.

(See S. C., 9 Otto, 309-325.)

Illinois University—exemption from taxation.

*An Act of the Illinois Legislature passed in 1855, declared that all the property of the Northwestern University should be forever free from taxation of all kinds. A subsequent statute of 1872, conforming taxation to the new Constitution of 1870, limited this exemption to land and other property in immediate use by the school, as it was construed by the assessors and by the Supreme Court of the State. *Held*, 1. That the latter Act impaired the obligation of the contract of exemption found in the Act of 1855. 2. That whether the Act of 1855 was a valid contract, or was void by reason of conflict with the State Constitution under which it was made, is a question on which this court can review the judgment of the Supreme Court of the State. 3. That lots and lands, and other property of the university, the annual profits of which, by way of rent or otherwise, are devoted to the object of the institution as a school, could, within the meaning of the Constitution of 1848, be exempt from taxation by the Legislature, and the power of exemption was not limited to real estate occupied or in immediate use by the University.

[No. 184.]

Argued Mar. 26, 1879. Decided Apr. 7, 1879.

IN ERROR to the Supreme Court of the State of Illinois.

The case arose in the County Court of Cook County, Illinois, upon the application of the relator, Miller, for judgment for certain taxes. Judgment having been given, and affirmed upon appeal by the Supreme Court of the State, the plaintiff in error sued out this writ.

The case is fully stated by the court.

Messrs. Matt. H. Carpenter (on question of jurisdiction) and *Wirt Dexter*, for plaintiff in error:

Where the plaintiff relies upon certain facts as constituting a contract, but the court below, dealing only with general principles of law, holds the supposed contract, no contract—as, for instance, holds the attempted contract void as against public policy—this court acquires no jurisdiction, even though this court may think the contract valid which the court below thinks void. In other words, this court acquires no jurisdiction based upon its differing from the court below in opinion as to the validity of a supposed contract depending upon general principles of law applicable to a conceded state of facts. To this effect are the cases:

Railroad Co. v. Rock, 4 Wall., 177 (71 U. S., XVIII., 381); *Knox v. Exchange Bank*, 12 Wall., 379 (79 U. S., XX., 414).

But it is equally well settled that where it is claimed in a state court that an Act of the State Legislature, under which one party is proceeding, is void, as impairing the obligations of a contract contained in a former Act of the same Legislature and the decision of the state court

* Head note by Mr. Justice MILLER.

NOTE.—Exemption from taxation, whether a contract or not; not implied. See note to *Tucker v. Ferguson*, 89 U. S., XXII., 805.

See 9 OTTO.

is in favor of the subsequent Act, upon the ground that the former Act did not create a contract, this court has jurisdiction.

Bank v. Skelly, 1 Black, 436 (66 U. S., XVII., 173); *Bridge Proprs. v. Hoboken Company*, 1 Wall., 116 (68 U. S., XVII., 571).

This is an exception to the general rule upon the subject, and this case falls within the exception.

A general law may impair the obligation of a contract, as well as a special law aimed directly at the contract.

Bank v. Skelly (*supra*); *Home of the Friendless v. Rouse*, 8 Wall., 431 (75 U. S., XIX., 495); *Washington University v. Rouse*, 8 Wall., 439 (75 U. S., XIX., 498); *Chicago v. Sheldon*, 9 Wall., 50 (76 U. S., XIX., 594).

A general law to the extent that it is unconstitutional, is void, although other and distinct provisions of the law may be valid.

Ogden v. Saunders, 12 Wheat., 316.

It is enough, if it appear from the whole record, that a federal question was involved in the decision of the state court.

Bridge Proprs. v. Hoboken Co. (*supra*).

Even the opinion may be referred to, to show whether a federal question was involved.

Moore v. Mississippi, 21 Wall., 639 (88 U. S., XXII., 654); *Bolling v. Lersner*, 91 U. S., 594 (XXIII., 366).

The Constitution conferred discretion upon the Legislature to exempt such property as they might deem necessary for school purposes, and their judgment exercised in making the exemption under consideration, is conclusive and cannot be reviewed by the courts.

A State Constitution, being a limitation upon the legislative power, is to be construed liberally.

Cooley, Const. Lim., 173; *Commonwealth v. Hartman*, 17 Pa., 119; *Fletcher v. Peck*, 6 Cranch, 128.

The court (Marshall, *Ch. J.*) says:

"The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Ogden v. Saunders, 12 Wheat., 270; *Twitichell v. Blodgett*, 13 Mich., 162.

In *Martin v. Mott*, 12 Wheat., 19, 31, an Act of Congress of 1795, provided that "Whenever the United States shall be invaded or be in imminent danger of invasion, etc., it shall be lawful for the President, etc., to call forth such number of the militia, etc., as he may judge necessary to repel such invasion."

This court held, that his decision was conclusive.

Mosier v. Hilton, 15 Barb., 657; *State v. Co. Ct. of Boone Co.*, 50 Mo., 817; *Bridge and Turnpike Co. v. Norfolk Co.*, 6 Allen, 353; *Carpenter v. Montgomery*, 7 Blackf., 415; *Franklin v. State Bd. of Exam.*, 23 Cal., 173.

It is admitted that the income of the property is applied, and the property itself is held, solely for the educational purposes of the institution. The explicit language of the charter prevents its diversion to any other purpose, under the penalty of forfeiture of the charter itself. If, under the power granted by the charter, this property is leased, the income must go to the support of the institution; if it is sold, the proceeds must be applied to the same purpose. No private individual has derived or can derive,

any personal benefit from the property thus exempted.

The words "school purposes" have no technical or special meaning; they are common and familiar words whose meaning cannot be made clearer than it is by definition. Property thus held, and irrevocably devoted to the purposes of this institution, as defined by its charter, is for school purposes.

Messrs. James K. Edsall, George O. Ide, C. H. Willett, J. M. Rountree and C. F. Peck, for defendants in error:

This court will not entertain jurisdiction of a case from a state court merely because the judgment of that court impairs or fails to give effect to a contract.

R. R. Co. v. Rock, 4 Wall., 177 (71 U. S., XVIII., 381); *Knox v. Exchange Bank*, 12 Wall., 379 (79 U. S., XX., 414); *R. R. Co. v. McClure*, 10 Wall., 511 (77 U. S., XIX., 997).

The federal question if any exists, must be disclosed by the record and proceedings as sent here from the state court, otherwise jurisdiction will not be entertained.

Warfield v. Chaffe, 91 U. S., 690 (XXIII., 383); *Moore v. Mississippi*, 21 Wall., 636 (88 U. S., XXII., 653); *Smith v. Adst*, 23 Wall., 368 (90 U. S., XXIII., 114); *Parmelee v. Lawrence*, 11 Wall., 36 (78 U. S., XX., 48); *Murray v. Charleston*, 96 U. S., 432 (XXIV., 760); *Murdock v. Memphis*, 20 Wall., 590 (87 U. S., XXII., 429).

The state court correctly held that, under the Constitution of 1848, the General Assembly could not exempt from taxation the property of colleges not necessary for "school purposes."

Constitution of Ill. of 1848, art. IX., sec. 2; Rev. Stat. of Ill. (of 1874), p. 52.

As to educational, religious and charitable corporations, the courts of the State have uniformly held that the power was confined to such property as was used directly for the purposes for which the corporations were created, and did not extend to property leased for other purposes or held for profit merely, although the rents and profits were applied to the proper purposes of the corporation.

N. W. University v. People, 80 Ill., 333; *Baptist Theo. Union v. People* (see MS. copy of opinion on file); *First M. E. Church v. Chicago*, 26 Ill., 482; *Ill. Cent. R. R. Co. v. Irvin*, 72 Ill., 452.

In these rulings the Supreme Court of Illinois has followed the general current of authority upon analogous questions.

Pierce v. Inhabitants of Cambridge, 2 Cush., 611; *Cincinnati College v. State*, 19 Ohio, 110; *Washburn's College v. Comrs. of Shawnee Co.*, 8 Kan., 344-348; *Kendrick v. Farguham*, 8 Ohio, 197; *Orr v. Baker*, 4 Ind., 86; *Trustees M. E. Church v. Ellis*, 38 Ind., 3; *State v. Newark*, 2 Dutch., 519; *State v. Flavell*, 4 Zab., 370; *State v. Comr's Mansfield*, 3 Zab., 510; *Railroad v. Berks Co.*, 6 Pa., 70; *Wyman v. St. Louis*, 17 Mo., 335; *Proprietors, etc., v. Lovell*, 1 Met., 538.

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Supreme Court of Illinois, bringing before us a judgment of that court, deciding that certain property of the plaintiff was liable to taxation, which was re-

sisted, on the ground that it was exempt by a legislative contract.

The University was incorporated by an Act of the Legislature of the State of Illinois, approved January 28, 1851, which contained the powers necessary to its usefulness as an institution of learning, and, among other provisions, authorized it to purchase and hold real estate to the extent of two thousand acres of land, and receive gifts and devises of land above that amount, which must be sold within ten years. In 1855, the Legislature, by an amendment to this charter, appointed three additional trustees, and enlarged its powers, in some respects not very important. But the 4th section of that Act is the one supposed to contain the contract on which this case must be decided. It was this: "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes."

The State Constitution of 1848, in force when the charter and amended charter above cited were enacted, declares that "The property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes, may be exempt from taxation."

The record shows a very large list of lots and lands in Cook County which the plaintiff asserted to be free from taxation under this law, but which were listed for taxes of the year 1874, and about to be sold for their non-payment. By proper judicial proceedings the question arose before the Supreme Court of the State, which held that they were liable to be so taxed.

A motion was made, some time before the case was reached for argument in this court, to dismiss it for want of jurisdiction, and was overruled; but the Attorney-General of Illinois renews the objection now in connection with the main argument.

This question of jurisdiction to review the judgments of state courts is so frequent, and the principles which govern it so well settled, that we need not be very elaborate in our opinion on that point. The argument is that the judgment of the state court is limited to a construction of the 4th clause of the amendatory charter of 1855, as it is affected by the Constitution under which it was enacted, and that whether that statute was a contract or not, or whether it was properly construed or not it is still but the decision of a court construing a contract or a statute, and there is no law of the State impairing the obligation of that contract, within the meaning of the Constitution of the United States.

If this were true in point of fact, the conclusion would be sound, as we have repeatedly held in this court. *R. R. Co. v. Rock*, 4 Wall., 177 [71 U. S., XVIII., 381]; *R. R. Co. v. McClure*, 10 Wall., 511 [77 U. S., XIX., 997]; *Knox v. Bk. 12 Wall.*, 379 [79 U. S., XX., 414].

But the premises assumed are not justified by the facts. The general Revenue Law of Illinois, prior to the Amendment of 1855 to plaintiff's charter, contained nothing which exempted its property from taxation. When that Act was passed, it became a part of the law of the State governing taxation as applicable to the property of the University. The law remained in

this condition until the State adopted a new Constitution, in 1870, the part of which relating to this subject is in these words:

"The property of the State, counties and other municipal corporations, both real and personal, and such other property as *may be used exclusively* for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."

In order to conform the law of the State on the subject of taxation to this provision of the new Constitution, the Legislature revised its revenue laws in 1872, and in this statute the exemption established was:

"First. All lands donated by the United States for school purposes, *not sold or leased*. All public schoolhouses. All property of institutions of learning, including the real estate on which the institutions are located, *not leased by such institutions* or otherwise used with a view to profit.

Second. All church property actually and exclusively used for public worship, when the land (to be of reasonable size for the location of the church building) is owned by the congregation."

It was under this law the local officers proceeded in assessing plaintiff's land for taxation, and it was their construction of the law which was sustained by the Supreme Court. If, therefore, the legislation of 1855 was a contract which exempted the property in question from taxation, and by the Law of 1872, as construed by the Supreme Court, it is held liable to taxation, it is manifest that it is the Law of 1872 and the Constitution of 1870 which impairs the obligation of that contract, however the court, by an erroneous construction of that contract, may be led to hold otherwise. It is strenuously insisted that these provisions of the Constitution of 1870 and the Revenue Law of 1872 do not repeal the exemption as established by the 4th section of the amended charter of 1855, because that section was in excess of the authority conferred by the Constitution of 1848. But this depends on the construction of that contract as affected by the Constitution under which it was enacted. If, by virtue of that Constitution, the Legislature of that day could only exempt plaintiff's real estate so far as it was *in immediate use for school purposes*, as was held by the Supreme Court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended for by plaintiff's counsel, which, under a true construction of the Constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the University as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, then the Law of 1872 and the Constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855.

Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction. See 9 Otto.

U. S., Book 25.

tion. *Bk. v. Skelly*, 1 Black, 436 [66 U. S., XVII., 173]; *Bridge Props. v. Hoboken Co.*, 1 Wall., 144 [68 U. S., XVII., 576]; *Delmas v. Ins. Co.*, 14 Wall., 668 [81 U. S., XX., 759].

The Supreme Court of Illinois, in its opinion found in the record, appears to concede that the Act of 1855, to the extent that it was authorized by the State Constitution, was a contract.

"It is not claimed," says the court, "that appellant is in any sense a public corporation; but it is claimed that the purpose for which it is created is so far beneficial to the public that it affords a sufficient consideration for the grant of exemption from taxation in the amendment, and that when the amendment was accepted and acted on by the corporation it must be held a vested right which cannot be withdrawn by subsequent legislation, because of the provision of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of a contract. If it was competent for the General Assembly to make the exemption, we are not disposed to contest the correctness of their position; but if it was not competent to make the exemption, the attempt was a nullity, and the case is not affected by the Constitution of the United States."

The court thus concedes that there was a contract so far as the legislative power extended.

It is possible, if that question had been fully investigated, and all the facts necessary to decide it were before the court, it might not appear that all the lands subjected to taxation by the judgment of the Supreme Court were bought after the date of the amended charter, or donated on the faith of that exemption.

But it does appear, by a stipulation made for that purpose, that since the granting of said amended charter the Corporation "Has expended, in the erection and purchase of buildings, apparatus, and other facilities and appliances for education, and for the promotion of the objects stated in and contemplated by the Act of incorporation, over \$200,000, realized from donations and the sale of lots and lands, and has built up a University, with several departments of learning, in which more than five hundred students are taught the higher branches of learning."

It is, perhaps, a fair inference from this statement, and in deference to the holding of the Supreme Court, that there was such acceptance of this Act of 1855, and such investments made on the faith of it, that at least some portion of the property now in question is protected by contract, if the exemption clause lawfully covers it.

It will readily be conceded that the language of the 4th section of the Act of 1855 is broad enough for that purpose: "All property, of whatever kind or description, belonging to or owned by said Corporation, shall be forever free from taxation for any and all purposes." But the argument is, that since the Constitution then in force only permitted the Legislature to exempt from taxation the property, real and personal, used by the University, in immediate connection with its function of teaching, the statute must be limited to property so used. This was the view taken by the Supreme

Court of the State. "By the language of the Constitution," says the court, "while a discretion is conferred on the General Assembly whether to exempt or not and, if it shall determine to exempt, the amount of the exemption, it is clearly restricted in the exercise of this discretion to property for schools and religious and charitable purposes; property for such purposes, in the primary and ordinary acceptation of the term, is property which in itself is adapted to and intended to be used as an instrumentality in aid of such purposes. It is the direct and immediate use, and not the remote or consequential benefit to be derived through the means of the property that is contemplated."

Though the court is here construing the Constitution of its own State and is, therefore, entitled to our consideration on that ground, as well as for its character and standing for learning and ability, we find ourselves, in the performance of the duty of reviewing this case, compelled to differ with that court in the nature and extent of the constitutional limitation of this contract, as made by the Legislature of the same State. For this Constitution necessarily becomes a part of the contract which is said to be impaired by subsequent legislation.

The first observation we have to make is that the Constitution does not say "property used for schools," as the opinion of the court implies. Neither the important word *use* or *schools* is found in the section of the instrument on that subject. If the language were that the Legislature might "exempt property for the use of schools," we should readily agree with that court. Indeed, that would be the appropriate language to convey the idea on which the court rests its decision.

The makers of the Constitution, however, used other language because they had another meaning, and did not use that because they did not mean that. They said that the Legislature might exempt from taxation "such property as they might deem necessary" (not for the use of schools, but) "for school purposes." The distinction is, we think, very broad between property contributing to the purposes of a school, made to aid in the education of persons in that school, and that which is directly immediately subjected to use in the school. The purposes of the school, and the school, are not identical. The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense.

A devise of a hundred acres of land "to the president of the University, for the purposes of the school," would be not only a valid conveyance, but, if the president failed to do so, a court of chancery would compel him to execute the trust; but if he leased it all for fair rent and paid the proceeds into the treasury of the Corporation to aid in the support of the school, he would be executing the trust.

When the Constitution, in 1870, came to be reconstructed, its framers had learned something about exemption from taxation, as we shall see by placing the provision in that Constitution alongside that of 1848 on the same subject:

1848.

"The property of the State and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes may be exempt from taxation."

1870.

"The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."

Here it is only such property as may be exclusively used for school purposes that may be exempted, and this only by a general law.

The general law passed in 1872 to give effect to the change in the Constitution exempted only "The real estate on which the institutions of learning are located, not leased by such institutions or otherwise used with a view to profit." This is what the Supreme Court says was meant by the Constitution of 1848; but if it was it took a deal of change in the language when the framers of the new Constitution and of the new tax law came to express the same idea. We cannot come to the conclusion that they were intended to mean the same, but that the later law was *designed* to limit the more enlarged power of the earlier one.

If our construction of the Constitution of 1848 is sound, the judgment of the Supreme Court must be reversed; for the stipulation of facts on which the case was tried says that "It is admitted that all the lots and lands mentioned and described in the objections filed in said proceeding for judgment, whereon said taxes are levied, excepting improvements on the same, are leased by said University to different parties for a longer or shorter period, and that all said lots and lands are held for sale or lease, for the use and support of said institution and the objects contemplated by said charter."

We are of opinion that such use and such holding bring the lots within the class of property which by the Constitution of 1848 the Legislature could, if it deemed proper, exempt from taxation, and that the Legislature did so exempt it.

The judgment of the Supreme Court of the State is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Cited—95 Ill., 568.

THE CANAL BANK OF NEW ORLEANS, THE CRESCENT CITY BANK, THE UNION BANK, THE LOUISIANA STATE BANK, J. MARSH DENMAN ET AL., *Appts.*,

v.

WILLIAM B. PARTEE ET AL.

(See S. C., 9 Otto, 325-334.)

Repudiation of contract—judgment against married woman—separate estate.

1. A married woman cannot, any more than an unmarried one, be permitted to retain the benefits

of a transaction which she has solicited, and at the same time to disavow it.

2. A personal judgment against a married woman, in an action of *assumpsit* against her on her promissory note, is a nullity under the laws of Mississippi.

3. In that State, unless a married woman has a separate estate, she is subject, as to her contracts, to the disability of coverture, and a creditor suing her must, in his bill in equity, or declaration at law, aver that she has such an estate, and that the debt is a charge upon it or ought to be paid out of it.

[No. 122.]

Argued Jan. 10, 1879. Decided Apr. 7, 1879.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The case which arose in the court below, is fully stated by the court.

Messrs. P. Phillips, W. A. Maury and Edward Janin, for appellants:

It is an essential allegation in every action against a married woman, that she has a separate property subject to the debt, and this must be made in the declaration, or in replication to the plea of coverture. It is also necessary to allege and prove, that the consideration of the contract sued on was such as is expressly authorized by statute. Every suit against her takes the shape and direction of reaching a particular fund. The enforcement of her contracts in Mississippi is in the nature of a proceeding *in rem*, and no general judgment can be rendered. She cannot execute a valid promissory note jointly with her husband, or separately, so as to impose any liability upon her or her estate. A judgment against a married woman is a nullity.

Choppin v. Harmon, 46 Miss., 304; *Pollen v. James*, 45 Miss., 129; *Mallett v. Parham*, 52 Miss., 921; *Nelson v. Miller*, 52 Miss., 410; *Griffin v. Ragan*, 52 Miss., 78; *Bank of Louisiana v. Williams*, 46 Miss., 618.

The case of *Cary v. Dixon*, 51 Miss., 593, was on all fours with this, and the title derived at execution sale under the judgment in that case was held to be a nullity.

For aught that appears, all the complainants did accept the terms of settlement within the ninety days as a matter of fact. They surrendered the old notes and took the new, and they are now endeavoring to enforce the deed.

Sarah D. Partee and her husband accepted the old notes and permitted the creditors to repose upon their security until the Statute of Limitations had barred their right of action on the old notes, and never once notified them that the deed was revoked because of a failure to accept it in writing within ninety days. It would, therefore, seem that their acquiescence in what was done by their agents, Hayams & Jonas, would operate as a complete equitable estoppel.

Mr. Justice L. Nugent, for appellees.

Mr. Justice Field delivered the opinion of the court:

In July, 1866, the defendant, Sarah D. Partee, wife of William B. Partee, then a resident of Mississippi, being indebted in the sum of \$125,000, and unable to pay the amount, submitted to her creditors a proposition in writing for settlement. She represented that the late war had caused her a loss of over \$300,000, leaving her indebted as mentioned, with no re-

See 9 OTTO.

sources except lands, which would not then sell for half of their value, or for half of her indebtedness. In order, therefore, to place all her creditors on the same footing, some of them having brought suits for sums amounting to about \$14,000, she offered to pay one half of her indebtedness in lands in Tallahatchie and Sunflower Counties, Mississippi, at \$10 per acre; and, for the remaining half, to give her notes in equal sums, payable in January, 1867, 1868, 1869, 1870 and 1871, with interest at eight per cent. per annum, secured by a mortgage on the residue of her lands in Yazoo County, then under cultivation. This proposal was afterwards modified so as to postpone for one year the maturity of the several notes.

To secure confidence in the papers to be drawn, to close the transaction, she selected gentlemen well known in Yazoo City to see to a proper execution of a deed of trust, and to act as trustees, or to select proper persons for that position. And she stated that Messrs. Hyams and Jonas, lawyers of high character in New Orleans, would attend to any of the business which the creditors might choose to place in their hands, and to the distribution of the new notes after they were executed. Accordingly, in November, 1866, a deed was executed by Mrs. Partee and her husband to one Robert Bowman, conveying to him the lands mentioned, upon the following trusts: 1, to hold the lands in Tallahatchie and Sunflower Counties for the benefit of such creditors as should accept the same at \$10 an acre in payment of one half of her indebtedness to them, or if a majority of the creditors should desire it, to sell the same and divide the proceeds, or to convey to each of such creditors his proportion of the lands; and, 2, in case of default in the payment at maturity of the notes executed upon the settlement, to sell the lands lying in Yazoo County, or so much as might be necessary to pay them, and apply the proceeds to their payment.

The deed contained a clause providing that if any of the creditors should fail within ninety days from its date "to signify in writing their acceptance of the terms of settlement and payment of their claims or debts," they should "be considered as refusing the same," and be debarred from the benefits of the deed.

The instrument was properly executed, stamped and registered. After its registration, it was delivered with the new notes, signed by Mrs. Partee and her husband, to Messrs. Hyams and Jonas, for the purpose of carrying out the proposed settlement and securing the acceptance of its terms. Many of the creditors had previously assented to its terms, and after the deed was executed they surrendered their old notes for the new notes. Other creditors came in afterwards, and in a similar way gave up their old notes and took the new paper. It does not appear, however, that any of them signified in writing their acceptance of the terms of the settlement within the ninety days mentioned in the deed.

It appears, also, that before the deed was executed, namely: in April, 1866, one James Stewart had brought suit against Mrs. Partee and her husband on a promissory note made by her, and in June following had obtained judgment by default against them for a sum exceeding \$6,000. Upon this judgment execution was

issued, and in January, 1869, the lands in Yazoo County embraced by the trust-deed were sold and purchased by Stewart and a son of Mrs. Partee. When the settlement was proposed, the existence of this judgment was concealed from Messrs. Hyams and Jonas, who acted, as already stated, for Mrs. Partee in securing the assent of creditors. The representation then made was that the lands were incumbered only by a small annuity.

The present suit is brought to set aside this judgment of Stewart, or to obtain leave to redeem the land sold under it; to remove the trustee, who is charged with certain fraudulent practices in connection with the trust property, and to have a new trustee appointed; and to enforce the trusts of the deed. It is unnecessary for the disposition of the present appeal to state in detail the various allegations of the bill or of the several answers of the defendants, as the case appears to have been decided upon the supposed impediment to the relief prayed by reason of the provision excluding creditors from the benefits of the deed, who failed, within ninety days from its date, to indicate in writing their acceptance of the terms of settlement; and by the sale of the property in Yazoo County under the judgment of Stewart. Our consideration is limited, therefore, to the effect of that provision upon the rights of the complainants, and to the validity of that judgment.

1. With reference to the provision, it is to be observed that it was not mentioned in the proposition for settlement made in July, 1866. That prescribed no period within which its terms should be accepted; and before the execution of the deed, as already stated, and as recited in it, many of the creditors had assented to them. To such creditors, and they embrace the complainants in this suit, the provision could not have been intended to apply. No purpose could have been subserved in requiring from them any further expression of assent to the settlement. As to them nothing further was necessary to complete the transaction than the surrender of the old notes and the acceptance of the new notes in their place; and this, as stated, was done.

As to the creditors who had not then acceded to the proposed settlement, it was important to fix some period within which they should come in. To quicken their action the provision was inserted. Their acceptance in writing was not a condition precedent to the vesting of the property in the trustee for their benefit, nor was it a condition upon which the trust was to be executed. It was at best only a condition subsequent in the nature of a penalty against creditors not assenting in the prescribed way, and could be waived by the grantors; and was in fact waived by them. Long after the lapse of the period prescribed they expressed to their agents a hope that all the creditors would come in; and they authorized them to receive from creditors their old notes and to deliver in exchange new notes in their place for one half of their amount; and when this was done they permitted the creditors to repose upon the new security furnished until the Statute of Limitations had barred a right of action upon the old notes, without any suggestion that the deed was inoperative because of their failure to accept in writing the terms of the proposed settlement

within ninety days. Their approval of or, at least, acquiescence in the conduct of their agents estops them in equity from enforcing the provision as to the acceptance in writing, so as to debar from the benefits of the deed any of the creditors who accepted the settlement by surrendering the old notes and taking the new ones. A married woman cannot be permitted, any more than an unmarried one, to retain the benefits of a transaction which she has solicited, and at the same time to disavow it. She cannot in this case retain the surrendered notes and repudiate the consideration upon which their surrender was made. 2 Story, Eq., sec. 1536.

2. As to the Stewart judgment, it is to be observed that the record shows it was rendered in an ordinary action of *assumpsit* upon a promissory note of Mrs. Partee, without mention in the pleadings of any separate property belonging to her, or, indeed, of her being a married woman. The plaintiff Stewart knew that she was not a *feme sole* and, therefore, neither he nor her son, who were the purchasers under the judgment, can claim any advantage from the omission. The judgment is simply a personal one; and a judgment of that character against a married woman is a nullity under the laws of Mississippi.

At common law, a married woman is incapable, except in a few special cases, of contracting a personal obligation. Her disability in this respect, by reason of her coverture, cannot be overcome by any form of acknowledgment or mode of execution, or by her uniting with her husband in the contract. The special cases in which the disability does not exist are those where she is compelled from necessity to act as a *feme sole*, as when her husband is imprisoned for life or for years, or has fled the country or been exiled. In such cases the husband is considered as civilly dead, and the wife as in a state of widowhood. Her disability also ceases when she is permitted to act as a sole trader, as in England by the custom of London; and in this country by special legislation. Equity, too, will sometimes impose as a charge upon her separate estate a debt incurred by her for its benefit, or for her benefit on its credit; but this is a different matter from a contract by which a personal obligation is created. Except in the cases mentioned, the general rule is that she cannot be personally bound; nor can she be subjected on her contract to a personal judgment. Various reasons are assigned for this latter exemption, some of which would be destitute of force under our altered laws. Reeves, in his treatise on Baron and Feme, says, "That no action at law can be maintained against her, for the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern." "And for the same reason," he adds, "there can be no personal decree against her in chancery. It must be one which reaches her property only." P. 171. This doctrine, whatever reasons may be assigned for it, has, with few exceptions, been recognized in the several States; and, in many instances, personal judgments against married women upon their contracts, rendered upon defaults or by confession, have been held void. *Griffith v. Clarke*, 18 Md., 457; *Morse v. Toppin*, 3 Gray, 411; *Dorrance*

v. *Scott*, 3 Whart., 309; see, also, *Wallace v. Rippon*, 2 Bay, 112, and *Norton v. Meader*, 4 Sawy., 620-624.

The doctrine of the common law has, however, been greatly modified in most of the States by legislation, and the extent to which a married woman may contract, and the manner in which her contracts shall be authenticated and enforced, are definitely prescribed. In Mississippi such modification has been made. The Code of 1857 enacted that the property owned by a woman at the time of her marriage, or which shall subsequently come to her, shall be her separate property, and not be subject to the debts of her husband, but shall be liable for her own debts contracted before marriage. At the same time, it authorized a married woman, either by herself or conjointly with her husband to contract with reference to her separate property, for its lease, use and improvement, and the construction of buildings upon it; also, for the support of herself and children, and for many other things; and provided that such contracts shall be binding on her, and that satisfaction for them may be had out of her separate property. It also declared that, in addition to the remedies then existing by the common law by and against married women, "The husband and wife may sue jointly, or if the husband will not join her, she may sue alone for the recovery of her property or rights, and she may be sued jointly with her husband on all contracts or other matters for which her individual property is liable; and if the same be against husband and wife, no judgment shall be rendered against her unless the liability of her separate property be first established." Code of 1857, p. 335.

In several cases which have arisen under these provisions, it has been held by the Supreme Court of Mississippi that unless a married woman has a separate estate she is subject, as to her contracts, to the disability of coverture, and that a creditor suing her must, in his bill in equity, or declaration at law, aver that she has such an estate, and that the debt is a charge upon it or ought to be paid out of it. It was so held in *Choppin v. Harmon*, decided in 1872, when the court added that every suit in the State, whether in law or in equity, founded upon her contracts, "takes the shape and direction of reaching a specific fund." 46 Miss., 307. And in *Bk. v. Williams*, 46 Miss., 629, decided in the same year, the court said, speaking of a suit against a married woman, "The condition precedent to a right of recovery, either at law or in equity, is that there be a separate estate out of which satisfaction may be had. Our jurisprudence does not realize the possibility of a personal judgment against a married woman." In *Cary v. Dixon*, 51 Miss., 593, decided in 1875, a personal judgment was rendered against a married woman and her husband, and her land sold under execution issued upon the judgment. The purchaser at the sale brought ejectment for the premises. It was held that the judgment was void and the sale under it invalid; the court saying, citing language used in a previous case not then reported, that in order to authorize a judgment against a married woman, her liability must be shown by averment and established by evidence; that a married woman is incapable of being bound either

by contract or judgment, except in the special cases authorized by law; and that by the Code of the State, if the suit is against her and her husband, no judgment can be rendered against her, "unless the liability of her separate property be first established."

In *Mallett v. Parham*, 52 Miss., 921, also decided in 1875, the court, speaking of the power of a married woman to contract for supplies for her plantation, said: "It is only in consequence of the existence of her separate estate that the statute authorizes her to make the contract, and that the separate estate alone is bound by the contract. The enforcement of the contract is in the nature of a proceeding *in rem*. No general judgment can be rendered against her so as to reach on execution any other property."

There are other adjudications of the Supreme Court of Mississippi to the same purport. Those cited are sufficient to establish the invalidity of the Stewart judgment. The allegation essential under those decisions in every suit against a married woman, that she has separate property which is liable for the debts alleged, is wanting in its record. That discloses no ground of action upon which a personal judgment can be rendered against her under the law of the State. The coverture of Mrs. Partee at the time the judgment was rendered is averred in the bill and is admitted. That fact going to the jurisdiction of the court could be shown by competent proof. There was no question of innocent purchasers without notice in the case, the judgment creditor and the son of Mrs. Partee being the purchasers.

The decree of the court below must be reversed, and the cause remanded for further proceedings; and it is so ordered.

Mr. Justice Miller, dissenting:

I dissent from the judgment of the court in this case, and especially from that part of the opinion which holds that the judgment against Mrs. Partee and her husband, under which the land in question was sold, was absolutely void.

It is to be remembered that the question is not whether such a judgment would be held erroneous on an appeal from that judgment, but whether it can be held absolutely void when assailed collaterally in another action, where it is relied upon as the foundation of a title based on a sale under execution issued on the judgment.

Mrs. Partee was sued jointly with her husband. Both by the common law and by the law of all the States, a married woman could sue or be sued by joining her husband with her. The statutes of Mississippi, where this judgment was rendered, largely increased the liability of married women to be sued beyond what it was at common law. It made her liable, out of her separate estate, for supplies to the farm owned or cultivated by her, for any debt contracted with reference to her own property, whether the contract was made with the consent of her husband or not. In the case in which the judgment is held void, she signed a joint note with her husband, her name being signed before his; and she was sued with him on that note, and personally served with process. She has never denied the validity of that judgment, or sought to set it aside or vacate its force. Other persons, not parties to that suit,

now come into court and say that all that was done was void because it does not appear affirmatively, by the record, that the note on which the suit was brought was a contract concerning her private property. That was a matter which, if it were true, should have been pleaded as a defense. She was subject personally to the jurisdiction of the court. Her contracts were subjects of which the court had jurisdiction. It had jurisdiction to enforce those contracts by sale of her individual property. The note on which she was sued had every indication that it was her individual contract, as it no doubt was, and that her husband's name was placed there to show his consent.

To hold that persons not interested in that contract, nor parties to the suit, can now come in and treat the judgment as absolutely void, on its face, is such a departure from all the principles on which the jurisdiction of the court is determined, that even the authority of the courts of Mississippi should not, in my opinion, control us in the matter.

Cited—111 U. S., 67.

RUSSELL SAGE, JAMES BUELL AND N.
A. COWDREY, INTERVENERS, *Appts.*,

v.

THE CENTRAL RAILROAD COMPANY
OF IOWA ET AL.,

(See S. C., 9 Otto, 334-348.)

Purchase by trustee, of railroad at mortgage sale—agreement enforced by court—new corporation—terms of sale—sale subject to rights of others—notice.

1. Where a mortgage of a railroad contained a covenant that the trustee named therein should, at the request of a majority of the bondholders, purchase the premises at a sale thereunder for the benefit of the bondholders and organize a new company; on a foreclosure of said mortgage, it was not error to decree that the trustee should be authorized and directed to bid at the sale, as trustee for the first-mortgage bondholders, at least the amount of the principal and interest of the first-mortgage bonds.

2. Under the prayer in the bill for such other and further relief as the nature of the case should require, and as might seem meet to the court, it was proper for the court, in the decree, to enforce the agreement contained in the deed, into which the railroad company, the trustee, and, through the trustee, all the bondholders, had entered.

3. The decree could direct the trustee, if he became the purchaser, to convey the property to a new corporation organized by, and for the benefit of, the bondholders, according to the priority of their interests, giving the controlling interest and power of management to the first-mortgage bondholders.

4. It was no error in the decree, to require any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to pay at once, in cash, a part of his bid, as earnest money.

5. It was proper to make a decree of sale subject to the rights and equities of parties to the suit under liens or judgments claimed by them, and to reserve such rights for further adjudication.

6. Where the name of a newspaper was changed after an order to advertise in it, if the identity of

the newspaper remained, it was proper to advertise in it under such order.

[Nos. 175, 570.]

Argued Mar. 10, 1879. Decided Apr. 7, 1879.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is fully stated by the court.

Messrs. **N. A. Cowdrey, M. H. Carpenter** and **J. Coleman**, for appellants.

Messrs. **C. C. Cole, Herbert B. Turner, B. F. Lee, R. L. Ashurst, J. C. Bullitt** and **J. H. B. Latrobe**, for appellees.

Mr. Justice **Strong** delivered the opinion of the court:

This proceeding was commenced by a bill filed at the suit of Charles Alexander and others, holders of bonds secured by a first mortgage or deed of trust of the Central Railroad Company of Iowa, praying for an account, for the appointment of a receiver, and for a foreclosure of the mortgage. The bill was filed to October Term, 1874, in the Circuit Court. It made the Railroad Company and the Farmers' Loan and Trust Company of New York, who were the trustees named in the mortgage, parties defendant. Subsequently, at the same Term, the trustees, who were also trustees under second and third mortgages, filed their original bill, as well for the benefit of the complainants in the first bill, as for all other bondholders, praying also for an account, for a receiver and for a foreclosure. By order of the court, these two bills were consolidated, and the hearing of the case proceeded until the 22d of October, 1875, when a final decree was made, directing *inter alia*, a sale of the mortgaged premises. On the 15th of January, 1876, the present appellants, on their petition, representing themselves to be holders of some of the mortgage bonds secured by the first mortgage, were permitted to intervene as parties, to prosecute an appeal to this court, for the protection of their several interests, against the decree of October 22, 1875. They have accordingly appealed; and as their appeal was not made a *supersedeas*, and the decree was executed by a sale, they have entered a second appeal from the confirmation of that sale.

Directing our attention first to the appeal from the decree of October 22, 1875, it is observable that it raises no question respecting the validity or amount of the debts due by the mortgagors and secured by the several mortgages, nor any respecting the order in which they are entitled to payment. There is some complaint that the court, before the final decree was entered, directed certain payments to be made by the receiver for locomotives and rental of cars used upon the road, either by the receiver, or before his appointment. Whether these orders were correct or not, we will consider hereafter. The appellants do not complain that the decree of the court has not determined correctly the amounts due upon the several mortgages, and marshaled them in their proper order of priority. Nor do they insist that it was not proper for the court, in view of the facts as they appeared, to order a sale of the mortgaged property. Their complaint is rather respecting the disposition which the court decreed to be made of the property, in case the trustees of the mortgage should become the purchasers. To understand those dispositions, and the reasons why they were

NOTE.—*Strict foreclosure of mortgages.* See note to Clark v. Reyburn, 75 U. S., XIX., 354.

ordered, it is necessary to observe carefully the provisions of the deed upon which the bill was founded and which, therefore, properly affected the decree. Some of them are quite peculiar. The first mortgage was given to the Farmers' Loan and Trust Company of New York, to secure the payment of bonds of the Railroad Company to the amount of \$3,776,000, with interest thereon. It covered the entire corporate property of the mortgagor, constructed or to be constructed, and all its franchises and privileges; all its property that might thereafter be acquired, including machinery, locomotives, rolling stock, tools and supplies, as well as the net income of the mortgagor. It contained also the usual stipulation made in railroad mortgages, that in case of default in the payment of interest the principal should fall due; that the trustee, on the written request of a majority of the holders of the bonds, should be authorized and empowered to take possession of the property, and sell it at public auction. It is unnecessary to refer to the other provisions, except the following, which are special and unusual, and have a material bearing upon the decree of which the appellants complain. These we quote at large:

"And it is further covenanted and agreed by and between the parties hereto, that in case of any judicial foreclosure sale, or other sale of the premises embraced in this mortgage, under the decree of any court having jurisdiction thereof, based upon the foreclosure of this mortgage, and the holders of a majority of the then outstanding bonds secured by this mortgage, shall, in writing, request the said trustee or their successor, they are authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds secured by this mortgage." "And having so purchased said premises, the right and title thereto shall vest in said trustees, and no bondholder shall have any claim to the premises or the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, as represented in a new company or corporation to be formed for the use and benefit of the holders of the bonds secured hereby, and that said trustee may take such lawful measures as deemed for the interest of said said bondholders, to organize a new company or corporation for the benefit of the holders of the bonds secured by this mortgage." "Said new company or corporation shall be organized upon such terms, conditions and limitations, and in such manner, as the holders of a majority of said outstanding bonds secured by this mortgage shall, in writing, request or direct, and said trustee so purchasing shall thereupon reconvey the premises so purchased by them to said new company or corporation."

It was a mortgage containing these stipulations that the circuit court was called upon to enforce. And the several bondholders claiming under the mortgage held their interests subject to this controlling power given to the majority of all the holders.

There were two subsequent mortgages of the same property, given by the Railroad Company to the same trustee, to secure the payment of other bonds. These were set forth in the bill; and when the consolidated case was ripe for a decree, it appeared that there was due from See 9 Otto.

the Company for principal and interest of the first mortgage debt the sum of \$4,623,334.99 in gold, with interest from October 15, 1875; upon the second mortgage, \$1,136,246.86; and that there were \$420,000 of bonds, secured by the third mortgage, outstanding. The court, therefore, decreed that the mortgagors should pay within ten days the sum due to the bondholders under the first mortgage; and if they failed to pay, that the mortgages under the second and third mortgages and the judgment creditors, or any of them, in the order of their respective liens, should pay the same, and that in default of said payment by any of said parties, their equity of redemption in the premises should be foreclosed.

Had this been all, the result would have been a strict foreclosure. The master to whom the case had been referred had found and reported that the property would not sell at the date of his report (October 11, 1875) for more than forty cents on the dollar of its indebtedness, and this report had been confirmed. It was, therefore, manifest that neither the Railroad Company nor any of the lien creditors subsequent to those holding under the first mortgage could or would pay the \$4,620,334.99 secured by that mortgage. But a strict foreclosure was undesirable for all the parties. Not only would it have cut off entirely the bondholders secured by the second and third mortgages, whose interests were before the court, and which it was bound to protect as far as possible, but it would have made the large number of bondholders under the first mortgage practically tenants in common of the railroad property. The inconveniences of such a result are obvious enough. A sale, therefore, was for the interest of all, and to that no one objected. Indeed, it was contemplated as possible in each of the three mortgages. The bondholders, through their trustee, had made arrangements in view of such a contingency. They had agreed what should be the effect and consequence of a judicial sale. All of them had taken their bonds with knowledge of the agreement and subject to it. What that agreement was, what purpose it was intended to subserve, against what mischief it was proposed to guard, and by what mode it was stipulated the object intended should be accomplished, it is very important to consider. By the agreement, the entire body of the bondholders consented to place their interests, to a certain extent, under the control of a majority of their number. Their trustee was authorized to purchase the property at the judicial sale, should one be ordered, and convey it to a new corporation, to be formed for their benefit, provided a majority of them should, in writing, request such a purchase. They had agreed to more than this. They had consented that the new corporation should be organized upon such terms, conditions and limitations, and in such manner, as the holders of a majority of the outstanding bonds secured by the mortgage should, in writing, request or direct. This consent and agreement, this deposit of power in the majority, was contained in the mortgage under which the appellants claim.

The purposes sought to be accomplished by it are manifest.

First. It was designed for protection against

the perils of a forced sale for cash of an unsalable property. It was well known that at judicial sales of railroads for cash there is little likelihood of obtaining a bid for a sum at all commensurate with the value of the property sold, or with the amount of incumbrances upon it. The amount required is so large, usually, that it is beyond the reach of ordinary purchasers. In such a case as the present, the first-mortgage bondholders are the only party that can become the purchasers, and they only, because they need not pay their bid in cash.

Second. The agreement looked further. It provided for the contingency of a purchase by bondholders under the mortgage. But such a purchase could not inure equally to the benefit of all, unless all were parties to it. There is almost a certainty that in foreclosure sales of a railroad, especially when the mortgage debts exceed the market value of the property, as in this case, the purchaser will be an association of some of the bondholders secured by the mortgage, who buy with the intention of organizing a new company to hold the property for their interests. Where the bondholders are numerous, diversities of views respecting the new organization may be expected, and they generally arise. Very rarely do all the bondholders unite in making the purchase. Frequently there is more than one combination, and a strife between them to secure the advantage hoped for from the purchase and consequent control of the property. The consequence is that those who do not belong to the successful combination are excluded from those advantages, and are not placed upon an equal footing with the others.

Third. Another evil, which observation shows to be very frequent, is that a small minority of the bondholders resist arrangements for the purchase of the mortgaged property and the organization of a new company, desired by the majority—arrangements which would be for the equal benefit of all, but which are resisted unless they, the minority, are paid in full, or unless superior advantages are conceded to them, at the expense of their fellows.

It was in view of all this that the first-mortgage bondholders entered into the agreements contained in the mortgage—the agreements which we have quoted. They provided that there should be no judicial sale for cash, unless the amount bidden at the sale should equal the sum due and secured by the mortgage. Instead of such a sale they provided a method by which all the bondholders with equal rights might effect a re-organization of the indebted corporation, and become the owners of the franchises and property mortgaged. This mode was the creation of a new corporation in which the property should be vested, for the equal benefit of all the holders of the bonds, thus preventing any minority, or any bondholders from demanding that their wishes and interests should be given a preference to those of others in like condition, or that they should be paid in whole, or in part, in cash. So the evils resulting from the want of unanimity among those whose rights were exactly the same, and the possible necessity of raising money to pay off non-assenting holders of the bonds against which the agreement was in part intended to guard. It was to secure the common interests of all the bondhold-

ers, in such a manner that none should obtain an advantage over the others, that it was agreed the purchase might be made by the trustee on account of all, and that the subsequent disposition of the subject of the purchase should be for the common benefit of all. To carry out these intentions a majority of the bondholders was empowered to act controllingly for the entire body, in matters respecting the purchase and disposition of the property purchased, subject to the limitation that the purchase, if made by the trustee, should be for the use and benefit of the outstanding bonds; that the property should be conveyed to a new company organized for their benefit, and that the new company should be organized on such terms, conditions, and limitations as the holders of a majority of the outstanding bonds should request or direct. The agreement, though unusual, was a reasonable one. While it prevented a small minority of the bondholders from forcing unreasonable and inequitable concessions from the majority, it did not empower that majority to crush out the rights of the minority, or put them to any disadvantage. It authorized only such arrangements as would inure equally to the benefit alike of the majority and the minority.

Such was the contract and such the power conferred upon a majority of the bondholders. It was such a contract which the bills brought before the circuit court for a decree. In view of its provisions we cannot think it was error to decree, as the court did, that the mortgaged property should be sold to the highest and best bidder, and that the trustee should be authorized and directed to bid at the sale, as trustee for the first-mortgage bondholders, at least the amount of principal and interest of the first-mortgage bonds.

The decree went further. At the time when it was made it appeared that a large majority of the first-mortgage bondholders had, in writing, requested and directed the trustee, if becoming the purchaser, to convey the property to a new corporation, organized substantially on the terms, conditions and limitations prescribed in the decree which the court made. The request was an attempted exercise of the power conferred upon that majority by the mortgage. The trustee, the *cestui que trust*, and the trust itself were before the court, and the court undertook a complete execution of the trust. It decreed as follows:

"That if said trustee, as aforesaid, shall become the purchaser of said property at such sale, the title shall pass absolutely to said trustee, subject, however, to the trusts herein indicated on behalf of the several parties in interest, being the first, second and third mortgage bondholders, creditors and stockholders of the Central Railroad Company of Iowa; and said property shall be conveyed by said trustee to a corporation organized, or to be organized, for the purpose of acquiring said property, under the provisions of said first mortgage, and of this decree, and to be approved by a majority of said first-mortgage bondholders, in which said corporation the controlling interest and power of management shall be given to the first mortgage bondholders in such manner as the majority of such first-mortgage bondholders shall indicate and provide, and in which the second mortgage bondholders shall receive a second

class of stock for the full amount, principal and interest, of said second-mortgage bonds; and in which corporation the third-mortgage bondholders and general creditors shall receive common stock at par for the respective amounts due them; and in which the stockholders of the defendant shall receive common stock at the rate of one dollar in the new corporation for every three dollars of stock held by them in the defendant corporation."

Against this part of the decree the appellants present several objections. They urge that it was unauthorized by the prayer in the bill of complaint, and was not responsive thereto. It is true the bill contained no specific prayer for such directions; but beyond there lief specifically asked the complainants prayed for such other and further relief as the nature of the case should require, and as might seem meet to the court. The specific relief sought was a strict foreclosure; but under the prayer for general relief, it is not questioned that the decree for a sale was appropriate. And as the deed of trust was made a part of the bill, and provided what should be done in case the trustee became the purchaser at the sale, it does not appear to be going outside of the case to enforce the agreement contained in the deed, into which the Railroad Company, the trustee and, through the trustee, all the bondholders had entered.

A second objection is that in this part of the decree the court attempted to force inconsistent duties and trusts upon the trustee, different from those the parties had established by contract under seal, viz.: by the mortgage deed. The meaning of this is, as we understand it, that the decree directs a disposition of the property variant from the one stipulated for in the deed of trust. At first sight this objection seems to be not without merit. But after a careful examination of the deed, bearing in mind also the purposes sought to be accomplished by it, the mode prescribed for the accomplishment of those purposes, the powers vested in the majority of the bondholders, and the subordination of the trustee to those powers, we are unable to say that the decree was unwarranted. We cannot say that the majority transgressed the power they possessed, in their arrangement for the organization of the new company and, consequently, that the decree of the court carrying out that arrangement directed a disposition of the property different from that to which all the bondholders had assented. The primary object of the deed was to secure to the bondholders a prior right to the entire property—the subject of the trust—so far as it was needed for the full payment of the bonds. This right the decree preserves in all its entirety. It directs that in the new corporation to which the trustee is ordered to convey, the controlling interest and power of management shall be given to the first-mortgage bondholders in such manner as the majority of them shall indicate and provide. It subordinates to the rights of these holders all the interests of the second and third-mortgagees, as well as those of the general creditors and the stockholders of the Railroad Company, foreclosing entirely the equity of that Company.

The agreement in the deed of trust (a similar one being also in these second and third-mortgages) contemplated a substantial reorganization. It was for this that the power was given to the ma-

jority of the bondholders. The power was coupled with a large discretion. The majority was authorized to define the "terms, conditions and limitations" under which the new company should be organized. What those should be was thus left to the discretion of the donees of the power. "Terms, conditions and limitations" are broad words. Let it be conceded that the new organization must be for the benefit of the holders of the first-mortgage bonds, how can we say it is not for the benefit of those holders that entirely subordinate interests are conceded to junior lien creditors and to the stockholders of the former corporation? How can we say that such a concession was beyond the discretion with which the agents of the bondholders, that is to say, the majority, were clothed? Such concessions are generally made in reorganizations of railroad companies, and they are regarded as beneficial to the joint lienholders. They prevent delay and expenditure arising out of litigation between creditors, which are sometimes almost ruinous, and they lessen the risk of redemptions. The majority were empowered to direct the terms and conditions under which the new corporation should exist, and hold the property conveyed to it, as well as the limitations within which it might act. It is not intended that the majority could postpone the rights of any minority of the bondholders to those of other creditors, or allow any interference with those rights. Nothing of the kind has been done. Under the agreement the appellants, as well as the other bondholders, had, in case of a purchase by the trustee, no claim to the property purchased or to the proceeds thereof, "except for their *pro rata* share of the proceeds as represented in a new company," to be formed in the manner, and upon such terms and conditions and with such limitations as a majority of their associates may direct.

Upon the whole, therefore, we think the decree of the court, in the particular we are now considering, is consistent with the agreement of the bondholders contained in the deed of trust and, therefore, that this objection of the appellants should not be sustained.

We see no error in the decree, so far as it required any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to pay at once in cash a part of his bid, as earnest money. Such other purchaser, of course, must be a cash purchaser, at least to the extent of the sum due on the first mortgage. It was, therefore, no hardship to require an immediate payment by him of a part of his bid, and the order that he should make such payment was a protection against false or unreal bids. That the same requirement was not made of the trustee was very proper, for the reason that a purchase by the trustee required no payment of money, beyond a sum sufficient for costs, unless the bid exceeded the sum due on the first mortgage, the purchase being made for the first-mortgage bondholders.

The appellants further object to certain orders made by the court for payment by the receiver to John S. Newberry *et al.*, to Isaac M. Cate *et al.*, to Mowery Car Company, and to Haskell, Barker & Co., for rolling stock, furnished under lease or otherwise, for the railroad. These orders were no part of the decree of October 22, 1875. These orders were made

prior to that time, when the appellants were not parties to the suit, except through their trustee. They did not intervene and become parties until after the decree of Oct. 22 was made. Then they were permitted to become parties "so far as to prosecute, if they so elected, for the protection of their several interests therein, an appeal to the Supreme Court from the decree entered October 22, 1875." They asked for nothing more. They prayed for no appeal from any prior orders, and certainly they cannot be permitted now to object to orders made prior to that decree; orders from which they have not appealed. But if this was not so, it would be sufficient to say that the orders were not erroneous. They were within the rules we announced in *Fosdick v. Schall*, a case decided at this Term [ante, 339], and it is sufficient to refer to that case for their justification.

The appellants further object that the 8th paragraph of the decree was erroneous. That paragraph is as follows:

"Eighth. That the right of the several parties to this suit claiming liens by judgment or otherwise upon the property of defendants, and of the several parties claiming rights or equities in and to said property, or any property in the use of said Railroad Company, or any part thereof, by virtue of contracts, or cases whereby material, labor or property has been furnished for or placed upon said defendant's road, shall not be affected by this decree, the same being taken subject to the rights and equities of said parties as the same may be established and declared hereafter by this court."

This order relates to the effect of the decree, and not to the effect of a sale made under it, as the appellants seem to think. It reserves certain rights claimed for further adjudication. It cannot well be understood without reference to the nature of the claims and their condition when the decree was made. This appears in the report of the master, to which there was no exception in these particulars. The claims were judgments amounting in the aggregate to about \$13,000, recovered against the railroad company for injuries to persons and property, and which were liens prior to the mortgages. From some of these, appeals had been taken. There were also judgments inferior to the liens of the three mortgages, and other judgments not claimed to be liens at all, and there was a floating debt. It was impossible to determine definitely the extent of the rights of these various claimants, when the sale was ordered, and no one could have been injured by reserving them for subsequent adjudication. This objection, therefore, has no weight.

One other remains. The appellants assign for error that the decree is in one particular illegal, incongruous and contradictory, in this: that while in the first paragraph the right of redemption is barred as to the railroad company, the defendant, the second and third-mortgage bondholders, and the judgment creditors, it is given in the seventh paragraph to the second and third-mortgage bondholders, the general creditors and the stockholders of the defendant company, "Thus apparently denying the right of redemption to the railroad company and to the judgment creditors." The assignment does not complain that a right of redemption was given to those to whom it was accorded. It rather

complains that it was denied to the railroad company and to the judgment creditors. If such be the meaning of the decree, how can the appellants complain of it? To them it works no injury, and those who might complain have not appealed. Besides, if the other portions of the decree are correct, as we have endeavored to show, redemption by anybody is, to say the least, extremely improbable, if not impossible. We cannot avoid the conviction that this assignment of error is not the assertion of a real grievance.

The appellants are the holders of about six per cent. of the first-mortgage bonds. They are endeavoring to overturn an arrangement agreed to by a large majority of the bondholders appointed by themselves to make an arrangement for the reorganization of the debtor company, an arrangement sanctioned by the court, which does not lessen their security or postpone them to any other bondholders, but which preserves to its fullest extent all the rights assured to them by the mortgage. They ought not to succeed without the most substantial reasons. We do not find such reasons in the record, and *the decree of the circuit court is affirmed.*

Of the second appeal, that taken from the decree of August 31, 1877, confirming the master's report of the sale, little need be said. The errors assigned to it are substantially the same as those we have considered in the former case, and held to be insufficient to justify a reversal of the decree of October 22, 1875. There are two or three other objections, only one of which, however, requires any notice. The others are wholly without merit.

It is objected that the decree and order required notice of the sale to be advertised in a newspaper printed in the City of New York, called *The Financier*, as well as in other newspapers; that the master did not advertise the sale in that newspaper, nor report his inability to find any such newspaper to this court, in which the former appeal was then pending and, therefore, did not comply with the order of the court. At the time when the sale was made there was no *supersedeas* in existence and, before the sale was advertised, it was represented and made to appear to the Circuit Judge that *The Financier* had been merged into *The Public*, or that its name had been changed to *The Public*. He therefore, on the 8th of January, 1877, ordered that the notice of sale be inserted in *The Public* with the same effect as if the name of the paper had not been changed, and he directed the order to be entered of record. The sale was thus accordingly advertised.

Now, whether the Judge had authority to make such an order in a recess of the court, it is not worth the while to inquire for, if he had not, advertisement in *The Public* was a substantial compliance with the original order. If the name of *Financier* was merely changed, the identity of the newspaper remained, and the order was to advertise in that newspaper. And so if *The Financier* was merged into *The Public*, its subscribers and readers, to whom the advertisement was addressed and required to be addressed, were reached by it, as they would have been had there been no merger or change of name. The purpose of the order to advertise in that newspaper was publicity, and to reach those persons who saw the paper. That

purpose was not defeated by a change of name or a union with another newspaper. This objection, therefore, is formal rather than substantial. The case requires nothing more.

The decree in each case is affirmed.

Dissenting, *Mr. Justice Clifford, Mr. Justice Miller and Mr. Justice Harlan.*

NOTE.—See 93 U. S., XXIII., 936; 96 U. S., XXIV., 641.

JAMES H. ALVORD ET AL., *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 9 Otto, 593.)

Practice in hearing causes—counsel.

1. The rules of this court, requiring causes to be ready for hearing when reached, will be rigidly enforced.

2. Counsel who enter their appearance under Rule 9, will be held responsible until they relieve themselves from the obligation they assume, by substitution or otherwise.

[No. 68.]

Submitted Mar. 31, 1879. Decided Apr. 7, 1879.

IN ERROR to the Supreme Court of the Territory of Utah.

Motion to re-instate cause dismissed under Rule 16.

This case having been previously dismissed for lack of appearance on the part of the plaintiffs in error, when called, this motion is now made to re-instate.

Messrs. Chas. G. Williams, J. W. Denver and S. S. Penn, for plaintiffs in error.

Mr. Charles Devens, Atty-Gen., for defendant in error.

Mr. Chief Justice Waite announced the judgment of the court:

This application comes directly within the rule laid down in *Hurley v. Jones*, decided at the last Term and not yet reported [97 U. S., 318, XXIV., 1008]. As we took occasion to say in that case, "Our rules requiring causes to be ready for hearing when reached are and will continue to be rigidly enforced." We recognize no "pro forma" attorneys of record. Counsel who enter their appearance under the requirements of Rule 9 must understand that the court will hold them responsible for all that such an entry implies until they relieve themselves from the obligation they assume, by substitution or otherwise.

The motion is denied.

UNITED STATES, *Plff. in err.*,

v.

BURTON M. FORD ET AL.

SAME *v.* SAME; SAME *v.* ONE STILL AND OTHER PROPERTY, BURTON M. FORD ET AL. Claimants. SAME *v.* FIFTY BARRELS OF DISTILLED SPIRITS, BURTON M. FORD ET AL. Claimants. SAME *v.* THREE HUNDRED AND NINETEEN BARRELS OF WHISKY AND OTHER PROPERTY, JOSEPH ROELLE ET AL. Claimants. SAME *v.* FOUR HUNDRED BARRELS OF DISTILLED SPIRITS, JOSEPH ROELLE ET AL.

See 9 OTTO.

Claimants. SAME *v.* FOUR HUNDRED PACKAGES OF DISTILLED SPIRITS, ROWELL C. MERSEREAU, Claimant. SAME *v.* ONE HUNDRED AND FIFTY BARRELS OF WHISKY, JOSEPH ROELLE ET AL. Claimants.

(See S. C., "Whisky Cases" 9 Otto, 594-606.)

Accomplices as witnesses—right to pardon—authority of district attorney.

1. Accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon, but have only an equitable right to a recommendation to the executive clemency.

2. Prisoners, under such circumstances, cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defense on their trial, though it may be made the ground of a motion for putting off their trial, in order to allow time for an application to the pardoning power.

3. The district attorney has no authority to make an agreement, that if a person charged with an offense would testify against his accomplices, he should be exempt from prosecution, and from certain assessments made against him.

[Nos. 929, 930, 931, 932, 933, 934, 935, 975.]
Argued Mar. 21, 24, 25, 1879. Decided Apr. 7, 1879.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The case is fully stated by the court.

Mr. Charles Devens, Atty-Gen., for plaintiff in error:

The alleged agreement, being without warrant of law, is void, and could not be made the foundation of any order or judgment of the court.

The power to pardon and thereby grant immunity for the consequences of crime committed, is given by the Constitution to the President alone. The courts cannot exercise the power, or trench in any manner or to any extent upon this prerogative of the President. There cannot be immunity before pardon.

The leading case on this subject is that reported in *Rex v. Rudd*, 1 Cowp., 331, also reported in 1 Leach. C. L., 115, and known as *Rudd's Case*.

Lord Mansfield, said, *Rex v. Rudd*, 1 Cowp., 334:

"It can only come before the court by way of application to put off the trial, in order to give the prisoner time to apply elsewhere."

The doctrine of this case has been followed to this day both in England and in this country.

Rex v. Gariside, 2 Ad. & El., 266; *Ex parte Wells*, 18 How., 307 (59 U. S., XV., 421); *U. S. v. Wilson*, 7 Pet., 159; in *People v. Whipple*, 9 Cow., 707, it is said by Duer, *Chief Justice*, 9 Cow., 716, that the authority of the court extends no further than the recommendation to mercy. It must after all rest with the Executive, whether that recommendation be complied with or not.

See, also, *U. S. v. Lee*, 4 McLean, 103.

Messrs. Edward Jussen and Chas. H. Reed, for defendants in error:

When an accomplice turns State's evidence, or becomes a witness for the Government in criminal or quasi criminal cases, he thereby becomes *ipso facto* entitled to full immunity from prosecution for any and all offenses to which he was a party with the accomplices against whom he testifies.

U. S. v. Lee, 4 McLean, 103; 4 Bl. Com., 331;

Rudd's Case, 1 Cowp., 336; *People v. Whipple*, 9 Cow., 707.

It is lawful for the Government to accept an accomplice as a witness. If an accomplice is thus accepted, and testifies fully, fairly and truthfully, the law gives him an implied promise of protection from prosecution or punishment for the offense concerning which he thus testifies.

We are unable to find any reported case where such an agreement has been interposed as a defense and passed upon by the court.

We suppose the reason why no such case can be found, is because no such agreement has ever been questioned.

There are, however, two cases where this question was presented to some extent by insufficient pleas.

See, *Commonwealth v. Brown*, 103 Mass., 422; *Commonwealth v. Woodside*, 105 Mass., 594.

The plain inference from the decisions in those cases is, that the court would have decided such an express agreement a good defense.

Mr. Justice Clifford delivered the opinion of the court:

Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other; and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully and fairly.

Where the case is not within any statute, the general rule is that if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed; but it is equally clear that he cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial, for it is merely an equitable title to the mercy of the Executive, subject to the conditions before stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the Executive for that purpose. *Rea v. Rudd*, 1 Cowp., 332.

Sufficient appears to show that the following are the material proceedings in the several cases: (1) That the first two were actions of debt commenced in the circuit court to recover the double internal revenue tax imposed, as fully set forth in the respective declarations. (2) That the other six cases are informations filed in the district court to forfeit the properties therein described for acts done in violation of the internal revenue laws.

Service was made in the first two cases, and the defendants appeared and plead the general issue and the special plea set forth in the transcript. Issue was joined upon the first plea, and the United States demurred to the special plea. Hearing was had, and the court overruled the demurrer and gave judgment for the defendants. Like defenses in the form of answers or pleas were filed in the other six cases commenced in the district court, to which the United States demurred; but the district court overruled the demurrers, and finally rendered judgment in each case for the defendants.

Prompt steps were taken by the district attorney to remove the cases into the circuit court, where the respective judgments rendered by the district court were affirmed.

Suffice it to say in this connection, without entering into detail, that the United States sued out a writ of error in each case and removed the same into this court. Both parties agree that the questions presented for decision are the same in each case, in which the court here fully concurs.

Two errors are assigned as causes for reversing the judgment, which present very clearly the matters in controversy as discussed at the bar. (1) That the plea or answer set up as defense is bad because it is too general and does not set forth the supposed agreement in traversable form. When filed, the first assignment of error also objected to the plea or answer that it did not designate the officer who made the alleged agreement, which was plainly a valid objection to it; but that was obviated at the argument, it being conceded by the United States that the plea or answer should be understood as alleging that the supposed agreement was made by the district attorney. (2) That the plea or answer is bad because the officer representing the Government in these prosecutions had no authority to make the agreement pleaded, and that the court cannot enforce it, as it is void.

As amended, it requires no argument to show that the plea or answer cannot be understood as alleging that the President was a party to any such agreement, as the distinct allegation is that it was made by the district attorney; nor could any such implication have arisen even if the pleading had not been amended, as it is settled law that suits of the kind to recover municipal forfeitures must be prosecuted in the subordinate courts by the district attorney, and in this court, when brought here by appeal or writ of error, by the Attorney-General. *Confiscation Cases*, 7 Wall., 454 [74 U. S., XIX., 196]. Suppose the plea to be amended as stipulated at the argument, the first question is, whether as amended it sets up a good defense to the several actions. Taken in that view, it alleges in substance and effect that the district attorney promised the defendants that if they would testify in behalf of the United States frankly and truthfully when required, in reference to a conspiracy among certain government officials in the internal revenue service, and other parties then known to exist, whereby the honest manufacture of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and would plead guilty to one count in an indictment then pending against them in said district court, and would withdraw their pleas in certain condemnation cases then pending against their property in said district court, for the purpose *only* of insuring their good faith in so testifying on behalf of the United States, then the United States would recall any and all assessments under the internal revenue law made against them; and that no more assessments under said law should be made against them, that no more proceedings against them should be commenced on account of violations of the internal revenue laws then passed; and that no penalties or forfeitures should in any manner be enforced or recovered against them

or their property; that all suits for penalties and for forfeitures then pending against them and their property should be dismissed, and that full and complete indemnity should be granted to them as the said claimants.

Complete performance on their part is alleged by the claimants, and they allege that the pending suits are for the condemnation and confiscation of their property, which was seized by the United States on the ground of the alleged violation of the internal revenue law, prior to entering into the said agreement. Assessments made against the claimants or their property are to be recalled, and they and their property are to be free of internal revenue taxation. Proceedings pending against them for violations of the internal revenue laws are to be dismissed and no more are to be instituted, and the claimants are promised full and complete indemnity, civil and criminal, if they will consent to testify.

Considering the scope and comprehensive character of the supposed agreement, it is not strange that the district attorney deemed it proper to demur to the plea. He took two objections to it; but the court will examine the second one first, as if that is sustained, the other will become immaterial.

Waiving, for the present, the question whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal revenue taxation, the court will consider in the first place whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offense; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution.

Considered in its full scope, the agreement is that, in consideration of the defendants testifying against their co-conspirators who were indicted for defrauding the revenue, they, the defendants, should have a full and complete discharge, not only from all criminal liability, but from all penalties and forfeitures they had incurred, and from liability for their internal revenue taxes which they had fraudulently refused to pay, giving them full and complete indemnity, civil and criminal, for all their fraudulent and illegal acts in respect to the public revenue.

Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt, if he testifies fully and fairly, will not be prosecuted for the same offense, and some of the decided cases and standard text writers give very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt, some of the elements of the usage had their origin in the ancient and obsolete practice called *approvement*, which may be briefly explained as follows: when a person indicted of treason or felony was arraigned, he might confess the charge before plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such *approvement* was only allowed in capital offenses, and See 9 OTTO.

was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty, the judgment of the law was against him, and the *approver*, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the *approver* should be condemned. 4 Bl. Com., 330.

Speaking upon that subject, Lord Mansfield said, more than a century ago, that there were three ways in the law and practice of that country in which an accomplice could be entitled to a pardon: First, in the case of *approvement*, which, as he stated, then still remained a part of the common law, though he admitted it had grown into disuse by long discontinuance. Second, by discovering two or more offenders, as required in the two Acts of Parliament to which he referred. Third, persons embraced in some royal proclamation, as authorized by an Act of Parliament, to which he added, that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

Approvers, as well as those who disclosed two or more accomplices in guilt and those who came within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled of right to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the King's mercy.

Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the case, and that there remained even at that date only the equitable practice which gives a title to recommendation to the mercy of the Crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of *approvement*, modified and modeled so as to be received with greater favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice that if he behaves fairly and discloses the whole truth, he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice rests on the described usage and his own good behavior; for if he acts in bad faith, or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness. *Rex v. Rudd*, 1 Cowp., 332; *S. C.*, 1 Leach, C. C., 115.

Great inconvenience arose from the practice of *approvement*, in consequence of which a mode of proceeding was adopted in analogy to that law, by which an accomplice may be entitled to a recommendation to mercy but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial. 2 Hawk. P. C., n. 3, p. 532; 3 Russ. Crimes, 9th Am. ed., 596.

In the present practice, says Mr. Starkie,

where accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the Crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity and practice of the court is to stay the prosecution against them and they have an equitable title to a recommendation to the King's mercy. 2 Stark. Ev., 4th Am. ed., 15.

Participes criminis in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy; but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defense on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe, Cr. Ev., 9th Am. ed., 597.

Authorities of the highest character almost without number support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte Wells*, 18 How., 307 [59 U. S., XV., 421].

Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right; and the court having explained the course of such proceedings, remarked that, except in those cases, accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency.

Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that he cannot plead it in bar of an indictment against him for the offense, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon.

Three quarters of a century before that, ten of the twelve Judges of England decided in the same way, holding that the accomplice in such a case cannot set up such a claim in bar to an indictment against him, nor avail himself of it upon his trial, that such a claim for mercy depends upon the conditions before described, and that it can only come before the court by way of application to put off the trial in order to give the party time to apply for a pardon. *Rev v. Rudd*, 1 Leach, 125; 1 Chit., Cr. L., ed. 1847, 82; Mass. Cr. L., 175.

An attempt was made sixty years later in the same court to convince the Judges then presiding that some of the remarks of the *Chief Justice* in *Rev v. Rugg*, before cited, justified the conclusion that the accomplice in such a case was by law entitled to be exempted from punishment; but Lord Denman replied that the organ of the court on that occasion was not speaking of legal rights in the strict sense, nor of such rights as would constitute a defense to an indictment or an answer to the question why sentence should not be pronounced, saying, in substance and effect, that the right mentioned was only an equitable right, and that the court would postpone

the trial or any action in the case to the prejudice of the prisoner, in order to give him an opportunity to apply to the Crown for mercy. *Rev v. Garside*, 2 Ad. & Ell., 275; *Rev v. Lee*, Russ. & R., 361; *Rev v. Bruntton*, Russ. & R., 454.

Other text writers of the highest repute, besides those previously mentioned, affirm the rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon; that they have only an equitable right to a recommendation to the executive clemency; and they all hold that prisoners under such circumstances cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defense on their trial.

None of those propositions can be successfully controverted; but it is equally clear that the party, if he testifies fully and fairly, may make it the ground of a motion to put off the trial in order that he may apply to the executive for the protection which immemorial usage concedes that he is entitled to at the hands of the Executive. 3 Russ. Crimes, 9th Am. ed., 597.

Certain ancient statutory regulations, as already remarked, gave unconditional promise to accomplices of pardon and complete exemption from punishment, and in such cases it was always held that the accomplice, if he was called and examined for the prosecution, was entitled as of right to a pardon, provided he acted in good faith, and testified fully and fairly to the whole truth. Instances of the kind are adverted to by Mr. Phillips in his valuable treatise on Evidence; but he, like the preceding text writer, states that accomplices, when admitted as witnesses, under the more modern usage and practice of the courts, have only an equitable title to be recommended to mercy, on a strict and ample performance, to the satisfaction of the presiding judge, of the conditions on which they were admitted to testify, that such an equitable title cannot be pleaded in bar nor in any manner be set up as a defense to an indictment charging them with the same offense, though it may be made the ground of a motion for putting off their trial in order to allow time for an application to the pardoning power. 1 Phil. Ev., ed., 1868, 86.

Offenders of the kind are not admitted to testify as of course, and sufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. 1 Phil. Ev., ed. 1868, 87; 3 Russ. Crimes, 9th Am. ed., 598.

Good reasons exist to suppose that the same course is pursued in the courts of some of the States, where the English practice seems to have been adopted without much modification. *People v. Whipple*, 9 Cow., 707.

Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceeding in the courts of many of the States is quite different from that just described, the rule being that the court will not advise the Attorney-General how he shall conduct a criminal prosecution. Consequently, it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is

willing to criminate himself and his associates in guilt, shall be called and examined for the State.

Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the beforementioned usage and practice of the courts allow.

Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor and the court if need be, when fully informed of the facts, will join in such a recommendation.

Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction; but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may *not*, *pros.* the indictment if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea and plead over to the merits if his application for pardon shall be unsuccessful. 1 Bish. Cr. Proc., 2d ed., sec. 1076, and *n.*

Where the power of pardon exists before conviction, well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the Executive for decision.

Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of *approvement*, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin, to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith, and testifies fairly and fully to the whole truth. Cases undoubtedly have arisen where the accomplice, having refused to comply with the conditions annexed to his equitable right, has been subsequently tried and convicted, it being first determined that he has forfeited his equitable title to protection by his bad faith and false representations. *Com. v. Knapp*, 10 Pick., 477. Such offenders, if they

make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to punishment; but if they refuse to testify, or testify falsely, they are to be tried, and may be convicted upon their own confession.

Nothing of weight by the way of judicial authority can be invoked in opposition to the views here expressed, as is evident from the brief filed by the defendants, which exhibits proof of research and diligence. Decided cases may be cited which contain unguarded expressions, of which the following are striking examples: *People v. Whipple*, 9 Cow., 708; *U. S. v. Lee*, 4 McLean, 103.

Neither of those cases, however, support the proposition for which they are cited. Enough appears in the first case to show that it was objected on behalf of the accomplice that the usage gave him no certain assurance of a pardon, inasmuch as the power of pardon was vested in the Governor, and the authority of the court extended no further than the recommendation for mercy; to which the court responded, that the legal presumption was that the public faith will be preserved inviolate, and that the equitable claim of the party will be ratified and allowed.

Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out; and the court proceeded to remark, that if the district attorney failed to enter a *nolle prosequi* to the indictment, "the court will continue the cause until an application can be made for a pardon," which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of *approvement*. More evil than good flowed from that regulation, and in consequence the practice now acknowledged was substituted in its place, under which the accomplice acquires only an equitable right to the clemency of the Executive, which, as Lord Mansfield said, rests on usage and the good behavior of the accomplice, who in a proper case will be bailed by the court in order that he may apply for the pardon to which he is equitably entitled.

Should it be objected that the application may not be successful, the answer of the court must be in substance that given by Lord Denman on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a Federal Court will not be sacredly accorded to him by the President, in whom the pardoning power is vested by the Federal Constitution.

Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the circuit court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remanded for further proceedings in conformity with the opinion of the court.

Tested by these considerations, it is clear that the circuit court also erred in affirming the judgment of the district court in all the other cases, and that the judgment in each of those cases must be reversed and the causes remanded, with directions to reverse the judgment of the District Court, and

for further proceedings in conformity with the opinion of the court.

TOWN OF ORLEANS, *Plff. in Err.*,
v.

NATHAN E. PLATT.

(See S. C., 9 Otto, 676-683.)

Charge to jury—facts undisputed—promissory notes, as a consideration for sale—certiorari to review county judge's decision for issue of bonds—recitals in—corporation liable for acts of its servant—lis pendens—conclusive judgment.

1. Where the testimony is all one way and is conclusive in its effect, a party has no right to ask a charge which assumes that it is otherwise.

2. If the facts in favor of plaintiff are clearly established and are sufficient and undisputed, it is competent for the court to give charge to find for plaintiff.

3. Negotiable promissory notes of a purchaser of municipal bonds are sufficient consideration for their sale.

4. Where a *certiorari* was granted to review the order of a County Judge for the issue of county bonds, and before the reversal of the order the commissioners appointed by the County Judges subscribed for the stock of the railroad company and issued the county bonds, they are valid in the hands of a *bona fide* holder, although the order for their issue be subsequently reversed.

5. Where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised; and where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital.

6. A corporation is liable for the acts of its servants while engaged in the business of their employment, to the same extent that individuals are liable under like circumstances.

7. The doctrine of *lis pendens* has no application to commercial securities.

8. When the county judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, his judgment is conclusive until reversed by a higher court.

[No. 176.]

Argued Mar. 11, 1879. Decided Apr. 7, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The defendant in error was the plaintiff below where the case arose.

The facts fully appear in the opinion of the court.

Messrs. Levi H. Brown, Chas. A. Sherman and H. L. Comstock, for plaintiff in error.

Mr. Francis Kernan, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

This suit was brought upon interest coupons belonging to alleged bonds of the Town of Orleans, in the State of New York. There are thirteen assignments of error in the record. Ten of them relate to the admission or rejection of evidence. All these ten have been pressed upon our attention; but we think there is nothing in them. We shall, therefore, pass them by without giving to either of them special consideration. The proceedings of the County

Judge touching the issuing of the bonds, and the bonds themselves, were sought to be excluded. This proceeded upon a misconception of the law of evidence. The plaintiff had a right to exhibit his case. These documents, according to his view, were links in his chain of title to recover. To shut them out would have been to condemn him unheard, and to give judgment against him without trial. The admissibility of testimony under such circumstances, and its effect after it is admitted and all the other evidence is in, are very different questions.

The twelfth assignment is, that the defendant asked the court to submit to the jury, as distinct issues to be tried, the propositions whether the two railroad companies which had held the bonds and the plaintiff were *bona fide* holders, and that the court refused.

Where the testimony is all one way and is conclusive in its effect, a party has no right to ask a charge which assumes that it is otherwise. It would tend to create a doubt where none existed or ought to exist, and might mislead the jury.

Admitting that there could be doubt as to the companies, a concession by no means necessary to be made, there could be none, as the case appears in the record, with respect to the plaintiff. The inquiry was, therefore, immaterial as to them, and wrong as to him. The court properly declined to accede to the request.

The tenth and eleventh assignments charge error in the refusal of the court to direct the jury to find for the defendant. The former relates to a general request and refusal; the latter, to a request upon twelve specified grounds, with the same result.

The last assignment complains that the court directed the jury to find for the plaintiff.

It is well settled in the jurisprudence of this court, that if the facts are clearly established and are undisputed, it is competent for the court to give such a charge.

In one of the cases brought before us, where it had been done, the practice was commended, and it was remarked that "it gives the certainty of applied science to the results of judicial investigation." *Merch. Bk. v. St. Bk.*, 10 Wall., 604 [77 U. S., XIX., 1008]. In whose favor the charge should have been given, will appear by the result of our examination of the case.

We have already adverted to the good faith of the defendant in error as a purchaser. When he bought, he gave his negotiable notes, payable at different times for the purchase money.

The consideration was sufficient. 1 Daniel, *Neg. Secur.*, 584. Whether the notes were absolute, presumptive or conditional payment, or only special collaterals to the amount to be paid, are points upon which there is great conflict in the authorities. 1 Parsons, N. & B., 151, ch. VII. We need not consider the subject in this case.

The plaintiff was not bound to allow his paper to go to protest, and take the hazards of the litigation which would have followed. The refusal to pay the note first due, upon the ground of the want of consideration, would, doubtless, have led to the transfer of the other notes, all under due, and as to them, in that case, there could have been no defense. But irrespective of this, there could have been none upon the merits.

NOTE.—When a verdict may be directed by the court. See *note to Grand Chute v. Winegar*, 82 U. S., XXI., 174.

In *Otis v. Cullum*, 92 U.S., 447 [XXIII., 496], a county bond issued in Iowa had been sold to the plaintiffs in New York. The Supreme Court of the State adjudged it void. The plaintiffs sued to recover back what they had paid for it. This court held that in such cases there is only an implied warranty of title and genuineness, and that if there were no guaranty, and no fraud or misrepresentation on the part of the vendor in selling, the plaintiffs could not recover. It was said that such instruments pass from hand to hand like bank-notes, and that if invalid, the law would not inflict the hardship of compelling everyone who had passed them to pay back what he had received from his transferee. This case followed *Lambert v. Heath*, 15 Mees. & W., 486, in which the same point was ruled in the same way.

The important question here is, whether the bonds were wholly void, like a promissory note given for a gaming consideration, and made a nullity by statute; or whether they were of such a character that a *bona fide* holder could enforce them like any other commercial security, free from infirmity.

It is not denied that the statutory authority to issue them under the circumstances designated was ample and valid. In this respect our attention has been called to no defect; no question has been raised upon the subject.

Parties claiming to be a majority of the tax payers, and to own the main part of the taxable property of the town, petitioned the County Judge for an order that the bonds of the Town, to the amount of \$80,000, should be issued to enable it to subscribe and pay for that amount of the capital stock of the Clayton and Theresa Railroad Company. After hearing the petitioners and their opponents at the appointed time, the Judge, on the 1st of July, 1871, ordered the bonds to be issued, and, pursuant to the statute, appointed three commissioners to execute and deliver them. An application was thereupon made by the dissatisfied parties to the Supreme Court for a writ of *certiorari*. The writ was allowed on the 30th of September, 1871. It was served upon the County Judge, and he made the proper return. On the 27th of June, 1872, the Supreme Court, at a General Term, affirmed the judgment. In the month of July following, the case was taken to the Court of Appeals, and in February, 1873, that court reversed the previous judgments and ordered the petition to be dismissed.

On the 3d of April, 1872, the commissioners appointed by the County Judge subscribed for 800 shares of the stock of the railroad company, amounting to \$80,000, and on the next day issued and delivered in payment 160 of the bonds of the Town of \$500 each, and thereupon received from the company scrip for the stock, which the Town still holds. On the face of each bond was a certificate that it had been duly registered in the clerk's office of the county. The coupons in suit in this case were attached to 140 of these bonds. On the 26th of February, 1872, and on the 31st of May, 1873, the Clayton and Theresa Company entered into a contract with the Utica and Black River Railroad Company, and at the date of the second contract delivered all the bonds to Isaac Maynard, as collateral security for the fulfillment of both contracts, and with authority to him to

sell the bonds and pay over the proceeds to the latter company. On the 4th of February, 1874, Maynard sold to the plaintiff the bonds here in question, under the circumstances before stated.

The Court of Appeals reversed the judgment of the County Judge, solely upon the ground that when the case was before him he had refused to allow tax payers who had signed the petition to withdraw their signatures, although applications for that purpose were made, and if it had been permitted, the numbers and taxable property represented would have been below the standard required by the statute to authorize the judgment that was rendered. It does not appear that any other objection was made by the contestants. *People v. Sawyer*, 52 N. Y., 296. The previous reported adjudications are said to have been all contrary to this decision; none of them, however, were by the court of last resort. *Matter of Tax payers of Greene*, 38 How. Pr., 515; *Mem. of Decisions of Sup. Court*, fols. 281, 282; see, also, *People v. Mitchell*, 35 N. Y., 555.

The bonds showed no defect upon their face. They purported to be issued by virtue of certain specified Acts of the Legislature, and set forth that the "Commissioners, under the Acts above referred to, for the Town of Orleans, * * * upon the faith and credit and on behalf of said Town, and confirmed by a majority of the tax payers, representing a majority of the taxable property of the same, according to said Acts, for value received, do hereby promise," etc.

When the County Judge appointed the commissioners to issue the bonds, it was made their duty to proceed "with all reasonable dispatch." They were not parties to the proceedings upon the *certiorari*, and hence were not directly affected by them. The same remarks apply to the corporation that received the bonds in payment for its stock. It is expressly provided by statute that, in case of disagreement of the commissioners touching the issuing of the bonds, the Supreme Court may decide and direct what shall be done, and that "Said court * * * shall have power at any time, by injunction, to prevent the issue of said bonds, or any part thereof, on notice and for good cause shown; and any judge of said court may grant a temporary injunction until such motion can be heard." *Laws of 1871*, Vol. II., p. 2119, ch. 935, sec. 5. In this case, a preliminary injunction might and should have been procured forbidding the commissioners to issue the bonds, and the railroad company, if it received them, from parting with them, until the case made by the *certiorari* was finally brought to a close. This would have involved only an ordinary exercise of equity jurisdiction. *Ill. v. Delafield*, 8 Paige, 527; *DeLafield v. Ill.*, on appeal, 2 Hill, 159. The omission was gross laches. This negligence is the source of all the difficulties of the plaintiff in error touching the bonds. The loss, if any shall ensue, will be due, not to the law or its administration, but to the supineness of the town and the contestants. *Ray Co. v. Van Syckle*, 96 U. S., 675 [XXIV., 800].

Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Hern v. Nichols*, 1 Salk., 289; *Merch. Bk. v. St. Bk.* [*supra*].

The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall., 110 [69 U. S., XVII., 857]. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer Co. v. Hackett*, 1 Wall., 83 [68 U. S., XVII., 548]; *San Antonio v. Mehaffy*, 96 U. S., 312 [XXIV., 816]; *Moultre Co. v. Bk.*, 92 U. S., 631 [XXIII., 631]; *Moran v. Miami Co. Comrs.*, 2 Black., 722 [67 U. S., XVII., 342]; *Knox Co. v. Aspinwall*, 21 How., 539 [62 U. S., XVI., 208]; *Royal British Bk. v. Turquand*, 6 El. & Bl., 327.

A corporation is liable for the acts of its servants while engaged in the business of their employment, to the same extent that individuals are liable under like circumstances. *R. R. Co. v. Quigley*, 21 How., 209 [62 U. S., XVI., 75]; *Greene v. Omnibus Co.*, 7 C. B. (N. S.), 290; *L. and F. Ins. Co. v. Mech. F. Ins. Co.*, 7 Wend., 31.

The doctrine of *lis pendens* has no application to commercial securities. *Murray v. Lyburn*, 2 Johns. Ch., 441; *Kieffer v. Ehler*, 18 Pa., 388; *Stone v. Elliott*, 11 Ohio, 252; *Mims v. West*, 38 Ga., 18; *Leitch v. Wells*, 48 N. Y., 585; *Warren Co. v. Marcy*, not yet reported [97 U. S., 96, XXIV., 977]. See, in the case last named, *Mr. Justice Bradley's* full examination of the subject.

The County Judge was the officer charged by law with the duty to decide whether the bonds could be legally issued, and his judgment was conclusive until reversed by a higher court. *Lynde v. County*, 16 Wall., 6 [83 U. S., XXI., 272]; *Town of Rock Creek v. Strong*, 96 U. S., 271 [XXIV., 815]. The plaintiff had no notice, actual or constructive, of the proceedings in the case subsequent to the first judgment, and is in nowise affected by them.

Warren Co. v. Marcy is in effect decisive of the case in hand. There the Board of Supervisors claimed to be authorized by a popular vote to subscribe for the stock of a railroad company, and to pay in county bonds to be issued by themselves. A tax payer filed a bill in the county circuit court, and procured a preliminary injunction prohibiting the issue of the bonds. Before the final hearing this injunction was dissolved; at the final hearing the bill was dismissed. There had been no injunction in force after the preliminary injunction was dissolved of.

The complainant appealed to the Supreme Court of the State. There, in due time, the decree of the lower court was reversed, and the case was remanded with directions to enter a decree in conformity to the prayer of the bill. But between the time of the dissolution of the preliminary injunction and the final hearing in the court below the supervisors subscribed for the stock and issued the bonds.

The same question arose as to the bonds there as here.

This court held that in the hands of a *bona*

fide holder they were free from objection and could be enforced.

Our examination of this case with respect to the bonds here in question constrains us to come to the same conclusion.

There is no difference between the two cases in any material point.

We think the instruction given by the court below to the jury was correct, and the judgment is affirmed.

Cited—99 U. S., 684, 685, 686; 101 U. S., 204; 102 U. S., 290; 1 McCrary, 463; 89 N. Y., 587; 11 N. W. Rep., 192; 16 N. W. Rep., 505.

LAFAYETTE M. FLOURNOY, PRESIDENT
OF THE COMMERCIAL BANK OF KENTUCKY,
Plff. in Err.,

v.

ALFRED LASTRAPES.

Sheriff's deed—objection not taken in court below—verdict for defendant—judgment in suit to quiet title.

1. In Louisiana, a sheriff's deed is good, if executed by a deputy-sheriff in his own name, and not in the name of the sheriff.

2. An objection, not made in the court below, cannot be considered here.

3. A verdict of a jury, "for the defendant," is equivalent to a special finding in favor of the defendant upon each and every one of the issues tried.

4. In a suit to quiet title to real property, where the defendant, in his answer, set out his title, and asked that it be recognized and acknowledged, and that plaintiff be adjudged to deliver to him possession, judgment may be rendered in favor of defendant for the property in controversy.

[No. 186.]

Submitted Mar. 27, 1879. Decided Apr. 7, 1879.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The plaintiff in error brought suit in the court below, to quiet his title to certain real property. The defendant answered, claiming title and praying to have his title established and possession delivered to him, and that "in default whereof writs of possession issue in due course." Judgment having been given for the defendant, the plaintiff sued out this writ of error.

Mr. Thomas Hunton, for plaintiff in error.
Mr. W. Hallett Phillips, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The first error assigned in this case is to the effect that the court admitted in evidence to prove the title of the defendant, a sheriff's deed executed by a deputy sheriff in his own name, and not in the name of a sheriff. In some States this would be a good objection, but in Louisiana the rule appears to be otherwise. The precise question was raised and directly decided in *Kellar v. Blanchard*, 21 La. Ann., 41, and we are not advised that the authority of this case has ever been questioned.

The second assignment is, that the sale and adjudication of the property by the deputy-sheriff was null and void, on account of the insufficiency of the bid. No such objection was

made below, and it cannot be considered here.

The third assignment is, that the verdict of the jury was too vague and indefinite. The verdict was "for the defendant." This is equivalent to a special finding in favor of the defendant upon each and every one of the issues tried, and authorizes any judgment that could be entered on such a finding.

The only remaining assignment is, that the court gave judgment in favor of the defendant for the property in controversy. It is claimed that this could not be done under the pleadings. The prayer of the petition was that the petitioner might be decreed to be the true and lawful owner of the property; that if the defendant set up color of title he might be required to produce the same; and if it should appear insufficient, that he might be prohibited from claiming ownership. The defendant answered, setting out his title, and asking that it be recognized and acknowledged, and that the plaintiff be condemned to surrender and deliver to the defendant full possession. The judgment followed this prayer in the answer.

Affirmed.

DAVID N. BARROW, Admr. of FERDINAND
M. GOODRICH, Deceased, *Appt.*

v.

LOGAN HUNTON.

(See S. C., 9 Otto, 80-85.)

Removal of causes—jurisdiction.

1. A proceeding in a State Court of Louisiana to procure the nullity of a former judgment of that court, for causes relative to the form of proceeding and not relative to the merits, cannot be transferred to the U. S. Circuit Court.

2. The character of cases is always open to examination for the purpose of determining whether the courts of the United States are incompetent to take jurisdiction thereof.

[No. 201.]

Argued Apr. 3, 1879. Decided Apr. 14, 1879.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. Geo. L. Bright and David N. Barrow, for appellant:

The circuit court has no jurisdiction to annul the judgment of a state court, and cannot enjoin its judgment.

2 Story, Const., sec. 1757; see, also, 1 Kent, Com., 7th ed., sec. 19, p. 451; *Bank v. Turnbull*, 16 Wall., 195 (83 U. S., XXI., 297).

That it was only auxiliary and incidental to the original suit is, we think, too clear to require discussion.

Gwin v. Breedlove, 2 How., 35; *Freeman v. Howe*, 24 How., 460 (65 U. S., XVI., 752); *Dunn v. Clarke*, 8 Pet., 1; *Williams v. Bryne*, Hemp., 472.

In *Brooks v. Montgomery*, 23 La. Ann., 450, the court decided: "The sale of property which has been seized by the Marshal of the United States, under a writ of *fi. facias* which has issued from the circuit court thereof, cannot be enjoined by a state court, on the allegation of a third party that the property seized belongs to

See 9 OTTO.

him, and is not that of the defendant in the suit under which the *fi. fa.* issued. In all cases of this kind the court which issued the original process by which the seizure was made, has the exclusive right to determine its jurisdiction in the case."

An action to annul a judgment must be brought before the same court that rendered it. *Stevenson v. Weber*, 29 La. Ann., 105.

Messrs. T. J. Durant, C. W. Hornor and Thos. Hunton, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

On the 19th of January, 1874, Logan Hunton recovered in the Fourth District Court for the Parish of Orleans, Louisiana, against F. M. Goodrich and one Pilcher, a judgment for \$2,500, and interest at eight per cent. per annum from May 1, 1861. On the 28th of January, Goodrich filed a petition in said court, praying for a decree of nullity of the said judgment and for an injunction in the meantime; setting forth as grounds for such relief that the judgment complained of was void, because it was founded on a default taken, and no lawful service of the petition and citation in the suit had ever been made on him, Goodrich; and because the partnership of Pilcher & Goodrich had been dissolved before 1866; and because he, Goodrich, had been discharged as a bankrupt in 1868. An injunction and citation were thereupon issued and served.

On Feb. 3, 1874, Hunton, the defendant in this proceeding, filed a petition for the removal of the action of nullity to the Circuit Court of the United States, alleging that he was a citizen of Missouri, and that Goodrich, the plaintiff, was a citizen of Louisiana; and after a hearing on the subject, an order of removal was made by the district court. The plaintiff moved the Circuit Court of the United States to remand the cause; but this motion was denied, and the suit proceeded in the latter court. After various proceedings had, the plaintiff, by leave of the court, amended his petition to conform to the equity practice of the United States Court, converting it into a bill in equity containing substantially the same averments, and praying the same relief as before. The defendant answered, and the parties went to proofs. Amongst the proofs adduced was an exemplification of the record and proceedings in the original suit in which the judgment was rendered, which the plaintiff in this suit sought to have declared null and void. On the 14th of February, 1876, the circuit court made a final decree, as follows: "This cause came on to be heard upon the bill, answer, replication and proofs, and was argued by counsel. On consideration whereof, it is ordered, adjudged and decreed that the injunction herein issued by the state court was wrongfully obtained and is, therefore, dissolved. And it is further ordered and decreed that the plaintiff's bill be dismissed at his costs."

A rehearing having been refused, the decree was confirmed on the 28th of February, 1876.

From this decree the present appeal was taken and it is sought to be reversed on two grounds, upon which errors are assigned, namely:

1. That the transfer was illegally made, and the circuit court was without jurisdiction.

2. That it appears that the fourth district court

which rendered the judgment against F. M. Goodrich, was without jurisdiction, and therefore the judgment was null and void.

The question presented with regard to the jurisdiction of the circuit court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible.

On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding and, according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S., 10 [XXIII., 524], the case might be within the cognizance of the Federal Courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.

It would seem apparent that the proceeding in the present case was one that affected the mere regularity of the original judgment. In the common law practice, it would have been a motion to set aside the judgment for irregularity, or a writ of error *coram vobis*.

It will be more satisfactory, however, to take a brief view of the practice of Louisiana on this subject.

The process for procuring nullity of a judgment in that State, is prescribed by the Code of Practice, in which we find the following provisions:

"Article 556. Definitive judgments may be revised, set aside, or reversed: 1, by a new trial; 2, by appeal; 3, by action of nullity; 4, by rescission. The last mode can only be exercised by minors, or persons who were absent when judgment was rendered against them."

"Article 605. The causes for which the nullity of a definitive judgment may be demanded are twofold: those that are relative to the form of proceeding, and those that appertain to the merits of the question to be tried."

Article 606 specifies the vices of form for which a judgment can be annulled; as, when against a minor appearing without a curator, or against a married woman appearing without the authority of her husband; where the defendant is condemned by default without being cited; where the judge was incompetent to try the suit;

and where defendant has not been legally cited, and has not entered appearance, and judgment is by default.

Article 607 specifies the grounds of nullity relating to the merits, namely: where the judgment has been obtained through fraud, bribery, forgery of documents, etc.

"Article 608. The nullity of judgment may be demanded from the same court which has rendered the same, or from the court of appeal before which the appeal from such judgment was taken pursuant to the provisions hereafter expressed.

Article 609. The nullity can be demanded on the appeal, only while the appeal is still pending, and when the nullity is apparent on the face of the records.

Article 610. The party praying for the nullity of a judgment before the court which has rendered the same must bring his action by means of a petition; and the adverse party must be cited to appear, as in ordinary suits."

From these extracts it is to be inferred that the action of nullity *must* be brought in the same court which rendered the judgment, or in the court of appeal when an appeal is pending. And so the Supreme Court of Louisiana has decided. *Hennen*, Dig., art. Judg., XI. (c), and cases there cited. In *David v. Cabouret*, 1 La. Ann., 171, the court says: "The settlement made before the notary, under the order of the judge, * * * sought to be annulled in this suit, was made the judgment of the court by a decree, * * * and before that court alone ought the action to annul the act to have been brought." The action of rescission, which is nearly identical with that of nullity, is expressly required to be brought in the court that rendered the judgment. C. Pr., 616.

The fact that an action of nullity can only be brought in the court which rendered the judgment, or in the court to which such judgment is appealed, is entitled to some weight in determining the question now under consideration. It shows that in the estimation of the Legislature of Louisiana there is a manifest propriety in submitting the question of the validity of a judgment to the court which rendered it, or to the court which has the right to revise the judgment by way of appeal. We are not disposed, however, to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States. If the State Legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiae*, the Courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it.

The classification of the causes of nullity in the Louisiana Code into causes relative to form and those relative to the merits is nearly coincident with the classification above suggested, of cases which are and cases which are not, cognizable in the courts of the United States. Causes of nullity relating to form would fall in that class of cases which could not be brought in these courts, or be removed thereto. The

present case is one of that character. It is precisely described in the 4th division of the 606th article of the Code.

In our judgment, therefore, the case was one of which the circuit court could not take cognizance; and, therefore, the judgment must be reversed and the record remitted, with directions to remand the cause to the state court from which it was removed.

Cited—109 U. S., 503; 111 U. S., 667; 3 McCrary, 312; 10 Biss., 517.

THE NEW ORLEANS CANAL AND BANKING COMPANY, *Plff. in Err.*,

v.

NEW ORLEANS.

(See S. C., 9 Otto, 97-99.)

Federal question—burden of proof.

Where the question in the state court was whether it sustained the taxation of a bank on its United States legal tender notes, the burden of proof is on the bank to show that it has been unlawfully taxed. The decision of the state assessor must stand, unless it can be affirmatively controverted.

[No. 836.]

Submitted Jan. 10, 1879. Decided Apr. 14, 1879.

IN ERROR to the Supreme Court of the State of Louisiana.

The case is fully stated by the court.

Mr. Jno. Finney, for plaintiff in error.

Mr. Samuel P. Blanc, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

This is a writ of error to the Supreme Court of Louisiana, brought to reverse a judgment of that court, affirming the judgment of the Superior District Court for the Parish of Orleans. The judgment of the latter court, which was thus affirmed, was a judgment for \$10,500, and interest, being for taxes alleged to be due from the New Orleans Canal and Banking Company, the plaintiffs in error, to the City of New Orleans. In assessing the taxes of the City for the year 1876, the Bank had been assessed, in addition to its real estate, for the sum of \$700,000, as its capital, or money at interest; and the rate of assessment being one and a half per cent., the tax amounted to \$10,500. This the Bank refused to pay, on the ground that its capital, not invested in real estate, consisted of United States legal tender notes. Whether this was so or not was the question in the cause; for it was not contended, on the part of the City, that it would be lawful to tax United States securities in the hands of the Bank. The question, therefore, was really one of fact; but as the Bank alleges that, under pretense of deciding the question of fact, the state courts have really sustained a taxation of its legal tender notes, it becomes our duty to examine the case.

It seems, from a statement which was admitted in evidence, that from February 1, 1875, to July 1, 1875, the period during which the assessment roll was made up, the Bank, did, in fact, have on hand an amount of currency in the form of legal tender notes, varying from

See 9 Otto.

\$1,500,000 to \$766,000; the latter being the amount on hand on the 30th of June, 1875; but there was no proof in the cause to establish the fact that these notes constituted the capital of the Bank, any more than that any other equal portion of its assets constituted such capital.

The nominal capital of the Bank was \$1,000,000, and estimating its real estate at \$200,000, the assessment was still \$100,000 less than the balance of the nominal capital; and it was conceded that the Bank had a large amount of assets, independent of the currency in its possession. By a statement put into the case by the Bank, with consent of counsel, it appeared that on the 28th of June, 1875, its affairs stood as follows:

ASSETS.

Real estate.....	\$182,516.85
Stocks.....	8,228.35
Taxes paid.....	14,431.65
Suspended debts.....	54,740.80
Foreign and domestic bills protested.....	26,949.73
Notes and bills discounted.....	1,833,146.41
Foreign and domestic exchange..	919,996.51
Interest due on loans on call....	3,349.47
City seven per cent. gold bonds (\$50,000).....	25,750.00

Cash items:

Gold.....	\$32,419.80
Legal tenders.....	974,777.17
Checks sent to clearing-house.....	172,409.73
	<hr/>
	1,179,606.70
	<hr/>
	\$4,248,716.47

LIABILITIES.

Capital stock.....	\$1,000,000.00
Profit and loss.....	99,694.00
Dividends unpaid..	46,556.00
Individual depositors.....	3,044,957.19
Foreign banks and bankers.....	48,061.78
Circulation.....	9,447.50
	<hr/>
	\$4,248,716.47

An inspection of this statement shows that the Bank had over \$4,000,000 of assets, and that the assets were sufficient to pay all its debts, and leave enough balance to return to the stockholders all their capital. Now, does it lie with the Bank to put its finger on a particular item of the assets—its money on hand, for example (which appears to have consisted of legal tenders)—and say that this item and no other item constituted its capital at that time? Does this depend on the mere option of the Bank? Why was not its cash on hand just as applicable to its deposits and other obligations as to its capital? Not a particle of proof was offered, and it is difficult to see how any proof could have been offered, to show that the cash exclusively constituted the capital.

The Bank had probably been in operation for years. It is to be presumed that its original capital, not invested in real estate had been loaned out to its customers, and was rather represented by its discounted bills than by the cash in its drawer. Can it be pretended that the cash on hand was the simple and only representative of that capital? Suppose that this cash had come to the Bank from its depositors—and it is

not shown to the contrary—would it be admissible then to say that it constituted the capital? In this suit the burden of proof is on the Bank to show that it has been unlawfully taxed. The decision of the assessor must stand, unless it can be affirmatively controverted.

We cannot perceive that the judgment of the Supreme Court of Louisiana invades any right of the plaintiff in error secured to it by the Constitution or laws of the United States, and, therefore, *it must be affirmed.*

THE BOARD OF SUPERVISORS OF CALHOUN COUNTY, *Plff. in Err.*,

v.

WILLIAM B. GALBRAITH.

(See S. C., 9 Otto, 214-220.)

County bonds—where may be made payable—assignment in blank—Mississippi Constitution.

1. Where the statute, under which bonds of a county in Missouri were issued, required that they should be made payable to a railroad company, its successors and assigns, and they were made payable to the company, or bearer, *held*: that the statutory requirement in this particular is only directory, the defect is one of form, and the county is estopped to take advantage of it by the recital in the bonds of conformity to the statutes.

2. Where no place of payment of the bonds was designated by the statute, it was competent for the supervisors to make them payable in New York.

3. The law of the place of performance governs the construction and effect of the contract. By the law of New York, such bonds may be assigned in blank, and after such assignment in blank they pass by delivery from hand to hand, and have all the properties of commercial paper.

4. Where there is no limitation as to the time when or the number of times, the voters might be called upon to decide the question of subscription, such question may be twice submitted to them.

5. The Constitution of the State of Mississippi, of 1869, section 14, is wholly prospective, and does not apply to an Act passed before its adoption.

[No. 197.]

Argued Apr. 2, 1879. Decided Apr. 14, 1879.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The case, which arose in the court below, is fully stated by the court.

Mr. P. Phillips, for plaintiff in error:

The Act was passed with full knowledge of a long series of decisions by this court, commencing in 1858, declaring county and municipal bonds payable to bearer to be commercial paper, which, in the hands of a *bona fide* holder, excluded all defenses, however just and equitable, which might exist against the company to which they had been issued. Such a holder was bound only to notice whether the power to issue them was granted.

The Act of 1871 was intended carefully to guard the country against these consequences. If any doubt remained as to the intent of the Legislature, it would be removed by reference to the Act of 1822, passed soon after the State was admitted into the Union, and continued in its statutes to the present time.

The judicial construction of this Act has been

NOTE.—Recitals in negotiable bonds or securities; evidence of the facts recited; estoppel by recitals in. See note to Mercer Co. v. Hackett, 68 U. S., XVII., 548.

long settled. It is declared to be anti-commercial in its character. It lets in the defense to all the classes of paper therein described, and holds that the only kind of paper not included in its provisions is that which is made payable to bearer.

Kershaw v. Bank, 7 How. (Miss.), 391.

Obligations payable on their face to bearer, and which need no assignment, are declared not to be within the purview of the statute.

Craig v. Vicksburg, 31 Miss., 244; *Mercien v. Cotton*, 34 Miss., 64; *Winstead v. Davis*, 40 Miss., 787; *Harrison v. Pike Brothers*, 48 Miss., 56.

The only Mississippi case cited by defendant in error to support the ruling on this plea, is *Vicksburg v. Lombard*, 51 Miss., 111.

The bonds in this case were made payable to "bearer."

The word "assigns," as used in the Acts of 1871 and 1822, has a well defined meaning in Mississippi.

Craig v. Vicksburg, 31 Miss., 247.

In the case of *Aspinwall v. County of Daviess*, 22 How., 364 (63 U. S., XVI., 296), the question was presented under the Constitution of Indiana.

The phraseology of this proposition differs from that used in the Constitution of Mississippi, but the general legal effect is the same.

Now, the case under the Indiana Constitution presented the fact that, prior to the adoption of the Constitution, the County, by Act of the Legislature, was authorized to subscribe for stock and issue bonds, provided a majority of the qualified voters assented thereto. The election was held and the required vote obtained, but the actual subscription and issue of the bonds was made subsequent to the adoption of the Constitution, and the question was whether the Constitution had not abrogated the power conferred by the prior Act.

It was held not to be a contract, and so the bonds were declared to be void for want of authority to issue them.

The same doctrine was held in *Concord v. Savings Bank*, 92 U. S., 625 (XXIII., 628).

The bearing of these two decisions is made palpable by the judgment in the case of the *County of Moultrie v. Savings Bank*, 92 U. S., 632 (XXIII., 632).

Here no popular election was required. The power to subscribe was conferred upon the Board. The Board, by resolution, made the subscription, and this subscription was duly accepted by the railroad. All this was done prior to the adoption of the Constitution, relied on as prohibiting the subscription.

The subscription thus made was held to be a contract which the Constitution could not impair.

And so it was held in *Falconer v. R. R. Co.*, 69 N. Y., 492, in which the constitutional amendment adopted in 1875 prohibited any county from becoming a stockholder in any corporation. The court said:

It is not to be questioned that as soon as the amendment was adopted all action by towns, not finished, towards the issue of bonds in aid of any corporation, at once fell to the ground, unless, by operation of law or in pursuance of some valid agreement, a right had been created to have such action perfected by the issuing of the bonds.

Messrs. Edward Mayes and Wiley P. Harris, for defendant in error:

1. The issuance of bonds payable to the "Grenada, Houston and Eastern Railroad Company, or bearer," is a substantial and sufficient compliance with the statute, if considered as a matter of mere form.

Mott v. Hicks, 1 Cow., 513; *Brockway v. Allen*, 17 Wend., 40; *Pitman v. Kintner*, 5 Blackf., 250; *Forbes v. Marshall*, 32 Eng. L. & E., 589; *Maddox v. Graham*, 2 Met. (Ky.), 78.

2. Neither does the fact that they were so issued, instead of to the "President and directors of, etc., their successors and assigns," invalidate the bonds by making them negotiable instruments, contrary to the intention of the Legislature.

Maddox v. Graham, 2 Met. (Ky.), 78; *Moran v. Miami Co.*, 2 Black, 722 (67 U. S., XVII., 342); *Bushnell v. Beloit*, 10 Wis., 195.

The whole phraseology of the Act of 1871 and all its provisions show that the Legislature intended negotiable instruments to issue.

See, *Vicksburg v. Lombard*, 51 Miss., 111.

The authority was ample, both to make the subscription and to issue the bonds, on a majority vote, notwithstanding the provisions of sec. 14, art. 12 of the new Constitution; because,

1. That section does not repeal the Act of 1860, which authorized the subscription.

Cass v. Dillon, 2 Ohio St., 609; *State v. Union Township*, 8 Ohio St., 398; *Code of Mo.*, p. 43; *State v. Sullivan Co.*, 51 Mo., 531; *Kan. City, etc., R. R. Co. v. Aldermen*, 47 Mo., 349; *State v. Nodaway Co. Ct.*, 48 Mo., 339; *State v. Macon Co.*, 41 Mo., 453; *New Const. of Miss.*, art. XII., secs. 2, 14, 15, &c.; *Callaway Co. v. Foster*, 93 U. S., 567, Oct. Term, 1876 (XXIII., 911).

The case of *Aspinwall v. Daviess Co.*, 22 How., 364 (63 U. S., XVI., 296), was different from this. There it was the act of subscription which was prohibited, not the action of laws permitting subscription. So, also, with *Concord v. Savings Bank*, 92 U. S., 625 (XXIII., 628).

Mr. Justice Swayne delivered the opinion of the court:

The question presented for our determination in this case is as to the validity of certain bonds issued and delivered by the Board of Supervisors of Calhoun County, in the State of Mississippi, in payment for stock of the Grenada, Houston and Eastern Railroad Company, for which the Supervisors subscribed in behalf of the County. In the court below they filed numerous pleas, presenting the points of defense upon which they relied. The pleas were all demurred to, the demurrers were sustained, and judgment was rendered for the plaintiff. Here the assignments of error are not numerous. We shall respond as far as we deem necessary, without formally restating them.

The Act of February 10, 1860, authorized the subscription, provided a majority of the voters of the County signified their approval. That sanction was given, and the stock was subscribed. The amendatory Act of March 25, 1871, declared that when bonds were issued in payment for such stock they should be "Signed by the President of the Board of Supervisors issuing the same, and be made payable to the President and Directors of the Grenada, Houston and Eastern Railroad Company, and their suc-

cessors and assigns; and may be assigned, sold and conveyed with or without guaranty of payment by said president and directors, or may be mortgaged in like manner, at their discretion, as they may deem best for the company." The bonds here in question bore date September 1, 1871, and were payable to "The Grenada, Houston and Eastern Railroad Company, or bearer, at the agency of said company in the City of New York, two years from date." Each bond was for \$500, with interest coupons attached, which matured half-yearly. On their face is this recital:

"This bond is one of a series of bonds issued and delivered to the Grenada, Houston and Eastern Railroad Company by Calhoun County, to meet and pay off the amount subscribed by said county to the capital stock of the railroad company aforesaid, in pursuance of an Act of the Legislature of the State of Mississippi, entitled 'An Act to Aid in the Construction of the Grenada, Houston and Eastern Railroad,' approved Feb. 10, 1860, and of an Act amendatory thereof, passed March 25, 1871, and in obedience to a vote of the people of said County at an election held in accordance with the provisions of said Acts."

An objection is made to the form of the bonds. It is said they should have been made payable to the railroad company and "their successors and assigns," and not to the company "or bearer," and it is insisted that this divergence from the prescribed formula is a fatal defect.

To this there are several answers. The statutory requirement in this particular is only directory. *R. R. Co. v. Hurst*, 93 U. S., 291 [XXIII., 898]; *Rock Cr. T. v. Strong*, 96 U. S., 271 [XXIV., 815]. The defect is one of form and not of substance. The irregularity was committed by the servants of the County, and the County is estopped to take advantage of it. *Bargate v. Shortbridge*, 5 H. L. Cas., 297. The recital in the bonds, of conformity to the statutes, is also conclusive. A buyer was not bound to look further. *Big. Estop.*, 266; *Knox Co. Comrs. v. Aspinwall*, 21 How., 539 [62 U. S., XVI., 208]; *Moran v. Comrs.*, 2 Black, 722 [67 U. S., XVII., 342]. No place of payment of the bonds being designated by the statute, it was competent for the Supervisors to make them payable in New York. *Meyer v. Muscatine*, 1 Wall., 384 [68 U. S., XVII., 564]. The law of the place of performance governed the construction and effect of the contract. *Brabston v. Gibson*, 9 How., 263; *Cook v. Moffat*, 5 How., 295. By the law of New York such bonds may be assigned in blank, and any holder can fill the blank with his own name or otherwise. In the meantime, after such assignment in blank, they pass by delivery from hand to hand, and have all the properties of commercial paper. *Hubbard v. R. R. Co.*, 36 Barb., 286. The result is, therefore, the same that it would have been if they had been drawn in literal conformity to the statute.

The requirement of the statute in this particular is evidently the result of inadvertence. It applies to the securities spoken of the language necessary in a deed intended to vest in a corporation a fee simple title to real estate. They were obviously intended to be made negotiable instruments. *Vicksburg v. Lombard*, 51 Miss., 111.

It appears by the record that the proposition for subscription was twice submitted to the voters. The first time it was rejected; the second, it was approved by a majority. It is contended that the first submission exhausted the power to submit, and that the second was a nullity. We cannot concur in this view.

The 1st section of the Act of 1861 gave ample power to the proper officers (then the Board of Police, afterwards the Board of Supervisors) to subscribe, upon conditions thus expressed:

"*Provided, however,* That an election shall be held in the County for and on account of which stock is proposed to be subscribed by the qualified electors thereof, at the regular precincts of said County, twenty days' notice of the time of holding such election, and of the amount proposed to be subscribed, and in what number of installments, being first given by the Board of Police; and if, at said election, a majority of the qualified electors voting shall be in favor of such subscription, then said Board shall make such subscription for and in behalf of the county, for the amount specified, by the president of said Board of Police, subscribing the amount so specified, to the capital stock of said company, but if a majority of those voting shall be opposed to such subscription, the same shall not be made."

The remaining sections provide for the collection of the amount subscribed, by taxation, the mode of collection, etc., if the subscription should be made.

There is no limitation as to the time when or the number of times the voters might be called upon to decide the question of subscription. We cannot recognize any restriction as to the latter, in this respect, without adding to the statute what it does not contain. Our duty is to execute the law, not to make it. Such an interpolation would involve the "judge-made law" which Bentham so earnestly denounces. If authority be needed in support of our construction of the clause, it will be found in *Soc. for Sav. v. N. London*, 29 Conn., 174.

The present Constitution of the State of Mississippi, ratified Dec. 1, 1869, declares:

"Sec. 14. The Legislature shall not authorize any county, city or town to become a stockholder in or to lend its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto."

The learned counsel for the plaintiff in error insists that this section abrogated the Act of 1860, and avoids the bonds.

It will be observed that the language of the section is wholly prospective. It is, in effect, that the Legislature shall not, *in the future*, authorize any county, city or town (without the consent of two thirds of the legal voters) to do either of two things: (1) Become a *stockholder* in any company, association or corporation. (2) *Lend its credit* to any company, association or corporation.

The restraint is upon the Legislature. It is forbidden to do *thereafter* either of the two prohibited things.

The Act which authorized the subscription here in question and under which it was made, was passed more than nine years before the Constitution took effect. As to this Act there

is no room for any doubt or question. It provided for the payment of the subscription by a tax equal to the amount subscribed.

The amendatory Act of 1871, as regards the point under consideration, only changed the mode of payment for the stock. Instead of payment by a tax imposed for that purpose, it provides "That it shall and may be lawful" for the Supervisors to issue bonds for such sums as "may be deemed necessary to meet, pay off and discharge the subscriptions" made theretofore or thereafter under the prior Act of 1860.

The 8th section requires the levy and collection of sufficient taxes to pay in due time the amount due upon such subscriptions, or upon the bonds given for their payment.

In neither case was there to be a loan of any kind to the railroad company, and certainly none of "the credit of the county." The constitutional prohibitions do not, therefore, apply in anywise to this case.

The Act of 1871 recognizes the distinction between *subscriptions* made under it and those made under the Act of 1860. The former permitted subscriptions by towns, which were not authorized by the latter. In relation to such subscriptions the constitutional majority of two thirds of the voters was required.

Our construction of the clause here in question has been given to like language in Constitutions elsewhere, under similar circumstances. There are several adjudications of this court exactly in point touching the Constitution of Missouri. *Henry Co. v. Nicolay*, 95 U. S., 619 [XXIV., 394]; *Callaway Co. v. Foster*, 93 U. S., 567 [XXIII., 911]; *Scotland Co. v. Thomas*, 94 U. S., 682 [XXIV., 219]; *Macon Co. v. Shores*, not yet reported [97 U. S., 272 XXIV., 889]. See, also, *Missouri v. Macon Co. Ct.*, 41 Mo., 453; *State v. Greene Co.*, 54 Mo., 540; *Cass v. Dillon*, 2 Ohio, 607.

We find no error in the record, and the judgment is affirmed.

Dissenting, *Mr. Justice Miller*, *Mr. Justice Bradley* and *Mr. Justice Harlan*.

THE WHEELING, PARKERSBURG AND
CINCINNATI TRANSPORTATION CO.,
Plff. in Err.,

v.

CITY OF WHEELING.

(See S. C., 9 Otto, 273-285.)

Taxes on vessels—enrollment.

1. Taxes levied by a State upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, are not within the constitutional prohibition against levying duties of tonnage.

2. The enrollment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel, as property, upon a valuation of the same, as in the case of other personal property.

[No. 203.]

Argued Apr. 3, 1879. Decided Apr. 14, 1879.

ERROR to the Supreme Court of Appeals of the State of West Virginia.

The case is fully stated in the opinion of the court.

Mr. Montgomery Blair, for plaintiff in error:

In *Cooley v. Portwardens of Phila.*, 12 How., 313, the court held in effect, that any tax which operates as a charge on such vessels, even though indirectly imposed, would be a tonnage duty; and says that a tonnage duty might be levied under the name of pilot dues or penalties, and "that it is the thing, and not the name, which is to be considered." And to the same effect is the case of the *Steamship Co. v. The Portwardens*, 6 Wall., 31 (73 U. S., XVIII., 749).

The points decided bearing on the question before the court, are, first: that the residence of the owners is immaterial, 12 Wall., 204 (79 U. S., XX., 370); second: that it is not necessary that the duty should be according to the capacity of the vessel; any tax upon a ship, however inconsiderable is a tonnage duty, and is prohibited (6 Wall., 31, *supra*); and third: it is not the name but the thing that is prohibited. (12 How., 299, *supra*). Now, the vessels in question are just as much within the description of things taxed by the West Virginia statute as if the statute had specifically taxed vessels by name; for it is as ships that they are assessed, and not as so much timber and iron; hence it is the thing which is prohibited and not the name. The prohibition certainly applies here.

In support of the decision of the state court, there is cited the language of *Mr. Justice McLean*, in the *Passenger Cases*, 7 How., 287, and of *Mr. Justice Clifford* in the case of *Cox v. Lott, Coll.*, 12 Wall., p. 204 (79 U. S., XX., 370); also certain expressions in *Hayes v. The P. M. S. S. Co.*, 17 How., 596 (58 U. S., XV., 254); *State Tonnage Tax Cases*, 12 Wall., pp. 212, 213 (79 U. S., XX., 373); and in *Morgan v. Parham*, 16 Wall., 473 (83 U. S., XXI., 303).

It is undeniable that the language cited tends to sustain the views of the state court; but the questions before this court in those cases did not involve the question now here presented for the first time, and, as we contend, is in conflict with the principles actually decided by the court.

(No counsel appeared for defendant in error.)

Mr. Justice Clifford delivered the opinion of the court:

Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal Government. *State Tonnage Tax Cases*, 12 Wall., 204 (79 U. S., XX., 370).

Taxes levied by a State upon ships or vessels as instruments of commerce and navigation are within the clause of the Constitution which prohibits the States from levying any duty of tonnage without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or to the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay

any duty of tonnage under any circumstances, without the consent of Congress.

Pending the controversy in the subordinate state court, the parties, by consent, filed in the case an agreed statement of facts, from which and the pleadings it appears that the plaintiffs commenced an action of *assumpsit* against the defendants to recover back certain sums of money which the latter involuntarily paid to the former as taxes wrongfully assessed, as they allege, upon four certain steamboats which they owned, and which for four years or more they employed in carrying passengers and freight between the Port of Wheeling and other ports on the Ohio River.

It appears that the plaintiffs are an incorporated Company organized under the law of the State, and that the defendants are a municipal Corporation chartered as a City under the law of the same State. Authority is vested in the City to assess, levy and collect an annual tax, under such regulations as they may prescribe by ordinance, for the use of the City, on personal property in the City, not to exceed in any one year fifty cents on every \$100 of the assessed valuation thereof. By the same law it is provided that personal property shall be deemed to include all subjects of taxation which the assessors, acting under the laws of the State, are or shall be by law required to enter on their books as such property for the purpose of state taxation. Pursuant to that law, taxes were assessed for the several years mentioned, against the plaintiffs for the appraised value of the four steamboats and the furniture of the same, which they owned and used as aforesaid, it appearing that the plaintiff's principal place of business was Wheeling, and that three of the steamboats were usually lying at the wharf or at the bank of the river within the corporate limits of the City.

Throughout the whole period each of the steamboats was duly enrolled and licensed as coasting vessels under the laws of the United States, and the agreed statement shows that the plaintiffs paid for each all dues, fees and charges which were properly demandable under those laws. Payment of the taxes was made under protest and in order to escape the seizure and sale of the steamboats.

Service was made and the parties having waived a jury and filed an agreed statement of facts as before stated, submitted the case to the court of original jurisdiction. Hearing was had, and the court rendered judgment in favor of the defendants. Exceptions were filed by the plaintiffs, and they removed the case into the Supreme Court of the State, called the Court of Appeals, where the judgment of the subordinate court was affirmed. Though defeated in both of the state courts, the plaintiffs sued out the present writ of error and removed the cause into this court.

Since the transcript was entered here, the plaintiffs have assigned for error that the State Court of Appeals erred in holding that the taxes levied are not within the constitutional prohibition that no State, without the consent of Congress, shall lay any duty of tonnage.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of

the United States, entitled to the privileges secured to such vessels by the Act for enrolling and licensing ships or vessels to be employed in the coasting trade. 1 Stat. at L., 287.

Authorities to show that the States are prohibited from subjecting any such ship or vessel to any duty of tonnage is scarcely necessary, as that proposition is universally admitted; the only question which can properly arise in the case presented for decision being whether the tax as imposed by state authority is or is not a tonnage duty, within the meaning of the Constitution. Tonnage duties cannot be levied; but it is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.

Power to tax for the support of the State Governments exists in the States independently of the National Government; and it may well be assumed that where there is no cession of contradictory or inconsistent jurisdiction in the United States, nor any restraining compact in the Constitution, the power in the States to tax for the support of the state authority reaches all the property within the State which is not properly regarded as the instruments or means of the Federal Government. *Nathan v. La.*, 8 How., 73; *Brown v. Md.*, 12 Wheat., 419; *Weston v. Charleston*, 2 Pet., 449.

Beyond question these authorities show that all subjects over which the sovereign power of a State extends are objects of taxation, the rule being that the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, except those means which are employed by Congress to carry into execution the powers given by the People to the Federal Government, whose laws, made in pursuance of the Constitution, are supreme. *McCulloch v. Md.*, 4 Wheat., 429; *Savings Soc. v. Coite*, 6 Wall., 604 [73 U. S., XVIII., 901].

Annual taxes upon ships and vessels for the support of the State Governments as property, upon a valuation as other personal property, are everywhere laid; nor is it believed that it requires much argument to prove that the opposite theory is unsound and indefensible in principle, as it is contrary to the generally received opinion, and wholly unsupported by any judicial determination. Instead of that, there are many cases in which the courts, in refuting the authority of the States to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property. Assessments of the kind, when levied for municipal purposes, must be made against the owner of the property, and can only be made in the municipality where the owner resides.

Though a ship, when engaged in the transportation of passengers, said Taney, *Ch. J.*, is a vehicle of commerce, and within the power of regulation granted to Congress, yet it has always been held that the power to regulate commerce, as conferred, does not give to Congress the power to tax the ship, nor prohibit the State from taxing it as the property of the owner, when he resides within their own jurisdiction; and he adds, that the authority of Con-

gress to tax ships is derived from the express grant of power in the eighth section of the first article, to lay and collect taxes, duties, imports and excises; and that the inability of the States to tax the ship as an instrument of commerce arises from the express prohibition contained in the 10th section of the same article. *Passenger Cases*, 7 How., 283, 479.

Support to that view is also derived from one of the numbers of the *Federalist*, which has ever been regarded as entitled to weight in any discussion as to the true intent and meaning of the provisions of our fundamental law. By that number it is maintained that no right of taxation which the States had previously enjoyed was surrendered, unless expressly prohibited; and that the right of the States to tax was not impaired by any affirmative grant of power to the General Government; that duties on imports were a part of the taxing power; and that the States would have had a right, after the adoption of the Constitution, to lay duties on imports and exports if they had not been expressly prohibited from doing so by that instrument. *Federalist*, No. 32. From which it follows, if the writer of that publication is correct, that the power granted to regulate commerce did not prohibit the States from laying import duties upon merchandise imported from foreign countries; that the commercial clause does not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the power to regulate commerce; and that the right of taxation in the States remains over every subject where it before existed, with the exception only of those expressly or impliedly prohibited.

Neither imports nor duties on imports or exports can be levied by a State, except what may be absolutely necessary for executing its inspection laws, nor can a State levy any duty of tonnage without the consent of Congress. State power of taxation is, doubtless, very comprehensive; but it is not without limits, as appears from what has already been remarked, to which it may be added, that state tax laws cannot restrain the action of the national authority, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value not excepted as aforesaid, within the sovereignty of the State; but they cannot reach the means and instruments of the Federal Government, nor the administration of justice in the Federal Courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of Congress.

Power to tax its citizens or subjects in some form is an attribute of every government, residing in it as part of itself; and hence it follows that the power to tax may be exercised at the same time upon the same objects of private property by the State and by the United States, without inconsistency or repugnancy. *McCulloch v. Md.* [*supra*]; *Bk. v. Billings*, 4 Pet., 514.

Such power exists in the State as one conferred or not prohibited by the State Constitution, and in the Congress by express grant. Hence the existence of such powers is perfectly consistent, though the two governments in exercising the same act entirely independent of each other as applied to the property of the citizens.

Legislative power to tax, as a general proposition, extends to all proper objects of taxation within the sovereign jurisdiction of a State; but the power of a State of the Union to lay taxes does not extend to the instruments of the National Government, nor to the constitutional means to carry into execution the powers conferred by the Federal Constitution. Tax laws of the State cannot restrain the action of the National Government, nor can they circumscribe the operation of any constitutional Act of Congress. They may extend to every object of value belonging to the citizen within the sovereignty of the State, not within the express exemptions of the Constitution, or those which are necessarily implied as falling within the category of means or instruments to carry into execution the powers granted by the fundamental law. *Day v. Buffinton*, 3 Cliff., 387.

Power to levy taxes, said Marshall, *Ch. J.*, could not be considered as abridging the right of the States on that subject, it being clear that the States might have exercised the power to levy duties on imports or exports had the Constitution contained no prohibition upon the subject; from which he deduces the proposition that the prohibition is an exception from the acknowledged power of the States to levy taxes, and that the prohibition is not derived from the power of Congress to regulate commerce. *Gibbons v. Ogden*, 9 Wheat., 201.

States, said *Mr. Justice* McLean, cannot regulate foreign commerce; but he held in the same case that they may tax a ship or other vessel used in commerce the same as other property owned by its citizens, or they may tax the stages in which the mail is transported, as that does not regulate the conveyance of the mail any more than the taxing the ship regulates commerce, though he admitted that the tax in both instances affected in some degree the use of the property, which undoubtedly is correct. *Pasenger Cases* [supra].

Enrolled vessels engaged in conveying passengers and freight, which were owned by citizens of the State of New York, entered the Port of San Francisco, and while there were compelled to pay certain taxes. Payment having been made under protest, the owners of the vessels brought suit to recover back the amount, and *Mr. Justice* Nelson, in disposing of the case here, in behalf of the court, held "That the vessels were not in any proper sense abiding within the limits of California so as to become incorporated with the other personal property of the State; that they were there but temporarily engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid," which shows to a demonstration that the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property. *Hays v. Steamship Co.*, 17 How., 596 [58 U. S., XV., 254].

Ships, when duly registered or enrolled, are instruments of commerce, and are to be regarded as means employed by the United States in execution of the powers of the Constitution and, therefore, they are not subject to state regulations. *Sinnot v. Davenport*, 22 How., 227 [63 U. S., XVI., 243].

See 9 OTTO.

Such instruments or means are not given by the People of a particular State, but by the People of all the States, and upon principle as well as authority should be subjected to that government *only* which belongs to all.

Taxation, beyond all doubt, is the exercise of a sovereign power, and it must be admitted that all subjects over which the sovereign power of a State extends are objects of taxation; but it is equally clear that those objects over which it does not extend are exempt from state taxation, from which it follows that the means and instruments of the general government are exempt from taxation. *McCulloch v. Md.* [supra].

Tonnage duties on ships by the States are expressly prohibited, but taxes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition, for the reason that the prohibition, when properly construed, does not extend to the investments of the citizens in such structures.

Duties of tonnage, says Cooley, the States are forbidden to lay; but he adds that the meaning of the prohibition seems to be that vessels must not be taxed as vehicles of commerce, according to capacity, it being admitted that they may be taxed like other property. Cooley, *Const. Lim.* 4th ed., 606.

"Vessels are taxable as property," says the same author; and he adds that "possibly the tax may be measured by the capacity, when they are taxed *only* as property and not as vehicles of commerce;" which may be true, if it clearly appears that the tax is to the owner in the locality of his residence, and is not a tax upon the ship as an instrument of commerce. Cooley, *Taxation*, 61.

Whatever more general or more limited view may be entertained of the true meaning of this clause, says *Mr. Justice* Miller, it is perfectly clear that a duty, tax or burden imposed under the authority of the State, which is by the law imposing it to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port in the United States, is within the prohibition. *Cannon v. New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417]; *Peete v. Morgan*, 19 Wall., 581 [86 U. S., XXII., 201]; *State Tonnage Tax Cases* [supra].

Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce, but they all admit, expressly or impliedly, that the State may tax the owners of such personal property for their interest in the same. Corresponding views are expressed by Mr. Burroughs in his valuable treatise upon Taxation. He says that vessels of all kinds are liable to taxation as property in the same manner as other personal property owned by citizens of the State; that the prohibition only comes into play where they are not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property. Burroughs, *Tax.*, 91; *Johnson v. Drummond*, 20 Gratt., 419.

Property in ships and vessels, say the Court of Appeals of Maryland, before the Federal Constitution was adopted, was within the taxing

power of the State; and they held that such property since that time, when belonging to a citizen of the State living within her territory and subject to her jurisdiction, and protected by her laws, is a part of his capital in trade, and like other property, is the subject of state taxation. *Hovell v. State*, 3 Gill, 14; *Perry v. Torrence*, 8 Ohio, 522.

Beyond all doubt, the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property, nor is it pretended that the taxes were levied as duties of tonnage. Congress has prescribed the rates of measurement and computation in ascertaining the tonnage of American ships and vessels, and in the light of those regulations Burroughs says that the word "tonnage" means the contents of the vessel expressed in tons, each of one hundred cubical feet. P. 89.

Homan says that the word has long been an official term, intended originally to express the burden that a ship would carry, in order that the various dues and customs levied upon shipping might be imposed according to the size of the vessel, or rather in proportion to her capability of carrying burden. Homan, Dic. Com. and Nav., Ton.

Tested by these definitions and the authorities already cited, it is as clear as anything in legal decision can be, that the taxes levied in this case are not duties of tonnage, within the meaning of the Federal Constitution. Taken as a whole, the contention of the plaintiffs is not that the taxes in question are duties of tonnage, but their proposition is that ships and vessels, when duly enrolled and licensed for the coasting trade, are not subject to state taxation in any form, and that the owners of the vessels cannot be taxed for the same as property, even when valued as other personal property, as the basis of state or municipal taxation.

Opposed as that theory is to the settled rule of construction, that the commercial clause of the Constitution neither confers, regulates nor prohibits taxation, it is not deemed necessary to give the theory much further consideration. *Gibbons v. Ogden* [*supra*]. By that authority it is settled that the power to tax, and the power to regulate and prohibit taxation, are given in the Constitution by separate clauses, and that those powers are altogether separate and distinct from the power to regulate commerce; from which it follows, as a necessary consequence, that the enrollment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property.

Judgment affirmed.

Cited—107 U. S., 374; 112 U. S., 74; 93 Ill., 36; 34 Am. Rep., 158; 33 Lea., 649; 39 Am. Rep., 281.

TOWN OF BROOKLYN, *Plff. in Err.*,

v.

THE ÆTNA LIFE INSURANCE COMPANY.

(See S. C., 9 Otto, 362-371.)

Town bonds, defenses to—issue and delivery—effect of former suit—immaterial objection.

416

1. A town in Illinois, which has subscribed to the stock of a railroad and issued its bonds therefor cannot, as against a *bona fide* purchaser, claim exemption from their payment upon the ground that the railroad company disregarded its promise to construct the road, or that its own officers delivered the bonds in violation of special conditions, of which the purchaser had no knowledge or notice, either from the statute or otherwise.

2. Where the bonds were signed, by the officers designated for that purpose by the law authorizing their issue, after the vote and subscription, it was not necessary that the Board of Auditors, or other corporate authorities of the town should have participated in their issue and delivery.

3. Where a suit was commenced in the state court against the holders and owners of bonds and coupons which had been issued in the name of the town and delivered to the railroad company, the decree therein could not bind anyone not personally served with process, or who did not appear, nor affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service.

4. Where, in this court for the first time, specific objection is made that the jury were sworn to try, and, in fact, tried but one of two issues, and there is no bill of exceptions showing to what point the evidence was directed, this court will assume that all the issues were tried which were presented or which the parties desired should be disposed of.

[No. 177.]

Argued Mar. 11, 1879. Decided Apr. 14, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Statement of the case by *Mr. Justice Harlan*:

This action is upon certain interest coupons issued in the name of the Town of Brooklyn, Illinois. Besides the general issue, the Town filed four special pleas.

The second plea, in substance, avers that the coupons in suit, and the bonds to which they were attached, were issued and delivered by the supervisor and town clerk of the Town, for stock claimed to have been subscribed to the Chicago and Rock River Railroad Company, an Illinois corporation, organized under an Act approved March 24, 1869, and thereby authorized and empowered to locate, construct and complete a railroad from a point on the south side of Rock River, near Stirling, *via* Amboy, crossing the Chicago and Burlington Railroad, thence to intersect the Chicago branch of the Illinois Central Railroad, outside of the corporation at Chicago; that the railroad company, in order to induce the Town to subscribe to its capital stock, by its officers and agents, pretended to lay out the line of railroad through the Town and near the Village of Maluguis Grove, thence to its *terminus* on the Chicago branch of the Illinois Central Railroad, and gave out that it was about to construct and complete its road, and thereby establish a through line to Chicago, wholly independent of and a competing line with the Chicago, Burlington and Quincy Railroad, which passes a few miles south of Brooklyn; that on 20th September, 1869, an election was held to determine whether the Town should subscribe \$50,000 to the stock of the company; that the notices for the election expressly stated that no bonds in payment of any subscription should be issued, or draw interest, or be delivered to the company, until the railroad was completed and cars running through Brooklyn; that a majority of the voters at such election voted to make the subscription; that on 23d May, 1870, William Holdren, the

98 U. S.

acting supervisor of the Town, as such supervisor signed and executed a certain paper, purporting to subscribe \$50,000 in the name of the Town to the capital stock of the company, which subscription provided that it was made upon the express understanding set forth in the notices of election, and that no payment was to be made until the road was completed and the cars running through the Town; that the supervisor of the Town had no authority or power to issue any bonds or coupons to said company until the road should be completed, which has never been done; that just before the issuing of the bonds and coupons it was rumored in the Town that the railroad was about to be transferred to the Chicago, Burlington and Quincy Railroad Company, and was not to be built and completed as required by the notices of election and the terms of subscription; that thereupon the agents and representatives of the Chicago and Rock River Railroad Company were notified that if the road was not to be built and completed as promised, the bonds and coupons would not be issued and delivered; whereupon said agents and representatives informed the Town and the citizens thereof that the company intended to complete the railroad as promised, and as fast as men and money could do so; that thereupon the supervisor and town clerk, relying upon such representations, but having no power or authority so to do, did, on or about November 7, 1872, sign, issue and deliver, in the name of the Town, to the agents and representatives of the company, bonds to the aggregate amount of \$50,000, with coupons attached, part of which are those sued on; that as soon as the bonds and coupons were received by the company it utterly ceased and refused to prosecute the construction of the road, and abandoned the entire work, whereby the Town failed to obtain any railroad to Chicago, or a competing road with that of the Chicago, Burlington and Quincy Railroad; that the representations aforesaid of the company's agents were knowingly false and fraudulent, but their falsity was unknown to the Town, its supervisor, and clerk when the bonds were issued and delivered, and the issuing and delivery were procured by such false and fraudulent representations; that the bonds and coupons are wholly void and in no wise obligatory upon the Town, because the company had not at the time they were issued complied with the conditions prescribed by the election notices and the subscription; that the Town claims no interest in the stock of the company, which is worthless and has been ever since the work was abandoned, and has received no value whatever for the bonds and coupons.

The third plea avers that the insurance company "Is not a *bona fide* assignee of the interest coupons declared upon in said declaration before maturity and without notice of the defenses set up in the second plea."

The fourth plea avers that the bonds and coupons "Were issued by the supervisor and town clerk of said Town of Brooklyn, and delivered without the authority of the Board of Auditors or the corporate authorities of said Town; and the supervisor of said Town, who issued and delivered the same, acted therein fraudulently and in collusion with the parties to See 9 OTTO.

whom the same were delivered; the said supervisor, knowing at the time he had no such authority, and he having been elected supervisor on the express pledge on his part, and with the understanding between him and those who voted for and supported him that he would not issue and deliver said bonds and coupons until said Chicago and Rock River Railroad was completed its entire length to the Chicago branch of the Illinois Central Railroad."

The fifth plea avers that, by a decree of the Circuit Court of Lee County, Illinois, rendered November 14, 1873, in the action of the Town of Brooklyn and others against the Chicago and Rock River Railroad Company and others, "It was ordered, adjudged and decreed that the said pretended bonds and coupons of the said Town of Brooklyn, so issued to the said Chicago and Rock River Railroad Company, and registered as aforesaid in the office of the Auditor of Public Accounts of Illinois, are void and in no wise obligatory on the said Town of Brooklyn, and that the same be surrendered up by the parties holding the same to be canceled," which decree it is averred is in full force and effect; that the said Insurance Company was made defendant in such suit with the other holders and owners of the bonds and coupons issued by the Town, by the name and description of "The unknown owners of certain bonds and coupons issued by Washington J. Griffin, the Supervisor of the Town of Brooklyn, Lee County, Illinois, to the Chicago and Rock River Railroad Company, purporting to be the bonds and coupons of said Town of Brooklyn;" that said Circuit Court of Lee County had then and there jurisdiction of the subject matter and the persons or parties defendant therein, by the issuing and return of process, and by proof of publication made as required by the Statute of the State of Illinois in the case of non-resident defendants.

To the plea of the general issue a joinder was filed, and to the third plea a replication was filed, averring that the Insurance Company became a *bona fide* assignee of the coupons declared upon, before maturity and for value, without notice of the defenses set forth. To the second, fourth and fifth pleas there was a general demurrer.

Upon the calling of the case for trial, the plaintiff moved the court (quoting from the order) "That a jury come to try the *issue* joined upon the plea herein. It is thereupon considered by the court that a jury came to try *said issue*, and thereupon came a jury, etc.," * * * who were * * * sworn, well and truly to try *said issue*, and after, etc., * * * returned into court the following verdict, to wit: 'We, the jury, find the *issue* for the plaintiff, and assess its damages to the sum of \$5,511.' It is therefore considered, etc." Upon a subsequent day of the term, the Town, by its attorney, moved the court to set aside the judgment and grant a new trial, but filed no grounds therefor in writing. Subsequently the Town failing thereafter to appear and sustain its motion for a new trial, the same was overruled.

The errors assigned are: 1, that the court sustained demurrers to the 2d, 4th and 5th pleas; 2, that the court erred, in rendering judgment on the verdict of the jury.

Messrs. Milton T. Peters and Thos. J. Henderson, for plaintiff in error.

Messrs. J. H. Roberts, O. J. Bailey, Cullom, Scholes & Mather and Francis Fellows, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

The questions presented for consideration upon this writ of error seem to have been concluded by the former decisions of this court.

1. The facts set out in the second plea do not constitute a defense to this action. It is not averred in that plea that the Insurance Company had, at the time it purchased the coupons in suit, any knowledge or actual notice of the special conditions embodied in the election notice, and repeated in the formal subscription of May 23, 1870. Nor is it therein alleged that the bonds to which these coupons were originally attached contained recitals indicating that the subscription had been voted and made upon any conditions whatever. The defendant in error was, undoubtedly, bound to take notice of the provisions of the statute under which the bonds were issued. But it was under no legal obligation to inquire as to the precise form or terms of the subscription, whether it was absolute or only conditional.

Had the Insurance Company, before consummating its purchase of the coupons, examined the Act incorporating the Chicago and Rock River Railroad Company, it would have ascertained: 1. That the statute made no provision for conditional subscriptions. 2. That, upon the approval by a majority of the legal voters of any incorporated city, town or township along or near the route of the road, at an election called and held for such purpose, in the mode prescribed by law, it was made, by the express words of the statute, the *duty* of the president of the Board of Trustees, or other executive officer of such town, and of the supervisor of such township, to make the subscription voted for, receive certificates therefor, and execute to the company bonds of the required amount, bearing interest, payable annually, and signed by such president, executive officer, or supervisor, and attested by the clerk of the municipality in whose name the bonds were issued. 3. That, within ten days after the approval of a subscription by popular vote, it was the duty of the clerk to transmit to the county clerk a statement of the vote given, the amount voted, and the rate of interest to be paid; and, within like period, after bonds were issued, to file with the county clerk a certificate showing the amount and number of bonds issued, and the rate of interest to be paid. If it be suggested that the statement thus directed to be transmitted to and filed with the county clerk would inform the purchaser whether the subscription was conditional or absolute, a sufficient response is, that such statement might have been in conformity with the letter of the statute without setting forth the precise nature of the subscription. But a conclusive answer is, that there is no averment that any such statement was prepared, transmitted or filed, or if filed, that it indicated the conditional nature of the subscription, by reference either to the election notice, or to the formal subscription of May 27, 1870. The plea shows that "The Town

and the citizens" (to adopt the language of the plea) were assured by the agents and representatives of the railroad company that the latter intended, in good faith, to perform the special conditions annexed to the subscription, and that all rumors to the contrary were without just foundation. These assurances were credited, and, in reliance upon them, the supervisor and clerk executed and delivered the bonds, knowing, at the time, that the conditions imposed by popular vote, as well as by the terms of the subscription, had not been complied with. Thus was faith in the promises of a railroad company substituted for a contract which, had the Town stood upon it, would either have secured the construction of the road, as contemplated, or guarded its people against a burden which has been imposed upon them through the fraudulent conduct of railroad officials, and the violation, by its own officers, of the trust committed to them. By the act of the Town's constituted authorities, who, by the statute, had the right, under certain circumstances, to execute and deliver the bonds and coupons, the railroad company was enabled to put them upon the money market in advance of the construction of the road. It is now too late for the Town to claim exemption, as against *bona fide* purchasers, upon the ground that the railroad company disregarded its promise to construct the road, or upon the ground that its own officers delivered the bonds in violation of special conditions, of which the purchasers had no knowledge or notice either from the statute or otherwise. The remedy of the Town is against the railroad company, and its own unfaithful officers, who, it is alleged, were in fraudulent combination with the company.

2. For the reasons already stated, the fourth plea must also be held to be insufficient. The bonds were signed by the officers designated for that purpose by the charter of the railroad company, and, after the vote and subscription, it does not seem to have been necessary that the Board of Auditors or other corporate authorities of the Town should have participated in their issue and delivery.

3. The fifth plea is radically defective. The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the Town, and delivered to the railroad company. Upon principle and authority, no decree therein rendered could bind any one not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S., 714 [XXIV., 565], and authorities there cited.

4. We come now to consider the remaining assignment of error, which need be considered viz.: that the court erred in rendering judgment upon the verdict. This objection rests upon the ground that although there were two issues to try—those arising under the first and third pleas—the jury were sworn to try "the issue," and found only "the issue" for the defendant in error.

We observe, from the record, that after the demurrer to the second, fourth and fifth pleas

was sustained, the city failed to appear, by attorney, at the trial before the jury. After verdict, a motion was entered to set aside the verdict and judgment and grant a new trial. But no written grounds were filed in support of the motion. Nor did the Town appear at the hearing of the motion, and urge any reason for its being granted. It was, consequently, denied and, in this court for the first time, specific objection is made that the jury were sworn to try and, in fact, tried but one issue, and that it is impossible from the orders of the court to say what issue was tried. We decline to consider the objection. If the attention of the court below had been called to this matter, the objection might have been obviated. There is no bill of exceptions showing to what point the evidence was directed, and we will assume, under the circumstances of the case, that all the issues were tried which were presented in due form for trial, or which the parties desired to be disposed of. *Laber v. Cooper*, 7 Wall., 565 [74 U. S., XIX., 151].

Our conclusion is that no error was committed in the court below, and the judgment is, therefore, affirmed.

Cited—101 U. S., 92, 129, 413; 105 U. S., 333; 107 U. S., 545; 10 Biss., 467; 2 Flipp., 502; 55 Vt., 497; 45 Am. Rep., 635.

SAMUEL HALE ET AL., Late Partners, as
HALE, AYER & CO., AND THE UNION
CAR SPRING MANUFACTURING COM-
PANY, INTERVENERS, *Appts.*,

v.

CHARLES L. FROST, Trustee, ET AL.

(See S. C., 9 Otto, 389-392.)

Railway mortgage—lien of—machinery used by receiver.

1. A railway mortgage upon the present and future acquired property of a railway company and its incomes and profits, is a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road is in the possession of the company.

2. The net earnings of the road, while in the possession of the court, and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the Chancellor in the payment of claims which have superior equities.

3. Persons furnishing to the company supplies for the machinery department, which the receiver after his appointment continued to use, have superior equities to those of the mortgagees, for such supplies, but not for material for construction purposes.

[No. 213.]

Argued Apr. 4, 1879. Decided Apr. 14, 1879.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The appellees were the plaintiffs below. The agreed facts show that the B. C. R. & M. Ry. Co., having made default Nov. 1, 1873, in the payment of its interest, the mortgage bondholders

consented to, and did, fund interest coupons on their bonds for eighteen months, and left the railway in the possession of the company; that May 1, 1875, on another default in payment of interest, the plaintiffs caused a receiver to be put in possession: that between Nov. 1, 1873, and May 1, 1875, the gross earnings were about \$1,772,249.74, and net earnings about \$550,000, which was paid on past floating indebtedness, past operating expenses, etc. That Nov. 1, 1873, the Company owed \$150,000, for back wages, taxes and current supplies then on hand and subsequently used. That May 19, 1875, the indebtedness to *employees* was about \$81,250.02, and for current supplies about \$60,000. That the net earnings while in the receiver's possession were \$337,540.45.

The appellants intervened, claiming priority of payment upon a debt of the railroad to them for current supplies. The points made and claimed by the intervening petitioners upon the pleadings and the agreed facts were these:

1. That the Railway mortgage is a prior lien upon the net earnings of the road after the payment of all operating expenses while in the possession of the Railway Company.

2. That after the default in the payment of interest Nov. 1, 1873, by the Company, the fact that the mortgagees funded their coupons and left the company in possession of the road, constituted the company, the agent and trustee in equity of the mortgagees, and that they are now estopped from objecting to the payment of all legitimate debts, contracted for operating expenses by the R'y Company from the earnings of the road.

3. That the net earnings of the road, while in the possession of the court and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the Chancellor in the payment of claims which have superior equities, if such shall be found to exist, and that these intervening petitioners' claims have superior equities to those of the mortgagees.

On these points and each of them, the opinions of the Judges were opposed.

Judgment was thereupon given in favor of Frost, against the interveners, who thereupon appealed to this court.

Messrs. Chas. A. Clark and N. M. Hubbard, for appellants.

Messrs. Jas. Grant and Grant, for appellees.

Mr. Chief Justice Waite announced the decision of the court:

The first question certified in this case is answered in the affirmative, upon the authority of *Fosdick v. Schall*, decided at the present Term [ante, 339].

The third question is answered in the same way, upon the same authority. The Union Car-Spring Manufacturing Company is entitled to payment in full, and Hale, Ayer & Co. to payment of so much of their claim only as is for supplies to the machinery department. There is nothing in the case to show any special equities in their favor in respect to that part of their account which is for material for construction purposes.

An answer to the second question is unnecessary.

NOTE.—The lien of a mortgage on after-acquired property. See note to *Pennock v. Coe*, 64 U. S., XLV., 436.

See 9 OTTO.

The several decrees appealed from are reversed and the cause remanded, with instructions to enter decrees in favor of the appellants for the amount due them respectively from the fund in court, upon the principles settled by the answers which are given to the questions certified.

Cited—9 Biss., 550 ; 5 Hughes, 383.

JOHN W. PENCE, *Plff. in Err.*,

v.

ROBERT B. LANGDON.

(See S. C., 9 Otto, 578-582.)

Direction to jury to find verdict—notice given on Sunday—construction of letters—waiver—rescission of contract.

1. A direction to a jury to find a verdict in favor of a party can be properly given only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

2. Notice of rescission of a contract is not void because given on Sunday, without a statutory provision to that effect.

3. Where the construction of letters was left to the jury and they found properly on the question, no harm was done by the omission of the court to construe them.

4. Acquiescence and waiver are always questions of fact. There can be neither without knowledge. Current suspicion and rumor are not enough.

5. The wrong-doer cannot make extreme vigilance and promptitude conditions of rescission of a contract. The burden of proving knowledge of the fraud which is the ground of rescission, and the time of its discovery, rests upon the defendant.

[No. 194.]

Argued Apr. 1, 1879. Decided Apr. 14, 1879.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

The defendant in error brought suit in the District Court, Hennepin County, Minn., to recover back certain money paid upon the purchase of certain mining stock. The case was removed for trial to the court below, where judgment was given for the plaintiff; whereupon the defendant sued out this writ of error.

The case is further stated by the court.

Messrs. C. K. Davis, M. H. Carpenter, M. Lamphrey and Shaw & Levi, for plaintiff in error.

Mr. Wm. Lochren, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

A brief statement of the facts disclosed in the record will be sufficient for the purposes of this opinion, and a few remarks will suffice to dispose of the case.

Langdon lived in Minnesota. Pence lived in California, and was engaged in mining operations. On the 10th of December, 1874, Langdon, by a letter of that date, advised Pence that he had seen Watson, and inquired about their mining interests. He concluded by saying: "If anything can be done that will be sat-

isfactory to all parties, let me know." Pence replied by letter of the 17th of that month. Speaking of the mine in which he and Watson were concerned, he said, amongst other things: "There is an eighth, that is, 7,500 shares, that can be bought if taken at once, at the same I paid and the same Watson paid, after looking and prospecting for five weeks." "The price is * * * \$8,368.75, gold." * * * "Should you conclude to buy, you must telegraph me here on receipt of this letter. You can pay," etc. "This will put you on the ground floor with us, or better than I am, as I have spent about \$600 to find this mine, prospect it, and have title looked up, etc. Our title is O. K." Langdon bought and paid the price demanded. On the 28th of January, 1875, Pence addressed Langdon another letter from San Francisco, in which he said: "There have been not less than ½ doz. after the 7,500 shares of stock I sold you, and all were astonished to find themselves too late; and still more astonished when I told them there was no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best." * * * "The stock I have deposited in the Nat. Gold Bank and Trust Co. of this city. * * * I would like to have you come out after the roads get good and weather pleasant in the spring." This letter inclosed a bill commencing "Hon. R. B. Langdon, Mina., to J. W. Pence, Dr." The stock was charged and the amount paid was credited. No person other than Pence was named as the seller. Linton and Shepherd were interested with Langdon in the purchase. On the 20th of June, 1875, all of them visited the mine with Pence. They claimed then to have learned for the first time that Pence had sold them his own stock, and to have learned also that the stock was worth much less than they had paid for it. They arrived on Saturday, and on the next day notified Pence that they rescinded the contract, and required what they had paid to be refunded. Shepherd and Linton transferred their interest to Langdon, and he thereupon brought this suit. The Code of Minnesota authorized it to be in his name.

Upon the trial in the court below six exceptions were taken by Pence. Two of them were to the admission of testimony. Both of them are so clearly without merit, that we deem it unnecessary to say more about them. He also excepted to the refusal of the court to direct the jury to find a verdict in his favor.

Such direction can be properly given only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. This case was certainly not within that category.

The objection that the notice of rescission was void because given on Sunday is without force. It was given at the mine, which is in Nevada. The result claimed could be produced only by a statutory provision to that effect. The Statute of Nevada relating to the Sabbath in nowise affects the subject. See "An Act for the Better Observance of the Lord's Day," of November 1, 1861, 1 Compiled Laws of Nevada; p. 2, ch. 3.

The stock certificate left at the Gold Bank for Langdon was never in his possession. The affirmation of this judgment will extinguish his claim to it, and Pence can reclaim it whenever he may choose to do so, Langdon was not

NOTE.—When a verdict may be directed by the court. See note to Grand Chute v. Winegar, 82 U. S., XXI., 174.

bound to receive it and tender it back to Pence before bringing suit.

The remaining exceptions relate to instructions given to the jury, which are as follows:

"I. In deciding this question of fact, you must take the letters and telegrams and all of them, and looking at them in the light of the previous relations of the parties, and of what each of the writers knew, placing yourselves in the writer's place and situation in order better to ascertain their meaning and purpose, and in the light shed upon this question of fact by these letters and telegrams, and by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of the stock from others."

Admitting that the court was wrong in not giving a construction to the letters one way or the other, touching the main point in the controversy, as is insisted, a concession, perhaps, not necessary to be made, it cannot avail the plaintiff in error that it was not done. Properly construed, we think the letters show clearly the agency of Pence as claimed by Langdon. The jury found accordingly. No harm was, therefore, done by the omission of the court; and if it were erroneous, the error is one of which Pence certainly has no right to complain. With respect to the duty of the court as to construing the letters, see, *Etting v. Bk.*, 11 Wheat., 59; *Barreda v. Silsbee*, 21 How., 146 [62 U. S., XVI., 86].

"II. It was not enough to charge the plaintiff with knowledge of the malcharacter of the transaction, that the language used was such as might have caused some persons to suspect it. He might in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used, rather than put upon them a construction which would show bad faith on the part of the defendant, which he had no reason to anticipate."

This, under the circumstances, we think, was exactly right.

"III. Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach."

The preceding remark is applicable also to this instruction.

"IV. If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

There can be no doubt as to the soundness of this proposition.

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reason.

See 9 OTTO.

U. S., Book 25.

able dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind and must seek compensation in damages. But the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive.

The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.

Here Langdon was lulled into security by his relations to Pence, and by Pence's letters.

There is no proof that he had the slightest knowledge or even suspicion of any foul play until he visited the mine. His action then was prompt and decided.

The instructions of the court as to the law upon the subject were clear, accurate, and well expressed. The rest was for the jury. With what they did we have nothing to do.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

SAMUEL STRINGFELLOW ET AL., Executors of BRIGHAM YOUNG, Deceased, *Appts. and Plffs. in Err.*,

v.

JOSEPH M. CAIN ET AL.,

SAME

v.

SAME.

(See S. C., 9 Otto, 610-619.)

Appeals from territorial courts—statement of facts—Town Site Act—purchase of possessory right—heirs.

1. Under the Act of April 7, 1874, on appeals to this court from the territorial courts, in cases where there has been no trial by jury, instead of the evidence at large, a statement of the facts and the rulings of the court is to be made and transmitted to this court.

2. If the findings of the District Court are sustained by the Supreme Court, and a general judgment of affirmance rendered, the findings of the District Court, thus approved by the Supreme Court, will furnish a sufficient "statement of the facts of the case" for the purposes of an appeal to this court.

3. The Act of March 2, 1867, which provides that the "land so settled and occupied" for a town site may be entered at the land-office, "in trust for the several use and benefit of the occupants thereof according to their respective interests" created the trust in favor of those who at the time the entry was made, were occupants, or entitled to the occupancy.

4. A non-resident may, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust.

5. An inchoate right to the benefit of the town site law descended, under the laws of Utah, to the owner's widow and children, and they might lose their rights by a failure to keep possession.

[Nos. 181, 182.]

Argued Mar. 13, 1879. Decided Apr. 14, 1879.

ERROR to and appeal from the Supreme Court of the Territory of Utah.

The cases, which were brought here both by appeal and by writ of error, are fully stated by the court.

Messrs. J. L. Rawlins, Williams & Young, A Sydney Biddle, Geo. W. Biddle and Geo. E. Whitney, for appellants.

Messrs. Robert N. Baskin, J. M. Wilson and Samuel Shellabarger, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court.

By the Act of Congress "Concerning the Practice in Territorial Courts and Appeals Therefrom," approved April 7, 1874, 18 Stat. at L., pt. 3, p. 27, the appellate jurisdiction of this court over the judgments and decrees of the territorial courts in cases of trial by jury is to be exercised by a writ of error, and in all other cases by appeal. It follows that the appeal in this case was properly taken, and that the writ of error must be dismissed.

An important question arising under that part of the Civil Practice Act of Utah which relates to appeals in a civil action from the District Court to the Supreme Court of the Territory has been elaborately discussed in the argument, but in the view we take of the case it need not be decided. This is a special statutory proceeding, instituted in a Probate Court to settle disputes between claimants as to their respective rights under the trust created through the purchase, by the Mayor of Salt Lake City, of the lands on which the city stands, pursuant to the authority for that purpose granted by the Act of March 2, 1867, 14 Stat. at L., 541, "For the Relief of the Inhabitants of Cities and Towns upon the Public Lands," and the several Acts amendatory thereof. The territorial statute under which this trust is to be carried into execution, Comp. L. Utah, 1876, 379, requires parties interested to sign a statement in writing containing the particulars of their claim, and deliver it to the clerk of the Probate Court of the County. If there are conflicting claimants, it is made the duty of the Probate Judge to call them before him, "And proceed to hear the proof adduced and the allegations of the parties, and decide according to the justice of the case." The statements filed stand in the place of pleadings. The court is required to cause full minutes of the testimony to be kept, which must be preserved with the papers, and entered on the record with the decision at length. If either party is aggrieved by the decision, he may appeal to the District Court, as in other cases, and upon the perfection of an appeal the Probate Court must "Cause the testimony and written proofs adduced, together with the statements of the parties and the judgment of the court, to be certified to the District Court, to be there tried anew, without pleadings, except as above provided."

This case was heard in the District Court on the record certified up in accordance with these requirements, and in giving its decision the court stated its findings of fact and conclusions of law separately. In this it followed the rule prescribed by the Civil Practice Act, on a trial by the court of an issue of fact in a civil action. After the decision was made, the present appellees moved for a new trial, on the ground

that the evidence was not sufficient to support the findings. This motion was denied, and appeals were thereupon taken to the territorial Supreme Court, both from the judgment and the order refusing a new trial. Such appeals are allowed by the Practice Act. When an appeal is taken to the Supreme Court of the Territory, the law requires a statement to be settled and signed by the judge who heard the cause, which shall set forth "Specifically the particular errors or grounds" relied on, "and contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more." This statement is annexed to the copy of the judgment roll or order appealed from and furnished to the Supreme Court. Comp. L. Utah, 1876, 493, 494.

The statement settled and signed in this case, annexed to the copy of the order refusing a new trial appealed from, contained all the "testimony, written proofs and statements of the parties" certified up from the Probate Court, and upon which the trial was had; and it was stipulated that the statement on the appeal from this order might be used, so far as applicable, on the appeal from the judgment. Thus, the proceeding was made to conform to the regulations of the Practice Act in reference to appeals in civil actions, and the court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether the facts as found would support the judgment. In short, the Supreme Court of the Territory was called upon to determine whether, according to the justice of the case as shown by the record, the judgment of the District Court was right.

The Act of April 7, 1874, 18 Stat. at L., 27, provides that on appeals to this court from the territorial courts, in cases where there has been no trial by jury, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to this court with the transcript of the proceedings and judgment or decree. Under this Act, if the findings of the District Court are sustained by the Supreme Court, and a general judgment of affirmance rendered, the findings of the District Court, thus approved by the Supreme Court, will furnish a sufficient "statement of the facts of the case" for the purposes of an appeal to this court. The same will be true if there is a reversal, for the reason that the facts as found are not sufficient to support the judgment. But if, as in this case, the judgment is reversed because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing in this court on appeal. Without undertaking to decide what would be the proper practice in an ordinary civil action when a judgment is reversed because a new trial was refused in the District Court, we are clearly of the opinion that in a suit like this, where all the evidence is before the Supreme Court that could be considered by the District Court if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the District Court.

To remand the case for a new trial would be in substance only to direct the District Court to state the facts as found by the Supreme Court and adjudge accordingly. This would make another appeal to the Supreme Court necessary in order to put the case in a situation for a review in this court, the probabilities being that on such an appeal the Supreme Court would be called upon to do no more than affirm its former judgment. There is no statute of the Territory which, in express terms, creates the necessity for such a circuitry of action, and we do not think the Practice Act, when fairly interpreted, requires it. Upon a new trial no new testimony could be introduced. The District Court could do no more than find the facts which, in the opinion of the Supreme Court, should have been found before, and the judgment which should follow from those facts may just as well be settled by the Supreme Court on the first appeal as on a second. We conclude, therefore, that the case is properly here for decision upon the facts stated by the Supreme Court, and this brings us to the inquiry whether, upon these facts, the judgment appealed from was right.

The Act of March 2, 1867, 14 Stat. at L., 541, provides that the "land so settled and occupied" for a town site may be entered at the land-office, "in trust for the several use and benefit of the occupants thereof according to their respective interests," and that the execution of the trust shall "be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory." The Legislature of Utah enacted that the lands so acquired in trust should be conveyed to the "rightful owner of possession, occupant or occupants," or to such persons as might be entitled to the occupancy or possession. Comp. L., 381.

In *Copfield v. McClelland*, 16 Wall., 331 [83 U. S., XXI., 339], this court decided that the Act of Congress created the trust in favor of those who at the time the entry was made were occupants, or entitled to the occupancy.

At the present Term, in *Hussey v. Smith* not yet reported [*ante*, 314], we held that a non-resident might, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust. The power of an occupant to sell and convey his possessory rights is clearly recognized by the territorial statute.

It is expressly found that the appellees were not in the actual possession of any part of the lot, except that which was adjudged to them by the District Court, when the entry was made by the corporate authorities. Joseph Cain died in 1857, leaving his widow, Elizabeth Cain, and two minor children, Elizabeth, now Mrs. Crimson, aged nine years, and Joseph M., aged seven. He then occupied the whole of the east half of the lot in question as his homestead. Soon after his death, Brigham Young set up a claim to the north half of the premises, and the widow, without recognizing his right, submitted to his demand. Young afterwards assumed to control the property and deeded a part of it to Jennings, who went into possession, claiming the right of occupancy, and under his occupation improvements were made by himself or his tenants. Young was never himself an actual occupant,

but it is found that when the testimony was taken, the Co-operative Company was in possession, paying him rent. It does not, however, distinctly appear from the findings whether either Jennings or the company were occupying the property when the entry was made at the land-office.

At some time after the death of Cain, his widow sold and conveyed to Charles King all "her right of claim, interest and possession" in that part of the south half of the premises in controversy which was claimed by Jennings and adjudged by the district court to him. When the testimony was taken in the case, the Co-operative Mercantile Company was in actual possession of this part of the lot, paying rent to Jennings. It is not stated definitely when this conveyance was made by Mrs. Cain or when the tenants of Jennings went into possession, though it is found that Jennings himself was never an actual occupant of the property.

On the 10th of December, 1869, the Stringfellow Brothers went into the possession of that part of the premises claimed by them, under a sale made by the administrators of Cain to pay taxes assessed upon the property after his death, and to pay debts incurred for improvements also made after his death. They paid for the property its full market value at the time, and were in the actual occupation when the entry was made by the corporate authorities at the land-office. The children of Cain were not made parties to the proceedings in the Probate Court to obtain an order for the sale, but from the time the sale was made until the statements were filed in the office of the clerk of the Probate Court, neither they nor their mother had possession of the premises which were sold.

Upon this state of facts it is apparent that the real question to be settled is, whether the children of Cain retain the benefit of their father's occupancy of that part of the lot in controversy not in their actual possession when the town site was entered at the land-office by the corporate authorities. All the interest their father had in the lot when he died was an inchoate right to the benefit of the Town Site Law in case the property should be purchased from the United States by the corporate authorities under the provisions of that law. All he could do was to maintain his occupancy, and claim the statutory trust in his favor in case that trust should be created. He held the position of one seeking to acquire a title by a possession adverse to all the other inhabitants of the town. His right to maintain this adverse possession descended under the laws of Utah to his widow and children. There can be no doubt that the possession the children thus acquired, if continued, would have ripened into a perfect title under the trust.

The infants could not bind themselves by contract to sell and convey their possessory rights, but they might lose their rights by a failure to keep possession. They need not maintain an actual occupancy, but they must in some form retain control of the property to the exclusion of an adverse entry. When Cain died, the mother became the head of the family and by the laws of Utah the natural guardian of the children. In this way she had by law the control of their persons. If she remained in the possession of the property, she necessarily did so for the benefit of her children and herself in proportion to

their respective interests in the inheritance; but if she voluntarily withdrew from the property and gave it up to others, the rights of the children as well as herself, which depended upon keeping the possession, were gone. The adverse possession commenced by the father might in this way be abandoned.

Applying these principles to the facts as stated we think it clear that the rights which the children had as occupants on their father's death were given up by their mother, except as to that part of the lot they had in actual possession when the corporate authorities purchased the land from the government. Soon after the death of the father, the mother yielded up the possession of the north half of the lot on the demand of Mr. Young, the leader of the Mormon Church, to which she and her husband during his life belonged. It matters not for the purposes of this inquiry whether this was rightfully or wrongfully done. In point of fact it was done many years before the purchase from the government. After that, Young assumed the control of the property so surrendered and deeded some part of it away. Subsequently the mother sold and conveyed to King that part of the south half which is now claimed by Jennings. From the facts as stated, it may fairly be presumed that this was done to save or improve the remainder. Her husband when he died owed no debts, and so far as appears had no considerable amount of property except his possessory rights in this lot. To raise the means to pay taxes which accrued after his death, and to pay debts incurred for improvements also made after his death, his administrators sold that part of the south half now claimed by the Stringfellow, and received its full value in money. When these several sales were made, the mother withdrew with her children from the occupancy, and the Stringfellow made an actual entry in December, 1869, which they have kept up until the present time. If the mother was not technically the guardian in socage of the children, she occupied under the circumstances the place of such a guardian, and Mrs. Crimson, who was then unmarried, must have been of full age when the Stringfellow took their possession. We cannot see how there could be an abandonment if this is not, and it seems clear to our minds that it must have been made by the mother in an honest effort on her part to save all she could of that which the father by his original occupancy had endeavored to secure.

We are, therefore, of the opinion, from the facts as they are stated by the Supreme Court:

1. That the surrender of the north half of the lot by Mrs. Cain, on the demand of Young, was such an abandonment of the possession as deprived her and her children of the right to claim title to that part of the lot without a subsequent entry, which is not shown.

2. That the conveyance by Mrs. Cain to King operated in the same way in respect to that part of the south half of the lot embraced in her deed to him.

3. That the administrator's sale had the same effect as to that part of the lot bought by George and Samuel Stringfellow, or one of them.

4. That George and Samuel Stringfellow are entitled to a conveyance of that part of the lot described in the administrator's deed, and claimed

by them in their statement filed with the clerk of the Probate Court.

5. That the appellees are entitled to a conveyance of all that part of the south half of the premises not embraced in the deed of Mrs. Cain to King and in that of the administrators to Stringfellow, and no more.

The judgment of the Supreme Court of the Territory is, therefore, reversed, and the cause remanded with instructions: 1. To enter or cause to be entered in the proper court a judgment in favor of George Stringfellow and Samuel Stringfellow for that part of the lot purchased by them at the administrator's sale. 2. To enter or cause to be entered a judgment in favor of the appellees, according to their respective interests under their inheritance from Joseph Cain, for that part of the south half of the premises in controversy not sold to the Stringfellow and King, and dismissing their claim as to all the rest and residue of the lot. 3. To rehear the case upon the evidence sent up from the District Court in respect to the claims of Jennings and Young as against the corporate authorities of Salt Lake City, and decide according to the justice of the case.

The appellees will pay the costs of this appeal.

Mr. Justice Strong did not sit in this case, nor participate in its decision.

Cited—99 U. S., 619, 621, 622; 103 U. S., 738; 104 U. S., 429, 619; 105 U. S., 236; 107 U. S., 346; 108 U. S., 13, 14; 111 U. S., 357.

WILLIAM H. PLATT, *Appt.*,

v.

THE UNION PACIFIC RAILROAD COMPANY AND FREDERICK L. AMES.

(See S. C., 9 Otto, 48-67.)

Railroad land grant—construction of—mortgage by Company—rule.

* By the 3d section of the Act of Congress of July 1, 1862, incorporating the Union Pacific Railroad Company, a grant of lands was made to the Company "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," and it was enacted that all such lands "not sold or disposed of" by the Company before the expiration of three years after the entire road should be completed should be subject to settlement and preemption, like other lands.

1. Held, that this statute should be construed, if possible, so as to effectuate the object which Congress had primarily in view.

2. Held, that the primary object of the grant was to furnish assistance in and during the construction of the road, and that opening the unsold, or undisposed of lands to settlement and preemption was only a subordinate and secondary object.

3. Held, therefore, that the secondary purpose of Congress did not control or defeat that which was primary.

1. Held further, that the words "or disposed of" are not redundant words, or synonymous with the word "sold" but that they contemplate a use of the lands granted, different from a sale, and that a mortgage is such a use.

*Head notes by Mr. Justice STRONG.

NOTE.—Construction of statute according to purpose for which it was passed. See note to U. S. v. Saunders, XXII., 736.

2. Held, that the Company was authorized to mortgage the land grant, and that the mortgage made in 1887, "for the purpose of raising money necessary to continue and complete the construction of their road," was a disposal of the lands within the meaning of the Act.

3. Held, that the mortgage was a hypothecation of the fee, and not merely of an estate terminable at the expiration of three years next after the completion of the road.

Held, therefore, the mortgage debt not having fallen due, and remaining unpaid, that the lands were not open to settlement and preemption.

Querre. Whether the remnants that may be unsold when the mortgage debt shall be paid, will not then be subject to preemption.

In construing a statute, aid may be derived from attention to the state of things as it appeared to the Legislature when the statute was enacted.

[No. 885.]

Argued Mar. 26, 1879. Decided Apr. 21, 1879.

APPEAL from the Circuit Court of the United States for the District of Nebraska.

The appellant was the complainant in the court below, where the case arose upon a bill to enjoin the defendant from proceeding further in a certain action of ejectment against him.

The case is further stated by the court.

Messrs. E. Wakely, James Lowndes, Chas. Devens, Atty-Gen. and E. M. Marble, Asst. Atty-Gen., for appellant:

Webster's Dictionary defines the phrase to *dispose of*, in the sense evidently used in the statute to be, "To exercise finally one's power of control over; to pass over into the control of some one else; to alienate; to bestow; to part with; to get rid of; as to dispose of a house; to dispose of one's time; more water than can be disposed of."

To *sell* is defined to be, "to transfer to another for an equivalent; to give up for a consideration; to dispose of in return for a consideration, especially money; to exchange; to barter." These definitions are in accord with the common understanding and use of the words. A man sells or disposes of his house, lands, or goods when he bestows, parts with, gets rid of, or exercises finally his control over them.

To accomplish this in respect to the lands in question, was neither the intention of the parties nor the legal effect of the mortgage that is set forth in the answer.

In the first place, by the statutes and laws of Nebraska, and of all the States and Territories in which the granted lands are situated, a mortgage conveys no title, and confers no right of possession, but is merely a lien, and the remedy is confined to an action to enforce it.

Kyger v. Ryley, 2 Neb., 20; *Chick v. Willcuts*, 2 Kan., 384; *Waterson v. Devoe*, 18 Kan., 223; *Drake v. Root*, 2 Col., 685; *Hyman v. Kelly*, 1 Nev., 179; *Johnson v. Sherman*, 15 Cal., 287; *Goodenow v. Euer*, 16 Cal., 461; *Dutton v. Warschauer*, 21 Cal., 609; Statutes of Wyoming; Compiled Laws of Utah, 478, sec. 260.

For the effect of any instrument in relation to land, we must look to the law of the State where the land is situated.

U. S. v. Crosby, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat., 577; *McGoon v. Scales*, 9 Wall., 27 (76 U. S., XIX., 546).

At the present day the debt is everywhere regarded as the principal thing, and the mortgage as mere security. *Gilman v. Tel. Co.*, 91 U. S., 615 (XXIII., 409).

When the mortgage in question was made, however, the Railroad Company expressly stip-

ulated against the loss of control and ownership. The instrument provides "That all the lands herein above conveyed and mortgaged shall be under the sole and exclusive control of the party of the first part;" that when the debt is paid, "the estate granted shall cease and determine," and "the trustees shall reconvey to said party of the first part all and singular the said lands not then sold or disposed of;" that the party of the first part shall have full power and authority to make contracts for the sale of the lands at such prices and upon such conditions as they and the trustees may agree upon.

Thus we see that, by the very terms of the instrument, it was to be simply a lien, and the lands were not in any sense sold or disposed of.

In determining the real meaning of Congress in making the provision in question, as well as in determining what is a fulfillment thereof, we may look to the history of the times, to surrounding circumstances, to the general policy of the government in that respect and to the mischief to be avoided.

Rhode Island v. Mass., 12 Pet., 657, 723; *Maryland v. R. R. Co.*, 22 Wall., 105 (89 U. S., XXII., 713); *U. S. v. Union Pacific R. R. Co.*, 91 U. S., 72 (XXIII., 224).

These are well known and are ably pronounced in the case of *Railway Co. v. Prescott*, 16 Wall., 609 (83 U. S., XXI., 374).

The intention clearly was to obtain an early settlement of the lands. This policy lies at the basis of all legislation affecting the public domain, because lands are sold at nominal prices, preemption and homestead privileges are given, schools fostered, navigation improved, and the construction of railways encouraged.

In pursuance of this uniform and liberal policy, the great grant in question was made upon condition that the lands should be sold or disposed of soon, or opened to the public for settlement and purchase at \$1.25 per acre. The phrase "disposed of" was properly used in addition to the word "sold"; for a wise policy might require a disposition of lands other than by sale. It might be good policy to bestow some lands gratuitously to encourage settlement, manufacturing, mining, or in aid of schools or branch roads, and thus add to the business and value of the road and remaining property, and follow the traditional policy of the government and the just expectation of Congress.

If we have given the real meaning and intent of the proviso, a construction must be given it that will not defeat its purpose. It must not be defeated by the transparent pretext that a lien upon it is a "sale or disposition of" the land. The Company will not be allowed by the cunning device of a lien to secure a debt payable twenty or one hundred years hence, to exclude settlers from those vast possessions, and so nullify an important condition of the grant under the vain pretext that they had fulfilled it.

Messrs. Shellabarger & Wilson and Sidney Bartlett (a brief also being filed with permission of the court by *John P. Usher and Henry Beard*), for appellees:

The words of the statute are, "sold or disposed of."

First. It is clear that the leading, primary policy of the Act is, by offers of aid to be utilized as the work progressed, to secure the completion of the road. When it was found that

the original grant would be inadequate to effect this policy, government, by the Act of 1874, doubled the grant.

Second. Its secondary, subordinate policy was, that all remnants of the grant which, from any cause (whether because other resources should prove sufficient, or from the impossibility of so disposing of the whole of the grant as to utilize it completely in construction) should, on the ascertainment of the fact, be by future legislation subject, at the will of Congress, to preemption.

Third. Such being the two features of public policy disclosed by the Act, are its provisions to be construed to intend, by a restriction of the powers of disposition, to absolute sales and conveyances, to insure, that all remnants not thus utilized for the purposes of the grant should be and continue in such shape as to be subject to preemption, although such restriction would necessarily impair and might possibly defeat the leading purpose of the grant?

Or was it the design to leave the mode of disposition to the grantee, to be governed by its opportunities and wants, but with the proviso that any remnants not affected by such disposition should, at the will of Congress, be subject to preemption?

Fourth. That it was the purpose of the Act to allow any mode of disposing of the lands which would secure its primary purpose, and not to secure all that could be saved for the purposes of preemption, is clear when it is seen that under its provisions the entire grant might be disposed of by absolute conveyance with warranty, to land companies or associated parties, for the purpose of obtaining means to aid in the construction. Can it be deemed that, with such conceded powers conferred by the Act, it was, nevertheless, the policy of the government to exclude the power of effecting the same ends by mortgage?

Fifth. Was it the policy of the Act to exclude all time contracts for sales in parcels to settlers and others on long credits, with the usual renewed indulgences? It is obvious that the risk to such purchasers, of the ultimate defeat of title at the expiration of three years from the wholly uncertain period of the completion of the road, would entirely exclude that usual mode of disposing of wild lands.

Sixth. It is submitted that if the policy of the Act was, as we contend, to enable the government, by legislation, to subject to preemption the remnants of the grant not used to accomplish its leading purpose; yet, that the mortgage in question does not defeat that policy, or withdraw such remnants from subjection to that preemption.

As will be seen hereafter, this mortgage is a conveyance in trust to sell in parcels, and with the proceeds discharge the mortgage debt. This debt matures in 1887. If the debt shall be satisfied before maturity, by partial sales, the remnants revert to the Company, and may thus be made subjects of preemption. If all shall, however, have been sold and prove insufficient to extinguish the debt, the lands will have been disposed of without remnants for the very purposes contemplated by the Act.

Mr. Justice Strong delivered the opinion of the court:

If it be conceded that the complainant has complied with all the conditions prescribed by the Acts of Congress for the acquisition by a preemptor of an equitable title to a portion of the public lands, the question still remains, whether the land which he claims was open to preemption when his settlement was made. It is confessedly a part of the lands which the United States granted to the Union Pacific Railroad Company by the Act of July 1, 1862, 12 Stat. at L., 489.

The 3d section of the Act is enacted as follows:

"That there be and is hereby granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this Act; but where the same shall contain timber, the timber thereon is hereby granted to said Company. And all such lands so granted by this section which shall not be sold or disposed of by said Company within three years after the entire road shall have been completed, shall be subject to settlement and preemption like other lands, at a price not exceeding \$1.25 per acre to be paid to said Company."

The section contains words of present grant, but the 4th section enacted that on the completion of each successive forty miles of the railroad and telegraph line, patents should be issued, "conveying the right and title to said lands to said Company, on each side of the road, as far as the same is completed, to the amount aforesaid." The 7th section required the road and telegraph to be completed before the first day of July, 1874. The amending Act of July 2, 1864, 13 Stat. at L., 356, enlarged the grant, but made no change in its terms; and the Secretary of the Interior, as directed by the Act, withdrew the lands within fifteen miles of the designated route of the road from preemption, private entry and sale.

Such was the grant. The railroad and telegraph line were entirely completed before July 1, 1874 (if not in 1869), and patents for all the lands granted were directed to be issued to the Company in November of that year. By force of the grant, however, and by the definite fixing of the route of the road, and the filing the map thereof in the Interior Department, as required by law, together with the completion of the road westward and beyond the tract claimed by the complainant, the title to that tract had become vested in the Company before April 16, 1867. On that day the Company, for the purpose of raising money necessary to continue and complete the construction of their road, issued their coupon bonds for the sum in the aggregate of \$10,400,000, bearing seven per cent. interest, and payable in twenty years from their date. On the same day, for the pur-

pose of securing the payment of the bonds, the Company executed a mortgage or deed of trust to trustees of all and several the several sections of land granted to them by the said Acts of Congress, including the tract claimed by the complainant. The instrument, we think, though in form a deed of trust, was substantially a mortgage. It was delivered to the trustees, and duly recorded. The bonds were sold in different markets to *bona fide* purchasers, and they are now outstanding, about \$7,000,000 still remaining unsatisfied. All this was before the entire road was completed, and before the first step was taken by the complainant to obtain his preemption right.

In view of these facts, we are to determine whether the mortgage was a disposition of the lands granted to the Company within the meaning of the last clause of section second of the Act of 1862. If it was, the tract of land claimed by the complainant was not open to settlement and preemption when he entered thereon, nor has it been at any time since. That clause declared that "All the lands granted by the section, which shall not be *sold or disposed of* by said Company within three years after the entire road shall have been completed, shall be subject to settlement and preemption," etc. Was the mortgage a sale or disposition of the lands as understood by Congress? That the Company had power to mortgage the lands admits of no reasonable doubt. It may be conceded that a railroad company has not power either to sell or mortgage its franchise, or perhaps the road which it has been chartered to build, without express legislative authority, and this has in some cases been decided. The reason is that such a sale or mortgage tends to defeat the purposes the Legislature had in view in the grant of the charter. The adventurers who obtain the charter and who accept it undertake to construct and maintain the public work. Their undertaking is the consideration of the grant, and without legislative consent they cannot throw off the obligation they have assumed. But the reason is inapplicable to a sale or mortgage of property which is not a part of the road and in no way connected with its use. Parting with such property or encumbering it in no degree interferes with the performance of the duties of the Company to the public. Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations, or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership—the right to sell or to mortgage. Especially is this so when, as in the present case, the lands have been granted to the Company by the Legislature that granted the charter, without any restriction of their use.

Assuming, therefore, as we must, and as has been tacitly conceded in the argument, that the company had the power to make the mortgage of 1867, we need not stop to inquire whether it was a sale or a partial sale. In some of the States, as well as in England, a mortgage is practically, as well as in form, a sale. It passes the legal title to the mortgagee. The more general modern doctrine in this country is, we admit, that it creates merely a lien, without any transmission of title. But if not a sale, was the mort-

gage made by the Company defendant in this case not a disposition of the lands granted to it by Congress? This question is not to be answered by reference to definitions given in the dictionaries. What did Congress mean in the Act of 1862? That something else than sale, either total or partial, was intended we are required by all the rules of construction to conclude. Congress is not to be presumed to have used words for no purpose. If it was intended that only lands which had been *sold* before three years had expired after the entire completion of the railroad should be exempted from preemption, the words "*or disposed of*" were entirely superfluous. But the admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute. In *Com. v. Alger*, 7 Cush., 53-89, it was said that in putting a construction upon any statute every part must be regarded, and it must be so expounded, if practicable, as to give some effect to every part of it. So, in *People v. Burns*, 5 Mich., 114, it was held that some meaning, if possible, must be given to every word in a statute, and that where a given construction would make a word redundant, it was reason for rejecting it. To the same effect is *Dearborn v. Brookline*, 97 Mass., 466; and in *Gates v. Salmon*, 35 Cal., 576, it was ruled that no words are to be treated as surplusage or as repetition. The phrase, "*or disposed of*" must, therefore, have some distinctive meaning, some meaning beyond the word "*sold*." What that is may be seen very plainly when the whole Act of 1862, 12 Stat. at L., 489, is examined. We are seeking for the intention of Congress, and to discover that we may look at the paramount object which Congress had in view, as well as the means by which it proposed to accomplish that object. Congress addressed itself to the work of securing a railroad from the Missouri River to the western boundary of the Territory of Nevada, and thence to the Pacific Ocean. The work was vast, beyond the reach of private capital or enterprise. It could be accomplished only by the bestowal upon a corporation of very large governmental aid. The proposed road ran over mountains and through what was known to be an uninhabited desert, for more than a thousand miles. The lands through which it must pass were supposed to be almost worthless and quite unsalable until they should be made, by the construction of a railroad, accessible to settlers and to Eastern markets. The construction of a railroad through such a region was most uninviting to private capitalists. To induce them to embark in the enterprise was the overshadowing motive that dictated the Act of 1862. This is apparent in almost every line of the Act. For this reason the grants of land were made, the rights of way and of taking materials were given, and the subsidy bonds were loaned, to be repaid only at the expiration of thirty years, with interest payable only at the expiration of that period. Even this was not enough. No association and no persons were found willing, with all this proffered assistance, to undertake the construction of the road. But so earnest was Congress to induce the corporators to attempt the work, that in 1864, 13 Stat. at L., 356, additional aid was proffered, the grant of

lands was doubled, and new privileges were conferred. We do not now attempt to portray the earnestness—the all-absorbing earnestness—with which Congress sought to secure the construction of the road by private enterprise. It was well exhibited in the *U. S. v. R. R. Co.*, 91 U. S., 72 [XXIII., 224], to which we refer. Suffice it to say, the purpose of Congress, above all others, was to obtain the construction of the railroad by the corporation it created to undertake the work. For that alone the subsidy bonds were given. Only for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise. We do not say that other incidental considerations were not kept in mind, but what we do assert as plainly manifest in the legislation is, that the *paramount* intention of Congress was to give such assistance to the Company as to induce them to build the road. Every other consideration was subordinate to that.

All will concede that in construing the Act of 1862 we are to look at the state of things then existing and, in the light then appearing, seek for the purposes and objects of Congress in using the language they did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers: "For the purpose of aiding in the construction of the railroad and telegraph line," and securing governmental transportation, etc. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that, when granted, the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective, dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the faith of the prospective value of the lands, if the railroad was built, who would not be willing to buy when it was doubtful whether the Company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind, indeed, if it did not foresee this, and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart. This, we think, was what was intended by the phrase "or disposed of," as distinguished from "sold." Some of the lands might be sold as the work was progressing, and others could be used in aid of the construction only by pledging them to persons who might be willing to advance money on the faith of their prospective value. But whether sold or used as a security for money loaned to advance the construction of the road, they were equally employed for the purpose for which they were granted. The words "disposed of" are, undeniably, apt words to indicate a transfer by mortgage. If land be conveyed to A to enable him to raise money for a particular pur-

pose, nobody would doubt that a mortgage would be a disposition of the land for that purpose; and the grant made by the 3d section of the Act of 1862 was obviously made, as we have suggested, with the intent of giving present assistance to the Company in the construction of the road. It was not intended to be available only after the Company had raised all the money necessary for the work. Then the time of need for the purpose mentioned would have gone by. The Act declares it to have been "To aid in the construction of the road," not to re-imburse expenditures made in the construction. Hence it must have been intended that the Company might use or dispose of the land in some other way than by a sale. But in what other way? Not by gift: for that would not have been in aid of the construction, and the grant was intended for that. Nor by leases. They could have brought little money. And no other mode of disposition except by mortgage has been suggested which could furnish aid for building the road. No other is conceivable. The conclusion would seem, therefore, to be almost inevitable, that Congress, when speaking of a disposition of the lands other than a sale, contemplated making them available for the purposes of the grant by mortgage.

And if so, it is hard to believe that only a limited interest in the lands was allowed to be hypothecated. Twelve years were designated as the period within which the road was required to be completed, and lands not sold or disposed of within three years thereafter were to be open to preemption. Moreover, under the provisions of the Act, the title to the lands could be perfected in the Company only as the work of construction advanced; that is, as each section of forty miles was completed. The Company might not become entitled to some until July 1, 1874. If, therefore, a mortgage could only bind the lands unsold until the expiration of three years after that date, it would have been a hypothecation for a term of years, and as to some of the lands, for a term of only three years. Was that the aid proffered by Congress to stimulate and render possible the completion of an enterprise in which it felt so deep an interest? If so, it was a barren gift. Looking at the character of the lands and their remoteness from settlements, it must have been evident enough that money could not have been raised on the credit of such a mortgage. The power of disposition given for the express purpose of enabling the Company to raise money for the construction of the road, by such an interpretation of the Act is made of no value. The interpretation, therefore, defeats the manifest intention of Congress, and for that reason it cannot be accepted.

If it be suggested, as it has been on behalf of the complainant, that the mortgage contains a provision that has some bearing upon the extent of its lien, it may be well here to notice that provision. The instrument purports to convey to the trustees a fee, and not a limited estate, and it requires in all sales that may be made under it the conveyance of a fee. It contains, however, the following clause: "It is hereby declared by the parties to this indenture that all the provisions of the said Acts of Congress [referring to the Acts of 1862 and 1864], so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instru-

ment, and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part are to be observed and strictly and faithfully carried out and fulfilled."

What are thus stipulated to be observed and strictly and faithfully to be carried out and fulfilled are the provisions of the Acts in all that concerns the sale and disposal of the lands. They are matters to be carried out and strictly fulfilled—duties to be performed by the Company; and duties which concern the sale or disposal of the lands. Carrying out and performing a provision implies action, and the provision must, therefore, be one relating to action. But the Acts of Congress contain no provision respecting the sale or disposal of the lands that requires action, that is, something to be carried out and fulfilled, except the implied duty of devoting the proceeds of sales or dispositions strictly and faithfully to aid in the construction of the road.

The provision that at the expiration of three years from the completion of the road the unsold or undisposed of lands should be open to preemption, was in its nature not one to be "strictly and faithfully carried out and fulfilled" by the Company. The right to preemption, of whatever might be left for preemption, was a matter with which the Company had nothing to do—in relation to which they had no duties to perform, and only a right to the price paid by the preemptor. The clause of the mortgage referred to seems, therefore, to have been intended only as a stipulation on the part of the Company that whatever money was raised on the mortgage should be strictly and faithfully applied in furtherance of the purpose for which the grant of the lands was made, namely: to aid in the construction of the railroad. Thus understood, it was a valuable stipulation for the mortgagees. It added to their security; for the value of the lands depended principally upon the application by the Company of all its means to the completion of the work.

On the other hand, if a hypothecation of the lands in fee was within the power to "dispose of" them, as we have endeavored to show, and if the granting part of the mortgage made, standing by itself, did hypothecate a fee, it is hard to believe the parties intended by the stipulations referred to to restrict the exercise of the power to the grant of an estate for years, a limitation alike injurious to the mortgagors and the mortgagees. We think, therefore, nothing in the stipulation is repugnant to the granting part of the mortgage which purported a hypothecation of the entire fee.

There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. We may now think it quite possible the lands could all have been sold before July 1, 1877. The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of the railroad have shed new light upon the value of the grants made to the Company. But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the

See 9 OTTO.

attending circumstances. Guided by this rule of construction, as well as by others universally recognized, we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed by this Company in 1867 was a disposition of the lands granted by the 3d section of the Act of 1862, within the meaning of that Act.

We do not say that any mortgage, however small, or manifestly made to evade a *bona fide* execution of the purposes for which the grants were made, or made to defeat the policy of the government which encourages the sale of public lands to private settlers, and guards against the accumulation of large bodies in single hands, would be a disposal as understood by Congress. It may be conceded it would not be, for it would be in conflict with the avowed object of the grant. The present is no such case. By the pleadings it appears that the mortgage of 1867 was made "For the purpose of raising money necessary to continue and complete the construction of the railroad, in accordance with the Act of Congress." Nor are we now called upon to decide whether the lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished. That question is not now before us.

The principal objection urged against the interpretation we have given to the words "*sold or disposed of*" is, that it is repugnant to the governmental policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be completed should be subject to settlement and preemption, at a price not exceeding \$1.25 per acre. But this policy was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant. No limitation was set to the quantity of land which the Company might *sell* to single associations, or single persons. It was left at liberty to *sell*, if it could, to any land association or private purchaser, the entire body of the lands or any lesser quantity, regardless of the general legislative policy. It was allowed to sell or dispose of the grant at its pleasure, for the purpose of raising money to aid in the road construction, provided thus raising the money was done within the limited period. With that power no preemptor was authorized to interfere. Whatever contingent rights he had were postponed and subordinated to it. If, as we think it manifest, the leading primary policy of the Act was to place the lands in the hands of the Company, to be used for the completion of the road, as this work progressed, any secondary policy the government may also have had in view ought not to be allowed to embarrass or defeat that which was primary. It is evident Congress thought there might be remnants of the grant, not used in aid of the construction of the road, either because other resources of the Company might prove sufficient, or because it might be found impossible to dispose of them in time to furnish such aid, and those remnants it undertook to open to settlement and preemption. This appears to us to have been what was intended, and all that was

intended. The construction gives full effect alike to the paramount and the subordinate purposes of the Act. Each has its own field of operation. The construction contended for by the appellant restricts the power of disposition, denies the authority of the Company to utilize, except partially, for the purposes of the grant, the land granted, and might have impaired and possibly defeated the leading purpose of the grant. It subjects the paramount to the subordinate, and postpones the primary object to the secondary. On the other hand, utilizing the lands, by raising money upon them through a mortgage, or, in other words, disposing of them by mortgage did not defeat the policy of opening the remnants not used, to preemption.

Thus construing the last clause of the 3d section of the Act, in connection with all the other provisions made by Congress, endeavoring to give effect to every part, and regarding the spirit as well as the letter, we are constrained to hold that the mortgage of 1867 was a disposition of the lands mortgaged within the meaning of the statute, and, consequently, that the tract of land claimed by the complainant was not open to preemption when he undertook to preempt it. He has, therefore, no equitable title to it.

The decree of the Circuit Court is affirmed.

Mr. Justice Bradley, dissenting:

I dissent from the judgment of the court in this case. In the 3d section of the original charter, after granting to the Company five alternate sections of public land on each side of its line of railroad, to aid in the construction thereof, it was provided that all lands so granted, which should not be sold or disposed of by the Company within three years after the entire road should have been completed, should be subject to settlement and preemption, like other lands, at a price not exceeding \$1.25 per acre, to be paid to the Company. The appellant, after the three years had expired, settled upon the land in question and claimed preemption of the same; and offered to the Company the price specified in the statute. The latter refused to receive the money or to recognize the plaintiff's right, alleging that it had disposed of the lands in 1867 by executing a mortgage for its entire land grant to secure a loan of \$7,000,000. The question is, whether such mortgage is a sale or disposition of the lands within the meaning of the proviso of the 3d section. I think it is not. In my judgment, Congress had in view such a sale and disposition of the lands as would secure a settlement thereof. The object was to encourage a speedy settlement of the country along the line of the road; and hence it was provided, if the Company did not so dispose of them, they should be open to settlers, at the usual prices, reserving to the Company, however, the right to receive the purchase money for the same. If the Company, by one sweeping deed of trust, or mortgage, could cover the whole domain as with a blanket, and thus prevent a settlement thereon until the lands, by advance of prices, would be out of the reach of actual settlers desirous of occupying and improving them, it seems to me it would entirely defeat the objects of the Act.

It is said, however, that if the Company could not mortgage the lands they could not make

use of them in aid of the construction of the road, the purpose for which they were expressly granted. I do not think this result would by any means follow. The 4th section provides for granting to the Company patents for a proportionate part of the lands, for every forty miles of railroad which should be completed. As fast, therefore, as the successive forty-mile sections should be completed, it was contemplated by the Act that the Company should have control of the lands to that extent. This would constantly subject to their use large tracts, which, if disposed of, according to the intent of Congress, would have effected a rapid settlement of the adjacent country in all portions of the route which were adapted to cultivation.

The criticism that the words "*sold or disposed of*" mean something more than "*sold*," and can only mean a mortgage of the lands, I do not conceive to be just, but rather as sticking in the bark. Reading the whole Act together, I think the only fair construction is that which is above suggested.

The objection that the right of preemption contended for would have prevented the Company from giving a mortgage at all is not tenable. The mortgagees take the mortgage subject to the provisions of the Act. It contains a proviso to this express effect. The lands were mortgaged *cum onere*, and the mortgagees, if so stipulated, would be entitled to the purchase money receivable from settlers. This view of the subject would effectuate justice between all the parties, preserve the true construction of the Act, and carry out the policy of Congress.

In view of these considerations, I think that the decree should be reversed, and that the appellant, the complainant below, should be declared to be equitably entitled to the land in question.

I am authorized to say that *Mr. Justice Clifford* and *Mr. Justice Miller* agree with me in this opinion.

Cited—5 Sawy., 577.

JOHN KLEIN, *Plff. in Err.*,
v.

CITY OF NEW ORLEANS.

(See S. C., 9 Otto, 149-151)

Lands of municipality—not subject to execution.

1. Lands which are held by a municipal corporation for public purposes, and ground rents which are part of the public revenues, cannot be levied on or sold on execution.

2. A public landing on a navigable river in a city used by the public for wharf and levee purposes, is not subject to seizure and sale on execution.

[No. 204.]

Submitted Apr. 3, 1879. Decided Apr. 21, 1879.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

Certain property having been seized to satisfy a judgment in this case in the court below, upon motion of the defendant in error, the seizure was dissolved; whereupon the plaintiff sued out this writ of error.

The case is further stated by the court.

Mr. J. Q. A. Fellows, for plaintiff in error.

Mr. B. F. Jonas, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We must take the facts of this case as they are stated in the bill of exceptions, and cannot look into the evidence. The questions to be settled are: 1. Whether the lands levied on are subject to seizure and sale under execution against the City; and, 2. Whether the ground rents are liable in the same way.

This depends on the facts. If the lands are held by the Corporation for public purposes, and the ground rents are part of the public revenues, it is well settled that they cannot be levied on or sold. *Dillon, Mun. Corp.*, secs. 64, 446. Municipal corporations are the local agencies of the government creating them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.

The bill of exceptions shows that the lands consisted of "Two squares of ground which had formerly constituted the easterly bank of the Mississippi River, but which, by the gradual accretion of said easterly bank, had ceased to constitute the bank of the river, but which were now used by the public for wharf and levee purposes, said squares forming a portion of the land known as the 'Batture property.'" From this it must be inferred that they were held for the use of the public. In a city where business is carried on by water, a public wharf is as much a public necessity as a public street or highway. If the land in this case had still continued to be the bank of the river, and used and improved as a public landing, it certainly could not have been subject to sale on execution against the City; but we think a simple extension of its surface does not change its character. If it continues to be used as it was before, it is still public wharf or levee property. It matters not that charges may have been made by the City for wharfage. That would be nothing more than a proper governmental regulation. A street extending to navigable waters and used for wharf purposes does not cease to be public property because a charge is made for its use in that way. The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality. Upon the facts as stated by the court below, we think the lands levied upon were not subject to seizure and sale.

As to the ground rents, it was decided by the Supreme Court of Louisiana in *R. R. Co. v. Municipality No. 1*, 7 La. Ann., 148, that "In authorizing the Mayor and City Council (of New Orleans) to sell property on perpetual ground rent, the Legislature established a legal destination of the rents, as a portion of the public revenue of the City, to enable the municipal authority to exercise its powers of police and government. These rents, therefore, cannot be sold under execution against the municipality." There is nothing in the bill of exceptions to show that the rents levied upon in this case were in any respect different from those under consideration in that. We must presume, therefore, that they are the same.

Judgment affirmed.

See 9 OTTO.

WELLINGTON GODDEN ET AL., *Appts.*,

v.

MARY A. L. KIMMELL, Admrx. of ABRAHAM F. KIMMELL ET AL., Deceased.

(See S. C., 9 Otto, 201-212.)

Limitations in equity—stale demands.

1. Equity courts, in cases of concurrent jurisdiction, usually consider themselves bound by the Statute of Limitations which govern courts of law in like cases.

2. Courts of equity, where no Statute of Limitations governs the case, often act upon their own inherent doctrine of discouraging antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights, and where none of the parties to the transaction are alive.

[No. 211.]

Argued Apr. 4, 1879. Decided Apr. 21, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The case fully appears in the opinion of the court.

Messrs. Hanna, James M. Johnston, John Scott, Jr., and W. S. Cox, for appellants.

Messrs. Calderon Carlisle and George F. Appleby, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

Statutes of limitation form part of the legislation of every government, and are everywhere regarded as conducive and even necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in controversies of concurrent jurisdiction, they are equally obligatory in both forums as a means of promoting uniformity of decision.

Stale claims are never favored in equity and, where gross laches is shown and unexplained acquiescence in the operation of an adverse right, courts of equity frequently treat the lapse of time, even for a shorter period than the one specified in the Statute of Limitations, as a presumptive bar to the claim. *Stearns v. Page*, 7 How., 819; *Badger v. Badger*, 2 Cliff., 154.

Time, it is said, is no bar to an established trust, which may be true in cases of concealed fraud, provided the injured party is not guilty of undue laches subsequent to its discovery. Circumstances of the kind form an exception to the rule; but the rule still is, that when a party has been guilty of such laches in prosecuting his equitable remedy as would bar him if his title was solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting titles. *Michoud v. Girod*, 4 How., 561.

It appears that the complainants are, or claim to be, creditors of Edwin Walker, deceased, and that they instituted the present suit in behalf of themselves and other creditors of the deceased to recover a moiety of certain real and personal property, together with the rents and profits of the same, which, as they allege, belonged to their creditor in his lifetime and at the time of his decease. They allege that their creditor owned and held the property described

in the bill of complaint in common with one Abram F. Kimmell, of the City of Washington, since deceased, with whom he was carrying on the livery-stable business, under the firm name of Walker & Kimmell, the said property being used for the purposes of said business; that the said Walker being largely indebted to the complainants, their testators and intestates, as well as other parties, dissolved partnership with said Kimmell and conveyed all his real and personal estate, after payment of all partnership debts, to one Voltaire Willett, by deed dated October 8, 1857, in trust to pay off the complainants, their testators and intestates, with the proceeds thereof, the remainder to be paid over to the grantor, his heirs and assigns. Possession of the property at the time was in the junior partner; and the complainants allege that he continued in the possession thereof up to the day of his death, holding the same and applying the proceeds thereof to his own use, without accounting for the rents and profits, either to the grantor, the trustee or to the creditors; and that since his death the property has been in the possession of his widow and children, who have appropriated the same to their own use; and that they utterly deny all right of the complainants to any part or interest in the same.

Sufficient appears from the preceding statement to show what the circumstances were on the first day of February, 1871, when the present bill of complaint was filed against the respondents in the subordinate court. They are Mary A. Kimmell, administratrix of Abram F. Kimmell, deceased, his four children, the heirs of the deceased trustee, and the administrator of the deceased senior partner, who, as alleged, was the debtor of the complainants.

Service was made and the respondents appeared and filed answers, setting up several defenses, the most material of which are contained in the answer of the widow and children of the deceased junior partner. They deny all the material allegations of the bill of complaint, to the effect following:

1. That the complainants or either of them are creditors of the deceased senior partner of the firm, or that the senior partner of the firm, was ever the owner of the real estate described in the bill of complaint, or that he ever owned or possessed any personal property, or that the deceased junior partner ever had in his possession any personal property which belonged either to the deceased senior partner or to the firm.

2. They admit the death of the trustee, but they aver that they are not informed and cannot state whether he ever did anything in discharge of the trusts created by the said deed, and they also admit that the trustee and the deceased junior partner made the alleged conveyance to the brother-in-law of the latter; but they aver that it was made in good faith, and that the moiety of the consideration belonging to the senior partner was appropriated to pay his just debt, as fully explained in the answer.

3. They also allege as a defense that the debtor of the complainants left Washington in the year 1846; that he went to Richmond and entered into business there with a new partner; that he there contracted large debts for which he was liable; that in the latter part of 1857 he

conveyed to his new partner a large amount of real and personal property to pay all his debts, including those set up by the complainants; that all these claims were fully satisfied and extinguished either by payment in money or by the acceptance of other securities; and that the supposed debtor of the complainants, at the time of the dissolution of the partnership here, before he went to Richmond, relinquished all interest in the future earnings of the concern, and that the partnership as between the parties was dissolved, though they admit that no formal notice of the dissolution was published.

4. They also admit that besides the real estate there was, at the time, on hand a large stock of horses, vehicles and other property, all of which was taken by the junior partner; but they aver that the junior partner from time to time made payments and advances to the retired partner exceeding in amount the value of his interest in the assets of the partnership, as estimated by himself; and they aver that no formal settlement of accounts ever took place, but they allege that if one could be made, which, as they state, it would be difficult and expensive to accomplish, it would be found that the estate of the debtor of the complainants is largely indebted to the estate of the junior partner.

Finally, they set up as defense to the suit that the claims are stale demands, and of a character that courts of equity will not countenance; because, as they allege, it would now be inequitable and unjust that the complainants should be permitted to enforce an account from the respondents, after having slept upon their rights, if any they have, for so long a time and until all the parties to the transaction are dead.

By consent the cause was referred to an auditor, with instructions to ascertain and report what amount, if any, was due to the respective complainants, and to ascertain and state the partnership accounts and the character of the partnership property at the date of the trust-deed, and the disposition made of the rents and profits by the respondents. Hearing was had before the auditor, and he made the report set forth in the transcript.

Testimony was taken by the complainants prior to the order of reference, and they took further testimony before the examiner subsequent to the appointment of the auditor. By his report it appears that two schedules were attached to the deed of trust, one of which purported to be a list of drafts, notes and bonds due to a third person, and the other to be a list of debts due by the debtor to the complainants. Among other thing, the deed recited that the said debtor, independently of his indebtedness to the firm of which he was a member, owed a large amount to the persons named in the two schedules, and that he desired, after paying all the firm debts, to secure *pro rata* the debts in the first schedule, and if sufficient was left after that, to pay in full the debts in the second schedule.

It appears that the deed was duly executed, and that the grantor conveyed to the trustee, his heirs, executors, administrators and assigns forever, all of his right, title and interest in and to the real and personal property, debts, effects, credits and assets of every kind whatever and in any manner belonging to the firm, subject to the debts and liabilities of the firm and to the right of the junior partner in winding up and

paying off the same, the true intent and meaning of the instrument being only to convey the interest of the senior partner after all the liabilities of the firm have been discharged. Matters of the kind being fully explained, the auditor proceeds to report that he has not stated the claims of the respective complainants; and he gives the reasons for the omission, which appear to be satisfactory, as the report shows that the complainants did not furnish the means to enable him to comply with that direction, except perhaps in the single instance fully set forth in the report.

Directions were also given by the decretal order that the auditor should state the partnership accounts, which he also failed to do, for the satisfactory reason, as he states, that no testimony or other material was furnished by the parties to enable him to perform the required service. Another direction of the decretal order was to state the amount of the property belonging to the firm at the date of the trust-deed: for a compliance with that order, so far as the real estate is concerned, the auditor refers to the deeds introduced in evidence before the examiner, and in respect to the personal property he states that there was no evidence given to show what, if any, belonged to the partnership at that date.

Lots numbered 16, 17, and the west half of 18, in the square numbered 491, were included in the trust-deed. On the 16th of November, 1858, the junior partner and his wife, the trustee of the senior partner joining with them, conveyed the west half of lot 18 and part of lot 17 to the trustee of the sister-in-law of the first named grantor, in respect to which the auditor reports that the deed conveying the same refers to the prior deed of trust given by the senior partner, and he states that the recitals of the deed specify the purpose for which it was executed, and show that the firm owed the *cestui que trust* the sum of \$2,000 money loaned, and that the property was conveyed to her for the sum of \$5,000, one half of which went to pay that debt and interest, and the other moiety was paid or secured to the junior partner of the firm.

Six years later the grantee in the deed reconveyed the same to her brother-in-law for \$5, as expressed in the consideration of the deed. Complainants charge in the bill of complaint that the junior partner fraudulently procured the conveyance to be made in order to secure the title to himself; but the respondents in their answer deny all fraud and bad faith in the premises, and the auditor reports that no testimony was given touching the conveyance. Instead of that, he states, in response to that charge, that while the circumstances attending the conveyance may be well calculated to cast suspicion upon it, he finds nothing in the case to warrant him in pronouncing it fraudulent and void.

Where the answer of the respondent is responsive to the bill it is evidence in his favor, and is conclusive, unless disproved by more than one witness. Story, Eq. Pl., 7th ed., sec. 875 *a*; *Daniel v. Mitchell*, 1 Story, 188.

Two witnesses, or one witness with confirmatory circumstances, are required to outweigh an answer asserting a fact responsive to the bill, the reason for the rule being that when the complainant calls upon the respondent to answer an allegation he admits the answer, if duly filed, to be evidence, and if it is testimony, it is

See 9 OTTO.

equal to the testimony of any other witness, and as the complainant cannot prevail unless the balance of proof is in his favor, he must have circumstances in addition to his single witness, else he fails to establish the affirmative of the issue. *Clark v. Van Riemsdyk*, 9 Cranch, 153; *Hughes v. Blake*, 6 Wheat., 453.

Chancery courts invariably hold, where the answer is responsive to the bill and positively denies the matters charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor; and unless it is overcome by the testimony of two credible witnesses, or of one witness corroborated by other facts and circumstances which give it greater weight than the answer, it is conclusive, so that the court will neither make a decree, nor send the case to trial, but will simply dismiss the bill. *Badger v. Badger*, 2 Cliff., 154.

Only one witness was examined before the auditor as to the rents and profits received by the respondents, and the report of the auditor states that the annual rental value of the property, excluding that charged to have been fraudulently conveyed, was only \$938, and if that be excluded, then the real estate consists only of lot 16 in square 491, with the improvements.

Ten exceptions to the auditor's report were filed by the complainants, alleging for error that he did not report their respective claims as liens against the property in controversy. Pursuant to the order of the court the parties were heard upon the auditor's report and the exceptions thereto, and the court entered a decree that the bill of complaint be dismissed, from which decree the complainants appealed to the General Term, where the decree of the subordinate court was affirmed.

Proceedings in the court below being ended, the complainants appealed to this court, and filed the following assignment of errors: 1. That the court erred in not entering a decree canceling and setting aside as fraudulent the said conveyance to the sister-in-law of the junior partner. 2. That the court erred in not entering a decree that the real estate transferred to the trustee of their debtor should be sold and distributed to his creditors. 3. That the court erred in not entering a decree that the administratrix of the junior partner should account and pay to the trustee to be duly appointed, so much of the personal assets of the firm included in the trust-deed as were held by her intestate in his lifetime. 4. That the court erred in dismissing the bill of complaint. 5. That the court erred in not entering a decree that the representatives of the deceased junior partner should account for the rents and profits of the real estate conveyed to the trustee up to the date of the decree in this cause.

That the partnership existed is not denied; and the proof is clear that the senior partner left Washington in 1846, and that he went to Richmond and there formed a new partnership, and engaged largely in business for twenty years before his death. As before remarked, the right of the complainants, if any, to prosecute the suit sprang from the trust-deed dated October 8, 1857, and executed by their alleged debtor to his trustee for the purpose of paying his debts, including what he owed to the complainants. Annexed as the deed is to the bill of

complaint, it may properly be referred to as an exhibit, from which it appears that their debtor and the intestate of the first named respondent were "Engaged as partners in the City of Washington, and in the progress of the business acquired real and personal estate, including horses, carriages, buggies, sulkies and other property," and that they held claims against various persons, and that the senior partner was independently indebted to the persons named in the schedules appended to the deed; that he conveyed all his right, title and interest in the real and personal property, debts, effects, credits and assets of the firm, to the grantee of the trust-deed for the described purposes, subject to the debts and liabilities of the firm, and the right of the junior partner in winding up and paying off the same.

There is no averment in the bill that any interest in the partnership property was ever collected by the trustee, or that he could have made any such collection, nor is it averred that any of the complainants are judgment creditors.

Fourteen years elapsed from the date of the deed to the filing of the bill, and throughout that period none of the complainants, during the lifetime of the partners and trustee or any of them, took any step whatever to ascertain or enforce their rights, if any they had, under that trust-deed. Nothing appears to show that the trustee ever took any beneficial title whatever to the real property. Beyond doubt, he took the legal title by the words of the deed; but there is no proof to show that he ever acquired the possession or the right of possession, it appearing by the deed that the right of possession was secured to the junior partner, for the purpose of winding up the partnership.

Concede that the grantor might have joined the trustee in a suit for an account on his own motion or at the suggestion of the trustee or creditors, still the answer to that suggestion, if made, is that he did not do so; and now the grantee, the trustee and the junior partner all being dead, unless there can first be an account of the partnership property, the complainants can obtain no relief, as there is nothing on which a decree in their favor could operate for their benefit. They do not allege that there was ever any settlement of the partnership affairs, nor do they in terms pray in the bill for an account of the partnership assets. By consent an auditor was appointed to ascertain and state the partnership accounts, but he characterizes the proceedings in the cause as involved in obscurity, and the testimony "as incomplete, vague and indefinite," and reports that there is only one instance in which the amount due to any one of the complainants has been proven with any reasonable degree of certainty. Except the prayer that the administratrix and heirs of the junior partner account with and pay over to the complainants the rents and profits of the estate conveyed to the trustee, the bill of complaint contains nothing which can possibly be construed as a prayer for an account of the assets of the partnership.

Four lots, to wit: 16, 17, 18 and 19, the complainants claim were held and used as partnership property; but the answer of the principal respondents denies that claim, and avers that the firm never owned any of the real estate mentioned, except lot 16 and parts of lots 17

and 18; and the auditor reports that, excluding the property conveyed to the other trustee, the assets consist only of lot 16 with the improvements on the same, and that there is not a particle of testimony to prove that the conveyance to the other trustee was fraudulent. Attempt is made to set aside that conveyance without making either the trustee or *cestui que trust* parties to the bill, though it is said by the complainants that they are both alive, of which, however, there is no proof in the record.

Exceptions to the auditor's report were taken by the complainants because he did not report as liens against the property described in the cause the claims of each and every complainant, when his report shows that the evidence given did not enable him, except in one instance, to ascertain the amount of the claims, which was much less than the *minimum* of jurisdiction.

For fourteen years the complainants slept upon their rights, and there is not a single allegation in the bill nor a particle of proof introduced in their behalf to excuse their manifest laches in not seeking an account until all the parties in interest have departed this life.

Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the Statute of Limitations which govern courts of law in like cases, and this rather in obedience to the Statute of Limitations than by analogy.

Wagner v. Baird, 7 How., 234. In many other cases they act upon the analogy of the statutory limitations at law, as where a legal title would in ejectment be barred by twenty years' adverse possession courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles or claims touching real estate. *Moore v. Greene*, 2 Curt., 202; 2 Story, Eq. Jur., 8th ed., 520; *Farnum v. Brooke*, 9 Pick., 243.

Support to those propositions is found everywhere; but there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations governs the case. Such courts in such cases often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. *Badger v. Badger* [*supra*]; *Roberts v. Tunstall*, 4 Hare, 269; *Stearns v. Page* [*supra*].

Authorities to support that proposition are numerous and decisive, nor is it necessary to look beyond the decisions of this court for the purpose. Lapse of time, said *Mr. Justice Thompson*, and the death of the parties to the deed have always been considered in a court of chancery entitled to great weight and almost controlling circumstances in cases where the controversy grows out of stale transactions. *Jenkins v. Pye*, 12 Pet., 241; *Beckford v. Wade*, 17 Ves., 96; *Humbert v. Rector*, 7 Paige, 195.

Few cases can be found more nearly analogous to the case before the court than the one in which the controversy had its origin in this district. It had respect to a deed of trust executed to secure certain creditors named in the schedule annexed to the deed. Enough appears to show that the deed was filed by the trustee himself within twenty years, and that the subordinate court decreed that the amount of debts

enumerated in the schedule should be paid. Appeal from that decree was taken to this court, and Taney, *Ch. J.*, in disposing of the case and reversing the decree, remarked as follows: "We do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or in analogy to the Statute of Limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the Statute of Limitations, courts of equity refuse to interfere after considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost." *McKnight v. Taylor*, 1 How., 168.

Corresponding views were expressed by *Mr. Justice Story* prior to that time, and the *Chief Justice* referred to the same as having settled the doctrine of the court upon the subject. *Piatt v. Vattier*, 9 Pet., 416; *Smith v. Clay*, 2 Amb., 645.

Courts of equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such cases may be sought; but the rule is that the *cestui que trust* should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights. *Badger v. Badger*, 2 Wall., 87 [69 U. S., XVII., 836]; *White v. Parnter*, 1 Knapp, C. C., 227.

When a party appeals to the conscience of the Chancellor in support of a claim, says *Mr. Justice Field*, where there has been laches in prosecuting it or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the Chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the Statute of Limitations contained in the answer. *Marsh v. Whitmore*, 21 Wall., 185 [88 U. S., XXII., 485].

Laches and neglect, says *Mr. Justice Swayne*, are invariably discountenanced in equity and, therefore, there has always been a limitation of suits in such courts from the beginning of their jurisdiction. Limitations of the kind are dictated by experience and are founded on a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and the other means of judicial proof. *Brown v. Buena Vista Co.*, 95 U. S., 161 [XXIV., 403].

Difficulties often arise in controversies of the kind in getting at the truth so as to administer justice with anything like reasonable certainty. That the parties to the original transaction have long since deceased is shown from the proofs in the case, and it is not improbable that many or

all of their clerks and agents may be inaccessible as witnesses, for the same or some other reason, or if alive and their attendance as witnesses may be secured, they may not be able to remember anything about the transactions.

Viewed in the light of these authorities and suggestions, the court is of the opinion that the last defense set up in the respondents' answer is fully maintained, and that there is no error in the record.

Decree affirmed.

Cited—4 Hughes, 323.

JOHN A. CAMPBELL ET AL., *Plffs. in Err.*,
v.

DAVID P. RANKIN.

(See S. C., 9 Otto, 261-265.)

Affidavit, when not part of record—possession, evidence of title—former judgment—mining rules—statute.

*1. An affidavit for a continuance does not become part of the record, so that the court can take judicial notice of it on the trial, unless properly introduced as evidence by one of the parties.

2. Possession of land by a plaintiff in trespass *quare clausum fregit* is *prima facie* evidence of title, and is sufficient for a recovery against a mere trespasser.

3. It is the doctrine of this court that the judgment in a former suit between the same parties is conclusive of every issue decided in that suit, and in the second suit it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so.

4. While the local record of a mining community is the best evidence of the rules and customs governing their mining interests, it is not the best or only evidence of priority or extent of actual possession.

5. The Act of Congress of May 10, 1872, section 5, gives no greater effect to the record of such mining claims than is given to the registration laws of the States, and this has never been to exclude proof of actual possession, and of its extent as *prima facie* evidence of title.

[No. 193.]

Argued Mar. 31, 1879. Decided Apr. 21, 1879.

IN ERROR to the Supreme Court of the Territory of Montana.

The case arose in the Third Judicial District Court, Meagher County, Montana Territory. Judgment was there given for the defendant, which was affirmed upon appeal by the Supreme Court of the Territory; whereupon the plaintiffs sued out this writ of error.

The case is stated by the court.

Messrs. J. Hubley Ashton, Nath'l Wilson and J. H. Shober, for plaintiffs in error.

Messrs. Richard T. Merrick and M. F. Morris, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The declaration avers that plaintiffs below, who are also plaintiffs in error, were the owners of a mining claim in Meagher County, known as Claim No. 2, below discovery, in Green Horn Gulch, and that defendant wrongfully entered upon and took possession of a portion of said claim, and took and carried away large quantities of gold-bearing earth and gold-dust, the

* Head notes by *Mr. Justice MILLER*.

NOTE.—*Mines, ownership of; U. S. statutes as to; right of support of surface. See note to U. S. v. Castillero*, 67 U. S., XVII., 448.

property of plaintiffs, of the value of \$15,000.

The answer amounts to a general denial of all the averments of the complaint.

Bills of exception taken on the trial show that plaintiffs offered in evidence the record of a judgment in the same court, in which the defendant in this suit was plaintiff, and the present plaintiffs and those under whom they claim were defendants, which was an action for trespass, wherein the same question of conflicting interference of the two mining claims was in issue, and the verdict and judgment were for plaintiffs in this suit. The admission of this record was objected to, and the court sustained the objection.

Plaintiffs then offered to prove that they had been in actual possession of Claim No. 2 in Green Horn Gulch for several years, and that defendant had admitted in conversation the existence of such a claim, and had conceded a dividing line between his claim and that of plaintiffs, which would give to the latter the ground in controversy. The court refused this also.

Plaintiffs then offered in evidence a deed from Harding & Wilson for Claim No. 2, Green Horn Gulch, dated December, 1869, and proof of occupancy and use of it ever since. The court rejected this also. And having rejected all the evidence offered by plaintiffs, it directed the jury to find for defendant, and on that verdict rendered a judgment, which was affirmed on appeal by the Supreme Court of the Territory.

The record sufficiently shows that neither party to this suit had any legal title to the *locus in quo* from the United States, and that only such possessory right as the Act of Congress recognizes in the locator and occupant of a mining privilege was in controversy.

Since this right of possession was the matter to be decided by the jury, it is almost incomprehensible that proof of prior occupancy, and especially when accompanied by a deed showing color of right, should be rejected.

In actions of ejectment, or trespass on real estate, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. 2 Greenl. Ev., sec. 311. If this be the law, when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession under the Acts of Congress which respect such possession among miners.

If this plain principle of the common law needed support from adjudged cases, as applicable to the one before us, it may be found in the courts of California in *Atwood v. Frisot*, 17 Cal., 37; *English v. Johnson*, 17 Cal., 107; and *Hess v. Winder*, 30 Cal., 355.

The court below erred, therefore, in rejecting this evidence of plaintiffs' prior possession.

Whatever may have been the opinion of other courts, it has been the doctrine of this court in regard to suits on contract ever since the case of the *Steam Packet Co. v. Sickles*, 24 How., 333 [65 U. S., XVI., 650], and in regard to actions affecting real estate, since *Miles v. Caldwell*, 2 Wall., 35 [69 U. S., XVII., 755], that whenever the same question has been in issue and tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit

between the same parties; and also, that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in *Cromwell v. Sac Co.*, 94 U. S., 351 [XXIV., 195]; *Davis v. Brown*, 94 U. S., 423 [XXIV., 204].

The rejection of the record of the suit of *Rankin v. Campbell* [1 Mont., 300], was in direct conflict with this doctrine. In that case Rankin had brought an action of the same character as the one he is now defending, against the parties who are now plaintiffs, and had a verdict and judgment against him. The record in that case, as in this, shows that one party claimed under Mining Claim No. 2, in Green Horn Gulch, and the other under Mining Claim No. 8, in Confederate Gulch. The issue in both cases was to which claim did the disputed piece of mineral deposit belong; and if that issue was not clear, it was competent, under the decisions we have cited, to show by parol proof that the controversy was over the same locality, and that the issue had, therefore, been decided against Rankin.

And this proof the plaintiffs offered, in connection with the record of the former suit. The exclusion of this evidence was error.

The principal ground on which the court rejected all this evidence, and all other evidence offered by the plaintiffs, is, that at the same Term of the court, and before the trial, one of the plaintiffs, in support of an application for a continuance, made an affidavit, in which he stated that he expected to prove by an absent witness that he had destroyed the original record and laws of Green Horn Gulch, in which the plaintiffs' claim is located; that said records and laws established the size, lines, boundaries and location of Claim No. 2 below discovery, in said gulch, and that said records showed that the predecessors of the plaintiffs in interest possessed and occupied this claim, in accordance with the local rules.

This affidavit, made in support of an application for continuance, which was overruled, the Judge, of his own motion, treated as part of the record, and as before him on the trial, though not offered by either party; and as well as we can understand it, excluded all other evidence of the possession and location and validity of the plaintiffs' claim, because this lost record was the best evidence, and all other was secondary or inferior.

It is difficult to argue this proposition seriously. The affidavit was in no judicial sense before the court on the trial, and could only be used, if at all, when introduced by one of the parties for some legitimate purpose. It it had been so presented by defendant, it plainly showed that this better evidence was destroyed and could not be produced, and was a sufficient foundation for the use of secondary evidence.

But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community, and to some extent the distribution of mining rights, is not the best or the only evidence of priority or extent of actual possession. It may fix limits to individual acquisition, the terms and rules for acquiring and transferring

mining rights, as the laws of the State do in regard to ordinary property; but such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact.

Whatever may be the effect given to the order of mining claims under section 5 of the Act of Congress approved May 10, 1872, 17 Stat. at L., 92, it certainly cannot be greater than that which is given to the registration laws of the States, and they have never been held to exclude parol proof of actual possession and the extent of that possession as *prima facie* evidence of title.

The Supreme Court of the Territory argue that the trial court can regulate the order of admission of evidence in a case, and because the plaintiffs did not introduce first of all proof of their mining records which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title-deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the *locus in quo*, were all unavailing and inadmissible.

We know of no rule of law which justifies this action.

The judgment of the Supreme Court of Montana is reversed and the cause remanded to that court, with directions to order a new trial.

Cited—111 U. S., 393; 6 Sawy., 508; 4 Hughes, 425; 94 Ill., 626.

FRANKLIN C. SMITH, *Appt.*,

v.

THE FORT SCOTT, HUMBOLDT AND
WESTERN RAILROAD COMPANY,
AND THE COUNTY OF BOURBON
ET AL.

(See S. C., 9 Otto, 398-401.)

Equity jurisdiction of Circuit Court—creditor's bill.

1. The Circuit Court of the United States has full equity jurisdiction, and state legislation cannot affect it. The States, however, may create equitable rights, which those courts will enforce where there is jurisdiction of the parties and of the subject-matter.

2. A creditor's bill must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant, for which he seeks satisfaction in chancery.

[No. 223.]

Argued Apr. 9, 1879. Decided Apr. 21, 1879.

A PPEAL from the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Messrs. H. G. Miller & T. G. Frost, for appellant.

Mr. J. E. McKeighan, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This case was decided by the court below upon demurrer to the amended bill of the appellant. The case made by that bill, so far as it is necessary to state it, may be embodied in a few words.

The appellant and Dunn, under the name of See 9 Otto, U. S. Book 25,

Smith & Co., on the 6th of June, 1871, contracted with a corporation then known as the Fort Scott and Allen County Railroad Company, afterwards the Fort Scott, Humboldt and Western Railroad Company, to grade the line of its roadway, extending from Fort Scott, in Kansas, to Humboldt City, in the same State, and to build all the necessary bridges and culverts, and to complete the work by the 1st of July, 1872.

The Railroad Company, in consideration of the work to be done, agreed to pay and deliver to Smith & Co. certain municipal bonds, amounting, according to their face value, to \$275,000, to wit: \$125,000 in the bonds of Bourbon County, \$25,000 in the bonds of Humboldt City, \$75,000 in the bonds of Humboldt Township, \$25,000 in the bonds of Salem Township and \$25,000 in the bonds of Elsmore Township. Dunn assigned his interest in the contract to Smith. The latter did all the work before the time specified. On the 6th of June, 1872, the Railroad Company passed a resolution accepting the work and acknowledging the fulfillment of the contract.

The bonds of Humboldt Township and Humboldt City, amounting together to \$100,000, have been delivered to Smith pursuant to the contract. The bonds of Bourbon County and those of Salem Township and of Elsmore Township have not been delivered.

On the 24th of July, 1869, the commissioners of Bourbon County passed a resolution calling for an election on the 24th of August following, under a statute of Kansas, to decide the question whether the County should subscribe \$150,000 to the capital stock of any railroad company then or thereafter organized to construct a railroad on the line specified in the contract of Smith & Co. The election was accordingly held at the time appointed. The result was in favor of the subscription. On the 13th of October, 1870, the Fort Scott and Allen County Railroad Company was duly organized. On the 13th of October, 1871, the commissioners of Bourbon County passed a resolution authorizing Joseph L. Emert to subscribe for \$150,000 of the stock. The subscription was made accordingly. The County, from time to time, voted upon the stock. The commissioners resolved to prepare and in part to execute the bonds as soon as the necessary lithographing could be finished. They promised Smith promptly to deliver them upon the completion of the work within the contract time. They were present when the contract was entered into, and made the same promise to Smith & Co. But for their repeated assurances to this effect, and the reliance of both Smith & Dunn upon their good faith, the work would not have proceeded, and would not have been done.

The county bonds have not been issued, and new and burdensome terms have been imposed as conditions of that result. The Railroad Company is hopelessly insolvent. There is no remedy left to the appellant but to procure the bonds still in arrear. The prayer of the bill is that the Railroad Company be decreed to assign its claim for the bonds of Humboldt County to the complainant; that the county commissioners be decreed to issue them, and that process issue against the Fort Scott, Humboldt and Western Railroad Company (formerly the Fort

Scott and Allen County Railway Company), and against the County Commissioners of Bourbon County and against that County.

The only question presented for our determination is whether the demurrer was properly sustained.

Our judgment will be confined to a single point.

There is no privity between the County of Bourbon and the complainant. There has been no assignment, legal or equitable, to him by the Railroad Company of its claim against the County. If there had been an assignment, the Circuit Court could not have taken jurisdiction of the case, because the assignor, if there had been no assignment, could not have maintained a suit upon the thing assigned in that forum. *R. S.*, 109; *Sere v. Pilot*, 6 Cranch, 332. The relationship of the complainant to the Company is that he is its creditor while the County is assumed to be, and perhaps is, its debtor. The complainant has no lien upon the fund he is seeking to reach. His case is, therefore, a common creditor's bill; nothing more and nothing less. There is no statutory provision in Kansas touching such bills. The distinction there between legal and equitable remedies has been abolished. 2 Dassel's Stat. of Kan., p. 643, sec. 3230.

The law of procedure there recognizes but two forms of action: one is designated a *civil*, the other a *criminal* action. The former relates to the assertion of civil rights by suit; the latter, to criminal prosecutions. The Circuit Court of the United States of that district has, nevertheless, full equity jurisdiction. The Federal Courts have it to the same extent in all the States, and state legislation cannot affect it. *Boyle v. Zacharie*, 6 Pet., 648. The States, however, may create equitable rights, which those courts will enforce where there is jurisdiction of the parties and of the subject-matter. *Clark v. Smith*, 13 Pet., 195; *Ex parte McNeil*, 13 Wall., 236 [80 U. S., XX., 624]. This bill, as regards this point, was well filed in the court to which it was addressed. But nothing is better settled than that such a bill must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant for which he seeks satisfaction in chancery. *Wiggins v. Armstrong*, 2 Johns. Ch., 144; *Hendricks v. Robinson*, 2 Johns. Ch., 296; *Greenway v. Thomas*, 14 Ill., 271; *Mizell v. Herbert*, 12 Smed. & M. (Miss.), 550; *Gorton v. Massey*, 12 Minn., 147; *Skeele v. Stanwood*, 33 Me., 309; *Sexton v. Wheaton*, 1 Am. L. Cas., 5th ed., 59.

There are exceptions to this rule, but they do not affect its application to the case in hand. It is, therefore, unnecessary to pursue the subject further.

The decree of the Circuit Court is affirmed.

THE DENVER AND RIO GRANDE RAILWAY COMPANY, *Appt.*,

v.

EBENEZER T. ALLING ET AL.

SAME, *Appt.*,

v.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

See (S. C., 9 Otto, 463-482.)

Dismissal of appeal—railroad grant—location—appropriation—use of cañon in common with others.

1. Where appeals are being prosecuted to final judgment by order of the directors or trustees of a corporation, this court will not, upon the suggestion of strangers to the decrees appealed from, go behind the official action of the Board of Directors or Trustees and, in plain disregard of their wishes, dismiss the appeals.

2. By the Act of June 8, 1872, Congress granted to the Denver Company a present beneficial easement in the particular way over which the routes designated in its charter lay, capable, however, of enjoyment only when the way granted was actually located and, in good faith, appropriated for the purposes contemplated by the charter of the Company, and the Act of Congress.

3. Where such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant.

3. The surveys of the Denver Company of 1871-72, followed by an occupancy of the cañon on the 19th of April, 1873, in advance of the Cañon City Company, for the purpose of constructing its road through that defile, was a final appropriation of the way granted by Congress.

5. When it accepted the benefits of the Act of March 3, 1877, it must be held to have assented to the provisions of the Act of March 3, 1875, whereby it was declared that any other railroad company, duly organized under the laws of any State or Territory, might use and occupy the cañon, for the purpose of its road, in common with the road first located.

[Nos. 811, 812.]

Submitted Jan. 6, 1879. Decided Apr. 21, 1879.

APPEALS from the Circuit Court of the United States for the District of Colorado.

The case is fully stated by the court.

Messrs. John P. Usher, James Grant, Hanson A. Risley, Wells, Smith & Macon and Lyman K. Bass, for appellant:

That the Act of Congress granting the right of way to the complainant, approved June 8, 1872, was a grant *in presenti*, will not be questioned, for it is established by a multitude of decisions.

Schulenberg v. Harriman, 21 Wall., 44 (88 U. S., XXII., 551); *Leavenworth, etc., R. R. Co. v. U. S.*, 92 U. S., 733 (XXIII., 634).

That the grant is paramount and must override all subsequent grants and dispositions of the public domain, along the designated route, whether to individuals or corporations, is also true. It was so decided by Mr. Justice Field in Nevada, in construing the grant to the Central Pacific Railway Company, which is like this.

Cent. Pac. R. R. Co. v. Dyer, 1 Sawyer, 641.

The question, then, may be said to be controlled by the doctrine of *stare decisis*, and further argument upon it superfluous.

A right of way acquired by grant or deed, can never be lost by non-user.

Smiles v. Hastings, 24 Barb., 48.

The charter proposed and designated that gorge of the Arkansas for complainant's route. Congress, by the Act of June 8, 1872, expressly approved the charter, and so expressly approved this route, and granted the right of way of two hundred feet in width through that cañon, to the complainant,

That grant covers the adjacent walls of the cañon, to an average width of seventy-five feet on each side, for it is admitted that the cañon is only about forty feet wide.

A grant of land "equal to one half of three sections in width, on each side of the Fox River, and the lakes through which it passes from its mouth to the point where the Portage canal shall enter the same, and on each side of said canal, from one stream to another," was held by the Attorney-General to be a grant defined with reasonable certainty, and with sufficient precision to pass the title to the land without survey.

See *Veeder v. Guppy*, 3 Wis., 502.

How much more the grant of the Arkansas cañon!

Now, whether this was a grant of the fee as we claim it to be, upon the authority of *Coburn v. Coxeter*, 51 N. H., 158; or a grant of an easement only, the result is the same; for if it was a grant of an easement, the right to the possession is vested in the complainant.

Bridge Co. v. Kan. Pac. Railw. Co., 12 Kan., 410; *S. C.*, 92 U. S., 316 (XXIII., 515).

These decisions are conclusive upon this question.

It only remains to consider the Act of Congress of March 3, 1875, Stat. at L., 482.

Is it an Act professing to alter, amend or repeal the Act of June 8, 1872?

In terms clearly it is not.

As long ago as 1839, the Supreme Court, in *Wilcox v. Jackson*, 13 Pet., 498, decided that "Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public land; and no subsequent law or proclamation or sale, would be construed to embrace it or to operate upon it, although no reservation were made of it."

The rule of law for the construction of statutes, is, that the Legislature, in passing an Act, does "not intend to make any alteration other than what is specified, and besides what has been plainly pronounced."

Potter's Dwar. St., 185, to which is appended a note, affirming that this is the rule of interpretation in all our courts, Federal and State.

Messrs. **Charles E. Gast, H. M. Teller, Willard Teller, G. B. Reed and E. R. Hoar**, for appellees:

"Since a right of way *ex vi termini*, imports a right of passing in a particular line," (*Jones v. Percival*, 5 Pick., 485), a grant of right of way must designate some line, to which the grant may apply. It must, as was said by Judge Hallet, of the circuit court, in this case, "come within something less than forty miles of the line of location." The certificate simply indicates the general course and direction of the lines, and was not such a designation or description of its way between the points named, as could either charge the public lands lying between the points named, with an easement, or prohibit the government from granting a right of way over the same tract by subsequent legislation, a subsequent grantee having designated its right of way by survey, plats, etc.

The grant expressed in said Act was merely a license to go upon the public domain and acquire a right of way, and an immunity from See 9 OTTO,

action for trespass; and such a likeness was revocable at any time before the right to be acquired had vested.

N. R. R. Co. v. Gould, 21 Cal., 260; *Wood v. Leadbitter*, 13 Mees. & W., 838; *Fentiman v. Smith*, 4 East, 107; *Ricker v. Kelly*, 1 Me., 117; Washb. Real Prop., 542; Washb. Eas., 2, 7, 24; *Rerick v. Kern*, 14 Serg. & R., 267; *Cook v. Stearns*, 11 Mass., 533; *Mumford v. Whitney*, 15 Wend., 380.

There was no sufficient description of the land to divest the government from granting a right of way to be acquired by another company.

Shipp v. Miller, 2 Wheat., 322; *Johnson v. Panel*, 2 Wheat., 216; *Blake v. Doherty*, 5 Wheat., 359.

The government was not divested of its right to the land by the Act of 1872, so as to place the land beyond control of Congress, since the rights are not expressly secured to it, and are not essential to the existence of the corporation.

2 Redf. Railw., 408; *Charles Rio. Bridge v. Warren Bridge*, 11 Pet., 420; *State v. Noyes*, 47 Me., 189.

The Act of 1875 applies as well to companies formed before its passage as those formed afterward, and this right of way could be acquired, after the passage of that Act, by no company or corporation whose line had not been determined, except upon compliance with that law, and the appellant was as much bound by that Act as the appellee.

Not having complied with the Law of 1875, the appellant had no right superior to that of appellees.

If appellant ever had any right of way up the Arkansas, above Cañon City, it abandoned it, as the evidence shows, in 1875; and both on the ground of lack of right, ever had, and abandoned, if had, appellant had no equities in this case, and the judgment of the circuit court should be affirmed.

Mr. Justice **Harlan** delivered the opinion of the court:

Statement.

These causes involve the conflicting claims of two railroad corporations—the Denver and Rio Grande Railway Company and the Cañon City and San Juan Railway Company—to the occupancy and use of the Grand or Big Cañon of the Arkansas for railroad purposes. For the sake of brevity, the former will be hereafter designated as the Denver Company, and the latter as the Cañon City Company.

The Denver Company became incorporated in the year 1870, in conformity to the laws of the then Territory of Colorado. Its object, expressed in articles of incorporation filed in the proper office of the Territory, was to locate, construct, operate and maintain certain railway and telegraph lines, viz.: the Denver and Rio Grande Railway, the Denver and Southern Railway, the South Park Railway, the Western Colorado Railway, the Moreno Valley Railway, the San Juan Railway, the Galleto Railway, and the Santa Rita Railway. The general route of each line was designated in the articles of incorporation. That of the main line, the Denver and Rio Grande Railway, was as follows:

"Commencing at Denver, Colorado Territory; thence running up the valley of the South Platte River, on the southeast side thereof, to a

point at or near the mouth of Plum Creek; thence up the valley of Plum Creek, to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main east branch of Plum Creek Valley to the lake in township 11, range 67 west, on the east of the ridge dividing the waters of Plum Creek and Monument Creek; thence down the valley of Monument Creek to a point at or near the junction of the valleys of the Monument and Fountain *qui bouille*, or to a point in the Fountain Valley, below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible; thence by the valley of the Fountain or across its west tributaries to such a point on the Arkansas River at or above Pueblo as may be found upon a detailed survey to be the most eligible for intersecting the same; *thence up the valley of the Arkansas to a point at or near Cañon City; thence continuing up the valley of the Arkansas through the Big Cañon of the same to a point at or near the mouth of the Arkansas River; thence by the valleys or the adjoining slopes of the Arkansas River and of Pueblo Creek to the summit of the divide between the waters of the Arkansas and the San Luis Park, known as Poncho Pass; thence by the most eligible route in a general southerly direction down the San Luis Valley to the valley of the Rio Grande del Norte; thence in a general southerly direction, by the particular route which may be determined upon by a detailed survey to be most eligible, down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the Republic of Mexico.*"

The remaining seven roads are, or were intended to be, branches or feeders of the main line.

By an Act of Congress, approved June 8, 1872, 17 Stat. at L., 339, "The right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops and other buildings for railroad purposes, and for yard room and side tracks, not exceeding 20 acres at any one station, and not more than one station in every ten miles, and the right to take, from the public lands adjacent thereto, stone, timber, earth, water and other material required for the construction and repair of its railway and telegraph line," was granted and confirmed unto the Denver Company, its successors and assigns. It is described in the Act as a corporation created under the incorporation laws of the Territory of Colorado. By the Act, all the rights, powers and franchises conferred by those laws on corporations created thereunder for constructing and operating railroad and telegraph lines, were granted, ratified and confirmed to that Company for the extension and operation of its railway and telegraph lines in and through any contiguous territory of the United States, to the northern boundary line of Mexico, subject to the conditions and requirements of the territorial statutes so far as the same were applicable and not inconsistent with the laws of the United States. The Act,

also, gave to the Company the rights, powers and privileges conferred upon the Union Pacific Railroad Company by section 3 of the Act of July 2, 1864. But the rights thus granted and conferred were accompanied by the proviso that the Company should complete its railway to a point on the Rio Grande as far south as Santa Fé, within five years after the passage of the Act of Congress, and complete each year thereafter fifty miles additional south of that point.

By an Act of Congress approved March 3, 1875, the Act of June 8, 1872, was corrected by adding thereto a proviso, which was declared to have been omitted by mistake of the copyist from the last named Act. That proviso declares, among other things, that the "Denver and Rio Grande Railway Company is hereby recognized as a lawful corporation from the date of its incorporation under the laws of Colorado, and all the powers, privileges and franchises by said laws conferred upon said Company are hereby expressly ratified, confirmed and legalized as existing from the said date of incorporation." 18 Stat. at L., 516.

On the same day, March 3, 1875, Congress passed an Act granting a "right of way through the public lands of the United States," to any railroad "company duly organized under the laws of any State or Territory, except the District of Columbia, or by Congress, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to line of the road, material, etc., necessary for the construction of the road, and grounds for station buildings, depots, machine-shops, side tracks, turn-outs, and water stations," etc.

The 2d section provides:

"That any railroad company whose right of way or whose track or road-bed upon such right of way passes through any *cañon, pass or defile* shall not prevent any other railroad company from the use and occupancy of said *cañon, pass or defile*, for the purposes of its road, *in common with the road first located*, or the crossing of other railroads at grade. And the location of such right of way through any *cañon, pass or defile* shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any *cañon, pass or defile*, said Railroad Company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road; *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same *cañon, pass or defile*."

Section 4 declares that any railroad company desiring to secure the benefits of that Act shall, "Within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the

survey thereof by the United States, file with the register of the land-office for the district where such land is located, a profile of its road; and upon the approval thereof by the Secretary of the Interior, the same was required to be noted upon the plats in said office, and thereafter all such lands over which such right of way passes should be disposed of subject to such right of way." All rights thereby granted to be forfeited as to any section located but uncompleted, within five years after such location. 18 Stat. at L., 482.

On the 15th of February, 1877, Alling, Locke and Megrue became incorporated under the laws of Colorado, as "The Cañon City and San Juan Railway Company," with a capital stock of \$100,000, for the purpose of constructing and maintaining a railroad from Cañon City; thence up the valley of the Arkansas River through the Grand Cañon thereof; thence, by the most practicable route, following that river to South Arkansas postoffice, in Lake County, Colorado. The articles of incorporation were filed in the office of the Secretary of State of Colorado, on the 19th February, 1877. On the 23d June, 1877, the Secretary of the Interior, in an official communication, declared his approval of the proofs of organization filed by the Cañon City Company, and of the map showing the line of its road for a distance of 20 miles.

On the 3d March, 1877, Congress passed an Act amending that of June 8, 1872, so as to read that the Denver Company should have ten years, from the passage of the original Act, to complete its railway as far south as Santa Fé, in default of which, the rights and privileges granted to it should be null and void as to the unfinished part of said road.

And on 20th April, 1878, the Cañon City Company filed its complaint for injunction and relief against the Denver Company, in the Third Judicial District Court of Colorado, Fremont County, claiming that it had complied, in all respects, with the Act of Congress of March 3, 1875, and had acquired a prior right to construct its road through the Grand Cañon, one hundred feet on each side of its line as surveyed in 1877. It charged that the defendant was interfering with the construction of its road upon that line.

In accordance with the prayer of the bill, an injunction was granted by the state court, restraining the defendant from interfering with its further operations in the cañon. On 22d April, 1878, that action upon the petition of the defendant Company was removed for trial into the Circuit Court of the United States for the District of Colorado.

On 27th April, 1878, the Denver Company filed its bill in the Circuit Court of the United States for the District of Colorado, against Alling and others, who are designated in the charter of the Cañon City Company as its trustees for the first year, and against the Atchison, Topeka and Santa Fé Railway Company, charging that the Cañon City Company was not a legally constituted corporation; that the individual defendants, wrongfully claiming to be such Corporation, had, by force occupied the Grand Cañon, and were proceeding to locate their road upon a line in that cañon which plaintiff had surveyed in 1871-72, and upon which plaintiff had made preparations to re-

sume active work on the 19th April, 1878; that, although plaintiff was in the occupancy of the narrow portion of the cañon, where only one road could be located, the defendants threatened by force to drive away its engineers and servants then working in said cañon, and thereby dispossess plaintiff of its located line and grade in the narrow part of said cañon; that the defendants were aided and abetted in said course by the Atchison, Topeka and Santa Fé Railway Company, who sought to build a road from Pueblo, by the valley of the Arkansas, and through said cañon, and to that end had confederated with the defendants to compel the plaintiff to abandon the extension of its railway as authorized by its charter and the Act of Congress. The plaintiff, by its bill, claimed an exclusive right of way through the Big Cañon, upon the line of its survey, and one hundred feet upon each side of its road, and to that effect relief was asked by final decree. In that suit a temporary injunction was granted against the Cañon City Company, restraining it from occupying or attempting to occupy the Big Cañon, and from, in any way or manner, constructing or attempting to survey, locate or construct their line of railroad through the cañon, which, for the purposes of that suit, was taken and decreed to begin at what is known as the "Point of Rocks," at the mouth of the cañon, and extending to the twelve-mile bridge. That injunction was subsequently modified and limited in its operation to that part of the cañon known as the Royal Gorge, and the defendant was allowed to enter upon that part of the cañon and grade the same for a railroad, but not to lay ties or rails on any part thereof until the future order of the court.

In the action instituted by the Cañon City Company, the Denver Company filed a cross-bill, setting up substantially the same facts as in its original bill against Alling and others. Upon final hearing a decree was rendered in the suit of the Cañon City Company against the Denver Company, which, among other things, recognized the prior right of the former to proceed in the construction and operation of its road through the Grand Cañon, without interference or obstruction, in any way, by the latter Company, but with liberty to the Denver Company to exhibit its bill in any court of competent jurisdiction to compel the Cañon City Company to so change, locate and construct its road as to permit the convenient and proper location by the Denver Company of its own road, or to compel the Cañon City Company to permit the Denver Company to occupy the track and roadway of the former Company, if at any point in that defile it should be impracticable to conveniently lay down or safely operate two distinct lines of railway. From that decree the Denver Company appealed, and it also appealed from the decree in its own suit, whereby the preliminary injunction granted to it was dissolved, and its bill dismissed.

OPINION.

A preliminary question, presented for our consideration, must be first disposed of.

These causes were determined in the circuit court, by final decree, on the 24th August, 1878. Upon stipulation between the parties they were submitted here on 10th of January last. On the

20th January it was represented to this court, in proper form, that the Pueblo and Arkansas Valley Railroad Company owned a railroad which, with its branches and extensions, is a continuation, in the State of Colorado, of the line of the Atchison, Topeka and Santa Fé Railroad Company in the State of Kansas; that since the pendency in this court of these causes, certain contracts and arrangements had been made and executed between the Denver Company, the Atchison, Topeka and Santa Fé Railroad Company, and the Pueblo and Arkansas Valley Railroad Company, with the consent of the appellees in both suits; that they were made after the filing of the stipulation for the argument of these causes, and completed and in part executed after the filing of the printed arguments herein; that by said contracts and arrangements, the Atchison, Topeka and Santa Fé Railroad Company had taken a lease of all the constructed lines of the Denver Company for 30 years from December 1, 1878, had received, and was then in the possession of and operating said lines; had purchased and received all the railroad supplies and materials of that Company; and had purchased and had transferred to a trustee for its use, a majority of all the shares of its capital stock, with an agreement providing for a further purchase and ownership of the remainder of such stock, and with the further agreement that the Pueblo and Arkansas Valley Railroad Company and the Atchison, Topeka and Santa Fé Railroad Company should have the selection of a majority of the directors of the Denver Company, the other third being selected by the bondholders of the latter Company; that those contracts and agreements were made with the intent and design of ending all controversies, and especially all competitive construction of railroad lines, between the Denver Company on the one part, and the Atchison, Topeka and Santa Fé Railroad Company and the roads operated by it, including the Pueblo and Arkansas Valley Railroad Company, on the other part; that, by reason of the premises, the Atchison, Topeka and Santa Fé Railroad Company, in its own right, and in connection with the Pueblo and Arkansas Valley Railroad Company, had become and was equitably the owner and entitled to the control of all the affairs, suits, interests and property of the Denver Company, and especially to the discontinuance of all litigation hostile to the interests of the Atchison, Topeka and Santa Fé Railroad Company and the Pueblo and Arkansas Valley Railroad Company. Upon these grounds, the Pueblo and Arkansas Valley Railroad Company (the present name of the Cañon City Company), and Alling and others, appellees, moved the court that the stipulation for the submission of these causes, upon printed arguments, be canceled and discharged, such printed arguments withdrawn from the files, and the appeals dismissed. Upon the part of the Atchison, Topeka and Santa Fé Railroad Company a motion was submitted that it be allowed to intervene and take charge of these suits in the name of the Denver Company, and appear by its solicitor, on behalf of the appellant, that it may give consent, of record, to the dismissal of the appeals. The trustee referred to in the alleged contracts gave his consent to the motions, and their hearing was set for the 20th

March, this court, in the meantime, suspending any action upon the appeals. At that date the Denver Company appeared by its attorneys and resisted each motion.

Upon the hearing of the motions it appeared, among other things, that on the 1st day of March, 1879, the Denver Company had issued 85,000 shares of stock, of which the plaintiffs in the motions claimed to own or control a bare majority—42,510 shares. It was also shown that, at a meeting of the directors of the Denver Company held on 7th February, 1879, a quorum being present, resolutions were unanimously adopted, declaring that these motions were hostile to the interests of that Company; that the claims of the Atchison, Topeka and Santa Fé Railroad Company and the Pueblo and Arkansas Valley Railroad Company were unfounded, and their assertion for the fraudulent purpose of depriving the Denver Company, its stockholders and creditors, of valuable rights, interests and property, without compensation. The resolutions instructed the president and the attorneys of the Company not only to oppose these motions but, by all legal means, prevent the dismissal of these appeals or the intervention herein for any purpose of any company or person not a party to the record. They were also required to prosecute the appeals in this court with the utmost diligence. At the argument of the motions, copies of all the contracts, resolutions, and writings relied upon by the respective parties were submitted for our examination. Upon careful consideration of the suggestions of learned counsel, we do not doubt that our duty is to decline any expression of opinion as to the effect or proper construction of the numerous documents which, it is claimed, give the plaintiffs in the motions the right to have the appeals of the Denver Company dismissed. It is apparent that there are serious differences among the stockholders of that Company, not only as to its general policy in the future, but as to the validity and interpretation of the contracts and writings under which the Atchison, Topeka and Santa Fé Railroad Company and the Pueblo and Arkansas Valley Railroad Company claim to be equitably the owners, and entitled to the control of the affairs, property and suits of the Denver Company. We cannot now enter that field of controversy. The present appeals are being prosecuted to final judgment by order of the directors or trustees of the appellant Corporation. To them, by law, is committed the management of the property and concerns of the Corporation. In all litigation involving the action of the Corporation they are its representatives in court. In the discharge of their duties they represent not only the stockholders but the bondholders and creditors of the Company. Their right, while in the exercise of their legitimate functions, to manage the affairs and suits of the Company, ought not to be controlled or interfered with by this court, by reason of anything which appears upon the pending motions. Upon their responsibility as directors and trustees they insist that these causes shall proceed to final judgment, in accordance with the stipulation heretofore made by the parties to the appeals. If, in prosecuting them to final judgment, they violate any trust committed to their hands, or any agreement which is binding upon the Corporation and the minority stock-

holders, remedy may be sought in some court of original jurisdiction, into which, upon proper pleadings, all persons interested may be summoned. No such proceeding has been instituted, so far as we are informed, and we do not feel at liberty, upon the suggestion of strangers to the decrees appealed from, to go behind the official action of the Board of Directors or Trustees, and, in plain disregard of their wishes and their directions to counsel, dismiss the appeals and thereby refuse to consider questions regularly presented for our determination.

The motions are, therefore, denied, and we proceed to an examination of the cases upon their merits, premising that our present duty is limited to a determination of the rights of the parties as they existed when the final decrees were rendered, and as they are manifested in the records before us. If, since these decrees were entered, the Atchison, Topeka and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, have, by valid contract, acquired a controlling interest in the property, rights and affairs of the Denver and Rio Grande Railroad Company, that interest can be asserted by appropriate proceedings, and will not be affected by anything we may determine upon the issues presented by these appeals.

The several Acts of Congress upon which the Denver Company and the Cañon City Company rest their respective claims to priority of right in the Big or Grand Cañon have already been referred to. We have also given the history of the organization of both Companies. But there are other facts of an important character to which attention will be called in the course of this opinion.

The first question, upon the merits, necessary to be considered is, as to the proper construction of the Act of June 8, 1872, 17 Stat. at L., 339. In its determination, however, we should not overlook what had previously transpired in the history of the Company to which was granted, by that Act, a right of way over the public domain. In January and February, 1871, very shortly after its articles of incorporation were filed in the proper office of the Territory, the Denver Company caused a survey to be made of the route through the Grand or Big Cañon of the Arkansas, for the purpose, as declared by the engineer who conducted it, of retaining control of the cañon for that Company. That survey, extending through the entire length of the cañon, is described by him as a 'close preliminary'; that is, a line very near location, without an actual location of the curves. But the location of the curves, he testifies, could have been made in his office away from the cañon. With that exception, he pronounces it to have been a complete survey. The line thus surveyed was marked by stakes every hundred feet, numbered consecutively, and at points where it seemed necessary, a plus or stake between the hundred feet was added. Of the work then done, a map and profile were made and returned to the chief engineer of the Company, and estimates sent to its general manager. Upon the occasion of that survey, or shortly thereafter, *employés* of the Company, under the direction of its engineer, graded several hundred feet at the upper outlet of the cañon, and put up a retaining wall ten to

fifteen feet high, and about one hundred yards in length. In January, 1872, the survey was continued west of the cañon for a distance of four or five miles. While these surveys were being made, the Company was employed in the construction of its road from Denver to Pueblo, and completed it to the latter place, within a few days after, or about the date of the passage of the Act of June 8, 1872. It may also be stated, in this connection, that it completed its road from Pueblo to Labran, within eight miles of Cañon City, about the 1st of October, 1872, and to Cañon City in July, 1875. All this was consistent with a purpose, upon the part of the Denver Company, to avail itself ultimately, and within the time prescribed by law, of the granted right of way through the Grand Cañon.

Of what the Company had done, prior to the passage of the Act of 1872, towards effecting the objects of its incorporation, Congress, it is fairly to be presumed, was not uninformed. It was aware, we must also presume, of the routes designated in the charter of the Company, for the main road and its several branches, all so connected as to constitute, when completed, an extended railway system for that entire region. That Congress was so informed, is quite clearly indicated by the terms employed in the Act of 1872. That Act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches. In this view, and having due regard to all the circumstances and condition of the Company, when the Act was passed, we do not doubt that the intention of Congress was to grant to the Company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located and, in good faith, appropriated for the purposes contemplated by the charter of the Company and the Act of Congress. When such location and appropriation took place, the title which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant. The settled doctrines of this court would seem to justify that conclusion. *R. R. Co. v. Smith*, 9 Wall., 95 [76 U. S., XIX., 599]; *Schulenberg v. Harriman*, 21 Wall., 44 [88 U. S., XXII., 551]; *R. R. Co. v. U. S.*, 92 U. S., 733 [XXIII., 634]; *Mo. Kan. & Texas R. Co. v. Kan. Pac. R. Co.*, 97 U. S., 491 [XXIV., 1095].

It is here suggested by counsel for the Denver Company that the surveys made in the Grand Cañon in 1871 and 1872 constituted, without further action on its part, a sufficient location and appropriation of at least that part of the designated route. To this proposition we cannot yield our assent. The right of way through that pass was not, in itself, and separate from the right of way along the whole route, of any special value, except the Company surveyed its line and located its road east and west of that defile. The grant was an entirety as to the right of way over all the lands lying on the route designated in the charter of the Company, and it would be unreasonable to say that, as to a particular part of that route, a mere preliminary survey was in itself equivalent to a fixed location of the road and an appropriation of the way granted, while as to another part of

the general route a similar survey would not be an appropriation of the way granted, unless followed by actual occupation and use for railroad purposes. Any such construction of the statute must be held altogether inadmissible.

When was there, then, an appropriation by the Denver Company of the Grand Cañon within the principle we have stated? In 1877 and 1878 it became evident that that pass was of vital importance to any company desiring to reach the trade and business of the country beyond it, whether to the west, northwest, or southwest. Discoveries then recently made, of mineral wealth in Western Colorado gave it immense pecuniary value in railroad circles, since as the evidence tends, to establish the occupancy of the Royal Gorge of the Grand Cañon by one line of railroad would practically exclude all other competing companies from using it for like purposes, except upon such terms as the first occupant might dictate. From the date of the survey made in 1872, down to April 19, 1878, the record furnishes no evidence that the Denver Company actually occupied that defile for any purpose whatever. On that day, however, Congress having extended the time to ten years from the date of the original Act within which to complete its road as far south as Santa Fé, that Company did, by its agents, occupy the narrow portion of the cañon known as the Royal Gorge, with the avowed intention of constructing its road upon the line of the surveys made in 1871 and 1872. But during the night of April 19, 1878, the board of directors of the Cañon City Company were convened, and Robinson and Strong, the chief engineer and manager, respectively, of the Atchison, Topeka and Santa Fé Railroad Company, were elected to the same positions in the Cañon City Company. They made preparations to take immediate possession of the cañon in behalf of the last named Company. Evidence of their diligence and activity in that direction is found in the fact that on the morning of the 20th, as early as four o'clock, a small squad of their *employés*, nine or ten in number, under the charge of an assistant engineer, swam the Arkansas River, and in the name of their Company took possession of the cañon. Under the circumstances, it is not material that they failed to find a rival force in the cañon at such an unseasonable hour. That squad was followed the same day by a large and overpowering force of workmen under the control of Robinson. These movements were succeeded by a suit instituted the same day, in the state court, in the name of the Cañon City Company against the Denver Company, in which an injunction was obtained restraining the latter Company from occupying or attempting to occupy the cañon for railroad purposes, or from interfering with the Cañon City Company in the construction of its own road therein.

The last named Company now insists that it has the prior right to occupy and use the cañon for its line of road. In support of this claim, it contends that the other company had lost whatever rights it acquired in the cañon through the imperfect survey of 1871 and 1872, by its long inaction after the construction of the road to Cañon City, and by its failure, within a reasonable period, to follow up those surveys by actual location and occupancy for railroad pur-

poses. The conduct of the Denver Company, it is urged, evinced a settled purpose upon its part to abandon its grant of a right of way through that cañon. The answer to all this seems very obvious.

As to the surveys of 1871 and 1872, although defective in some particulars, and not equivalent to actual location or appropriation of the way, they were quite as complete and extended as the survey which the Cañon City Company caused to be made in 1877. The evidence shows, beyond all question, that when the latter survey was made there was seen in the cañon all or very many of the stakes which the engineer of the Denver Company had put there in 1871 and 1872. Those who made the survey in 1877 undoubtedly knew when, by whom, and for what purpose those stakes had been there placed. Nor had they sufficient reason to suppose that the Denver Company had finally abandoned its purpose of constructing a road through the cañon. We have already referred to the completion of the road from Denver to Pueblo, and from Pueblo to Cañon City, by July, 1875. In 1873, the Denver Company commenced the construction of one of its branches, the Denver and Southern Railway. Commencing at Pueblo, it completed that road to Cucharas, fifty miles from Pueblo, by February, 1876; to Garland, sixty miles from there, by August, 1877; and to the valley of the Rio Grande, by July, 1878. After July, 1875, the Company, it is true, suspended active work upon the line west of Cañon City. But the cause of such suspension, as its officers testify, was the wide-spread depression in business and financial circles, and the belief, shared by all interested in the prosperity of the Company, that the extension of the line southward from Pueblo gave promise of quicker returns and more immediate results in every way. They state that it was the purpose of the Company to resume work upon its line through the cañon as soon as the necessary means therefor could be obtained, and that there was no intention at any time to abandon the route west of Cañon City. Their delay in the construction of the road west of Cañon City and through the Grand Cañon seems to have been in the interest of the stockholders they represented, and not inconsistent with an honest purpose, within the period fixed by law, to meet the objects for which Congress granted to it the right of way. Its surveys of 1871-2, followed by an occupancy of the cañon on the 19th of April, 1878, in advance of the Cañon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress. The Denver Company then, if not before, came into the enjoyment of the present beneficial easement conferred by the Act of June 8, 1872, 17 Stat. at L., 339, and whatever privileges or advantages belonged to that position, it was entitled to have secured against all intruders.

But the important question remains as to the effect of the Act of March 3, 1875, 18 Stat. at L., 516, granting the right of way through the public lands of the United States to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States. The explicit language of that Act leaves no doubt as to its object. It declares "That

any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any *cañon*, pass or defile, shall not prevent any other railroad company from the use and occupancy of said *cañon*, pass or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade." At the date of that Act, the road of the Denver Company, as we have seen, had not been located through the Grand *Cañon* of the Arkansas. But it had a subsisting grant of a right of way through that defile. According, therefore, to the Act of March 3, 1875, the Cañon City Company, if it belonged to the class described in the 1st section of the Act, might, for the purposes of its road, occupy and use that *cañon* in common with the Denver Company.

Upon this branch of the case, the first contention of the latter Company is that the Cañon City Company was not "duly organized" under the laws of Colorado and, therefore, by the terms of the Act of March 3, 1875, 18 Stat. at L., 482, was not entitled to its benefits. But this objection is not well taken. The articles of incorporation filed by that Company seem to be in substantial compliance with the statutes of Colorado. This objection need not be further considered.

But its right to claim the benefit of the Act of March 3, 1877, is impeached upon the further ground that it was not organized in good faith, for the purpose of constructing a road for itself, but was the mere instrument of the Atchison, Topeka and Santa Fé Company, by whom the real work of construction through the *cañon* was carried on. It is not to be doubted, under the evidence, that the Atchison, Topeka and Santa Fé Railroad Company is the active power behind all the movements made in the name of the Cañon City Company for the occupation of the *cañon*, and that the former Company, or some of its stockholders, were deeply interested in the success of the movement to drive the Denver Company from the Grand *Cañon*. But the Cañon City Company is none the less a railroad company, duly organized under the laws of Colorado. It is, therefore, embraced by the very letter of the Act of March 3, 1875. We are unable to perceive upon what sound principle the courts can go behind its regular and lawful organization, and exclude it from the rights granted by that Act, because in the prosecution of its work it derives assistance or accepts aid from another corporation, with which it may choose to share the benefits secured under the Act of Congress.

Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the Act of March 3, 1875. When that Act was passed, its grant of the right of way by the Act of June 8, 1872, had not been acted upon as to the Grand *Cañon* of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that Company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fé, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original See 9 OTTO.

Act. Now, it is solely by reason of such extension that the Denver Company had the right, on the 19th April, 1878, to take possession of the Grand *Cañon*, and prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the Act of March 3, 1877, it must be held to have assented to the provisions of the Act of March 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company duly organized under the laws of any State or Territory might use and occupy the *cañon*, for the purpose of its road, in common with the road first located. At the time of the passage of the Act of March 3, 1875, Congress had become convinced of the importance to the country, and particularly to the Western States, of preserving *cañons*, passes and defiles in the public domain for the equal and common use of all railroad companies organized under competent state or territorial authority, and to which might be granted by national authority the right of way. We may well presume that the extension of time accorded to the Denver Company by the Act of March 3, 1877, would not have been given except subject to the conditions contained in the Act of March 3, 1875. This conclusion renders it unnecessary that we should, in this case, consider whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the Act of March 3, 1877, had that Company actually located and constructed its road in or through the Grand *Cañon* within five years after the passage of the Act of June 8, 1872.

It results from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand *Cañon*. The decree, as entered, can only be sustained upon the assumption that the Cañon City Company had by prior occupancy acquired a right superior to any which the Denver and Rio Grande Railway Company had to use the *cañon* for the purpose of constructing its road. But that assumption, we have seen, is not sustained by the evidence, and is inconsistent with the rights given by the Acts of Congress to the Denver Company. The Denver Company should have been allowed to proceed with the construction of its road unobstructed by the other Company. Where the Grand *Cañon* is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road. Further, if in any portion of the Grand *Cañon* it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the Act of March 3, 1875, to use the same road-bed and track, after completion, in common with the Denver Company.

The decrees in these causes are, therefore, reversed, with directions to set aside the order grant-

ing an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor, and dismissing its bill. By proper orders, entered in each suit, the court below will recognize the prior right of that Company to occupy and use the Grand Cañon for the purpose of constructing its road therein, and will enjoin the Cañon City and San Juan Railway Company, its officers, agents, servants and employes, from interfering or obstructing that Company in such occupancy, use and construction. It may be that, during the pendency of these causes in the court below, or since the rendition of the decrees appealed from, the Cañon City and San Juan Railway Company has under the authority of the circuit court, constructed its road-bed and track in the Grand Cañon, or in some portion thereof. In that event, the cost thus incurred in those portions of the cañon which admit of only one road-bed and track for railroad purposes may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require.

The court will make such further orders as may be necessary to give effect to this opinion.

Mr. Chief Justice Waite, dissenting:

I dissent from the judgment in this case. In my opinion, the grant of the right of way to the Denver and Rio Grande Company, contained in the Act of June 8, 1872, is no more than a license to enter upon and use such of the public lands of the United States as should be unoccupied and not appropriated to other purposes when the permanent location of its road with a view to actual construction should be made. Words which, in a grant of land to aid in building a railroad, imply a present grant need not necessarily have that effect in a grant of right of way only.

I think, also, the Cañon City and San Juan Company made the first permanent location with a view to actual construction through the pass in controversy. Consequently, it secured the preference of routes, subject to a reasonable use of the route it occupied, if necessary, by the Denver Company in common with itself.

Copy, foregoing opinions, authenticated by James H. McKenney, Esq., Clerk, Supreme Court U. S.

Cited—101 U. S., 711.

BENJAMIN D. WHITNEY, *Plff. in Err.*,

v.

ALEXANDER H. COOK ET AL.

(See S. C., 9 Otto, 607.)

Practice as to dismissal.

Under Rule 6, a motion to affirm may be united with a motion to dismiss, if there appears on the record some color of right to a dismissal.

[No. 901.]

Submitted Mar. 17, 1879. Decided Apr. 21, 1879.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

On motion to affirm.

446

This case was an action upon certain promissory notes, brought by the defendants in error in the Circuit Court of Warren County, Mississippi, and removed thence to the Circuit Court of the United States for the Southern District of Mississippi. The questions of fact, as well as of law were, by stipulation, submitted to the court; the finding of facts by the court to be entered as the verdict of the jury. The defendant pleaded: (1) The general issue; (2) Accord and satisfaction. The general issue was abandoned by the defendant, and the court found that the proof failed to sustain the plea of accord and satisfaction, and gave judgment for the plaintiffs. The defendant then sued out this writ of error.

Mr. P. Phillips, for defendants in error.

Messrs. T. J. Durant and C. W. Hornor and Nathl. Wilson, for plaintiff in error.

Mr. Chief Justice Waite announced the decision of the court:

This is a motion to affirm only. Our amended Rule 6 allows a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. *We are, therefore, compelled to deny the motion.* Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit. Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked.

Cited—103 U. S., 785; 106 U. S., 429.

GEORGE Q. CANNON ET AL., *Exrs. of*
BRIGHAM YOUNG, Deceased, *Appts. and*
Plffs. in Err.,

v.

SARAH M. PRATT.

(See S. C., 9 Otto, 619-624.)

Supreme Court of Utah—immaterial error.

1. When the Supreme Court of Utah affirms the judgment of the Territorial district court upon findings of fact made by the district court, the Supreme Court in effect adopts such findings as its own, for the purposes of an appeal to this court.

2. A judgment will not be reversed for error in excluding testimony which is cumulative only, if it is apparent that, if received, it would not affect the result.

[No. 183.]

Argued Mar. 14, 1879. Decided Apr. 21, 1879.

IN ERROR and appeal to the Supreme Court of the Territory of Utah.

The case is fully stated by the court.

Messrs. Sheeks & Rawlins, Williams & Young, J. Rodman Paul, George W. Biddle and Geo. E. Whitney, for plaintiffs in error.

Mr. Robert N. Baskin, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

99 U. S.

This, like the case of *Stringfellow v. Cain* [ante, 421], was a statutory proceeding begun in the Probate Court of Salt Lake County, Utah, to settle disputes between claimants as to their respective rights to a lot in Salt Lake City, purchased by the mayor of the City from the United States, in trust, under the Town Site Act of March 2, 1867, 14 Stat. at L., 541. As doubts were entertained in respect to the proper manner of bringing it here for review, an appeal was taken and a writ of error sued out. For the reasons stated in that case, the appeal is sustained and the writ of error dismissed.

The controversy arises as to the ownership of the south half of lot 5, block 76, plat A, and the first question to be settled is in respect to the jurisdiction of the district court on the appeal from the probate court. The decision of the probate court was given November 28, 1873, and the appeal taken February 3, 1874. The territorial Act of 1869, regulating the execution of town site trusts, Comp. L. Utah (1876), 381, provides that if either party shall feel aggrieved at the decision of the probate court, he may appeal to the district court "as in other cases." In *Golding v. Jennings*, 1 Utah, 135, it was decided that there could be no appeal from the probate court to the district court in a civil action, because the probate court did not have jurisdiction of such actions. Here the probate court had jurisdiction of the suit, and the right of appeal is expressly given. The difficulty is not as to the right of appeal, but as to the time within which the appeal is to be taken. The Civil Practice Act of Utah, Comp. L. (1876), 492 provides that an appeal may be taken "From a final judgment in an action or special proceedings commenced in the court in which the judgment is rendered, within one year from the rendition of the judgment," and "from a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment." This, we think, governs the present case. The provision in the territorial Act relating to the judiciary, approved January 19, 1855, fixing the time for appeals from the probate to the district courts at thirty days, is in conflict with the Civil Practice Act in this particular, and comes within the repealing clause of the latter Act.

Upon the appeal from the probate court to the district court, "All the testimony and written proofs adduced, together with the statements of the parties and the judgment of the court," were certified up as required by the territorial Town Site Law. Upon the trial, the district court decided that the execution of a deed from Orson Pratt to Brigham Young, which was sent up as part of the written proofs below, had not been sufficiently shown. For this reason the deed was excluded as evidence. The district court also excluded as evidence the answers of Brigham Young, Jr., to two interrogatories which had been propounded to him, and also the answers of Hamilton G. Park to interrogatories propounded to him. The same thing was done in respect to the answers of Brigham Young, Sr., to five interrogatories. The excluded testimony of Brigham Young, Jr., related to the payment of rent for the premises in dispute to him as agent for his father, Brigham Young, Sr., after the claim of Mrs. Pratt, the appellee, had been filed with the clerk of the probate court.

The testimony of Park related to payment of rent for the lot by one Ellerbach, as agent of Orson Pratt, to him as the agent of Brigham Young, Sr., from the fall of 1867 to the spring of 1869. The testimony of Brigham Young, Sr., related to his purchase of the lot from Orson Pratt in 1861 or 1862, and he also said that he was the owner of the lot with two tenants on it. Objections to all the testimony which was excluded had been taken and entered upon the minutes in the probate court.

Upon the trial in the district court the facts were found, and as a conclusion of law judgment was given in favor of Mrs. Pratt. Brigham Young, Sr., the adverse claimant, moved for a new trial, because the findings were against the evidence. This motion was overruled, and he thereupon appealed to the territorial Supreme Court both from the judgment and the order refusing a new trial. A statement of the case was made on these appeals, which included all the testimony with the exceptions and the entire record of the proceedings in the district court. The Supreme Court affirmed generally the judgment of the district court.

As we held in *Stringfellow v. Cain*, when the Supreme Court affirms the judgment of the district court upon findings of fact made by the district court, the Supreme Court in effect adopts such findings as its own for the purposes of an appeal to this court. We are, therefore, to consider the case here upon the facts found by the district court. These findings show that Sarah M. Pratt, the present claimant and appellee, and Orson Pratt, settled on the lot in controversy about the year 1854. Mrs. Pratt erected a house and fences upon the lot, and the two lived there until 1861, when they went to the southern part of the Territory. After that for several years Brigham Young, Sr., had possession of the lot by his tenants, but in 1867 or early in 1868 he told Mrs. Pratt she might have back the south half, and accordingly she and her family went into possession on the 12th of March, 1868, and have occupied it as their home ever since. Orson Pratt has not lived with his wife, Sarah M. Pratt, since March 12, 1868, and he has five other families, four of which are residents of Salt Lake City. Mrs. Pratt and her children have supported themselves by their labor and means since March 12, 1868, and have put improvements on the lot by repairing the house, fencing, setting out trees, etc. Mrs. Pratt was the head of her family for ten years previous to November, 1873. No rent has been claimed of or paid by her since she went into possession, nor by Orson Pratt or any agent of his since that time. Orson Pratt has not supported his wife, Sarah M. Pratt, or her family since March, 1868, and has contributed but a very small amount for that purpose. The town-site was purchased by the mayor, under the provisions of the Congressional Town Site Act, November 21, 1871. Young filed his declaratory statement in the office of the probate clerk, January 13, 1872, and Mrs. Pratt filed hers April 9, 1872.

Upon this state of facts, it is clear that the judgment appealed from was right, unless there was error in the rulings as to the admissibility of evidence. The original occupancy of Orson Pratt and his wife was abandoned in 1861. Brigham Young then entered into possession.

It matters not, for the purposes of this inquiry, whether he purchased the possessory rights of Pratt and his wife or not. They voluntarily left the lot and he took it. Then in 1868 he gave back the south half to Mrs. Pratt, and she has occupied adversely ever since. Under the rule settled in *Stringfellow v. Cain*, this gave her the right to a conveyance under the trust created by the town site purchase.

It remains only to consider the several objections to the rulings upon the admissibility of the evidence. From what has been said it is clear that the exclusion of the deed was immaterial. As Pratt and his wife abandoned the possession in 1861, it is of no consequence whether Young occupied after that as their vendee or as an adverse possessor. He was in possession claiming title, and they were out with no apparent purpose of returning. That is all that is necessary to make his right good as against their previous entry.

As to the testimony of Brigham Young, Jr., it related to a payment of rent by Orson Pratt after this proceeding was begun in the probate court. Of course that, under the circumstances, could have no effect adverse to Mrs. Pratt's title.

As to the testimony of Brigham Young, Sr., it was clearly immaterial or incompetent. That in respect to his purchase from Pratt was immaterial, because his rights prior to his putting Mrs. Pratt in possession the second time are not disputed. His statement that he owned the property was incompetent. That depended upon the facts, and his statement was no more than an expression of his opinion.

The testimony of Park, so far as it related to the ownership of the property, was also incompetent, as it was in reality only an expression of his opinion. As to the collection of rent from Orson Pratt, he says his collections were made from T. W. Ellerbach, as the agent of Pratt, and in the testimony of Ellerbach the same payments are shown, with the manner of payment and his authority as agent. No possible harm could have resulted from the exclusion of this evidence. A judgment will not be reversed for error in excluding testimony which is cumulative only, if it is apparent that if received it would not affect the result. In this case the rejected evidence was all before the Supreme Court, and was there considered. In the opinion it is, in effect, said that if the evidence had been admitted in the court below, and if that court had given it all the force which could be reasonably claimed, the result must have been the same. Under these circumstances we must consider the case as coming here from the Supreme Court, with the facts found upon all the evidence.

Upon the whole case we are satisfied with the judgment below and it is, consequently, affirmed.

Cited—108 U. S., 13.

THE GERMANIA NATIONAL BANK OF
NEW ORLEANS ET AL., *Appts.*,

v.

FRANK F. CASE, RECEIVER OF THE CRESCENT CITY NATIONAL BANK of New Orleans

(See S. C., 9 Otto, 628-635.)

Pledge of stock, liable as stockholder—fraudulent transfer—power of bank—suits against stockholders.

1. One to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of the creditors.

2. A transfer of his stock by a shareholder, for the mere purpose of avoiding his liability to the company or its creditors, is fraudulent and void, and he remains still liable.

3. A bank is authorized to make a loan with the stock of another bank pledged as collateral security. If otherwise, it could not set up its own violation of law, to escape the responsibility resulting from its illegal action.

4. The determination of the Comptroller of the Currency and his order to the receiver, are conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders.

[No. 217.]

Argued Apr. 7, 1879. Decided Apr. 21, 1879.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The appellee was the complainant in the court below, where the case arose.

The case is fully stated by the court.

Messrs. T. J. Durant, C. W. Hornor, Henry J. Levy and McDonald, for appellants:

The only question in all these cases is: who were the shareholders entitled to the profits and liable for losses, on the date of the order of liquidation; who was the holder and owner?

Sanger v. Upton, 91 U. S., 56-63 (XXIII., 220, 223); *Casey v. Galli*, 94 U. S., 673 (XXIV., 168).

The owners of the 100 shares are Phelps, McCulloch & Co., the Germania Bank is the pledgee and Waldo the agent or trustee for both owners and pledgee. These facts exclude the notion of any liability on the part of the appellant. All that was done was regular and legal.

Talty v. Freedman's Bank, 93 U. S., 321 (XXIII., 886).

The shareholders of the Germania Bank are at all times subject to the personal liability clause of the National Bank Act. But this, the act of its cashier, doubles this personal liability clause, and makes the stockholders of the appellant liable also on the shares of the Crescent City Bank. This is making bad worse.

Pleckner v. Bank, 8 Wheat., 338; *Minor v. Bank*, 1 Pet., 46; *U. S. v. Bank of Columbus*, 21 How., 356 (62 U. S., XVI., 130).

A blunder of this sort cannot be made the basis of either legal or equitable liability.

The Reciprocity Bank, 22 N. Y., 17.

"Individual liability is repugnant to the law of corporations."

Carrol v. Green, 92 U. S., 512 (XXIII., 739).

Hence, no national bank can lend on the shares of another national bank.

The whole system of National Banks could be evaded if this were not the law, by establishing two banks instead of one, and paid up capital, the basis of the entire system, would thus be a mere sham, as in the present case.

Bank v. Bank, 92 U. S., 128 (XXIII., 681); *Fowler v. Scully*, 72 Pa., 456; *R. S. U. S.*, 5136, 5200-5203.

Messrs. Charles Case and J. D. Rouse, for appellee:

Under the circumstances of this case the personal liability to respond as shareholder attaches.

Bowden v. Far. & Merch. Bank, 1 Hughes, 307; *Magruder v. Colston*, 44 Md., 349; *Hale v. Walker*, 31 Ia., 344; *Grew v. Breed*, 10 Met., 569; *Crease v. Babcock*, 10 Met., 525; *Holyoke Bank v. Burnham*, 11 Cush., 183; *Adderly v. Storm*, 6 Hill, 624; *Matter of Empire City Bank*, 18 N. Y., 199.

Mr. Justice Strong delivered the opinion of the court:

This is a bill, the object of which is to compel contribution by the stockholders of the Crescent City National Bank of New Orleans. It asks for a decree that each of the defendants pay to the Receiver of the Bank seventy per cent. of the par value of the stock owned by them severally at the time when their respective liabilities were fixed by the Bank's insolvency, without regard to any pretended transfers of such stock, which they may have attempted to make after the insolvency occurred.

The Bank was organized under the National Banking Law in 1871. On the 13th of February, 1873, its London correspondents failed, and the Bank lost heavily by the failure; nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 14th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest.

In reference to the alleged ownership by the Germania Bank (one of the appellants) of shares in the Crescent City Bank, the facts appear to be as follows: on the 14th day of December, 1872, it loaned to Phelps, McCulloch & Co., \$14,000 on a note of the firm dated December 7, 1872, payable in ninety days, and to secure the payment of the loan the borrowers pledged to the Bank one hundred shares of the stock of the Crescent City Bank, with power, on non-payment of the note, to dispose of the stock for cash, at public or private sale, without recourse to legal proceedings, and to this end to make transfers on the books of the corporation whose stock it was. At the same time a power of attorney was given to Mr. Roehl, empowering him to transfer the stock to the Germania Bank, of which he was cashier. The note fell due on the 10th of March, 1873, and was not paid; and on that day a transfer of the one hundred shares to the Germania Bank was made on the transfer books of the Crescent City Bank. The Germania then caused seventy-six of the shares to be transferred to William A. Waldo, one of its clerks, and on the next day transferred to him the remainder. It has ever since stood in his name. Waldo acquired by the transfer no beneficial interest in the stock, and there was an understanding between him and the officers of the Bank that he should retransfer it at their request. The cashier has testified, in answer to the question: "Was not the transfer made (to Waldo) with the view to avoid the liability under the National Bank Act in case of suspension of the Crescent City Bank?" that it was not exactly in that way. "We simply transferred," says he, "because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name. That was the object." When further asked whether he

See 9 OTTO.

was well aware of the fact that the stockholders of national banks were liable to contribute to the payment of their debts in case of insolvency, he replied in the affirmative. When asked whether he did not have that in contemplation at the time of this transfer, he answered, "That may be one of the reasons why we did not want to own any stock." And when further asked: "Was not that one of the principal motives of this transfer to Waldo?" his reply was, "Yes."

From this testimony, as well as from other in the record, it is evident that Waldo held the stock as a cover for the Germania Bank; that, notwithstanding the transfer to him, it remained subject to the Bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The Bank continued after it was made a pledgee with the legal title in itself or in its representative, and Phelps, McCulloch & Co. were no longer the owners.

Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, 96 U. S., 328 [XXIV., 818]; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y., 148; *Bk. v. Burnham*, 11 Cush., 183; *Magruder v. Colston*, 44 Md., 329; *Crease v. Babcock*, 10 Met., 525; *Wheelock v. Kost*, 77 Ill., 296; *Matter of Emp. C. Bk.*, 18 N. Y., 199; *Hale v. Walker*, 31 Iowa, 344. For this several reasons are given. One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. This subject is well treated in Mr. Thompson's recently published work on "The Liability of Stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. *Vide*, ch. 13.

When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the Bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCulloch & Co. ceased. We have, then, only to inquire whether the Bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corpora-

tion and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out;" that is, completely, so as to divest the transferor of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or as sometimes coarsely denominated, a sham; if, in fact, the transferee is a mere tool or nominee of the transferor, so that, as between themselves, there has been no real transfer; "but in the event of the company becoming prosperous the transferor would become interested in the profits, the transfer will be held for nought, and the transferor will be put upon the list of contributors." *Williams' Case*, L. R. 9 Eq., 225, note, where the transfer was, as in the present case, made to a clerk of the transferor without consideration; *Paynes' Case*, L. R., 9 Eq., 223; *Ex parte Kintrea*, L. R., 5 Ch., 95. See, also, Lindley, Part., 2d ed., p. 1352; *Chinnocks' Case*, 1 Johns. V. Ch., 714; *Hyams' Case*, 1 De G., F. & J., 75; *Budds' Case*, 3 De G., F & J., 297. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferor and the transferee it was out and out." *Nathan v. Whitlock*, 9 Paige, 152; *McClaren v. Francisco*, 43 Mo., 452; *Marcy v. Clark*, 17 Mass., 330; *Johnson v. Laylin*, by Dillon, J., 6 Cent. L. J., 131.

The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferor. Waldo was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the Bank. No case holds that such a transfer relieves the transferor from his liability as a stockholder. We are, therefore, compelled to rule that the decree of the circuit court against the Germania Bank was correct. Its case, no doubt, is a hard one; but it is not in our power to give relief, without a sacrifice of the well established rules of law and equity both in this country and in England.

There is nothing in the argument on behalf of the appellants that the Bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action.

In support of the other appeals which were

taken from the decree of the court below, no argument has been submitted, and they require only brief remarks.

Alcus, Scherck and Autey in their first answer to the bill, after setting forth several matters perfectly immaterial, admit that they were at one time the owners of seventy shares of the stock of the Crescent City National Bank, but aver that on the [blank] day of [blank], 1873, they sold them all to one Julius Fox, a white person, about twenty-one years old, and a clerk by occupation; that the price paid to them by Fox for the stock was \$5, and that they never offered to Fox any money or other valuable consideration or promise to induce him to accept the stock. The utter worthlessness of this as a defense sufficiently appears in what we have said respecting the appeal of the Germania Bank. Subsequently, what is called a supplemental and amended answer was filed, quite inconsistent with the one first made. It admits the ownership of the stock by the respondents at the time of the Bank's insolvency and suspension, and merely denies any unlawful confederacy. That no defense was shown by this supplemental answer we need spend no time to prove.

The only material averment in the answer of the Crescent Mutual Insurance Company was, in substance, that they had owned shares of the stock of the Crescent City Bank before it became a national bank, and that though the state bank had become a national bank with their consent, and they had received dividends, they had not received new certificates. The stock ledgers of the Bank, however, show that one hundred and thirty shares stood in their name when the Bank failed and, therefore, taking their averment to be true, it is impossible to find any reason why they are not subject to the liabilities of stockholders.

The appeal of Benjamin J. West is equally without merit. It was admitted by his answer and proved by his own testimony that on the 13th of March, 1873, the day before the Bank ceased paying its depositors, he was the owner of fifty-eight shares of its stock. On that day he transferred it to one Vincent, whom he describes as a white man, about thirty-five years old, a salesman by trade, for the price of about \$10 a share. Nothing more than the testimony of Mr. West himself is needed to show that this is what is called in the English books a sham sale, made to conceal his liability. Vincent was West's clerk at the time and, so far as it appears, without any pecuniary responsibility. No certificate of the stock was issued to him. He paid nothing at the time of the alleged transfer, and never has paid anything since. He gave no note or other written acknowledgment of indebtedness, and West continued to pay his salary as a clerk six or eight months after the transfer, without deducting anything for the price of the stock. Indeed, the price of the stock was never charged against Vincent in West's books. Add to this the fact plainly visible in his testimony, that the alleged transfer was made when Mr. West had become alarmed about the condition of the Bank, and nothing more is needed to show that it was inoperative, as against the creditors of the Bank, according to the doctrine of the cases hereinbefore cited.

There are some other averments in the answer

of the appellants, of which it is hardly necessary to say anything. Former decisions of this court have ruled that the determination of the Comptroller of the Currency and his order to the receiver are conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders.

The several appeals in this case are not sustained and the decrees of the Circuit Court are affirmed.

Cited—107 U. S., 261; 111 U. S., 483; 28 Hun, 128; 17 Blatchf., 262; 19 Blatchf., 362; Hughes, 533; 7 Sawy., 31.

TOWN OF LYONS, *Plff. in Err.*,

v.

EDGAR MUNSON.

(See S. C., 9 Otto, 684-686.)

County Judge's decision as to county bonds—certiorari—conclusive judgment—recitals—bona fide holder.

1. Where the County Judge has jurisdiction to decide upon the application made by the tax payers for the issuing of county bonds, his judgment until reversed is final.

2. If there were errors, the proceedings should be brought before a higher court for review by a writ of *certiorari*; and if need be, the issuing and circulation of the bonds should have been enjoined, subject to the final result of the litigation.

3. The judgment rendered can no more be collaterally attacked in such case than could any other judgment of a court of competent jurisdiction, rendered with the parties properly before it.

4. Where the recital in the bonds set forth the judgment of the County Judge, that it was duly rendered, that the bonds were issued pursuant to the statutes referred to, for the object specified in the petition of the tax payers, and by persons properly appointed and charged by law with the duty of subscribing for the stock and issuing the bonds, and the sufficiency of the statutory authority under which the proceedings were had is not denied, the recital is an estoppel. A *bona fide* holder of the bonds was not bound to look further, and the obligor cannot go behind it.

[No. 214.]

Argued Apr. 4, 1879. Decided Apr. 21, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case, which arose in the court below, sufficiently appears in the opinion.

Messrs. H. L. Comstock and C. H. Roys, for plaintiff in error.

Mr. W. F. Cogswell, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

All the questions presented for our consideration by this record relate to the validity of bonds issued by the Town of Lyons in payment for railroad stock subscribed by its proper authorities.

Propositions covering the entire ground of the controversy between the parties have been so frequently decided by this court that any extended examination of the case is unnecessary. The *Town of Orleans v. Platt* [*ante*, 404], our last adjudication of this class is conclusive in favor of affirming the judgment of the circuit court.

See 9 OTTO.

The County Judge unquestionably had jurisdiction to decide upon the application made by the tax payers. His judgment until reversed was final. If there were errors, the proceedings should have been brought before a higher court for review by a writ of *certiorari*, and if need be, the issuing and circulation of the bonds should have been enjoined, subject to the final result of the litigation. The judgment rendered can no more be collaterally attacked in this case than could any other judgment of a court of competent jurisdiction rendered with the parties, as in this case, properly before it. The recital in the bonds sets forth the judgment of the County Judge, that it was duly rendered, that the bonds were issued pursuant to the statutes referred to, for the object specified in the petition of the tax payers, and by persons properly appointed and charged by law with the duty of subscribing for the stock and issuing the bonds to pay for it.

The sufficiency of the statutory authority under which the proceedings were had is not denied.

Under such circumstances the recital is an estoppel. A *bona fide* holder of the bonds was not bound to look further, and the obligor cannot go behind it. *Orleans v. Platt* [*supra*]; *Lynde v. The County*, 16 Wall., 6 [83 U. S., XXI., 272]; *Mercer Co. v. Hackett*, 1 Wall., 83 [68 U. S., XVII., 548]; *Knox Co. Comrs. v. Aspinwall*, 21 How., 539 [62 U. S., XVI., 208]; *Town of Rock Creek v. Strong*, 96 U. S., 271 [XXIV., 815].

The learned Judge below in his charge to the jury well remarked: "To imply the intent that such obligations after they are negotiated shall be vulnerable to the objections here urged, would be to impute bad faith to the authors of such legislation towards those who are to be induced to invest in such bonds."

The judgment of the Circuit Court is affirmed.

Cited—89 N. Y., 588.

GEORGE BURT, *Plff. in Err.*,

v.

MARIA M. PANJAUD.

(See S. C., 9 Otto, 180-183.)

Objection to juror—examination of—possession, evidence of title.

*1. Though an objection to a juror as legally disqualified be improperly overruled, the error is cured if it appear affirmatively that he was not on the jury when the case was tried and it does not appear that the party's right of peremptory challenge was abridged in getting him off.

*2. A man offered as a juror is, no more than a witness, compelled to disclose under oath his guilt of a crime which would disqualify him. The party relying on such disqualification must prove it by other evidence if the juror declines to answer.

*3. In an action of ejectment or trespass to land, actual possession, or receipt of rent by plaintiffs prior to eviction, is *prima facie* evidence of title, on which recovery can be had against a naked trespasser.

[No. 235.]

Submitted Apr. 18, 1879. Decided Apr. 23, 1879.

*Head notes by *Mr. Justice MILLER*.

NOTE.—Causes of challenge to jurors and their qualifications. See note to *Clinton v. Englebrecht*, 80 U. S., XX., 659.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida. The case is fully stated by the court.

Mr. H. Bisbee, Jr., for plaintiff in error:

1. Mr. Holmes did not for himself claim that he might criminate himself by answering such questions. Under the operation of the amnesty Proclamation he was pardoned of the offense of treason, if he had ever been guilty of it.

Refusing to answer questions touching his qualifications was tantamount to an admission that he was disqualified.

The fact that this juror was afterwards challenged peremptorily and was thus kept off the jury does not cure the error.

U. S. v. Hammond, 2 Woods (C. C.), 197.

2. Assuming that prior possession alone would entitle plaintiff to recover in any case, such possession must in any event be open, notorious, adverse and continuous for the statutory period, and must be based upon color and claim of title.

Tyler, Ej., 859, 860, 861.

Here was no pretense of continuous possession, nor of any possession, except the shadowy one of a person claiming to be agent, without evidence of such agency, exercising the right to lease the premises in 1842. Nor does the plaintiff pretend that her alleged prior possession commenced under color of title.

But we deny that a plaintiff in ejectment can recover on the strength of a prior possession, though open, notorious, continuous and adverse for the statutory period, against a defendant lawfully in possession.

In the New York cases, where a recovery was had on prior possession, it was shown affirmatively that defendant was an intruder or wrong-doer.

Tyler, Ej., 72.

In *Whitney v. Wright*, 15 Wend., 171; *Jackson v. Denn*, 5 Cow., 200; *Jackson v. Walker*, 7 Cow., 637; *Jackson v. Harder*, 4 Johns., 210; *Devacht v. Newsam*, 3 Ohio, 57; *Ludlow v. Barr*, 3 Ohio, 388; *Abram v. Will*, 6 Ohio, 164; *Newnam v. Cincinnati*, 18 Ohio, 323; and *Christy v. Scott*, 14 How., S. C., 292; this doctrine of the sufficiency of a prior possession, to enable a plaintiff in ejectment, is discussed; and in every case the court held that recovery could not be had except as against an intruder or wrong-doer.

Present possession of defendant is presumed to be in harmony with the legal title; and plaintiff must rebut this presumption before a mere prior possession can avail him.

Ricard v. Williams, 7 Wheat., 107, 108.

Again; such prior possession must be such an adverse possession as the statute requires.

"Where it shall appear that there has been an actual, continual occupation of premises under a color of title, exclusive of any other right, but not founded upon a written instrument, as a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely."

Sec. 7, Laws of Florida, 1872.

Mr. James M. Baker, for defendant in error:

I. Section 820 of the Rev. Stat., invoked as authority for challenging the juror, Holmes, in the court below, was passed in violation of the 8d clause of the 9th section of Article 1, of the Constitution of the United States, which pro-

vides that "No bill of attainder or *ex post facto* law shall be passed."

Cummings v. Missouri, 4 Wall., 323 (71 U. S., XVIII., 363).

This law was enacted nearly six years after the President of the United States issued his Proclamation of general amnesty and pardon. And this court, in commenting on the effect of the Executive's pardon so issued, as applied in the case of *Ex parte Garland*, 4 Wall., 380 (71 U. S., XVIII., 370), says: "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."

In this case Mr. Holmes was asked if he had committed a certain crime mentioned in the Act. He refused to answer. He was not bound to accuse himself, nor to answer any question that would have a tendency to expose him to a penal disability, or liability to any kind of criminal charge.

1 Greenl., secs. 451, 453; 5th Amendment to the Constitution.

II. *Chief Justice Kent*, in his opinion in the case of *Smith v. Lorrillard*, 10 Johns., 356, says: "It is not necessary that a plaintiff in ejectment should in every case show a possession of twenty years or a paper title. A possession of a less period will form a presumption of title sufficient to put the tenant on his defense. A prior possession short of twenty years, under a claim or assertion of right, will prevail over a subsequent possession of twenty years, when no evidence of title appears on either side."

1 Best, Ev., 68; Tyler, Ej., 71; *Allen v. Rivington*, 2 Saund., 111; *Hartley v. Ferrel*, 9 Fla., 375; *Jackson v. Hubble*, 1 Cow., 613.

The court below properly left it open to the jury to judge of the sufficiency of the evidence to establish the possession by the plaintiff.

Mr. Justice Miller delivered the opinion of the court:

This is an action of ejectment brought by the defendant in error against plaintiff in error, in the State Court of Florida, and afterwards removed into the Circuit Court of the United States for that District. Plaintiff there sued and recovered judgment for two lots or parcels of land in the City of St. Augustine. Defendant set up no title whatever to the land, and did not even rely on the Statute of Limitations, as far as the record shows, though in possession for several years previous to the commencement of the suit.

It appears that, before the jury was sworn to try the case, one of the panel, Henry Holmes, was sworn on his *voir dire*, and was asked whether or not he had aided or abetted the late rebellion against the United States, when he was told by the presiding Judge that it was optional with him whether he would answer the question or not; and said Holmes declined to answer. The defendant excepted to this ruling, and then moved that Holmes be excluded for cause, which the court overruled, and defendant excepted again.

It appears affirmatively that Holmes was not sworn as one of the jury, and no reason is given for it.

1. We are of opinion that, since Holmes did not sit on the jury, no harm was done to defendant. The object of both motions was to exclude him, as one incompetent to sit. It is

immaterial to the defendant how this was brought about. It is possible that if defendant had shown affirmatively that he was excluded by reason of his peremptory challenge, and that in doing so the exercise of his right of peremptory challenge had been abridged, the result might be otherwise. It is sufficient to say that the record does not show that he was on the jury, but in fact that he was not, or that in getting rid of him any right of defendant was abridged or lost.

2. But we are further of opinion that a juror is, no more than a witness, obliged to disclose on oath his guilt of any crime, or of any act which would disgrace him, in order to test his qualification as a juror. The question asked him, if answered in the affirmative, would have admitted his guilt of the crime of treason. Whether pardoned by a general amnesty or not pardoned, we think the crime was one which he could not be required to disclose in this manner. Nor would this ruling deprive the party of his right of challenge. Like a conviction for felony, or any other disqualifying circumstance, the challenger was at liberty to prove it by any other competent testimony.

He did not offer to do this, and as the juror's incompetency was not proved, the court was not bound to exclude him.

All the other exceptions relate to the insufficiency of plaintiff's title to recover, it being conceded that defendant showed none in himself.

It is true that plaintiff does not trace her title to any acknowledged source. But as to lot 4, she produces a deed from M. C. Mordecai and Thomas Kerr, dated April 30, 1845, conveying the lot to her; and she proves by a competent witness that there were two houses on this lot, and that she lived in one or both of them from 1845 to 1847, and that one Solonoa, as agent for plaintiff, returned this property for taxes and paid the taxes from 1857 to 1860, and that the two houses were occupied.

As regards the other lot of ground, no written evidence of title is proved, but the tax collector states that the same Mr. Solonoa, professing to act for plaintiff, paid the taxes on this lot as on the other, and that witness leased this lot from him, professing to act as agent of plaintiff.

On this evidence the court instructed the jury, in several forms, that if they believed the plaintiff had possession of the lots in suit at the times mentioned, that the presumption was that she retained possession by herself or tenants until ousted by defendant, and that her removal from the City of St. Augustine was not necessarily an abandonment of this possession; and if her possession had continued for seven years, it was sufficient to enable her to recover against a trespasser or one showing no right to enter.

We think there was sufficient evidence, as to both lots, of plaintiff's possession under claim of ownership. The deed from Mordecai and Kerr, with her actual residence on lot 4, and payment of taxes, was clearly sufficient to establish such possession. So, also, as regards the other lots, the witness who paid the rent was her tenant. The payment of the rent to a man who professed to act as her agent bound the tenant to her as such, and he could not have disputed her title. It was her possession. This

See 9 OTTO.

U. S., Book 25.

was corroborated by the payment of taxes and the absence of any proof of abandonment or loss of possession prior to defendant's tortious entry. It was sufficient for the jury, in the absence of any pretense of right by defendant.

This principle is so well settled in the law of ejectment and trespass *quare clausum fregit*, as to need no citation of authority. It will be found laid down by Mr. Greenleaf in 2 Greenl. Ev., sec. 311, that either actual possession of the premises or receipt of rent is *prima facie* evidence of title in fee; also secs. 618, 618 a; see, also, *Hutchinson v. Perley*, 4 Cal., 33; *Nagle v. Macy*, 9 Cal., 426.

There are no other assignments of error worthy of notice, and we see no error in the record.

The judgment of the Circuit Court is affirmed.

Mr. Justice Field, concurring:

I agree with the court that the juror, Holmes, in this case, could not be required to answer the questions put to him; but I go further. I do not think that the Act of Congress, which requires a test oath as to past conduct, and thereby excludes a great majority of the citizens of one half the country from the jury-box, is valid. In my judgment, the Act is not only oppressive and odious, and repugnant to the spirit of our institutions, but is unconstitutional and void. As a war measure, to be enforced in the insurgent States when dominated by the national forces, it could be sustained; but after the war was over, and those States were restored to their normal and constitutional relations to the Union, it was as much out of place and as inoperative as would be a law quartering a soldier in every Southern man's house.

Mr. Justice Strong dissents, on the ground that the evidence of plaintiff's possession was not sufficient to raise the presumption of title.

Cited—99 U. S., 184, 185; 14 N. W. Rep., 418.

WARNER VAN NORDEN, *Appt.*,

v.

LEVI P. MORTON ET AL., as MORTON, BLISS & Co.

(See S. C., 9 Otto, 378-382.)

Legal or equitable remedy.

*The rule is well settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or Acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the Federal Courts, must be determined by the essential character of the case; and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other.

[No. 225.]

Argued Apr. 10, 1879. Decided Apr. 28, 1879.

APPPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. T. J. Durant & C. W. Hornor, for appellant.

Mr. John A. Campbell, for appellees.

*Head note by *Mr. Justice MILLER*.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Louisiana.

The complainant filed his bill, addressed to the Judges of the Circuit Court sitting in chancery, alleging that he is the owner of dredge-boat No. 3, lying in the river at New Orleans; that Morton, Bliss & Co., having obtained a judgment in the same court against the Mississippi and Mexican Gulf Ship Canal Company for over \$24,000, had issued an execution on said judgment, under which the marshal had seized dredge-boat No. 3, and had advertised to sell it to satisfy the writ; he then alleges that he, and not the Ship Canal Co., is the owner of the boat; that it is not liable to be taken on said execution; and that the seizure has already subjected him to a loss of \$5,000, and his continued deprivation of its use will cause him much greater loss. He prays that the plaintiffs in this judgment and Packard, the Marshal, be made defendants, and enjoined from interfering with him in the possession of the boat; that he be quieted and maintained in his title and possession, and defendants be decreed to pay him \$5,000 aforesaid as damages, and for the writ of subpoena. A temporary injunction was granted. Answer and replication were filed, depositions and other testimony taken and, on hearing, the court dissolved the injunction and dismissed the bill.

The first question we are called to consider is, whether the circuit court had jurisdiction of this suit in equity.

If the case had arisen in any State where separate jurisdiction at common law and in equity was fully recognized, there could be no difficulty in answering this question in the negative.

The remedy in all times for this trespass, which is a very common one, has been by an action of replevin to take the property out of the hands of the sheriff or marshal and return it to the owner, or to leave the officer to proceed with the sale of the property and sue him or the purchaser in trespass for its value and for any incidental damage. In the one case, the party whose property was wrongfully seized recovered possession of it. In the other he recovered compensation for its loss. No case has been cited to us, we presume none can be found, where equity has interfered under such circumstances. The case of *Watson v. Sutherland*, 5 Wall., 74 [72 U. S., XVIII., 580], is supposed to support that of the appellant here. In that case *Sutherland*, the party whose goods were seized, was engaged in a successful dry goods trade. The seizure was of all his goods, and it closed his store, and if continued would have broken up a profitable business. For this the court held that the action at law for damages could have given no adequate remedy. The equitable jurisdiction, as will be seen by an examination of the opinion of the court, rested solely on that consideration. The case, as it was, is a very close one, and its main feature is absent in the one before us. There is no reason to believe that the value of the dredge-boat would not be adequate compensation for its loss, and no such allegation is made in the bill. On the contrary, the complainant claims \$5,000

damages for the loss of its use while held by the marshal.

It is said, however, that the Code of Louisiana does not give an action of replevin in any case, or its equivalent, and that it *does* give a specific remedy for cases of this class, which, in its nature, is of an equitable character, and should be administered in the Federal Courts on the equity side of the calendar.

If the first proposition were true, there would still remain the remedy by an action for damages at law, which is legally an adequate remedy. But while it is true that the Louisiana Code provides no process by which, in advance of a judgment as to the right of the parties, personal property can be taken from the possession of one party and delivered to the other, it *does* provide the remedy of sequestration, by which the possession of the property which is the subject of the litigation may be taken by order of the court and held until the right is decided. See, Sequestration, Code of Pr., art. 269-283. Under the provisions of these articles, we see no reason why complainant might not have brought suit and recovered the ultimate possession of his boat and damages for its detention.

The special provision for such cases as the present is found in article 298, paragraph 7, of the same Code of Practice. The whole of section 5 is devoted to injunctions, and a careful reading of all the subdivisions shows that the word is used as applicable to cases which are in their nature of a common law character, and that it is used as synonymous and interchangeably with prohibition. It is also authorized in some cases which with us would be undoubtedly of chancery cognizance.

We think the rule is settled in this court that whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or Acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the Federal Courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the other.

The case of *Thompson v. R. R. Co.*, 6 Wall., 134 [73 U. S., XVIII., 765], had been removed from the state court into the Circuit Court of the United States. In the latter a bill in chancery was filed and a decree rendered in favor of the complainant. On appeal, this court held that the case had no feature of equitable cognizance, and it was ordered to be dismissed without prejudice. It was conceded that if the case had remained in the state court the plaintiff could have recovered.

The court said: "The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in that country, from which we derive our knowledge of these principles. And although the forms of proceedings and practice in the state courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable

claims to be blended together in one suit;" citing *Robinson v. Campbell*, 3 Wheat., 212, and *Bennett v. Butterworth*, 11 How., 669, to which we take leave to add: *Jones v. Mc Masters*, 20 How., 8 [61 U. S., XV., 805], and *Basey v. Gallagher*, 20 Wall., 680 [87 U. S., XXII., 453].

With this criterion before us, we are of opinion that the remedy provided by the Code of Practice of Louisiana is a simple application to the court from which the writ issued to remedy the evil of an erroneous levy of the execution. It says: "The injunction must be granted and directed against the defendant himself in the following cases: * * *

When the sheriff, in the execution of a judgment, has seized property not belonging to the defendant, and insists on selling the same, disregarding the opposition of him who alleges that he is the real owner, or is guilty of any other act in the execution of his office."

Now this obviously refers to the control of the court over its own officer, in the execution of its own writs, and is as applicable to other misconduct of that officer, in the execution of his official duties, as in cases of seizure of property not liable under an execution in his hands. The remedy needs no formal chancery proceeding, but a petition or motion, with notice to the sheriff, is not only all that is required, but is the most speedy and appropriate mode of obtaining relief.

This relief does not depend on any inadequacy of an action for damages or by sequestration. It is a short, summary proceeding before the court under whose authority the officer is acting, gives speedy relief, and is very analogous to the statutory remedy given in many of the western States in similar cases, to try the right of property at the instance of the party whose property is wrongfully seized. It has no element of equitable right or procedure, and as a court of chancery the circuit court had no jurisdiction of the case.

Although the court below dismissed the bill, it was a decision on the merits, and not for want of jurisdiction. The decree recites that the case was heard on bill, answer, replication, exhibits and proofs, and on consideration thereof the bill was dismissed. This decree would be a bar to any other action which complainant might bring at law.

In accordance with the settled rule of this court, as shown in the case above cited, of *Thompson v. R. R. Co.* [supra], and *Kendig v. Dean*, at this Term [97 U. S., 423, XXIV., 1061], this decree must be reversed and a new one entered dismissing the bill for want of jurisdiction, and without prejudice to the right of complainant to bring any action at law or other proceeding which he may be advised; and it is so ordered.

Cited—101 U. S., 157; 105 U. S., 602; 106 U. S., 678; 110 U. S., 236; 6 N. W. Rep., 848; 44 Miss., 336; 38 Am. Rep., 275.

F. W. HARTMAN, *Plff. in Err.*,
v.

IRVING M. BEAN, COLLECTOR OF INTERNAL
REVENUE, and F. W. PAYNE, DEPUTY-
COLLECTOR.

(See S. C., 9 Otto, 393-398.)

Sale of distilled spirits—lien for tax.

1. The owner of distilled spirits may sell the same while the spirits are deposited in a bonded warehouse; but the purchaser takes the property subject to the lien in favor of the United States for the tax created by the Act of Congress.

2. It is the duty of the Commissioner to examine the monthly returns of the distiller, and if he finds that the distiller has not accounted for all the spirits produced, he must assess the delinquent for the excess produced beyond the amount reported; the spirits purchased under such circumstances were subject to the lien for such corrected tax.

[No. 242.]

Submitted Apr. 22, 1879. Decided Apr. 28, 1879.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is fully stated by the court.

Mr. F. W. Cotzhausen, for plaintiff in error.

Mr. Edwin B. Smith, Asst. Atty-Gen., for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

High wines produced by distillation, like other distilled spirits, when removed from the place where the same were distilled, if not deposited in a bonded warehouse, as required by law, become liable to the same internal revenue tax as that prescribed to be paid by the distiller, owner or person in possession thereof before the same is removed from the bonded warehouse; and the provision is, that when the commissioner obtains knowledge that such distilled spirits have been so removed, and that the same are not deposited in the bonded warehouse, it is made his duty to assess the distiller for the amount, and to return the assessment to the collector, who is directed to demand payment of the tax; and if the distiller neglects and refuses to pay the assessment, the requirement is that the collector shall proceed to collect the same by distraint. R. S., secs. 3251, 3253.

Certain high wines which the plaintiff alleges that he owned, and which he claims that he purchased of the distiller, were seized and sold by the defendants, under and by virtue of a warrant of distraint for the collection of certain internal revenue taxes assessed against the distiller of the same, of whom plaintiff made his purchase. Sufficient appears to show that the plaintiff is, and for a number of years has been, engaged in business as a rectifier of such wines and as a wholesale dealer in liquors, and that the principal defendant is the Collector of Internal Revenue for the district, the other being his deputy.

Liquors of the kind, when lawfully removed from the distillery and deposited in a warehouse, are frequently sold by the distiller subject to tax, but while they remain in the warehouse they are subject to the regulations prescribed by the Act of Congress. Such distillers are required, on the first day of each month, or within five days thereafter, to render, under oath, to the collector of the district, an account in duplicate, taken from their books stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons of spirits produced and placed in warehouse.

Accounts of the kind, in duplicate, are required; and it is made the duty of the collector to transmit one of the same to the commissioner, and on the receipt of the return the commissioner is directed in each month to inquire and determine whether the distiller has accounted for all the grain or molasses used and the spirits produced by him in the preceding month.

Even if the commissioner is satisfied that the distiller has reported all the spirits produced by him, still if the quantity reported is less than eighty per centum of the producing capacity of the distillery, he is required by law to make an assessment for such deficiency at the rate of ninety cents for every proof gallon; but if the commissioner finds that the distiller has not accounted for all the spirits produced by him, the Act of Congress directs that he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and that an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of ninety cents for every proof gallon, the same as if the true quantity had been reported. R. S., secs. 3307, 3309.

Much discussion of the facts is unnecessary, as there is no conflict in the evidence as reported in the bill of exceptions.

On the 8th of May, 1875, the plaintiff in good faith purchased the high wines mentioned in the declaration of the distiller. They had been produced at the distillery of the seller, and were regularly deposited in the bonded warehouse, the tax not having been paid; and it appears that the purchaser paid for the spirits twenty-six cents for each proof gallon, subject to tax. Purchases of the kind had frequently been made by the plaintiff; and the bill of exceptions states that it is the custom to make such purchases subject to tax, the purchaser withdrawing the same from time to time on payment of tax, as fast as the spirits are wanted in his business. Written notice of the sale and purchase was given to the collector on the same day, and the statement is that the notice has ever since remained on file in his office.

Irregularity in the transaction is not suggested; and it appears that the plaintiff, not needing the high wines for immediate use in his business, allowed the same to remain in the bonded warehouse, which constituted a part of the distillery premises where the wines had been manufactured, he, the purchaser, not making any application to remove or withdraw the same until after the tax in question had been assessed, as required by the Internal Revenue Act of Congress.

Prior to such application, to wit: on the 10th of June subsequent to the purchase by the plaintiff, the commissioner, pursuant to the provision contained in the section of the Revised Statutes last above cited, assessed the distiller and vendor of the plaintiff the sum of \$2,857.68 as an internal revenue tax on 4,082³⁸/₁₀₀ proof gallons of high wines distilled by the said distiller at his said distillery between the 6th of January and the 8th of March of the same year the purchase of the distilled spirits was made by the plaintiff.

Due notice, in writing, of the tax and demand of payment were made by the collector of the

district, and the bill of exceptions states that the distiller wholly neglected and refused to make the payment. Assessment being duly made and payment being refused, the collector, pursuant to law, issued his warrant of distraint, and the deputy-collector seized and sold the property to make the money. Immediate redress was sought by the plaintiff through the present action of trover, commenced in the state court. Service having been made, the defendants appeared, and on their motion the cause was removed into the circuit court, where the answer of the defendants was filed. Both parties appeared in the circuit court and, having waived a jury, they submitted the cause to the determination of the court. Hearing was had; and the court being of the opinion that, in point of law, there was a lien on the high wines for the taxes assessed by the commissioner, under the provision before referred to, held that the action could not be maintained, and that the assessment of the tax and the sale of the spirits under the warrant of distress were valid. Judgment being rendered for the defendants, the plaintiff removed the cause into this court, and assigns for error that the circuit court erred in the conclusions of law set forth in the transcript, he, the plaintiff, insisting that the high wines were neither subject to a lien for the tax nor to seizure under the warrant of distraint, and that the withholding and sale of the same constituted a conversion.

Formal application to withdraw the high wines from the bonded warehouse was made on the 14th of July subsequent to the assessment, and the bill of exceptions shows that on that day the plaintiff caused the statements and certificates required by law to be made out for that purpose, and that he tendered to the collector the tax on the same, meaning the tax assessed on the quantities reported by the distiller; but the leave to withdraw was refused, because the corrected assessment by the commissioner had previously been made for the difference between the quantity reported and the quantity shown to have been actually produced.

Actual seizure of the high wines was made by the deputy-collector on the 8th of the same month, and it appears that he advertised the same for sale on the same day. Prior to the sale, to wit: July 22, the plaintiff tendered to the collector the amount of the tax admitted to be due and owing on the said high wines, at the rate of ninety cents per proof gallon, demanded possession thereof, and that the levy be released and the sale abandoned; but the defendants refused to release the property, and the same was sold on the following day under the warrant of distress and pursuant to the antecedent advertisement. But such a tender, even if it included the corrected assessment, could not benefit the plaintiff, as it did not cover either interest or penalty for the non-payment.

Beyond all question, the corrected assessment made was fully authorized by the Act of Congress, as the same section provides that all assessments made under that section shall be a *lien on all distilled spirits*, the distillery premises, the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, the tract of land whereon the said distillery is located,

and any building thereon, from the time such assessment is made until the same shall have been paid and discharged. R. S., sec. 3309.

Argument to show that that provision secures a lien upon the distilled spirits as security for the payment of the tax is quite unnecessary, as the language of the Act is express to that effect; and section 3188 also provides that in case of such neglect or refusal the collector may levy, or by warrant may authorize a deputy-collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person or on which the said lien exists, for the payment of the sum due with interest, and penalty for non-payment.

Nothing can be plainer in legal decision than the proposition that the lien in such a case attaches to the distillery, the distilled spirits, and to the real and personal property used in connection with the distillery, and that it may be enforced against the distilled spirits at any time before the purchaser of the same withdraws the spirits from the bonded warehouse, which is all that is necessary to decide in the case before the court. *Dobbins v. U. S.*, 96 U. S., 401 [XXIV., 638].

Concede that the owner of the distilled spirits may sell the same while the spirits are deposited in the bonded warehouse, still his sale must be regarded as subject to the tax, as the purchase was in this case; which means that the purchaser takes the property subject to the lien in favor of the United States that is created by the Act of Congress; nor is it any hardship upon the purchaser, as he as well as the distiller knows that the Act of Congress makes it the duty of the commissioner to examine the monthly returns of the distiller, and that if he finds that the distiller has not accounted for all the spirits produced, he must assess the delinquent for the excess produced beyond the amount reported.

Viewed in the light of that suggestion, it is clear that the purchaser has no just ground of complaint, as he knew that the spirits purchased under such circumstances were subject to such a corrected tax, and that the corrected assessment as well as that levied pursuant to the report of the distiller becomes a lien upon the high wines deposited in the bonded warehouse.

Judgment affirmed.

EDWIN PARSONS ET AL., *Appts.*,

v.

HENRY R. JACKSON ET AL.

(See S. C., 9 Otto, 434-441.)

Railroad bonds—when not negotiable—stolen bonds.

1. Railroad bonds, by which the company acknowledges indebtedness to A or bearer, in the sum of either £225 in London or \$1,000 in New York or New Orleans, the place of payment to be fixed by the president of the company by his indorsement, but the place of payment left blank in the indorsement, are not negotiable paper.

2. The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability.

See 9 OTTO.

3. Where such bonds were never issued by the railroad company, but were seized and carried off by a raid of soldiers during the war, and had past-due coupons attached and were offered for a very small consideration, purchasers were affected with notice of their invalidity, and cannot sustain the position of *bona fide* holders without notice.

[No. 156.]

Argued Mar. 5, 1879. Decided Apr. 28, 1879.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is fully stated by the court.

Messrs. N. A. Cowdrey, Thos. L. Bayne and Thos. Allen Clarke, for appellants:

The bonds are in the usual form and are negotiable.

Hotchkiss v. Nat. Bank, 21 Wall., 354 (88 U. S., XXII., 645); *White v. Vt. & Mass. R. R. Co.*, 21 How., 575 (62 U. S., XVI., 221); *Murray v. Lardner*, 2 Wall., 110 (69 U. S., XVII., 857); *Mercer County v. Hackett*, 1 Wall., 83 (68 U. S., XVII., 548).

The designation of a place of payment is not essential. The bonds would be negotiable without naming any place whatever and, the President having indorsed them, leaving the place of payment blank, any holder *bona fide* was authorized to fill the same.

1 Dan. Neg. Inst., 111; *Michigan Bank v. Eldred*, 9 Wall., 552 (76 U. S., XIX., 766); *Bank of Pittsburg v. Neal*, 22 How., 107 (63 U. S., XVI., 328); *Woodward v. Gunn*, Supreme Court of Appeals of Virginia, March Term, 1878, reported in the "Reporter," published at Boston, Vol. 5, p. 668.

The indorsement is signed by the President, and if it was not intended that this blank should be filled by any holder, then there was negligence in signing the indorsement in blank; and persons acquiring in good faith, are entitled to recover upon the bond.

Putnam v. Sullivan, 4 Mass., 45; *Worcester Co. Bank v. Dorchester Bank*, 10 Cush., 488; *Redlich v. Doll*, 54 N. Y., 235.

In the latter case the note was as follows:

"NEW YORK, Sept. 30th, 1868.

Three months after date I promise to pay to the order of myself, six hundred and seventy-nine dollars and twenty cents, at value received.

Signed, N. DOLL."

"Earl, C. I am well satisfied, upon a long line of authorities, that the insertion of the place of payment in this note did not avoid it in the hands of a *bona fide* holder for value."

The defendant made his note perfect in form except the place of payment, and intrusted it to Istel for a special purpose. If the word "at" had not been inserted in the note, it would have been a complete note without the insertion of other words. But with that word in, preceding a blank, it carried upon its face an implied authority for any *bona fide* holder to insert the place of payment. In such a case, if the note be used or the blank filled up contrary to the agreement or the intention of the original parties, the maker is held to any *bona fide* holder for value, upon the principle that where one of two innocent parties must suffer by the fraud or wrong of a third person, the one who put it in the power of such third person to commit the wrong, must bear the loss.

Garrard v. Hadden, 67 Pa., 82; *Kitchen v. Place*, 41 Barb., 465; *Montague v. Perkins*, 22

Eng. L. & E., 516; *Orrick v. Colston*, 7 Gratt., 189.

Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title; that result can only be produced by bad faith on his part.

Murray v. Lardner, 2 Wall., 121 (69 U. S., XVII., 859); *Cromwell v. Sac Co.*, 96 U. S., 51 (XXIV., 681); *Hotchkiss v. National Bank* (*supra*).

These bonds were bought in open market, in the usual course of business, and for what the record in this case will show was a fair price; but if the price was not for full value, this will not affect appellants' right to recover.

Cromwell v. County of Sac (*supra*).

The railroad was seized under process from the state courts in 1865, and sold February, 1866.

Jackson v. Ludeling, 21 Wall., 616 (88 U. S., XXII., 492).

The sale has been set aside, and the litigation is still pending.

Bonds, such as these found in this record, are made to raise money by sale. They are payable to bearer twenty years after their date, and to facilitate their sale several places of payment are indicated in the face of the bond, and in the indorsement, a blank is left over the signature of the President, to be filled by any *bona fide* holder. The option which the holder enjoys, appreciates the value of the bond, and is an advantage which accrues to the makers.

Hotchkiss v. Bk. (*supra*); *Wheeler v. Guild*, 20 Pick., 550.

Messrs. John A. Campbell and H. M. Spofford, for appellees:

A negotiable instrument is a writing containing a promise to pay a certain sum of money, unconditionally, to a person designated by the instrument.

This bond shows an obligation to pay a certain number of pounds sterling, or a certain number of American dollars. Whether the one or the other, or any, according to the terms of the bond fairly and distinctly appearing on the face, was to be settled and declared by the indorsement of the president. No such declaration is to be found. The President did not negotiate these bonds; he did not intrust them to another for negotiation. They were carried away from the custody of the company amid tumult and violence, and without its consent or privity, and without fault or neglect. The absence of a negotiable quality, and the fact that they were never negotiated, is proved by the bond and the testimony. The appellants have no just claim on the property.

Story, Prom. N., secs. 19, 20, 22; Chit. Bills, 152; *Floyd Acceptances*, 7 Wall., 683 (74 U. S., XIX., 176); Nelson's Opinion; *Cook v. Satterlee*, 6 Cow., 108.

A floating contingent promise is not negotiable.

Storm v. Stirling, 3 Ell. & B., 832; 1 Pars. Bills & N., 114.

On the face of the bond an act is imposed on the president of the corporation, as a duty to be performed, without which the bond is incomplete as a negotiable security. The absence of the indorsement of the president indicated

to the holder and to the buyer that an officer of the corporation had a duty to perform, and that it had not the constituents of negotiable paper in its condition, as held or offered for sale.

Goodman v. Simonds, 20 How., 343, 365, 366 (61 U. S., XV., 934, 941); Chit. Bills, 206, 225.

There was no trust or confidence on the part of the president of the corporation, and none on the part of the corporation itself, reposed in any other party whereby these bonds reached the New York market.

They were taken by violence or stealth, by unauthorized person or persons, from a secure and unexposed place.

There was no neglect or fraud on the part of any person belonging to the corporation. The corporation is not blameworthy for the circulation, and not responsible on the bonds.

Foster v. MacKinnon, L. R., 4 C. P., 704; *Nance v. Lary*, 5 Ala., 370; *McGrath v. Clark*, 56 N. Y., 34; *Angle v. Ins. Co.*, 92 U. S., 330 (XXIII., 556); *Taylor v. Gr. Ind. P. R. Co.*, 3 De Gex, F. & J., 442; *Michigan Bk. v. Eldred*, 9 Wall., 544 (76 U. S., XIX., 763); *Garrard v. Hadden*, 67 Pa., 82; *Caulkins v. Whisler*, 29 Iowa, 495.

The case of *Ledwich v. McKim*, 53 N. Y., 307, is founded upon a negotiation of bonds of the Vicksburg, Shreveport and Texas Railroad Company, under the same conditions as those proved to the Master, and including some of these bonds. The Supreme Court of New York decided that they were not negotiable, and not a valid claim upon the Vicksburg, Shreveport and Texas Railroad Company.

This case is a very striking one. The determination of the place of payment ascertains the currency to be employed, and affects the sum of money to be paid. If the blank be filled with New York, or New Orleans, gold money, silver money, or Treasury notes may be paid. A reasonable hope may be entertained by the debtor that lead, copper or leather may come into vogue as a legal tender. Another currency of coin would be exacted in London, and of a different value.

Some years ago the difference was thirty or forty per cent. The indorsement of the president, according to the terms of the bond, was an essential part of it, and this indorsement was indispensable to the constitution of a complete negotiable instrument.

Toullier discusses questions arising under obligations or sales written over blank signatures by persons not authorized by the author of the signature. His conclusions are, that the author is bound by the obligation of the sale in case he intrusted the signature to the writer, and could not complain of a breach of trust in opposition to a *bona fide* holder. But if the signature were obtained without any consent or privity of the author or by force or fraud the author might denounce the forgery or fraud and cause the paper to be annulled though held by a *bona fide* holder.

4 Toull., p. 275, or book 3, tit. 3, ch. 6, sec. 2.

Mr. Justice Bradley delivered the opinion of the court:

This case arises out of the supplementary proceedings which took place in the case of *Jackson v. Vicksburg, Shreveport & Texas R. R. Co.*, reported under the name of *Jackson v. Ludeling*, in 21 Wall., 616 [88 U. S., XXII., 492]

after our decision therein. In pursuance of the mandate issued in that case, the court below made a further decree on the 22d day of March, 1875, directing, amongst other things, as follows, that is to say:

"3. It is ordered that F. A. Woolfley be appointed special master to take the proofs of the bonds *bona fide* issued by the said Vicksburg, Shreveport and Texas Railroad Company, and to report the names of the owners and the amounts due to the holders of such bonds so issued. * * *

He will give notice to the holders of bonds *bona fide* issued for twenty days by publication in one of the city papers that he is ready to receive proofs of the debt aforesaid, and that he shall hold sessions for thirty days, each day, Sunday excepted, from the date of his first publication in the paper for that purpose."

In pursuance of this decree the master gave the required notice, and received proofs adduced by those claiming to hold bonds entitled to the benefit of the decree rendered by this court. By his report filed the 17th day of January, 1876, it appears that there were then outstanding seven hundred and sixty-one bonds *bona fide* issued by the said railroad company, of which schedules were annexed to his report. He further reported a schedule of certain other bonds executed by the company, and presented to him as issued under the mortgage mentioned in the decree; but which, the testimony taken by him proved, were never issued by the said company, its officers or agents, but were carried off by persons belonging to, or taking advantage of, a raid upon the Town of Monroe, La., during the late war, in the month of April, 1864. As to these bonds, the master further reports as follows:

"None of the parties presenting these bonds, or the coupons on them, have proved at what time, for what consideration, or under what circumstances they acquired them, except Francis T. Willis, Charles Parsons, E. G. Pearl, Edwin Parsons, George Parsons and Scott, Zérega & Co. in liquidation. In reference to this class, if the bonds were complete in all their parts and no circumstances of suspicion appeared on their face, the proof that they had not been issued *bona fide* under the authority of the corporation, and other facts relative to the issue, would have required the parties to prove that they were *bona fide* holders for a valuable consideration.

In reference to the claims of Francis T. Willis, Charles Parsons, E. G. Pearl, Edwin Parsons and Scott, Zérega & Co. in liquidation, I report that in addition to the fact that the bonds were not issued *bona fide*, but were taken by force from the custody of the company, that there appears on the indorsement of the bonds a material deficiency and an incompleteness which deprives them of the character of commercial instruments fit for circulation. I also report that the railroad was, at the date of their purchase, in a damaged condition, it having been under the control of the military power of the Confederate States and the United States, which had been used to partially destroy it. That there were several years of unpaid coupons on each of the bonds, in the most of cases being contemporaneous with the execution of the mortgage; that these bonds were sold for an

insignificant sum, and apparently purchased at a hazard, without any view to their character as commercial instruments fit for circulation, and that from the date of this suit, the 1st December, 1866, nor in any proceedings antecedent thereto, did the holders, or any of them, appear to maintain any claim for protection.

I, therefore, report that the said bonds mentioned in the schedule BB were not issued *bona fide* by the said railroad company, and ought not to be allowed as a charge on the mortgage."

The parties above named excepted to this report; but after hearing thereon, the court confirmed the same, and made a decree disallowing the said last mentioned bonds, and from that decree the present appeal was taken.

From the evidence taken by the master it appears that the appellants purchased the bonds held by them, in the City of New York, in November and December, 1865, at from ten to fifteen cents on the dollar, without any actual knowledge that they were not issued by the company. But it further appeared that none or very few of the coupons had been cut off from the bonds, and that the latter were imperfect in form.

Each bond, on its face, certifies "That the Vicksburg, Shreveport and Texas Railroad Company is indebted to John Ray, or bearer, for value received, in the sum of either £225 sterling or \$1,000 lawful money of the United States of America, to wit: £225 sterling if the principal and interest are payable in London, and \$1,000 lawful money of the United States of America if the principal and interest are payable in New York or New Orleans, etc." This is the obligatory part of the instrument, and is necessarily indeterminate in its character without some further designation of the place at which it is to be paid. Each bond, further, on its face declares that "The president of said company is authorized to fix, by his indorsement, the place of payment of the principal and interest in conformity with the terms of this obligation." And on the back of the bonds is indorsed a printed blank in the following words to wit: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ——" On the bonds, which are conceded to be genuine and *bona fide* issued, this blank is filled up with the name of some place, as, for example, "The City of New York;" or, in some cases, "New Orleans, at the Citizens' Bank of Louisiana," etc. All the indorsements have the signature of the president of the company, but on the bonds in question the above blank for the place of payment is not filled up. The mortgage under which the bonds purport to be issued, and which is referred to in the body thereof, contains the same provision with respect to the place of payment. After referring to the bonds to be issued under and secured by it, its language is as follows: "The principal and interest of said bonds being made payable in New Orleans, New York, or London, as he, the said president, by his indorsement, may determine." The resolutions of the Board of Directors, authorizing the execution of the mortgage and the issue of the bonds, which resolutions are copied in the mortgage, contain the same provision, namely: "The principal and interest of said bonds being made payable in New Orleans, New York, or London, as the

president, by his indorsement, may determine." These resolutions, being the authority by virtue of which the mortgage and bonds were executed and issued, would seem to be mandatory, and to require that the place of payment should be indorsed by the president on the bonds independently of the necessity of such indorsement for the purpose of fixing the amount payable thereon.

The uncertainty of the amount payable, in the absence of the required indorsement, is of itself a defect which deprives these instruments of the character of negotiability. As they stand, they amount to a promise to pay so many pounds, or so many dollars, without saying which. One of the first rules in regard to negotiable paper is that the amount to be paid must be certain, and not be made to depend on a contingency. 1 Daniel, Neg. Inst., sec. 53. And although it is held that, *Id certum est quod certum reddi potest*—a maxim which would have given the bonds negotiability in this instance, had the requisite indorsement been made, yet, without such indorsement, the uncertainty remains, and operates as an intrinsic defect in the security itself.

Now it is shown by the master's report, and if it were necessary to go behind the report, the evidence shows that these bonds were never issued by the railroad company at all, but were seized and carried off by a raid of soldiers during the war. They afterwards turned up in New York, and were purchased by the appellants; and the question is, whether the fact that the past-due coupons were still attached, and that no place of payment was indorsed on the bonds, as required to be done by the bonds themselves, was sufficient to put the appellants upon inquiry as to their validity, and as to the *bona fides* of their issue; these marks of suspicion being supplemented by the further fact, that the bonds were offered for a very small consideration.

Our opinion is, that the appellants had abundant cause to question the integrity of these bonds, that they were affected with notice of their invalidity, and cannot be allowed to sustain the position of *bona fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry. The imperfection as to the place of payment is another strong evidence of want of genuineness. Of course, it is not necessary to the validity of a bond that it should name a place of payment, but these bonds expressly declare that they are to be payable at the place which should be determined by the president's indorsement; and that the sum payable should depend on that indorsement; and yet no indorsement appears thereon. We do not say that this defect would have invalidated the bonds if they had in fact been issued by the company, and the amount had been certain; but it was a pregnant warning to the purchasers to inquire whether they had been issued or not. These facts, taken in connection with the price at which the bonds were offered, were abundantly sufficient to affect the purchasers with notice of any invalidity in their issue. The case is so plain, that it is hardly necessary to cite any authorities on the subject. "A person who takes a bill," said this court in *Andrews v. Pond*, 13 Pet., 65,

"which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice." The same doctrine is re-affirmed in *Fowler v. Brantly*, 14 Pet., 318, and, indeed, is elementary law. The circumstances in this case went farther than merely to cast a shade of suspicion upon the bonds; they were so pointed and emphatic as to be *prima facie* inconsistent with any other view than that there was something wrong in the title. See, 1 Daniel, Neg. Inst., sec. 796.

The decree of the Circuit Court is affirmed.

Dissenting, *Mr. Justice Clifford.*

Mr. Justice Swayne did not sit in this case.

Cited—99 U. S., 513; 103 U. S., 762; 70 Mo., 339, 341.

HENRY R. JACKSON ET AL.,

v.

THE VICKSBURG, SHREVEPORT AND TEXAS RAILROAD COMPANY, JOHN T. LUDELING ET AL.

—

THE VICKSBURG, SHREVEPORT AND TEXAS RAILROAD COMPANY, JOHN T. LUDELING ET AL., *Appts.*,

v.

HENRY R. JACKSON ET AL.

(See S. C., "*Jackson v. Ludeling*," 9 Otto, 513-539.)

Foreclosure sale of railroad—resale—improvements—Louisiana law—rule of compensation.

*1. In Louisiana, where a railroad, in a state of complete dilapidation and ruin, was sold under a mortgage, under circumstances importing some fraud in the purchasers which induced the court to set the sale aside and order a resale, such purchasers, though deemed possessors in bad faith, are entitled by the spirit of article 508 of the Civil Code, to compensation for reconstructing and repairing the road and putting it in working order.

2. Whatever question may exist about compensation for intrusion or inseparable ameliorations and improvements made by a possessor in bad faith, there is no question about his right to be reimbursed for necessary repairs, both according to the general civil law and the 2314th article of the Civil Code of Louisiana.

3. It seems to be held in Louisiana, contrary to former decisions, that compensation will not be allowed to the possessor in bad faith for inseparable improvements to land, such as clearing and ditching; but the reconstruction and putting in working order of a railroad, thereby restoring it to its normal condition, partake so much of the nature of repairs, that compensation therefor is required, by an equitable construction of article 508 of the Civil Code.

4. The rule of compensation in such a case is, to allow credit to the possessors for the value of the materials of the improvements yet in existence, and the cost of the labor bestowed thereon; but not for the improvements which have been consumed in the use, and not to exceed the value of the improvements when delivered up. Interest on the outlay of the possessors will also be allowed to an amount not exceeding the net earnings or fruits received from the improvements. They will be accountable, however, for all the fruits received by them from the property. [*Quere*: whether they would be accountable for the fruits of the improvements beyond the allowance made to them therefor.]

5. For any balance found to be due them on such

*Head notes by *Mr. Justice BRADLEY.*

an accounting, the possessors will have a lien on the property.

[Nos. 525, 526.]

Argued Mar. 7, 1879. Decided Apr. 28, 1879.

APPEALS from the Circuit Court of the United States for the District of Louisiana.

The facts are fully stated by the court.

Messrs. John A. Campbell and H. M. Spofford, for Jackson *et al.*

Messrs. Jeremiah S. Black, Matt. H. Carpenter, John T. Ludeling, in person, *John Ray* and *W. H. Hunt*, for R. R. Co., *Ludeling et al.*

Mr. Justice Bradley delivered the opinion of the court:

This case, like the one just decided [*ante*, 457], arises out of the supplementary proceedings which took place in the case of *Jackson v. R. R. Co.*, reported as *Jackson v. Ludeling* in 21 Wall., 616 [88 U. S., XXII., 492], after our decision therein. In pursuance of the mandate in that case, the Circuit Court for the District of Louisiana made a further decree on the 23d day of March, 1875, containing amongst other things, the following directions, that is to say:

"2. It is further adjudged and decreed that the writ of injunction directed by the decree issue to the parties to the deed of the 5th February, 1866, executed to John T. Ludeling and his associates, and to all of the defendants in this cause, according to the directions of said mandate, and that they be required to cancel the said deed, and deliver the same as canceled to the master of this court hereinafter named.

3. It is ordered that F. A. Woolfley be appointed special master to receive the said deed as canceled; to take the proofs of the bonds *bona fide* issued, etc.; that he take an account of the property embraced in the mortgage described in the bill executed to John Ray or bearer, which was not sold or disposed of prior to 23d December, 1865, and render the account between the plaintiffs and defendants provided for in the decree aforesaid. He will give notice to the holders of bonds, etc. He will give notice to the defendants, or their solicitor, of his taking the account, and for all purposes of his duties under this order he may refer to the testimony on file in the cause, and shall also report upon the sale of the property and the best mode of effecting it, so as to promote the interest of all concerned under the decree. He is authorized to make special reports from time to time to the court, and to ask for instructions.

4. It is further ordered that John W. Greene be appointed receiver under the decree, to collect, receive and hold possession of all of the estate, property and effects described in the mortgage aforesaid, executed to John Ray or bearer, by the Vicksburg, Shreveport and Texas Railroad Company, not sold or disposed of prior to the 23d of December, 1865, and to hold the same subject to the orders of this court."

To understand the questions that are raised on the present appeal, it is necessary briefly to rehearse the history of the case:

The Vicksburg, Shreveport and Texas Railroad Company, on the first day of September, 1857, by an authentic act of mortgage, did grant to John Ray a first mortgage lien and privilege upon its entire railroad from the Mississippi River, opposite Vicksburg, by way of Monroe

and Shreveport, to the boundary line of Louisiana and Texas, a distance of one hundred and ninety miles, more or less, including right of way, lands, property and franchises of every description, with all its rolling stock, machinery and effects, including also a land-grant of over four hundred and twenty thousand acres, to secure the payment of a contemplated issue of two thousand bonds of \$1,000 each. A considerable portion of these bonds were issued; but the disturbances arising from the late civil war resulted in the destruction of the company's property, and default in the payment of interest on the bonds. In the month of December, 1865, an order of seizure and sale was made by the Twelfth District Court of Louisiana, for the sale of the mortgaged premises, at the instance of one William R. Gordon, a holder of some of the bonds; and on the 3d day of February, 1866, the whole property was sold by the sheriff of the Parish of Ouachita to John T. Ludeling and others, for the sum of \$50,000; and a regular act of sale was passed to them on the 10th day of February, 1866; and they thereupon took possession of the property, and commenced to reconstruct the same and put it in repair. A large number of the bondholders, however, on the first day of December, 1866, filed their original bill in this case, complaining that the said proceedings were irregular and fraudulent, and praying that the said sale might be set aside, and that the property might be again sold by virtue of the mortgage for the benefit of all the *bona fide* bondholders; and that the purchasers under the first sale might be decreed to account for all moneys received, or which they might have received, from the use of the property; and for an injunction and receiver. This bill was dismissed by the circuit court; but that decree was reversed by this court, and a decree made in favor of the complainants, establishing the mortgage, declaring the sale to Ludeling and his associates fraudulent and void and setting it aside, and ordering an injunction against them to refrain from setting up any title by reason thereof. The cause was thereupon remitted to the circuit court with instructions to direct an account to be taken of all the property of the corporation, to appoint a receiver thereof, and to order the same to be sold for the benefit of the bondholders. It was further ordered and decreed that the defendants should account for all money and property received by them out of the property, or from its profits or income, receiving in their account such credits as, under the circumstances of the case, by the law of Louisiana, they were entitled to, and that they should pay and deliver to the receiver whatever on such accounting might be found due from them. A mandate was issued corresponding to this decree; and in obedience thereto the decree of the circuit court was made, which is first above recited. In pursuance of this decree an accounting was had, in which the amounts received by the defendants from the earnings of the railroad were stated, and in which the defendants claimed large allowances for expenditures made by them in rebuilding and repairing the railroad and its appurtenances, and in providing it with rolling stock, machinery, etc. The plaintiffs resisted all claim for allowances to the defendants, beyond the necessary expenses of operating the road; and whether any, and what, allowances

should be made to them is the principal question in the cause. The court below made such allowances, decreeing, amongst other things, as follows:

"Third. That the defendants have expended on said mortgaged property in the making of improvements and betterments thereon, which still remain upon said property ready to be turned over, the sum of four hundred and eighty-eight thousand one hundred and nine dollars and fifty-four cents (\$488,109.54), on which they are entitled to interest from the date of said expenditures, at the rate of five per cent. per annum, until said mortgaged property was placed in the hands of a receiver by this court; that defendants have received from the earnings of said property, over and above all sums paid out for maintenance of said property and running expenses, the sum of one hundred and sixty-one thousand four hundred and seventy-six dollars and sixty-nine cents, for which they should account, with interest at the rate of five per cent. per annum from the receipt of said sum; that the interest on said sum expended and said sum received by the defendants should be computed for the same period of time, or, what is equivalent thereto, the said sum received should be deducted from the said sum expended and the interest computed on the remainder; that after making said deduction the remainder is three hundred and twenty-six thousand six hundred and thirty-two dollars and eighty-five cents (\$326,632.85), which, with interest added from the time when interest should be computed, up to April 13, 1875, when the receiver of this court took possession of said property, amounts to three hundred and ninety-one thousand nine hundred and fifty-nine dollars and forty-two cents (\$391,959.42), for which sum defendants are entitled to compensation out of said property, to be raised in the manner hereinafter set forth.

Fourth. That article 508 of the Revised Code of Louisiana, which authorizes the owner of property to require the removal or demolition of the improvements made in his land by a third person, or to keep them at the value of the materials and cost of the workmanship, is not applicable to this case, because the plaintiffs are mortgagees and not owners, and because the removal of many of said improvements is impossible; and because said improvements cannot be demolished without destroying the property of which they form a part; and, therefore, the claim to said election made by plaintiffs under said article of the Code is disallowed.

Fifth. That all of said mortgaged property, including the improvements placed thereon by the defendants, shall be set up at the price of \$833,098.38, the actual value thereof, as shown in the report of the experts; and that if this sum or a greater amount be obtained at the sale, the defendants shall be entitled to the sum of \$391,959.40, fixed as the value of their improvements and interest thereon, as settled in the third paragraph of this decree; and if the said sum of \$833,098.38 cannot be obtained, then they shall have in the same proportion of the sum actually obtained as that sum bears to the upset price aforesaid if any less amount shall be obtained.

Sixth. That the holders of a majority of the bonds and coupons shall be at liberty to agree

upon a committee to purchase the property for their account upon articles and terms of associations, and with concessions to any bondholder to become a party thereto at or within fifteen days from the day of sale. Should the purchase be made, the purchasers shall not be required to make a payment beyond the costs, charges, expenses of the sale and the amount of the judgment in favor of the defendants hereinbefore stated, with five per cent. interest to the day of sale, which shall be a privilege upon the proceeds of sale; and the said purchasers shall be entitled to credit their bonds with the sums that may be due from the purchasers on them as a part of the payment."

From this decree both parties have appealed; the complainants insisting:

1. That no allowance at all should have been made to the defendants for ameliorations and improvements.

2. That the allowances made are too great.

3. That interest should not have been allowed.

The defendants, on the other hand, insist:

1. That the allowances made are insufficient in amount.

2. That no allowance is made for improvements worn out in the service of the railroad.

3. That an insufficient amount of interest is allowed.

4. That no allowance is made for salaries and contingent expenses, taxes, etc.

5. That it does not enforce the right of the defendants to retain possession until their claim for improvements is paid.

6. That the account of earnings is incorrectly stated.

Other errors are assigned, but they are either included in those stated, or are not of sufficient importance to require serious consideration.

Assuming that the determinations of this court in its former decree are not open to further question, and that the defendants acquired possession of the property by a proceeding which was founded in fraud, still it cannot be doubted that they supposed themselves to be the legal owners of the property by virtue of the judicial sale, and made the repairs and improvements in controversy under that idea. But as the vice of their title consisted in their own inequitable acts and proceedings, we think that they are to be regarded, in the language of the civil law, as possessors in bad faith. The common law allows nothing to the possessor in good or bad faith for expenditures made upon land from which he is evicted by superior title; but equity, in cases within its jurisdiction, allows the possessor in good faith both for repairs and improvements; but where the possessor (being a trustee) has been guilty of actual fraud, it makes him no allowance for improvements, but allows him compensation for necessary repairs. *Lewin, Tr.*, 466. The present case, however, is to be governed by the law of Louisiana, which is based upon the civil law, not precisely as laid down in the compilations of Justinian, but as interpreted in the jurisprudence of France and Spain, and has some peculiar rules on this subject. When Louisiana was acquired by the United States in 1803, it had been a Colony of Spain for more than thirty years, except in the formal transfer to France at the time of our purchase; and the Spanish law was the common law of the Territory until modified by subse-

quent legislation. In 1808, the first Civil Code was adopted, based partly on the Spanish *Partidas* and partly on the *projet* of the Code Napoleon, the completed Code not having yet been received. In 1825, the Civil Code was revised, and was made to conform more closely to the French Code, often copying its phraseology. The provisions of the Code which have the nearest application to the present case are the same both in the Code of 1808 and 1825, and are very nearly an exact copy of the corresponding provisions of the Code Napoleon, whilst they also correspond, substantially, with the Spanish law. They are as follows:

"Art. 508. When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or to compel this person to take away or demolish the same.

If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained.

If the owner keeps the works, he owes to the owner of the materials nothing but the re-imbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

Nevertheless, if the plantations, edifices or works have been done by a third person evicted, but not sentenced to make restitution of the fruits, because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, plantations or edifices, but he shall have his choice either to re-imburse the value of the materials and the price of workmanship, or to re-imburse a sum equal to the enhanced value of the soil."

"Art. 2314. He to whom property is restored must refund to the person who possessed it, even in bad faith, all he had necessarily expended for the preservation of the property."

These articles are substantially equivalent to articles 555 and 1381 of the Code Napoleon. They are also nearly equivalent to the laws of the *Partidas*. The latter divide ameliorations into three kinds, necessary, useful and voluntary. *Necessary*: such as preserve the property and prevent it from going to ruin, as repairs to a house, causeways to prevent inundations, etc.; *Useful*: such as augment the value of the property and its rents, as the planting of trees or vines, the erection of a furnace, wine-press, barn or stable. *Voluntary*: such as are made for ornament or pleasure. The *Partidas* declare, that if the possessor in bad faith makes necessary repairs, or does other things by which the estate is benefited, he may recover the expense thereof, less the amount of rents received, and will not be obliged to deliver the property to the owner until such compensation is made. But if he construct an edifice, or plant seed, he can only deduct the expense from the fruits for which he is made accountable; or if he has defrayed expenses for works of profit and utility, and the owner is unwilling to re-imburse him, he may carry away the additional works which he has erected. *Partida*, III., title 28, laws 42, 44; Es-

See 9 OTTO.

riche, titles, *Mejores* and *Poseedor de mala fe*.

From these laws it seems clear that for necessary repairs the possessor, even in bad faith, is entitled to full indemnity; and for useful improvements, he will also be entitled to full indemnity to the value of the materials and price of workmanship, if the owner elects to retain them; or the right to demolish them and remove the materials, if the owner shall elect not to retain them. The general principle upon which this law is founded is, that no one should be made richer at the expense of another, even though the latter has acted in bad faith.

The question, then, arises, how the laws which we have quoted are to be applied in a case like the present; the case of a railroad which was in a state of ruin and dilapidation, and which the purchasers have repaired and put in working order. Are they to be indemnified in any way or to any extent, for the expense which they have been at, or are they to lose it all?

We have no great difficulty in considering the parties as holding the relation of rightful owners on one side, and ejected possessors on the other. Both claim under the same title—the mortgage—and the question between them was, whether the derivative title of the defendants was a valid one or not. The complainants, if not the owners, represent the owners, namely: the railroad company, which is conceded to be utterly insolvent and practically out of existence. So far as the parties are concerned, therefore, the laws above quoted may be regarded as applicable to them.

But, in regard to the subject matter, it seems almost impossible to apply them literally. It is not like the case of lands, either in the country or the town. These may be recovered and enjoyed by the owner, though the improvements erected thereon be demolished. But a railroad is not land; it is a peculiar species of property, of a compound character, consisting of roadway, embankment, superstructure and equipment. These constitute the *corpus* of the property. There is no room to exercise the election which the law gives to the owner, of keeping the ameliorations, or requiring the ejected possessor to demolish them. The demolition of the ameliorations would be the demolition of the thing itself. If any room for election does exist, it is virtually made in bringing the suit to recover the property. To carry out the spirit of the law, therefore, since we cannot carry out its letter, the other alternative, of allowing the defendants compensation for their ameliorations, seems to be the only course that is left. Its propriety in this case is corroborated by the fact that the property in its improved state has been taken possession of by a receiver at the instance of the complainants, and has been used for their benefit for now nearly four years past.

In addition to these considerations, it is very questionable whether a large portion of what are called ameliorations in this case are not rather to be regarded as repairs. The railroad has been rescued from destruction and repaired by the defendants. These repairs were necessary in order to restore the property to its condition and quality as a railroad; the thing which the mortgage contemplated, and which the complainants seek to possess under and by virtue of the mortgage. So far as the improvements

may be regarded as necessary repairs, there is no question that the defendants would be entitled to compensation for their expenses in making the same. But as it is impossible to distinguish what might properly be called, repairs, from ameliorations, we think that the rule laid down in the law for the case where the owner elects to keep the constructions and works erected by the unlawful possessor may be equitably applied. This rule is that the latter shall be reimbursed the value of his materials and the price of the workmanship. This was the rule adopted by the circuit court, and we think that its decision in this respect was correct, except that, in an equitable application of the rule, the allowance made to the defendants should not exceed the value of the improvements. For this amount, therefore, with interest, less the fruits received, the defendants should have remuneration.

After a careful examination of the authorities bearing upon the case, we find nothing which, properly considered, derogates from this view of the case. The class of cases which comes nearest to the present is that of lands which have been cleared up, and brought to a state of cultivation by embankments and ditches; though even here, there is a point of difference which it is material to notice, namely: that such clearings and reclamations of new land involve a change in its character, which was not produced by the rehabilitation of the railroad. The repairs made on the latter had the effect to restore the property to its first estate and use; and the expenditures for that purpose are such as the true owner must necessarily have made, in order to have the property in the only form which its nature and uses admit of, and which the mortgage contemplated.

A leading case in Louisiana relating to clearing and reclaiming land is *Pearce v. Frantum*, decided in 1840, and reported in 16 La., 414. In that case, the defendant had settled on the land, supposing it to belong to the United States, and that he had a right of preemption to it; but it turned out to be an Indian claim under which the plaintiff's title was derived. Whether the defendant was a possessor in good or bad faith the court do not seem to have decided, and do not appear to have regarded it as material. The defendant cleared about 150 acres of the land, and put up a very ordinary dwelling on it, and some cabins. The clearing was the principal improvement; and with regard to the defendant's claim to compensation therefor, the court said: "The right of the defendant to be paid for the improvements by which the value of the premises was enhanced depends upon other provisions of law. It rests upon the broad principle of equity, that no man ought to enrich himself at the expense of another. If instead of recovering four hundred arpents of waste land, covered with heavy timber, the plaintiffs succeeded in establishing their title to that quantity, of which one hundred and fifty is ready for the plough, together with the convenience of a dwelling and a gin, the result of the industry of his adversary, he cannot justly resist the latter's claim for remuneration. If the party evicted be entitled to be paid for edifices erected on the premises, of which the successful party has taken possession, no plausible reason can be perceived

why he should lose the lasting conquest his industry has achieved over the forest."

On a reargument of the case, the court, in support of the same views, further said: "The character of Frantum's possession, his liability to restore fruits upon eviction, and his right to be paid for useful improvements, are to be determined by the provisions of the Code of 1808, and the Spanish law then in force. Admitting that the provisions of the Code itself left it doubtful whether Frantum was or was not a possessor in bad faith, in that sense which would deprive him of a right to claim for improvements, yet, the 44th law, 28th title, of the 3d Partida, appears fully to sustain the court in the position first assumed; to wit: that 'in respect to the right to be reimbursed for useful expenses, by which the property has been made more valuable to the owner, the Code makes little or no distinction between the possessor in good or bad faith.' The words of that law of the Partida are: 'Men may incur expenses on account of other persons' houses or lands, not by erecting new works there, but by making necessary repairs, or doing other things there by which the estate is benefited. In that case, we say that if such expenses were necessary, they who made them may and ought to recover them back, while in possession of the estate upon which they expended them, whether they hold in good or in bad faith; and, though the owner may evict them by a judgment of the court, they will not be obliged to deliver him the house or estate until he shall have paid the expenses incurred on account of the same.'"

The court also cites Merlin, as follows: "Merlin, after treating this subject *ex professo*, and in a manner as usual with that author, which leaves little to be said on either side, and after discussing the opinions of Cujas, Favre, and other distinguished doctors, opinions not always in harmony with each other, sums up his conclusions in the following manner. * * * We may, therefore, lay it down as a settled rule, that the proprietor who sues for an immovable (*un fonds*) never ought to enrich himself at the expense of the possessor, whether in good or in bad faith, no matter in what manner the maxim ought to be applied." *Repertoire de Jurisprudence, verbo*, Amelioration, 16 La., 431.

Quite a number of cases, which it is not necessary to quote, followed the general reasoning of this case. In *Beard v. Morancy*, 2 La. Ann., 347, decided in 1847, the court allowed a party compensation for improvements of the same kind as those in *Pearce v. Frantum*, made after judicial demand, and after judgment of eviction; holding that they were necessary improvements, and that the rule of compensation should extend to such, though not to improvements merely useful. The court say: "But there can be no doubt that the party evicted is entitled to be paid for necessary improvements. The improvements in this case were clearings, levees and ditches, without which the land could not have been brought into cultivation, so as to yield the rents and profits which the plaintiff now claims."

If the Supreme Court of Louisiana was correct in this case in holding that the ameliorations made by the defendants were necessary improvements, taking into view the fact that

the character of the property was changed thereby from its original condition, then, much more in the present case ought the improvements effected by the defendants to be regarded as necessary, resulting as they did in the restoration of the property to its original and normal state. It is for the use by the defendants of these very improvements that the complainants are seeking, in this suit, for an account of fruits and profits of the estate.

There is a series of cases, however, in which it is held by the Supreme Court of Louisiana that a person without title, going into possession of the public lands of the United States, cannot set up a claim for improvements against the government or its grantees. This was decided in *Jenkins v. Gibson*, 3 La. Ann., 203; in *Hollon v. Sapp*, 4 La. Ann., 519; and in *Jones v. Wheelis*, 4 La. Ann., 541. In *Hollon v. Sapp*, the court say expressly: "We are of opinion that this article of the Code is not applicable to materials used and labor expended in making settlements upon the national domain. No right can be acquired in relation to the public lands except under authority of Congress."

The case of *Gibson v. Hutchins*, 12 La. Ann., 545, is much relied on by the complainants, and in its general reasoning does undoubtedly overrule the doctrine of *Pearce v. Frantum*, though, as in *Jenkins v. Gibson*, *Hollon v. Sapp*, and *Jones v. Wheelis*, the title of the land was in the government when the improvements were made. The court say: "The mere possessor is presumed to have made such changes for his own amelioration, and to have received a sufficient reward in the immediate benefit which he reaps from the enhanced production of the soil. Perhaps the true owner would have preferred that the primitive forest should remain. Perhaps the ditching will not suit the purposes for which he wishes to use the land." It is evident from the reasons here given that the court regarded the change of the condition and character of the land as a material circumstance, and the suggestion is not without force, that the owner might have preferred that the original timber of the forest should not have been destroyed. The present case, as already intimated, is distinguishable from *Gibson v. Hutchins*, and others of like character, in that the character of the property is not changed by the improvements, but the property is restored to its original condition, purpose and use, and to the only condition and use which it is susceptible of, and which makes it what it is, a railroad. It is this aspect of the present case which gives to a large portion of the improvements made, the character of necessary repairs.

But the fact that the title to the land in the case of *Gibson v. Hutchins* was in the government when the improvements were made is sufficient, of itself, to place it in a different category from the present. The court, indeed, say: "He (the defendant) had no claim against the United States for improvements. He was rather indebted to the United States for the privilege of living so long undisturbed upon the public land. And the United States ceded its rights to the plaintiff's authors. They took it free from any legal demand against either the government or themselves for improvements." 12 La. Ann., 547. Reference is then made by the court to *Pearce v. Frantum*, and other cases, as being

See 9 OTTO.

overruled. But one of the grounds for overruling them is stated to be that they sustained a claim for improvements against the United States. "The overruled cases," said the court, "conceded to a settler upon the United States lands, who possessed with the hope of securing a preemption, the right of retaining the land against a vendee or patentee of the United States Government until such patentee should reimburse the settler the increased value of the property as resulting from improvements and expenses upon it during the settlement." It is true, the court adds: "We said in *Hemkin v. Overly* (a case which seems not to have been reported) that 'We are unable to recognize the doctrine that one who makes improvements upon property to which he knows he has no title has any legal or equitable claim to reimbursement for such improvements.'" But with the feature referred to, namely: the right of the government, present in the case of *Gibson v. Hutchins*, to which so much importance is given, it is impossible to regard it as a decisive authority on the general question of a possessor's right to compensation for improvements which are inseparable from the land.

It must be conceded, however, that in several subsequent cases the Supreme Court of Louisiana has used expressions indicating an intention to adhere to the general views enunciated in *Gibson v. Hutchins*, and to hold that for improvements of the kind referred to the only compensation which the maker of such improvements can claim is the benefits which he has enjoyed from the use of them. Thus, in *Cannon v. White*, 16 La. Ann., 91, the defendant having been adjudged a possessor in bad faith, the court held that he was entitled to no other claim for improvements than those stated in the first three sections of the article of the Civil Code before recited. Art. 508. The improvements consisted of a clearing of two hundred and thirty acres of land, and of certain erections on the land, costing \$5,250. The clearing was set off in compensation of the fruits and cord-wood derived from the land cleared, which, the court said, would more than compensate for the clearing made. As to the erections, the plaintiff was decreed to elect in thirty days whether he would keep them and pay for their cost, or not; if he so elected or made default, it was decreed that he should pay for them; on his refusal to retain them, the defendant was allowed to remove them in a reasonable time.

But in the case of *Stanbrough v. Wilson*, 13 La. Ann., 494, decided a year later than *Gibson v. Hutchins*, the defendant, who had purchased land at a probate sale, which was declared void and which would probably place him in the category of a possessor in bad faith, was allowed compensation for his improvements, including over \$4,000 for clearing the land, and judgment was given in his favor for a balance exceeding \$5,000, over the rent of the property.

And in the case of *D'Armand v. Pullin*, 16 La. Ann., 243, where the defendant had erected various improvements on land to which he had no just title, the court held that, under the Code, the plaintiff had the right either to keep them or to cause their removal or demolition; but also held, that by executing a lease to the defendant for a few months, after having procured an adjudication of his title, he had elect-

ed to keep the improvements, and must pay the defendant their cost.

The case of *Wilson v. Benjamin*, 26 La. Ann., 587, was decided at the same Term with *D'Armand v. Pullin* (1861), and the judgment was affirmed on a rehearing in 1874. In that case, the plaintiff, who had been a possessor in bad faith, sued for the value of his improvements; and it was held that his expenses in clearing the land should be set off in compensation for his detention thereof; and judgment was given in his favor for the value of his other improvements, consisting of erections on the land; and the court refused to charge him any rent therefor, because they were his own property.

On the whole, we should infer the prevailing doctrine of the Supreme Court of Louisiana at present to be, that for inseparable improvements on land, such as clearings, etc., made by a possessor in bad faith, he cannot recover any compensation from the owner; though he will not be accountable for the fruits derived from such improvements.

But, as before suggested, we do not think that the decisions referred to govern the present case. It is so different in its circumstances from the cases in which those decisions were made, that any attempt to carry out the spirit of the Code will require that those circumstances should be taken into consideration.

The character of the property, a railroad, so different from that of land; the character of the ameliorations made to it, partaking so nearly of that of necessary repairs; the acts and demands of the parties in this suit, wherein the plaintiffs seek possession of the ameliorations in question, and thereby, in effect, elect to retain them, and seek to charge the defendants for all the fruits and profits thereof; the fact that, at the instance of the complainants, and for their benefit, the property, with all its ameliorations, has been taken out of the defendants' hands, and placed in the hands of a receiver; the fact that the plaintiffs, in getting possession of the property, cannot but come into the enjoyment of large expenditures which the defendants have made, and which, if they had not made, the plaintiffs, or the persons who may purchase the property, would have to make, and which they are now relieved from making; the fact, in other words, that the taking of the property in its present state would make the complainants so much richer as the improvements are worth—all these things combined present a case so peculiar that we do not see how it is possible for the complainants, under any fair interpretation of the Code, to avoid allowing the defendants the value of the improvements. On the contrary, we think that the Code, interpreted according to its spirit and meaning, requires that the complainants should take the property, or rather that it should be sold, subject to the lien of the defendants for the actual expense which they have incurred in creating and putting into repair the works as they now exist, but not to exceed the actual value thereof.

We have not thought it necessary to discuss or review the commentaries on the French Code cited by both parties, except in a single instance which will be presently stated. We have examined them sufficiently to ascertain that they give us no clear light on the precise question in this case. They are not contemporaneous even on the general question of inseparable improve-

ments made to land. The references to the Roman law, even if otherwise applicable to the case, cannot be received against the positive laws of France and Spain, much less against the text of the Civil Code of Louisiana. It is this Code, and the proper meaning and effect to be given to its provisions, adopting its spirit where the letter is imperfect, that must decide the case before us. It is conceded by many French juriconsults that the Roman law of Justinian refuses any re-imbursement for improvements to a possessor in bad faith. But the French law has always been otherwise. See, Denisart, *verbo*, Ameliorations, Vol. I, p. 495, where this subject is discussed.

Cujas thought the rule for re-imbursement could be deduced from the general principle that no one ought to enrich himself by another's loss; and from the dispositions of the 38th law of the title *De Petitione Hereditatis*. Dig., lib. v. tit. iii. Pothier, expounding the old French law, says: "In our practice, it is left to the discretion of the judge to decide, according to the different circumstances, whether or not the owner ought to re-imburse the possessor in bad faith for useful expenses to the amount that the property recovered is benefited thereby." And then he distinguishes between possessors in bad faith whose acts partake of a criminal character; such as usurping an estate without any title during the long absence of the owner; and those who have taken a title which they knew was not valid, yet had some excuse for doing so; such as purchasing from a guardian, etc. The former class should receive the utmost rigor of the law; the latter should be treated with indulgence, and should receive compensation for their ameliorations to the amount they have benefited the property. Pothier, *Traité du Droit de Propriété*, sec. 350.

The Code Napoleon settled many uncertainties of the old law, and attempted to lay down a fixed rule; but, nevertheless, as we have seen, left the question of inseparable improvements somewhat at large.

Demolombe, one of the ablest commentators on this Code, in Vol. IX., sec. 639, has a very interesting article on this subject. He thinks that inseparable improvements are not provided for by 555th article of the Code; but that the question of compensation therefor is to be governed by general principles of equity, to be drawn from other sources. He instances the case of a possessor in bad faith who has drained a marsh, cleared lands, dug ditches for irrigation, or who has caused paintings to be made or paper to be placed on the walls of a mansion, or who has performed any other like work of intrinsic amelioration. And he asks: is article 555 applicable in such a case? After stating the argument on both sides of this question, he gives his own opinion in the negative. He says the article refers to works which the possessor may be compelled to remove; but such as those mentioned are not susceptible of removal; and the option given to the owner, either to keep them by payment, or to cause them to be removed, cannot be exercised. Besides, it would be a savage doctrine to hold that the possessor might in any case destroy such improvements, even though he should leave the property in its first estate. He, therefore, concludes that the specific case is unprovided for, and thinks that it is necessary to

resort to analogies deduced from similar matters and to the general principles of the law; and that a solution of the case may be found in the *quasi* contract of agency. We find here, he says, two rules of equity, both equally certain:

First. That no one ought to enrich himself at the expense of another; a rule which the law applies in the very case of the relations between the owner and possessor, even in bad faith.

Second. That a third person cannot impose upon the owner of the soil, without his authority and against his will, expenses which he would not have made himself, and which exceed his means, and for the payment of which, if forced to it, he would have to sell an estate that he would prefer to keep.

In the combination and conciliation of these two rules, he thinks, we may find the solution of the difficulty.

He then quotes to his purpose a law of the Digest (law 38, De Rei Vindicatione, Book VI., tit. i.), which he characterizes as full of good sense, equity, wisdom and practical knowledge of affairs. It is a passage from Celsus, as follows: "On another's land which you have unwittingly bought, you have builded, or made repairs; then you are evicted; a good judge will decide according to the merits of the parties, and according to the circumstances. Suppose the owner would have done the same thing, then let him re-imburse the expense, as a condition of receiving his land; but only to the amount that it is benefited. If he is poor, and cannot pay without selling his home, you should be satisfied in being permitted to remove what you can of your improvements, leaving the estate in as good condition as if they had not been made. But it has been decided that if the owner can pay what the possessor can get for them, if removed, he should have that privilege. And let nothing be done in malice; as, by defacing plaster or pictures on the walls, which could do you no good, but only result in injury. If it is the owner's intention immediately to sell the property, you will not be condemned to give it up, until he has paid what we have said he ought to pay."

Considering the possessor in bad faith as a *quasi* agent in charge, and applying these principles, we must look, says Demolombe,

First. To the *character of the possessor*; as whether he has taken a title which he knew to be invalid, but which he hoped to have confirmed; or whether he was a mere interloper, without title, taking possession in the absence of the owner.

Second. To the *character of the owner*; as whether he would himself have been able and willing to make the improvements in question; whether they would be useful to him, considering his profession, habits, etc.; and whether it was his intention to keep the property, or to offer it for sale.

Third. To the *nature of the improvements made*; as whether they have added to the income and to the actual value and salableness of the property, etc., or only to its ornamentation, etc.; also, whether the improvements have or have not been excessive and unreasonable.

The consideration of these three elements, giving due weight to each, will enable the judge to decide whether any indemnity should be given; what it should be; and how it should be

paid, whether at once or on time, whether in a capital sum or in the way of rent.

This is the substance of Demolombe's article. We can only say, that if it is a sound explication of the law of France and, therefore, of the law of Louisiana (which in this matter is exactly the same as that of France), it is in direct accord with the result to which we have been brought in this case, by the application of the principles which we suppose to be involved in article 508 of the Civil Code of Louisiana, interpreted according to its spirit and intent. If by the course of decisions in Louisiana it cannot be held to apply to the case of an ordinary immovable, it is at least applicable to such a case as that with which we are now dealing, considered in all its various circumstances.

The other points raised in the case do not present much difficulty. We shall proceed to consider those which we deem material.

First. The defendants complain that they were not allowed for the cost of those things which were consumed by them in the use, such as cross-ties, etc., which were worn out, and had to be replaced. The court below only allowed them compensation for those things which were in existence when the railroad was turned over to the receiver, in April 1875. This, it seems to us, is in strict accordance with the law. In ordinary cases of possessors in bad faith, the owner, according to article 508, has an election either to keep the constructions and works, or to require their removal. He certainly cannot keep, nor require the removal of, that which no longer exists. When he elects to keep them, as we suppose to be virtually the case here, he owes to the owner of the materials nothing but the re-imbursement of their value and of the price of workmanship. This evidently refers only to the materials which compose the things which are in existence at the time of making the election; and that time, in this case, must be deemed to be the time of the delivery of the property to the receiver, which was on the 13th of April, 1875. We think the court was right in deciding that it was the improvements then in existence, the value or cost of which was to be allowed to the defendants.

Second. The defendants complain that the full first cost of the improvements which were in existence was not credited to them in the decree; they contend that these improvements cost them at least forty per cent. more than their value at the time they were appraised by the experts, besides the sum of \$49,005, which the experts deducted for deterioration.

The experts appraised these improvements in the fall of 1875, and estimated their then cash value at the sum of \$347,361.29. It was sufficiently shown that their original cost was considerably more than this. The master, from the evidence before him, estimated and reported that the cost of materials and workmanship, was, on the whole, twenty-five per cent. more than their then value, the cost being much greater when the improvements were made than the same would be at the time of the appraisal, in consequence of the condition of the country after the war, the disturbance in labor, and the expansion of the currency. He, therefore, reported the cost at \$434,201.61. But as the experts had deducted \$49,005 for deterioration of iron rails whilst used by defendants, this sum

added would make the whole first cost \$483,206.61. The court, in its opinion, considers the allowance of twenty-five per cent. as excessive, because, whilst prices were higher when the improvements were made, so also the currency was depreciated; and the court was of opinion that fifteen per cent. additional was sufficient. This would make the first cost of the improvements equal to \$399,465.48. But the decree allows the sum of \$488,109.54, which is more than forty per cent. greater than the amount of the appraisalment. No explanation of this discrepancy has been made. It seems to be the result of some inadvertent error in making the computations.

But, in our judgment, there should be no allowance for increased cost. We have proceeded on the principle of carrying out the spirit and equity of the law, since it cannot be carried out in the letter. Now, the letter gives the owner the option of requiring the improvements to be removed. This option is a means in his hands of protecting himself if the original cost is greater than the improvements are worth. As he cannot actually exercise it in this case, it would violate the spirit of the law to allow the defendants a greater sum. We think, therefore, that the appraised value of \$347,361.61 is all that can be allowed to the defendants.

Third. As to the question of interest. On this subject there does not seem to have been any distinct adjudication by the Supreme Court of Louisiana. In all the cases which we have examined, the rents, or fruits, have been deducted from the cost of the improvements, or *vice versa*, and judgment given for the balance, without any calculation of interest on either side, except where the possessor, in exoneration of the estate, has paid money which was a lien thereon. The question of interest does not seem to have been debated. But the French jurists, who have given special attention to this subject, agree that when the owner of the land compels the unlawful possessor to account for the fruits of his improvements, the latter is entitled to interest on their value, on the principle that it would be unjust to charge him for the fruits of his own improvements without allowing him interest on their cost, provided it does not exceed the amount of such fruits; not, indeed, as interest properly so called, but as an equivalent *pro tanto* to the fruits received, in the account to be rendered thereof. They all agree, however, in saying that interest cannot be allowed beyond the amount of such fruits, and that it cannot be brought into compensation with the fruits of the original property. Demolombe on the Code Napoleon, Vol. IX., art. 679; Aubry & Rau, Droit Civ. Fr., Vol. II. sec. 204 b, p. 232 and n.; Dalloz, Vol. XXXVIII., p. 273, tit. *Propriété*, art. 429.

In the present case, the fruits were, in fact, the results of the improvements made. The property, when taken possession of by the defendants, was a ruin. They reconstructed it, and made it capable of producing what it did produce. According to the French rule, therefore, the defendants were entitled to interest on their expenditures in making the improvements in question, provided it did not exceed the fruits and profits with which they were charged. It is conceded that interest should only be charged at the rate of five per cent. per annum. The

master estimates four and a half years as the proper average time for allowing interest. In this we concur. The interest, therefore, on the whole first cost of the improvements, without deducting for deterioration, would be \$108,721.48. This should be credited against the net earnings for which the defendants are held responsible, both being in the same currency. These net earnings were found to be \$161,476.69; and deducting the said interest therefrom, the remainder is \$52,755.21, which is to be deducted from the value of the improvements. Being so deducted, the balance is \$294,606.08.

This sum, according to our view, was the amount due to the defendants at the time when they delivered the property to the receiver, and not the sum of \$391,959.42, as stated in the decree of the circuit court; which should, therefore, be reversed, with directions to be corrected in respect to the amount, as now stated; which amount, with interest at the rate of five per cent. per annum from the time of delivering the property to the receiver, should be first paid to the defendants out of the proceeds of the sale of the property, before any payment made to the bondholders. But as it may be difficult for the bondholders, or other persons purchasing the property, to raise at once the whole amount due to the defendants, the court below should direct the property to be sold subject to the lien of the defendants for said amount with interest as aforesaid, and should allow a reasonable time to the purchaser, not exceeding nine months from the day of sale, to pay the same; with a condition annexed to said sale, that if the amount due the defendants be not paid within the time so limited, a resale of the property shall be made for the purpose of satisfying said amount due the defendants, with interest as aforesaid and expenses. The court should also direct that, subject to said lien, no bid be received for a less sum than will be sufficient as a fund to defray the costs, expenses and charges arising in the cause since the former decree of this court; which costs, expenses and charges, except the costs of the defendants for attorneys', counsel, and witness fees, should be paid from said fund. The amount of said fund should be fixed by the court, and should be paid to the special master making said sale before adjudicating the property as sold to any bidder.

In view of the dispositions thus to be made in the decree, the defendants will not be concerned or interested in the accounts and transactions of the receiver; but any net earnings of the railroad, or proceeds of property, which shall have come into his hands as such receiver, after paying his expenses and compensation, will go to the benefit of the bondholders; and any deficiency of moneys in his hands to pay said expenses and compensation should be paid out of the said fund required to be paid in cash as aforesaid.

As to the costs in the court below, incurred since the former decree of this court, the defendants should be decreed to pay their own attorneys', counsel, and witness fees; and the residue of the costs, expenses and charges in the cause should be paid out of the proceeds of said sale from the fund before specified in that behalf.

We do not deem it necessary to discuss the remaining points which have been raised on

decided that the judge who pronounced the sentence was not liable for false imprisonment because he acted as a judge, such decision does not present a federal question of which this court has jurisdiction.

[No. 826.]

Submitted Apr. 28, 1879. Decided May 5, 1879.

IN ERROR to the Court of Appeals of the State of New York.

On motion to dismiss.

The case sufficiently appears in the opinion.

Mr. B. F. Tracy, for defendant in error.

Mr. Wm. Henry Arnoux, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

In *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872], we decided that the present plaintiff in error must be discharged from imprisonment, because the sentence under which he was held was not authorized by law. In the present case, the Court of Appeals of New York held that, even though such was the law; the defendant in error is not liable in damages for the false imprisonment, because in pronouncing the judgment under which the imprisonment was had he acted as a judge, in his judicial capacity, and not so entirely in excess of his jurisdiction as to make it the arbitrary and unlawful act of a private person. This is not a federal question, and it was the only question decided.

Dismissed.

TOWN OF WEYAUWEGA, *Plff. in Err.*,

v.

CHARLES H. AYLING.

(See S. C., 9 Otto, 112-119.)

Town bonds—estoppel—delivery.

1. A town in Wisconsin issuing its bonds, is estopped as against a *bona fide* holder for value, to show that the true date of the bonds was different from that named in them.

2. The town is estopped from showing, in an action on the bonds, that the town clerk, who was in office at the date of the bonds, in fact signed the bonds after he went out of office.

3. It must be assumed that the bonds were delivered to the railroad company with the assent of the clerk and, therefore, that they were issued by the proper officers of the town. If the fact was otherwise, it was incumbent on the town to make the necessary proof.

[No. 241.]

Argued Apr. 22, 1879. Decided May 5, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The defendant in error brought suit in the court below, upon certain bonds. The Judges were divided in opinion upon certain questions, of which the first was: "Whether the said Town of Weyanwega was estopped from showing the true date upon which the bonds were in fact signed by the said C. A. Verke."

The case further appears in the opinion of the court.

Messrs. Wm. P. Lynde and **H. M. Finch**, for plaintiff in error.

Messrs. Edwin H. Abbot and **L. L. Dixon**, for defendant in error.

470

Mr. Chief Justice Waite delivered the opinion of the court:

The first question certified in this case is answered in the affirmative. The legal voters of the Town, by a vote duly taken pursuant to statutory authority for that purpose, directed the issue of the negotiable bonds in controversy. As soon as this vote was given, it became the duty of the chairman of the Board of Supervisors and the clerk of the Town to cause the bonds to be made out and delivered to the railroad company. Such was the requirement of the statute under which the vote of the Town was taken. The designated officers had no discretion in the premises.

After the vote, an appropriate form of bond and coupons was lithographed and printed, with blanks in the bond for the signatures of the chairman and clerk. As printed, the bonds bore date June 1, 1871. At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of the Town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of a new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those which had been printed. These bonds so signed by Verke and by Fenelon, who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds to which the coupons sued on were attached, and paid their full value without notice of any claim of defense to their due execution. Under these circumstances, we think the Town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself on inquiry when he made his purchase he would have found: (1) that the Town had authority to vote the bonds, (2) that the necessary vote had been given; (3) that at the date of the bonds Verke was clerk and Fenelon chairman; (4) that their signatures were genuine; and (5) that the bonds had actually been delivered to the railroad company by Fenelon, who was at the time chairman. If a bank puts out a note for circulation bearing the signature of one who was, in fact, president of the bank when the note bore date, no one will pretend that it could be shown as a defense to the note when sued upon by a *bona fide* holder, that the signature of the person purporting to be president was affixed after he went out of office. So if one puts out a note purporting to be signed by himself, but which was in fact signed by another having at the time no authority from him, he cannot prove the forgery or want of authority in the signer as against a *bona fide* holder. The reason is obvious. The bank by issuing the note, and the individual by delivering the paper which purported to be his obligation, adopted what they thus put out as their own, and became bound accordingly.

The same principle applies in this case. There is no pretense that the obligation of these bonds is other or different from that authorized by the voters. So far as the record shows, the Town has received and retains the consideration for which they were voted. No bad faith is imputed to anyone. It is true the chairman alone

99 U. S.

made the actual delivery to the railroad company; but the presumption is, that what he did was assented to by the clerk in office at the time. Certainly it could not have been contemplated that, to make a binding obligation, both the chairman and clerk must have been present when the delivery to the railroad company was made; and as the presumption always is, in the absence of anything to the contrary, that a public officer while acting in his official capacity is performing his duty, it must be assumed for all the purposes of this case that the bonds were delivered to the railroad company by the chairman with the assent of the clerk and, therefore, that they were issued as negotiable instruments by the proper officers of the Town. If the fact was otherwise, it was incumbent on the Town to make the necessary proof.

It is unnecessary to answer any of the other questions certified, further than has already been done. The answer to the first question is decisive of the case.

Judgment affirmed.

Cited—101 U. S., 699.

GEORGE W. ATWOOD ET AL., *Plffs. in Err.*,
v.

FANNY E. WEEMS, as EXRX. of FRANCIS M.
WEEMS and in her own right, ET AL.

(See S. C., 9 Otto, 183-188.)

Oath to jurors—devise of lands contracted—void sale for taxes—effect of offer to pay taxes.

*1. The right, under sec. 821 of the Revised Statutes, to require the panel of the jurors called to serve for a term to take the oath therein prescribed, or to be discharged from the panel, is limited to the district attorney, and is not a right of individual suitors in a case about to be tried.

2. A testator in whom was the legal title to real estate, which he had sold by a written contract, can transfer by his will, both the legal title of the land and the notes given for its purchase, and the devisee will stand towards the purchaser in the same position that the testator did.

3. The cases of *Bennett v. Hunter*, and *Tracey v. Irwin*, re-affirmed, holding that a sale for direct taxes under the Act of 1862 is void, where the owner or some one for him, offered to pay, was ready to pay before the sale, and was told payment would not be accepted; that such offer to pay, made to a clerk of the Board of Commissioners at their office, who was authorized by them to receive delinquent taxes generally, was sufficient.

[No. 236.]

Submitted Apr. 18, 1879. Decided May, 5, 1879.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida. The case is fully stated by the court.

Mr. H. Bisbee, Jr., for plaintiffs in error.
Mr. James M. Baker, for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

This is an action of ejectment for a lot in St. Augustine, brought in the proper court of

*Head notes by Mr. Justice MILLER.

NOTE.—*Direct taxes.* See note to Scholey v. Rew, 90 U. S., XXIII., 99.

See 9 OTTO.

the State of Florida, and transferred into the Circuit Court of the United States for that district, where the plaintiffs below recovered a judgment against the plaintiffs in error, which we are called on to review. The questions to be decided are all raised by a bill of exceptions.

1. It appears "That the defendants moved the court that the jurors of the panel be required to answer upon oath whether or not they had given aid and comfort to, or aided and abetted, the late rebellion against the Government of the United States, within the true sense and meaning of section 820 of the Revised Statutes, for the purpose of exercising the right of challenging them, if they came within its provisions." The court denied the motion, on the ground that said section was unconstitutional.

We have just decided in *Burt v. Panjaud*, [ante, 451], from the same circuit, that a man cannot be compelled to answer this question when put to him separately in reference to the right of challenge for the disqualification prescribed by that section and that, to enable a party to avail himself of the right there given, he must prove by other evidence, if the proposed juror declines to give it, that he has been guilty of the offenses which so disqualify him.

But section 821 authorizes such an oath to be tendered to the whole panel, at the instance of the district attorney or his representative. This, however, must be at the beginning of the term, and relates to service on the panel for the term. The right to tender the oath is discretionary with the attorney for the government, and belongs to no one else.

It is not a right, therefore, in a party to a civil suit to tender such oath in that suit. Section 821 does not require the panel, or anyone on it, to take the oath or to take a general oath to answer questions touching his qualifications, but provides expressly for his declining to take the prescribed oath. This act of declining of itself disqualifies him as a member of the panel for that term. This right to decline to swear confirms what we have said in *Burt v. Panjaud*, namely: that it was not intended to compel the proposed juror to disclose on oath his own guilt. Since, therefore, the defendant had no right to challenge the entire panel, as the district attorney might have done at the beginning of the term, nor to require each member of it to testify as to his guilt or innocence of treason, and since he offered no evidence that any one of them was so disqualified, the court was right in overruling his motion.

The Judge's declaration of opinion that the law was unconstitutional did not make his action erroneous when it was right on other grounds.

2. The next question arises out of the construction of the will of Francis M. Weems, under which plaintiffs claimed title.

The will is in the record, and is dated September 25, 1865, and conveys a lot in St. Augustine, three notes due from J. H. Meyers for \$500, each given for the purchase of a lot in St. Augustine, and all his other property, to his wife and three sons, who are the plaintiffs. A written agreement, made in 1860 by Francis M. Weems, for the sale of this lot to J. H. Meyers, is offered in evidence, with proof that Meyers had taken possession under it. The court was asked to instruct the jury that the will did

not convey the title to the lot, but only the notes of Meyers; and that, if it was designed to convey the title, it was void, by reason of the adverse possession of defendants. The court refused to do this, and said that the failure to pay the notes gave to the testator, Weems, a right of entry which passed by the will.

It is clear that the contract with Meyers left the legal title in Weems. This legal title passed by the will as well as the notes; and though it may have been the desire of the testator to recognize the contract for the sale, it was necessary, to enable the devisees and the executor to enforce the collection of the notes, that the title should be in them also. They could then either tender a deed and demand payment, or assert their right of entry for failure of the purchaser to pay.

It is not necessary to decide here whether by the common law a testator having the legal title and right of entry of land in the adverse possession of another could make a valid devise of the title, or whether, if that be the common law, it was the law of Florida; for it appears both by the will itself and by other evidence in the record that the plaintiffs are heirs as well as devisees of Francis M. Weems, and if the will did not convey the title, it was theirs by inheritance.

3. Defendants produced in evidence a certificate of sale of this lot for taxes made by commissioners appointed under the Act of June 5, 1862, for the collection of direct taxes in insurrectionary districts within the United States, to Adolph Mayer, and an assignment from Mayer to Anna M. Atwood, one of the defendants, and possession under that certificate. In avoidance of this certificate, plaintiffs introduced evidence tending to prove that the sale was not advertised as long as the law required, and also that before the sale plaintiff's intestate offered to pay the taxes and costs, which the commissioners refused to receive.

The evidence on this last point, which is without contradiction, is, that the commissioners had determined that no taxes could be lawfully paid, after the advertisement of the sale, by anyone else but the owner of the property; and that, under this view of the matter, the clerk of the Board of Commissioners, who had charge of the office at St. Augustine, twice peremptorily refused to receive the tax due from Weems on this lot.

One offer to pay was made by Amos Corbitt, who was in possession of the lot under J. H. Meyers, the purchaser from Weems, and the other by Christoval Bravo, an agent authorized by Weems to do so. To Corbitt, the clerk said he would take the money from no one but the owner, and he might as well talk of paying tax for Jeff. Davis.

In the case of *Bennett v. Hunter*, 9 Wall., 326 [76 U. S., XIX., 672], and *Tacey v. Irwin*, 18 Wall., 549 [85 U. S., XXI., 786], we decided this very question. In the former case, the tax was offered by a tenant of the owner and refused, and we held the sale void; and further, that said payment could be made by any friend or agent of the owner, whose act he recognized. The case of *Tacey v. Irwin* went further, and held that neither payment nor actual tender was indispensable, but that a refusal to receive the taxes rendered a manual tender unnecessary. If the party offered to pay, was ready to pay,

and was told it would not be accepted, it defeated the sale as much as payment.

Some attempt is made to show that Dunham, the clerk, to whom Corbitt and Bravo applied, was not authorized to receive taxes, and that they could only have been lawfully paid or tendered to the commissioners in person at Fernandina.

But it appears, by the testimony of the commissioners themselves, that they had an office at St. Augustine as well as at Fernandina; that Dunham, their clerk at the former place, was authorized to receive, and did receive, the taxes which were payable there, and that all the money received for taxes at that place was paid to him. Of their right to authorize him to act for them in the receipt of taxes we have no doubt, and that his refusal to receive these taxes, which was under instructions from them, was the same as if they had done it in person.

The sale, therefore, was void. Payment of the taxes is one of the matters which, by the express terms of section 7 of the amendatory Act of 1862, may be shown to avoid the certificate; and in the cases cited we have held that an offer to pay, and refusal to receive, had the same effect. The error of the Judge concerning the length of the advertisement of the sale, which is not one of the matters that will avoid the certificate under that section, was immaterial, as it was clearly void, for the reason we have just stated.

We see no error in the judgment and it is, therefore, affirmed.

Mr. Justice Field, concurring:

I agree with my associates that the jurors summoned in this case could not be required to make oath whether they had participated in, or given aid and comfort to, the late rebellion against the Government of the United States. And I also agree with the court below as to the unconstitutionality of the Act which excludes from the jury persons who decline to take such oath.

Undoubtedly, Congress may prescribe the qualifications of jurors in the Federal Courts, and declare the causes of disqualification and challenge. But if any of these causes be the commission of an act which the law has made a public offense, it is not competent for the court to go into an investigation to determine the guilt or innocence of the juror. That is to be ascertained only in one way: by a separate trial of the party upon an indictment for the offense, and the only competent evidence in such case is the record of his conviction or acquittal. It would be a strange and unprecedented thing for a court, upon the challenge of a juror, to go into a side trial, whether he had committed a felony, such as highway robbery, arson or murder. No one would contend that such a procedure is admissible; and if not in those cases, it is not admissible in any case where the commission of a public offense is the ground of challenge.

The court may take judicial notice, from the existence of war, that a whole People are public enemies; but it cannot take judicial notice that a whole People, or individuals of it, have violated the municipal laws of the country. If such violation be relied upon to exclude a person from becoming a witness or a juror, it must

be shown, not by evidence of what others may have seen or heard, but by the record of the party's conviction.

Cited—105 U. S., 321; 106 U. S., 200.

GEORGE A. KETCHUM, *Plff. in Err.*,

v.

GEORGE W. BUCKLEY.

(See S. C., 9 Otto, 188-191.)

Rebellion, effect of on law of the States—Military Governor.

1. During the late civil war the same general form of government and the same general law for the administration of justice and the protection of private rights which had existed in the States prior to the rebellion, remained during its continuance and afterwards.

2. The appointment by the President of a Military Governor for the State at the close of hostilities, did not, of itself, change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf.

[No. 766.]

Submitted Apr. 23, 1879. Decided May 5, 1879.

IN ERROR to the Supreme Court of the State of Alabama.

On motion to dismiss, with which was united, under Rule 6, a motion to affirm.

Judgment was given in the Circuit Court of Mobile County, Ala., against the plaintiffs in error, upon the bond of McGuire as general administrator. The judgment was affirmed by the Supreme Court of the State; whereupon they sued out this writ of error.

Mr. Thomas H. Price, for defendant in error.

Messrs. P. Phillips and E. S. Dargan, for plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We are not willing to hear an argument on the only possible federal question presented by this case. It is now settled law in this court that during the late civil war "The same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the Acts of the States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding." *Williams v. Bruffy*, 96 U. S., 176 [XXIV., 716]; *Horn v. Lockhart*, 17 Wall., 570 [84 U. S., XXI., 657]; *Sprott v. U. S.*, 20 Wall., 459 [87 U. S., XXII., 371]; *Texas v. White*, 7 Wall., 700 [74 U. S., XIX., 227]. The appointment by the President of a Military Governor for the State at the close of hostilities did not, of itself, change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf. It is not

See 9 OTTO.

alleged that the Governor after his appointment undertook by any positive act to remove McGuire from the position he occupied as general administrator, or that McGuire himself at any time ceased to perform the duties of his office by reason of what was done by the President or others towards the restoration of the State to its political rights under the Constitution of the United States. From all that appears in the record, he continued to act during the whole of his term as general administrator of the county, notwithstanding the changes that were going on in the other departments of the State Government. Under these circumstances, it is so clear that the judgment of the court below was right, that we grant the motion to affirm.

Affirmed.

THOMAS J. PHELPS, Assignee, *Appt.*,

v.

AUGUSTINE R. McDONALD ET AL.

(See S. C., 9 Otto, 298-309.)

Sale of bankrupt's claim against foreign government—suits by assignee—powers of court of equity.

1. A claim against a foreign government, vaguely described in the schedule of a bankrupt's assets, and denominated worthless, does not pass on a general sale of his accounts, notes and judgments to a purchaser of the same for the benefit of the bankrupt with money furnished by him, where the price paid was a mere nominal sum, and the claim was largely valuable.

2. The provision of the Bankrupt Law, which requires that all suits by or against the assignee should be brought within two years from the time the cause of action accrued, relates to suits by or against the assignee with respect to parties other than the bankrupt; in a suit against the bankrupt it has no application.

3. A claim of a bankrupt against a foreign government passes to his assignee in bankruptcy.

4. Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal; it has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

[No. 254.]

Argued Apr. 25, 1879. Decided May 5, 1879.

APPEAL from the Supreme Court of the District of Columbia.

McDonald was adjudged a bankrupt, and his assets sold in the ordinary proceedings in bankruptcy in 1869. The claim here in question was sold for \$20, and the purchaser transferred it back to McDonald. Subsequently McDonald, being a British subject, although long resident in this country, prosecuted said claim before the joint British and American Commissioner under the Treaty of May 8, 1871, and obtained an adjudication in his favor of \$197,190. The appellant thereupon filed the bill in this case in the court below, to obtain the proceeds of said claim for the creditors of the bankrupt.

The case further appears in the opinion.

Messrs. F. P. Stanton, Jno. D. McPherson and Geo. F. Appleby, for appellant :

It is not necessary to the character of the claim that it should be one capable of enforcement by legal proceedings. A claim upon the

justice of a foreign nation or of the Congress of the United States, passes by proceedings in bankruptcy.

Comegys v. Vasse, 1 Pet., 193; *Clark v. Clark*, 17 How., 315 (58 U. S., XV., 77); *Milnor v. Metz*, 16 Pet., 221; *Sheppard v. Taylor*, 5 Pet., 707; *Prevall v. Bache*, 14 Pet., 95.

The authorities above cited, which show that a claim against foreign powers, passed by bankrupt proceedings from the claimant to his assignee, conclusively show that the claim is the property of the injured person, and not of his government.

The learned Judge, in his opinion, objects that the bill does not charge a fraudulent motive as to the statement of this item in the schedule, but only "that it was calculated to mislead as to its value." We submit that this is virtually a charge of fraud. The circumstances which constitute the fraud are most distinctly stated, although they are not actually characterized and stigmatized by the potential word, fraudulent. This is sufficient, we think, and brings the case directly within the principle of the case of *Clark v. Clark* (*supra*), and sufficient to cause for that reason the overruling of any demurrer.

Adams, Eq., 336, in note.

Messrs. **W. A. Cook** and **C. C. Cole**, for appellees:

There was no concealment by Mr. McDonald of the condition or supposed value of the claim to bring the case within the principle of *Clark v. Clark* (*supra*).

At the time of the sale by the assignee and purchase by White of this claim, it was worthless, having only a possibility of a value.

The Supreme Court for the District of Columbia had no jurisdiction of the subject matter of the suit. The fund was under the control of the British Government to be distributed. The decree of any court in this country could not operate upon that fund.

Treaty of 1871, art. XII.; *Sto. Eq. Pl.*, sec. 489.

This fund should be considered as situated in England, and the assignment in bankruptcy did not pass the title to the assignee.

Oakley v. Bennett, 11 How., 33; *Law. Wheat.* 2d ed., 162, 163; *Perry v. Barry*, 1 Cranch (C. C.), 204; *Blane v. Drummond*, 1 Brock., 62; *Hunt v. Jackson*, 5 Blatchf., 349.

The fund being in a foreign jurisdiction, the Supreme Court for the District of Columbia could have no jurisdiction, except on the ground of fraud, trust or contract, and neither is alleged in the bill.

Blake's Case, 1 Cox, 398; *Penn v. Baltimore*, 1 Ves., 444; *Massie v. Watts*, 6 Cranch, 148.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity from the Supreme Court of the District of Columbia. The case was decided in that court upon a demurrer to the bill and amended bill of the complainant. The demurrer was sustained and the bills were dismissed. The complainant is the appellant, and the action of the court below is brought before us for review.

The demurrer admits the facts alleged. The question is only as to their sufficiency to entitle the appellant to the relief which he seeks.

Without reproducing the case in detail as it is in the record, we shall address ourselves to the salient points which it presents for our consideration.

A chose in an action lies at the foundation of the controversy. It is thus described by McDonald in the schedule of his assets filed with his petition in bankruptcy: "Claim against Gen. Osborne, of U. S. Army, and others, for burning, in January or February, 1865, from 1,000 to 2,000 bales of my cotton in Arkansas and Louisiana."

The late Bankrupt Law provided that as soon as an assignee was appointed, the judge or register should convey to him "All the estate, real and personal, of the bankrupt." R. S., sec. 5044. And that there should vest in the assignee, among other things, all the bankrupt's "Rights of action for property, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention or injury to" his property.

Comegys v. Vasse, 1 Pet., 195, has an important bearing upon this case. That case arose under the Bankrupt Law of April 4, 1800. 2 Stat. at L., 19. The 5th and 6th sections authorized the commissioners to convey to the assignees "All the real and personal estate, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever."

Under this Act, Vasse was declared a bankrupt and received his certificate of discharge. He had been an underwriter, and as such received from those whom he had insured and indemnified assignments of their claims against France, Great Britain and Spain. In his return of his effects to the commissioners, pursuant to the statute, he named the claims against France and England, but not the claim against Spain. The omission was supposed to have been honestly made, because there was then not the slightest *spes recuperandi*, with respect to that country. The claim was regarded as hopelessly worthless.

More than twenty years later, under a Treaty between Spain and the United States, an award was made for its payment. There as here, the money was demanded by the bankrupt and by his assignees, and the same lines of argument to which we have listened in this case were pursued by the counsel in that case with consummate learning and ability. The judgment of the court was delivered by *Mr. Justice Story*. It sustained the demand in behalf of the creditors, and is exhaustive and conclusive.

It is needless for us in this case to go over the same field of discussion. A few remarks, however, grounded chiefly upon that authority will not be out of place. It will be observed that the claim against Spain, and the claim against the United States, here in question, rested upon the same foundation, and that each was surrounded by like circumstances.

There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly

upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. It is but a short time since our government could be sued, and it can be done now only under the special circumstances defined by the statute. It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. Nor has an adverse decision any final effect. If the demand be just, and recognized as valid by the law of nations, the claimant or his government, if the latter choose to do so, may still press it upon the attention of the alien government.

If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category. *Erwin v. U. S.*, not yet reported, 97 U. S., 392 [XXIV., 1065]. The register's deed in this case bears date on the 12th of February, 1869. The title then became vested in the appellant. Thereupon he stood in the place of McDonald, and was clothed with all the rights which had belonged to the bankrupt before he became such. On the 25th of September, 1873, within less than five years after the assignment, an award was made by the mixed commission, sitting under the Treaty between the United States and Great Britain, for the payment of \$187,190 in satisfaction of the claim.

In the light of these considerations, it would be sheer fatuity to deny the substantial character and value of the claim at the time of the transfer by the register's deed.

But it is insisted that the alleged sale under the order of the district court divested the title of the assignee.

According to the bill, the order was to sell "certain accounts, notes, judgments," etc. The exhibit referred to as containing "copies of the petition, order and report of the sale" is not in the record. Whether the order was broad enough to include the claim in question, and whether the report showed that it was sold, are questions which, in the state of the record as it is before us, we are unable to determine. Doubts in such cases are to be resolved against the pleader. But if the affirmative be conceded, as to both these points, a fatal objection still remains. McDonald went into voluntary bankruptcy. His petition did not disclose that he was a British subject. We have given the description of the claim in the schedule filed with his petition. It was brief and vague, and gave no definite information. In a duplicate schedule filed with the register he pronounced it "*worthless*." In assigning to him exempted property, the register and assignee unite in saying: "No other exemptions made, because there are no assets, except some old claims which upon their face called for large amounts, and upon inquiry I find them totally or entirely worthless." He failed to make known that he bought the cotton under a permit from the Treasury Department, accompanied with an order from the

President directing the officers of the army and navy to aid him in getting it beyond the lines of the insurgent territory, and that it was lost to him by reason of a sudden and unexpected change in the legislation of Congress, thus creating as strong an equity in his favor against the United States as could well exist.

His memorial to the mixed commission was sworn to on the 25th of November, 1871. In that document his losses are stated with fullness and particularity. It is in striking contrast with the meagerness of the schedules. When there had been a transfer of the claim, the rules of the commission provided that "the mode and manner of such transfer must be stated." The memorial was silent upon this subject. This asset—soon to realize nearly \$200,000—was sold for \$20! The amended bill avers, and the demurrer admits, that "The said White at the sale of assets in the bill mentioned purchased the same at the request of said McDonald, and with money furnished by him."

Such is the case touching the point in hand, as it is presented by the demurrer of the appellees to the allegations of the complainant. Considering the sale in the light of this showing, we cannot hesitate to hold it invalid. We are not unmindful that the question may come again before the lower court and, perhaps, before this court, upon the answers of the appellees and the testimony adduced by the parties, and that it may then be the hinge of the controversy. It is our purpose in such case to leave both courts unfettered by anything in this opinion, and in all respects as free to decide, one way or the other, as if the subject had not been before considered by either tribunal.

The Bankrupt Law required that all suits by or against the assignee should be brought within two years from the time the cause of action accrued. R. S., p. 982, sec. 5057.

But this provision relates to suits by or against the assignee with respect to parties other than the bankrupt. In a case like this it has no application. If this were otherwise, the cause of action here did not accrue until the award was made and McDonald set up a claim to the fund awarded. *Clark v. Clark*, 17 How., 315 [58 U. S., XV., 77].

Lastly, it is said that the suit is in effect a suit against the British Government, and that hence the court below had no jurisdiction of the case.

In *Clark v. Clark* [*supra*], where the contest was between the bankrupt and his assignee, touching a fund in the treasury derived from a foreign government, the Secretary, though not a party, was enjoined from paying it over until the rights of the contestants were settled in the suit then pending.

In *Milnor v. Metz*, 16 Pet., 221, also, the fund in controversy was in the Treasury. The Secretary refused to recognize the claim of either party, and left them to adjust the conflict by a judicial determination. The contest was ended by a decree in the court below, which was affirmed by this court, perpetually enjoining one of the parties from receiving the money.

This objection assumes facts which have no existence. The British Government is in no-wise, either in form or substance, a party to the record, and no final or coercive judicial action is sought except with respect to McDonald and

White. In the progress of the case below, George W. Riggs, Esq., was appointed receiver, with authority to collect the fund. Of course he could do nothing without the voluntary concurrence of the just and eminent British agent who was in possession. By consent of parties the fund was delivered to the receiver, and in the final decree brought here for review he was directed to pay it over to the appellees, less certain charges and expenses incurred in procuring the award, and he was thereupon to be discharged from his office. We have heard no objection from any quarter to the placing of the fund in the hands of the receiver. Certainly, none has been suggested in behalf of the sovereignty whose rights are said to have been invaded.

But suppose, as has been suggested, that the money were in the British exchequer, at the seat of the home government; still the court below acquired jurisdiction of the parties and of the cause, and had an important duty to perform.

Such commissions as that which made the award here in question usually decide only as to the validity of the claim and the amount to be paid. It is rarely, if ever, within their jurisdiction to decide to whom the claim belongs, and hence is entitled to receive the money. They have no means of compelling the attendance of parties or witnesses, no rules of pleading or procedure applicable to such a case, and the foreign element in the tribunal, at least, cannot be supposed to have any knowledge of the law according to which the question is to be determined. The validity of the claim depends upon the law of nations; its ownership, upon the local jurisprudence where the transfer is alleged to have been made.

Hence, *Comegys v. Vasse, Clark v. Clark* [*supra*], and other like cases have arisen, involving conflicting claims to the fund awarded, and nothing else.

In this case, whether the money be here or abroad, the assignee is entitled to have the question finally settled whether he or McDonald has the better right. This court has twice decided that a British subject can sue the United States in the Court of Claims, because an American citizen is permitted to sue the British Government by a petition of right. The Act of Congress creating the court requires reciprocity. *U. S. v. O'Keefe*, 11 Wall., 178 [78 U. S., XX., 131]; *Carlisle v. U. S.*, 16 Wall., 147 [83 U. S., XXI., 426].

If the claim of the assignee were presented to the British Government by a petition of right, and the claim of McDonald were also presented, the parties, in the absence of any judicial determination, would, doubtless, be required to settle their controversy by interpleading, or in some other appropriate form of litigation. If the appellant shall be finally successful in this case, and the record should be presented with his petition, no such question could arise, and judgment in his favor must necessarily follow. Conceding the fund to be there, why should not this question of paramount right be settled in this case, rather than that the American claimant should be subjected to the delay, expense and other inconveniences of a suit before a foreign tribunal? The adjudication would be as binding in one case as in the other.

Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond its territorial jurisdiction. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree *in personam*, according to those equities, and enforce obedience to their decrees by process *in personam*. 2 Story, Eq., sec. 899; *Miller v. Sherry*, 2 Wall., 249 [69 U. S., XVII., 830]; *Penn v. Ld. Baltimore*, 1 Ves., Sr., 444; *Mitchell v. Bunch*, 2 Paige, 606.

The decree of the court below is reversed and the cause is remanded, with directions to proceed in conformity to this opinion.

Mr. Justice Miller, dissenting:

The Treaty under which the award was made, which is the subject-matter of this suit, provides for the payment to Great Britain of claims for injury to British subjects, and the award in this case in express terms orders the money to be paid to the agent of that government in this country. The case of *Comegys v. Vasse* and *Clark v. Clark*, cited in the opinion, are cases of awards made in favor of the United States for the use of *her* citizens.

While the money so awarded is properly a fund within the jurisdiction of our courts, as are also our own citizens, I do not think those courts have any control over the British Government or its agents in the distribution of the fund awarded to them.

It does not appear from anything in the record, as I read it, that the fund in controversy has ever been voluntarily paid into court by the agent of that government. It is an indelicate attempt by the courts of this country to seize *in transitu*, for its own citizens, what by Treaty this government has agreed to pay to another government for its subject.

I, therefore, dissent from the judgment of the court, and my brother **Field** concurs with me in the matter.

Cited—109 U. S., 663; 29 Hun, 284; 96 Ill., 31.

JAMES W. DENVER ET AL., *Appts.*,
v.

ARCHIBALD ROANE, *Exr.* of JAMES
HUGHES, Deceased.

(See S. C., 9 Otto, 355-361.)

Duty of partners—compensation for settling business—violation of agreement.

1. Every partner is under obligation to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, without any rewards or compensation, unless there be an express stipulation for compensation.

2. Where there is no stipulation in the partnership agreement, for compensation to a surviving partner for settling up the partnership business, he is entitled to no compensation.

3. He who acts so as to treat the articles of co-partnership as a nullity as it regards his own obligations, cannot complain if they are so treated for all purposes.

[No. 240.]

Argued Apr. 22, 1879. Decided May 5, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The case is fully stated by the court.

Messrs. Albert Pike, R. W. Johnson, Luther H. Pike and J. W. Denver, for appellants.

Messrs. S. S. Henkle, J. H. Bradley, and Archibald Roane, in person, for appellee.

Mr. Justice Strong delivered the opinion of the court:

The bill filed in this case was not an ordinary bill for the settlement of partnership accounts. James Hughes, the complainant's testator, and James W. Denver and Charles F. Peck were in partnership as attorneys and counselors at law from 1866 until the 18th of March, 1869. On that day it was agreed between them, virtually, that the general partnership should terminate; that thereafter no new business should be received in partnership, and that any coming to the firm through the mails should be equitably divided. The agreement, however, contained a stipulation that the business of the firm theretofore received and then in hand should be closed up as rapidly as possible by the members of the firm "*as partners under their original terms of association and in the firm name.*"

Soon after, on the 13th of August, 1869, a further agreement was made to the effect that in case of the death of any one of the partners, his heirs or personal representatives, or their duly authorized agent, should receive one third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases. Denver acceded to this second agreement, with the understanding that before any such division should be made, at any time, all partnership obligations should be first satisfied, proposing no new terms, only stating the legal effect. We think this was a closed contract.

It is upon these two agreements the bill is founded. Mr. Hughes died on the 21st of October, 1873, and Roane, the executor of his will, has brought the present suit for a discovery, and to recover from the surviving partners the share of the testator in the fees received by them out of the partnership business which remained unfinished when the general partnership was dissolved. A decree having been entered against the defendants in the court below, they have appealed to this court, and have assigned numerous errors. Of most of them it will be necessary to say but little and, indeed, in regard to most of them there has been hardly any controversy between the parties during the argument.

It is first insisted by the appellants that the court below had no competency or jurisdiction to entertain a bill for such relief as is prayed for, nor to give such a decree as the court gave, whereby it attempts to settle and close the affairs of a partnership by decreeing specific sums as legally due, and if so demandable at law, and providing for the further continuance of the partnership and collection by virtue of its decree of other like sums until the business of the partnership may end. Such is the first assignment of error. The objection misapprehends

the nature of the case made by the bill, overlooks the facts, and does not state accurately the decree. That a bill in equity may be maintained by the personal representatives of a deceased partner against the survivors to compel an account, so far as an account is possible, and for a discovery of the partnership property which came to their hands, is undeniable, and such was the object of the present bill. When the firm was dissolved in March, 1869, for general purposes, the agreement of dissolution stipulated that, as to the business then in hand, the members of the firm should continue partners, and should close it up. What that business was, the present defendants only could know, after the death of Hughes, for it was then left in their hands, and they only could know what fees had been received on account of it. A bill for discovery, as well as for distribution of the fees received, was, therefore, plainly within the province of a court of equity. And as the partners had agreed, as they did by the agreement of August, 1869, to divide those fees in certain proportions, it was quite competent for the court to enforce fulfillment of the contract, so far as was possible when the decree was made. The court did not attempt to make a complete settlement of the affairs of the partnership. In the nature of the case that was impossible. Some of the partnership business remained unfinished, and fees uncertain in amount were yet to be collected. But so far as fees had been collected, the right to immediate distribution was complete. The agreement did not contemplate that all the fees collected might be held by the surviving partners until all the partnership business should be brought to an end, and it was, therefore, quite proper to reserve consideration of the fees yet to be received after they shall have been earned.

An objection raised by several other assignments of error (particularly the 6th, 7th, 8th, 9th, 18th and 19th) is, in substance, that the court erred in applying to a partnership between lawyers and claim agents the principles of the law of commercial partnerships, in regard to the modes of settlement of the same after the death of a partner, and in regard to the neglect of the business of such a firm by a partner; that, by the decree, no compensation is allowed to the survivors for carrying on the unfinished business, but that they are required to continue it as well for themselves as for the benefit of the deceased partner's estate. We think these objections to the decree ought not to be sustained. We are not convinced that during his life Mr. Hughes (except, perhaps, in reference to a single case in charge of the firm) was guilty of such neglect, or violation of his duty to his partners, as should deprive him or his personal representative of a right to share in the profits of the partnership. In regard to the work done and the fees received after his death, the parties, by their agreements, prescribed the rule for determining their rights as against each other. Having jointly undertaken the business intrusted to the partnership, all the parties were under obligation to conduct it to the end. This duty they owed to the clients and to each other. And as to the unfinished business remaining with the firm on the 18th day of March, 1869, the duty continued. The agreement provided for that. Now, in reference to this duty the law is clear. "As

there is an implied obligation on every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it follows that he must do it without any rewards or compensation, unless there be an express stipulation for compensation." Story, Part., secs. 182, 331; *Caldwell v. Leiber*, 7 Paige, 483. So it is held that where partnerships are equal, as was true in the present case, and there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to no compensation. *Brown v. McFarland*, 41 Pa., 129; *Beatty v. Wray*, 19 Pa., 516; *Johnson v. Hartshorne*, 52 N. Y., 173. This is the rule in regard to what are commonly called commercial partnerships, and the authorities cited refer to those. There may possibly be some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor. No adjudicated cases, however, with which we are acquainted, recognize any such distinction. And in the present case, as we have said, the parties made arrangements for the work and results of work after the death of any of their number. The agreement of Aug. 13, 1869, provided that in case of the death of any partner, one third of the fees in cases nearly finished, and one quarter of the fees in other partnership cases, should belong to the representatives of the decedent. Of course, it was contemplated that the surviving partners should finish the work, and that no allowance should be made to them beyond the share of the fees specified in the agreement.

The most important objection to the decree which has been urged by the appellant is that it adjudged to the complainant one third of the fee collected by the defendants in the case of *Gazaway B. Lamar* against *The United States*, including the claim of D. A. Martin. That case was in charge of the firm before the agreement of March 18, 1869, was made, and was commenced in 1868. It was, therefore, one of the cases within the purview of the agreement of Aug. 13, 1869. Mr. Hughes' name appeared on the record as attorney and counsel with the appellants for the claimant. But on the 9th of January, 1873, he came into court and asked that his name be erased as such attorney, and that he have leave to withdraw his appearance and sever his connection with the cause. His motion was allowed, and his appearance was then withdrawn. The appellants, however, went on with the case. Briefs were filed for the claimant on the 21st of March and the 22d of April, 1873, the case was argued on the 20th of May, and on the 2d of June next following the court entered a judgment for the claimant. An appeal was then taken to this court, which was subsequently dismissed. After the withdrawal of his appearance and the severance of his connection with the cause, Mr. Hughes took no part in prosecuting the claim, neither in the Court of Claims nor in the Supreme Court, and he paid no attention to it. He quarreled with Lamar, and about the time he withdrew from the cause he denounced the claim privately to one of the Judges of the Court of Claims as altogether without merit and a fraudulent case,

or words to that effect, and said that he had decided not to be involved in a case of so scandalous a character, and for so worthless or unworthy a client. In regard to the question of fees in the case, the Judge testifies, "He declined to have any interest in the case, or to take fees, because he believed the case was a corrupt one, and not likely to succeed, and that he would not lose much by his withdrawal from the case."

The question presented by this state of facts is, whether, inasmuch as the case was afterwards conducted by the appellants to final success, and they received a fee from Mr. Lamar, the claimant, Mr. Hughes would be entitled to any part of the fee, were he now living. If not, certainly his personal representative cannot be now. The recovery of the claim was undertaken by the firm without any agreement respecting fees. By undertaking it, the firm and each member of it assumed to conduct the case to a final conclusion, and with all fidelity to the client. Such was the contract of Mr. Hughes with Lamar, as completely as if he had been the sole attorney and counsel employed. And as the contract was entire, he could not have abandoned it after a partial performance, and still have held the other party bound. Much less could he have accompanied his abandonment by denouncing the honesty of the claim to one of the Judges of the court whose province it was to find the facts and adjudicate upon its merits, and yet claim compensation for services rendered. Such conduct on his part was not merely a renunciation of his engagement to the client; it was a flagrant breach of professional duty. It was not in his power to refuse performance of his part of the implied contract with Lamar, take action hostile to the claim, and still hold Lamar bound. Certainly he could not hold Lamar directly liable. And we do not perceive that, in equity, his situation is any better because he had contracted with the client jointly with his copartners.

If, then, by abandoning the case and denouncing it as fraudulent, he lost all the right which he had against Lamar, how can he claim from his copartners any of the compensation they obtained for conducting the case after his abandonment to final success? His action was a breach of his duty to those partners, as well as of his obligation to Lamar. By the agreement of copartnership he had undertaken to share in the labor, and to promote the common interests of the firm, and that was the foundation of his right to share in its earnings. It may be that mere neglect of his duty would not have extinguished that right, but a repudiation of his obligations, refusing to act as a partner, or to perform the functions of a partner, is quite a different thing. It may well be considered as a repudiation of the partnership. It was said in *Wilson v. Johnstone*, 16 Eq. Cas. Abr., 606: "He who acts so as to treat the articles as a nullity as it regards his own obligations, cannot complain if they are so treated for all purposes." It may, therefore, very justly be held that by his action Mr. Hughes became a stranger to the case, and repudiated any relation he had previously held to it as a partner in the firm. The partnership ceased as respects that claim. The other partners who continued to attend to the case could charge the client nothing for his services, for as the contract was contingent on suc-

cess, nothing was due to any partner until success was attained. They certainly could claim nothing for services rendered by him after he severed his connection with the case, for he rendered none; and if he had any just claim on a *quantum meruit* for services rendered before, it was against Lamar, and not against his co-partners.

We think, therefore, the decree of the court below was erroneous, in so far as it allowed to the complainant any part of the fee collected from Lamar or from Martin, who owned a part of what was recovered in the Lamar suit.

We discover no other fault in the decree, but for this the case must be sent back for correction.

The decree of the Supreme Court of the District is reversed and the record is remitted, with instructions to enter another decree in conformity with this opinion.

UNITED STATES, *Appt.*,

v.

JOSIAH WINCHESTER, *Ext.* of JOHN C. JENKINS, Deceased.

(See S. C., 9 Otto, 372-377.)

Admiralty jurisdiction—confiscation—seizure—naval forces—prize money.

1. The admiralty jurisdiction of the District Court extends to seizures on navigable waters, not to seizures on land.

2. By the Abandoned and Captured Property Act, the provisions for confiscating property, in the Confiscation Act of 1862, are not repealed.

3. No previous seizure of the property, under an order of the Executive, was essential to give jurisdiction to the court to adjudge its forfeiture and decree its condemnation under the Confiscation Act.

4. Where the seizure was made by the naval forces, a decree by a court, which thus never had the property rightfully before it for condemnation, has no validity.

5. Where half the proceeds of cotton thus seized was distributed to the naval captors as prize money, the claimant is entitled to judgment for such amount illegally distributed.

[No. 1098.]

Submitted Apr. 17, 1879. Decided May 5, 1879.

APPPEAL from the Court of Claims.

The case is stated by the court.

The proceedings in the District Court of the District of Columbia, mentioned in the opinion were proceedings begun there in July, 1874, for the distribution of the "informers'" money among the officers and crew, of the Mississippi squadron. These proceedings were instituted by Admiral Porter, who placed in the custody of the court his check upon the assistant treasurer at St. Louis in favor of the assistant treasurer at Washington, for the amount of such money. The admiral had previously refused to accept the money for himself, as is related in the opinion.

Messrs. Charles Devens, Atty-Gen., Jos. K. McCammon and E. B. Smith, Asst. Atty-Gen., for appellant.

Messrs. Jos. S. Fowler and John Pool, for appellee.

Mr. Justice Field delivered the opinion of the court:

The claimant is the surviving executor of the
See 9 OTTO.

will of John C. Jenkins, deceased, who died in 1855, leaving four minor children, surviving him, and possessed of a plantation in the State of Mississippi, on the Mississippi River, above Vicksburg. By directions in the will, the plantation was to be cultivated by the representatives of the estate for the benefit of the testator's children.

On the 18th of February, 1863, there was on this plantation, belonging to the estate and raised thereon according to the provisions of the will, a quantity of cotton, one hundred and sixty-eight bales of which were on that day seized by the naval forces of the United States, and taken on board of a government steamer. The cotton was then carried to Johnson's Landing, on the river, and thence to Milliken's Bend; where, with other cotton, making in all two hundred and fifty-eight bales, it was shipped on board of the transport Rowena, by order of Admiral Porter, who was in command of the naval forces on the Mississippi.

In March following, the admiral reported the capture of this cotton to the Secretary of the Navy, and was informed, in reply, that all property captured as "prize property" must be sent to a prize court for adjudication, and be disposed of as the court might decree; and that the disposition of captured "abandoned property" was provided for by an Act of Congress of March 12, 1863, 12 Stat. at L., 820. The cotton was thereupon sent to Cairo, where it arrived on the 7th of April, 1863, and was delivered to Captain Pennock, commanding at the station, and was by him turned over to the United States Marshal of the District. Soon afterwards, upon information given by Captain Pennock, the United States District Attorney filed a libel in the District Court of the United States for the Southern District of Illinois for the condemnation and sale of the cotton as forfeited to the United States. The libel stated that the seizure was made by order of Admiral Porter, on the Mississippi River, that river "Being a public water of the United States, navigable to the sea by vessels of ten or more tons burden;" and that the seizure was made for violation of the Non-Intercourse Act of July 13, 1861, 12 Stat. at L., 255, and the Proclamation of the President of August 16, 1861, 12 Stat. at L., 1262; and because the property belonged to a person in armed rebellion against the Government of the United States; and that the case was within the admiralty jurisdiction of the court. The case then proceeded, in accordance with the forms of admiralty practice and entitled as in admiralty, to a decree condemning the property as forfeited to the United States. The decree was subsequently opened as to part of the property, and the libel was amended by striking out the first allegation as to the Non-Intercourse Act, which was inapplicable to the cotton belonging to the estate of Jenkins and seized on his plantation.

Pending the proceedings, the cotton was sold, and by the decree one half of the proceeds was paid into the Treasury, and the other half ordered to be paid to Captain Pennock, as informer, to whom a check for that amount was delivered. Captain Pennock handed the check to Admiral Porter, his superior officer. The admiral, unwilling to receive or keep it as informer, sent it to the Secretary of the Navy,

requesting that the money might be distributed among the officers and crews of the Mississippi squadron as captors. The Secretary refused to distribute the money, and returned the check to the admiral, and he deposited it with the Assistant Treasurer at St. Louis, upon whom it was drawn.

Treating the proceedings in the district court as in admiralty, they are without validity. The admiralty jurisdiction of the district court extends only to seizures on navigable waters, not to seizures on land. The difference is important, as cases in admiralty are tried without a jury, whilst in cases at law the parties are entitled to a jury, unless one is waived. *U. S. v. The Betsey*, 4 Cranch, 443; *The Sarah*, 8 Wheat., 391.

But it is contended by the Attorney-General that the proceedings, however loose and defective in form, can be sustained under the Confiscation Act of July 17, 1862, 12 Stat. at L., 589, upon the charge that the property was seized as belonging to a person in armed rebellion against the Government of the United States. Assuming that upon a vague allegation of this kind, without designation of the owner, and with an erroneous statement in the libel of the place of seizure, a valid decree of condemnation could be rendered under the Act of 1862, previous to the passage of the Captured and Abandoned Property Act, it is contended on the part of the claimant that by the passage of this Act the provisions for confiscating property, in the Act of 1862, are impliedly repealed, as being repugnant to those of the latter Act. We do not think so. We agree with the Court of Claims on this point.

The whole scope and purpose of the two Acts are different. The first Act provides for the punishment of treason, the seizure, condemnation and sale of property of persons engaged in the rebellion, and the payment of the proceeds into the Treasury, to be applied to the support of the Army of the United States. It was directed against persons committing certain overt acts of treason, and against their property. Its object was to punish the persons and to confiscate their property, and contemplated in the latter proceedings equally as in the former the intervention of judicial authority.

The second Act was designed to reach all property, with few exceptions, in the insurgent States, seized or taken from hostile possession by the military or naval forces of the United States, whether belonging to friends or enemies, as well as property taken while the owner was voluntarily absent and engaged in aiding or encouraging the rebellion. It provided for a sale of the property thus captured or abandoned without judicial proceedings, and the payment of the proceeds into the Treasury, allowing the loyal owner, who had never given aid or comfort to the rebellion, the privilege of pursuing the proceeds in the Court of Claims. There was also a marked difference in the effect of the proceedings under the two Acts. The Confiscation Act authorized proceedings only against the interest of the disloyal owner; the Captured and Abandoned Property Act directed the seizure of the property itself; and its sale carried the title against all claimants. The former also took the property wherever it was

found; the latter only in the insurgent States. The former, as respects property, had all the merciless features inseparable from a war measure, and treated as enemies, whose property could be confiscated, all residents within the insurgent States; the latter had this beneficent provision, that it made a discrimination among those whom the rule of international law classes as enemies, in favor of those who, though resident within the hostile territory, maintained in fact a loyal adhesion to the government. The two Acts can stand together, and the Confiscation Act be enforced as to all property seized under its provisions. The position of the claimant, as to an implied repeal from a supposed repugnancy of the provisions of the two Acts, is not, therefore, tenable.

But upon another ground, apparent upon the face of the record, the proceedings and decree of the district court cannot be sustained. There was no previous seizure of the property under any order of the Executive; and such seizure was an essential preliminary to give jurisdiction to the court to adjudge its forfeiture and decree its condemnation. The executive seizure is the foundation of all subsequent proceedings under the Confiscation Act. Such is the plain import of the law, and it was so held by this court in *Pelham v. Rose*, 9 Wall., 103 [76 U. S., XIX., 602], and re-affirmed in *The Confiscation Cases*, 20 Wall., 92 [87 U. S., XXII., 320]. Here the property was seized by the naval forces of the United States upon the notion that being property in the enemies' country, it was subject to capture as a prize of war. The Secretary of the Navy, when informed of the capture, instructed the admiral in command that the disposition of captured abandoned property was provided for by the Act of March 12, 1863, 12 Stat. at L., 820, evidently regarding the property as coming within that class, if not "prize property." No seizure by executive order is alleged in the libel, for none such was made. The seizure alleged is one made by the naval forces, and even that is stated to have been made at a place other than the plantation of the testator. No validity can be ascribed to a decree by a court which thus never had the property rightfully before it for condemnation. For one half of the proceeds of the sale paid into the Treasury under the decree the claimant is, therefore, clearly entitled to judgment.

As to the remaining half also we have no doubt. The check which Captain Pennock received under the decree of the court, included not only one half of the proceeds of the claimant's cotton, but of cotton libeled in other cases, amounting in the whole to \$59,943.42. The admiral of the squadron to whom Captain Pennock turned over the check, desired, as already stated, that the money should be distributed among the officers and crews of the Mississippi squadron as captors; and when the Secretary of the Navy declined to make the distribution, he deposited the check with the Assistant Treasurer at St. Louis, upon whom it was drawn. Subsequently, in July 1864, the admiral invoked the aid of the District Court of the District of Columbia to make the distribution, and placed in the hands of the district attorney a certificate stating that the amount decreed to him as informer, namely: \$59,943.42, was on

deposit with the Assistant Treasurer at St. Louis, and expressing his wish as to the distribution of the money, accompanying the certificate with a check for the amount. The district court took jurisdiction in admiralty of the case, and ordered the check to be deposited by the Marshal with the Assistant Treasurer at Washington, and that the money should remain in his hands subject to the further order of the court. The check was accordingly deposited with the Assistant Treasurer, and by a subsequent decree the court ordered the money to be distributed as desired, after the payment of certain costs and disbursements incurred in the proceedings.

It is not a question upon which contention can arise that these proceedings of the District Court of the District of Columbia were extra-judisdictional from beginning to end; and indeed it is apparent from inspection of the decree that the court, assuming as valid the action of the Illinois Court, proceeded to distribute the money more upon the request of the admiral than upon any authority conferred by law. The decree of distribution signed by the *Chief Justice* of the district court shows the kind disposition of a learned magistrate to carry out the generous intentions of a gallant admiral to distribute among the officers and crew under his command money awarded to him as informer, but which he refused to take in that character, without assuming any authority beyond what the admiral implored him to exercise. But, as the Illinois Court had no jurisdiction to award to the admiral or his captain the money thus generously distributed, we are of opinion that the claimant must have judgment for the amount as well as for the other moiety of the proceeds of the cotton belonging to the estate of his testator.

In the views thus expressed we have merely stated, in brief, the conclusions of the Court of Claims. In the opinion of that court the questions are so fully, clearly and exhaustively discussed as to leave nothing to be added.

Judgment affirmed.

JAMES S. CLARK ET AL., Partners, under the firm name of J. S. CLARK & Co., *Appts.*,

v.

UNITED STATES.

(See S. C., 9 Otto, 493-496.)

Limitations to government claims.

1. Claims against the United States in the Court of Claims are barred by statute, unless filed within six years after the claim accrues.

2. A claim for cotton which was shipped from Mobile to New York in August, 1865, and there sold, and the proceeds paid into the Treasury of the United States, filed on the 27th of March, 1872, is barred by the statute.

[No. 111.]

Argued Apr. 15, 1879. Decided May 5, 1879.

APPEAL from the Court of Claims.

The case is fully stated by the court.

Messrs. John J. Weed and Matt. H. Carpenter, for appellants.

Messrs. Charles Devens, Atty-Gen., T. S. Si-

See 9 OTTO.

mons, Asst. Atty-Gen., and Edwin B. Smith, Asst. Atty-Gen., for appellee.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal from the Court of Claims. The facts of the case cannot be more clearly or compactly stated than they are presented in the findings of the court.

The findings are as follows:

"In July and August, 1865, the petitioners, James S. Clark and Edward Fulton, were merchants and copartners doing business at New Orleans, under the firm name and style of J. S. Clark & Co., and Joseph C. Palmer was a merchant at Mobile.

In said July and August the petitioners were the owners jointly of 900 bales of cotton, which arrived at Mobile in the last part of said July or the first part of said August, consigned by them to T. C. A. Dexter, supervising special agent of the Treasury Department for the department of Alabama.

At the times above stated the Government had charge of the railroads, and the cotton was consigned to Mr. Dexter to facilitate its arrival at Mobile, and on its arrival there it was claimed of him by the petitioners.

In August, 1865, Mr. Dexter having received orders from the Treasury Department to ship all the cotton received by him, shipped the said 900 bales to New York, where it arrived and was sold by the United States, and the net proceeds thereof, amounting to \$127,350, were paid into the Treasury.

The said Clark and Fulton resided in New Orleans, and said Palmer in Mobile, during the whole rebellion, and this petition was filed March 27, 1872."

The United States rely upon two defenses:

(1) That the petitioners did not, within two years after the suppression of the rebellion, prefer their claim in the Court of Claims.

This limitation is prescribed by the "Act for the Collection of Abandoned Property, and for the Prevention of Frauds in the Insurrectionary Districts of the United States," passed March 3, 1863. 12 Stat. at L., 820. It is confined to cases arising under that Act.

(2) That the petition was not filed in the Court of Claims within six years after the cause of action accrued.

This limitation is found in the 10th section of the Act relating to the Court of Claims, also of March 3, 1863. 12 Stat. at L., 765. That section enacts:

"That every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this Act, within six years after the claim first accrues; *Provided*, That claims which have accrued six years before the passage of this Act shall not be barred, if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this Act; *And provided further*, that the claims of married women first accrued during marriage, of persons under the age of twenty-one years, first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be

barred if the petition be filed in the court or transmitted as aforesaid within three years after the disability had ceased; but *no other disability than those enumerated shall prevent any claim from being barred*, nor shall any of the said disabilities operate cumulatively."

In the Revised Statutes of 1874, section 1009, the first proviso was dropped. It was then needless, the time of the saving thereby created with respect to the claims to which it related having before expired.

The counsel of the appellants have contended, in an argument of unusual research and ability, that the cotton in question was not captured or abandoned property within the meaning of the Act upon that subject, and that hence the limitation in that Act has no application to this case. Our view renders it unnecessary to consider this point. We, therefore, pass from it without further remark. The only question to be considered is whether the action is barred by the limitation of six years in the Court of Claims Act before referred to.

Nothing can be clearer than the terms of the limiting section.

It begins by declaring that every claim cognizable by the court "shall be forever barred" unless the petition "shall be filed within six years after the claim first accrued." Then follows the proviso naming the disabilities which shall arrest the running of the statute, and either of which shall give three years for the filing of the petition "after the disability has ceased." Finally, it is enacted that "No other disability shall prevent any claim from being barred, nor shall any of said disabilities operate cumulatively."

It is not claimed that any of the disabilities named affected *either of the appellants*.

In the early part of April, 1862, New Orleans was captured by the naval forces of the United States under the command of Admiral Farragut. On the first of May following the national military forces under the command of General Butler took possession of the city. It was never afterwards in possession of the insurgents. *Des mare v. U. S.*, 93 U. S., 605 [XXIII., 959]. The appellants resided there. It is a part of the public history of the country, of which we are bound to take judicial notice, that from the time last mentioned, communication between that place and the seat of the National Government was constant and uninterrupted.

In the case just referred to, this court said: "Upon the issuing of General Butler's proclamation, the legal *status* of New Orleans and its inhabitants with respect to the United States became changed. Before that time the former was enemy's territory and the latter were enemies. * * * General Butler's proclamation was proof of the subjugation of the city and the re-establishment of the national authority. The hostile character of the territory thereupon ceased, and the process of rehabilitation began. The inhabitants were at once permitted to resume, under the regulations prescribed, their wonted commerce with other places, as if the State had not belonged to the rebel organization. *The Venice*, 2 Wall., 258 [69 U. S., XVII., 866]. But they were clothed with new duties as well as new rights."

The cotton was shipped to New York in August, 1865, and there sold and the proceeds paid
482

into the Treasury of the United States. The claim then first accrued. The petition was filed on the 27th of March, 1872. This was at least six months in excess of the six years limited by the Statute.

During all this period the appellants could easily have put the proper machinery of the law in motion. The delay is unaccounted for.

The supplementary briefs filed by the parties since the argument at the bar do not, we think, call for any special remarks.

The case is clearly within the bar of the Statute, and we are constrained to hold accordingly.

The judgment of the Court of Claims is affirmed.

Dissenting, *Mr. Justice Field*, *Mr. Justice Miller* and *Mr. Justice Bradley*.

UNITED STATES, *Plf.*,

v.

CHARLES N. GERMAINE.

(See S.C., 9 Otto, 508-512.)

Surgeon, when not U. S. officer—indictment—Commissioner of Pensions.

1. A surgeon, appointed by the Commissioner of Pensions to examine pensioners and applicants for pensions, is not an officer of the United States.

2. An indictment against him for extortion in taking fees from pensioners under section 12, of the Act of 1825, is not sustainable.

3. The Commissioner of Pensions is not the head of a department, within the meaning of the Constitution.

[No. 216.]

Argued Apr. 7, 1879. Decided May. 5, 1879.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the District of Maine.

The case is fully stated by the court.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for plaintiff:

That Germaine was a federal officer, see *U. S. v. Maurice*, 1 Brockb., 102; see, also, *State v. Wilson*, 29 Ohio, 347, *et. seq.*

Mr. T. B. Reed, for defendant.

Mr. Justice Miller delivered the opinion of the court:

The defendant was appointed by the Commissioner of Pensions to act as surgeon, under the Act of March 3, 1873, 17 Stat. at L., 566, the 3d section of which is thus stated in the Revised Statutes as section 4777:

"That the Commissioner of Pensions be, and he is hereby, empowered to appoint, at his discretion, civil surgeons to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension, where he shall deem an examination by a surgeon appointed by him necessary; and the fee for such examinations, and the requisite certificates thereof in duplicate, including postage on such as are transmitted to pension agents shall be two dollars, *which shall be paid by the agent for paying pensions* in the district within which the pensioner or claimant resides, out of any money appropriated for the payment of pensions, under such regulations as the Commissioner of Pensions may prescribe."

He was indicted in the District of Maine for extortion in taking fees from pensioners to which he was not entitled. The law under which he was indicted is thus set forth in section 12 of the Act of 1825, 4 Stat. at L., 118:

"Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than \$500, or by imprisonment not more than one year, according to the aggravation of his offense."

The indictment being remitted into the circuit court, the Judges of that court have certified a division of opinion upon the questions whether such appointment made defendant an officer of the United States within the meaning of the above Act, and whether, upon demurrer to the indictment, judgment should be rendered for the United States or for defendant.

The counsel for defendant insists that article 2, section 2, of the Constitution, prescribing how officers of the United States shall be appointed, is decisive of the case before us. It declares that "The President shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court, and *all other officers* of the United States, whose appointments are not *herein* otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments."

The argument is, that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer*, though he may be an agent or *employé* working for the Government and paid by it, as nine tenths of the persons rendering service to the Government undoubtedly are, without thereby becoming its officers.

The Constitution, for purposes of appointment, very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices became numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the Government; and this has been done where it was so intended, as in the 16th section of the Act of 1846, concerning embezzlement, by which any

See 9 Otto.

officer or agent of the United States, and all persons participating in the act are made liable. 9 Stat. at L., 59.

As the defendant here was not appointed by the President or by a court of law, it remains to inquire if the Commissioner of Pensions, by whom he was appointed, is the head of a department, within the meaning of the Constitution, as is argued by the counsel for plaintiffs.

That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the article relating to the Executive, and the word as there used has reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power. One of the definitions of the word given by Worcester is, "A part or division of the executive government, as the Department of State, or of the Treasury." Congress recognized this in the Act creating these subdivisions of the executive branch by giving to each of them the name of a department. Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, etc. And by one of the latest of these statutes reorganizing the Attorney-General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of the Treasury, Interior and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.

So in this same section of the Constitution it is said that the President may require the opinion in writing of the principal officer in each of the Executive Departments, relating to the duties of their respective offices.

The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other.

While it has been the custom of the President to require these opinions from the Secretaries of State, the Treasury, of War, Navy, etc., and his consultation with them as members of his Cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments.

The case of *U. S. v. Hartwell*, 6 Wall., 385 [73 U. S., XVIII., 830], is not, as supposed, in conflict with these views. It is clearly stated and relied on in the opinion, that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In *Hartwell's* case the court said, the term embraces the ideas of tenure, duration,

emolument and duties, and in that case it said the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

No regular appropriation is made to pay his compensation, which is \$2 for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to \$5 or \$500 per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel, at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor. Let it be so certified to the Circuit Court.

GARDNER R. COLBY ET AL., EXRS. OF GARDNER COLBY, Deceased, *Plffs. in Err.*,

v.

GEORGE REED.

(See S. C., 9 Otto, 560-566.)

Oral demand of performance—demand for too much—mitigation of damages.

1. An oral demand of performance of a written contract is sufficient, where the contract does not contain the stipulation that the demand should be in writing.

2. Where a party demands more than he is entitled to receive, that circumstance alone will not justify the other party in refusing to deliver that part of the property to which the demandant is entitled, provided it is distinct, well known and clearly distinguishable from that to which the latter had no right.

3. Courts may, in a proper case, where the action is trover or trespass *de bonis*, order the plaintiff to accept the property, in mitigation, of damages, against his wishes; but the practice is not applicable in actions of *assumpsit* for a breach of contract.

[No. 243.]

Argued Apr. 23, 1879. Decided May 5, 1879.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is fully stated by the court.

484

Messrs. Edwin H. Abbot and L. S. Dixon,
for plaintiffs in error:

If the defendant's possession was lawful, and his refusal to surrender was qualified, or if the conversion was technical only and without willful wrong on his part, and the property remains strictly *in statu quo*, the defendant may compel the plaintiff to accept it in mitigation of damages.

Pickering v. Truste, 7 T. R., 53; *Hayward v. Seaward*, 1 Moore & S., 459.

(a) And even if the plaintiff do not expressly consent, the defendant may show, in mitigation of damages, that the property has gone into possession of plaintiff or to his use. *Hart v. Skinner*, 16 Vt., 138; *Yale v. Saunders*, 16 Vt., 243; *Reynolds v. Shuler*, 5 Cow., 323; *Baldwin v. Porter*, 12 Conn., 473; *Kaley v. Shed*, 10 Met., 317.

(b) And the law will imply an acceptance where the property has actually gone into his use, and mitigate damages accordingly, and will reduce verdict, on motion, for acts done after verdict, as if on *audita querela*. *Plevin v. Henshall*, 10 Bing., 24 (1833); *Irish v. Cloyes*, 8 Vt., 30.

(c) And it will grant a rule that the judgment for damages be discharged, on placing the plaintiff, by full delivery and payment of costs, in as good a position as he was before the action arose. *Coombe v. Sansom*, 1 Dowl. & R., 201; *Earl v. Holderness*, 4 Bing., 462.

Will this court adopt less liberal practice in contract than in tort?

The plaintiff is entitled to indemnity only. He has no right to force a purchase upon an unwilling and innocent purchaser, and the common law courts have jurisdiction to prevent this injustice by shaping their procedure.

Chinery v. Viall, 5 Hurl. & N., 288; *Johnson v. Stear*, 15 C. B. (N. S.), 330 (1863); *Robinson v. Harman*, 1 Exch., 850.

"The old cases which hold that judgment in trover vests the property in the defendant (which would prevent the right of return after suit), have been overruled."

Big. Lead. Cas. on Torts, 439; *Brinsmead v. Harrison*, L. R., 6 C. P., 584.

"A party cannot," says Baron Parke, "recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant."

Laird v. Pim, 7 Mees. & W., 474.

Interest on the value of the stock from May 27, 1875, was wrongly included in the judgment, even if it is otherwise correct.

Van Dieman's Land Co. v. Cockerill, 1 C. B. (N. S.), 732; *Sedg. Dam.*, 260; *Shepherd v. Hampton*, 3 Wheat., 200; *Gray v. Portland Bank*, 3 Mass., 364.

And there is no just distinction between stock and any other vendible commodity.

Sedg. Dam., 273; *Copper Co. v. Copper Mining Co.*, 33 Vt., 92; *Shaw v. Holland*, 15 Mees. & W., 136; *Rand v. White Mountain R. R. Co.*, 40 N. H., 79; *Taylor v. Turner*, 2 Cranch (C. C.), 203; *Gilpins v. Consequa*, Pet. (C. C.), 85.

Messrs. Matt. H. Carpenter and N. S. Murphey, for defendant in error:

Where there is a breach of contract, the defendant must respond in damages. The damage claimed in this case is the value of the stock, and judgment must be rendered for amount proven.

Chit. Pl., 338.

99 U. S.

No objection was made by the defendant at the time, to the sufficiency of the demand.

No stricter rule could be required than in an action of trover, and the demand in such case would have been sufficient. No particular form is necessary. *Thompson v. Shirley*, 1 Esp., 33, per Lord Kenyon; 1 Chit. Pl., 159.

The defendant was advised by plaintiff's request, that he desired the stock in question. If he considered that we were not entitled to all of it, he should have offered to deliver so much as he considered us entitled to. The stock was all of the same character, one share as good as another.

After the commencement of this action, and at the trial, defendant offered to deliver the stock. An offer to pay is a waiver of any objection to the form of demand.

Bank of Ky. v. Wister, 2 Pet., 318.

As to the motion made at close of testimony, on trial, that the plaintiff be ordered to accept stock in mitigation of damages to be recovered by plaintiff, we say the offer comes too late. There is no authority for such an order.

Suit is for breach of contract. No tender was made before suit was brought.

Plaintiff was entitled to recover the value of the stock found to be due him by the jury, at the time of demand, on the 27th of May, 1875, with interest from the time of demand.

Clark v. Pinney, 7 Cow., 681; *Bush v. Canfield*, 2 Conn., 485; *Barnard v. Conger*, 6 McLean, 497; *Halseys v. Hurd*, 6 McLean, 102; *Dana v. Fiedler*, 12 N. Y., 40; *Vaughan v. Howe*, 20 Wis., 497.

In the case of *Wheeler v. Pereles*, 43 Wis., 332, it was held that a person having wrongfully converted a policy of insurance, left with him as security, must be presumed to have in his possession its market value in cash, or its equivalent, and it was held that plaintiff could not be compelled to accept the policy in mitigation of damages.

Mr. Justice Clifford delivered the opinion of the court:

Tender, when the demand is of money, for a definite sum or for an amount capable of being made certain, may at common law be made on the very day the money becomes due, but it will constitute a defense only when made before the action is brought. Chit. Cont., 10th ed., 732, 733; Pars. Cont., 6th ed., 148; 9 Bac. Abr. Tender, D, 321; *Stat. Bk. v. Worcester Bk.*, 5 Pick., 106; *Pitcher v. Bailey*, 8 East, 171; *Briggs v. Calverly*, 8 T. R., 629.

In actions of debt and *assumpsit* the principle of the plea of tender is, that the defendant has always been ready to perform the contract, and that he did perform it as far as he was able by tendering the requisite money, the plaintiff himself having prevented a complete performance by his refusal to accept the tender. Such a tender and refusal do not discharge the debt, and hence the plea must proceed to allege that the defendant is still ready to perform, and it must contain a *proferit in curia* of the money tendered. *Dixon v. Clark*, 5 Man. G. & S., 377; *Ayers v. Pease*, 12 Wend., 393.

Arrangements were made between the parties to advance material aid in the construction of a certain land-grant railroad, and to promote that object the defendant agreed with the plaintiff

iff, in writing under seal, that he would take stock in the company to the amount of \$200,000, and that he would pay or deliver to the order of the plaintiff \$45,000 of the proceeds of the subscription. Pursuant to the agreement, the defendant subsequently paid the agreed sum in money, and received the certificates of the stock to the same amount. Progress was made in the undertaking, but it turned out that more money was needed to complete the enterprise; which made it necessary that the same parties should subscribe for an additional \$100,000 of the stock. It appears that they were willing to do so; but that the plaintiff could not furnish his proportion of the money for the new subscription, and that the defendant, in consideration of receiving \$5,000 out of the plaintiff's stock, agreed to pay the entire amount of the additional subscription and to take the whole of the new stock, which left in his hands only \$40,000 of the original stock belonging to the plaintiff. Money to the amount of \$2,000 was, about the same time, borrowed for six months by the plaintiff of the defendant, on a pledge of \$8,000 of plaintiff's stock in the hands of the defendant, which the record shows was never repaid, leaving in the possession of the defendant only \$32,000 of the first subscription.

Throughout these transactions the relations between the parties were amicable; but they subsequently became hostile, and on the 28th of May, 1875, the plaintiff instituted the present suit in the circuit court, in which he claimed judgment against the defendant for the stock of the railroad in his hands to the amount of \$45,000, with interest, as alleged in the complaint.

Service was made; and the defendant filed an answer, setting up several defenses: (1) That the allegation that he refused to deliver the stock mentioned in the complaint is not true. (2) That no proper demand for the delivery of the same was ever made. (3) That the demand made was for the delivery of \$45,000 of the stock, when the defendant well knew that he was only entitled to demand \$32,000 of the same, and the defendant avers that he always was and still is ready and willing to deliver the true amount. (4) That the plaintiff is indebted to the defendant in the sum of \$2,000, for which he claims an allowance as a set-off or as a counter claim. (5) That the value of the stock is much below par, and that the pledge to him for the loan is inadequate as security.

Preliminary matters being closed, the parties went to trial. Evidence was introduced on both sides, and the court submitted certain questions to the jury, to which they responded to the effect following: that the plaintiff, before the commencement of the action, made a demand of the stock from the defendant, and that the defendant refused to deliver the same; that the parties entered into the agreement set forth in the answer, by which the plaintiff was to deliver to the defendant the excess of the stock originally subscribed, above \$40,000, in the event that it should become necessary to make the additional subscription of \$100,000; and that the notice, required of the defendant in that contingency, was waived by the plaintiff; and the jury also found that the amount of stock which the plaintiff was entitled to demand and receive was only \$32,000, and that the cash

value of the same was and is \$9,600, which finding appeared to be satisfactory to the plaintiff, as he moved for judgment in his favor; but the defendant filed two motions: one that the plaintiff be ordered to accept the stock found to be due in mitigation of damages, and the other that a new trial be granted.

Hearing was had, and the court overruled the motions of the defendant and rendered judgment for the plaintiff in the sum of \$7,641.72. Before doing so, however, the court adjusted the equities between the parties as follows: interest in favor of the plaintiff was added to the sum found due by the jury as the value of the stock, and from that amount the court deducted the counter claim and interest set up by the defendant which gave as a balance the sum for which the judgment was rendered.

Seasonable exceptions were filed by the defendant and he sued out the pending writ of error.

Numerous errors are assigned by the defendant, but in the view taken of the case it will not be necessary to give them a separate examination. Attention will be called to the substantial issues presented in the pleadings and to the material questions which arose in the progress of the trial and in the rendition of the judgment.

Both parties agree that the controversy grew out of a contract between them, and that the redress sought by the plaintiff is compensation for the alleged breach of it and the failure of the defendant to comply with its terms. Every pretense of conversion, therefore, may be dismissed in the outset without the least consideration, as there is nothing either in the cause of action, or the form of the remedy, or in the allegations of the complainant, or in the averments of the answer, or in the evidence introduced by either party, which gives such a theory any support whatever. Instead of that, the plaintiff set up the agreement and alleges that the defendant broke it, and he claims compensation for the damage he suffered from its non-performance by the defendant. Demand of performance is also alleged by the plaintiff, which is explicitly denied by the defendant, who avers in his answer that he was always ready and willing to perform to the full extent of his obligation under the agreement.

Neither the answer nor the evidence shows that the defendant ever did perform the agreement to deliver, but what he alleged and attempted to prove was that the plaintiff claimed \$13,000 of stock more than he, the defendant, contracted to deliver; and his theory is that the demand being in excess of the obligation created by the contract, was null and of no effect, and inasmuch as the demand exceeded the right, he was not required to perform what the contract required.

Two issues of law were presented by the defendant in respect to the alleged demand: (1) That it must be in writing, and that an oral demand was insufficient. (2) That a request to deliver more property than the party is entitled to receive and a failure to deliver placed on that ground do not in law constitute a sufficient demand and refusal to sustain an action like the one before the court.

Had the the contract contained the stipulation that the demand should be in writing, there would be much force in the suggestion; but, in-

asmuch as the contract is silent upon the subject, the court is of the opinion that the ruling of the circuit court that it might, be verbal or in writing is undoubtedly correct. *Smith v. Young*, 2 Dev. & B. (N. C.), 26.

Responsive to the second request, the Judge told the jury that where a party demands more than he is entitled to receive, that circumstance alone will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled, provided it is distinct, well known, and clearly distinguishable from that to which the demanding party had no right; that if the plaintiff demanded \$45,000 of the stock when he was only entitled to \$32,000 of the same, the defendant could not properly refuse to deliver what the plaintiff was entitled to receive, on the ground that the demand was excessive. Injustice and inconvenience would flow from any different rule, and inasmuch as we are all of the opinion that the instruction was correct, it is not deemed necessary to pursue the subject. 2 Greenl. Ev., sec. 604.

Matters of fact in the case need no examination, as they are found by the jury and are not the subject of review in this court. Actual demand, it is conceded, was necessary to complete the cause of action, and the court is of the opinion that the demand was not vitiated because it was for too much, as the party of whom it was made was under no obligation to tender more than was due. Chit. Cont., 10th ed., 738. Both demand and refusal are established by the special verdict, which is all that need be said upon the subject.

Two other assignments of error deserve to be considered, and they may be examined together, as they involve the same question. They are as follows: (1) That the court erred in denying the motion of the defendant to require the plaintiff to accept the stock tendered by the defendant to the plaintiff in open court in reduction of the damages. (2) That the court erred in rendering judgment for the full value of the stock in money, and in not applying the stock deposited in court in mitigation of damages, at its value as fixed by the jury.

Tender of the stock before breach of the condition or before the commencement of the action is not pretended, nor is it pretended that the defendant ever made a money tender of the debt due to the plaintiff, either before or after the action was commenced. Such a tender, if made before action brought and kept good, is a defense to the action, as the money to pay the debt remains in the court, and the party plaintiff is not entitled to prevail unless the sum tendered was insufficient, nor is it questioned that such a tender in a proper case, and payment of the money into court, may be made after action brought; but the rule is universal, that in that event the tender and the payment must include the costs to that time as well as the debt. Add. Cont., 6th ed., 954.

Authority undoubtedly exists in the defendant to tender the debt, if it is of a definite amount, before action brought; but it is equally well settled, even if it be large enough to pay the whole debt, that it is utterly nugatory after action brought, unless it also include a sum sufficient to pay the costs. *Emerson v. White*, 10 Gray, 351; *People v. Banker*, 8 How. Pr., 258.

Exceptional cases may be found, but they arise in States where the matter is regulated by statute. *Ashburn v. Poulter*, 35 Conn., 553; *Call v. Lothrop*, 39 Me., 434; R. S. (Me.), 642; Gen. S. (Mass.), 671.

No such regulation has ever been adopted by the State in which this controversy arose, from which it follows that it must be governed by the general rules, which do not give the right of tender after action brought, except in the form and under the conditions before explained.

Concede that; and still it is insisted by the defendant that the court erred in refusing his request to order the plaintiff to accept the certificates of stock in mitigation of damages, which presents the principal question in the case.

Power to tender back the property in trover, where the gist of the action is conversion, is certainly vested in the defendant, and its exercise is a matter of frequent occurrence, where it appears that the property is in the same condition as when taken. Such a right may, doubtless, be exercised where the charge is conversion or a wrongful taking even after action brought, if it be accompanied with a tender of costs and intervening damages. *R. R. Co. v. Bk.*, 32 Vt., 639; *Kaley v. Shed*, 10 Metc., 317.

There can be no manner of doubt that the defendant in actions of trover and trespass *de bonis asportatis*, in cases where the taking was not unlawful and the property is not essentially injured, will be allowed to surrender the property *in specie* in mitigation of damages. *Hart v. Skinner*, 16 Vt., 138; *Fisher v. Prince*, 3 Burr., 1363; *Pickering v. Truste*, 7 T. R., 54.

Courts, beyond doubt, may in a proper case, where the action is trover or trespass *de bonis*, order the plaintiff to accept the property in mitigation of damages against his wishes; and the rule is that the return of the property in such a case will reduce the damages to those actually sustained for the wrongful taking, together with intervening damages, and costs. *Yale v. Saunders*, 16 Vt., 243; *Halliday v. Holgate*, L. R., 3 Exch., 301.

Orders of the kind are frequently given in actions of trover and trespass *de bonis asportatis*, but the practice is not applicable in actions of *assumpsit* for a breach of contract, the rule being that the party, if he desires to stop the litigation, must adopt the measure prescribed by the common law, except in jurisdictions where a different mode of proceeding is prescribed by statute.

Judgment affirmed.

THE CONGRESS AND EMPIRE SPRING COMPANY, *Plff. in Err.*,

v.

ANN P. EDGAR.

(See S. C., 9 Otto, 645-659.)

Injuries inflicted by animals, liability for—negligence—vicious habits—experts—charge to jury.

NOTE.—*Liability of owner of animals for injuries to persons by them.*

The owner of ordinary domestic animals is not liable for injuries which they do to another, unless the animal was accustomed to injure persons or had an inclination to do so, to the knowledge of the owner. *Smith v. Causey*, 22 Ala., 568; *Dearth v.* See 9 OTTO.

1. Whoever undertakes to keep an animal *feræ nature* in places of public resort, is liable for the injuries inflicted by it on a party who is not guilty of negligence, and is otherwise without fault.

2. It is not necessary to aver negligence in the owner or keeper, but only to state the ferocity of the animal, and the knowledge of the defendant.

3. Owners are liable for the hurt done by the animal, even without notice of the propensity, if the animal is naturally mischievous; but if it is of a tame nature, there must be notice of the vicious habit.

4. Experts are entitled to give their opinions in evidence, as to conclusions from facts within the range of their specialties.

5. Instructions given by the court at the trial are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies not pointed out by the accepting party.

[No. 255.]

Argued Apr. 25, 1879. Decided May. 5, 1879.

ERROR to the Circuit Court of the United States for the Northern District of New York.

The case, which arose in the court below is fully stated by the court.

Mr. Charles S. Lester, for plaintiff in error: The liability of the owner of an animal of any description, for an injury committed by such animal, is founded upon negligence, actual or presumed.

Earl v. Van Alstine, 8 Barb., 630; *Whart. Neg.*, secs. 918, 926; *Earhart v. Youngblood*, 27 Pa., 331; *Shear. & Redf. Neg.*, sec. 185; *Munn v. Reed*, 4 Allen, 431; *Ilott v. Wilkes*, 3 B. & Ald., 304.

It is well settled that the owner of a domestic animal like a dog, horse or cow, is not liable for injuries committed by it, unless he had notice that it was accustomed to do mischief.

Bull. N. P., 77; 3 Bl. Com., 153; *Vrooman v. Lawyer*, 13 Johns., 339; *Van Lewen v. Lyke*, 1 N. Y., 515.

Deer, although *feræ nature*, may be reclaimed and domesticated when they cease to be such. 2 Kent, Com., 348.

The common law refers the question, whether an animal is wild or tame, to our knowledge of his habits derived from fact and experience. 2 Kent, Com., 349.

It follows, therefore, that if the deer was a domesticated animal, there was no cause of action made out, because there was no evidence that it had ever before committed any injury, or exhibited any disposition to commit an injury, nor that the defendant had any knowledge that it possessed a dangerous disposition; and the court should have directed a verdict for defendant.

But if it is claimed that a deer belongs to the same class of animals as lions, bears and tigers, then the plaintiff is chargeable with the same knowledge of its dangerous character as the defendant, and her negligence in going into the inclosure where she knew this deer was confined, was such contributory negligence as barred her from recovering.

Whart. Neg., sec. 926; *Earhart v. Youngblood*, 27 Pa., 331; *Brock v. Copeland*, 1 Esp., 203; *Ilott v. Wilkes*, 3 B. & Ald., 304.

Baker, 22 Wis., 73; *Earl v. Van Alstine*, 8 Barb., 630; *Fleming v. Orr*, 29 Eng. L. & E., 16; *Rex v. Hugbins*, 2 Raym., 1583; *Cox v. Burbridge*, 13 C. B. (N.S.), 430; *Vrooman v. Lawyer*, 13 Johns., 339; *Le Forest v. Tolman*, 117 Mass., 109; S. C., 19 Am. Rep., 400; *Popplewell v. Pierce*, 10 Cush., 509; *Pressey v. Wirth*, 3 Allen, 191.

1. The character and disposition of a wild or domestic animal is a fact to be ascertained by experience, and not a question of science, skill or trade, on which the opinion of an expert is admissible.

It is only upon questions of science, skill or trade, that opinions of experts are admissible.

1 Greenl. Ev., sec. 440; *Devitt v. Barley*, 9 N. Y., 375; *Hewlett v. Wood*, 55 N. Y., 634; *Bristow v. Sequeville*, 5 Exch., 275; *Nelson v. Sun. M. Ins. Co.*, 71 N. Y., 453.

2. The books of natural history, which the witness said he had read, would not of themselves have been competent evidence.

Commonwealth v. Wilson, 1 Gray, 337; *Morris v. Harmer*, 7 Pet., 554; *McKinnon v. Bliss*, 21 N. Y., 206; *Collier v. Simpson*, 5 Car. & P., 73.

The statements of the witness, therefore, as to what he had read in relation to living animals well known to many people, was the merest hearsay and its admission was error.

Mr. Geo. W. Miller, for defendant in error.

A person harboring or owning and keeping an animal *feræ naturæ*, is responsible for any injury it may do to another, without notice of its vicious character, other than that to be presumed from the nature of the beast.

Van Leuven v. Lyke, 1 N. Y., 516, and cases cited; *Bac. Abr. Trespass*, 15, 106; *Buster v. Newkirk*, 20 Johns., 75.

Mr. Justice Clifford delivered the opinion of the court:

Animals *feræ naturæ*, as a class, are known to be mischievous; and the rule is well settled, that whoever undertakes to keep such an animal in places of public resort is or may be liable for the consequences to a party suffering injury from the animal, if not guilty of negligence and otherwise without fault.

Compensation in such a case may be claimed of the owner or keeper, for the injury; and it is an established rule of pleading that it is not necessary to aver negligence in the owner or keeper, as the burden is upon the defendant to disprove that implied imputation. Cases have often arisen where no such averment was contained in the declaration; and the uniform ruling has been that the omission constitutes no valid objection to the right of recovery. *May v. Burdett*, 9 Q. B., 100.

Where an animal is accustomed to injure persons, and the owner has notice or knowledge of that fact, he is liable for any injury which such animal may do to another person. *Arnold v. Norton*, 25 Conn., 92; *Fairchild v. Bentley*, 30 Barb., 147; *Laverone v. Mangianti*, 41 Cal., 138; *S. C.*, 10 Am. Rep., 269; *Shirley v. Bartley*, 4 Sneed, 58; *McCaskill v. Elliott*, 5 Strob., 196; *Meibus v. Dodge*, 38 Wis., 300; *S. C.*, 20 Am. Rep., 6; *Smith v. Pelah*, 2 Str., 1264.

A person bitten by a ferocious dog left loose in the day-time may recover from the owner, although he was, when bitten, trespassing. *Loomis v. Terry*, 17 Wend., 496; *S. C.*, 31 Am. Dec., 306; *Brock v. Copeland*, 1 Esp., 203; *Sarch v. Blackburn*, 4 C. & P., 297.

If a person provokes a dog to bite, he cannot recover. *Keightlinger v. Egan*, 65 Ill., 235.

A person who keeps an animal after he has notice of its vicious disposition, is liable for such injury as it may do, without reference to any specific negligence in its custody. *Popplewell v. Pierce*, 10 Cush., 509; *Koney v. Ward*, 2 Daly, 295; *S. C.*, 36 How. Pr., 255; *Stumps v. Kelly*, 22 Ill., 140; *Kittredge v. Elliott*, 16 N. H., 77; *Kelly v. Tilton*, 2 Abb. Ct. of App. Dec., 495; *S. C.*, 3 Keyes, 263; *Earhart v. Youngblood*, 27 Pa. St., 337.

A person who keeps a monkey that is dangerous to allow at large, is liable for injuries it may do to

Negligence was not alleged in that case. Trial was had, and the verdict being for the plaintiff, the defendant moved in arrest of judgment that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. Attempt was made by a very able counsel to support the motion, upon the ground that even if the declaration was true, still the injury might have been occasioned entirely by the carelessness and want of caution on the part of the plaintiff; but Lord Denman and his associates overruled the motion in arrest, and decided that whoever keeps an animal accustomed to attack and injure mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of the person attacked and injured, without any averment of negligence or default in securing or taking care of the animal; and the *Chief Justice* added, what it is important to observe, that the gist of the action is the *keeping* of the animal after knowledge of its mischievous propensities.

Precedents, both ancient and modern, it seems, were cited in the argument and were examined by the court, and the learned *Chief Justice* remarked that, with scarcely an exception, they merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care. *Jackson v. Smithson*, 15 Mees. & W., 563; *Popplewell v. Pierce*, 10 Cush., 509.

Injuries of a serious character inflicted by a mischievous deer, which the defendant Company kept in their park, were received by the plaintiff at the time and place alleged, for which she claims compensation of the Company. By the declaration it appears that the Company is the owner and proprietor of the Congress Spring at Saratoga, in the State of New York, whose waters have become celebrated for their medicinal qualities and the source of great gains and profits to the Company. Among other things, the plaintiff alleges that the spring had for a long time been kept open and accessible to visitors, the public being invited in various forms to patronize its waters, and that to make it more inviting and attractive the Company had opened in connection therewith an extensive park, ornamented with fountains, trees, shrubbery and flowers, through which extensive graveled walks

persons. *May v. Burdett*, 9 Q. B., 101; 10 Jur., 692; 16 L. J. Q. B., 64.

Knowledge of owner's agents, or servants having charge of the animal, of its ferocious disposition, may be sufficient to charge the owner with notice. *Applebee v. Percy*, 9 L. R. C. P., 647; 22 W. R., 704; 43 L. J. C. P., 365; 30 L. T. N. S., 785.

If a person harbors a dog accustomed to bite, or allows it to frequent his premises, he is liable, although not the owner of it. *Frammell v. Little*, 16 Ind., 251; *Marsh v. Jones*, 21 Vt., 378; *McRone v. Wood*, 5 C. & P., 1; *Wilkinson v. Parrott*, 32 Cal., 102.

Otherwise, where he tries to keep him off his premises, but is not successful. *Smith v. Gt. Eastern Ry. Co.*, 2 L. R. C. P., 4; 36 L. J. C. P., 22; 15 W. R., 131; 15 L. T. N. S., 246.

The owner of wild and savage beasts is liable for injuries committed by them, without proof of notice of their savage propensities. *Scribner v. Kelley*, 38 Barb., 14; *Besozzi v. Harris*, 1 Fost. & F., 92; *May v. Burdett*, 9 Q. B., 101.

Knowledge of owner, that dog is vicious, is sufficient, without showing that it had ever bitten any one. *Rider v. White*, 65 N. Y., 54; *S. C.*, 22 Am. Rep., 600; *Godeau v. Blood*, 52 Vt., 251; *S. C.*, 36 Am. Rep., 751.

have been constructed for the use and comfort of those who resort there to use the mineral waters and to enjoy the landscape; that the Company, in order further to enhance the attractions of the park, had obtained and in some degree domesticated several wild deer, and among them a large and powerful buck, with large horns and of vicious character and habits, which were well known to the defendant Company, their officers and agents, and the residents of the village.

Actual knowledge by the Company of the mischievous character of the animal is alleged by the plaintiff, and she avers that the vicious animal on the day named, to wit: the 18th of October, 1870, was permitted to run at large in the park, and that she on that day visited the spring to partake of its waters, and that while she was peaceably proceeding along one of the walks in the parks she was fiercely attacked by the mischievous buck and greatly injured, bruised and lacerated, as more fully set forth in the declaration.

Service was made; and the defendant Company appeared and pleaded: (1) The general issue. (2) That the damage and injury suffered by the plaintiff were occasioned by her own fault in neglecting to obey the rules and regulations of the Company. On motion of the plaintiff a jury was impaneled, and the parties went to trial, which resulted in a verdict and judgment in favor of the plaintiff. Exceptions were filed by the defendant Company, and they sued out the pending writ of error.

Since the cause was entered here the defendant Company has filed the following assignments of error: (1) That the court, in view of the evidence, should have directed a verdict for the defendant. (2) That the court erred in admitting the questions to the two witnesses called by the plaintiff as experts. (3) That the court erred in the instructions given to the jury in respect to the question of damages.

Certain animals *feræ naturæ* may, doubtless, be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals; but, inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated; the gist of the action in such a case, as in the case of untamed wild animals, being not merely the negligent keeping of the animal, but the keeping of the same with *knowledge* of the vicious and mischievous propensity of the animal. Whart. Neg., sec. 922; *Decker v. Gammon*, 44 Me., 322.

Three or more classes of cases exist in which it is held that the owners of animals are liable for injuries done by the same to the persons or property of others, the required allegations and proofs varying in each case. 2 Bl. Com., per Cooley, 390.

Owners of wild beasts or beasts that are in their nature vicious are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows

that he is guilty of negligence in permitting the same to be at large.

Though the owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *feræ naturæ* the owner is liable to an action of damage if it get loose and do harm. 1 Hale, P. C., 430; *Worth v. Gilling*, L. R., 2 C. P., 3.

Owners are liable for the hurt done by the animal even without notice of the propensity, if the animal is naturally mischievous, but if it is of a tame nature, there must be notice of the vicious habit. *Mason v. Keeling*, 12 Mod., 332; *Rex v. Huggins*, 2 Ld. Raym., 1574.

Damage may done by a domestic animal kept for use or convenience, but the rule is that the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief. *Vrooman v. Lawyer*, 13 Johns., 339; *Buzendin v. Sharp*, 2 Salk., 662; *Cockerham v. Nixon*, 11 Ired. (N. C.), L., 269.

Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal after the knowledge of its vicious propensity. *Jackson v. Smithson*, 15 Mees. & W., 563; *Van Leuwen v. Lyke*, 1 N. Y., 515; *Card v. Case*, 5 C. B., 632; *Hudson v. Roberts*, 6 Exch., 697; *May v. Burdett*, 9 Q. B., 100; *Dearth v. Baker*, 22 Wis., 73; *Coa v. Burbridge*, 13 C. B. (N. S.), 430.

It appears by the bill of exceptions that the plaintiff, on the morning of the day of the injury, entered the park belonging to the defendant Company; that after drinking of the water of the spring she walked through the grounds and that she met the mischievous deer; that he attacked her, goring and striking her with his head and horns, whereby she was thrown down and greatly injured and put to great suffering and expense, as more fully set forth in her testimony. On her cross-examination she testified that she had been in the habit of visiting the park to enjoy the water and the pleasure of the walk; that she had noticed the deer at an earlier period and had often seen them running about on the lawn; that she had seen persons playing with them on different occasions; and that she had noticed the signboard posted in the park containing the notice, "Beware of the buck." Another witness called by the plaintiff testified that the park contains about eleven acres; that there were nine deer in the park, among which were three bucks, the oldest being four years old; that he first heard that the buck was ugly when the plaintiff was attacked and knocked down; that notices were put up at different places in the park a year or two before, cautioning visitors not to tease or worry the deer; and that he had no knowledge or belief, prior to the accident, that the buck or any other of the herd would attack any person if they were not disturbed. Expert witnesses were called by the plaintiff, and they gave it as their opinion that the male deer in the fall of the year is a dangerous animal.

Five witnesses were examined in behalf of the plaintiff; but the bill of exceptions does not show that the defendant Company gave any evidence in reply, nor is it stated that the whole testimony introduced by the plaintiff is reported. When the evidence was closed, the defendant moved that the action be dismissed, that the plaintiff be nonsuited, and that the court direct the jury to return a verdict in favor of the defendant.

Discussion of the first two propositions involved in the motion is wholly unnecessary, for two reasons: (1) Because the jurisdiction of the court was beyond doubt, and the record shows that the suit was well brought. (2) Because it is not competent for the circuit court to order a peremptory nonsuit in any case.

Circuit courts cannot grant a nonsuit, but the defendant at the close of the plaintiff's case may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to maintain the action, and to direct a verdict for the defendant. In considering the motion, the court proceeds upon the ground that all the facts stated by the plaintiff's witnesses are true, and the rule is that the motion will be denied unless the court is of the opinion that in view of the whole evidence, and of every inference the law allows to be drawn from it, the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor. *Merch. Nat. Bk. v. St. Nat. Bk.*, 3 Cliff., 205; *S. C.*, 10 Wall., 655 [77 U. S., XIX., 1021].

Tested by that rule, which is everywhere admitted to be correct, it is clear that the motion of the defendant was properly denied, for several reasons: (1) Because the proof of injury was overwhelming. (2) Because the allegation that the animal was vicious and mischievous was satisfactorily proved. (3) Because the evidence to prove that the defendant Company had knowledge of the vicious and mischievous propensity of the animal was properly left to the jury, and it appearing that the circuit court overruled the motion for a new trial, the court here cannot disturb the verdict except for error of law. (4) Because the cause of action in the case arises not merely from the keeping of the animal, but from the keeping of the same after knowledge of its vicious and mischievous propensities. (5) Because the evidence is plenary that the plaintiff was rightfully in the place where she was injured, and that the owners of the vicious animal, inasmuch as the evidence tended to show that they had knowledge of its mischievous propensities, are justly held liable for the consequences. *Stiles v. Nav. Co.*, 33 L. J. (N. S.), 311; *Oakes v. Spaulding*, 40 Vt., 347; *Sarch v. Blackburn*, 4 Car. & P., 297; *S. C.*, 1 Moo. & M., 505; *Besozzi v. Harris*, 1 Fos. & F., 92.

Whoever keeps an animal accustomed to attack or injure mankind, with the knowledge of its dangerous propensities, says Addison, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of the animal, the gist of the action being the keeping of the animal after knowledge of its mischievous disposition. Add. Torts, ed. 1876, 233; *Dickson v. McCoy*, 39 N. Y., 400; *Applebee v. Percy*, L. R., 9 C. P., 647; Lead. Cas. Torts, 489.

Witnesses are not ordinarily allowed to give

opinions as to conclusions dependent upon facts not necessarily involved in the controversy; but an exception to that rule is recognized in the case of experts, who are entitled to give their opinions as to conclusions from facts within the range of their specialties, which are too recondite to be properly comprehended and weighed by ordinary reasoners. 1 Whart. Ev., sec. 440.

Men who have made questions of skill or science the object of their particular study, says Phillips, are competent to give their opinions in evidence. Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but the author proceeds to say that they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case. Medical men, for example, may give their opinions, not only as to the state of a patient they may have visited, or as to the cause of the death of a person whose body they have examined, or as to the nature of the instruments which caused the wounds they have examined, but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial. Judicial tribunals have in many instances held that medical works are not admissible, but they everywhere hold that men skilled in science, art or particular trades may give their opinions as witnesses in matters pertaining to their professional calling. 1 Phil. Ev., ed. 1868, 778.

It must appear, of course, that the witness is qualified to speak to the point of inquiry, whether it respects a patented invention, a question in chemistry, insurance, shipping, seamanship, foreign law or the habits of animals, whether *feræ naturæ* or domestic.

On questions of science, skill or trade, or others of like kind, says Greenleaf, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. 1 Greenl. Ev., sec. 400; *Buster v. Newkirk*, 20 Johns., 75.

Whether a witness is shown to be qualified or not as an expert, is a preliminary question to be determined in the first place by the court; and the rule is, that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous. *Townboat Co. v. Starrs*, 69 Pa., 36; *Page v. Parker*, 40 N. H., 48; *Tucker v. R. R. Co.*, 118 Mass., 546.

Experts may be examined, says Justice Grier, to explain the terms of art and the state of the art, at any given time. Speaking of controversies between a patentee and an infringer, he says that experts may explain to the court and jury the machines, models or drawings exhibited in the case. They may point out the difference or identity of the mechanical devices involved in their construction, and adds, that the maxim "*Cuique in sua arte credendum*," permits them to be examined in questions of art or science peculiar to their trade or profession. *Winans v. R. R. Co.*, 21 How., 88 [62 U. S., XVI., 68]; *Ogden v. Parsons*, 23 How., 167 [64 U. S., XVI., 410].

Even if the witnesses are not properly to be regarded as experts, the court is of the opinion that the testimony was properly admitted as a matter of common knowledge.

Well guarded instructions were given to the jury on the subject, as appears from the transcript. Their attention was directed to the testimony, and they were told that it was for them to determine its weight, which shows that the defendant has no just ground of complaint.

3. Complaint is also made by the defendant that one sentence of the charge of the court in respect to the damages is erroneous. When you have made up your mind, said the Judge, as to the amount *really sustained*, you are not to be nice in the award of compensation. It should be liberal.

Exception was taken to that remark without request for a different instruction, or that it should be qualified or explained in any way. Before that remark was made the Judge cautioned the jury against giving credence to any extravagant statement of the injuries received, and then told them that when they had made up their minds as to the amount, meaning the amount of the injury really sustained, they should not be nice in the award of compensation; adding, as if to qualify the antecedent caution given in favor of the defendant, that it should be liberal.

In examining the charge of the court, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages and to decide upon them, without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions. *Magniac v. Thompson*, 7 Pet., 348.

Instructions given by the court at the trial are entitled to a reasonable interpretation, and if the proposition as stated is not erroneous, they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party. *Castle v. Bullard*, 23 How., 172 [64 U. S., XVI., 424].

Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the matter explained. *Locke v. U. S.*, 2 Cliff., 574; *Smith v. McNamara*, 4 Lans., 169.

Requests for such a purpose may be made at the close of the charge, to call the attention of the judge to the supposed error, inaccuracy or ambiguity of expression; and where nothing of the kind is done, the judgment will not be reversed, unless the court is of the opinion that the jury were misled or wrongly directed. *Carver v. Jackson*, 4 Pet., 1; *White v. McLean*, 57 N. Y., 670.

None of the exceptions can be sustained, and there is no error in the record.

Judgment affirmed.

Cited—15 N. W. Rep., 93.

See 9 OTTO.

BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS, *Plff.*

in Err.,

v.

JOHN H. D. BLOCK.

JOHN H. D. BLOCK, *Plff. in Err.,*

v.

BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY.

(See S. C., 9 Otto, 686-699.)

County bonds—former judgment, when a bar—bona fide holder of coupons—election—new election—Kansas Act—subsequent state judgment.

1. Where a judgment has been rendered by the State Supreme Court against the validity of coupons of county bonds, their owner, who was a party to such judgment, cannot, while still owning them, recover upon them in another action in a third person's name. Such judgment pleaded in the new action is a conclusive answer to the suit founded upon those coupons.

2. A *bona fide* holder of other coupons, who has purchased them for a valuable consideration, without actual notice of any defense which could be set up against them, where there was legislative authority for the issue of the bonds, and the condition upon which it was allowed to be exercised had been fulfilled, may enforce them.

3. For all legal purposes, the result of an election is what it is declared to be by the authorized Board of Canvassers empowered to make the canvass at the time when the returns should be made, until its decision has been reversed by a superior power; and a reversal has no effect upon acts lawfully done prior to it.

4. A new election subsequently ordered and held, and the action of the Board after the bonds were issued, are immaterial.

5. Under the Kansas Statute of 1865, it is not necessary to name any particular company in the submission to the popular vote. A description of a railroad company may well be made without mentioning its corporate name.

6. This court will not follow a state judgment not given until after the bonds were issued and after the rights of the holders thereof had become fixed, which is not in harmony with many rulings of this court, made and repeated through a long series of years.

[Nos. 234, 290.]

Argued Apr. 13, 1879. Decided May 5, 1879.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is fully stated by the court.

Messrs. J. E. McKeighan, Jno. C. Orrick and A. L. Williams, for Board of Commissioners:

In No. 234.

The case of the *Comrs. of Johnson County v. Thayer*, 94 U. S., 631 (XXIV., 133), contains the latest and most forcible enunciation of the law applicable to this case. If a majority of the electors cast their votes against the proposition to issue bonds, the entire foundation for the proceedings is gone. There is an absolute want of jurisdiction to proceed further in the matter, and an attempt to do so is void, as are all proceedings or issues based upon it. With this elemental failure existing in that case, other and further decisions tending to the same result are not to be regarded as authority.

NOTE.—*Suits on coupons detached from bonds. See note to Kenosha v. Lamson*, 76 U. S., XIX., 725.

Mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds. See note to The Mayor v. U. S., 76 U. S., XIX., 704.

But it will be urged that the so-called canvass of the Commissioners is conclusive. This was argued in the *Lewis* case, and overruled, and approved by this court in the *Johnson County* case.

The purchaser of bonds like those in suit, must inquire and find both legislative and actual authority; and even if the Commissioners had made a record which, on its face was clean, and which showed that the bonds were authorized to be issued by a majority vote, yet, as this court has said, the court has jurisdiction to inquire for itself whether or not such was the fact. This principle has peculiar force in this case. The County Commissioners had no express authority to canvass the vote; no time was named when a canvass should be made; and the record which was made contained enough to lead to a discovery of the truth.

Lewis v. Comrs. Bourbon Co., 12 Kan., 186.

The record of the meeting of May 10, 1867, at which the votes were canvassed, distinctly informs the purchaser that there were two townships whose votes were not canvassed: Franklin and Walnut, but "that there was no evidence that there had been an election in those townships." This is simply equivalent to saying that, at the time of the canvass, the returns had not come in. The presumption of the law is that there was an election.

There is no estoppel in this case against the County. There are no recitals in the bonds. The County does not, and never did, hold the stock of the company, but assigned it at the solicitation of the company, for a nominal consideration.

The bonds are void at all points; and the bonds themselves, instead of silencing inquiry by their statements, excite it.

The familiar argument of acquiescence by the people is of no force in Kansas. The individual tax payers were powerless.

Craft v. Comrs. of Jackson Co., 5 Kan., 518.

In No. 290.

1. The judgment of the Supreme Court of Kansas in the case of *Lewis v. Comrs. of Bourbon Co.*, was final as to all coupons held by said Lewis, or for him by the plaintiff.

Beloit v. Morgan, 7 Wall., 619 (74 U. S., XIX., 205).

A judgment in *mandamus* at common law would not be a bar; but it is submitted that, under the laws of Kansas, it is a bar.

Gen. Stat., 1868, sec. 688, pp. 766, 767; *State v. Marston*, 6 Kan., 524; *State v. Jeff. Co. Comrs.*, 11 Kan., 66.

In modern practice, the writ of *mandamus* is nothing more than an ordinary process in cases where it is applicable.

Kentucky v. Dennison, 24 How., 66 (65 U. S., XVI., 171); *Gilman v. Bassett*, 33 Conn., 298; *Arberry v. Beavers*, 6 Tex., 457.

Where a party has resorted to *mandamus*, he cannot maintain another suit for the same cause of action.

Kendall v. Stokes, 3 How., 87.

Mr. John D. Stevenson, for Block:

In No. 234.

When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has the right to presume that they were issued under the circumstances which give the requisite authority, and that they are

no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper.

City of Lexington v. Butler, 14 Wall., 283 (81 U. S., XX., 809); *Gelpcke v. Dubuque*, 1 Wall., 203 (68 U. S., XVII., 524); *Knox Co. v. Aspinwall*, 21 How., 539 (62 U. S., XVI., 208); *Supervisors v. Schenck*, 5 Wall., 784 (72 U. S., XVIII., 559); *Bissell v. Jeffersonville*, 24 How., 299 (65 U. S., XVI., 671).

A county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled, by the fact that the county had subsequently levied taxes to pay interest on the bonds.

Pendleton Co. v. Amy, 13 Wall., 297 (80 U. S., XX., 579).

Power to issue bonds being shown, the municipal corporation, as against a *bona fide* holder for value, is estopped to deny that the power was properly executed.

Rogers v. Burlington, 3 Wall., 654 (70 U. S., XVIII., 79); *Grand Chute v. Winegar*, 15 Wall., 356 (82 U. S., XXI., 170); *Mercer Co. v. Hackett*, 1 Wall., 83 (68 U. S., XVII., 548); *Meyer v. Muscatine*, 1 Wall., 384 (68 U. S., XVII., 564); *The Mayor v. Lord*, 9 Wall., 409 (76 U. S., XIX., 704); *Aurora v. West*, 7 Wall., 82 (74 U. S., XIX., 42); *Beloit v. Morgan, Id.*, 619 (74 U. S., XIX., 205).

Corporations cannot, by their acts, representations or silence, involve others in onerous engagements.

Moran v. Miami County, 2 Black, 722 (67 U. S., XVII., 342); also, *Zabriskie v. C. C. & C. R. R. Co.*, 23 How., 400 (64 U. S., XVI., 497); *Bissell v. Jeffersonville*, *Clark v. Supervisors*, 27 Ill., 305.

In No. 290.

The proceedings by *mandamus*, *Lewis v. Comrs. of Bourbon Co.*, 12 Kan., 186, was to compel the county officials to perform a duty imposed on them by statute. The only judgment that could be rendered was, to grant or deny the writ.

Stat. of Kan., Rev. of 1868, p. 760.

The opinion of the Supreme Court of Kansas is no part of the judgment.

Gibson v. Chouteau, 8 Wall., 314 (75 U. S., XIX., 317).

This court will decide the validity of the bonds under the laws of Kansas for itself.

Township of Pine Grove v. Talcott, 19 Wall., 666 (86 U. S., XXII., 227).

The judgment in *Lewis v. Bourbon Co.*, 12 Kan., 186, if held to be an estoppel, is only good against the coupons due July 1st, 1872.

Big. Estop., 104, 111; *Goodrich v. Yale*, 8 Allen, 454.

Mr. Justice Strong delivered the opinion of the court:

These are writs of error complaining of one judgment. The plaintiff, Block, brought suit to recover the amount of \$16,800 alleged to be due him upon past-due interest coupons detached from bonds made and issued by Bourbon County. From the findings of fact made by the court below it appears that the plaintiff is the *bona fide* owner of twenty of the bonds from which part of the coupons in suit were taken, and that he purchased them in open market without actual notice of any defense the

county now sets up against them. The remaining coupons are the property of one William J. Lewis, delivered by him to the plaintiff to be collected, not for the benefit of Block, but for that of Lewis, the true owner. Whether, in view of such a finding, a recovery for them can be had in this suit, if there were no other objection to it, we do not now determine. There is another and graver question to be considered. The Lewis coupons had been in litigation before this suit was commenced. In January, 1873, he applied to the Supreme Court of the State for a *mandamus*, suggesting that he was the owner of bonds of the County, one hundred in number, and numbered from one to one hundred, and of the coupons attached to the same; that he was the holder, bearer, and owner of the one hundred coupons due and payable July 1, 1873, part of the coupons now in suit; that a tax had been levied and collected amply sufficient to pay those coupons, but that the County had refused to pay them. The suggestion further represented that the proper officers of the County had neglected and refused to take the necessary steps to make provision for the payment of the coupons falling due in 1873, in January and July, and by an alternative writ the Board of Commissioners of the County were commanded to pay the coupons due in 1873, and to provide for levying a tax sufficient to pay the coupons as they should fall due in 1873.

To this alternative writ the Commissioners answered, in substance, denying the validity and obligation of the bonds. Much of the answer was formal and quite immaterial, but there was also much of substance. It was denied that there had been any proper submission to the electors of the County, of the question whether the County should subscribe to the stock, or issue bonds to the railroad company to which the bonds were issued, to wit: the Tebo and Neosho Railroad Company. The answer further averred that, though there was a submission to the electors, of the question whether the County would vote \$150,000 to any railroad running east to connect with the aforesaid road, a majority of the votes cast at the election ordered was cast against the proposition. It further avers that though the Commissioners canvassed the vote and decided from the returns before it that a majority had voted in favor of the proposition, the returns from one township were not brought in until after the canvass had been completed, and until after the Board had adjourned, and that if the return from that township had been made in season and had been counted, a majority would have appeared against the proposition submitted. This belated return remained unopened until years afterwards, until after the bonds had been issued and after a new submission to the electors had resulted in the vote of a decided majority in favor of the bonds. This new submission, it was averred, was made in 1869, and it was not until after the vote had been taken that a subscription was made to the stock of the Tebo and Neosho Railroad Company, and the bonds of the county were issued in payment. At the time when the subscription was ordered to be made and the bonds were directed to be executed and delivered to the railroad company, it was also ordered that the stock of the County in the railroad company should be sold to the

Land-Grant and Trust Company of New York, for the sum of \$5.

Upon the issue thus tendered and made up, the case was tried by the Supreme Court of the State, and a judgment was given for the defendant. What the effect of this judgment was has a most important bearing upon the inquiry whether there can be any recovery in the present suit for the coupons belonging to Lewis, the relator in the application for the *mandamus*.

To obtain a clear appreciation of that, it is necessary to observe closely what was in issue in the proceeding in the state court and, consequently, what was adjudicated. It was not denied that Lewis was the owner of the one hundred bonds to which the coupons now in suit for his use were attached. It was not denied that the coupons were due and unpaid, as averred in the suggestion and alternative writ. Nor was it denied that the officers of the County had power, and that it was their duty to levy a tax to pay them and to make payment, if they were a lawful debt of the County. In legal effect all this was admitted. The only issue tendered and the only issue tried was that tendered by the answer, namely: that the bonds and coupons were unauthorized by law, because a majority of the voters of the County, voting at the election in 1867, had not sanctioned a subscription to the stock of the railroad company, and approved the proposition submitted for the issue of the bonds. If they had not, the bonds were unauthorized, and the coupons, of course, constituted no debt of the county. Then the relator was not entitled to his *mandamus*. If, on the other hand, the bonds and coupons were lawfully issued, either in pursuance of the vote of 1867 or that of 1869, they did constitute a debt of the County, and a *mandamus* to enforce their payment necessarily followed. The court gave judgment for the defendant, as we have seen, and thus decided that the bonds and coupons held and owned by Lewis were invalid. Such was the necessary effect of the judgment. The issue tried was a material one, and the judgment could not have been rendered without deciding it. Now that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities in its support. A few cases go farther, and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded. As between Lewis, therefore, and Bourbon County the judgment of the State Supreme Court finally established that the coupons, which he held and which he subsequently placed in the hands of Block, the plaintiff in the present suit, were invalid and constituted no part of the debt of the County. As that judgment was pleaded in the present case, it was a conclusive answer to the suit so far as it was founded upon those coupons. The plaintiff's writ of error, consequently, cannot be sustained.

The coupons held and owned by Block are in a different position. As between him and the County there is no estoppel. He was not

party to the suit in which the Lewis coupons were adjudged invalid, and he is unaffected by the judgment therein. Of the coupons which he holds, he is a *bona fide* holder, having purchased them for a valuable consideration, without actual notice of any defense which could be set up against them. When he bought, he was under no obligation to look further than to see that there was legislative authority for the issue of the bonds, and that the condition upon which it was allowed to be exercised had been fulfilled. If there was such authority, and the precedent conditions had been performed, the bonds and coupons are valid obligations of the County, which he, as their owner, may enforce.

The bonds are dated July 1, 1870, and on their face they purport to have been issued by order of the Board of County Commissioners of the County of Bourbon, Kansas, dated March 8, 1867, and they are made payable to the Tebo and Neosho Railroad Company or bearer.

The authority under which it is claimed they were issued was an Act of the Legislature of the State of Feb. 10, 1865, amended by an Act passed Feb. 26, 1866. By that it was enacted "That the Board of County Commissioners of any county to, into, from or near which, whether in this State or *any other State*, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation in the name and for the benefit of such county, not exceeding in amount the sum of \$300,000 in any one corporation, and may issue the bonds of such county, in such amounts as they may deem best, in payment of said stock; * * * but no such bonds shall be issued until the question shall first be submitted to a vote of the qualified electors of the county at some general election, or at some special election to be called by the Board of County Commissioners; * * * and in submitting such question said Board of Directors shall direct in what manner the ballots shall be cast. If a majority of the votes cast at such election shall be in favor of issuing such bonds, the Board of Commissioners of the county shall issue the same."

In this Act several things are to be noticed. The bonds were allowed to be issued in payment for subscriptions to stock of *any* railroad company, whether its road was then located, or might be thereafter, whether it *was in the State or out of it*, in the county or out of it, provided the question of subscription to the stock and issuing the bonds was first submitted to a vote of the qualified electors, and a majority was found in favor of issuing the bonds. Another thing is manifest. It was the legislative intention that the Board of Commissioners should be the body which should submit the question of subscription and issue of the bonds to popular decision, and they were also deputed to determine the result of the election; we mean the Board as it was constituted at the time when an election might be held.

Authorized by this statute, the Board of County Commissioners, on the 8th of March, 1867, submitted to the electors of the County the question whether there should be subscribed for the County \$150,000 to the stock of any railroad company then organized, or that might thereafter be organized, that should construct a railroad commencing at a point on the Tebo and Neosho Railroad running westward, *via* Fort

Scott (in Bourbon County), and should issue bonds to the company for the same. Pursuant to this submission an election was held, the returns of which were canvassed at the proper time by the Board, and the result declared to be that a majority of the votes had been cast in favor of the subscription and the issue of the bonds. This was on the 10th of May, 1867. The declaration of the result was duly entered upon the minutes of the Board. Subsequently an additional return was made from one township which was not before the Board when the canvass was made. Had it been, the result would have been different. But this return was not opened until June 27, 1872; long after the bonds had been issued. Upon the records of the Board nothing appeared to impeach the canvass made in 1867, though in the files of the office the belated poll-book remained unopened. It is hardly necessary to say that the Board, *as it was in 1872*, had no authority to make a new canvass of the election held in 1867, after the bonds had been issued and purchasers had bought on the faith of the canvass first made. The bonds, it is true, contain no recitals. If they did contain a recital that an election had been held, and that a majority had voted for the issue of the bonds, the recital would have been conclusive upon the County, and a purchaser would have needed to look no further than to the Act of the Legislature. This is according to all our decisions. But, in the absence of any recital, it may be conceded he was bound to inquire whether a majority vote had been returned for the issue of the bonds. But where was he to inquire? Plainly only of the Board whose province it was to ascertain and declare the result of the election. Had he gone to their records, they would have shown that the popular vote was in favor of the bond issue. They showed nothing else until 1872. He was not bound to canvass the vote for himself, or to revise and correct a mistaken canvass, any more than he was bound to inquire into the qualification of the electors. And if, relying upon the canvass of the Board and the declared result, he accepted the obligations of the County, it would be a strange doctrine were we to hold that a second canvass, made many years afterwards, could reverse the first and annul rights that had been acquired under it. There is no such law. For all legal purposes, the result of an election is what it is declared to be by the authorized Board of Canvassers empowered to make the canvass at the time when the returns should be made, until their decision has been reversed by a superior power, and a reversal has no effect upon acts lawfully done prior to it. The County of Bourbon is, therefore, estopped, in a suit by a bondholder whose bonds were issued in 1870, from asserting that the canvass of 1867 was incorrect, and that in fact no majority of the qualified electors had voted in favor of the issue of the bonds. All that took place afterwards, all the new evidence that was discovered, the new election ordered and held in 1869, and the action of the Board after the bonds were issued, are immaterial. It follows that much of the argument of the learned counsel for the County, who has argued against the validity of the bonds and coupons, is unsound. It assumes, what cannot be admitted, that a majority of the votes cast at the election

in 1867 was against the issue of the bonds, when it was conclusively established by the decision of the tribunal appointed by law to determine the result of the election, that the contrary was the fact.

We pass now to the consideration of some of the objections made to the order of the County Board of March 8, 1867, submitting to the qualified electors the question whether there should be a subscription made to the stock of any railroad organized, or that might thereafter be organized, that should build a railroad commencing at a point on the Tebo and Neosho Railroad and running westward to Fort Scott, and whether county bonds should be issued to said company therefor. It is said this did not authorize a subscription to the stock of the Tebo and Neosho Railroad Company, or the issue of bonds to it. The objection, in view of the facts that appear in the record, is of no weight. When the order was made, that company had been incorporated by the Legislature of Missouri, and had projected its road along and near the northern boundary of that State through a county adjoining Bourbon. The order of the County Board contemplated a connection of Fort Scott with that road, and the issue of bonds to any company that would make that connection. A part of the connecting road was necessarily in Missouri and a part in Kansas. The Missouri corporation could only build, by its own direct action, to the State line, and a Kansas corporation could only build the part in Kansas; but the Tebo and Neosho Company could and did cause the entire line to be constructed. It had power by its charter to extend, construct, maintain and operate its railroad and branches beyond the limits of the State, so far as Missouri could give it that power. In 1869, that company, under legislative authority, sold all its privileges, rights, powers and franchises to the Missouri, Kansas and Texas Railway Company, organized under the laws of Kansas, stipulating that the vendee should assume all indebtedness incurred for the construction, or otherwise, of the line between Sedalia, Mo., and Fort Scott, in Bourbon County, Kansas. Accordingly, the road begun by the Tebo and Neosho Company was constructed and extended to and beyond Fort Scott, and is now in operation. There can be no doubt that this was a compliance by the Tebo and Neosho Company with the conditions prescribed by the order of the County Board. It built the road through the agency of the Kansas corporation and it, therefore, answered the description made in the order of submission. The County Commissioners subscribed to its stock and issued the bonds to it, or bearer, and their action was warranted, as we have said, by the terms of the submission and its approval. It was not a case of authority given to issue bonds to one railroad company and their issue to another.

We have said enough in refutation of the argument, that because the Tebo and Neosho Railroad Company was a Missouri corporation and could not, therefore, extend its road into Kansas, it was excluded from the roads contemplated in the order and election. If it was, then every railroad company was excluded, for even a Kansas company could not build a road into Missouri. Yet the order and election meant something. No company was named in the or-

See 9 OTTO.

der. None could be. But a description was given that pointed unmistakably to the company that caused the work to be done. In *Johnson Co. Comrs. v. Thayer*, 94 U. S., 631 [XXIV., 133], this court held that under the Kansas Statute of 1865 it is not necessary to name any particular company in the submission to the popular vote. A description of a railroad company may well be made without mentioning its corporate name.

This is all that, in our judgment, these cases require. We have not deemed it necessary to invoke, in aid of our conclusions, the provisions of the curative Act of 1868, for we think it is not open to question that a majority of the qualified electors of the County approved the subscription that was made and the issue of the bonds. That was finally determined by the Board whose duty it was to canvass the result of the election and declare the result. Their decision has never been reversed by any competent authority, and it cannot be impeached collaterally. Nor do we place any reliance upon the second order, made in 1869, and the election held thereunder, resulting in a large majority in favor of the subscription and issue of the bonds. The bonds stand on the order and vote of 1867, as determined by the Canvassing Board at that time.

Nor can we yield assent to the claim that the Acts of 1865 and 1866 were repealed by the General Statutes of 1868. Certainly there was no express repeal, and we can discover no necessary implication of a repeal. And it may be added that the Supreme Court of the State seem to regard those Acts as still in force. *Lewis v. The Comrs.*, 12 Kan., 186, gives no intimation to the contrary, though the court had before it the questions we are now considering. In *Morris v. Morris Co.*, 7 Kan., 576, decided in 1871, the court said: "The Acts of 1865-6 have never been expressly repealed; and if they have ever been impliedly repealed, all rights, power and authority that had accrued under them prior to their repeal had at least been impliedly reserved." And again; "Whatever was done under the Acts of 1865 and 1866, prior to the passage of the Acts of 1868, continued in force the same as though the Acts of 1868 had never been passed."

We have not overlooked the opinion delivered by the Supreme Court of the State in *Lewis v. The Comrs.* [supra]. The judgment in the case was not given until after the bonds were issued, and after the rights of the holders thereof had become fixed. We are, therefore, at liberty to follow our own convictions of the law. To those expressed by the state court we cannot assent. They are not in harmony with many rulings of this court, made and repeated through a long series of years, and they are not such as in our opinion would administer substantial justice if applied to this case.

The judgment of the Circuit Court is affirmed.

Mr. Justice Clifford, dissenting:

Two cases are disposed of by the opinion in this case. I dissent from the judgment in the first case, and concur in the judgment in the second case.

THE UNION PACIFIC RAILROAD COMPANY, *Appt.*,

v.

UNITED STATES.

(See "*Sinking Fund Cases*," 9 Otto 700-727.)

Union Pacific Railroad sinking fund—power of Congress—effect of deposit—earnings from services rendered Government—amendment—Act of 1878.

1. That part of the Act of May 7, 1878, to aid in the construction of a railroad, etc., from the Missouri River to the Pacific Ocean, etc., which establishes in the Treasury of the United States a sinking fund, is constitutional.

2. That part of said Act does not deprive the Union Pacific Railroad Company of its property without due process of law, or in any other way improperly interfere with vested rights; but is a reasonable regulation, promotive of the interests of the public and the corporators.

3. Whatever rules Congress might have prescribed in the original charter, for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment to such charter.

4. That the Secretary of the Treasury is made the sinking fund agent, and the Treasury of the United States the depository, or that the investment is to be made in the public funds of the United States, does not make the deposit a payment of the debt due the United States.

5. It is not a fatal objection that the half of the earnings for services rendered the Government, is retained and put into this fund, for this money, although kept in the Treasury, is owned by the Company.

[No. 1083.]

Argued Mar. 19, 20, 21, 1879. Decided May 5, 1879.

A PPEAL from the Court of Claims. The appellant brought suit in the court below, to recover one half of the amount allowed it as compensation for transporting troops, etc., which sum, demanded, was retained by the Secretary of the Treasury by authority of Act of Congress approved May 7, 1878, to be turned into a sinking fund.

The case is further stated by the court.

Messrs. Samuel Shellabarger and Jeremiah M. Wilson, for appellant.

The question is, whether the United States, having made to its citizen a loan of money, upon full and valuable considerations other than the promise of repayment at the end of thirty years, as well as upon consideration of the promise of such repayment; and such borrower, the claimant, having long since rendered and paid such other full consideration for said loan on time, and the borrower and lender having agreed on, and given and received at the time of the loan, all the security for repayment of the loan which the parties either required or contemplated as a condition of the loan, may the lender now, of its own motion, and fifteen years before any part of the loan is due, order either the present payment of the debt, or that the moneys of the borrower shall be now seized by the lender, and by it be held and managed as a fund for the payment of this debt until the maturity thereof, and then applied to its payment?

The claimant, the Union Pacific Railroad Company, as a person, "a citizen," *O. & M. R. R. Co. v. Wheeler*, 1 Black, 286 (66 U. S., XVII., 130), was created before this loan was made; this, under and in virtue of the Act of 1862.

II. The claimant, at the date of this loan, was not merely a person capable of making a con-

tract with the defendant fixing the terms of the loan, but "was not", to here adopt the words of this court in the late case unreported, which, for the sake of identifying it, we shall denominate the *Credit Mobilier Case*," (*ante*, 143) "a mere creature of the United States; but while it owes duties to the Government, which may in a proper case be enforced, it is still a private corporation, the same as any other railroad company;" and as such private corporation the said "railroad and telegraph line are neither in whole nor in part the property of the Government, but the ownership is in the claimant, a private corporation." *R. R. Co. v. Peniston*, 18 Wall., 32 (85 U. S., XXI., 792). Hence, any property held by the claimant in the terms of this contract of loan, is the private property of this private corporation.

III. This private property of this private corporation, whether held in the terms of this contract of loan or in aught else, is not subject to any outstanding trust, in, or in favor of, the United States, in virtue of which the United States can assert, by suit or Act of Congress, any trust dominion whatever over such property, or deal with the terms of this loan otherwise than as any ordinary loan.

IV. In the words of the court, as found in the case last cited, "The Government sustains two distinct relations to this railroad company. The power of Congress, therefore, in its sovereign and legislative capacity over this corporation is very great."

The Government, however, holds another and very important relation to the Company, namely: that of contractor.

Citing *U. S. v. R. R. Co.*, 91 U. S., 72 (XXIII., 224), under this contract relation of lender, therefore, "There is no ground of relief on account of money due by the defendant to the plaintiff."

V. Since all this is conclusively adjudged or confessedly true, and must, in this case, under the state of the pleadings, be assumed as true, therefore this Funding Act, in its order to seize, by mere mandate of Congress, the moneys and property of this company; to hold, manage and use these according to its mere pleasure; to deprive the company of the right to enjoy, manage, and use its own income under the rights and dominion which belong to ownership; to do this, in pretended security and for ultimate payment of a debt not due by about the seventh of a century, and for which delay of payment the Government has already exacted and been paid an enormous consideration; and to do this in the very teeth of the exact and unambiguous letter of this "distinct" contract of loan, by which it was stipulated that "only one half of the price of transportation and five per cent. of net earnings should be annually applied in payment of such thirty year loan, and that the residue should be demandable and paid only at the end of thirty years, is grossly violative of every guarantee of property right known to this Government."

It violates that limitation which declares:

(a) The legislature has "no power over the substance of that original justice" which is the basis of all government and of society itself;

(b) That the obligations of contracts shall not be impaired;

(c) That property shall be taken for the public use only upon full compensation;

(d) That none shall be deprived of property save by due process of law.

Reserved power of amendment is not, in its terms, an unconditional one.

This court has repeatedly held that these two Acts of 1862 and 1864, being *in pari materia*, must be considered and read as one Act. In the recent decision of this court in the case of *The Missouri, Kansas and Texas Railroad Company v. Kansas Pacific*, this was considered and held; and on this principle it was there decided that the title of the companies to their land grants "took effect, by relation, as of the date of the Act" of 1862. The same principle is declared in *Union Pacific Railroad Company v. Hall*, 91 U. S., 350 (XXIII., 430), and in other cases.

Congress has no power to interpret laws.

In fixing our rights under these statutes, they shall utter language both as to the past and the future, only through the mouth of the judiciary of the land, and not through Congress. How far Congress has power to alter and amend these laws, is another and the main point, to which we presently again come; but with the exception of its power to change the language of these Acts by amendment, Congress is powerless to declare what the laws as they now stand have meant, or shall in the future mean.

Cooley, Const. Lim., 84, note 1, says: "It is well said in *Haley v. Philadelphia*, 68 Pa., 45, it would be monstrous to maintain that when the words and intention of an Act were so plain that no court had ever been applied to for the purpose of declaring their meaning, it was, therefore, in the power of the Legislature, by retrospective law, to put a construction upon them contrary to the obvious letter and spirit."

Justice Gibson, in *Greenough v. Greenough*, 11 Pa., 494, says: "How a mandate to the courts to establish a particular interpretation of a particular statute can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not." And in the text, Mr. Cooley explicitly states what is the indisputable law on this point. He says, page 94: "As the Legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts, for the future, to adopt a particular construction of a law which the Legislature permits to remain in force. To declare what the law is or has been, is a judicial power. To declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial."

Dash v. Van Kleeck, 7 Johns., 498; *Lambertson v. Hogan*, 2 Pa. St., 25; *Ogden v. Blackledge*, 2 Cranch, 272; see, also, *Governor v. Porter*, 5 Humph., 165; *People v. Supervisors*, 16 N. Y., 424; *Reiser v. Tell. Asso's*, 39 Pa., 137; *Dundas v. Bowler*, 3 McL., 397.

The power of amendment cannot destroy vested rights.

The leading case upon this point is *The Commonwealth v. The Essex Company*, 13 Gray, 239, and the opinion was delivered by Chief Justice Shaw. In that case the reserved right of amendment was unlimited. And yet in this case, where the question was the validity of the attempt to so amend as to require the making the additional fishways to those required by the charter, the

court unanimously declare the legislation void, and Judge Shaw says, among other things:

"The rule to be extracted is this, that when under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

Commonwealth v. Bridge Proprs., 2 Gray 339.

In *Miller v. State*, 15 Wall., 498 (82 U. S., XXI., 104) this court adopts the words of Judge Shaw.

See, also, *Holyoke v. Lyman*, 15 Wall., 522 (83 U. S., XXI., 140).

By the definition of this court, the alteration must be one which "will defeat or substantially impair the object of the grant, or any rights which have vested under it."

In *Shields v. Ohio*, 95 U. S., 324 (XXIV., 357, 359), the court uses these words: "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith; they must be consistent with the scope and object of the Act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserve powers, the vested rights of property of corporations, in such cases, are surrounded by the same restriction, and are as inviolable as in other cases."

Sage v. Dillard, 15 B. Mon., 357; *Miller v. Erie R. R. Co.*, 21 Barb., 513.

Power of Congress to impair the obligation of contracts.

Wilkinson v. Leland, 2 Pet., 657, opinion by Mr. Justice Story, is exactly in point "That government can scarcely be deemed free, where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and of private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative power, or ought to be implied from any general expression of the will of the people." * * * * A different doctrine is utterly inconsistent with the great and fundamental principles of a republican government.

In *Calder v. Bull*, 3 Dall., 388, "A law that destroys or impairs the lawful private contracts of citizens," is declared to be "against all reason and justice," and, therefore, not law; and the court adds, in speaking of the powers of Legislatures: "They command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or State Legislature possess such powers, if they had not been expressly restrained would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

In *Hepburn v. Griswold*, 8 Wall., 623 (75 U. S., XIX., 526), the court upon this point says:

"We cannot doubt that a law, not made in pursuance of an express power, which necessarily and in its direct operation, impairs the obligation of contracts, is inconsistent with the spirit of the Constitution."

True it is that *Hepburn v. Griswold*, has been, in one particular, overruled in *Legal Tender Cases*, 12 Wall., 457 (79 U. S., XX., 287), but these remarks of Chief Justice Chase, so far as they have reference to an attempt by Congress to "directly" destroy a contract, as in this Funding Act, are not controverted by Mr. Justice Strong, who delivered the leading opinion in *The Legal Tender Cases*.

Osborn v. Nicholson, 13 Wall., 662 (80 U. S., XX., 695).

In *Marbury v. Madison*, 1 Cranch, 163, Chief Justice Marshall uses the following language:

"The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested rights."

See also, *Fletcher v. Peck*, 6 Cranch, 135.

In *Sturges v. Crowninshield*, 4 Wheat., 206; Chief Justice Marshall discussed the questions of the purpose of the Convention which framed the Federal Constitution in regard to the protection of private contracts, and the prevention of the mischief which had arisen out of their violation. In that connection he used the following words:

"To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that contracts should be inviolable."

In the 44th number of the *Federalist*, p. 281, it is said that "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defenses against these dangers ought not to be omitted. Very properly, therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights."

Is it conceivable that the framers of the Constitution, with these words upon their lips, declaring that the impairment, by legislation of the obligations of contract, was prohibited by the "spirit and scope of all existing constitutional charters, and that additional defense against the danger of such impairment by Legislatures should not be omitted from the Federal Constitution" and yet designed at the same moment to transfer the power of impairing the obligation of contracts from the States to the Federal Government?

The reasoning of the Judges, as found in *Ogden v. Saunders*, 12 Wheat., 213, shows that no such absurdity as that just stated is attributable to the framers of the Federal Constitution.

See especially pages 354 and 355 of 12 Wheat.

The case of *Loan Association v. Topeka*, 20 Wall., 655 (87 U. S., XXII., 455), covers the legal principle that property vested in contracts is, like all other property, protected against invasion by the Legislature, whether State or National.

Cooley in his *Constitutional Limitations*, page 175, says:

"The bill of rights in the American Constitution, forbids that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another, would nevertheless be void. If the Act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, because neither legislative nor judicial, but a mere arbitrary fiat."

The note is as follows:

"*Bowman v. Middleton*, 1 Bay, 252; *Wilkinson v. Leland*, 2 Pet., 657; *Terrett v. Taylor*, 9 Cranch, 43; *Ervine's Appeal*, 16 Pa., 266. It is now considered a universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for a strictly private purpose at all, nor for public, without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plenitudes of power in the legislative department." Nelson, *J.*, in *People v. Morris*, 13 Wend., 328.

In Duer, on Constitutional Jurisprudence, it is said, page 356: "But the National Legislature has no power to interfere with contracts, except where it is expressly given to it."

The power to impair the obligation of contracts, save as to bankruptcy, is neither expressly granted, nor necessary as an incident of any grant. Hence, it was not necessary to be prohibited, by the Constitution, to Congress, as it was necessary, or at least prudent, to do as to the States; simply because, not being granted to Congress, it was prohibited to Congress by the clause reserving all powers not granted to the States or the people. See, also, *Gideon v. U. S.*, 1 Abb. Dig., 568, sec. 370.

Claimant had a vested estate in the thirty year loan.

On this point this court lays down the rule in these words, in the cases of *Green v. Biddle*, 8 Wheat., 84; and in *Von Hoffman v. City of Quincy*, 4 Wall., 553 [71 U. S., XVIII., 409]:

"The objections to a law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." See, also, *Bronson v. Kinzie*, 1 How., 316.

The case of *Palairot's Appeal*, 67 Pa., 479, brought up the question whether the Act of

15th April, 1869, was valid, which authorized irredeemable ground-rents to be discharged and paid off by payment of their value in a gross sum, to be found by a jury in a specified judicial proceeding. It was not an attempt to take property at the will of the Legislature, at less than full value, but was an attempt to compel the citizen to take its full value at a time different from that stipulated by his contract of leasing. Held invalid.

The following cases tend to illustrate the question, when and how a right becomes "vested," or becomes property, so as to be, as such, within the protection due to all forms of property:

Southard v. R. R. Co., 2 Dutch., 13; *State v. Warren*, 28 Md., 338; *Lucas v. Sawyer*, 17 Ia., 517; *Burke v. Barron*, 8 Ia., 132; *Dunn v. Sargent*, 101 Mass., 336; *People v. Auditors*, 9 Mich., 327; *La Forge v. Magee*, 6 Cal., 650; *Pembroke v. Epson*, 44 N. H., 113; *Leffingwell v. Warren*, 2 Black, 605 (67 U. S., XVII., 263); *Hull v. Sunderland*, 3 Vt., 507; *Burch v. Newbury*, 10 N. Y., 374; *Lewis v. Webb*, 3 Me., 326; and a large number of cases cited in note on page 96, Cooley's Const. Lim.; Cooley, 289; *McCracken v. Hayward*, 2 How., 608; the Funding Act, a device to compel payment before maturity.

The Funding Act was defended against the allegation that it compelled virtual payment, before maturity, of a debt no part of which was due, on the ground that it did not compel payment, but only security.

This reply sets up a form for the purpose of disguising substance—resorts to a device in order to hide reality—in a way which has hardly the merit of ingenuity.

Messrs. Chas. Devens, Atty. Gen., and Edwin B. Smith, Asst. Atty. Gen., for appellee:

In equity, the property of the corporation is regarded as held in transfer for the payment of its debts. And it is also held, that stockholders are not entitled to any part of the capital stock or dividend of the profits, until all the debts are paid. And the rights of the creditors are recognized to pursue corporate property into whose possession soever it may have passed, unless transferred to a *bona fide* purchaser; even assets derived from the sale of corporate property will be regarded as substitutes for the things sold. 1 Potler, Corp., 389, sec. 308.

It is evident that the law under discussion is based upon this principle. It is the nature of a law allowing a bill *quia timet*; or of a statute authorizing interposition to preserve rights seen to be endangered by a course adopted and pursued by a debtor. It is the mere accident of the present case that the sovereign which creates the law is also the creditor to be protected. This does not affect the merits of the question. The interest to be subserved is the same in this as in the other cases, viz.: that of the public.

Therefore, as a matter of general legislation, this Act of May 7, 1878, might have been passed, even if the power of Congress were as restricted by existing obligation as is that of a State Legislature; or if the Acts of 1862 and of 1864 contained no reservation of the right to amend or repeal them.

II. Congress is not expressly debarred by the Constitution from passing a law which may incidentally impair or affect the obligation of a contract in some of its provisions. The pro-

hibition is against any State doing this. *Expressio unius*, etc., may, perhaps, apply here. In the clause referred to (art. 1, sec. 10), it is noticeable that everything forbidden to the State is something which is competent to the United States, except the passage of attainder and *ex post facto* laws and the grant of a title of nobility; and this last excepted power is explicitly denied the Federal Government in the next preceding section of the Constitution, and that of passing bills of attainder and retroactive laws by another sentence of that section.

The power to establish a system of bankruptcy is a power to abrogate contracts between citizens by wholesale, "so it may relieve parties from their apparent obligations indirectly in a multitude of ways." *Legal Tender Cases*, 12 Wall., 550 (79 U. S., XX., 311); *Evans v. Eaton*, 1 Pet. (C. C.), 323.

What is meant by indirect release from obligations is very evident. For instance, there is no power expressly conferred upon the United States to make any contract at all. It is implied from the erection of a sovereignty. *Dugan v. U. S.*, 3 Wheat., 172; *U. S. v. Hodson*, 10 Wall., 407 (77 U. S., XIX., 940).

The validity of the statutes giving priority to debts due to the Government, is placed upon a constitutional duty of providing for the public debt. *U. S. v. Fisher*, 2 Cranch, 396.

The effect of this priority is, that the debtor is unable to fulfill earlier obligations to individual creditors. So a statute, constitutional, as providing means to secure a debt to the Government, may take property previously inaccessible, or vary existing rights. The direct purpose is, to provide for the public debt; the indirect result is, that other creditors have to go unpaid.

III. These Acts of 1862 and 1864 are not mere contracts, but are also statutes. *State v. Jersey City*, 31 N. J. Law, 579, case cited *infra*.

As such they are liable to modification or repeal by the body originally enacting them.

Congress did not merely contract for the preservation of the Union; it passed laws to that end, reserving the right to alter and amend such laws as national exigencies might require. It authorized the construction of these roads for uses for which it was constitutionally bound to provide.

In this statute it delegated the right of eminent domain; a thing hardly to be accomplished by mere contract. In this very important particular, railroad, canal and turnpike corporations are *sui generis*. *R. R. Comrs. v. R. R. Co.*, 63 Me., 276, 277, *et seq.*

Whatever is given by statute may be taken away by statute, especially if the right of revocation or modification is reserved.

State v. Hoeflinger, 31 Wis., 262; *Perrine v. Canal Co.*, 9 How., 184; *State v. Mayor, etc.*, 31 N. J. Law, 579.

The present case is not one of an interference with vested rights. It deprives the Corporations of no property, interferes with no proper exercise of corporate privileges. The contract entered into for the repayment of the government advances is not disturbed. The Companies are not required to anticipate the time for extinguishing the debts due the United States. They are simply required to furnish security that they will finally perform this agreement. The payments to constitute a sinking fund are not taken

from the Company, nor do the moneys so paid belong to the United States, by whose treasurer they are held for safe-keeping, simply as a custodian in trust for the companies. The interest earned by this sinking fund inures wholly to the benefit of the Corporations, because the funds are theirs.

The law merely requires a deposit of security, just as it is exacted of insurance companies, etc. It is expressly recited in the preamble that this security is demanded, because the companies, by their operations and management of their incomes, are endangering the interests of the United States, which would be entirely insecure without further legislation. It sets out the precise state of facts which has always been held to justify similar interference with the management of corporations. The existence of these facts is for legislative ascertainment and determination, and is not at all matter of judicial inquiry or cognizance, otherwise than that the court is bound to accept, as an unquestionable verity, that condition of things which the Legislature declares to exist.

Crease v. Babcock, 23 Pick., 344; *Story v. Jersey City, etc., Co.*, 16 N. J. Eq., 22; *State v. Miller*, 30 N. J. Law, 373, affirmed in 31 N. J. L., 521 and 579; *Miners' Bank v. U. S.*, 1 Greene (la.), 563, 564; *Errie R. R. Co. v. Casey*, 26 Pa., 300, *et seq.*, per Black, J.

The requirement of a safety fund, so far from being in contravention of the design of the Acts of 1862 and 1864, is in furtherance of it.

"The reserved power (to alter and amend), may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of its stockholders and of creditors, and for the proper disposition of the assets."

Miller v. State of N. Y., 15 Wall., 498 (82 U. S., XXI., 104); see, also, *Tomlinson v. Jessup*, 15 Wall., 454 (82 U. S., XXI., 204); *Peik v. R. R. Co.*, 94 U. S., 164 (XXIV., 97); *R. R. Co. v. Ackley*, 94 U. S., 179 (XXIV., 99); *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S., 155 (XXIV., 94); *Stone v. Wisconsin*, 94 U. S., 181 (XXIV., 102).

In railroad, ferry, bridge and other similar corporations, the inducement to the corporators is evidently the excess (above expenses) of tolls or profits that may accrue to be divided.

Yet it has been repeatedly held that, under the general clause reserving the right to alter and amend, rates established in the organizing Act might be reduced, or fixed, if none were there mentioned, or if they were merely required to be reasonable.

Parker v. R. R. Co., 109 Mass., 506; *Mass. Gen. Hosp. v. Life Ass. Co.*, 4 Gray, 227.

These corporations were conceived and created with a liability to such limitations and modifications as might subsequently be imposed, and to extinction by repeal. "*Nascentes morimur, et finis ab origine pendet.*"

South Meadow Dam Co. v. Gray, 30 Me., 552 (top); *Oliver Lee & Co's Bank*, 21 N. Y., 21; *R. R. Co. v. Miller*, 10 Barb., 283 (top).

It would be competent for any Legislature to require a deposit of funds with the state treasurer, to meet the judgments against railroads doing business in the State, recovered by reason of any mismanagement occasioning injury to person or property in the State.

It is for the Legislature to ascertain whether or not the management of railroad companies is such as to demand a new remedy, to secure or compel performance of existing obligations.

In the present case it may be noticed, *arguendo*, the officers of these two Corporations communicated to Congress the fact that, under former laws they would be unable to pay the claims of the Government when they matured, or at all. See Cong. Rec., pt. II., p. 1967; and especially same vol., pt. III., p. 2101.

If there is any right which might fairly be called vested, it would be the privilege of exemption from taxation, especially if conceded upon condition that the State should share all above a given per centage of the profits; yet in the case of *Hoge v. R. R. Co.*, No. 134 (*ante*, 303), this court says: that where a charter is made subject to amendment, this right of exemption exists only until the Legislature may otherwise enact.

Railroad Co v. Maine, 96 U. S., 499 (XXIV., 836).

Possibly the right to use the accepted location of the road for the purposes for which it was made, with its designated stations, etc., may be deemed more essentially and vitally a vested right than that to which allusion has just been made. In Massachusetts, however, certain corporations were required to unite in building a passenger station, to extend their tracks thereto, and thereafter to discontinue a portion of their existing locations. This court cited this case, *Worcester v. R. R. Co.*, 109 Mass., 103, with approval in *Shields v. Ohio*, 95 U. S., 319; 325 (XXIV., 357), which also see.

This reserved power of amendment has been exercised in the matter of regulating tolls (whether the reservation was expressed in the charter or made by general law, a part of every Act of incorporation) in almost every State, if not in all; or else similar modifications of the rights first conceded, have been held constitutional.

Proprietors, etc., v. Haskell, 7 Me., 474; *Read v. Frankfort Bk.*, 23 Me., 318; *Meadow Dam Co. v. Gray*, 30 Me., 547; *Crease v. Babcock*, 23 Pick., 334; *Roxbury v. R. R. Co.*, 6 Cush., 424; *Fitchburg R. R. Co. v. Grand Junction R. R. Co.*, 4 Allen, 198; *Comm. v. Eastern R. R. Co.*, 103 Mass., 254; *McLaren v. Pennington*, 1 Paige, 102; *Schenectady & S. P. R. Co. v. Thatcher*, 11 N. Y., 102; *R. R. Co. v. Dudley*, 14 N. Y., 336; *Oliver Lee & Cos. Bank*, 21 N. Y., 9; *Matter of Reciprocity Bank*, 17 How. Pr., 323; *R. R. Co. v. Miller*, 10 Barb., 260; *White v. R. R. Co.*, 14 Barb., 559; *Hyatt v. McMahon*, 25 Barb., 457; *Bailey v. Trustees*, 6 R. I., 491; *Gardner v. Ins. Co.*, 9 R. I., 194; *Errie R. R. Co. v. Casey*, 26 Pa., 287; *Story v. Jersey City, etc., Co.*, 16 N. J. Eq., 13; *State v. Miller*, 30 N. J. Law, 368 and 31 N. J. Law, 531; *State v. Mayor*, 31 N. J. Law, 575; *Wilson v. Tesson*, 12 Ind., 285; *Perrin v. Oliver*, 1 Minn., 202; *Blake v. R. R. Co.*, 19 Ind., 418; *Miners' Bk. v. U. S.*, 1 Green (la.), 563; *R. R. Co. v. Reynolds*, 3 Wis., 287; *Pratt v. Brown*, 3 Wis., 603; *R. R. Co. v. Marsh*, 17 Wis., 16; *Whiting v. R. R. Co.*, 25 Wis., 197; *State v. Milwaukee Gas Co.*, 29 Wis., 461; *West Wis. R. R. Co. v. Supervisors*, 35 Wis., 257; *Atty-Gen. v. R. E. Cos.*, 35 Wis., 425; See, also, *Sherman v. Smith*, 1 Black, 587 (66 U. S., XVII., 163); *Pa. College Cases*, 13 Wall., 190 (80 U. S., XX., 550); *Tomlinson v. Jessup*, *Miller v. State and*

Holyoke Co. v. Lyman, 15 Wall., 454 and 478, and 500, cited *ante* (82 U. S., XXI, 204, 98, 133); *Olcott v. Supervisors*, 16 Wall., 678 (83 U. S., XXI., 382); *Perrine v. Canal Co.*, 9 How., 184; *State v. Hoeflinger*, 31 Wis., 262.

The above cited case of *Sherman v. Smith*, is an affirmation of the decision as to Oliver Lee & Co's Bank, 21 N. Y., 9, making stockholders individually responsible for corporate debts, from which the charter exempted them. The charter was subject to amendment. This amendment gave infinitely more security to creditors, and made every stockholder's estate pledged for debts for which it was not previously holden. It greatly affected the value of the stock. So did the change mentioned in *Bailey v. Hope Ins. Co.*, 9 R. I., 194, requiring stockholders to fill up reduced capital. The report of *Lee's Bank Case*, 21 N. Y., 9, cites *Mass. Hosp. v. State Life Ins. Co.*, 4 Gray, 227 (*supra*). Near the commencement of his opinion, Denio, *J.*, says: "The intention was more adequately to protect the creditors of these institutions," etc. 21 N. Y., 11. These cases are cited in the *Inland Fisheries v. Holyoke Co.*, 104 Mass., 451.

Mr. Chief Justice Waite delivered the opinion of the court:

The single question presented by this case is as to the constitutionality of that part of the Act of May 7, 1878, 20 Stat. at L., 56, which establishes in the Treasury of the United States a sinking fund. The validity of the rest of the Act is not necessarily involved.

It is our duty, when required in the regular course of judicial proceedings, to declare an Act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this Corporation to aid in the construction of its railroad. Neither can they by legislation compel the Corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

See 9 OTTO.

U. S., Book 25.

The contract of the Company in respect to the subsidy bonds is to pay both principal and interest when the principal matures, unless the debt is sooner discharged by the application of one half the compensation for transportation and other services rendered for the Government, and the five per cent. of net earnings as specified in the charter. This was decided in *U. S. v. R. R. Co.*, 91 U. S., 72 [XXIII., 224]. The precise point to be determined now is, whether a statute which requires the Company in the management of its affairs to set aside a portion of its current income as a sinking fund to meet this and other mortgage debts when they mature, deprives the Company of its property without due process of law, or in any other way improperly interferes with vested rights.

This Corporation is a creature of the United States. It is a private Corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests. *R. R. Co. v. Iowa*, 94 U. S., 155 [XXIV., 94].

It is unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved; for, as we think, that reservation has been made. In the Act of 1862, 12 Stat. at L., 489, section 18, it was accompanied by an explanatory statement showing that this had been done "The better to accomplish the object of this Act, namely: to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but especially in time of war) the use and benefits of the same for postal, military and other purposes," and by an injunction that it should be used with "due regard for the rights of said companies." In the Act of 1864, 13 Stat. at L., 356, however, there is nothing except the simple words (section 22) "That Congress may at any time alter, amend and repeal this Act." Taking both Acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the Corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through *Mr. Justice Clifford*, in *Miller v. The State*, 15 Wall., 498 [82 U. S., XXI., 104], "It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;" and again; in *Holyoke Company v. Lyman*, 15 Wall., 519 [82 U. S., XXI., 139], "To protect the rights of the public and of the corporations, or to promote the due administration of the affairs of the corporation." *Mr. Justice Field*, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, 15

Wall., 459 [82 U. S., XXI, 206], he said: "The reservation affects the entire relation between the State and the Corporation, and places under federal legislative control all rights, privileges and immunities derived by its charter directly from the State;" and again; as late as *R. R. Co. v. Maine*, 96 U. S., 510 [XXIV., 840], "By the reservation * * * the State retained the power to alter it [the charter] in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities." *Mr. Justice Swayne*, in *Shields v. Ohio*, 95 U. S. 324 [XXIV., 359] says, by way of limitation, "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the Act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority. Further citations are unnecessary.

Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the Corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future.

Legislative control of the administration of the affairs of a corporation may, however, very properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due. If a State, under its reserved power of charter amendment, were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because it impaired the obligations of the charter contract, or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stockholders without laying by anything to meet losses, would anyone doubt the power of the State under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all divi-

dends that may legitimately be declared and paid out of the current net income, their claims on the property of the Corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A court of equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legislative regulation which requires no more of the corporation than a court would compel it to do without legislation is not unreasonable.

Such a regulation, instead of being destructive in its character, would be eminently conservative. Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations. Large amounts of money are required for construction and equipment, and this to a great extent is represented by a funded debt, which, as well as the capital stock, is sought after for investment, and is distributed widely among large numbers of persons. Almost as a matter of necessity it is difficult to secure any concert of action among the different classes of creditors and stockholders and, consequently, all are compelled to trust in a great degree to the management of the corporation by those who are elected as officers, without much, if any, opportunity for personal supervision. The interest of the stockholders, who, as a rule, alone have the power to select the managers, is not unfrequently antagonistic to those of the debtholders, and it, therefore, is especially proper that the Government, whose creature the corporation is, should exercise its general powers of supervision and do all it reasonably may to protect investments in the bonds and stock from loss through improvident management.

No better case can be found for illustration than is presented by the history of this Corporation. Without undertaking in any manner to cast censure upon those by whose matchless energy this great road was built and, as if by magic, put into operation, it is a fact which cannot be denied, that, when the road was in a condition to be run, its bonds and stocks represented vastly more than the actual cost of the labor and material which went into its construction. Great undertakings like this, whose future is at the time uncertain, requiring as they do large amounts of money to carry them on seem to make it necessary that extraordinary inducements should be held out to capitalists to enter upon them, since a failure is almost sure to involve those who make the venture in financial ruin. It is not, however, the past with which we are now to deal, but rather the present and the future. We are not sitting in judgment upon the history of this Corporation, but upon its present condition. We now know that when the road was completed its funded debt alone was as follows: first-mortgage, \$27,232,000, subsidy bonds, \$27,236,512, all maturing thirty years after date, and that the average time of its maturity is during the year 1897. In addition to these are now the sinking-fund bonds, the land-grant bonds, and the Omaha bridge bonds, amounting to at least \$20,000,000 more. The interest on the first-mortgage and all other classes of bonds,

except the subsidy bonds, will undoubtedly be met as it falls due; but on the subsidy bonds, as has already been seen, no interest is payable, except out of the half of the earnings for government service and the five per cent. of net earnings, until the maturity of the principal. Thus far, as we have had occasion to observe in the various suits which have come before us during the past few years, involving an inquiry into these matters, the payments from these sources have fallen very far short of keeping down the accruing interest, and according to present appearances, it is not probably too much to say that when the debt is due there will be as much owing the United States for interest paid as for principal. There will then become due from this Company, in less than twenty years from this date, in the neighborhood of \$80,000,000, secured by the first and subsidy mortgages. In addition to this are the capital stock, representing \$36,000,000 more, and the funded debt inferior in its lien to that of the subsidy bonds. All these different classes of securities have become favorites in the market for investments, and they are widely scattered, at home and abroad. They have taken to a certain extent the place of the public funds as investments. With the exception of the land-grant, which is first devoted to the payment of the land-grant bonds, but little if anything except the earnings of the Company can be depended on to meet these obligations when they mature. The Company has been in the receipt of large earnings since the completion of its road, and, after paying the interest on its own bonds at maturity, has been dividing the remainder, or a very considerable portion of it, from time to time among its stockholders, without laying by anything to meet the enormous debt which, considering the amount, is so soon to become due. It is easy to see that in this way the stockholders of the present time are receiving, in the shape of dividends, that which those of the future may be compelled to lose. It is hardly to be presumed that this great weight of pecuniary obligation can be removed without interfering with dividends hereafter, unless at once some preparation is made by sinking fund or otherwise to prevent it. Under these circumstances, the stockholders of to-day have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the Corporation, and the stockholders, as such, have no right to them as against the just demands of creditors.

The United States occupy towards this Corporation a twofold relation: that of sovereign and that of creditor. *U. S. v. R. R. Co.* [ante, 143]. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign or creditors, require the Company to pay the other debts it owes before they mature. But out of regard to the rights of the subsequent lienholders and stockholders, it is not only their right, but their duty, as sovereign to see to it that the current stockholders do not, in the administration of the affairs of the Corporation, appropriate to their own use that which in equity belongs to

others. A legislative regulation which does no more than require them to submit to their just contribution towards the payment of a bonded debt cannot in any sense be said to deprive them of their property without due process of law.

The question still remains, whether the particular provision of this statute now under consideration comes within this rule. It establishes a sinking-fund for the payment of debts when they mature, but does not pay the debts. The original contracts of loan are not changed. They remain as they were before, and are only to be met at maturity. All that has been done is to make it the duty of the Company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of the creditors than it is for the Corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

To our minds it is a matter of no consequence that the Secretary of the Treasury is made the sinking fund agent and the Treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States. The duty of the manager of every sinking fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available. Certainly no objection can be made to the security of this investment. In fact, we do not understand that complaint is made in this particular. The objection is to the creation of the fund and not to the investment, if that investment is not in law a payment.

Neither is it a fatal objection that the half of the earnings for services rendered the Government, which by the Act of 1864 was to be paid to the Companies, is put into this fund. The Government is not released from the payment. While the money is retained, it is only that it may be put into the fund, which, although kept in the Treasury, is owned by the Company. When the debts are paid, the securities into which the moneys have been converted that remain undisposed of must be handed over to the corporation. Under the circumstances, the retaining of the money in the Treasury as part of the sinking fund is, in law, a payment to the Company.

Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the Corporation, and promotive of the interests of the public and the corporators. It takes nothing from the Corporation or the stockholders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a Corporation in which the public are

so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities.

The legislation is also warranted under the authority by way of amendment to change or modify the rights, privileges and immunities granted by the charter. The right of the stock holders to a division of the earnings of the Corporation is a privilege derived from the charter. When the charter and its amendments first became laws, and the work on the road was undertaken, it was by no means sure that the enterprise would prove a financial success. No statutory restraint was then put upon the power of declaring dividends. It was not certain that the stock would ever find a place on the list of marketable securities, or that there would be any bonds subsequent in lien to that of the United States which could need legislative or other protection. Hence, all this was left unprovided for in the charter and its amendments as originally granted, and the reservation of the power of amendment inserted so as to enable the Government to accommodate its legislation to the requirements of the public and the Corporation as they should be developed in the future. Now it is known that the stock of the Company has found its way to the markets of the world; that large issues of bonds have been made beyond what was originally contemplated, and that the Company has gone on for years dividing its earnings without any regard to its increasing debt, or to the protection of those whose rights may be endangered if this practice is permitted to continue. For this reason Congress has interfered and, under its reserved power, limited the privilege of declaring dividends on current earnings, so as to confine the stockholders to what is left after suitable provision has been made for the protection of creditors and stockholders against the disastrous consequences of a constantly increasing debt. As this increase cannot be kept down by payment unless voluntarily made by the Corporation, the next best thing has been done, that is to say, a fund safely invested, which increases as the debt increases, has been established and set apart to meet the debt when the time comes that payment can be required.

Judgment affirmed.

Dissenting, *Mr. Justice Strong, Mr. Justice Field and Mr. Justice Bradley.*

See dissenting opinions, *post*, 506.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—105 U. S., 21; 107 U. S., 476, 740; 109 U. S., 27, 542; 110 U. S., 353; 17 Blatchf., 420; 6 Sawy., 357, 358; 31 Hun., 548; 90 N. Y., 161; 93 Ill., 239; 5 N. W. Rep., 280; 9 Lea., 621; 42 Am. Rep., 686.

THE CENTRAL PACIFIC RAILROAD COMPANY, LELAND SANFORD ET AL.,

Appts., v.

ALBERT GALLATIN.

(See "Sinking Fund Cases," 9 Otto, 727-769.)

Franchises granted—assent of State—right of amendment by Congress—construction of road—extent of amendment—sinking fund.

1. By the Act of Congress of 1862, all the rights, privileges and franchises, including land-grants and subsidy bonds were given to the Central Pac. R. R. Co., that were granted to the Union Pac. R. R. Co., except the franchise of being a Corporation, which it already possessed under the laws of California.

2. That State, by implication at least, has given its assent to what was so done by Congress.

3. The Act of Congress of 1864, granting to the former Company certain additional corporate powers and pecuniary resources reserved to Congress full power of amendment.

4. The Central Pacific Co. assigned to the Western Pacific Co., organized under the law of California, its rights under the Act of Congress, to construct the road between San José and Sacramento, and this assignment was ratified, and further privileges given it by Congress.

5. To the extent of the powers, rights, privileges and immunities granted these corporations by the United States, Congress retains the right of amendment, and in this way may regulate their affairs, in a matter not inconsistent with the requirements of the original state charter.

6. The establishment of a sinking fund by the Act of 1875, is within the power of Congress and is not at all in conflict with anything contained in the original state charters.

[No. 972.]

Argued Mar. 19, 20, 21, 1879. Decided May 5, 1879.

APPEAL from the Circuit Court of the United States for the District of California.

This case arose upon a bill filed in the court below, to restrain the payment of certain dividends by the Central Pac. R. R. Co. The question involved is the validity of the so-called "Thurman Act" of Congress, approved May 7, 1878, as applied to this Company.

The case is fully stated by the court.

Messrs. S. W. Sanderson, J. H. Storrs and B. H. Hill, for appellants.

Mr. Geo. H. Williams, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

The only material difference between this case and that of the *Union Pacific Company*, arising under the Act of May 7, 1878, lies in the fact that in this the special franchises as well as the land and subsidy bonds, were granted by the United States to a corporation formed and organized under the laws of the State of California, while in that, Congress created the corporation to which the grants were made. The California Corporation was organized under a state law with an authorized capital of \$8,500,000, to build a road from the City of Sacramento to the eastern boundary of the State, a distance of about one hundred and fifteen miles. Under the operation of its California charter, it could only borrow money to an amount not exceeding the capital stock, and must provide a sinking fund for the ultimate redemption of the bonds. Hit-tell, Cal. L., 1850, 1864, sec. 840. No power was granted to build any road outside the State, or in the State except between the *termini* named. By the Act of 1862, Congress granted this Corporation the right to build a road from San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of the State, and from there through the Territories of the United States until it met the road of the Union Pacific Company. For this purpose all the rights, privileges and franchises were given this Company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incidental to the organization of the Company.

The land-grants and subsidy bonds to this Company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. Each of the companies was required to file in the Department of the Interior its acceptance of the conditions imposed, before it could become entitled to the benefits conferred by the Act. This was promptly done by the Central Pacific Company, and in this way that Corporation voluntarily submitted itself to such legislative control by Congress as was reserved under the power of amendment.

No objection has ever been made by the State to this action by Congress. On the contrary, the State, by implication at least, has given its assent to what was done, for in 1864 it passed "An Act to Aid in Carrying Out the Provisions of the Pacific Railroad and Telegraph Act of Congress," and thereby confirmed and vested in the Company "All the rights, privileges, franchises, power and authority conferred upon, granted to, or vested in said Company by said Act of Congress," and repealed "All laws or parts of laws inconsistent or in conflict with * * * the rights and privileges herein (therein) granted." Hittell, L., sec. 4798; Acts of 1863, 1864, 471. Inasmuch as, by the Constitution of California, then in force (art. IV., sec. 81) corporations, except for municipal purposes, could not be created by special Act, but must be formed under general laws, the legal effect of this Act is probably little more than a legislative recognition by the State of what had been done by the United States with one of the state corporations.

In so doing, the State but carried out its original policy in reference to the same subject-matter, for as early May 1, 1852, an Act was passed reciting "That the interests of this State as well as those of the whole Union, require the immediate action of the Government of the United States, for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of national safety, in the event of war, and to promote the highest commercial interests of the Republic," and granting the right of way through the State to the United States for the purpose of constructing such a road. Hittell, L., sec. 4791; Acts of 1852, 150. In 1859 (Acts of 1859, 391), a resolution was passed calling a convention "To consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said railroad can be accomplished;" and at the same session of the Legislature a memorial was prepared asking Congress to pass a law authorizing the construction of such a road and asking also a grant of lands to aid in the construction of railroads in the State. Acts of 1859, 395. Nothing was done however by Congress until the rebellion, which at once called the attention of all who were interested in the preservation of the Union to the immense practical importance of such a road for military purposes, and then, as soon as a plan could be matured and the necessary forms of legislation gone through with, the Act of July 1, 1862, was passed. But this was not enough to interest capitalists in the undertaking, and although the Legislature of California during the year 1863 passed several Acts intended to hold out further

inducements, but little was accomplished until the amendatory Act of Congress in 1864, which besides authorizing the first mortgage, and changing in some important particulars the conditions on which the subsidy bonds were to be issued, conferred additional powers on the Corporation, some of which, such as the right of eminent domain in the Territories, the State could not grant, and others, such as the right of issuing first-mortgage bonds without a sinking fund, and in excess of the capital stock, it had seen fit to withhold. This Act also reserved to Congress full power of amendment, and was promptly accepted by the Corporation. With this addition of corporate powers and pecuniary resources the work was pushed forward to completion with unexampled energy. But for the corporate powers and financial aid granted by Congress it is not probable that the road would have been built. The first-mortgage bonded debt was created without a sinking fund, and the road in the Territories built under the authority of Congress, assented to and ratified by the State.

The Western Pacific Company, now, by consolidation, a part of the Central Pacific Company, was also organized, December 13, 1862, Acts of 1863, 81, under the general Railroad Law of California, with power to construct a road from a point on the San Francisco and San José Railroad, at or near San José, to Sacramento, and there connect with the road of the Central Pacific Company. Afterwards the Central Pacific Company assigned to this Corporation its rights, under the Act of Congress, to construct the road between San José and Sacramento; and this assignment was ratified by Congress, "With all the privileges and benefits of the several Acts of Congress relating thereto, and subject to all the conditions thereof," 13 Stat. at L., 504. By the same Act further privileges were granted by the United States both to the Central Pacific and Western Pacific Companies, in respect to their issue of first-mortgage bonds.

Under this legislation we are of the opinion that, to the extent of the powers, rights, privileges and immunities granted these corporations by the United States, Congress retains the right of amendment, and that in this way it may regulate the administration of the affairs of the Company in reference to the debts created under its own authority, in a manner not inconsistent with the requirements of the original state charter, as modified by the state Aid Act of 1864, accepting what had been done by Congress. This is as far as it is necessary to go now. It will be time enough to consider what more may be done when the necessity arises. As yet, the State has not attempted to interfere with the action of Congress. All complaint thus far has come from the Corporation itself, which, to secure the government aid, accepted all the conditions that were attached to the grants, including the reservation of power to amend.

It is clear that the establishment of a sinking fund by the the Act of 1878 is not at all in conflict with anything contained in the original state charter, for by that charter no such debt could be created without provision for such a fund. This part of the Act of 1878 is, therefore, in the exact line of the policy of the State, and does no more than place the Company

again, to some extent, under obligations from which it had been released by congressional legislation. So, too, the reservation of the power of amendment by Congress is equally consistent with the settled policy of the State; for not only the state charter, in terms, makes such a reservation in favor of the State, but the Constitution expressly provides that all laws for the creation of corporations "may be altered from time to time, or repealed." Art. IV., sec. 31.

It is not necessary now to inquire whether, in ascertaining the net earnings of the Company for the purpose of fixing the amount of the annual contributions to the sinking fund, the earnings of all the roads owned by the present corporation are to be taken into the account, or only of those in aid of which the land-grants were made and the subsidy bonds issued. The question here is only as to the power of Congress to establish the fund at all. If disputes should ever arise as to the manner of stating the accounts, they can be settled at some future time.

All the other questions which have been argued in this case were considered and decided in that of the Union Pacific Company in a way to sustain the decree below.

It follows that the decree of the Circuit Court must be affirmed; and it is consequently so ordered.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

[Dissenting opinions refer to both this and the preceding case, Nos. 1083 and 972.]

Mr. Justice Strong, dissenting:

In my opinion, the Act of Congress of May 7, 1878, 20 Stat. at L., 56, is plainly transgressive of legislative power. As was said by Mr. Hamilton in his celebrated communication to the Senate of January 20, 1795, "When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it." 3 Hamilton's Works, 518. Opinions similar to this have often found expression in judicial decisions, even in those of this court. If this be sound doctrine, it is as much beyond the power of a Legislature, under any pretense, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors.

The contracts of the government with the Union Pacific Railroad Company and with the Central Pacific, which the Act of Congress of 1878 has in view, were not made by the Act of 1862, 12 Stat. at L., 489, the Act chartering the former Company, nor by the amending Act of 1864, 13 Stat. at L., 356. They were made after those Acts had been accepted by the Companies,

and after their chartered rights had been completely acquired. There was no agreement of the Companies to repay the loan of government bonds made to them, until the bonds were issued and delivered. The companies were under no obligation to accept the loan and assume the liability resulting from its acceptance. The contracts, therefore, are no part of the charter of the Union Pacific Company and no part of the Acts of 1862 or 1864. They are subsequent to those Acts and independent of them. It is true Congress authorized the loan. It made the Companies offers to lend upon certain conditions; and when those offers and conditions were subsequently accepted, the contracts of loan were made. Not until then. Before that time there was nothing but an unaccepted offer.

What, then, was the contract when it was made? The government lent its bonds and, in consideration of the loan, each Company assumed five obligations: 1, to pay the bonds at their maturity, that is, at the expiration of thirty years; 2, to keep the railroad and telegraph line in repair and use; 3, to furnish transmission of dispatches and transportation for the government at reasonable rates, allowing it a preference for such purposes; 4, to apply to the payment of the bonds and interest half the compensation due to it from the government for services rendered, until the whole amount of the loan is fully paid; and 5, after the completion of the railroad, to apply to the payment of the bonds at least five per cent. annually of its net earnings. The lender required and the borrower undertook nothing more.

It is manifest that by this contract the government acquired a vested right to payment at the time and in the mode specified, as well as to preference of transportation and transmission of dispatches; and the Company acquired a vested right to retain the consideration given for its assumption; that is, a vested right to withhold payment until by the terms of the contract payment became due. The contract implied an agreement not to call for payment or additional security before that time. I cannot conceive of any rational doubt of this. There is no technicality about vested rights. Most of them grow out of contracts and, no matter how they arise, they are all equally sacred, equally beyond the reach of legislative interference. A vested right of action is property in the same sense in which rights to tangible things are, and is equally protected. Whether it springs from contract or from other rules of the common law, it is not competent for the Legislature to take it away. If we look at what must have been the understanding of all parties to these contracts of loan, the rights created and vested under them cannot be in doubt. The government sought to induce private adventurers to construct a railroad and telegraph line to the Pacific Ocean: a work which necessarily required years and immense expenditures for its accomplishment. A loan, repayable on call or within a short time, would have been no inducement. Had it been dreamed that a call could have been made at any time thereafter designated by Congress, it is inconceivable that the loan proffered would have been accepted. It would have furnished no reliable basis for an attempt to build the road. The parties could not so have understood the bargain. The bonds were required to be paid

by the Companies only at their maturity, except so far as half payment for governmental service, and five per cent of the net earnings, after the completion of the road, might pay. The contract, therefore, means exactly what it would have meant had it contained the express stipulation: "The United States shall not require payment of the amount of the bonds, or any part thereof (except half compensation for services, and five per cent. of net earnings), until the expiration of thirty years from their issue to the Company, or date, nor shall additional security be required, beyond the lien reserved." Such was the contract. It was not one of the franchises granted in the charter of the Union Pacific or the Central, but it was a business transaction, differing in nothing, except parties, from what it would have been if it had been made between two private individuals. It is true Congress authorized the loan on the terms upon which it was made; but, as I have said, the contract was not made by the Act of Congress, or with Congress. It was a subsequent transaction, and the United States became a party to it, not in its sovereign character, but as a civil corporation, as said by Mr. Hamilton, with the same rights and obligations as a private person, and no more.

Now, what has been attempted by the Act of May 7, 1878? That Act was passed with sole reference to this contract, and all its provisions have in view the imposition of additional obligations upon the Railroad Company. It does not purport to be a repeal of the charter. Its leading purpose is to take control of the property of the debtor, and sequester it for the security of a debt, which, by the terms of the contract, is not due and payable for years to come. I shall not go over all its provisions. It will be sufficient to notice some of the more prominent ones, which, if they are ruled to be operative, greatly change the contract which the parties made when the bonds were delivered and accepted, when the contract was closed, and which impose new and oppressive obligations upon the debtor.

By the contract only one half the compensation for services rendered to the government was required to be applied to the payment of the bonds, but by this Act the whole amount of the compensation which may from time to time be due for services rendered to the government is directed to be retained by the United States and, at the same time, the obligation to render those services is continued. By the 3d section of the Act a sinking fund is established in the Treasury of the United States, that is, in the Treasury of the creditor; and the 4th section enacts that there shall be carried into that fund, on the first day of February in each year, the one half of the compensation above named, not applied in liquidation of interest. By the contract the debtor was bound to pay only five per cent. of its net earnings, after the completion of the road, annually to the creditor; but this Act requires the debtor to pay into the creditor's treasury, to the credit of the sinking fund, twenty-five per cent. of its whole net earnings, on the 1st of February in each year. The Act further directs that the sinking fund thus created shall, with its accumulations, be invested in bonds of the United States, and at the maturity of the bonds

See 9 OTTO.

loaned to the debtor be applied to the payment and satisfaction thereof, and of all interest paid by the United States. There are other provisions of this Act intended to enforce compliance with these newly added obligations imposed upon the debtor, as also provisions that the sinking fund shall be held for the benefit, protection and security of other lien creditors of the debtor. But I deem it unnecessary to mention them in detail. Those which I have mentioned are enough for the present case. No one can deny that they materially change the contract of loan and borrowing previously existing between the government and the railroad companies, and change it at the will of the creditor alone. Nor can it be denied that they impose upon the debtors new and onerous burdens that they never agreed to assume. Practically, they enforce payment of the debt before, by the terms of the contract, it is due. The Act seizes the half compensation, which the government agreed should not be retained, and covers it into the Treasury, appropriating it to the payment of the debt. For nothing else can it be used. The Act also requires payment into the treasury of twenty-five per cent. of the net earnings of the company, instead of five per cent. only, as stipulated when the contract was made. It is true it does not make immediate application of the sums thus withheld and demanded to the extinguishment of the debt. It declares that they shall be applied to the payment of the debt and interest "at the maturity of the bonds." But this is a distinction without a difference, obviously made to evade what it was known could not lawfully be done. An immediate application might as well have been directed. It would probably be better for the debtor if the application were immediately made. The money is taken from the debtor, withdrawn entirely from the debtor's control and use, and put into the Treasury of the creditor, and there left to the mere agreement of the creditor to apply it to payment. I apprehend no plain man of common sense will hesitate to conclude that this is exacting payment before the debt is due. If A borrows from B \$1,000, and gives his note therefor, payable at the expiration of five years, and at the end of one year the lender demands that there be placed in his hands by the debtor a sum of money to meet the note when it shall fall due, it will hardly be contended that would not be requiring payment before the debtor was bound to pay. And if such a demand could be enforced, it would be at the expense of the contract. What more is the present case? And were it conceded the Act of 1878 does not attempt to enforce the payment before the maturity of the debt, the concession would be of little worth, for it will not be questioned that it attempts to enforce giving additional security for payment beyond that stipulated for in the contract. That is no less a material alteration of the contract, a serious addition to it. The plain truth is, the assertion of such a power is claiming the right to disregard the contract entirely, and substitute for it a different one, without the consent of the debtor. If the United States can exact now one quarter of the net earnings of each of these companies, and place it in their Treasury, they can, by the same power, and with the same reason, exact the whole of the earnings, or any other property

equal to the amount of the debt. Was any such thing contemplated by the parties when the contract was made?

Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? Where is the power to annul vested rights? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to state legislation. For such legislation the prohibition was necessary; for State Legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the 84th number of the *Federalist*, "Why declare that things shall not be done which there is no power to do?" Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to lessen the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. Even a bankrupt law cannot be enacted applicable only to single corporations or single debtors. To be constitutional, it must be uniform throughout the United States. I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can by any direct action, otherwise than by a bankrupt law, even relieve a debtor to a private party from any duty he has assumed by his contract. Much less can it change the stipulations of the contract and impose additional liabilities upon a contractor with the government. Such an exercise of power would be making a contract for parties to which they never assented. In all the history of congressional legislation before the Act of 1878, such a power was never attempted to be exercised.

And not only is such legislative authority not conferred upon Congress by the Constitution, but it is, in effect, expressly denied. The Fifth Amendment contains restrictions taken, in substance, from *Magna Charta*. Among them are the provisions that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. These are restrictions upon legislative as well as executive power. What is due process of law is well understood. It is law in regular course of administration through courts of justice. *Coke*, 2 Inst., 272; *Murray v. Hoboken L. and Imp. Co.*, 18 How., 272 [59 U. S., XV., 372]. "The terms 'the law of the land,' said Chief Justice Ruffin, *Hoke v. Henderson*, 4 Dev. (N. C.), 15, do not mean merely an Act of the General Assembly. If they did, every restriction upon legislative authority would be at once abrogated, and private property would be at the mercy of the Legislature." Yet the Act of 1878 does attempt by its own force,

and without any judicial action, not only to change a contract and increase its obligations, but also to deprive the Railroad Companies of their property. What is property? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who has that right has the property. The subject may be corporeal or incorporeal. A right in action is as completely property as is a title to land. A very large portion of the property of the country consists in rights attendant upon contract. The right of a promisee to demand payment when the note falls due is a right of property; and equally so is the right of the promisor to hold, as against his promisee, the consideration for the promise until the time stipulated in the note for payment. The promisee has no right to enforce payment, or to enforce giving security for it, if none was promised in the contract. Such a right is no portion of his property, and it can be enforced only at the expense of a clear right of the promisor. On the other hand, the promisor has a right to exemption from liability to give such security. It is incident to his contract. Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very just sense, property, and as such are protected by the Fifth Amendment to the Constitution.

I notice another consideration which, to my mind, is not without weight. It may, I think, well be doubted whether the Act of 1878 is even an attempted exercise of legislative power. A statute undertaking to take the property of A and transfer it to B is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department of the Government. The Act of Congress is little, if any, more. It does not purport to be a general law. It does not apply to all corporations or to all debtors of the government. It singles out two Corporations, debtors of the government, by name and prescribes for them as debtors new duties to their creditor. It thus attempts to perform the functions of a court. This, I cannot but think, is outside of legislative action and power.

I turn now to the arguments by which the constitutionality of the Act of Congress has been attempted to be supported. It is said that, though Congress cannot directly abrogate contracts, or impair their obligation, it may indirectly, by the exercise of other powers granted to it. This I have conceded, but I deny that an acknowledged power can be exerted solely for the purpose of effecting indirectly an unconstitutional end which the Legislature cannot directly attempt to reach. If the purpose were declared in the Act, I think no court would hesitate to pronounce the Act void. In the case to which I have referred, *Hoke v. Henderson*, 4 Dev., 27, *Ch. J. Ruffin*, when considering at length an argument that a Legislature could purposely do indirectly what it could not do directly used this strong language: "The argument is unsound in this, that it supposes (what cannot be admitted as a supposition) the Legislature will, designedly and wilfully, violate the Constitution, in utter disregard of their oaths and duty. To do indirectly in the abused exercise of an acknowledged

power, not given for but perverted for that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the Constitution."

It is unnecessary, however, to enlarge upon this, for the effect wrought upon the contracts of these two Companies is a direct effect; a direct alteration of the obligation assumed by the debtors, and not an incidental result of legislation upon some other subject over which Congress has a right to legislate. It is too plain to admit of any doubt that the sole object of the Act of 1878 was to enforce giving new and additional security for the payment of the subsidy bonds at their maturity. All its provisions aim directly at that, and the new terms thereby added to the contract have that end solely in view.

In further attempted support of the validity of the Act, it has been denied that it does change the contract, because it does not require the application of the additional payments to the satisfaction of the debt before its maturity. I have, perhaps, said enough upon this subject. The argument can hardly be seriously made. The Act does compel the debtors to surrender possession of their property to the creditor before the time when, by the terms of the contract, they were under obligation to part with it. The debtors are no longer permitted to hold and use one half the compensation due presently from the government for services rendered, and are no longer at liberty to use all their net income or earnings, except five per cent. at their discretion. One quarter of their net earnings they are compelled to surrender to the creditor. Thus the creditor becomes the custodian of the debtors' property, and acquires a right to hold and manage it as if it were his own. It is absurd to say this is not practically a radical change in the relations between the parties established by the contract. And it is equally impossible to maintain that it is not depriving the debtors of their property without due process of law.

I turn now to what has been most relied upon in support of the validity of the Act. I refer to the clauses in the Acts of 1862 and 1864, reserving the right to repeal, amend or alter. There are two such: one in the Act of 1862, and one in that of 1864. That in the latter Act is the broadest, and it is as follows: "Congress may at any time alter, amend or repeal this Act." The power thus reserved is one over the Act itself, not over anything that may have lawfully been done under the Act, before its repeal or alteration. It is only by great confusion of things essentially distinct that this power can be construed as applicable to a contract made after the Corporation came into existence. Besides, the Act of 1878 does not attempt to repeal or alter or amend the Acts of 1862 and 1864. It changes no franchise granted by those Acts, nor does it interfere with its exercise. It interferes only with the fruits of the franchise. The right to possess and enjoy the income of the Company is not a franchise. It is an incident of the ownership of the Company's property, though the property may be accumulated by the use of the franchise. Concede that Congress has power to regulate the tolls on the railroad, or in some other mode to restrict the use of the franchise, and thus lessen the income,

yet the income, whether large or small when made, is the Company's property, and, like other property, protected against being taken without due process of law. Or suppose the Acts of 1862 and 1864 were repealed, and thus all the franchises granted by them were taken away, the property of the Company would remain, and the income thereof, though greatly decreased, would be the property of the stockholders. Nobody denies that. Is the lesser greater than the whole? I repeat, therefore, the Act of 1878 is no exercise of the reserved power to alter, amend or repeal the Acts of 1862 and 1864. It is no attempt to make any such repeal or amendment. It is, at most, an attempt to seize the fruits of the franchise after they shall have become the vested property of the Corporations. It is an attempt to sequester the income of the property owned by them. As well might the government attempt to seize and put into its Treasury the rents, issues and profits of the lands granted to them by the 3d and 4th sections of the Act of 1862, and call that an amendment of the Act. There is no distinction to be made between the profits of the road and telegraph line and the rents of the lands. None has been attempted.

But if the Act of 1878 could be considered an alteration or amendment of the Acts of 1862 and 1864, the question would still remain: what was the extent of the power reserved by those Acts: I mean the power to alter, amend or repeal them. All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus: it must be exercised, when exerted at all, so as to do no injustice to those to whom the franchise has been granted. Certainly the reservation cannot mean a right to take away the franchise, in whole or in part, and yet hold the grantee to the performance of the duties assumed, the consideration given for the grant. Nor can it mean to continue in the legislative power which the Legislature never possessed, and which it is constitutionally incapable of exercising. A partial definition of the limits of the reserved power may be found in *Com. v. Essex Co.*, 13 Gray, 239, where Chief Justice Shaw (speaking of the reserved power to alter, amend or repeal a charter) said: "It seems to us this power must have some limit, though it is difficult to define it. Suppose authority has been given by law to a railroad corporation to purchase a lot of land and hold it for purposes connected with its business, and they purchase such lot from a third person, could the Legislature prohibit the Company from holding it? If so, in whom would it vest? Or could the Legislature direct it to revert to the grantor or escheat to the public? Or how otherwise? Suppose a manufacturing company, incorporated, is authorized to construct a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid, can the Legislature afterwards alter the Act of incorporation so as to give to such meadow owners future annual damages? Perhaps from these extreme cases, for extreme cases are allowable to test a legal principle, the rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a

legitimate exercise of the powers granted." This rule has been recognized ever since. *Vide, Sage v. Dillard*, 15 B. Mon., 349. It has been adopted by this court. In *Miller v. State*, 15 Wall., 478 [82 U. S., XXI., 98], it was said by *Mr. Justice Clifford*: "Power to legislate founded upon such a reservation in a charter of a private corporation is certainly not without limits, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation." To the same effect is *Holzyoke Co. v. Lyman*, 15 Wall., 500 [82 U. S., XXI., 133]. If this limitation be admitted, it is impossible to see how a reserved power to alter, amend or repeal an Act granting a private charter can include a right to change the stipulations of a contract made under that charter, or to sequester for any purpose the property of the Company acquired while the charter remains unrevoked and unaltered. If the Acts of 1862 and 1864 were repealed, would not the contract of loan remain unaffected thereby? Can a Legislature that offers a contract on certain terms change those terms after they have been accepted and after the contract has been perfected? Yet that is what the Act of 1878 attempts to do. A principal who has authorized his agent to make a contract for him may revoke or restrict the agency before any contract is made, but he is bound by a contract made during the continuance of the agent's powers, if those powers were not transgressed in making it. He cannot afterwards repudiate its terms or add to them. I see no essential difference between such a case and the present. I cannot confound an alteration of the Acts of 1862 and 1864 with an alteration of a subsequent commercial contract authorized by those Acts, and made between the United States and companies chartered by them. My conviction, therefore, is, that the Act of 1878 cannot be defended as a legitimate exercise of the powers reserved to Congress.

I need not say it cannot rest upon what is generally denominated the visitatorial power of the government over its own corporations, though it is upon this power the opinion of the majority of the court largely relies. That power is applicable only to eleemosynary corporations, such as colleges, schools and hospitals, and the visitation is always through the medium of courts of justice. It is judicial and not legislative. 2 Kent, Com. Lect., 23, sec. 4. To claim, therefore, that, by virtue of that power, a private business corporation can be compelled by legislative action to establish a sinking fund for the payment of its debts, and deposit it in the treasury of its creditor, is totally inadmissible.

There are, undoubtedly, many cases to be found in which it has been decided that, by virtue of such a reservation as that contained in the Acts of 1862 and 1864, a Legislature may make new regulations, to some extent, of the action of corporations created by it; such as prescribing a new measure of tolls, increasing the capital of insurance companies, repealing an exemption from taxation, and the like. So, without the reservations, some new regulations may be prescribed in the exercise of the police power. They are all regulations of the franchise or of its use; not invasions of rights or property

acquired under the franchise subsequent to its grant; and not one of them under the practice of amendment or rightful regulation has undertaken to change or vary any contract the corporation had made, or to control possession of property acquired. The Act of 1878 is, I believe, the first assertion of any such force in the reservation. It is a very grave and dangerous assertion. It is especially dangerous in these days of attempted repudiation, when the good faith of the government is above all price. If it can be maintained, the government is no longer bound by any commercial contract into which it may enter with these corporations, though it holds them bound. I cannot assent to any such doctrine; and upon the whole, in my opinion, the Act of 1878, 20 Stat. at L., 56, is not only unauthorized by any power existing in Congress, but it is an infraction of the prohibition I have pointed out, contained in the 5th amendment of the Constitution.

Most of what I have said is applicable to each of the cases: that of the Union Pacific and that of the Central. There are some other considerations peculiar in the case of the Central Pacific, which is a Corporation of the State of California, and was such in 1862. These I leave for consideration by my brethren who unite with me in dissent.

Mr. Justice Bradley, dissenting:

I am unable to concur in the judgment of the court in these cases, and will very briefly state the grounds of my dissent:

I think that Congress had no power to pass the Act of May 7, 1878, either as it regards the Union Pacific or the Central Pacific Railroad Company. The power of Congress, even over those subjects upon which it has the right to legislate, is not despotic, but is subject to certain constitutional limitations. One of these is, that no person shall be deprived of life, liberty or property without due process of law; another is, that private property shall not be taken for public use without just compensation; and a third is, that the judicial power of the United States is vested in the supreme and inferior courts, and not in Congress. It seems to me that the law in question is violative of all these restrictions—of their spirit at least, if not of their letter; and a law which violates the spirit of the Constitution is as much unconstitutional as one that violates its letter. For example, although the Constitution declares only that private property shall not be taken for public use without just compensation, and does not expressly declare that it shall not be taken for private use without compensation, or, in other words, does not declare that the property of one person shall not be taken from him and given to another without compensation, yet no one can reasonably doubt that a law which should do this would be unconstitutional, because the prohibition to do it is within the spirit of the prohibition that is given, it being the greater enormity of the two.

The contract between the Union and Central Pacific Railroad Companies and the government was an executed contract, and a definite one. It was in effect this: that the government should loan the Companies certain moneys, and that the Companies should have a certain period of time to repay the amount, the loan resting

on the security of the Companies' works. Congress, by the law in question, without any change of circumstances, and against the protest of the Companies, declares that the money shall be paid at an earlier day, and that the contract shall be changed *pro tanto*. This is the substance and effect of the law. Calling the money paid a sinking fund makes no substantial difference. The pretense or excuse for the law is, that the stipulated security is not good. Congress takes up the question, *ex parte*, discusses and decides it, passes judgment, and proposes to issue execution, and to subject the Companies to heavy penalties if they do not comply. That is the plain English of the law. In view of the limitations referred to, has Congress the power to do this? In my judgment it has not. The law virtually deprives the companies of their property without due process of law; takes it for public use without compensation; and operates as an exercise by Congress of the judicial power of the government.

That it is a plain and flat violation of the contract there can be no reasonable doubt. But it is said that Congress is not subject to any inhibition against passing laws impairing the validity of contracts. This is true; and the reason why the inhibition to that effect was imposed upon the States and not upon Congress evidently was, that the power to pass bankrupt laws should be exclusively vested in Congress, in order that the bankruptcy system might be uniform throughout the United States. When the States exercised the power, they often did it in such a manner as to favor their own citizens at the expense of the citizens of other States and of foreign countries. It was deemed expedient, therefore, to take the power from the States so far as it might involve the impairing the validity of contracts. State bankrupt laws, since the Constitution went into effect, have only been sustained when operating prospectively upon contracts, and then only in the absence of a national law. The inhibition referred to undoubtedly had its origin in these considerations. It fully explains the fact that no such inhibition was laid upon the National Legislature; and the absence of such an inhibition, therefore, furnishes no ground of argument in favor of the proposition that Congress may pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation. The limitations already quoted exist in their full force, and apply to that subject as well as to all others. They embody the essential principles of *Magna Charta*, and are especially binding upon the Legislative Department of the Government. Under the English Constitution, notwithstanding the theoretical omnipotence of Parliament, such a law as the one in question would not be tolerated for a moment. The famous denunciation that "It would cut every Englishman to the bone," would be promptly reiterated.

It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled. That it will be entitled by the contract to a like amount at some future time does not matter. Time is a part of the contract. To

coerce a delivery of the money is to coerce without right a delivery of that which is not the property of the government, but the property of the Companies. It is needless to refer to the importance to the Companies of the time which the contract gives. If it be alleged that the security of the government requires this to be done in consequence of waste or dissipation by the Companies of the mortgage security, that is a question to be decided by judicial investigation with opportunity of defense. A prejudgment of the question by the Legislative Department is a usurpation of the judicial power.

But if it were not, as it is, an actual or physical taking of property; if it were merely the subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law.

The case bears no analogy to the laws which were passed in time of war and public necessity, making treasury notes of the government a legal tender. The power to pass those laws was found in other parts of the Constitution: in the power to borrow money on the credit of the United States, to regulate the value of money, to raise and support armies, to suppress insurrections, and to pass all laws necessary and proper for carrying into execution the general powers of the government. My views on that subject were fully expressed in the *Legal Tender Cases*, reported in 12 Wallace, 457 [79 U. S., XX., 287], and I have yet seen no reason to modify them. The legal tender laws may have indirectly affected contracts, but did not abrogate them. The case before us is totally different. It is a direct abrogation of a contract and that, too, of a contract of the government itself; a repudiation of its own contract.

Nor does the case in hand bear any analogy to what are familiarly known as the *Granger Cases*, reported in 94 U. S., 113 [XXIV., 77], under the names of *Munn v. Illinois*, etc. The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power. It is obvious that the present case does not belong to that category. It is an individual case of private contract between the Companies and the government. It is a question of dollars and cents, and terms and conditions, in a particular case. To call the law an exercise of the police power would be a misuse of terms.

Great stress, however, is laid upon the reservation in the charter of the right to amend, alter or repeal the Act.

As a matter of fact, the reservation referred to really has no office in an Act of Congress; for Congress is not subject, as the States are, to the inhibition against passing any law impairing the obligation of contracts. It has become

so much the custom to insert it in all charters at the present day, that its original intent and purpose are sometimes forgotten. Since, however, it is contained in the charter of the Union Pacific Railroad Company, it is proper that its meaning and effect should be adverted to.

It seems to me that this clause has been greatly misunderstood. It is a sort of proviso peculiar to American legislation, growing out of the decision in the *Dart. Coll. Case*. *Mr. Justice Story*, in his opinion in that case, 4 Wheat., 675, says: "When a private eleemosynary corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown than what is expressly or impliedly reserved by the charter itself. Unless a power be reserved for this purpose, the Crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises." This hint that such a reservation would authorize an alteration or amendment to be made in a charter, has been freely availed of by Legislatures and constitutional conventions, in order to be freed from the constitutional restriction against impairing the validity of contracts, so far as it applied to charters of incorporation. The application of that restriction to such charters, by construing them to be contracts within the meaning of the Constitution, was a surprise to many statesmen and jurists of the country. *Chief Justice Marshall*, indeed, in his opinion in that case, says: "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into the instrument." 4 Wheat., 644. Probably in view of this somewhat unexpected application of the clause, operating as it did to deprive the States of nearly all legislative control over corporations of their own creation, the courts have given liberal construction to the reservation of power to alter, amend and repeal a charter; and have sustained some Acts of legislation made under such a reservation which are, at least, questionable.

In my judgment, the reservation is to be interpreted as placing the State Legislature back on the same platform of power and control over the charter containing it as it would have occupied had the constitutional restriction about contracts never existed; and I think the reservation effects nothing more. It certainly cannot be interpreted as reserving a right to violate a contract at will. No Legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will; but never to violate a contract, or change its terms, without the consent of the other party. The reserved power in question is simply that of legislation: to alter, amend or repeal a charter. This is very different from the power to violate, or to alter the terms of a contract at will. A reservation of power to violate a contract or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed or to the enacting part of a statute is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable.

The question then comes back to the extent of the power to legislate. But that is a restricted power; restricted by other constitutional provisions, to which reference has already been made. Certainly the Legislature cannot, in a charter of incorporation or in any other law, reserve to itself any greater power of legislation than the Constitution itself concedes to it. It seems to me clear, therefore, that the power reserved cannot authorize a flat abrogation of the contract by Congress, because, as before shown, such an abrogation would be a violation of those clauses which inhibit the taking of property without process of law and without compensation.

It may be said that by reason of the reserved power to alter and repeal a charter, this court has sustained legislative Acts imposing taxes from which the corporation by the charter was exempted. This is true. But the imposition of taxes is pre-eminently an Act of legislation. Its temporary suspension, conceded in a charter, is a suspension of the legislative power *pro tanto*. Being such, a reservation of the right to legislate, or, which is the same thing, to alter, amend or repeal the charter, necessarily includes the right to resume the power of taxation. The same observations apply to the regulation of fares and freights; for this is a branch of the police power, applicable to all cases which involve a common charge upon the people.

I conclude, therefore, that the power reserved to alter, amend and repeal the charter of the Union Pacific Railroad Company, is not sufficient to authorize the passage of the law in question.

I will only add, further, that the initiation of this species of legislation by Congress is well calculated to excite alarm. It has the effect of announcing to the world and giving it to be understood that this Government does not consider itself bound by its engagements. It sets the example of repudiation of government obligations. It strikes a blow at the public credit. It asserts the principle that might makes right. It saps the foundations of public morality. Perhaps, however, these are considerations more properly to be addressed to the legislative discretion. But when forced upon the attention by what, in my judgment, is an unconstitutional exercise of legislative power, they have a more than ordinary weight and significance.

Mr. Justice Field, dissenting:

I also dissent from the judgment of the court in these cases.

The decision will, in my opinion, tend to create insecurity in the title to corporate property in the country. It, in effect, determines that the General Government, in its dealings with the Pacific Railroad Companies, is under no legal obligation to fulfill its contracts, and that whether it shall do so is a question of policy and not of duty. It also seems to me to recognize the right of the government to appropriate by legislative decree the earnings of those Companies, without judicial inquiry and determination as to its claim to such earnings, thus sanctioning the exercise of judicial functions in its own cases. And in respect to the Central Pacific Company it asserts a supremacy of the Federal over the State Government in the control of the Corporation which, in my

judgment, is subversive of the rights of the State. I, therefore, am constrained to add some suggestions to those presented by my associates, *Justices Strong and Bradley*. In what I have to say I shall confine myself chiefly to the case of the Central Pacific Company. That Company is a state Corporation, and is the successor of a corporation of the same name, created before the railroad Acts of Congress were passed, and of four other corporations organized under the laws of the State. No sovereign attributes possessed by the General Government were exercised in calling into existence the original company, or any of the companies with which it is now consolidated. They all derived their powers and capacities from the State, and held them at its will.

The relation of the General Government to the Pacific Companies is twofold: that of sovereign in its own territory and that of contractor. As sovereign, its power extends to the enforcement of such acts and regulations by the Companies as will insure, in the management of their roads, and conduct of their officers in its territory, the safety, convenience and comfort of the public. It can exercise such control in its territory over all common carriers of passengers and property. As a contractor it is bound by its engagements equally with a private individual; it cannot be relieved from them by any assertion of its sovereign authority.

Its relation to the original Central Pacific Company, and to the present Company as its successor, in the construction and equipment of its road, and its use for public purposes, was and is that of a contractor; and the rights and obligations of both are to be measured, as in the case of similar relations between other parties, by the terms and conditions of the contract.

By the 1st section of the original Railroad Act of Congress, passed in July, 1862 [12 Stat. at L., 489], certain persons therein designated were created a Corporation by the name of the Union Pacific Railroad Company, and authorized to construct and operate a continuous railroad and telegraph line from a designated point on the 100th meridian of longitude west from Greenwich to the western boundary of Nevada Territory, and were invested with the powers, privileges and immunities necessary for that purpose, and with such as are usually conferred upon corporations.

By subsequent provisions of the Act and the Amending Act of 1864, 13 Stat. at L., 356, three grants were made to the Company thus created: a grant of a right of way over the public lands of the United States for the road and telegraph line; a grant of ten alternate sections of land on each side of the road, to aid in its construction and that of the telegraph line; and a grant of a certain number of subsidy bonds of the United States, each in the sum of \$1,000 payable in thirty years, with semi-annual interest; patents for the lands and the bonds to be issued as each twenty consecutive miles of the road and telegraph should be completed. These grants were made upon certain conditions as to the completion of the road and telegraph line, their construction and use by the government, and their pledge as security for the ultimate payment of the bonds. They were the consid-

erations offered by the government to the Company for the work which it undertook.

By the Act which thus incorporated the Union Pacific Company, and made the grants mentioned, the United States proposed to the Central Pacific that it should construct in like manner a railroad and a telegraph line through the State of California from a point near the Pacific coast to its eastern boundary, upon the same terms and conditions, and after completing them across the State, to continue their construction through the Territories of the United States until they should meet and connect with the road and telegraph line of the Union Pacific.

They, in effect, said to the Company, that if it would construct a railroad and a telegraph line from the Pacific Ocean eastward to a connection with the Union Pacific—the road to be in all respects one of first class—and keep them in repair, so that they could be used at all times by any department of the government for the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores, at reasonable rates of compensation, not exceeding such as were charged private persons for similar services, and allow the government at all times the preference in the use of the road and telegraph, they would grant the Company a right of way over the public lands for the construction of the road and telegraph line, and grant to it ten alternate sections of land on each side of the road, and give it their bonds, each for the sum of \$1,000, payable thirty years after date, with semi-annual interest, such bonds to be issued at the rate of sixteen, thirty-two or forty-eight the mile, according to the character of the country over which the road should be constructed; and would issue patents for the lands, and the subsidy bonds, as each twenty consecutive miles of the road and telegraph should be completed in the manner prescribed; it being agreed that the Company should pay the bonds as they should mature, and that for the security of their payment they should constitute a second mortgage upon the whole line of the road and telegraph, and that one half of the compensation earned for services to the government, and, after the completion of the road, five per cent. of its net earnings should be retained and applied to the payment of the bonds; and also, that the Company should complete the road by the first of July, 1876, and keep it in repair and use thereafter; or upon failure to do so, that the government might take possession of the road and complete it, or keep it in repair and use as the case might be. And they further, in effect, said, that if these terms and conditions were satisfactory, the Company should file its written acceptance thereof with the Secretary of the Interior, within six months thereafter; and that thereupon there should be a contract between them.

This proposition of the government the Central Pacific accepted, and filed its acceptance, as required; and thereupon the provisions of the Act became a contract between it and the United States, as complete and perfect as could be made by the most formal instrument. The United States thus came under obligation to the Company to make the grants and issue the bonds stipulated, upon the construction of the

road and telegraph line in the manner prescribed. The corporate capacity of the Company in no respect affected the nature of the contract, or made it in any particular different from what it would have been had a natural person been one of the parties. The Company was not a creature of the United States, and Congress could neither add to nor subtract from its corporate powers. The exercise of the right of eminent domain allowed in the Territories was not the exercise of a corporate power. That right belongs to the sovereign authority, and whoever exercises it does so as the agent of that sovereignty. Nor was its character as a state institution changed by the fact that it was permitted by Congress to extend its road through the territory of the United States. This permission was no more than the license which is usually extended by positive agreement, or by comity in the absence of such agreement, by one State to the corporations of another State, to do business and own property in its jurisdiction. Such license is not the source of the corporate powers exercised. Insurance companies, express companies and, indeed, companies organized for almost every kind of business, are, by comity, permitted throughout the United States, and generally throughout the civilized world, to do business, make contracts, and exercise their corporate powers in a jurisdiction where, in a strict legal sense, they have no corporate existence. The Pacific Mail Steamship Company, for example, to take an illustration mentioned by counsel, is a corporation created under the laws of the State of New York and, like the Central Pacific, has been subsidized by the United States. Its ships visit Central America, California, Japan and China, and in all these places it leases or owns wharves, and makes and enforces contracts necessary to the transaction of its business, yet no one has ever pretended or suggested that it derived any of its corporate powers from the United States, or from the authorities of any of the places named. By consent of those authorities, expressed in terms, or implied in what is understood as their comity, it exercises powers derived solely from the State of New York.

When, therefore, Congress assented to the extension into the territory of the United States of the road which the Central Pacific was authorized by its charter to construct in California, it was deemed important for the Company to obtain also the consent and authority of the State to act without its limits and assume responsibilities not originally contemplated. Accordingly, in 1864, the Legislature of the State, at its second session after the adoption of the original Railroad Act of Congress, in order to enable the Company to comply with its provisions and conditions, authorized the Company to construct, maintain and operate the road in the territory lying east of the State, and invested it with the rights, privileges and powers granted by the Act of Congress, with the reservation, however, that the Company should be *subject to all the laws of the State concerning railroad and telegraph lines*, except that messages and property of the United States, of the State and of the Company should have priority of transmission and transportation. The extent of the power which was thus reserved we shall hereafter consider. It is sufficient at present to observe that it was as

ample and complete as it is possible for one sovereignty to exert over institutions of its own creation, and that its exercise is incompatible with the control asserted by the Law of Congress of 1878, which has given rise to the present suit.

The Central Pacific Company having accepted, as already stated, the conditions proffered by Congress, proceeded at once to the execution of its contract. In the face of great obstacles, doubts and uncertainties, its directors commenced and prosecuted the work, and within a period several years less than that prescribed, its telegraph line and road were completed, the latter with all the appurtenances of a first class road, and were accepted by the government. Patents for the land granted and the subsidy bonds mentioned were accordingly issued to the Company. Since then the road and telegraph line have been kept in repair and use, and the government has enjoyed all the privileges in the transmission of dispatches over the telegraph, and in the transportation of mails, troops, munitions of war, supplies and public stores over the road, which were stipulated. There has been no failure on the part of the Company to comply with its engagements nor is any complaint of delinquency or neglect in its action made by the government. The road is more valuable now than on the day of its completion; it has been improved in its rails, bridges, cars, depots, turnouts, machine-shops, and all other appurtenances. Its earnings have been constantly increasing, and it constitutes to-day a far better security to the United States for the ultimate payment of the subsidy bonds than at any period since its completion, and to the government it has caused, with the connecting road of the Union Pacific, an immense saving of expense. The records of the different departments show an annual saving, as compared with previous expenditures, in the item of transportation alone of the mails, troops and public stores, of \$5,000,000, aggregating at this day over \$50,000,000.

Whilst the Company was thus complying in all respects with its engagements, the Act of May 7, 1878, 20 Stat. at L., 56, was passed, altering in essential particulars the contract of the Company, and greatly increasing its obligations. By the contract, only one half of the compensation for transportation for the government is to be retained and applied towards the payment of the bonds. By the Act of 1878, the whole of such compensation is to be retained and thus applied. By the contract, five per cent. only of the net earnings of the road are to be paid to the United States to be applied upon the subsidy bonds. By the Act of 1878, twenty-five per cent. of the net earnings are to be thus paid and applied. By the contract, the only security which the government had for its subsidy bonds was a second mortgage on the road and its appurtenances and telegraph line; and the Company was allowed to give a first mortgage as security for its own bonds, issued for an equal amount. By the Act of 1878, additional security is required for the ultimate payment of its own bonds, and the subsidy bonds of the United States, by the creation of what is termed a sinking fund; that is, by compelling the Company to deposit \$1,200,000 a year in the Treasury of the United States, to be held for such payment, or so much thereof as may be necessary to make

the five per cent net earnings, the whole sum earned as compensation for services, and sufficient in addition to make the whole reach twenty-five per cent of the net earnings.

It is not material, in the view I take of the subject, whether the deposit of this large sum in the Treasury of the creditor be termed a payment, or something else. It is the exaction from the Company of money for which the original contract did not stipulate, which constitutes the objectionable feature of the Act of 1878. The Act thus makes a great change in the liabilities of the Company. Its purpose, however disguised, is to coerce the payment of money years in advance of the time prescribed by the contract. That such legislation is beyond the power of Congress I cannot entertain a doubt. The clauses of the original Acts reserving a right to Congress to alter or amend them do not, in my judgment, justify the legislation. The power reserved under these clauses is declared to be for a specific purpose. The language in the Act of 1862 is as follows: "And the better to accomplish the object of this Act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend or repeal this Act." Sec. 18. The language of the amendatory Act of 1864 is more general: "That Congress may at any time alter, amend or repeal this Act." The two Acts are to be read together; they deal with the same subject; and are to be treated as if passed at the same time. *R. R. Co. v. Prescott*, 16 Wall., 603 [83 U. S., XXI., 373]. The limitations, therefore, imposed upon the exercise of the power of alteration and amendment in the Act of 1862 must be held to apply to the power reserved in the Act of 1864. They are not repealed, either expressly or impliedly, by anything in the latter Act. If this be so, the legislation of 1878 can find no support in the clauses. The conditions upon which the reserved power could be exercised under them did not then exist. The road and telegraph had years before been constructed, and always kept in working order; and the government has at all times been secured in their use and benefits for postal, military and other purposes.

But if the reserved power of alteration and amendment be considered as freed from the limitations designated, it cannot be exerted to affect the contract so far as it has been executed, or the rights vested under it. When the road was completed in the manner prescribed and accepted, the Company became entitled as of right to the land and subsidy bonds stipulated. The title to the land was perfect on the issue of the patents; the title to the bonds vested on their delivery. Any alteration of the Acts under the reservation clauses, or their repeal, could not revoke the title to the land or recall the bonds or change the right of the Company to either. So far as these are concerned the contract was, long before the Act of 1878, an executed and closed transaction, and they were as much beyond the reach of the government as any other property vested in private proprietor-

ship. The right to hold the subsidy bonds for the period at which they are to run without paying or advancing money on them before their maturity, except as originally provided, or furnishing other security than that originally stipulated, was, on their delivery, as perfect as the right to hold the title to the land patented unincumbered by future liens of the government. Any alteration or amendment could only operate for the future and affect subsequent acts of the Company; it could have no operation upon that which had already been done and vested.

There have been much discussion and great difference of opinion on many points as to the meaning and effect of a similar reservation in statutes of the States, but on the point that it does not authorize any interference with vested rights, all the authorities concur. Such was the language of *Chief Justice Shaw* in the case cited from the Supreme Court of Massachusetts; and such is the language of *Mr. Justice Clifford* in the cases cited from this court. And such must be the case, or there would be no safety in dealing with the government where such a clause is inserted in its legislation. It could undo at pleasure everything done under its authority, and despoil of their property those who had trusted to its faith. *Com. v. Essex Co.*, 13 Gray, 289; *Miller v. State*, 15 Wall., 478 [82 U. S., XXI., 98]; *Holyoke Co. v. Lyman*, 15 Wall., 500 [82 U. S., XXI., 133]. See, also, *Shields v. Ohio*, 95 U. S., 319 [XXIV., 357], and *Sage v. Dillard*, 15 B. Mon., 349.

The object of a reservation of this kind in Acts of incorporation is to insure to the government control over corporate franchises, rights and privileges which, in its sovereign or legislative capacity, it may call into existence, not to interfere with contracts which the corporation created by it may make. Such is the purport of our language in *Tomlinson v. Jessup*, where we state the object of the reservation to be "To prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference," and that "The reservation affects the entire relation between the State and corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State." 15 Wall., 454 [82 U. S., XXI., 204]. The same thing we repeated with greater distinctness in the case of the *R. R. Co. v. Maine*, where we said that by the reservation the State retained the power to alter the Act incorporating the Company, in all particulars constituting the grant to it of corporate rights, privileges and immunities; and that "The existence of the corporation, and its franchises and immunities, derived directly from the State, were thus kept under its control." But we added, that "Rights and interests acquired by the Company, not constituting a part of the contract of incorporation, stand upon a different footing." 96 U. S., 499 [XXIV., 836].

Now, there was no grant by the United States to the Central Pacific Company of corporate rights, privileges and immunities. No attribute of sovereignty was exercised by them in its creation. It took its life, and all its attributes and capacities from the State. Whatever powers, rights and privileges it acquired from the United States it took under its contract with them, and

not otherwise. The relation between the parties being that of contractors, the rights and obligations of both, as already stated, are to be measured by the terms and conditions of the contract. And when the Government of the United States entered into that contract, it laid aside its sovereignty and put itself on terms of equality with its contractor. It was then but a civil corporation, as incapable as the Central Pacific of releasing itself from its obligations, or of finally determining their extent and character. It could not, as justly observed by one of the counsel who argued this case, "*Release itself and hold the other party to the contract. It could not change its obligations and hold its rights unchanged. It cannot bind itself as a civil corporation, and loose itself by its sovereign legislative power.*" This principle is aptly expressed by the great conservative statesman, Alexander Hamilton, in his report to Congress on the public credit, in 1795; "When a government," he observes, "enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered out of its *power to legislate*, unless in aid of them. It is, in theory, impossible to reconcile the two ideas of a *promise which obliges with a power to make a law which can vary the effect of it.*" Hamilton's Works, Vol. III., pp. 518, 519.

When, therefore, the Government of the United States entered into the contract with the Central Pacific, it could no more than a private corporation or a private individual finally construe and determine the extent of the Company's rights and liabilities. If it had cause of complaint against the Company, it could not undertake itself, by legislative decree, to redress the grievance, but was compelled to seek redress as all other civil corporations are compelled, through the judicial tribunals. If the Company was wasting its property, of which no allegation is made, or impairing the security of the government, the remedy by suit was ample. To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the exercise of judicial power; and all such power, with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country.

In the case of *Commonwealth v. Proprs. of N. B. Bridge*, a corporation of Massachusetts, the Supreme Court of that State, speaking with reference to a contract between the parties, uses this language: "Each has equal rights and privileges under it, and neither can interpret its terms authoritatively so as to control and bind the rights of the other. The Commonwealth has no more authority to construe the charter than the Corporation. By becoming a party to a contract with its citizens the government devests itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contract-

ing with the government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belong exclusively to the *Judicial* Department of the government. The Legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers which would be contrary to the elementary principles of our government, as set forth in the Declaration of Rights." 2 Gray, 350.

In that case the charter of the corporation authorized the building of a toll-bridge across a navigable river, with two suitable draws at least thirty feet wide. A subsequent Act required draws to be made of a greater width; but the court held that the question whether the draws already made were suitable, and constructed so as not unreasonably or unnecessarily to obstruct or impede public navigation, was not a question to be determined by the Legislature, or by the corporation, but by the courts. It was a question which could not be authoritatively determined by either party so as to control and bind the other. "Like all other matters involving a controversy concerning public duty and private rights," said the court, "it is to be adjusted and settled in the regular tribunals, where questions of law and fact are adjudicated on fixed and established principles, and according to the forms and usages best adapted to secure the impartial administration of justice." In the case at bar, the government, by the Act of 1878, undertakes to decide authoritatively what the obligations of the Central Pacific are, and in effect declares that if the directors of the Company do not respect its construction, and obey its mandates, founded upon such construction, they shall be subject to fine and imprisonment.

The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an Act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such Act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus, an Act of the Legislature of Illinois authorizing the sale of the lands of an intestate, to raise a specific sum, to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred, was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts which could not be performed by the Legislature. *Lane v. Dorman*, 3 Scam., 238. So, also, an Act of the Legislature of Tennessee authorizing a guardian of infant heirs to sell certain lands of which their ancestor died seised, and directing the proceeds to be applied to the payment of the ancestor's debts, was, on similar grounds, held to be unconstitutional. *Jones v. Perry*, 10

Yerg., 59. Tested by the principle thus illustrated, the Act of 1878 must be held in many ways to transcend the legislative power of Congress.

I cannot assent to the doctrine which would ascribe to the Federal Government a sovereign right to treat as it may choose corporations with which it deals, and would exempt it from that great law of morality which should bind all governments, as it binds all individuals, to do justice and keep faith. Because it was deemed important, on the adoption of the Constitution, in the light of what was known as tender laws, appraisement laws, stay laws and installment laws of the States, which Story says had prostrated all private credit and all private morals, to insert a clause prohibiting the States from passing any law impairing the obligation of contracts, and no clause prohibiting the Federal Government from like legislation is found, it is argued that no such prohibition upon it exists.

"It is true," as I had occasion to observe in another case, "there is no provision in the Constitution forbidding in express terms such legislation. And it is also true that there are express powers delegated to Congress, the execution of which necessarily operates to impair the obligation of contracts. It was the object of the framers of that instrument to create a National Government, competent to represent the entire country in its relations with foreign nations, and to accomplish by its legislation measures of common interest to all the people, which the several States in their independent capacities were incapable of effecting, or if capable, the execution of which would be attended with great difficulty and embarrassment. They, therefore, clothed Congress with all the powers essential to the successful accomplishment of these ends, and carefully withheld the grant of all other powers. Some of the powers granted, from their very nature, interfere in their execution with contracts of parties. Thus, war suspends intercourse and commerce between citizens or subjects of belligerent nations; it renders during its continuance the performance of contracts previously made, unlawful. These incidental consequences were contemplated in the grant of the war power. So the regulation of commerce and the imposition of duties may so affect the prices of articles imported or manufactured as to essentially alter the value of previous contracts respecting them; but this incidental consequence was seen in the grant of the power over commerce and duties. There can be no valid objection to laws passed in execution of express powers, that consequences like these follow incidentally from their execution. But it is otherwise when such consequences do not follow incidentally, but are directly enacted."

"The only express authority for any legislation affecting the obligation of contracts is found in the power to establish a uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property." *Legal Tender Cas.*, 12 Wall., 663 [79 U. S., XX., 348]. From this express grant in the case of bankrupts the inference is deducible, that there was no general power to interfere with contracts. If such general power existed, there could have been no occasion for the delegation of an express power in the case of bankrupts. The

argument for the general power from the absence of a special prohibition proceeds upon a misconception of the nature of the Federal Government as one of limited powers. It can exercise only such powers as are specifically granted or are necessarily implied. All other powers, not prohibited to the States, are reserved to them or to the people. As I said in the case referred to, the doctrine that where a power is not expressly forbidden it may be exercised, would change the whole character of our government. According to the great commentators on the Constitution, and the opinions of the great jurists, who have studied and interpreted its meaning, the true doctrine is, that where a power is not in terms granted, and is not necessary or proper for the exercise of a power thus granted, it does not exist. It would not be pretended, for example, had there been no amendments to the Constitution as originally adopted, that Congress could have passed a law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or the right of the People to assemble and petition for a redress of grievances. The amendments prohibiting the exercise of any such power were adopted in the language of the preamble accompanying them, when presented to the States, "in order to prevent misconception or abuse" of the powers of the Constitution.

Independent of these views, there are many considerations which lead to the conclusion that the power to impair contracts, by direct action to that end, does not exist with the General Government. In the first place, one of the objects of the Constitution, expressed in its preamble, was the establishment of justice, and what that meant in its relations to contracts is not left, as was justly said by the late *Chief Justice* in *Hepburn v. Griswold*, to inference or conjecture. As he observes, at the time the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in framing the ordinance for the government of the Northwestern Territory, in which certain articles of compact were established between the People of the original States and the People of the Territory, for the purpose, as expressed in the instrument, of extending the fundamental principles of civil and religious liberty, upon which the States, their laws and constitutions, were erected. By that ordinance it was declared, that, in the just preservation of rights and property, "No law ought ever to be made, or have force in the said Territory, that shall, in any manner, interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed." The same provision, adds the *Chief Justice*, found more condensed expression in the prohibition upon the States against impairing the obligation of contracts, which has ever been recognized as an efficient safeguard against injustice; and though the prohibition is not applied in terms to the Government of the United States, he expressed the opinion, speaking for himself and the majority of the court at the time, that it was clear "That those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to

establish was not thought by them to be compatible with legislation of an opposite tendency." 8 Wall., 623 [75 U. S., XIX., 526.].

Similar views are found expressed in the opinions of other Judges of this court. In *Calder v. Bull*, which was here in 1798, *Mr. Justice Chase* said, that there were acts which the Federal and State Legislatures could not do without exceeding their authority, and among them he mentioned a law which punished a citizen for an innocent act; a law that destroyed or impaired the lawful private contracts of citizens; a law that made a man judge in his own case; and a law that took the property from A and gave it to B. "It is against all reason and justice," he added, "for a people to intrust a Legislature with such powers, and therefore it cannot be presumed that they have done it. They may command what is right and prohibit what is wrong; but they cannot change innocence into guilt, or punish innocence as a crime or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that a Federal or State Legislature possesses such powers if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in all free republican governments." 3 Dall., 388.

In *Ogden v. Saunders*, which was before this court in 1827, *Mr. Justice Thompson*, referring to the clauses of the Constitution prohibiting the State from passing a bill of attainder, an *ex post facto* law, or a law impairing the obligation of contracts, said: "Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No state court would, I presume, sanction and enforce an *ex post facto* law, if no such prohibition was contained in the Constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded."

In *The Federalist*, *Mr. Madison* declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact and to every principle of sound legislation; and in the *Dartmouth Coll. Case* *Mr. Webster* contended that Acts, which were there held to impair the obligation of contracts, were not the exercise of a power properly legislative, as their object and effect was to take away vested rights. "To justify the taking away of vested rights," he said, "there must be a forfeiture, to adjudge upon and declare which is the proper province of the judiciary." Surely the Constitution would have failed to establish justice had it allowed the exercise of such a dangerous power to the Congress of the United States.

In the second place, legislation impairing the obligation of contracts impinges upon the provision of the Constitution which declares that no one shall be deprived of his property without due process of law; and that means by law in its regular course of administration through the courts of justice. Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the

owner; and if that be effected by direct legislative action operating upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated.

In the case at bar, the contract with the Central Pacific is, as I have said, changed in essential particulars. The Company is compelled to accept it in its changed form, and by legislative decree, without the intervention of the courts, that is, without due process of law, to pay out of its earnings each year to its contractors, the United States, or deposit with them, a sum that may amount to \$1,200,000, and this, twenty years before the debt to which it is to be applied becomes due and payable by the Company. If this taking of the earnings of the Company and keeping them from its use during these twenty years to come is not depriving the Company of its property, it would be difficult to give any meaning to the provision of the Constitution. It will only be necessary hereafter to give to the seizure of another's property or earnings a new name, to call it the creation of a sinking fund or the providing against the possible wastefulness or improvidence of the owner, to get rid of the constitutional restraint. To my mind the evasion of that clause, the frittering away of all sense and meaning to it, are insuperable objections to the legislation of Congress. Where contracts are impaired, or when operating against the government are sought to be evaded and avoided by legislation, a blow is given to the security of all property. If the government will not keep its faith, little better can be expected from the citizen. If contracts are not observed, no property will in the end be respected; and all history shows that rights of persons are unsafe where property is insecure. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where this foundation of all just government is unsettled. "The moment," said the elder Adams, "the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."

I am aware of the opinion which prevails generally that the Pacific railroad corporations have, by their accumulation of wealth, and the numbers in their employ, become so powerful as to be disturbing and dangerous influences in the legislation of the country; and that they should, therefore, be brought by stringent measures into subjection to the State. This may be true; I do not say that it is not; but if it is, it furnishes no justification for the repudiation or evasion of the contracts made with them by the government. The law that protects the wealth of the most powerful, protects also the earnings of the most humble; and the law which would confiscate the property of the one would in the end take the earnings of the other.

There are many other objections to the Act of Congress besides those I have mentioned, each to my mind convincing; but why add to what has already been said? If the reasons given will not convince, neither would any

others which could be presented. I will, therefore, refer only to the interference of the law with the rights of the State of California.

The Central Pacific being a state Corporation, the law creating it is, by the Constitution of California, subject to alteration, amendment and repeal by its Legislature at any time; a power which the Legislature can neither abdicate nor transfer. In its assent given to the Company to extend its road into the territory of the United States, the General Government having authorized the extension, the Legislature reserved the same control which it possesses over other railroad and telegraph companies created by it. That control under the new Constitution goes, as is claimed, to the extent of regulating the fares and freights of the Company, thus limiting its income or earnings; and of supervising all its business, even to the keeping of its accounts, making disobedience of its directors to the regulations established for its management punishable by fine and imprisonment; and the Legislature may impose the additional penalty of a forfeiture of the franchises and privileges of the Company. The law in existence when the Corporation was created, and still in force, requires the creation of a sinking fund by the Company to meet its bonds, and under it large sums have been accumulated for that purpose, and still further sums must be raised. In a word, the law of the State undertakes to control and manage the Corporation, in all particulars required for the service, convenience and protection of the public; and can there be a doubt in the mind of anyone that over its own creations the State has, within its own territory, as against the United States, the superior authority? Yet the power asserted by the General Government in the passage of the Act of 1878 would justify legislation affecting all the affairs of the Company, both in the State and in the Territories of the United States. It could treble the amount of the sum to be annually deposited in the sinking fund; it could command the immediate deposit of the entire amount of the ultimate indebtedness; it could change the order of the liens held by the government and the first-mortgage bondholders; it could extend the lien of the government beyond the property to the entire income of the Company, and, in fact, does so by the Act in question (sec. 9); it could require the transportation for the government to be made without compensation; and it could subject the Company to burdens which, if anticipated at the time, would have prevented the construction of the road. A power thus vast, once admitted to exist, might be exerted to control the entire affairs of the Company, in direct conflict with the legislation of the State; its exercise would be a mere matter of legislative discretion in Congress. Yet it is clear that both governments cannot control and manage the Company in the same territory, subjecting its directors to fine and imprisonment for disobeying their regulations. Under the Constitution the management of local affairs is left chiefly to the States, and it never entered into the conception of its framers that under it the creations of the States could be taken from their control. Certain it is that over no subject is it more important for their interests that they should retain the management and direction than over corporations brought into existence by them. The

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decision of the majority goes a great way—further, it appears to me, than any heretofore made by the court—to weaken the authority of the States, in this respect, as against the will of Congress. According to my understanding of its scope and reach, the United States have only to make a contract with a state corporation, and a loan to it, to oust the jurisdiction of the State, and place the corporation under their direction. It would seem plain that if legislation taking institutions of the State from its control, can be sustained by this court, the government will drift from the limited and well guarded system established by our fathers into a centralized and consolidated government.

UNITED STATES, *Plff. in Err.*,

v.

JAMES H. MORGAN ET AL.

Secretary of the Treasury—extra compensation to collector—bill of exceptions—point not taken below.

1. An adjusted account made by the Secretary of the Treasury containing an allowance made by him to a Collector of Internal Revenue for extra compensation, is conclusive of that question.

2. Such Secretary may fix the rate of extra compensation to be allowed in advance of the service rendered and, if he does, it becomes binding with Government.

3. This court will hear the case upon the rulings contained in the bill of exceptions, and not upon the evidence.

4. A point, which does not appear by the bill of exceptions to have been taken in the court below, will not be heard in this court.

[No. 258.]

Submitted Apr. 25, 1879. Decided May 5, 1879.

IN ERROR to the Circuit Court of the United States for the District of California.

The United States brought suit in the court below, upon the bond of Morgan as Collector of Internal Revenue, for an alleged failure to pay over moneys due. The defense was: 1. A general denial of indebtedness. 2. A special plea, setting forth certain items disallowed by the accounting officers of the Treasury, and claiming the allowance thereof. Upon the trial, defendants gave evidence against plaintiff's objection, by one Curtis and by Morgan himself, to show that the Secretary of the Treasury, by a letter from the Commissioner of Internal Revenue, agreed to allow the defendant seven per cent. commission on the first \$100,000 and five per cent on all over that amount collected and accounted for by him for the term commencing June 30, 1864, and ending Feb. 28, 1865.

There was verdict and judgment for the defendants; whereupon the plaintiff sued out this writ of error.

The case is further stated by the court.

Messrs. Charles Devens, Atty-Gen., Edwin B. Smith, Asst. Atty-Gen., for plaintiff in error.

Mr. William W. Morrow, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We find no error in this record. The objection to the admissibility of the testimony of Curtis and the defendant Morgan, was not because

it was insufficient to prove an arrangement between the Secretary of the Treasury and Morgan, by which Morgan was to be allowed his extra compensation, but because the Secretary of the Treasury might make the allowance at any time, and as the adjusted account showed the exact amount finally allowed, this account was conclusive evidence on that question. As the case stands upon the record, it is to be presumed there was evidence tending to prove that the letter of the Commissioner of Internal Revenue was authorized by the Secretary of the Treasury. Upon the objection as made, we think the ruling of the court was right. There is nothing in the Act of Congress which precludes the Secretary of the Treasury from fixing the rate of extra compensation to be allowed in advance of the service rendered, and if he does, it becomes binding on the Government and may be enforced in the settlement of accounts thereafter.

The allowance of a commission upon the sum of \$13,619.85, as part of the compensation of the Collector for the year ending June 30, 1864, was also right. The money was all collected before the expiration of that year, and \$10,000 was actually paid into the Treasury. As to the allowance of commissions for this there can be no doubt. It is a matter of no consequence that advices of the payment did not reach the accounting officers of the Treasury Department, so as to be entered on the books there, until after the year expired. No unnecessary delay occurred in paying over the remainder. It was actually collected in a distant part of the collection district, and did not in the ordinary course of transmission reach the Collector so that it could be paid into the Treasury before June 30. The Collector was accountable for it when it was collected, and since he paid it over as soon as he could, we think he was entitled to his compensation as for services rendered during the year.

The objection to the claim for express charges paid was not made below and cannot be considered by us. We hear the case upon the rulings contained in the bill of exceptions, and not upon the evidence.

The same is true as to the claim now made, that compensation has been given by the jury in their verdict in excess of the maximum limit fixed by the statute for the year. It does not appear from the bill of exceptions that this point was taken below.

No error is assigned upon that part of the charge of the court which related to the payment of the bills of the assistant assessors.

The judgment is affirmed.

JOHN B. DUMONT, *Appt.*,

v.

THE DES MOINES VALLEY RAILROAD
COMPANY ET AL.

Bill of Review.

A petition for a bill of review will be denied, unless diligence is shown in making the application, and where the evidence, alleged to have been dis-

covered, might as easily have been found at the time of the controversy, as now.

[No. 87.]

Submitted Apr. 21, 1879. Decided May 5, 1879.

APPEAL from the Circuit Court of the United States for the District of Iowa.

Petition for leave to file bill of review.

The bill in this case was filed in the court below, for the cancellation of a certain land certificate, and the establishment of title in the complainant. The court below dismissed the bill, and the decree was affirmed by this court.

The appellant now brings his petition for leave to file a bill of review, on the ground that he had discovered new and important evidence, since the decision of the court below, which evidence would enable him to prove the invalidity of the defense and establish his claim. That the evidence consisted of a certain Treaty between the United States and the Sacs and Foxes and other Indian Tribes, made July 15, 1830, and ratified Feb. 24, 1831. 7 Stat. at L., 328. That he had been guilty of no negligence or laches in not sooner discovering said evidence, but that he and his counsel had been very diligent in endeavoring to obtain full knowledge of all the evidence as to the title in controversy.

Messrs. Charles A. Clark and James Grant, for appellant:

The new matter goes directly to the issue. It is not merely cumulative, but is a new fact, decisive of the central issue in the case. As such, it warrants a bill of review.

Story, Eq. Pl., secs. 415, 416 and *notes*; *Partridge v. Osborn*, 5 Russ., 195; *Massie v. Graham*, 3 McLean, 42; see, also, 2 Daniells, Ch. Pl. (Perkins, 3d Am. ed.), 1640, 1641 and *notes*.

Messrs. C. C. Nourse and N. M. Hubbard, for appellees:

The evidence with reasonable diligence might have been discovered sooner. Besides it is not so much a revelation of new facts, as a discovery of new theories.

As to diligence, see *Livingston v. Hubbs*, 3 Johns. Ch., 124; *Pendleton v. Fay*, 3 Paige, 203; *Massie's Heirs v. Graham*, 3 McLean, 41; Story, Eq. Pl., sec. 414.

Mr. Chief Justice Waite delivered the opinion of the court:

This application is denied. The petitioners have not shown such diligence as will entitle them to reopen a litigation that has been carried on with so much pertinacity for a great number of years. The new matter relied upon consists principally of record evidence drawn from the archives of the government, which might as easily have been found at the time the controversy arose, as now. The Treaty was a part of the law of the land, and the maps and official reports have been on file in the proper government office where they were discovered, for a quarter of a century. We are all of opinion that if a bill of review should be filed containing all the averments that are in the present petition, it ought not to be sustained.

Clearly, then, leave ought not to be granted for a continuance of the litigation.

99 U. S.

XCIX UNITED STATES.

99 U. S. 1-10, 25 L. 309, WOLF v. STIX.

Bankruptcy.—Provision that no debt created by fraud shall be discharged, means positive fraud, or fraud in fact; hence, one liable on replevin bond as purchaser from bankrupt selling in fraud of his creditors, is not guilty of fraud in this sense, but his liability may be discharged in bankruptcy, p. 7.

Cited in *Hennequin v. Clewes*, 111 U. S. 679, 28 L. 568, 4 S. Ct. 579, holding debt arising from appropriation of pledged securities may be discharged; *Noble v. Hammond*, 129 U. S. 68, 69, 32 L. 623, 9 S. Ct. 236, 237, holding debt arising from mingling funds with those of another may be discharged; *Upshur v. Briscoe*, 138 U. S. 376, 34 L. 935, 11 S. Ct. 317, affirming 37 La. Ann. 152, holding person receiving money, agreeing to pay interest, may be discharged; *Peel v. Bryson*, 72 Ga. 333, holding fraudulent representations with reference to sale of land not within the provisions of the act; *Georgia R. R. v. Cubbedge*, 75 Ga. 323, holding debt of a person failing to account for property, barred by discharge; *Baines v. Adams*, 33 La. Ann. 47, holding constructive fraud not within meaning of act; *Ames v. Moir*, 138 U. S. 311, 34 L. 954, 11 S. Ct. 312, holding insolvent purchasing goods with intent not to pay for them is guilty of fraud; *Bank of North America v. Crandall*, 87 Mo. 212, holding fraud occurring long after debt, not obnoxious to the act; *Ely v. Curtis*, 60 N. H. 513, holding, to prevent discharge, fraud must be actual and not mere fraud in law; *Gibson v. Gorman*, 44 N. J. L. 327, purchase money unaccounted for by auctioneer is debt discharged by bankruptcy.

Fraud in law may exist without imputation of bad faith or immorality, p. 7.

Fraud.—Purchase of property from debtor, selling with intent to hinder and delay creditors, is not fraudulent, p. 7.

Distinguished in *Eichenberg v. Marcy*, 18 R. I. 175, 26 Atl. 9, holding, under statute, actual as well as constructive fraud prohibited.

Fraudulent conveyances.—The only risk a person incurs who purchases property sold in fraud of creditors is that such property may be reclaimed for their benefit, p. 7.

Bankruptcy.—Debt of claimant of goods, who has given a replevin bond for their recovery, is provable under bankrupt act, though replevin suit undecided and debt, therefore, contingent, p. 7, 8.

Cited in *Carey v. Mayer*, 79 Fed. 929, 51 U. S. App. 190, contingent debt not provable where time or amount of payment uncertain; *Glenn v. Abell*, 39 Fed. 12, stockholder's liability a provable debt.

Bankruptcy.—Under revised statutes, section 5118, sureties on bond given in replevin suit are not discharged by the bankruptcy, and discharge of their principal, p. 9.

Cited in *Hill v. Harding*, 130 U. S. 703, 704, 32 L. 1084, 9 S. Ct. 720, holding bankrupt may be proceeded against in order to fix liability of sureties; *McCombs v. Allen*, 82 N. Y. 117, holding principal's discharge does not release sureties; *Whereatt v. Ellis*, 103 Wis. 352, 79 N. W. 417, holding discharge of the principal by operation of law does not discharge the sureties; *Robinson v. Soule*, 50 Miss. 551, holding surety on replevin bond not affected by discharge of principal; *Revere Rubber Co. v. Dimock*, 90 N. Y. 37, holding discharge no bar to action upon a judgment subsequently obtained; *King v. Neill*, 26 Fed. 722, holding United States Circuit Court has no jurisdiction, after discharge, to protect exempted property. See elaborate note, 77 Am. Dec. 386.

99 U. S. 10-20, 25 L. 267, UNITED STATES v. FARDEN.

Internal revenue.—President has power, during recess of Senate, to suspend internal revenue collector, and act of secretary of treasury is presumed to be the act of the president, p. 19.

Cited in *United States v. Badeau*, 31 Fed. 699, and *Runkle v. United States*, 122 U. S. 557, 30 L. 1171, 7 S. Ct. 1147, both holding president may act through appropriate head of department, whose acts, in due course, are the acts of the president.

Internal revenue.—Collector having been suspended for fraud, and his deputy directed to assume duties of the office by the secretary of treasury, held, that deputy was entitled to compensation of collector during that period, p. 19.

99 U. S. 20-25, 25 L. 314, HUSSEY v. SMITH.

Public lands.—Under act of Congress, March 2, 1867, for confirmation of townsite titles on public lands, occupant of townsite lot has an equitable interest which he can sell and convey, or mortgage, p. 22.

Cited in *West v. Child*, 8 Utah, 229, 30 Pac. 756, *Stringfellow v. Cain*, 99 U. S. 615, 25 L. 423, *Clawson v. Wallace*, 16 Utah, 306,

52 Pac. 10, *United States v. Tithing-Yard*, 9 Utah, 281, 34 Pac. 58, *Hager v. Wikoff*, 2 Okl. 587, 39 Pac. 283, all holding occupant has a vested salable interest; *Lockwitz v. Larson*, 16 Utah, 281, 52 Pac. 281, holding person cannot acquire title unless he was an occupant at time of entry. Cited, *arguendo*, in *Mayor v. Aspen, etc., Co.*, 10 Colo. 203, 15 Pac. 800, *Guthrie v. Beamer*, 3 Okl. 662, 41 Pac. 650, and *McKennon v. Winn*, 1 Okl. 335, 33 Pac. 585, 22 L. R. A. 512, and *n.*

Public lands.—By entry by town mayor, under act of 1867, for confirmation of townsite titles on public lands, title vested in him in trust for the occupants, p. 22.

Cited in *Eakin v. McCraith*, 2 Wash. Ter. 116, 3 Pac. 839, holding by entry and payment city became vested with the legal title.

Officers.—Acts of a *de facto* officer are valid and binding upon the parties; hence, where marshal erroneously conducted foreclosure sale for private parties, where United States were not involved, the sale was held valid, p. 24.

Cited in *North Western, etc., Ins. Co. v. Seaman*, 80 Fed. 360, holding appointment of a master in chancery, under color of title, cannot be attacked collaterally; *Ex parte Ward*, 173 U. S. 456, 19 S. Ct. 460, holding title of judge not open to collateral attack. Cited, *arguendo*, in *Foster v. Foster*, 129 Mass. 565.

99 U. S. 25, note, 25 L. 315, *HUSSEY v. MERRITT*.

Adjudged in conformity with *Hussey v. Smith*, *supra*.

Not cited.

99 U. S. 25-30, 25 L. 294, *MILLS v. SCOTT*.

Statute should be given such a construction as not to impair operation of other laws, which it is unreasonable to suppose legislature intended to repeal, p. 28.

Courts.—Federal courts follow State courts as to statute of limitations, p. 28.

Cited in *Brunswick Co. v. National Bank*, 88 Fed. 609, *Balkam v. Woodstock Iron Co.*, 154 U. S. 188, 38 L. 957, 14 S. Ct. 1014, and *Bausermann v. Blunt*, 147 U. S. 653, 37 L. 318, 13 S. Ct. 469, all holding State statute of limitations controls the Federal courts.

Limitation of actions.—Where statute, passed after the war, allowed only nine months for recovery of existing debts, but another statute prohibited the proving of debts against an estate for one year after letters issued, the nine months' limitation begins to run only after the year, p. 28.

Corporations.—Liability of stockholder may be enforced by a suit in equity, p. 29.

Cited in *Maine Trust Co. v. Loan Co.*, 92 Me. 450, 43 Atl. 25, holding creditor's bill appropriate remedy against stockholders; *Farmers' Loan, etc., Co. v. Funk*, 49 Neb. 361, 68 N. W. 522, holding liability of stockholder may be enforced in equity. See 3 Am. St. Rep. 855, note.

Courts.—Where State statute allowed action of debt to enforce stockholders' liability, where amount was mere matter of computation, Federal court will do likewise, p. 29.

Cited in *First Nat. Bank v. Peavy*, 69 Fed. 457, *Cuykendall v. Miles*, 10 Fed. 344, *Fourth Nat. Bank v. Francklyn*, 120 U. S. 756, 30 L. 829, 7 S. Ct. 762, *National Bank v. Peavy*, 64 Fed. 916, 920, and *McVickar v. Jones*, 70 Fed. 756, 757, all holding, whether the remedy in Federal courts be in law or equity depends upon State law.

Debt.—Action of, will always lie where amount is certain or can be ascertained by computation, p. 29.

Cited in *National Bank v. Peavy*, 64 Fed. 918, 920, holding, where indebtedness and number of shares held are ascertained, action at law may be maintained.

Appeal and error.—Where error in amount of recovery is apparent on record, though not pointed out by counsel, appellate court will direct its correction, p. 30.

See elaborate note in 43 Am. Dec. 702, 703.

99 U. S. 30-34, 25 L. 269, QUINN v. UNITED STATES.

Contracts.—Where government contract was terminated by government engineer for cause, but without loss to United States, and work was completed by others for less cost, held, contractor was entitled to the 10 per cent. of contract price, payable upon completion of work, but not to the profit to the government from the cheaper arrangement, pp. 32-34.

Not cited.

99 U. S. 35-47, 25 L. 295, UNITED STATES v. AMES.

Admiralty.—Prize jurisdiction is included in the general delegation of causes of admiralty and maritime cognizance to the District Court, p. 35.

Admiralty Courts proceed according to principles of admiralty, as contradistinguished from common-law courts, p. 36.

Admiralty.—As condition of the right to defend, court may require party to give security for costs, p. 36.

Admiralty.—After appearance the court may, upon application, release the property, upon the party giving a bond, p. 36.

Admiralty.—Bond, when given, is a substitute for the property; not for the amount of claim, but for the value of the property arrested, p. 36.

Cited in *In re Morrison*, 147 U. S. 35, 37 L. 68, 13 S. Ct. 253, holding stipulation stands in place of vessel and freight and court may exact a new or further stipulation; *The Doris Eckhoff*, 30 Fed. 141, holding stipulation stands in place of res, the sureties being substituted for vessel; *Clark v. Five Hundred and Five Thousand Feet of Lumber*, 65 Fed. 240, 24 U. S. App. 509, holding bond stands as a representation of the cargo, and the res is regarded as being in custody of court; *The Frank Vanderkerchen*, 87 Fed. 765, stipulation takes place of vessel, and libellant looks to the sureties for his claim; *Braithwaite v. Jordan*, 5 N. Dak. 212, 65 N. W. 705, 31 L. R. A. 246, holding remedy transferred from ship to the stipulation; *The Haytien Republic*, 59 Fed. 478, 15 U. S. App. 288, holding the remedy of libellants is transferred from property to bond.

Admiralty.—The court may, against the stipulators in the bond, exercise all authorities as if the thing itself were still in the custody of the court, p. 36.

Cited in *The Oregon*, 158 U. S. 211, 39 L. 954, 15 S. Ct. 814, holding court has power to reinstate case, as stipulators are liable to the same extent as property released.

Admiralty.—Stipulation with sureties for the discharge of property are allowed in all revenue cases, including forfeitures, p. 39.

Admiralty Courts have jurisdiction in a summary manner to enter judgment in suits in rem, and award execution against parties to stipulation in favor of prevailing party, p. 40.

Cited in *Mitchell v. Chambers*, 43 Mich. 159, 5 N. W. 63, holding judgment against principal and surety is part of the general relief; *Braithwaite v. Jordan*, 5 N. Dak. 207, 65 N. W. 704, 31 L. R. A. 244, holding new suit is unnecessary on the stipulation, whether it is for value or costs; *Munks v. Jackson*, 66 Fed. 574, 29 U. S. App. 482, holding bonds are, to all intents, stipulations in the admiralty.

Admiralty.—Circuit Courts, in the exercise of appellate jurisdiction, are possessed of full admiralty powers, p. 41.

Admiralty.—In cases of fraud or where order of release of property on stipulation was improvidently made, the court may recall the property, p. 42.

Cited in *The Haytien Republic*, 154 U. S. 126, 38 L. 933, 14 S. Ct. 994, holding court may recall vessel where fraudulent bond has been given; *The Three Friends*, 166 U. S. 68, 41 L. 920, 17 S. Ct. 504, holding the court may recall the vessel where it has been released improvidently; *Braithwaite v. Jordan*, 5 N. Dak. 213, 65 N. W. 706,

31 L. R. A. 246, holding, where vessel has been released improvidently or through fraud or mistake, court may order its recall.

Judgment against one of two joint contractors is a bar to action against the others; hence judgment against one partner, executing bond in admiralty for seized property of partnership, bars action against other partners, p. 44.

Cited in *Connecticut Fire Ins. Co. v. Oldendorff*, 73 Fed. 90, 44 U. S. App. 487, holding release of one joint obligor operates as a release of all. See 25 Am. Dec. 544, note.

Pleading.—Matters of fact well pleaded are admitted by the demurrer, but mere conclusions of law are not, p. 45.

Cited in *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 578, 35 L. 282, 11 S. Ct. 659, *Chicot County v. Sherwood*, 148 U. S. 536, 37 L. 549, 13 S. Ct. 698, *Dishong v. Finkbinder*, 46 Fed. 17, *Haynes v. Brewster*, 46 Fed. 473, and *Newberry Land Co. v. Newberry*, 95 Va. 123, 27 S. E. 901, all holding demurrer admits only such facts as are well pleaded; *Fogg v. Blair*, 139 U. S. 127, 35 L. 107, 11 S. Ct. 478, alleging a transaction to be fraudulent is a mere legal conclusion, which demurrer does not admit; *United States v. Flournoy Live-Stock, etc., Co.*, 71 Fed. 578, pleading matters of judicial cognizance will not prevent court from drawing proper legal conclusion; *Lumley v. Wabash Ry. Co.*, 71 Fed. 28, holding epithets "surreptitiously" and "fraudulently" conclusions of law not admitted by demurrer; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 256, holding averment that defendant agreed to sell, and the plaintiff to purchase, is a legal conclusion not admitted by demurrer; *State v. County Court*, 33 W. Va. 593, 11 S. E. 74, holding motion to quash only admits such facts as are well pleaded.

Equity affords no relief against a mistake of law, p. 46.

Cited in *Railway Co. v. Smith*, 60 Ark. 238, 29 S. W. 753, holding, where party is negligent, equity will not relieve; *Allen v. Gallo-way*, 30 Fed. 467, in equity, courts of the United States afford no relief from a mistake of law; *Griswold v. Hazard*, 141 U. S. 293, 35 L. 692, 11 S. Ct. 1000, dissenting opinion, holding equity will not relieve against mistake of law. Cited, without particular application, in *The Battler*, 67 Fed. 253.

Equity can afford no relief where plaintiff, having obtained judgment against one of several contractors, thereby releases the liability of the others, of which he was in ignorance, but might, with reasonable diligence, have learned, p. 47.

99 U. S. 48-67, 25 L. 424, **PLATT v. UNION PACIFIC R. R. CO.**

Mortgages.—An instrument, in form a deed of trust, held to be a mortgage, p. 57.

Cited in *Southern Pacific R. R. Co. v. Doyle*, 8 Sawy. 70, 11 Fed. 259, holding a trust conveyance to secure bonds is a mortgage.

Railroad company has not power either to sell or mortgage its franchise, or perhaps its road, without express legislative authority, p. 57.

Railroad may mortgage property which is not a part of its road, e. g., its land grant, p. 58.

Railroad.—Where railroad is authorized to hold property aside from its road, e. g., a land grant, it possesses ordinary incidents of ownership, p. 58.

Cited in *Memphis & Little Rock R. R. Co. v. Dow*, 22 Blatchf. 53, 19 Fed. 392, holding railroad empowered to hold land possesses all the incidents of ownerships.

Statutes.—Legislature is presumed to have used no superfluous words, p. 58.

Statute must be expounded, if practicable, so as to give effect to every part of it, p. 58.

Approved in *State v. Cunningham*, 81 Wis. 515, 51 N. W. 740, 15 L. R. A. 577, holding statutes ought to be so construed that no clause, sentence or word shall be void or insignificant.

Statutes.—In construing act of Congress, courts will look at the paramount object Congress had in view, p. 59.

Statutes.—In construing acts of Congress, courts must look at the state of things then existing and in the light then appearing, p. 60.

Approved in *Smith v. Townsend*, 148 U. S. 495, 37 L. 534, 13 S. Ct. 635, holding, in construing a statute, courts may recur to the history of the times; *Mobile, etc., R. R. v. Tennessee*, 153 U. S. 502, 38 L. 799, 14 S. Ct. 974, holding, in construing a State law, it is necessary to recur to the history and situation of the country; *Gold Hill v. Caledonia S. M. Co.*, 5 Sawy. 577, F. C. 5,512, holding, in construing statutes, we must place ourselves in the light that Congress enjoyed; *Johnston v. Morris*, 72 Fed. 896, 44 U. S. App. 303, holding, in construing statutes, recourse may be had to the state of things at the time of its passage; *Hamilton v. Rathbone*, 175 U. S. 419, construing provision as to married women's conveyances; *Cortesy v. Territory*, 7 N. Mex. 97, 32 Pac. 507, 19 L. R. A. 356, construing Sunday liquor law.

Railroads.—Land grant act of 1862 to Union Pacific, opening to pre-emption, after three years from completion of road, all such lands not sold "or disposed of" by the company, inferentially authorized company to mortgage them, p. 61.

Mortgages.—Land conveyed to a person to enable him to raise money would be an authorization for him to mortgage, p. 61.

Cited in *Farmers' Loan, etc., Co. v. Toledo, etc., R. Co.*, 54 Fed. 774, 6 U. S. App. 469, holding power to sell negotiable securities implies the power to pledge; *Texas, etc., Ry. Co. v. Rust*, 17 Fed. 275, holding power to pledge securities includes the power to sell.

Statutes.—Interpretation which defeats the manifest intention cannot be accepted, p. 62.

Approved in *Van Patten v. Chicago, etc., Ry. Co.*, 81 Fed. 547, holding purpose of act and evils sought to be remedied must be always kept in mind; *Freight Discrimination Case*, 95 N. C. 447, 59 Am. Rep. 258, holding, in construing statute, the mischief sought to be remedied must be taken into consideration; *Bissell Carpet-Sweeping Co. v. Goshen Sweeping Co.*, 72 Fed. 553, 43 U. S. App. 47, holding laws intended to provide a remedy for evils should be favorably construed.

Statutes.—A secondary object should not be allowed to defeat or embarrass that which is primary, p. 65.

Cited in *State v. McGraw*, 13 Wash. 317, 320, 43 Pac. 178, 179, holding statutes should be so construed as to effect their primary objects.

99 U. S. 68-71, 25 L. 469, *LANGE v. BENEDICT*.

Courts.—State court decision that a judge is not liable in damages for having ordered imprisonment of defendant, involves no Federal question, p. 71.

Approved in *Manning v. French*, 133 U. S. 191, 33 L. 585, 10 S. Ct. 260.

99 U. S. 72-78, 25 L. 301, *DOGGETT v. RAILROAD CO.*

Railroads.—Under Florida internal improvement act of 1855, empowering trustees of the improvement fund to compel deposit semi-annually, by railroads, of certain per cent. of bonded indebtedness in a sinking fund, purchaser of railroad at foreclosure sale must make such deposit only on remaining outstanding bonds, not on entire amount, pp. 75-77.

Receivers.—In action by receiver of Florida internal improvement fund to compel a land company to pay its portion into sinking fund, bondholders are improperly joined as plaintiffs, p. 78.

Cited in *Express Co. v. Railroad Co.*, 99 U. S. 199, 25 L. 320, holding, in suit to enforce contract of railroad, receiver the only necessary party.

Statutes.—Where intent is plain, nothing is left to construction, p. 78.

Cited in *Cline v. State*, 36 Tex. Cr. 351, 61 Am. St. Rep. 870, 36 S. W. 1108, *Berlin Iron-Bridge Co. v. San Antonio*, 62 Fed. 889, and *Lake County v. Rollins*, 130 U. S. 671, 32 L. 1063, 9 S. Ct. 652, all holding, where law is expressed in plain and unambiguous language, no room is left for construction. See extensive note, 44 Am. St. Rep. 232.

99 U. S. 78-79, 25 L. 382, *TRANSPORTATION LINE v. COOPER*.

Shipping.—Canal-boat loaded with coal, having on board family of captain, is not a barge carrying passengers, within revised statutes, section 4492, requiring fire apparatus on board, p. 79.

Cited in *United States v. Guess*, 48 Fed. 588, holding wife and neighbors of owner on board tug during trial trip are not passengers.

99 U. S. 80-85, 25 L. 407, *BARROW v. HUNTON*.

Removal of causes.—Where proceeding subsequent to judgment in State court is practically a motion to set it aside for irregularity, or in the nature of appeal or writ of review therefrom, Federal court will not take jurisdiction on removal; e. g., petition to annul a default judgment for defective service, p. 83.

Approved and principle applied in *Kalamazoo Wagon Co. v. Snavely*, 34 Fed. 825, holding independent, as distinguished from auxiliary, actions may be removed; *Filler v. Levy*, 17 Fed. 613, holding that where suit is not a mode of relief, but an independent action, it may be removed; *Chappell v. Chappell*, 86 Md. 544, 39 Atl. 989, holding auxiliary proceedings respecting alimony, counsel fees and costs not removable; *Massachusetts Life Assn. v. Lohmiller*, 74 Fed. 27, 46 U. S. App. 103, holding proceedings must be original, Federal courts will not revise mere errors or irregularities; *Grauer v. Faurot*, 64 Fed. 241, holding Federal courts will not entertain bill of review attacking judgment of State courts; *Ralston v. Sharon*, 51 Fed. 707, 709, 710, holding, where no diverse citizenship and State courts can give full relief, Federal courts will not entertain jurisdiction; *Cowley v. Northern Pacific R. R. Co.*, 46 Fed. 331, holding, where plaintiff has an adequate remedy by motion, Federal courts will not interfere; *Smith v. Schwed*, 9 Fed. 490, holding Federal courts will not set aside judgment of State courts for mere irregularities; *Edwards Mfg. Co. v. Sprague*, 76 Me. 60, *Oakley v. Taylor*, 64 Fed. 248, *Pelzer Mfg. Co. v. Hamburg-Bremen Ins. Co.*, 62 Fed. 3, *Lackawanna Coal & Iron Co. v. Bates*, 56 Fed. 739, and *Ladd v. West*, 55 Fed. 354, all holding that, in order for Federal courts to assume jurisdiction, proceedings must be original and not incidental; *Jackson v. Gould*, 74 Me. 577, holding statute of removal was not intended to confer power of review; *Pratt v. Albright*, 10 Biss. 517, 9 Fed. 638, holding controversy between

judgment creditor and garnishee is not a removal cause; *Poole v. Thatcherdeft*, 19 Fed. 51, supplemental proceedings not subject to removal.

Distinguished in *McDonald v. Seligman*, 81 Fed. 757, *Ellis v. Davis*, 109 U. S. 503, 27 L. 1012, 3 S. Ct. 338, *Oglesby v. Attrill*, 12 Fed. 228, and *Boatmen's Savings Bank v. Wagenspack*, 4 Woods, 133, 12 Fed. 68.

Removal of causes.—If proceedings in State court, subsequent to a judgment, are tantamount to a bill in equity to annul judgment for fraud, Federal courts have jurisdiction on removal, p. 83.

Approved and relied upon in *Central Nat. Bank v. Hazard*, 49 Fed. 296, *Sahlgard v. Kennedy*, 1 McCrary, 293, 2 Fed. 297, *Marshall v. Holmes*, 141 U. S. 597, 598, 35 L. 873, 12 S. Ct. 64, 65, *Young v. Sigler*, 48 Fed. 183, *Arrowsmith v. Gleason*, 129 U. S. 99, 100, 32 L. 634, 635, 9 S. Ct. 241, *Carver v. Mortgage Trust Co.*, 73 Fed. 12, *Davenport v. Moore*, 74 Fed. 947, *Johnson v. Waters*, 111 U. S. 667, 28 L. 556, 4 S. Ct. 634, and *Kurtz v. Railroad Co.*, 187 Pa. St. 68, 40 Atl. 991, all holding that where jurisdictional amount is sufficient and citizenship diverse, Federal courts have jurisdiction to set aside judgments of State courts fraudulently obtained; *McNeill v. McNeill*, 78 Fed. 835, holding divorce judgment obtained by fraud may be set aside; *In re Iowa, etc., Construction Co.*, 3 McCrary, 312, 10 Fed. 402, allowing removal of petition in intervention, charging fraud in obtaining of interlocutory orders; *Stackhouse v. Zunts*, 4 Woods, 173, 15 Fed. 482, holding execution obtained upon fraudulent judgment may be restrained; *Cowley v. Northern, etc.*, R. R., 159 U. S. 579, 580, 40 L. 266, 16 S. Ct. 130, holding judgment obtained through fraud of attorneys may be set aside; *Hunt v. Fisher*, 29 Fed. 806, holding State or Federal courts may inquire into titles procured by fraudulent judgments; *United States v. Norsch*, 42 Fed. 418, holding Federal government may annul naturalization obtained by fraud in State courts; *Daniel v. Benedict*, 50 Fed. 354, holding, in suit brought by surviving wife against trustee of decedent, collusive decree of divorce may be set aside; *Little Rock, etc.*, R. R. v. *Burke*, 66 Fed. 88, 27 U. S. App. 736, *Bledsoe v. Erwin*, 33 La. Ann. 617, and *Blythe v. Hinckley*, 84 Fed. 254, all holding Federal courts will not assume jurisdiction where judgments appear to be void upon their face; *United States v. Gleason*, 78 Fed. 398, holding decree of naturalization cannot be set aside on the ground that the facts were falsely represented; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 19, holding Federal courts have jurisdiction, though property has been set aside by Probate Court; *Furnald v. Glenn*, 64 Fed. 53, 26 U. S. App. 202, holding Federal courts have jurisdiction in proper cases to restrain prosecution, although based upon judgments.

Distinguished in *National Bank v. Northwestern Car Co.*, 28 Fed. 113.

Courts.—Character of cases is always open to investigation, irrespective of State legislative declaration, to determine whether Federal courts may take jurisdiction, p. 85.

Cited in *Davenport v. Moore*, 74 Fed. 952, *Edmunds Mfg. Co. v. Sprague*, 76 Me. 58, *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, 62 Fed. 2, and *Ralston v. Sharon*, 51 Fed. 708, all holding character of case always open in order to determine jurisdiction.

99 U. S. 86-96, 25 L. 363, *HACKETT v. OTTAWA*.

Municipal corporation.—Common fairness requires that municipalities should express in their ordinances the purposes for which bonds are issued, p. 92.

Municipal corporations.—Authority to levy taxes for "corporate purposes" contemplates a tax to be expended in a manner to promote the general prosperity and welfare of the municipality, p. 93.

Cited in *Wetherell v. Devine*, 116 Ill. 635, 637, 6 N. E. 25, 26, and *Weightman v. Clark*, 103 U. S. 260, 26 L. 394, both holding the same as the principal case; *Cary v. City of Ottawa*, 8 Fed. 200, 204, 206, holding money borrowed for the improvement of water-power is for a municipal purpose; *Cole v. La Grange*, 113 U. S. 7, 28 L. 898, 5 S. Ct. 419, holding bonds issued for benefit of private manufactory void. See elaborate note, 98 Am. Dec. 668.

Municipal corporations.—Municipality is estopped to question validity of its bonds, which recite that they were issued for municipal purposes, without specifying what, where State Constitution authorizes indebtedness for such purpose, p. 96.

Approved and principle applied in *Austin v. Nalle*, 85 Tex. 543, 22 S. W. 674, *Ottawa v. Carey*, 108 U. S. 118, 121, 27 L. 673, 674, 2 S. Ct. 362, 363, *Town of Brewton v. Spira*, 106 Ala. 235, 17 So. 607, *Waite v. Santa Cruz*, 89 Fed. 632, 634, *Huron v. Second Ward Savings Bank*, 86 Fed. 277, 57 U. S. App. 603, *Howard v. Kiowa County*, 73 Fed. 408, *West Plains Township v. Sage*, 69 Fed. 946, 956, 32 U. S. App. 725, *Risley v. Village of Howell*, 64 Fed. 457, 458, 22 U. S. App. 635, *National Life Ins. Co. v. Board of Education*, 62 Fed. 785, 27 U. S. App. 244, *Ashley v. Board of Supervisors*, 60 Fed. 67, 16 U. S. App. 656, *Cadillac v. Woonsocket Institution*, 58 Fed. 940, 16 U. S. App. 545, *National Bank of Com. v. Town of Grenada*, 41 Fed. 92, 93, *Moulton v. Evansville*, 25 Fed. 386, *Cary v. City of Ottawa*, 8 Fed. 205, *Board of Commrs. v. Howard*, 83 Fed. 298, 49 U. S. App. 645, *Barnett v. Denison*, 145 U. S. 140, 36 L. 653, 12 S. Ct. 820, and *Ottawa v. National Bank*, 105 U. S. 343, 344, 26 L. 1127, all holding that recitals in municipal bonds are binding upon the municipality, and it is estopped from showing, against bona fide purchasers, that indebtedness was fraudulent.

lent or not for a municipal purpose; *Lynchburg v. Slaughter*, 75 Va. 63, holding person taking bonds, with knowledge of their invalidity, may transfer title to innocent purchaser; *Flagg v. School District*, 4 N. Dak. 61, 58 N. W. 510, 25 L. R. A. 375, holding, where bonds are issued upon certificate of county clerk, bona fide holder may rely upon certificate; *Carter v. Ottawa*, 24 Fed. 547, holding person who purchases bonds, with knowledge of invalidity, cannot recover; *Klamath Falls v. Sachs*, — Or. —, 57 Pac. 335, holding recitals in bonds are binding upon the purchasers. See elaborate note, 98 Am. Dec. 688; 51 Am. St. Rep. 835, 849, note. Affirmed, *arguendo*, in *Rich v. Mentz*, 21 Blatchf. 496, 18 Fed. 55.

99 U. S. 97-99, 25 L. 409, *CANAL CO. v. NEW ORLEANS*.

Banks and banking.—Burden of proof held to be upon a bank to show that it had been unlawfully taxed upon its capital, alleged to be invested in government notes, p. 99.

Cited in *Cotton Exchange v. Board of Assessors*, 37 La. Ann. 424, holding assessment presumed to be correct; *Jones v. Seward Co.*, 10 Neb. 162, 4 N. W. 951, holding, where government bonds are purchased for the purpose of evading taxation, the money may be taxed.

Distinguished in *Griffin v. Heard*, 78 Tex. 614, 14 S. W. 894

99 U. S. 100-112, 25 L. 366, *GRAFTON v. CUMMINGS*.

Frauds, statute of.—In New Hampshire, memorandum of sale of realty must contain a description of the thing sold, of the price and of the party who sells, as well as of purchaser, p. 107.

Cited and principle applied in *Peoria Sugar Co. v. Babcock Co.*, 67 Fed. 895, holding memorandum must contain description, price, parties; *Sprankle v. Trulone*, 22 Ind. App. 585, 54 N. E. 464, holding essential terms must be ascertainable from writing; *Breckinridge v. Crocker*, 78 Cal. 535, 21 Pac. 181, memorandum must show parties, price, when to be paid, description; *Railway, etc., Assn. v. Loomis*, 142 Ill. 568, 32 N. E. 426, memorandum must show parties as well as terms; *American, etc., Leather Co. v. Porter*, 94 Iowa, 120, 62 N. W. 659, itemized list of goods sold, signed by seller, insufficient; *Commissioners v. Shipley*, 77 Ind. 555, contract, without designating parties, insufficient; *Becker v. Mason*, 30 Kan. 702, 2 Pac. 854, unsigned real estate contract insufficient; *Fry v. Platt*, 32 Kan. 68, 3 Pac. 785, and *Ross v. Allen*, 45 Kan. 242, 25 Pac. 574, 10 L. R. A. 839, both holding written receipt for part of purchase of land insufficient; *Kelley v. Thuey*, 143 Mo. 436, 45 S. W. 303, holding memorandum not stating price insufficient; *Mentz v. Newwitter*, 122 N. Y. 496, 497, 19 Am. St. Rep. 517, 518, 25 N. E. 1045, 1046, entry by auctioneer, not showing name of seller, insufficient; *Rafferty v. Lougee*, 63 N. H. 56, holding unsigned

memorandum of auctioneer insufficient; *Clampet v. Bells*, 39 Minn. 274, 39 N. W. 496, holding memorandum not showing vendor's name insufficient; *Ringer v. Holtzclaw*, 112 Mo. 522, 20 S. W. 801, memorandum must state terms with reasonable certainty; *Rucker v. Harrington*, 52 Mo. App. 489, memorandum must contain essential elements of contract; *Lewis v. Wood*, 153 Mass. 322, 26 N. E. 862, holding memorandum which does not identify purchaser insufficient; *McGovern v. Hern*, 153 Mass. 810, 25 Am. St. Rep. 634, 26 N. E. 862, 10 L. R. A. 816, holding memorandum identifying party as "seller" insufficient; *Kingsley v. Siebrecht*, 92 Me. 30, 31, 69 Am. St. Rep. 491, 492, 42 Atl. 251, 252, holding contract signed by agent, principal may take advantage of it; *Rice v. Bush*, 16 Colo. 492, 27 Pac. 723, holding interest of known, but unnamed, principal not bound; *Freeland v. Ritz*, 154 Mass. 259, 26 Am. St. Rep. 246, 28 N. E. 227, 12 L. R. A. 561, holding memorandum may refer to other papers containing essentials of contract; *Riggles v. Erney*, 154 U. S. 254, 38 L. 980, 14 S. Ct. 1086, holding part performance of contract to convey land takes it out of statute; *Hale v. Hale*, 90 Va. 731, 19 S. E. 741, contract to make mutual wills within the statute. Affirmed in dissenting opinion in *Mantz v. Maguire*, 52 Mo. App. 154, 155. Cited, *arguendo*, in *Bank v. Sprague*, 21 Blatchf. 479, 17 Fed. 788, and *Burton v. Huma*, 37 Fed. 743.

99 U. S. 112-119, 25 L. 470, *TOWN OF WEYAUWEGA v. AYLING*.

Municipal corporations.—Town is estopped from questioning legality of its bonds, in hands of bona fide purchaser, signed by town clerk, whose term had expired, but bearing date within his term, p. 118.

Cited in *Yesler v. Seattle*, 1 Wash. 323, 25 Pac. 1019, holding bonds valid, although not executed at date of issue; *Brown v. Bon Homme County*, 1 S. Dak. 225, 46 N. W. 175, holding bonds issued as of a certain date, by proper officers, valid in hands of bona fide purchaser; *Jones v. Hurlburt*, 13 Neb. 139, 13 N. W. 11, holding bonds signed outside of county valid; *Montgomery v. Township of St. Mary*, 43 Fed. 363, holding signing of trustee's name to bond in his presence and by his direction does not invalidate; *Rich v. Mentz*, 21 Blatchf. 496, 18 Fed. 55, town may be estopped by acquiescence and payment of interest.

Evidence.—Presumption is that official duty has been rightfully performed, p. 119.

Cited in *Nofire v. United States*, 164 U. S. 660, 41 L. 590, 17 S. Ct. 213, holding law presumes requisites for issuance of marriage license were followed. See 98 Am. Dec. 678, note. *Arguendo*, in *Catron v. LaFayette County*, 106 Mo. 670, 17 S. W. 579.

Distinguished in *Coler v. Cleburne*, 131 U. S. 174, 175, 33 L. 150, 9 S. Ct. 724, 725, and *Anthony v. County of Jasper*, 101 U. S. 699, 25 L. 1009.

99 U. S. 119-129, 25 L. 370, *CASE v. BEAUREGARD*.

Partnership.—The effects of a partnership belong to it so long as it continues in existence, p. 124.

Partnership.—Right of each partner extends only to a share of what may remain after payment of debts of the firm, p. 124.

Partnership.—Partner has a right to have partnership property applied to payment of partnership debts, and this right accrues to creditors, p. 124.

Affirmed in *First Nat. Bank v. Cody*, 93 Ga. 150, 19 S. E. 840.

Partnership.—Creditors have a right to have debts due to them paid out of assets of firm, p. 125.

Partnership.—The right of creditors to have partnership assets applied to their debts, in preference to debts of individual partners, is a derivative one, and must be enforced through the individual partner; hence, if individual partner has sold his interest to a creditor, who has taken possession and disposed of the property, a firm creditor could not enforce any lien thereon, p. 125.

Cited in *Reyburn v. Mitchell*, 106 Mo. 376, 27 Am. St. Rep. 355, 16 S. W. 594, holding bona fide waiver by partners of their equitable rights destroys derivative rights of firm creditors; *Calder v. Creditors*, 47 La. Ann. 354, 16 So. 856, *Stahl v. Osmer*, 31 Or. 201, 202, 49 Pac. 958, *Winslow v. Wallace*, 116 Ind. 326, 17 N. E. 927, 1 L. R. A. 184, *Lamkin v. Baldwin Mfg. Co.*, — Conn. —, 43 Atl. 595, 44 L. R. A. 789, and *Goldsmith v. Eichold*, 94 Ala. 121, 33 Am. St. Rep. 101, 10 So. 82, all holding equity of firm creditors to share in partnership assets is derivative, and is destroyed by bona fide transfer; *Hanover Bank v. Klein*, 64 Miss. 150, 151, 60 Am. Rep. 47, 49, 8 So. 208, 209, holding, if from any cause partner cannot enforce his rights, firm creditors cannot.

Partnership.—Neither partners nor creditors have any specific lien on partnership assets until the property has passed in custodiam legis, through assignment or bankruptcy or some sort of trust; hence, failing that, a simple contract creditor cannot dispute a bona fide sale of one partner's interest and the purchaser's disposition of the portion of the firm property thus acquired, p. 125.

Cited in *Harris v. Peabods*, 73 Me. 267, *Vietor v. Glover*, 17 Wash. 40, 41, 48 Pac. 789, 40 L. R. A. 300, *Wiggins v. Blackshear*, 86 Tex. 670, 26 S. W. 940, *Saunders v. Reilly*, 105 N. Y. 19, 59 Am. Rep. 476, 12 N. E. 172, *Fairbanks v. Welshans*, 55 Neb. 380, 75 N. W. 871, *Krueger v. Speith*, 8 Mont. 492, 20 Pac. 668, 3 L. R. A.

294, *Roach v. Brannon*, 57 Miss. 500, *Goodhar v. Cary*, 4 Woods, 666, 16 Fed. 319, *Sickman v. Abernathy*, 14 Colo. 179, 180, 23 Pac. 449, 450, and *Jones v. Fletcher*, 42 Ark. 451, all holding partnership creditors have no lien on partnership assets, and their right to firm assets may be defeated by bona fide transfer.

Partnership.—Where one partner sells half the firm's effects to a third person, with the other's consent, and such other subsequently sells the other half to same person, sale is prima facie valid, p. 128.

Approved and principle applied in *Ellison v. Lucas*, 87 Ga. 227, 27 Am. St. Rep. 244, 13 S. E. 445, *Coffin v. Day*, 34 Fed. 690, *Huis-kamp v. Moline Wagon Co.*, 121 U. S. 323, 324, 30 L. 976, 7 S. Ct. 905, *Woodmansie v. Holcomb*, 34 Kan. 38, 7 Pac. 605, *Sexton v. Anderson*, 95 Mo. 381, 8 S. W. 566, and *Myers v. Tyson*, 2 Kan. App. 469, 43 Pac. 92, all holding transfer in good faith by one partner, with consent of partnership, good as against creditors of firm; *Hudgins v. Rix*, 60 Ark. 22, 28 S. W. 424, holding purchase by one partner of partnership assets not per se fraudulent; *Hanford v. Prouty*, 133 Ill. 352, 24 N. E. 568, holding sale by one partner of all his interest good as against firm creditors; *Thayer v. Humphrey*, 91 Wis. 303, 64 N. W. 1016, 30 L. R. A. 558, holding sale by one partner to another releases equities of firm creditors; *Douglas v. Alder*, 13 Utah, 311, 312, 44 Pac. 708, partner who sells his interest, with consent of firm, loses his equity; *Temman v. McKean*, 46 Mo. App. 492, holding sale by partner who has acquired the assets of firm good as against firm creditors; *Fitzpatrick v. Flanagan*, 106 U. S. 655, 27 L. 213, 1 S. Ct. 374, holding creditors cannot recover property of firm which has passed into hands of bona fide holder; *Rouse v. Wallace*, 10 Colo. App. 97, 50 Pac. 367, holding rights of creditors depend upon the existence of equities between the partners; *Bates v. Collender*, 3 Dak. 264, 16 N. W. 509, dissolution and distribution of assets does not affect partner's right to exemption laws; *Harris v. Meyer*, 84 Wis. 147, 53 N. W. 1127, holding partner purchasing the interest of firm may convey it to secure individual debts; *Patton v. Leftwich*, 86 Va. 426, 19 Am. St. Rep. 906, 10 S. E. 688, 6 L. R. A. 572, and n., holding surviving partner may make assignment and give preferences; *Batchelor v. Sanger*, 15 Tex. Civ. App. 113, 38 S. W. 360, holding members of insolvent firm may prefer individual debts; *Durant v. Pierson*, 124 N. Y. 453, 21 Am. St. Rep. 691, 26 N. E. 1097, 12 L. R. A. 149, holding, in absence of fraud, firm may prefer creditors; *Goddard-Peck, etc., Co. v. McCune*, 122 Mo. 431, 25 S. W. 905, 29 L. R. A. 687, and n., holding assets of insolvent firm before dissolution may, with firm's consent, be applied to satisfaction of individual debts; *McDonald v. Cash*, 57 Mo. App. 545, holding application of firm property by insolvent partnership not per se fraudulent; *Arnold*

v. Hagerman, 45 N. J. Eq. 208, 17 Atl. 99, holding transfer by retiring partner to one who continues the business is good as against firm creditors; Purple v. Farrington, 119 Ind. 171, 21 N. E. 545, 4 L. R. A. 538, holding chattel mortgage executed by partnership to secure individual debts good as against firm creditors; Bedford v. McDonald, 102 Tenn. 365, 52 S. W. 158, holding transfer of firm assets to one knowing firm to be insolvent is fraudulent; Johnston v. Shoe Co., 5 Tex. Civ. App. 400, 24 S. W. 581, holding member of insolvent firm cannot, without consent of partners, execute mortgage to secure individual debts; Reynolds v. Johnson, 54 Ark. 452, 16 S. W. 125, holding insolvent firm may, in good faith, mortgage partnership property to secure individual debts; Simmons, etc., Co. v. Thomas, 147 Ind. 321, 46 N. E. 647, holding mortgage of firm property, with consent of partnership, good as against firm creditors; Smith v. Smith, 87 Iowa, 99, 43 Am. St. Rep. 362, 54 N. W. 74, holding mortgage of firm property to secure pre-existing debt good as against firm creditors; Batchelder v. Altheimer, 10 Mo. App. 189, holding appeal to equity cannot be made by partnership creditor until he exhausts his remedy at law; Dahlman v. Jacobs, 5 McCrary, 132, 15 Fed. 864, holding equity will not set aside fraudulent conveyance until creditor has established his claim at law; Fogg v. H. & K. R. Co., 5 McCrary, 451, 17 Fed. 872, holding creditors at large must reduce their claims to judgment before equity will intervene; Johnson v. McClary, 131 Ind. 106, 30 N. E. 888, holding receiver may recover property transferred without consent.

Partnership.—Without a lien, a partnership creditor has only the right to prosecute his claim in the ordinary courts of law, p. 129.

Affirmed, *arguendo*, in Schuster v. Rader, 13 Colo. 336, 22 Pac. 507, Robinson v. Allen, 85 Va. 730, 8 S. E. 839, Excelsior Mills Co. v. Hanover, 102 Wis. 317, 78 N. W. 740, Broadway Nat. Bank v. Wood, 165 Mass. 316, 43 N. E. 102, Hibernia Ins. Co. v. New Orleans Transfer Co., 5 McCrary, 400, 17 Fed. 480, and Savings Bank v. National Bank, 53 Vt. 91. See notes, 43 Am. St. Rep. 375, 51 Am. St. Rep. 907, and 66 Am. St. Rep. 277.

Distinguished in Bartlett v. Meyer-Schmidt, etc., Co., 65 Ark. 293, 45 S. W. 1065, Collier v. Hanna, 71 Md. 260, 17 Atl. 1019, Putney v. Whitmire, 66 Fed. 388, Blair v. Shaeffer, 33 Fed. 222, Hibernia Ins. Co. v. St. Louis Transfer Co., 3 McCrary, 371, 10 Fed. 598, Johnson v. Strauss, 4 Hughes, 628, 26 Fed. 62, and Jackson Bank v. Durfey, 72 Miss. 976, 977, 48 Am. St. Rep. 598, 600, 18 So. 457, 31 L. R. A. 471.

99 U. S. 130-137, 25 L. 345, WILKERSON v. UTAH.

Territories have right to legislate in all matters not inconsistent with Federal Constitution and laws, p. 130.

Criminal law.—Capital punishment by shooting is not cruel or unusual, p. 135.

Cited in *In re Kemmler*, 136 U. S. 447, 34 L. 524, 10 S. Ct. 933, holding execution by electricity is not cruel or unusual.

Criminal law.—Where Utah penal code provided death penalty for murder, and directed the trial court to “impose the punishment prescribed,” court may sentence prisoner to be publicly shot, a mode of capital punishment authorized by Utah statute of 1852, p. 137.

99 U. S. 138-142, 25 L. 315, *BURBANK v. SEMMES*.

Judicial sale.—A marshal's deed, which includes land not mentioned in the information, monition or decree, conveys no title to such parcel, p. 142.

Cited in *National Bank v. Heyer*, — W. Va. —, 32 S. E. 1001, holding sale of property under decree which does not authorize it passes no title.

99 U. S. 143-146, 25 L. 271, *BIEBINGER v. CONTINENTAL BANK*.

Mortgage.—A bank cannot claim an equitable mortgage against a bankrupt, because of the deposit of a deed, where it is not claimed that money was advanced upon the faith of the deposit, p. 146.

Cited in *Reynes v. Dumont*, 130 U. S. 392, 32 L. 945, 9 S. Ct. 496, holding where bonds are specially deposited and no advances made upon them, bank has no lien; *Harding v. Giddings*, 73 Fed. 341, 34 U. S. App. 642, holding payment of debt releases the collateral security.

99 U. S. 147-149, 25 L. 272, *RAILROAD CO. v. MCKINLEY*.

Removal of causes.—After judgment in State court, right to new trial must be absolutely perfected before cause may be removed; hence though reversal and new trial were ordered by Iowa appellate court, the cause was held not removable until expiration of sixty days, within which time a petition for rehearing might be filed, and in this case was actually filed and allowed, p. 148.

Cited in *Jackson v. Gould*, 74 Me. 574, holding cause not removable after final judgment; *Stone v. Sargent*, 129 Mass. 509, holding cause may be removed after consent hearing before auditor; *Field v. Williams*, 24 Fed. 514, holding cause may be removed after decision on demurrer; *Baltimore R. R. Co. v. Bates*, 119 U. S. 467, 30 L. 438, 7 S. Ct. 286, removal may be had after new trial granted; *Ayers v. Watson*, 113 U. S. 597, 28 L. 1094, 5 S. Ct. 642, holding party procuring, is estopped from objecting that removal was not in time; *Henen v. B. & O. R. R. Co.*, 17 W. Va. 895, holding State court has the right to pass on bond and sufficiency of sureties; *B. & O. R. R. Co. v. P., W. & K. R. R. Co.*, 17 W. Va. 860, holding

where record does not show cause. State court may deny removal; *Metropolitan Life Ins. Co. v. Ethier*, 44 Mich. 145, 6 N. W. 201, holding where necessary steps are not taken for a year, petition should be denied. Approved obiter in *Elliot v. Stocks*, 67 Ala. 299.

99 U. S. 149-151, 25 L. 430, *KLEIN v. NEW ORLEANS*.

Exemptions.—Lands held by city for public purposes and ground rents which are part of revenues may not be levied upon, p. 150.

Approved and principle applied in *The Fidelity*, 16 Blatchf. 571, F. C. 4,758, holding tug used by government may not be libelled; *Hitchcock v. Wharf Co.*, 4 Woods, 305, 50 Fed. 269, holding stock held by city in a wharf exempt from execution; *Ellis v. Pratt City*, 111 Ala. 631, 56 Am. St. Rep. 78, 20 So. 650, 33 L. R. A. 265, holding insurance money received for public building is exempt; *Emery County v. Burren*, 14 Utah, 331, 333, 60 Am. St. Rep. 900, 901, 47 Pac. 92, 37 L. R. A. 733, 734, property consisting of scrapers, planes, stray brands, are exempt from execution; *Galveston Wharf Co. v. Galveston*, 63 Tex. 23, holding city cannot subject its interest in wharf company to taxation; *Pipe Foundry Co. v. Howland*, 111 N. C. 635, 16 S. E. 864, 20 L. R. A. 751, holding franchise and water works being built by corporation to supply city are subject to lien; *Kline v. Parish of Ascension*, 33 La. Ann. 566, rents of land belonging to parish not necessary for public use may be seized; *Oyster Police Steamers of Maryland*, 31 Fed. 768, holding oyster police steamers subject to the inspection regulations of United States.

Municipal corporations exercise sovereign powers and are the local agencies of the government creating them, p. 150.

99 U. S. 152-161, 25 L. 348, *UNITED STATES v. FORT SCOTT*.

Municipal corporations.—City improvement bonds containing the promise of the city to pay principal and interest, bind all the city's taxable property, though issued under an ordinance declaring them payable solely from special assessments upon the property improved thereby, pp. 159, 160.

Cited in *State v. Engle*, — Fla. —, 24 So. 542, holding payment of valid bonds may be coerced like payment of any other county indebtedness; *Austin v. Seattle*, 2 Wash. 675, 27 Pac. 560, holding city liable generally, although authorized to pay bonds out of special assessment; *Fowler v. City of Superior*, 85 Wis. 420, 54 N. W. 803, holding bonds payable out of improvement assessments are general liabilities of county. Affirmed, *arguendo*, in *Fort Scott v. Hickman*, 112 U. S. 162, 28 L. 640, 5 S. Ct. 63, *Covington v. McKenna*, 99 Ky. 514, 36 S. W. 520, and *Atkinson v. Great Falls*, 16 Mont. 375, 40 Pac. 879.

99 U. S. 161-168, 25 L. 317, *HARRIS v. McGOVERN*.

Ejectment cannot be maintained in California unless the party was seized or possessed of the premises within five years, p. 165.

Adverse possession.—When statute begins to run it will not be impeded by any subsequent disability, p. 168.

Cited in *Bauserman v. Blunt*, 147 U. S. 657, 37 L. 320, 13 S. Ct. 470, and *Ewell v. Chicago Ry. Co.*, 29 Fed. 58, both holding the same as principal case.

99 U. S. 168-179, 25 L. 383, *GORDON v. GILFOIL*.

Mortgage.—In Louisiana order of seizure and sale does not merge the mortgage debt, p. 175.

Limitation of actions.—In Louisiana an order of seizure and sale interrupts the running of the statute against the personal liability on mortgage notes, p. 178.

Courts.—Pendency of suit in State court is no ground for plea of abatement to suit on same matter in Federal court; hence, though seizure and sale for foreclosure of mortgage have been instituted in State court, suit on debt is maintainable in the Federal court, p. 178.

The following cases reaffirm this principle: *Green v. Underwood*, 86 Fed. 429, 57 U. S. App. 539, *Rogers v. Pitt*, 96 Fed. 677, *Leidigh Carriage Co. v. Stengel*, 95 Fed. 642, *Ryan v. Seaboard, etc.*, R. R. Co., 89 Fed. 407, *Brendal v. Church*, 82 Fed. 262, *Gamble v. City of San Diego*, 79 Fed. 500, *Shaw v. Lyman*, 79 Fed. 3, *Deming v. Orient Ins. Co.*, 78 Fed. 4, *Marks v. Marks*, 75 Fed. 332, *Short v. Hepburn*, 75 Fed. 113, 41 U. S. App. 520, *First National Bank v. Deuel Co.*, 74 Fed. 375, *Woodbury v. Alleghaney*, 72 Fed. 374, *North Muskegon v. Clark*, 62 Fed. 698, 22 U. S. App. 522, *Wilcox Guano Co. v. Phoenix Ins. Co.*, 61 Fed. 200, *Regale v. Greenwood*, 60 Fed. 786, *Marshall v. Otto*, 59 Fed. 252, *Howlett v. Central Imp. Co.*, 56 Fed. 162, *Gates v. Bucki*, 53 Fed. 965, 12 U. S. App. 69, *Leggett v. Glenn*, 51 Fed. 389, 4 U. S. App. 438, *Converse v. Dairy Co.*, 45 Fed. 20, *Pierce v. Feagans*, 39 Fed. 588, *Washburn v. Scott*, 22 Fed. 711, *Sharon v. Hill*, 10 Sawy. 306, 22 Fed. 30, *Sharon v. Terry*, 13 Sawy. 392, *Dwight v. Central Vt. R. R. Co.*, 20 Blatchf. 205, 9 Fed. 789, *Latham v. Chaffee*, 7 Fed. 523, and *Ahlhauser v. Butler*, 50 Fed. 709. Cited also in *Mix v. Creditors*, 39 La. Ann. 626, 2 So. 393, *State v. Railroad Co.*, 42 La. Ann. 18, 7 So. 86, *Bourgeois v. Jacobs*, 45 La. Ann. 1314, 14 So. 70, *Kilpatrick v. Kansas City, etc.*, R. R., 38 Neb. 641, 41 Am. St. Rep. 757, 57 N. W. 671, and *Willson v. Milliken*, — Ky. —, 44 S. W. 661, 662, 663, 664, 42 L. R. A. 451, 452, 453, 454, 455, 458, 466, all holding that pendency of action in Federal courts does not abate action in State courts; *Barnes v. Dow*, 59 Vt. 547, 10 Atl. 264, holding court of equity will assume jurisdiction, although action pending between same parties involving same subject-matter.

99 U. S. 180-183, 25 L. 451, **BURT v. PANJAUD.**

Trial.— Error in overruling an objection to a juror is cured where it does not appear that he sat upon the panel, or that his exclusion abridged party's right of challenge, p. 181.

Cited in *Ford v. Umatilla Co.*, 15 Or. 324, 16 Pac. 39, and *Andrews v. State*, 21 Fla. 605, both holding that erroneous ruling on challenge, is cured if jury is procured before peremptories are exhausted; *Savage v. State*, 18 Fla. 956, holding where it does not appear that the juror was excluded for reason assigned, it is not error.

Jury.— A juror upon his examination is not bound to disclose his guilt of a crime, or any fact which would disgrace him, p. 181.

Cited in *Atwood v. Weems*, 99 U. S. 184, 185, 25 L. 471, holding right to have juror discharged for failing to take oath, as required by section 821, United States revised statutes, is limited to district attorney.

Ejectment.— Actual possession of the premises or receipt of rent by plaintiff prior to eviction, is prima facie evidence of title, p. 182.

Cited in *Duggan v. Davey*, 4 Dak. 123, 26 N. W. 892, holding actual possession of mining claim is a good title against an intruder; *Haws v. Copper Mining Co.*, 160 U. S. 317, 40 L. 441, 16 S. Ct. 288, holding possession or receipt of rents sufficient as against intruder; *Spitznagle v. Vanhessch*, 13 Neb. 341, 14 N. W. 418, and *Sherin v. Larson*, 28 Minn. 525, 11 N. W. 71, both holding possession of ancestor good title against intruder; *Lancy v. Brok*, 110 Ill. 616, holding where no circumstances to contrary, possession indicates ownership in fee; *Parker v. Fort Worth Ry. Co.*, 71 Tex. 134, 8 S. W. 541, *Mining Co. v. Briscoe*, 47 Fed. 278, and *Shaw v. Hill*, 79 Mich. 91, 44 N. W. 424, all holding possession is prima facie evidence of title; *Probst v. Trustees, etc.*, 3 N. Mex. 270, 5 Pac. 705, paper title not necessary in defense against trespasser.

Distinguished in *People v. Casey*, 96 N. Y. 123.

99 U. S. 183-188, 25 L. 471, **ATWOOD v. WEEMS.**

Trial.— Revised statutes, section 821, authorizing district attorney to apply test oath to jury panel at commencement of term, is inapplicable to parties to civil suits, p. 184.

Appeal and error.— If ruling was right on other grounds, judge's opinion that law was unconstitutional is not error, p. 185.

Taxation.— Under act of Congress of 1862, for direct taxation in insurrectionary districts, if the party liable for taxes, or his tenant or friend, was ready and willing to pay and was told payment would not be accepted, this defeats the sale, p. 187.

Cited in *Hills v. National Bank*, 12 Fed. 95, holding when it is reasonably certain tender of taxes will be refused, no tender is

necessary; *United States v. Lee*, 106 U. S. 200, 203, 27 L. 174, 175, 1 S. Ct. 244, 246, and *Poindexter v. Greenhow*, 114 U. S. 282, 29 L. 190, 5 S. Ct. 910, both holding tender, as far as certificate of sale is concerned, is equivalent to payment; *State v. Johnson*, 30 Fla. 507, 11 So. 857, holding it is the duty of the collector to receive taxes; *Wilbert v. Michel*, 42 La. Ann. 856, 8 So. 608, holding State cannot convey any better title than she has acquired; *Hills v. Exchange Bank*, 105 U. S. 321, 26 L. 1053, and *Royal v. Virginal*, 116 U. S. 579, 29 L. 737, 6 S. Ct. 513, both holding lawful tender of taxes equivalent to payment; dissenting opinion in *Sims v. Walshe*, 49 La. Ann. 792, 21 So. 866.

Distinguished in *Emery v. Union Society*, 79 Me. 342, 9 Atl. 892, and *Morrison v. Jacoby*, 114 Ind. 95, 15 Atl. 807.

99 U. S. 188-191, 25 L. 473, *KETCHUM v. BUCKLEY*.

War.— Upon close of war appointment of military governor did not affect general laws of the State respecting settlement of estates, nor remove probate officers, p. 190.

Cited in *Hyatt v. McBurney*, 18 S. C. 222. See note in 89 Am. Dec. 262.

99 U. S. 191-201, 25 L. 319, *EXPRESS CO. v. RAILROAD CO.*

Receiver.— Bill against receiver without consent of court is a contempt, p. 198.

Courts.— To support Federal jurisdiction, citizenship of complainant need not be proved unless it is denied, p. 199.

Cited in *Imperial Roofing Co. v. Wyman*, 38 Fed. 576, 3 L. R. A. 505, and n., holding denial of diverse citizenship must be by special plea in abatement.

Corporations.— Contract of corporation is presumed to be *infra vires* until contrary is shown, p. 199.

Cited in *Burden v. Burden*, 159 N. Y. 305, 54 N. E. 22, holding burden of proof is on plaintiff to show action of corporation was illegal; *Commonwealth Trust Co. v. Cummings*, 83 Fed. 768, holding not necessary for corporation to allege its power to contract.

Receiver.— Where railroad is in the hands of receiver, he is the only necessary party in an action for specific performance against the railroad, p. 199.

Specific performance.— Contracts for specific performance are not confined to realty, p. 200.

Specific performance.— Equity never enforces specific performance where power of revocation exists, p. 201.

Cited in *Rust v. Conrad*, 47 Mich. 455, 41 Am. Rep. 722, 11 N. W. 268, holding where lessees have power to revoke lease, equity will

not compel specific performance; *Dow v. Railroad Co.*, 67 N. H. 65, 36 Atl. 543, holding equity will restrain railroads from carrying out an invalid lease.

Distinguished in *Newgass v. Atlantic Ry. Co.*, 72 Fed. 714, 715.

Specific performance.—An express company's contract whereby a railroad was to furnish it necessary facilities for conducting express business over its lines, in consideration of money loaned, is not enforceable against a receiver of the road representing mortgage bondholders, since that would be in effect a form of satisfaction or payment, pp. 200, 201.

Cited and principle applied in *Central Trust Co. v. Marietta R. R. Co.*, 51 Fed. 16, 16 L. R. A. 91, and n., holding contract to transport marble will not be enforced against receiver, although freight has been paid; *Ames v. Union Pac. Co.*, 60 Fed. 970, 971, holding receiver is not bound to carry out provisions of lease; *Farmers' Trust Co. v. Cape Fear R. R. Co.*, 73 Fed. 715, holding freight contract cannot be enforced against receiver; *Brown v. Warner*, 78 Tex. 546, 22 Am. St. Rep. 70, 14 S. W. 1033, 11 L. R. A. 395, holding receiver not bound to carry out contract for maintenance of switch; *Scott v. Rainier R. R. Co.*, 13 Wash. 113, 42 Pac. 532, holding receiver not bound to carry out contract for sawing and delivering logs; *Union Trust Co. v. Motor Road Co.*, 49 Fed. 269, holding receiver will not be directed to pay for grading and macadamizing between tracks; *Mercantile Trust Co. v. Farmers' Loan Co.*, 81 Fed. 258, 49 U. S. App. 470, holding if leases be renounced by receiver, no part of deficiencies can be paid out of the corpus of the trust; *Sun Flower Oil Co. v. Wilson*, 142 U. S. 323, 35 L. 1028, 12 S. Ct. 237, holding receiver may return property held under contract of purchase; *N. Pac. R. R. Co. v. Heflin*, 48 U. S. App. 564, 83 Fed. 94, holding receiver not responsible for tort committed before appointment; *United States v. De Coursey*, 82 Fed. 304, holding receiver not criminally responsible under interstate commerce act for failure to carry out traffic arrangement; *Link Belt Co. v. Hughes*, 174 Ill. 160, 51 N. E. 180, and *Spencer v. Columbian Exposition*, 163 Ill. 126, 45 N. E. 253, both holding where receiver continues in possession of premises conducting the business, lease is binding upon him; *Philadelphia Coal Co. v. Daube*, 71 Fed. 587, holding guaranty that a firm will pay for coal inures to the benefit of receiver; *Breed v. Glasgow Ins. Co.*, 92 Fed. 766, holding persons having contractual relations with debtor are bound by order appointing receiver; *Kan., etc., Ry. v. Bayles*, 19 Colo. 355, 35 Pac. 746, holding contracts made by preceding receiver do not bind his successor.

99 U. S. 201-212, 25 L. 431, *GODDEN v. KIMMELL*.

Equity.—State claims are never favored in equity, p. 201.

Approved and principle relied upon, as follows: *Woolensak v. Reiher*, 115 U. S. 102, 29 L. 352, 5 S. Ct. 1140, holding delay of two

years in applying for reissue of patent, is laches; *Speidle v. Henricl*, 120 U. S. 387, 30 L. 720, 7 S. Ct. 612, holding bill filed after fifty years to recover trust funds is stale; *Mackall v. Casilear*, 137 U. S. 566, 34 L. 779, 11 S. Ct. 181, holding where, by reason of death, court cannot do exact justice, relief will be denied; *Etting v. Marx*, 4 Hughes, 323, 4 Fed. 684, holding acquiescence for twelve years in settlement of executor's accounts bars recovery; *United States v. Deebe*, 4 McCrary, 17, 17 Fed. 40, holding, although no statute of limitations in existence, lapse of time may bar recovery; *Kittle v. Hall*, 24 Blatchf. 188, 29 Fed. 511, holding acquiescence for number of years in the infringement of patent bars recovery; *Foster v. Mansfield Co.*, 36 Fed. 639, holding fraudulent sale will not be set aside where party has acquiesced for period of ten years; *Lemoine v. Dunklin Co.*, 51 Fed. 492, 10 U. S. App. 227 (see S. C., 38 Fed. 570), holding delay of twenty-two years after repudiation of trust to county constitutes laches; *Puckering v. Terhermann*, 41 Fed. 378, holding delay of eighteen years, by surety who has discharge lien, to demand subrogation constitutes laches; *Kenny v. Contner*, 43 Fed. 711, holding lapse of fifteen years will bar action by heirs to set aside deed of testator; *Van Fleet v. Sledge*, 45 Fed. 748, holding, after delay of nine years, reformation of indorsement will be denied; *Naddo v. Barden*, 47 Fed. 790, holding lapse of twenty years defeats action to establish involuntary trust in land; *St. Paul Ry. Co. v. Sage*, 49 Fed. 318, 4 U. S. App. 160, holding where all the facts were matters of record, it was laches for plaintiff to delay for fourteen years its assertion of title; *Rugan v. Sabin*, 53 Fed. 420, 10 U. S. App. 519, holding fraudulent sale of land cannot be rescinded by heirs who acquiesced for period of seven years; *Percy v. Cockrill*, 53 Fed. 876, 10 U. S. App. 574, holding collusive sale of property after lapse of fifteen years will not be disturbed; *Prince's Paint Co. v. Prince Mfg. Co.*, 57 Fed. 944, 17 U. S. App. 145, holding acquiescence in use of trademark for eight years bars recovery; *Kemp v. Nickerson*, 66 Fed. 683, holding action by heir, after twenty-three years, to set aside will, is stale; *Jones v. Perkins*, 76 Fed. 84, holding after lapse of seven years suit to force decedent to make complainant his heir is barred; *Hemmick v. Standard Oil Co.*, 91 Fed. 334, holding acquiescence in payments under a lease for period of years bars accounting; *Scheffel v. Hays*, 58 Fed. 460, 19 U. S. App. 220, holding victim of fraudulent sale must act promptly, and a lapse of three years bars a recovery; *Curtis v. Larkin*, 94 Fed. 255, holding it is laches for party to wait for a year after the repudiation of his claim to a mine, he having knowledge that corporation is to be formed and large improvements made; *Hagerman v. Bates*, 5 Colo. App. 402, 38 Pac. 1104, holding standing by for an unreasonable time while valuable improvements are being made on mining claim bars recovery; *Schlawig v. Purslow*, 59 Fed. 853, 19 U. S. App. 501, holding standing by for a period of ten years, permitting valuable improve-

ments to be made, bars recovery; *Wetzel v. Minnesota, etc.*, Transfer Co., 65 Fed. 26, 27 U. S. App. 594, holding where valuable improvements have been made, delay for forty years to assert right under land warrant bars recovery; *Dugan v. O'Donnell*, 68 Fed. 992, holding after seventeen years equity will afford no relief to recover estate; *Church of Christ v. Reorganized Church*, 70 Fed. 188, 36 U. S. App. 110, holding where land is charged with trust, acquiescence for period of years will bar recovery; *Lant v. Manley*, 71 Fed. 15, holding, after fifteen years, action to set aside a deed made in fraud of creditors, is barred; *Seculovich v. Morton*, 101 Cal. 677, 40 Am. St. Rep. 107, 36 Pac. 387, holding, after lapse of twenty-five years, action to enforce a trust in land is barred; *Coles v. Vanneman*, 51 N. J. Eq. 320, 18 Atl. 471, holding lapse of eight years before suit to set aside surrender of mortgage bars recovery; *Hodges v. Council*, 86 N. C. 184, holding suit by ward, commenced more than three years after reaching majority, against sureties on guardian's bond, is barred; *Bolton v. Dickens*, 4 Lea, 577, partner who delays for twelve years to compel accounting is guilty of laches; *Perkins v. Lane*, 82 Va. 64, holding, where parties have died and records destroyed, a lapse of years will bar an accounting; *Wickham v. Sprague*, 18 Wash. 471, 51 Pac. 1057, holding action by ward, thirty years after her majority, against her guardian's estate, to recover proceeds of the sale of land, is barred; *Bell v. Hudson*, 73 Cal. 287, 2 Am. St. Rep. 793, 14 Pac. 792, holding action by personal representative of partner against personal representative of another partner, after lapse of twenty-five years, is stale; *Parker v. Kuhn*, 21 Neb. 427, 32 N. W. 83, failure to commence action for period of years to redeem land is barred; *De Grauw v. Mechan*, 48 N. J. Eq. 225, 21 Atl. 195, holding delay, involving lapse of time, changed conditions, death of witness, improvements, bars recovery; *Horbach v. Marsh*, 37 Neb. 38, 55 N. W. 291, holding lapse of four years before commencing action to set aside judicial sale bars recovery; *Barden v. Duluth*, 28 Fed. 15, holding failure to foreclose certificates against city lots for period of thirteen years bars recovery; *Mueller v. Mueller*, 95 Fed. 159, holding acquiescence in use of patent will bar equitable relief; *Old Times Distillery Co. v. Casey*, — Ky. —, 47 S. W. 611, 42 L. R. A. 468, holding where two distillers use same trademark for ten years, the one having the prior right is estopped; *Whitney v. Fox*, 166 U. S. 648, 41 L. 1149, 17 S. Ct. 717, holding equity will sometimes refuse relief where suit is brought within the period of the statute; *Bartlett v. Ambrose*, 78 Fed. 844, 42 U. S. App. 381, holding person may not be guilty of laches although his claim to recover land is barred by statute.

Equity.—Answer to bill is conclusive unless disproved by two witnesses, or by one witness and confirmatory circumstances, p. 206.

Equity, in many cases, acts upon analogy of statutes of limitations at law, p. 210.

Approved in *Rhino v. Emery*, 65 Fed. 835, holding bill charging testatrix and devisee with fraud will not be entertained after period in which to contest the will has expired; *Ballou v. Sherwood*, 32 Neb. 695, 49 N. W. 798, holding adverse possession which has ripened into a title will defeat specific performance; *Coles v. Ballard*, 78 Va. 147, holding, if claim not barred at law, mere lapse of time will not prevent recovery; *Van Winckle v. Blackford*, 33 W. Va. 584, 11 S. E. 30, holding, in case of concurrent jurisdiction, courts of equity apply the statute in analogy to courts of law; *Kropp v. Kropp*, 97 Wis. 145, 72 N. W. 383, holding, where statute gives longer period, delay of four years in bringing action to reform mortgage is not laches; *Borden v. Duluth*, 28 Fed. 15, holding equity follows the law; *Metropolitan Bank v. Dispatch Co.*, 149 U. S. 448, 37 L. 803, 13 S. Ct. 948, holding courts of equity in case of concurrent jurisdiction consider themselves bound by statute; *Kelley v. Boettcher*, 85 Fed. 62, 56 U. S. App. 375, 376, where suit is commenced to set aside deed within the period of the statute, burden of showing special circumstance why equity should deny relief is upon defendant; *New York Land Co. v. Hyland*, 8 Tex. Civ. App. 616, 28 S. W. 213, holding Texas statute applies to both equitable and legal actions.

Equity.—In prosecuting a stale claim, reason for the delay should be set out and explained in the bill, p. 211.

Approved and relied upon in *Felix v. Patrick*, 145 U. S. 332, 36 L. 726, 12 S. Ct. 867, *Ware v. Galveston City Co.*, 146 U. S. 115, 36 L. 910, 13 S. Ct. 38, *Hardt v. Heidweyer*, 152 U. S. 559, 38 L. 552, 14 S. Ct. 674, *Teall v. Slaven*, 14 Sawy. 374, 40 Fed. 781, and *Taylor v. Holmes*, 14 Fed. 509, all holding bill must contain distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered; *Hinchman v. Kelley*, 54 Fed. 66, 7 U. S. App. 481, holding where laches appears on the face of the bill, advantage may be taken of it by demurrer; *Lemoine v. Dunklin County*, 38 Fed. 570, holding where bill shows relation of trustor and trustee, and no intervening rights, and lapse of thirty years, it is good as against demurrer. Cited, *arguendo*, in *Parks v. Satterthwaite*, 132 Ind. 414, 32 N. E. 83. Distinguished in *Fowler v. True*, 76 Me. 45, *Wissler v. Craigs*, 80 Va. 29, and *Lux v. Haggin*, 69 Cal. 280, 10 Pac. 685. See notes to 2 Am. St. Rep. 799, 23 Am. St. Rep. 149, 150, 151, 40 Am. St. Rep. 574, and 54 Am. Dec. 130.

99 U. S. 213-214, 25 L. 265, **VANSANT v. GAS-LIGHT CO.**

Appeal and error.—Citation is necessary except where appeal is allowed in open court during term at which judgment below was rendered, pp. 213, 214.

Not cited.

99 U. S. 214-220, 25 L. 410, SUPERVISORS v. GALBRAITH.

Municipal corporations.—Statutory requirement that bonds issued by county in payment of stock in railroad shall be made payable to railroad and “their successors and assigns” is directory; hence their issue payable to A., or bearer, does not invalidate them where they contain recital of compliance with authorizing act, p. 217.

Approved in *Linton v. Carter*, 23 Fed. 539, holding word “obligations” in an act authorizing municipality to issue bonds, includes bonds payable to bearer; *D’Esterre v. Brooklyn*, 90 Fed. 588, holding leaving the payee’s name blank does not affect validity of bonds, and makes them payable to bearer. See 51 Am. St. Rep. 854, note.

Municipal corporations.—Recital in bonds that they were issued in conformity to statutes is conclusive, p. 218.

Cited in *Woodruff v. Okolona*, 57 Miss. 808, holding that recitals are not conclusive as to liability of county, and overruling doctrine of principal case. See note in 98 Am. Dec. 669.

Municipal corporations.—No place of payment being designated by authorizing statute, held competent to make municipal bonds payable in New York, p. 218.

See note in 98 Am. Dec. 678.

Contracts.—Law of place of performance governs construction of contract, p. 218.

Cited in *Cæsar v. Capell*, 83 Fed. 418, holding where foreign corporation does business in defiance of the law of the State, in suit to foreclose mortgage given to company, the law of its domicile governs; *Phipps v. Harding*, 70 Fed. 471, 34 U. S. App. 148, 30 L. R. A. 515, holding joint maker of note liable according to law of place where note is payable; *Sturdivant v. Memphis Bank*, 60 Fed. 733, 23 U. S. App. 300, holding note given in one State, payable in another, is governed by the law of the latter.

Municipal corporations.—Where municipal bonds are assigned in blank, holder may fill in blank, and meantime they pass by delivery and have all the properties of commercial paper, p. 218.

Municipal corporations.—Where statute authorized submission of bond issue to voters, one submission does not exhaust the power, but the matter may be again voted upon after statutory notice, p. 218.

Cited in *Kansas City, etc., R. R. v. Rich Twp.*, 45 Kan. 294, 25 Pac. 602, holding irregularities in the first subscription were cured by the second; *Bunch v. Fluvanna Co.*, 86 Va. 458, 10 S. E. 534, *arguendo*. See 98 Am. Dec. 672, note.

99 U. S. 221-224, 25 L. 321, FARRELL v. UNITED STATES.

Internal revenue.—Under act of 1868, where distilled spirits deposited in bonded warehouse are destroyed by fire, the obligors on the bond are not relieved from payment of tax, p. 224.

Cited in *United States v. Peace*, 48 Fed. 714, holding destruction of spirits by fire does not constitute removal so as to make tax payable.

Distinguished in *Heger v. Union Ins. Co.*, 17 Fed. 500.

99 U. S. 225-229, 25 L. 273, UNITED STATES v. GLAB.

Internal revenue.—Under revised statutes, section 3232, requiring annual traders' licenses, partner who succeeds to the business of a firm of brewers may carry on the business under the old license until the expiration of the year, p. 228.

Cited in *United States v. Davis*, 37 Fed. 468, 469, holding succeeding partner in business of retail liquors and cigars, although he has moved, may carry on business under license issued to firm; *St. Charles v. Hackman*, 133 Mo. 645, 34 S. W. 881, *arguendo*.

99 U. S. 229-234, 25 L. 373, KING v. UNITED STATES.

Internal revenue.—Where railroad paid to collector overdue revenue tax on its bonds, his sureties cannot defend suit for his failure to account for the money, on ground that assessor had not previously received the proper returns of such property for assessment, from the taxpayer. Action of debt may be maintained though no assessment made, pp. 231-233.

Cited in *United States v. L. & R. Co.*, 1 Fed. 701, holding, where statute describes the subject, and fixes rate, taxes may be recovered in action of debt.

United States.—Money received by officer of United States in his official capacity belongs to the government, p. 233.

Cited in *Berrien Co. Treasurer v. Bunbury*, 45 Mich. 85, 7 N. W. 706, *Meads v. United States*, 81 Fed. 688, 54 U. S. App. 158, *Potter v. United States*, 107 U. S. 130, 27 L. 331, 1 S. Ct. 528, and *Smith v. United States*, 170 U. S. 379, 42 L. 1077, 18 S. Ct. 629, all holding that money unlawfully collected by public officer belongs to government; *Blaco v. State*, 58 Neb. 566, 78 N. W. 1059, holding sureties on official bond cannot defend on ground that money embezzled was received by public officer irregularly.

Internal revenue.—Revised statutes, section 825, giving Federal district attorneys fee of 2 per cent. on recoveries under revenue laws, means 2 per cent. of the recovery, not of the judgment, p. 234.

Cited in *United States v. Wolters*, 51 Fed. 898, holding issuance of execution in revenue case entitles clerk to 1 per cent. of

amount; *Bell's Gap Ry. Co. v. Penn.*, 134 U. S. 240, 33 L. 896, 10 S. Ct. 536, *arguendo*.

Distinguished in *State v. Railroad Co.*, 54 S. C. 575, 32 S. E. 695, and *United States v. Pacific R. R.*, 1 McCrary, 7, 1 Fed. 102.

99 U. S. 235-256, 25 L. 339, *FOSDICK v. SCHALL*.

Attachment.—Where personal property is seized and sold under attachment, liability of the property is determined by the law of the situs, p. 250.

Mortgage.—Lien of mortgage on after-acquired property attaches subject to all the conditions with which it is incumbered when it comes into the hands of mortgagor, p. 251.

Mortgages.—Possession of receiver is possession of court, and he holds for the benefit of whomsoever in the end it shall be found to concern, p. 251.

Cited in *Memphis, etc., R. Co. v. Hoechner*, 67 Fed. 458, 31 U. S. App. 644, holding receiver mere agent of court, and not responsible for injuries while operating road; *Davis v. Bonney*, 89 Va. 760, 17 S. E. 231, holding appointment of receiver determines no right, nor does it affect the property in any way; *New York, etc., R. R. v. New York, etc., R. R.*, 58 Fed. 278, holding receivers are custodians of the property, and hold as mere agents of the court; *Meyer v. Car Co.*, 102 U. S. 10, 26 L. 60, holding possession of receiver is for the benefit of whomsoever it may concern.

Railroads.—Lien of mortgage covering after-acquired property, does not attach to cars sold conditionally to the railroad company, the title being reserved by vendor, p. 251.

The doctrine that vendor's right to retake property is not affected by a mortgage covering after-acquired property, is applied in the following cases: *Fidelity Ins. Co. v. Shenandoah, etc.*, R. R., 86 Va. 9, 10, 11, 19 Am. St. Rep. 864, 865, 866, 9 S. E. 762, 763, to cars sold to railroad; *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 474, 476, 42 Atl. 106, 107, to motors, controller, trolley poles, electric generators, switch board, where they may be removed without injury to the corpus; *Wood v. Holly Mfg. Co.*, 100 Ala. 352, 46 Am. St. Rep. 66, 13 So. 954, to pumping engines fastened by bolts and taps; *Campbell v. Roddy*, 44 N. J. Eq. 252, 6 Am. St. Rep. 896, 14 Atl. 283, to engine, boiler and machinery annexed to realty; *Hardesty v. Pile*, 15 Fed. 779, to rolling stock of railroad; *Western Union Tel. Co. v. B. & S. Ry. Co.*, 3 McCrary, 140, 11 Fed. 7, to telegraph poles; *Meyer v. Car Co.*, 102 U. S. 9, 12, 26 L. 59, 61, and *Fosdick v. Car Co.*, 99 U. S. 256, 257, 25 L. 344, to railroad cars; *Hudekoper v. Locomotive Works*, 99 U. S. 260, 25 L. 345, to railroad engines; *Manhattan Co. v. Sioux City Ry. Co.*, 76 Fed. 661, to electric generators; *Warren v. Liddel*, 110 Ala. 247, 20 So.

93, to sale of machinery, although void as to creditors under registry laws; *Call v. Seymour*, 40 Ohio St. 673, holding conditional sale of threshing machine good against attaching creditors; *Central Trust Co. v. Marietta, etc., Ry.*, 48 Fed. 874, 2 U. S. App. 95, holding vendor failing to comply with recordation act has prior claim to mortgagee of after-acquired property; *Fairbanks v. Eureka Co.*, 67 Ala. 112, holding conditional vendor may recover property from purchaser of vendee; *McGourkey v. Toledo, etc., R. R. Co.*, 146 U. S. 551, 36 L. 1085, 13 S. Ct. 175, holding conditional sales of rolling stock have been universally respected; *In re Binford*, 3 Hughes, 299, F. C. 1,411, holding sale of goods by vendee does not affect conditional vendor's right of recovery; *Hall v. Larey*, 73 Ga. 699, holding conditional sale of personalty between the parties is valid; *Binkley v. Forkner*, 117 Ind. 185, 19 N. E. 757, 3 L. R. A. 36, and *n.*, holding mortgage of after-acquired property attaches only to interest of mortgagor at time of annexation; *Loomis v. Davenport R. R. Co.*, 3 McCrary, 495, 496, 17 Fed. 305, and *Harris v. Youngston Bridge Co.*, 90 Fed. 328, 62 U. S. App. 123, both holding vendor's lien upon land paramount to mortgage of after-acquired property; *New York Trust Co. v. Capital Ry. Co.*, 77 Fed. 531, and *Phoenix Iron Works v. Trust Co.*, 83 Fed. 759, 54 U. S. App. 414, both holding conditional sale of machinery, which becomes part of realty, is subject to prior mortgage; *Porter v. Pittsburgh Steel Co.*, 122 U. S. 283, 30 L. 1211, 7 S. Ct. 1208, holding bridges sold conditionally inure to the benefit of the mortgagee; *Evans v. Kister*, 92 Fed. 834, 836, holding mortgagee of after-acquired property not a creditor or subsequent purchaser for value; *Hart v. Barney, etc., Mfg. Co.*, 7 Fed. 552, holding where conditional sale is not recorded, attaching creditors have superior right to vendor; *National Bank v. Goodyear*, 90 Ga. 728, 16 S. E. 964, holding consignment of goods to sell is a bailment and not a sale; *Union, etc., Transit Co. v. Western Land Co.*, 59 Fed. 53, 18 U. S. App. 438, holding recordation acts do not apply to bailment of goods. See notes in 42 Am. Rep. 106, and 89 Am. Dec. 127, 128. Cited, *arguendo*, in *Bosworth v. Terminal R. Assn.*, 80 Fed. 971, 53 U. S. App. 305, *Mercantile Trust Co. v. Kanawha, etc., Ry.*, 58 Fed. 14, 16 U. S. App. 37, *Trust Co. v. Locomotive Works*, 135 U. S. 225, 34 L. 104, 10 S. Ct. 742, *Kilpatrick v. Kansas City B. R. Co.*, 38 Neb. 645, 57 N. W. 672, *Farmers' Loan & Trust Co., Petitioner*, 129 U. S. 213, 32 L. 657, 9 S. Ct. 266, *Cook v. Cole*, 55 Iowa, 73, 7 N. W. 421, *Clyde v. Richmond Road*, 56 Fed. 541, 542, *Bosworth v. St. Louis Terminal R. R.*, 174 U. S. 185, 19 S. Ct. 626, *Stewart v. Potomac Ferry Co.*, 5 Hughes, 383, 12 Fed. 305, *Farmers' Trust Co. v. Mission, I. & N. Ry. Co.*, 21 Fed. 267, 272, *Sage v. Central R. R. Co.*, 99 U. S. 345, 25 L. 398, *Beaches' Appeal*, 58 Conn. 473, 20 Atl. 476, *Redewill v. Gillen*, 3 N. Mex. 530, 4 N. Mex. 80, 12 Pac. 530, and *Fidelity, etc., Co. v. Shenandoah Val. R. R.*, 33 W. Va. 788, 11 S. E. 68.

Distinguished in *Hassall v. Wilcox*, 130 U. S. 504, 32 L. 1005, 9 S. Ct. 593, *George v. St. Louis Cable Ry.*, 44 Fed. 120, *The Allianca*, 65 Fed. 246, *St. Louis Trust Co. v. Riley*, 70 Fed. 34, 37, 36 U. S. App. 100, 30 L. R. A. 458, *Farmers' Trust Co. v. Cape Fear R. R.*, 73 Fed. 715, *Union Trust Co. v. Morrison*, 125 U. S. 612, 31 L. 831, 8 S. Ct. 1010, *Wood v. Guarantee Trust Co.*, 128 U. S. 420, 421, 32 L. 473, 9 S. Ct. 132, *International Trust Co. v. Brick, etc., Co.*, 95 Fed. 858, *Merchants' Bank v. Moore*, 106 Ala. 649, 17 So. 706, *Hanna v. State Trust Co.*, 70 Fed. 6, 36 U. S. App. 61, 30 L. R. A. 204, *Ford v. Central Trust Co.*, 70 Fed. 145, 36 U. S. App. 203, *Farmers' Trust Co. v. Detroit R. Co.*, 71 Fed. 36, *Terre Haute, etc., R. R. v. Harrison*, 88 Fed. 924, 60 U. S. App. 287, *Central Trust Co. v. R. & C. R. Co.*, 94 Fed. 280, *Reinhardt v. Augusta Mining Co.*, 94 Fed. 906, *Felton v. Cincinnati*, 95 Fed. 342, *Central Trust Co. v. Thurman*, 94 Ga. 742, 20 S. E. 143, *Ex parte Brown*, 15 S. C. 533, *Perkins v. Bank*, 43 S. C. 46, 20 S. E. 761, *Phinzy v. Augusta R. R. Co.*, 63 Fed. 924, *State v. E. & K. R. R. Co.*, 6 Lea, 365, 366, 367, and *Ryan v. Hayes*, 62 Tex. 49, 50, 51. See valuable notes to 41 Am. St. Rep. 759, 54 Am. St. Rep. 403, 408, 411, 412, 415, 417, 420, 427, 431, 432, and 67 Am. St. Rep. 90, 91, 92, 93.

Railroads.—Upon application of mortgagees for receiver, pending foreclosure, the court may, in its discretion, direct payment out of income, of debts for labor, supplies, equipment, and permanent improvement of mortgaged property, e. g., for rental of cars, p. 252.

Cited and relied upon in *New England Co. v. Carnegie Co.*, 75 Fed. 56, 58, 33 U. S. App. 491 (and see note to 8 Biss. 320, F. C. 14,258); *Central Trust Co. v. Utah Cent. Ry. Co.*, 16 Utah, 17, 50 Pac. 814, *Farmers' Loan Co. v. Kansas City N. W. R. Co.*, 53 Fed. 185, all holding court may impose as condition of appointing receiver, the payment of debts for supplies, etc.; *Union Trust Co. v. Walker*, 107 U. S. 596, 27 L. 490, 2 S. Ct. 299, holding assignee of preferred claim entitled to preference; *Southern Co. v. Carnegie Co.*, 76 Fed. 495, 42 U. S. App. 145, holding when receiver appointed, conditions imposed binding upon mortgagee; *Putnam v. Jacksonville, etc., Ry.*, 61 Fed. 445, but holder of labor claims may not have receiver appointed without first getting judgment. In the following citing cases preferential claims have been allowed as follows: *Keelyn v. Carolina, etc., Co.*, 90 Fed. 29, 30, to persons furnishing labor to telegraph and telephone companies; *Hall v. Planing Mill Co.*, 16 Mo. App. 459, to liens of mechanics upon machinery; *Litzenberger v. Jarvis-Conklin Co.*, 8 Utah, 19, 28 Pac. 872, to wages earned sixty days prior to appointment of receiver; *Farmers' Loan Co. v. Vicksburgh & M. R. Co.*, 33 Fed. 783, to money borrowed within a year to pay taxes, employees, etc.; At-

kins v. Petersburg R. R., 3 Hughes, 313, 317, F. C. 604, to money borrowed to pay employees; Bellingham Bay Imp. Co. v. Fairhaven Ry. Co., 17 Wash. 377, 379, 49 Pac. 515, to claim for labor and supplies not barred by statute of limitations; McElhenny v. Binz, 80 Tex. 13, 14, 15, 16, 17, 26 Am. St. Rep. 719, 720, 721, 722, 723, 13 S. W. 660, 661, 662, to creditors furnishing labor and materials in construction of railroad; Grand Trunk Co. v. Central Vermont Co., 88 Fed. 621, to claims for supplies incurred six months before appointment; Farmers' Loan Co. v. Kansas City N. W. R. Co., 53 Fed. 189, to persons who furnish labor and supplies; Bear Lake Irrigation Co. v. Garland, 164 U. S. 16, 41 L. 333, 17 S. Ct. 11, to contractors constructing ditch for irrigation company on public lands; V. & A. Coal Co. v. Central R. R. Co., 170 U. S. 364, 365, 42 L. 1071, 18 S. Ct. 661, to persons selling coal to railroad in the hands of receiver; Taylor v. Philadelphia, etc., R. R., 7 Fed. 381, to employees and materialmen whose claims accrued prior to appointment; Dow v. Memphis & L. R. R. Co., 20 Fed. 267, to operating expenses accruing within six months prior to appointment; Frank v. Denver & R. G. Ry. Co., 23 Fed. 126, 127, to claim for rolling stock sold conditionally; Thomas v. Peoria Ry. Co., 36 Fed. 818, 820, to amount due for leasing cars; Bound v. S. C. T. Co., 47 Fed. 31, 32, to amount due for rails; Finance Co. v. Charleston R. Co., 61 Fed. 371, in North Carolina, to a judgment for injuries; Clark v. Central R. R. Co., 66 Fed. 806, 30 U. S. App. 263, to amount due for coal in bin at time of appointment; Hall v. Frost, 99 U. S. 392, 25 L. 419, to amount due for machinery furnished receiver; Burnham v. Bowen, 111 U. S. 780, 28 L. 597, 4 S. Ct. 677, to debt for fuel; Wood v. New York & N. E. Co., 70 Fed. 743, 746, to claim for coupling links and pins, and tank steel furnished within four months prior to appointment; Jones v. Central Trust Co., 73 Fed. 573, 43 U. S. App. 224, to claim of sureties who release property from levy; Southern Co. v. Carnegie, 76 Fed. 499, 42 U. S. App. 145, to supply creditors where earnings have come into hands of receiver; Southern Ry. Co. v. Tillett, 76 Fed. 509, 42 U. S. App. 173, to claims for repair of road, contracted a reasonable time before appointment; Atlantic Trust Co. v. Irrigation Co., 79 Fed. 40, to claims for labor and repairs contracted by irrigation company; Guarantee Indemnity Co. v. Tacoma R. R. Co., 83 Fed. 367, 48 U. S. App. 673, to claim for cable furnished street railroad; Drennen v. Deposit Co., 115 Ala. 606, 609, 611, 613, 616, 617, 619, 622, 627, 629, 630, 634, 636, 67 Am. St. Rep. 77, 80, 81, 83, 86, 87, 88, 23 So. 166, 167, 168, 169, 170, 171, 172, 174, 175, 177, 188, 39 L. R. A. 625, 626, 627, 628, 629, 630, 631, 633, 634, 635, 636, applying rule to claims of employees who contribute to permanent improvement of coal mine and railroad, accruing within six months before appointment; Green v. Coast Line R. R., 97 Ga. 23, 54 Am. St. Rep. 385, 24 S. E. 817, 33 L. R. A. 809, in Georgia, judgment for damages

for tort; *Frazier v. Railroad Co.*, 88 Tenn. 165, 12 S. W. 544, in Tennessee, to claim arising out of damages to person; Texas, etc., *Ry. Co. v. Johnson*, 76 Tex. 431, 18 Am. St. Rep. 68, 13 S. W. 466, to claim for injuries to person while road was in hands of receiver; *Randolph v. Trust Co.*, 91 Tex. 613, 44 S. W. 73, in Texas, to all judgments obtained before appointment; *Williams v. Virginia*, etc., B. R., 33 Gratt. 628, to current debts, contracted before appointment, within reasonable limits; *Ellis v. Water Co.*, 86 Tex. 111, 23 S. W. 859, to receiver's certificates, issued to keep water works in operation; In re Tallahassee Mfg. Co., 64 Ala. 599, holding earnings of factory in hands of receiver should be applied to payment of general creditors.

In the following citing cases the claims were held not to be preferential: *Farmers' Trust Co. v. Green Bay R.*, 45 Fed. 665, claim against railroad for death; *Central Trust Co. v. N. Y. R. R. Co.*, 30 Fed. 897, judgment for personal injuries; *Central Trust Co. v. Tennessee Ry. Co.*, 80 Fed. 630, advertising debt of railroad; *Lackawanna Coal Co. v. Farmers' Trust Co.*, 79 Fed. 207, 52 U. S. App. 102, claim for large amount of rails incurred about two years before appointment of receiver; *Finance Co. v. Charleston R. R. Co.*, 52 Fed. 679, 680, claim for legal services rendered railroad company; *Easton v. Houston & T. C. R. Co.*, 38 Fed. 14, claim against railroad for goods lost by fire; *Louisville Co. v. Central Trust Co.*, 87 Fed. 504, 59 U. S. App. 700, former track rentals in absence of special equities; *Central Trust Co. v. Charlotte C. R. Co.*, 65 Fed. 268, 269, and *Quincy R. R. v. Humphreys*, 145 U. S. 103, 36 L. 639, 12 S. Ct. 794, *Central Trust Co. v. Wabash Ry. Co.*, 46 Fed. 29, 33, and *New York R. Co. v. New York W. R. Co.*, 58 Fed. 281, rentals of leased lines; *McCormick v. Salem Con. St. Ry. Co.*, 34 Or. 547, 549, 56 Pac. 519, heater furnished street railroad; *American Loan Co. v. East & West R. R. Co.*, 46 Fed. 103, debt contracted for materials of construction furnished more than six months before appointment of receiver; *Whiteley v. Trust Co.*, 76 Fed. 77, 43 U. S. App. 643, 34 L. R. A. 305, liability of sureties upon supersedeas bond given by railroad apparently solvent; *Morgan's Co. v. Texas*, etc., B. R., 137 U. S. 197, 34 L. 634, 11 S. Ct. 69, money loaned to railroad generally, although used in payment of interest on bonds or of operating expenses; *Finance Co. v. Charleston*, etc., R. Co., 49 Fed. 694, 695, claim for furnishing rations to railroad used by its employees, unless earnings have been diverted; *Farmers' Trust Co. v. N. P. R. R. Co.*, 74 Fed. 432, judgment for negligent killing of stock; *St. Louis Trust Co. v. Riley*, 70 Fed. 33, 36 U. S. App. 100, 30 L. R. A. 457, damages for injuries against street railroad; *United States Trust Co. v. Contract Co.*, 81 Fed. 464, 54 U. S. App. 90, advances made by one road to another under a common management; *Buhlender v. C. O. & S. W. R. Co.*, 91 Fed. 11, 62 U. S. App. 13, claim for rails sold to individual on his own credit, to be used

by railroad; Manchester Locomotive Works v. Truesdale, 44 Minn. 118, 46 N. W. 302, 9 L. R. A. 143, 144, and n., purchase price of locomotive due more than six months before appointment of receiver; Penn. v. Calhoun, 121 U. S. 252, 30 L. 915, 7 S. Ct. 907, money loaned to railroad by bank; Addison v. Lewis, 75 Va. 709, 710, 711, borrowed money used in payment of president's salary and for current expenses; National Bank of Augusta v. K. & W. R. Co., 63 Fed. 25, president's salary. Cited and principle applied also in Hooper v. Central Trust Co., 81 Md. 591, 32 Atl. 514, 29 L. R. A. 272, holding in case of private corporation, no priority given receiver's certificates; Seventh National Bank v. Shenandoah Iron Co., 35 Fed. 438, 439, holding doctrine of preferences is confined to railroad corporations; Roht v. Attrill, 106 N. Y. 436, 60 Am. Rep. 462, 13 N. E. 286, holding certificate issued by receiver of hotel corporation gives no preference over bondholders; Fidelity Ins. Co. v. Roanoke Co., 68 Fed. 624, holding courts have no power to issue receivers' certificates to carry on business of private corporation; Baltimore Loan Assn. v. Alderson, 90 Fed. 147, 61 U. S. App. 645, holding court cannot authorize receiver to issue certificates for purpose of improving property of private corporation; Farmers' Trust Co. v. Creek Coal Co., 50 Fed. 482, 16 L. R. A. 604, and n., holding court has no authority to direct receiver to issue certificates to carry on coal mine; Bound v. S. C. Ry. Co., 50 Fed. 314, 315, holding employee of navigation company has no prior equity over mortgagee; Sniveley v. Loomis Coal Co., 69 Fed. 205, holding claims for labor and materials furnished mining company not entitled to preference; Atlantic Trust Co. v. Irrigation Co., 79 Fed. 509, holding scrip issued by water company for services, not a preferred claim; Cal. Safe Deposit Co. v. Yakima Investment Co., 82 Fed. 544, holding claim against irrigation company for constructing lateral ditches not preferred; Lock v. Turnpike Co., 100 Tenn. 173, 47 S. W. 135, holding turnpike road not liable for injuries occurring through negligence of receiver; Reyburn v. Consumers' Gas Co., 29 Fed. 563, holding debts for gas meters subordinate to mortgage; New York R. R. Co. v. N. Y. W. R. Co., 58 Fed. 280, holding receivers have the option but are not bound to adopt leases; Cutting v. Tavares A. R. Co., 61 Fed. 156, 23 U. S. App. 363, United States Trust Co. v. New York, etc., R. R. Co., 25 Fed. 802, 803, and Farmers' Loan Co. v. Or. Pac. R. R. Co., 31 Or. 246, 248, 65 Am. St. Rep. 824, 825, 48 Pac. 707, 708, 38 L. R. A. 426, all holding no preferential claims can be paid unless order so directs; Hand v. Savannah R. R. Co., 17 S. C. 270, 271, holding equity of preferred creditors limited to income; Central Trust Co. v. St. Louis Co., 41 Fed. 554, holding court at time of appointment should designate the preferred claims; Blair v. St. Louis, H. & K. R. R. Co., 19 Fed. 862, court may permit claims to be filed in order to determine the question of preference.

Distinguished in *The Kate*, 63 Fed. 715.

Railroad mortgages are peculiar in their character, and affect peculiar interests, p. 252.

Affirmed in *Compton v. Jesup*, 167 U. S. 31, 42 L. 66, 17 S. Ct. 806.

Railroad mortgagee impliedly agrees that current debts shall be paid from current receipts, p. 252.

Cited in *Central Trust Co. v. East Tenn. R. Co.*, 80 Fed. 627, 47 U. S. App. 663, holding court should use fund in paying current expenses in same manner as company would be bound in equity to use it.

Railroads.—Until possession taken by mortgagee, the whole earnings belong to railroad company, and are subject to its control, p. 253.

Cited in *Jones v. Riddle*, 70 Ala. 226, *Giles v. Stanton*, 86 Tex. 628, 26 S. W. 618, *Roberts v. Denver, etc.*, R. R., 8 Colo. App. 510, 512, 46 Pac. 882, 883, *Farmers' Trust Co. v. Kansas City, etc.*, R. Co., 53 Fed. 184, *White v. Pulley*, 27 Fed. 441, and *In re Tallahassee Mfg. Co.*, 64 Ala. 597, all holding that income is subject to claims of general creditors until mortgagee takes possession.

Mortgages.—Appointment of receiver is a matter of discretion, p. 253.

Affirmed in *American Biscuit Co. v. Klotz*, 44 Fed. 725, and *Williamson v. Virginia, etc.*, R. R., 33 Gratt. 637.

Railroads.—Where there has been a diversion of income in order to pay bonded interest, or for permanent improvements, prior to foreclosure proceedings, income during receivership may be applied to discharge of obligations incurred and allowed to accumulate, for labor, supplies, etc., to keep road a going concern, hence, payment of rental for use during receivership, of cars sold on installment to railroad, but unpaid for, held allowable, but claim for rent prior to receivership disallowed, pp. 253-255.

Cited and doctrine approved in *Finance Co. v. Charleston, etc.*, R. R., 48 Fed. 189, *International Trust Co. v. Brick Co.*, 95 Fed. 859, 860, *United States Trust Co. v. Souther*, 107 U. S. 594, 595, 27 L. 489, 2 S. Ct. 296, 298, *Union Trust Co. v. Morrison*, 125 U. S. 612, 31 L. 831, 8 S. Ct. 1010, *Calhoun v. St. Louis R. R. Co.*, 9 Biss. 331, 14 Fed. 10, and *Williamson v. Virginia, etc.*, R. R., 33 Gratt. 630, 639, 640. Cited in *Hunt v. Memphis Gas-L. Co.*, 95 Tenn. 143, 144, 31 S. W. 1008, holding where there has been no diversion, claims for coal furnished gas company not preferred; *Coe v. Midland Ry. Co.*, 31 N. J. Eq. 130, 131, and *Central Trust Co. v. Chattanooga S. R. Co.*, 69 Fed. 296, both holding where there has been no diversion, and no terms imposed at time of appointment, claims for services are not preferred; *Central Trust Co. v. East Tennessee R. R.*, 80 Fed. 625, 47 U. S. App. 663, holding where it is uncertain

whether interest was paid out of borrowed money or income, no question of diversion arises.

Railroads.—Cases may arise where equity will direct that the proceeds of the sale of the mortgaged property be first applied to payment of current debts, p. 254.

Cited in *Union Trust Co. v. Midland Co.*, 117 U. S. 462, 29 L. 973, 6 S. Ct. 824, holding same as principal case; *Farmers' Trust Co. v. Trust, etc., Co.*, — Tex. Civ. App. —, 41 S. W. 115, holding receiver having been appointed by second mortgagee, payment of interest on first mortgage not a diversion; *Finance Co. v. Charleston R. Co.*, 52 Fed. 525, 527, holding where diversion has been made good by sale of receiver's certificates, no preference will be given out of proceeds of sale; *Burnham v. Bowen*, 111 U. S. 782, 783, 28 L. 598, 599, 4 S. Ct. 678, 679, holding, where sale is ordered, provision may be made for restoration of diverted fund; *Kneeland v. Brass Foundry, etc., Works*, 140 U. S. 596, 35 L. 545, 11 S. Ct. 859, holding supplies purchased on credit of receiver, first charge on fund realized.

99 U. S. 256-257, 25 L. 344, **FOSDICK v. CAR CO.**

Mortgage.—Lien of mortgagee of after-acquired property is subject to the paramount claim of vendor, who reserves title until price paid, p. 257.

Distinguished in *St. Louis Trust Co. v. Riley*, 70 Fed. 34, 36 U. S. App. 100, 30 L. R. A. 458, and *National Bank v. Goodyear*, 90 Ga. 728, 16 S. E. 964.

99 U. S. 258-260, 25 L. 344, **HUIDEKOPER v. LOCOMOTIVE WORKS.**

Railroads.—Balance due upon locomotives sold conditionally, vendors retaining title, is a general claim, entitled to no preference out of funds in receiver's hands on foreclosure of mortgage on road, p. 260.

The above rule is cited and applied in the following cases, where no preference was allowed: *Manchester Locomotive Works v. Truesdale*, 44 Minn. 118, 46 N. W. 302, 9 L. R. A. 143, and n., to balance due on conditional sale of locomotive; *Fidelity Ins. Co. v. Shenandoah Val. R. R.*, 86 Va. 10, 19 Am. St. Rep. 866, 9 S. E. 762, to balance due upon cars sold conditionally; *United States Trust Co. v. New York, W. S. & R. R. Co.*, 25 Fed. 803, to claim for clocks sold railroad, payment of which was not provided for in order appointing receiver; *American Loan, etc., Co. v. E. & W. Co.*, 46 Fed. 103, there being no diversion, to claim for materials furnished more than six months before appointment; *Addison v. Lewis*, 75 Va. 710, to claim for officer's salary, and to money

borrowed upon the general credit of the company; *New York R. Co. v. New York L. E. R. Co.*, 58 Fed. 281, to rental accruing under railroad lease prior to appointment; *St. Louis Trust Co. v. Riley*, 70 Fed. 34, 35, 30 U. S. App. 100, 30 L. R. A. 458, claim for injuries received six months before appointment; *Ryan v. Hayes*, 62 Tex. 49, holding railroad company not liable for injuries received while road in hands of receiver; *Union Trust Co. v. Morrison*, 125 U. S. 612, 31 L. 831, 8 S. Ct. 1010, holding liability of surety on bond given, at request of receiver, to release cars, is a preferred claim; *Burnham v. Bowen*, 111 U. S. 783, 28 L. 599, 4 S. Ct. 679, holding bills for fuel are preferred and may be paid out of corpus.

99 U. S. 261-265, 25 L. 435, *CAMPBELL v. RANKIN*.

Ejectment.—In actions of ejectment or trespass, possession at time of eviction is *prima facie* evidence of title, p. 262.

Cited and rule applied in *Haws v. Victoria Copper Mining Co.*, 166 U. S. 317, 40 L. 441, 16 S. Ct. 288, *Aurora Hill Min. Co. v. Eighty-five Mining Co.*, 12 Sawy. 364, 34 Fed. 520, *Fuller v. Harris*, 23 Fed. 819, *Duggan v. Davey*, 4 Dak. 123, 26 N. W. 892, *Patchen v. Keeley*, 19 Nev. 413, 14 Pac. 352, and *McKay v. McDougall*, 19 Mont. 496, 48 Pac. 991, all holding possession of mining claim sufficient evidence of title as against trespasser; *North Noonday v. Orient Mining Co.*, 6 Sawy. 508, 11 Fed. 128, holding, irrespective of mining laws, possession of mining claim is valid, and intruder a trespasser; *Brady v. Husby*, 21 Nev. 458, 33 Pac. 803, holding reference to stake sufficient compliance with law to make a valid location; *Probst v. Trustees, etc.*, 3 N. Mex. 270, affirming rule.

Judgments.—When same question was in issue and judgment rendered, it is conclusive in subsequent action between same parties, p. 263.

Cited in *Hoyner v. Stanley*, 8 Sawy. 219, 13 Fed. 221, holding determination of title to land *res adjudicata*, in subsequent suits between parties and privies; *Flanagan v. Thompson*, 4 Hughes, 425, 9 Fed. 179, holding, although different subject-matter, if the issue is the same, parties are bound by former judgment; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 989, 18 U. S. App. 349, holding decree as to validity of patent, conclusive in regard to alleged anticipations; *Stearns v. Lawrence*, 83 Fed. 745, 54 U. S. App. 546, holding finding against president of bank as to purchase of note conclusive in action of receiver to charge president; *Darling v. McDonald*, 101 Ill. 374, holding judgment of court having jurisdiction of parties and subject-matter, *res adjudicata*; *Whiting v. Burger*, 78 Me. 296, 4 Atl. 697, holding judgment in one State bar to further prosecution in another; *Blodgett v. Dow*, 81 Me. 201, 16 Atl. 660, holding judgment rendered upon report of referee is a

bar; *Pupiper v. Calloway*, — Wis. —, 80 N. W. 918, holding judgment is to be considered with reference to pleadings, and is as broad as the issues; *New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. 211, 17 S. Ct. 914, holding judgment rendered on the same facts, *res adjudicata*; *Solly v. Clayton*, 12 Colo. 40, 20 Pac. 356, and *German Nat. Bank v. School D.*, 25 Fed. 634, both holding, where point upon which judgment is based is uncertain, it is not *res adjudicata*; *Southern Pac. R. R. Co. v. United States*, 168 U. S. 49, 50, 42 L. 377, 18 S. Ct. 27, 28, holding, although different cause of action, fact in issue directly determined is binding upon the parties. Cited in *Smith v. Brittenham*, 94 Ill. 626, holding errors occurring upon prior appeal will not be considered upon subsequent appeal. Cited in dissenting opinion in *Fischer v. Johnson*, 139 Mo. 440, 41 S. W. 205. Cited, *arguendo*, in *St. Joseph R. R. Co. v. Steele*, 63 Fed. 872. See extensive note in 85 Am. Dec. 209.

Judgments.—Where it cannot be ascertained from the record the precise issue upon which judgment was rendered, it may be ascertained by *parol*, p. 263.

Cited in *Wither v. Sims*, 80 Va. 660, *Tyler Mining Co. v. Sweeney*, 54 Fed. 288, 7 U. S. App. 463, *Southern Minn. Ry. Co. v. St. Paul R. Co.*, 55 Fed. 695, 696, 12 U. S. App. 320, *Morgan v. Burr*, 58 N. H. 472, *Hornbuckle v. Stafford*, 111 U. S. 393, 28 L. 469, 4 S. Ct. 517, and *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 688, 39 L. 862, 15 S. Ct. 735, all holding *parol* evidence is admissible to show what was actually decided. Cited in *McMakin v. Fowler*, 34 S. C. 288, 13 S. E. 536, holding charge of judge may be resorted to for purpose of ascertaining issues submitted to jury.

Trial.—Affidavit, on motion for continuance, not introduced in evidence, cannot be considered at the trial, p. 264.

Mines and minerals.—Local regulations under act of 1872, respecting record of mining claims, cannot exclude *parol* proof of actual possession of mining claim, p. 264.

99 U. S. 265-272, 25 L. 322, UNITED STATES v. PUGH.

Statutes.—In the case of a doubtful and ambiguous law, contemporaneous construction by those whose duty it is to carry it into effect, is entitled to great weight, p. 269.

Cited and doctrine approved in *Five Per Cent. Cases*, 110 U. S. 485, 28 L. 202, 4 S. Ct. 218, *Brown v. United States*, 113 U. S. 571, 28 L. 1080, 5 S. Ct. 650, *Hahn v. United States*, 107 U. S. 406, 27 L. 529, 2 S. Ct. 497, *Swift Co. v. United States*, 105 U. S. 695, 26 L. 1109, *Westfield v. Tioga Co.*, 150 Pa. St. 163, 24 Atl. 704, *United States v. Hill*, 120 U. S. 183, 30 L. 632, 7 S. Ct. 517. Cited in *Swayne v. Hager*, 13 Sawy. 621, 37 Fed. 783, applying principle to defini-

tion of goods in tariff act; *Hewitt v. Schultz*, 7 N. Dak. 611, 76 N. W. 233, applying principle to construction placed by officers on act granting indemnity lands to railroad; *United States v. Union Pacific R. R. Co.*, 37 Fed. 555, holding construction of land grant followed for fifteen years will not be disturbed; *Round v. United States*, 38 Fed. 667, holding construction of law relating to compensation of commissioner should not be disturbed; *Grossett v. Townsend*, 86 Fed. 912, 56 U. S. App. 721, holding contemporary construction of shipping agreement should be followed; *Barker v. Louisville*, 83 Ky. 102, holding contemporary construction of law regarding fines imposed by city court should be followed; *Clark's Run, etc., Co. v. Commonwealth*, 96 Ky. 532, 29 S. W. 361, holding construction placed on charter of turnpike road should be followed; *Westbrook v. Miller*, 56 Mich. 152, 22 N. W. 257, holding construction of statute allowing deputy auditor to act for principal should be followed; *Northern Pac. R. R. v. Barnes*, 2 N. Dak. 383, 51 N. W. 410, holding construction placed upon organic act of territory should be followed; *Pitts v. Logan County*, 3 Okl. 741, 41 Pac. 591, holding construction of laws with reference to accounting by clerks of territorial courts should be followed.

Court of Claims' judgment as to the legal effect of its findings upon the ultimate circumstantial facts of a case, is subject to review in the Supreme Court, and such findings should be so framed as to clearly present the question of their legal effect, p. 271.

Cited and approved in *United States v. New York Indians*, 173 U. S. 470, 19 S. Ct. 490, holding court not bound to insert all the evidence in the finding; *Edwin I. Morrison*, 153 U. S. 216, 38 L. 694, 14 S. Ct. 829, holding sufficiency of findings are determined by the interpretation which the law puts upon them; *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 503, 27 L. 343, 1 S. Ct. 593, holding finding indemnity of reinsurance as a matter of law instead of as matter of fact, does not affect sufficiency of finding; *The Belgenland*, 114 U. S. 372, 29 L. 158, 5 S. Ct. 868, holding where legal inference can be drawn from facts found, direct finding of negligence unnecessary; *McClure v. United States*, 116 U. S. 151, 29 L. 574, 6 S. Ct. 324, holding not necessary to find incidental facts; *Williams v. United States*, 137 U. S. 136, 34 L. 598, 11 S. Ct. 51, holding where correct inference may be drawn from facts found, finding of fact as conclusion of law will not affect the judgment.

War.—Restitution of captured property decreed under acts of 1863 and 1864, where circumstances and presumption that officers did their duty, justified the inference that proceeds had been paid into the treasury, pp. 267-271.

99 U. S. 273-285, 25 L. 412, TRANSPORTATION CO. v. WHEELING.

Commerce.—Taxes levied by a State on ships, as instruments of commerce, is a tonnage tax, and unconstitutional, p. 277.

Cited in *Morn v. New Orleans*, 112 U. S. 74, 28 L. 655, 5 S. Ct. 40, holding license imposed on tugboats plying to and from gulf of Mexico, is unconstitutional; *New Orleans v. Eclipse Tow-Boat Co.*, 33 La. Ann. 648, 649, 39 Am. Rep. 280, 281, holding license tax imposed upon owners of tugboats running on Mississippi to the Gulf is not a tax on tonnage or regulation of commerce; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 374, 27 L. 423, 2 S. Ct. 264, holding State has power to impose license fee upon ferry-keepers for boats used in interstate commerce.

Commerce.—Taxes levied by a State upon ships or vessels, as property, are not prohibited by the Federal Constitution; hence, boats enrolled and licensed as coasting vessels under Federal laws, may be taxed by city which is their home port, and where principal office of owners is situated, p. 279.

Cited in *Linehan R. T. Co. v. Pendergrass*, 70 Fed. 2, 36 U. S. App. 48, holding boat engaged in interstate commerce is not exempt from taxation; *Oteri v. Parker*, 42 La. Ann. 379, 7 So. 571, holding vessels are subject, like any other property, to State taxation.

Taxation.—Power of the State to tax reaches all property except those means employed by the Federal government to carry out its constitutional powers, p. 279.

Approved in *People v. Wemple*, 138 N. Y. 11, 33 N. E. 723, 19 L. R. A. 698, holding business which is exclusively that of interstate commerce may not be taxed; *Union, etc., Transit Co. v. Lynch*, 18 Utah, 387, 55 Pac. 641, holding leased cars within the State, owned by foreign corporation, are taxable; *State v. Fulker*, 43 Kan. 241, 22 Pac. 1022, 7 L. R. A. 185, and n., holding intoxicating liquors transported from other State, are subject to State laws. Cited in *People v. United States*, 93 Ill. 36, 34 Am. Rep. 158, and *Van Brocklin v. Tennessee*, 117 U. S. 177, 29 L. 854, 6 S. Ct. 684, both holding land acquired by the United States by tax sale, while title is in the government, is exempt; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 32, 35 L. 620, 11 S. Ct. 881, holding tax imposed upon foreign corporation upon basis of number of miles its cars traverse the State, is void; *Pullman Southern Car Co. v. Nolan*, 22 Fed. 280, holding privilege tax, imposed on sleeping-car company carrying interstate passengers, is void.

Municipal corporations.—Assessments for municipal purposes of ships must be against the owner and in the municipality in which he resides, p. 280.

Cited in *Johnson v. Merchants' Line*, 37 Fla. 518, 523, 19 So. 646, 648, 37 L. R. A. 526, 527, and n., and *Gunther v. Baltimore*, 55 Md. 460, both holding interest of owner of vessel taxable in the port of registry.

99 U. S. 286-290, 25 L. 352, *TICE v. UNITED STATES*.

United States.—Contract of treasury department with T., for use of distiller's meters, as modified by commissioner of internal revenue, 1870, construed and held not to give T. a claim for reimbursement for meters on hand when contract was terminated in 1871, pp. 287-290.

99 U. S. 291-297, 25 L. 324, *MYRICK v. THOMPSON*.

Appeal and error.—Upon writ of error Supreme Court will not review findings of State trial court, adopted by State appellate court, p. 294.

Indians.—Agreement by attorney in fact for Sioux half-breeds, to transfer lands on which scrip issued to the Indians under act of 1854 should be located, to a third person for a money consideration, held not to violate such act of 1854 or the treaty of Prairie du Chien of 1831, pp. 295-297.

Courts.—Where Federal question is correctly decided by State court, Supreme Court will affirm judgment without determining question not of a Federal character, p. 297.

Cited, *arguendo*, in *Rosenberg v. Frank*, 58 Cal. 405.

99 U. S. 298-309, 25 L. 473, *PHELPS v. McDONALD*.

Bankruptcy.—Right of indemnity due a British subject resident in United States for unlawful destruction of property by United States, allowed by treaty of 1871, vests in his assignee in bankruptcy, p. 304.

Cited in *Williams v. Herd*, 140 U. S. 544, 545, 35 L. 556, 11 S. Ct. 889, holding award due from United States, growing out of Alabama claims, passes to assignee; *Calder v. Henderson*, 54 Fed. 807, 2 U. S. App. 627, holding claim against United States for bounty on sugar passes to the assignee; *Grant v. Bodwell*, 78 Me. 464, 7 Atl. 14, holding claim against United States, growing out of Alabama claims, passes to administrator. Cited in *Taft v. Marsily*, 120 N. Y. 478, 480, 24 N. E. 927, and *Heard v. Sturgis*, 146 Mass. 548, 553, 16 N. E. 440, 443, both holding money paid by United States as balance of Geneva award constitutes a gift and does not pass to assignee; *John Shillito Co. v. McClung*, 51 Fed. 877, 6 U. S. App. 128, holding assignment of unliquidated claims against United States for duties is void.

Bankruptcy.—Provision of bankrupt law that all suits by or against assignee must be brought within two years has no application to suit by assignee against bankrupt, p. 306.

Cited in *Bowen v. Del., L. & W. R. R. Co.*, 153 N. Y. 488, 489, 60 Am. St. Rep. 675, 676, 47 N. E. 911, and *Dushane v. Beall*, 161 U. S. 515, 40 L. 792, 16 S. Ct. 638, both holding limitation in act is applicable to suits only over property of bankrupt to which adverse claims existed at time of assignment; *Phelps v. Elliott*, 35 Fed. 457, holding suit by assignee to recover bonds fraudulently disposed of must be commenced within two years; *Thomas v. Blythe*, 55 Fed. 964, 8 U. S. App. 414, holding limitation inapplicable to suit by assignee to secure fund held by bankrupt in fraud of the act; *Leech v. Dawson*, 23 Fed. 656, 657, limitation applies to suit by assignee to recover land claimed by bankrupt as a homestead.

Equity.—Where necessary parties are before a court of equity it is immaterial that the res of the controversy is beyond the jurisdiction, p. 308.

Cited and principle applied in *Hawkins v. Ireland*, 64 Minn. 344, 58 Am. St. Rep. 537, 67 N. W. 75, *Hayden v. Yale*, 45 Ia. Ann. 371, 40 Am. St. Rep. 241, 12 So. 637, and *Cole v. Cunningham*, 133 U. S. 119, 33 L. 544, 10 S. Ct. 273, all holding that equity may restrain creditor of insolvent from prosecuting action in another State; *Schindelholz v. Cullum*, 55 Fed. 889, 12 U. S. App. 242, holding court appointing receiver to take charge of lands outside of State has no jurisdiction to restrain citizen of latter State from proceeding by attachment against the land; *Municipal Imp. Co. v. Gardiner*, 62 Fed. 956, holding suit to enforce contract for conveyance of land is a proceeding in personam; *Gage v. Riverside Trust Co.*, 86 Fed. 998, 999, holding courts may restrain parties from prosecuting action in other tribunals; *Baltimore Trust Assn. v. Alderson*, 90 Fed. 146, 61 U. S. App. 644, holding court may not put its receiver in possession of real estate outside of its jurisdiction; *Craft v. Ind., etc., Ry.*, 166 Ill. 593, 46 N. E. 1136, holding court may decree sale of land outside of its jurisdiction in accordance with deed of trust; *Manley v. Carter*, 7 Kan. App. 88, 52 Pac. 915, holding equity will enforce trust of land although situated in another State; *Eaton v. McCall*, 86 Me. 348, 41 Am. St. Rep. 562, 29 Atl. 1103, holding, unless special circumstances exist, equity will not compel a release of the equity of redemption upon land beyond the jurisdiction; *Wyeth v. Lang*, 54 Mo. App. 151, holding petition to restrain prosecution of action in other State must show case of oppression or fraud. Affirmed, arguing, in *Bachman v. Lawson*, 109 U. S. 663, 27 L. 1068, 3 S. Ct. 481, *Dulaney v. Schudder*, 94 Fed. 8, 9, and *Phelps v. Elliott*, 23 Blatchf. 471, 26 Fed. 881; dissenting opinion in *Allen v. Woodruff*, 96 Ill. 31.

Distinguished in *In re Herdic*, 40 Fed. 361, and *In re Bank's Will*, 87 Md. 442, 40 Atl. 274.

99 U. S. 309-325, 25 L. 387, *UNIVERSITY v. PEOPLE*.

Constitutional law.—Decision of State court, construing a contract or statute, is not a law impairing the obligation of contracts within the meaning of the Constitution, p. 320.

Cited in *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 36, 31 L. 614, 8 S. Ct. 751, holding constitutional provisions is aimed at legislative power and not at decisions of courts; *Lehigh Water Co. v. Easton*, 121 U. S. 392, 30 L. 1060, 7 S. Ct. 919, holding judgment of State court, interpreting contract, involves no Federal question under the removal act; *Denny v. Bennett*, 128 U. S. 495, 32 L. 493, 9 S. Ct. 136, holding State laws, with reference to assignments for benefit of creditors, do not impair obligation of contracts; *Mobile R. R. v. Tennessee*, 153 U. S. 495, 38 L. 797, 14 S. Ct. 971, holding where legislature has power to exempt, decision of court that act is unconstitutional impairs obligation of contract.

Courts.—Supreme Court has jurisdiction to determine whether a State decision, holding that a law did not create a contract because nugatory under the State Constitution, was correctly decided, p. 321.

Constitutional law.—Obligation of a charter, exempting all property of university from taxation, is impaired by subsequent act limiting exemption to property in immediate use, p. 325.

Approved and principle applied in *University of the South v. Skidmore*, 87 Tenn. 162, 9 S. W. 894, holding leasing of lands by university does not affect its charter exemption; *Gains v. Whitworth*, 8 Lea, 603, 615, holding exemption of lands from taxation donated to university does not inure to benefit of purchasers; *New Orleans v. Poydras Asylum*, 33 La. Ann. 856, 862, 865, holding charter exempting orphan asylum from taxation is a contract protected by Federal Constitution; *Willamette University v. Knight*, — Or. —, 56 Pac. 125, holding exemption of property for educational purposes does not exempt property leased for revenue; *M. E. Church v. Hinton*, 92 Tenn. 200, 21 S. W. 324, 19 L. R. A. 295, and n., holding outfit of publishing house, if net proceeds are applied to religious purposes, comes within the exemption; *Commissioners v. Colorado Seminary*, 12 Colo. 502, 504, 21 Pac. 492, holding exemption of property, as may be necessary to carry out design, operates upon such property only as is in actual use; *Morris v. Lone Star Chapter*, etc., 68 Tex. 704, 5 S. W. 522, holding renting part of building, though proceeds be donated to charity, subjects such part to taxation; *Hogg v. Mackay*, 23 Or. 341, 31 Pac. 780, holding Constitution is violated by relieving railroad of taxation; *Grand Lodge of Masons v. New Orleans*, 44 La. Ann. 665, 11 So. 151, holding exemption, granted on considerations of public policy, may be repealed; *State Board of Assessors v. Paterson*, etc., R. R., 50 N. J. L. 450, 14

Atl. 612, and Manistee, etc., *R. R. v. Commissioner*, 118 Mich. 351, 76 N. W. 634, both holding a contract exempting railroads must be supported by a consideration; *People v. Soldiers' Home*, 95 Ill. 568, holding charter exempting property amounts to a contract; *Chicago v. Baptist, etc., Union*, 115 Ill. 25, 2 N. E. 255, holding charter relieving theological society from taxation is void. See 72 Am. Dec. 684, note.

Distinguished in *People v. Theological Seminary*, 174 Ill. 183, 51 N. E. 199.

99 U. S. 325-334, 25 L. 390, *BANK v. PARTEE*.

Assignments for benefit of creditors.—Person acting in pursuance of original offer contained in deed of assignment is presumed to accept condition of deed for benefit of creditors, p. 329.

Cited in *National Bank v. Copeland*, 141 Mass. 266, 4 N. E. 795, holding time of acceptance by creditors of an assignment, not of essence of contract.

Husband and wife.—Married woman cannot be permitted to retain benefits of a transaction and at same time disavow it, p. 329.

Husband and wife.—In Mississippi a married woman is, as to her contracts, subject to disability of coverture, and creditor in his bill must allege a separate estate and that debt is a charge upon it, p. 331.

Cited in *T. T. Hayden Carriage Co. v. Pier*, 74 Wis. 586, 43 N. W. 504, holding liability of married woman on bond, not relating to her separate estate, determined by rules of the common law; *Prentiss v. Paisley*, 25 Fla. 929, 7 So. 56, 7 L. R. A. 644, and n., holding, in suit to set aside sale of land on ground of fraud, error to decree personal judgment against married woman; *McAnally v. Alabama Insane Hospital*, 109 Ala. 113, 55 Am. St. Rep. 924, 19 So. 493, 34 L. R. A. 225, and n., holding wife cannot bind herself by contract to pay her insane husband's board in asylum. Affirmed, *arguendo*, in *Wilder v. Commissioners, etc.*, 41 Fed. 514, *Howard v. Huron*, 6 S. Dak. 190, 191, 60 N. W. 807, 26 L. R. A. 502, *Canal Bank v. Hudson*, 111 U. S. 67, 28 L. 354, 4 S. Ct. 304, and *Williams v. Paine*, 169 U. S. 75, 42 L. 667, 18 S. Ct. 287.

99 U. S. 334-348, 25 L. 394, *SAGE v. CENTRAL R. R. CO.*

Mortgage.—Under mortgage, authorizing trustee to buy in mortgaged railroad at request of majority of bondholders, court, in foreclosing, may authorize trustee to bid and purchase road and organize new corporation, p. 341.

Cited in *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. St. 582, and *Mackintosh v. Flint P. M. R. Co.*, 34 Fed. 591, both holding agreements between bondholders and stockholders respecting

foreclosure and purchase valid; *Hackettstown Bank v. Brewing Co.*, 74 Fed. 113, 38 U. S. App. 681, holding corrupt agreement by majority naming conditions in bonds will not be enforced.

Appeal and error.—Orders not appealed from, made prior to decree of foreclosure and before intervention by appellants, cannot be complained of by them, p. 345.

Cited in *Elwell v. Fosdick*, 134 U. S. 512, 33 L. 1002, 10 S. Ct. 601, holding release by trustee of right of appeal and errors in decree binding on bondholders.

Railroads.—Upon decree foreclosing railroad mortgage, held proper in rendering decree of sale to reserve rights of judgment creditors for labor, materials and supplies furnished to railroad, p. 345.

Cited in *Langdon v. Railroad Co.*, 54 Vt. 610, holding final decree may be made as to ascertained debts and bill retained for enforcement of other liens.

Mortgages.—Legality of notice of foreclosure sale is not affected by change in the name of the newspaper, p. 347.

Cited in *Perkins v. Keller*, 43 Mich. 57, 4 N. W. 562, holding change of place of publication of order of sale does not invalidate it; *Donohue v. Parkman*, 161 Mass. 413, 42 Am. St. Rep. 416, 37 N. E. 205, *arguendo*.

99 U. S. 348-355, 25 L. 303, *HOGUE v. RAILROAD CO.*

Corporations.—Act of legislature not expressly excepted in a charter is applicable to it, p. 354.

Taxation.—Intention of legislature to grant immunity from taxation must be clear beyond a reasonable doubt; hence railroad enjoying exemption from taxation under original charter, held not to retain same under subsequent consolidation act, p. 355.

Cited in *Citizens' Savings Bank v. Owensboro*, 173 U. S. 647, 19 S. Ct. 534, holding exemption from taxation of savings bank does not affect power to amend; *Covington v. Kentucky*, 173 U. S. 239, 19 S. Ct. 386, holding exemption in charter of water works subject to repeal under general law; *Bank of Kentucky v. Stone*, 88 Fed. 424, holding reservation of right to repeal applies to tax exemption conferred by same act; *Memphis R. R. Co. v. Berry*, 41 Ark. 445, and *State v. Whitworth*, 8 Lea, 606, 623, both holding exemption does not inure to the benefit of purchaser; *Vicksburg, etc., R. R. v. Dennis*, 116 U. S. 668, 29 L. 771, 6 S. Ct. 627, and *Dow v. Northern R. R.*, 67 N. H. 49, 36 Atl. 534, both holding exemption from taxation strictly construed; *Louisville Water Co. v. Clark*, 143 U. S. 14, 36 L. 58, 12 S. Ct. 350, holding immunity, unless otherwise expressly declared, may be withdrawn; *McCandless v. Railroad Co.*, 38 S. C. 111, 112, 16 S. E. 431, 432, 18 L. R. A. 443, 444, holding where no

exemption in charter, railroad may be made liable for fire by sparks; *Ex parte Chamberlain*, 55 Fed. 707, holding railroad in hands of receiver bound to pay taxes; *Charlotte, etc., R. R. v. Gibbes*, 27 S. C. 392, 4 S. E. 51, holding, under reservation in general law, act requiring railroad to pay for support of commission, is valid. Cited, *arguendo*, in *Railroad Commissioners v. Railroad Co.*, 22 S. C. 231; dissenting opinion in *Commonwealth v. Farmers' Bank*, 97 Ky. 626, 31 S. W. 1021.

99 U. S. 355-361, 25 L. 476, *DENVER v. ROANE*.

Partnership.—Bill in equity may be maintained by personal representatives of deceased partner against survivors for an accounting and discovery, p. 357.

Partnership.—Surviving partner is entitled to no allowance for winding up the business, unless otherwise stipulated; and this rule applies to partnership between attorneys, p. 358.

Cited in *Little v. Caldwell*, 101 Cal. 560, 40 Am. St. Rep. 93, 36 Pac. 108, holding surviving law partner must complete the business of firm and is entitled to no compensation; *Osment v. McElrath*, 68 Cal. 471, 58 Am. Rep. 20, 9 Pac. 734, holding after dissolution of law partnership each partner entitled to share in fees of unfinished business; *Justice v. Lairy*, 19 Ind. App. 279, 65 Am. St. Rep. 410, 49 N. E. 461, holding member of law firm appointed circuit judge has no interest in fees earned by other member in winding up the business.

Partnership.—Where attorney-at-law refuses to act as a partner and repudiates his obligation to aid in prosecution of one of firm's cases, he is not entitled to fees subsequently earned in the cause, p. 361.

Cited in *Shæffer v. Blair*, 149 U. S. 258, 37 L. 725, 13 S. Ct. 859, and *Elair v. Shæfer*, 33 Fed. 224, both holding where agent acts fraudulently he forfeits all right to compensation under the contract. See extensive notes in 40 Am. St. Rep. 570, and 69 Am. St. Rep. 422.

99 U. S. 362-371, 25 L. 416, *BROOKLYN v. INSURANCE CO.*

Municipal corporations.—Holder of bonds is bound to take notice of statute under which they are issued, but is under no legal obligation to inquire as to precise form or terms of subscription; hence it is no defense that railroad failed to build road or that municipal officers improperly delivered over the bonds, p. 368.

Cited in *Brown v. Bon Homme County*, 1 S. Dak. 228, 46 N. W. 177, holding municipality is estopped from denying recital in bonds that they were issued in accordance with law; *Shepard v. Tulare Irr. Dist.*, 94 Fed. 6, holding where bonds recite their issuance

according to law, allegation of regularity not necessary; *Dennison v. Columbus*, 62 Fed. 778, holding where different road from one contemplated was built, city is bound by recitals; *Insurance Co. v. Bruce*, 105 U. S. 333, 26 L. 1123, holding municipality is estopped as against recitals that conditions imposed upon issuance of bonds were not performed.

Judgments.—Suit adjudging invalidity of municipal railroad-aid bonds does not affect holder not served with process or who did not appear, p. 370.

Cited in *Smith v. Woolfolk*, 115 U. S. 149, 29 L. 360, 5 S. Ct. 1180, *Brooks v. Dunn*, 51 Fed. 146, *Laughlin v. New Orleans Ice Co.*, 35 La. Ann. 1186, *Hobson v. Peake*, 44 La. Ann. 387, 10 So. 763, *Wilson v. St. Louis Ry. Co.*, 108 Mo. 597, 32 Am. St. Rep. 629, 18 S. W. 292, and *Eastman v. Dearborn*, 63 N. H. 366, all holding in personal actions constructive service of summons insufficient to give court jurisdiction; *Tregea v. Modesto Irr. Dist.*, 164 U. S. 187, 41 L. 398, 17 S. Ct. 55, *Enfield v. Jordan*, 119 U. S. 693, 30 L. 529, 7 S. Ct. 365, *County of Livingston v. Darlington*, 101 U. S. 413, 25 L. 1018, *Empire v. Darlington*, 101 U. S. 92, 25 L. 880, and *Pana v. Bowler*, 107 U. S. 545, 27 L. 430, 2 S. Ct. 718, all holding doctrine of *lis pendens* does not apply to actions relating to negotiable securities; *Lackett v. Rumbaugh*, 45 Fed. 32, holding judgment, although irregular, is not void where court has jurisdiction of person and subject-matter; *National Bank v. Peabody*, 55 Vt. 497, 45 Am. Rep. 635, holding judgment procured by publication, good as to attached property.

Appeal and error.—In absence of bill of exceptions, appellate court will consider that all the issues were tried, though the jury was sworn to try only the "issue," p. 371.

Cited, *arguendo*, in *Roberts v. Bolles*, 101 U. S. 129, 25 L. 884, and *United States v. Town of Brooklyn*, 10 Biss. 467, 8 Fed. 474.

Distinguished in *Green v. Dyersburg*, 2 Flipp. 502, F. C. 5,756.

99 U. S. 372-377, 25 L. 479, UNITED STATES v. WINCHESTER.

Admiralty jurisdiction of District Courts extends only to seizures on navigable waters, p. 374.

War.—Executive order of seizure is the foundation of all proceedings under the confiscation act; hence seizure of property on land by naval forces without such order is invalid, p. 376.

Cited in *Henry v. Carson*, 96 Ind. 424, holding record must show seizure of property by executive order.

Distinguished in *Oakes v. United States*, 174 U. S. 424, 19 S. Ct. 668.

99 U. S. 378-382, 25 L. 453, VAN NORDEN v. MORTON.

Injunction will not lie to recover dredgeboat seized by sheriff, replevin or action for damages being adequate remedy, p. 379.

Cited in *Clark v. Shaw*, 24 Blatchf. 98, 28 Fed. 357, holding money in hands of marshal, collected by executions, cannot be attached; *Rio Grande Ry. Co. v. Gomilla*, 28 Fed. 338, holding Federal court on petition will direct property in hands of marshal about to be illegally sold to be turned over to administrator; *Heyman v. Covell*, 44 Mich. 336, 38 Am. Rep. 275, 6 N. W. 848, holding replevin will lie in State court against Federal marshal.

Courts.—Where new right is granted by State or new remedy given, jurisdiction of such cases in Federal courts, as law or equity, must be determined by their essential character; legal and equitable claims cannot blend together in one suit, p. 380.

Cited in *Grether v. Wright*, 75 Fed. 745, 43 U. S. App. 770, holding where State gives remedy by injunction against illegal assessment Federal courts will grant same remedy; *Alderson v. Dole*, 74 Fed. 30, 33 U. S. App. 460, holding, although State courts permit creditors to sue stockholders in equity, the procedure in Federal courts is at law; *Waite v. O'Neill*, 72 Fed. 355, holding where right to specific performance is doubtful, Federal court will decree proper relief; *Wilson v. Smith*, 66 Fed. 83, holding action at common law for legacy may be removed; *Buisenden v. Chamberlain*, 53 Fed. 310, holding common law, as used in removal act, includes statutory action for death; *Elliot v. Schaler*, 50 Fed. 457, holding proceeding by administrator to sell land, although in State court equitable when removed must be tried at law; *Alexander v. Mortgage Co. of Scotland*, 47 Fed. 134, holding, although lien may be established by filing conveyance in clerk's office when right is asserted in Federal courts, it must be in equity; *Cherokee Nation v. Southern Kansas R. R.*, 33 Fed. 914, holding whether remedy given to recover damages for right of way is in law or equity is determined by the essential character of the case; *Snyder v. Pharo*, 25 Fed. 400, holding, although allowable in State court, equitable set-off to promissory note cannot be pleaded in Federal courts; *Näumburg v. Hyatt*, 24 Fed. 900, holding where creditors are allowed to interplead in State courts, same proceedings may be had in Federal courts; *Wells, Fargo & Co. v. Miner*, 11 Sawy. 285, 286, 25 Fed. 536, holding right to interplead adverse claimants may be enforced in equity; *New Orleans v. Construction Co.*, 129 U. S. 46, 47, 32 L. 607, 9 S. Ct. 223, 224, holding remedies in Federal courts not controlled by decisions in State courts; *Alger v. Anderson*, 92 Fed. 700, holding Federal courts will not entertain action to rescind sale where party guilty of laches or before his eviction; *Missouri, etc., Trust Co. v. Krumseig*, 77 Fed. 43, 40 U. S. App. 620, holding State law giving relief in equity against usurious contract will be followed in Federal courts; *Cummings v. National Bank*, 101 U. S. 157, 25 L. 904, hold-

ing State remedy by injunction against illegal tax can only be enforced in equity; *Norwood v. Baker*, 172 U. S. 292, 19 S. Ct. 196, holding injunction to restrain illegal assessment of land is the appropriate remedy; *Lacassagne v. Chapuis*, 144 U. S. 125, 36 L. 371, 12 S. Ct. 662, holding, in case of eviction, equity will give no relief till party has established his action at law; *Krippendorf v. Hyde*, 110 U. S. 286, 28 L. 149, 4 S. Ct. 31, holding equity will afford relief to claimant of property seized under process of Federal courts. *Hayward v. Andrews*, 106 U. S. 678, 27 L. 273, 1 S. Ct. 549, holding assignee cannot sue in equity merely because he cannot sue in his own name at law; *Chapman v. Brewer*, 114 U. S. 171, 29 L. 88, 5 S. Ct. 805, holding Federal court will, as a rule, administer the same equity as State court; *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 651, 34 L. 300, 10 S. Ct. 969, holding legal and equitable courts cannot be united in the Federal courts. Cited, *arguendo*, in *Jackson v. Gould*, 74 Me. 577, *Chandler v. Thompson*, 30 Fed. 44, *New Orleans v. Morris*, 105 U. S. 602, 26 L. 1185, and *Thomas v. American, etc., Mortgage Co.*, 47 Fed. 554, 12 L. R. A. 686, and *n.*

99 U. S. 382-389, 25 L. 305, *RYAN v. RAILROAD CO.*

Public lands.—Under grant to Oregon and California railroad in 1866, when road was located and maps made, the right of the company to the odd sections became fixed, p. 386.

Cited in *Southern Pacific Co. v. Orton*, 6 Sawy. 198, 32 Fed. 479, and *Southern, etc., R. R. v. Dull*, 10 Sawy. 512, 514, 22 Fed. 493, both holding same as principal case; *Vance v. Burlington, etc., R. R.*, 12 Neb. 288, 11 N. W. 334, holding where lateral limits are given, no specific selection is necessary. Cited, *arguendo*, in *United States v. Central Pac. R. R. Co.*, 8 Sawy. 91, 11 Fed. 456.

Public lands.—With respect to lieu lands, the right of California and Oregon railroad, under act of 1866 granting alternate sections, was only float, and attached to no specific tract until actually selected, p. 386.

Cited in *Elling v. Thexton*, 7 Mont. 339, 343, 16 Pac. 934, 935, *St. Paul, etc., R. R. v. Ward*, 47 Minn. 44, 49 N. W. 403, *Grandin v. La Bar*, 3 N. Dak. 453, 57 N. W. 243, *M., K. & T. R. R. v. Noyes*, 25 Kan. 348, A., T. & Santa Fe R. R. v. *Rockwood*, 25 Kan. 298, *Sioux City, etc., R. R. v. Countryman*, 83 Iowa, 180, 49 N. W. 74, *Northern Pac. R. R. v. Amacker*, 49 Fed. 533, 7 U. S. App. 33, *Northern Pac. R. R. v. St. Paul, etc., R. R.*, 26 Fed. 562, *Köhler v. Barin*, 25 Fed. 165, 166, *United States v. Central Pac. R. R. Co.*, 11 Sawy. 441, 442, 444, 445, 26 Fed. 481, 482, 483, 484, *St. Paul R. R. v. Winona R. R.*, 112 U. S. 731, 28 L. 876, 5 S. Ct. 340, *Cedar Rapids R. R. v. Herring*, 110 U. S. 39, 28 L. 61, 3 S. Ct. 493, and *United States v. Winona, etc., R. R.*, 67 Fed. 967, 32 U. S. App. 272, all holding railroad acquires no right to lieu lands until selected; *United States*

v. Mullan, 7 Sawy. 473, 10 Fed. 790, holding State has no title to lieu lands until selection; Iowa Falls R. R. v. Beck, 67 Iowa, 429, 25 N. W. 690, holding indemnity land not claimed or selected open to pre-emption; St. Paul R. R. v. Sage, 71 Fed. 46, 36 U. S. App. 340, holding lieu lands, until selected, are subject to sale by government; Southern Pac. R. R. v. Wood, 124 Cal. 482, 57 Pac. 390, holding selection of lieu lands does not operate by relation as of date of grant; Jackson v. La Moure Co., 1 N. Dak. 240, 46 N. W. 450, and Wisconsin R. R. v. Price Co., 133 U. S. 512, 33 L. 695, 10 S. Ct. 347, both holding that until selection lieu lands not liable to taxation; Wisconsin, etc., R. R. v. Price Co., 64 Wis. 592, 26 N. W. 98, holding, after selection, equity in lieu lands subject to taxation.

Distinguished in Southern, etc., R. R. v. Wiggs, 14 Sawy. 571, 43 Fed. 335, and Lake Superior Ship Canal Co. v. Cunningham, 44 Fed. 830, 842.

Public lands.—Selection of lieu lands by railroad to which alternate sections were granted, and patent therefor, are superior to subsequent entry and patent under homestead laws, pp. 387-389.

99 U. S. 389-392, 25 L. 419, *HALE v. FROST*.

Railroads.—Net earnings of railroad in hands of receiver on foreclosure proceeding may be applied to payment of claims having superior equities to those of bondholders, such as for materials and supplies used in operating road, p. 392.

Cited and doctrine applied in following cases, in which claims were held preferential: New York, etc., Indemnity Co. v. Tacoma R. & M. Co., 83 Fed. 367, 48 U. S. App. 673, cable sold to railroad; Wood v. New York & N. E. Co., 70 Fed. 743, 746, labor claims necessary to keep road a going concern; Frank v. Denver, etc., R. R., 23 Fed. 127, demands for rolling stock; Giles v. Stanton, 86 Tex. 628, 26 S. W. 618, statutory liens upon earnings prior to appointment; Ames v. U. Pac. R. R. Co., 74 Fed. 345, and Williamson v. Washington, etc., R. Co., 33 Gratt. 628, 630, 638, 639, claims for operating expenses; Texas Pac. R. R. v. Johnson, 76 Tex. 431, 18 Am. St. Rep. 68, 13 S. W. 466, holding, if receiver has invested earnings in betterments, corpus responsible for operating expenses; Bellingham Bay Imp. Co. v. Fairhaven R. R., 17 Wash. 375, 49 Pac. 515, holding preferential claims not barred should be paid; Central Trust Co. v. Utah Central R. R. Co., 16 Utah, 19, 50 Pac. 815, McIlhenny v. Binz, 80 Tex. 13, 14, 17, 19, 26 Am. St. Rep. 719, 720, 724, 726, 13 S. W. 660, 661, 662 663, Central Trust Co. v. Thurman, 94 Ga. 741, 742, 20 S. E. 143, New York Guarantee Co. v. Tacoma R. R. & M. Co., 83 Fed. 370, 48 U. S. App. 678, Central Trust Co. v. East Tenn. R. R., 80 Fed. 629, 47 U. S. App. 663, Northern Pac. R. R. v. Lamont, 69 Fed. 24, 32 U. S. App. 480, and Farmers' Loan, etc., Co. v. Kansas City, etc., R. R., 53 Fed. 187, all holding there is no arbitrary six months'

rule with reference to preferential debts; *McCormac v. Salem Con. St. Ry.*, 34 Or. 549, 56 Pac. 519, holding court may impose as condition of appointing receiver the payment of preferential debts; *American Trust, etc., Bank v. McGettigan*, 152 Ind. 587, 71 Am. St. Rep. 350, 52 N. E. 795, holding equitable and legal liens existing at time of appointment preferred; *Atlantic Trust Co. v. Woodbridge Canal, etc., Co.*, 79 Fed. 41, holding rule applied by analogy to irrigation company; *Drennan v. Mercantile Trust, etc., Co.*, 115 Ala. 606, 67 Am. St. Rep. 77, 23 So. 166, 39 L. R. A. 625, rule applied to manufacturing and mining corporation; *The Allianca*, 65 Fed. 246, and *Stewart v. Potomac Ferry Co.*, 5 Hughes, 383, 12 Fed. 305, both holding courts have applied to railroads principles assimilated to admiralty law. In the following cases the claims were held to be unpreferred: *Manchester Locomotive Works v. Truesdale*, 44 Minn. 118, 46 N. W. 302, 9 L. R. A. 143, and *n.*, balance for locomotive sold more than six months before appointment; *Fidelity Ins. Co. v. Shenandoah Val. R. R.*, 86 Va. 9, 19 Am. St. Rep. 865, 9 S. E. 762, claim for money borrowed to pay wages; *American Trust Co. v. E. & W. R. R. Co.*, 46 Fed. 103, 104, there being no diversion construction debt contracted more than six months before appointment; *St. Louis Trust Co. v. Riley*, 70 Fed. 34, 36 U. S. App. 100, 30 L. R. A. 458, injuries caused by negligence more than five months before appointment; *Hiles v. Case*, 9 Biss. 550, 14 Fed. 142, and *In re Dexterville, etc., Boom Co.*, 4 Fed. 874, claims for losses by fire from sparks; *Cleveland, etc., Ry. Co. v. Knickerbocker Trust Co.*, 86 Fed. 77, claim for repair of bridge contracted more than six months before appointment. See valuable notes in 54 Am. St. Rep. 417, 432, and 71 Am. St. Rep. 377.

Distinguished in *Addison v. Lewis*, 75 Va. 709, 710, *State v. Edgefield R. R.*, 6 Lea, 365, and *Lock v. Turnpike Co.*, 100 Tenn. 173, 47 S. W. 135.

99 U. S. 393-398, 25 L. 455, *HARTMAN v. BEAN*.

Internal revenue.—High wines remaining in bonded warehouse, although sold to an innocent purchaser, are subject to corrected tax and to interest penalty and charges, pp. 393-398.

Cited in *George v. Fourth National Bank*, 41 Fed. 263, holding whiskey in warehouse, although sold, is subject to all assessments made against distiller.

99 U. S. 398-401, 25 L. 437, *SMITH v. RAILROAD CO.*

Courts.—Jurisdiction of Federal courts cannot be affected by State legislation, and they will enforce equitable rights created by State laws where they have jurisdiction of subject-matter and parties, p. 401.

Cited in *Buford v. Holley*, 28 Fed. 682, holding State statute giving simple contract creditor right to file creditor's bill will be followed by Federal courts; *Pulliam v. Pulliam*, 10 Fed. 78, holding State statute as to presentation of claims against deceased will be followed by Federal courts; *Goldsmith v. Gilliland*, 10 Sawy. 609, 22 Fed. 866, holding Federal courts will take jurisdiction of suit under State law in the nature of bill of peace; *Scott v. Neely*, 140 U. S. 113, 35 L. 361, 11 S. Ct. 715, holding State law giving remedy in equity to contract creditors to subject property to lien will not be followed by Federal courts.

Actions.— Mere contract creditor of a corporation cannot enforce his claim against its debtor for want of privity, no assignment of such claim having been made, pp. 400, 401.

Cited in *Cates v. Allen*, 149 U. S. 458, 37 L. 808, 13 S. Ct. 885, holding where cause removed to Federal courts, simple contract debtor cannot maintain action to set aside sale made in fraud of creditors; *National Tube Co. v. Ballou*, 146 U. S. 524, 36 L. 1072, 13 S. Ct. 166, holding United States courts will not entertain creditor's bill where it is not alleged that debt has been established by judgment; *Dawson v. Coffey*, 12 Or. 519, 8 Pac. 841, holding simple contract creditors cannot maintain action to set aside conveyance on ground of fraud; *Putney v. Whitmire*, 66 Fed. 388, holding simple contract creditor cannot maintain creditor's bill; *United States v. Engate*, 48 Fed. 254, holding simple contract creditor is one whose claim has not been reduced to judgment; *Talley v. Curtin*, 54 Fed. 45, 8 U. S. App. 347, holding where claim is not disputed in pleadings, it may be the basis of creditor's bill; *Goff v. Kelley*, 74 Fed. 331, holding bill of intervention by simple contract creditor will not be entertained; *Greenwood v. Strange*, 77 Fed. 499, holding Federal courts sitting in equity have no jurisdiction to enforce mere money demand; *McKeldin v. Gouldy*, 91 Tenn. 681, 20 S. W. 232, holding equity cannot aid contract creditor to subject equitable assets to his claim; *Smith v. Commissioners*, 43 Kan. 621, 23 Pac. 643, holding simple contract creditor cannot maintain action to recover bonds due his debtor; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 755, 30 L. 829, 7 S. Ct. 762, holding only judgment creditor can enforce stockholder's liability; *Mellier v. Bartlett*, 106 Mo. 391, 17 S. W. 298, holding where creditor permits his judgment to lapse he cannot maintain action to set aside fraudulent conveyance; *Dawson v. Sims*, 14 Or. 562, 13 Pac. 507, holding attachment lien sufficient to maintain creditor's bill; *Twell v. Twell*, 6 Mont. 25, 9 Pac. 541, holding creditor's bill may be maintained where defendant has left the State and transferred his property in order to avoid paying alimony; *Pulman v. Stebbins*, 51 Fed. 10, 12, holding where corporation has been dissolved, corporation creditors may be sued by contract creditors.

Distinguished in *National Bank v. Root*, 107 Ind. 229, 8 N. E. 107. See extensive notes in 43 Am. St. Rep. 380, and 66 Am. St. Rep. 276, 287.

Creditor's suit must be preceded by judgment at law establishing his claim, p. 401.

99 U. S. 402-434, 25 L. 274, *UNION PAC. R. R. CO. v. UNITED STATES*.

Railroads.—Net earnings are ascertained by deducting from gross earnings ordinary expenses of organization and operation and for bona fide improvements, but not including interest paid on bonded debt, p. 420.

Cited in *Belfast, etc., R. R. v. Belfast*, 77 Me. 453, 1 Atl. 366, holding net earnings are to be estimated after payment of mortgage debts and interest; *Mobile, etc., R. R. v. Tennessee*, 153 U. S. 498, 38 L. 798, 14 S. Ct. 972, holding interest on bonded debt must be paid before dividends; *New York R. R. v. Nickals*, 110 U. S. 308, 30 L. 368, 7 S. Ct. 215, reversing 21 Blatchf. 181, 15 Fed. 579, holding where earnings are used in constructing double tracks, preferred stockholders not entitled to dividends; *S. P. R. R. Co. v. Board of R. R. Commrs.*, 78 Fed. 264, 266, holding commissioners fixing rates should exclude betterments, but allow for reasonable renewals, improvement of roadbed, track and equipment; *Commonwealth v. Railroad Co.*, 164 Pa. St. 261, 30 Atl. 146, holding, in ascertaining net earnings for purpose of taxation, rental for rolling stock and equipment should be deducted; *State v. Assessors*, 48 La. Ann. 1159, 20 So. 671, holding assessment on basis of earning capacity excludes payment of old debts; *Barry v. Missouri, K. & T. R. Co.*, 27 Fed. 5, holding loss incurred by sale of bonds to pay old indebtedness is not a charge against net earnings; *Railway v. Shinn*, 52 Ark. 97, 12 S. W. 184, holding contract for part of gross earnings includes earnings of wagon road operated in conjunction with railroad; *Sioux City, etc., R. R. v. United States*, 110 U. S. 207, 28 L. 121, 3 S. Ct. 567, holding, under internal revenue act, net earnings includes payment of interest on bonds.

Distinguished in *Ruhlender v. Chesapeake R. R. Co.*, 91 Fed. 12, 62 U. S. App. 16, and *San Diego Water Co. v. San Diego*, 118 Cal. 583, 62 Am. St. Rep. 284, 50 Pac. 642, 38 L. R. A. 468, See elaborate note in 99 Am. Dec. 762.

Railroads.—Union Pacific held to have been completed within meaning of act of 1862 requiring payment of 5 per cent. of net earnings to government after its completion, when so reported by its president and accepted by the United States for purposes of bond issue, pp. 418-420.

Railroads.—The question of dividends and expenditures for betterments is one of policy, usually left to discretion of directors, p. 421.

Cited in *Excelsior W. & M. Co. v. Pierce*, 90 Cal. 145, 27 Pac. 47, holding, in absence of fraud, declaration of dividends will not be disturbed.

Railroads.—Five per centum of earnings payable to the government each year by Union Pacific railroad, under act of 1862, is to be estimated after the payment of interest on first-mortgage bonds, p. 424.

Cited in *United States v. Sioux City & Pacific R. R. Co.*, 99 U. S. 492, 25 L. 292, holding, if interest on first-mortgage bonds absorbed earnings, government not entitled to its percentage; *United States v. Central, etc., R. R.*, 138 U. S. 85, 34 L. 896, 11 S. Ct. 285, holding betterments and improvements not to be considered in arriving at amount of net earnings. Affirmed generally in *United States v. Kansas Pac. R. R. Co.*, 99 U. S. 456, 25 L. 291, and *United States v. Central, etc., R. R.*, 99 U. S. 450, 25 L. 288.

99 U. S. 434-441, 25 L. 457, *PARSONS v. JACKSON*.

Bonds.—Uncertainty of amount payable deprives bonds of their negotiability; hence bonds for £225 in London or \$1,000 in New York, the company's president not having fixed place of payment, are not negotiable, p. 439.

See note in 64 Am. Dec. 439.

Bonds.—Past due and unpaid coupons attached to bonds, held evidence of dishonor sufficient to put purchasers on inquiry, p. 440.

Cited in *Bangor Power Co. v. Robinson*, 52 Fed. 521, 523, holding caveat emptor applies to negotiable paper which has been drawn and signed, but not issued; *Simmons v. Taylor*, 38 Fed. 687, holding persons purchasing bonds, having attached unpaid coupons, not bona fide holders; *Chouteau v. Allen*, 70 Mo. 339, holding bond payable before maturity, with overdue interest coupons attached, is dishonored paper; *Stern Bros. v. Bank*, 34 La. Ann. 1120, holding overdue, detached coupons of public bonds dishonored paper; *Mercantile Deposit Co. v. Low*, 87 Fed. 246, holding purchaser knowing of agreement giving committee power to control bonds cannot recover; *Rouede v. Jersey City*, 18 Fed. 722, F. C. 12,031a, *Railway Co. v. Sprague*, 103 U. S. 762, 26 L. 557, *Martin v. Salina R. R. Co.*, 79 Ala. 615, 617, and *Fairex v. Bier*, 37 La. Ann. 825, all holding bonds with overdue, unpaid interest coupons attached do not put purchaser on inquiry; *Long Island Loan, etc., Co. v. Columbus R. R.*, 65 Fed. 457, holding fact that interest on bonds is not paid insufficient to put purchaser on inquiry. Cited generally in *Jackson v. Ludeling*, 99 U. S. 513, 25 L. 461. See notes to 100 Am. Dec. 197, 98 Am. Dec. 684, and 98 Am. Dec. 683.

Bonds.—Where bonds are offered for a low price it is a circumstance calculated to raise suspicion of their validity, p. 441.

Cited in *Chouteau v. Allen*, 70 Mo. 341, holding, that bonds are purchased for less than one-half of the accrued interest, important circumstance in determining bona fides.

Bonds.— Purchaser of bonds with overdue coupons, sold at small price and containing unfilled blanks, held charged with notice of fact that they had been stolen during war before issuance, pp. 439-441.

99 U. S. 441-449, 25 L. 327, *KEELY v. SANDERS*.

Taxation.— Description of land in notice of sale for taxes is sufficient if it informs owner of claim against his property, p. 443.

Cited in *Poland v. Dreyfous*, 48 La. Ann. 85, 18 So. 907, holding assessment giving changed names by which boundaries are known sufficient to support tax sale; *Textor v. Shipley*, 86 Md. 441, 38 Atl. 933, holding levy describing city, corner of street and character of building sufficient.

Taxation.— Commissioner's certificate, in accordance with acts of Congress of 1862 and 1863, is prima facie evidence of regularity of sale and title of purchaser, p. 444.

Cited in *In re Douglas*, 41 La. Ann. 768, 6 So. 676, and *Henderson v. Ellerman*, 47 La. Ann. 314, 16 So. 824, both holding legislature may make tax deed conclusive evidence of compliance with every requirement; *State v. Central Pac. R. R.*, 21 Nev. 267, 30 Pac. 691, holding legislature may fix time, amount and manner of imposing taxes, and that certificate shall be evidence of compliance with all prerequisites. Cited, *arguendo*, in *Keely v. Weir*, 38 Fed. 292, *Sherry v. McKinley*, 99 U. S. 497, 498, 25 L. 330, and *Fox v. Stafford*, 90 N. C. 301, dissenting opinion in *Cooper v. Freeman Lumber Co.*, 61 Ark. 48, 32 S. W. 496, and *Van Brocklin v. Tennessee*, 117 U. S. 179, 29 L. 855, 6 S. Ct. 685. See note in 4 Am. St. Rep. 188.

Taxation.— Sale of all of tract without subdivision, though tax but small proportion of the value, is at most an irregularity, not an invalidity, p. 445.

Taxation.— Proceeding to collect taxes is a proceeding in rem, of which owners are bound to take notice, p. 445.

Constitutional law.— Whether military authority has been established is a political, not a judicial, question, p. 446.

Evidence.— Law presumes persons acting in public office have been duly appointed, p. 447.

99 U. S. 449-455, 25 L. 287, *UNITED STATES v. CENTRAL PACIFIC R. R. CO.*

Railroads.— Central Pacific railroad, formed by consolidation of Central and Western Pacific, succeeded to all the rights and duties of the original companies under acts of 1862, p. 450.

Affirmed in *United States v. Stanford*, 70 Fed. 361, 44 U. S. App. 68.

Railroads.—Date of completion of Central Pacific railroad for purpose of fixing date when government entitled to 5 per cent. of net earnings, held same as in case of Union Pacific, p. 454.

99 U. S. 455-460, 25 L. 289, *UNITED STATES v. KANSAS PAC. R. R. CO.*

Railroads.—Government subsidy bonds are a lien, and 5 per cent. of earnings of Kansas Pacific railway are only demandable upon the aided portion of the railroad, p. 458.

Cited in *United States v. Central, etc.*, R. R. Co., 118 U. S. 230, 30 L. 175, 6 S. Ct. 1040, and *United States v. Alabama R. R. Co.*, 142 U. S. 622, 35 L. 1136, 12 S. Ct. 308, both holding government cannot withhold payment for services of roads not aided, although owned and controlled by aided roads; *United States v. Denver, etc.*, R. R., 99 U. S. 462, 25 L. 292, holding lien of bonds extends only to aided portion of road.

Railroads.—In estimating net earnings to fix per cent. due government on its loan, under Pacific Railroad aid act of 1862, depreciation, construction and equipment account should be deducted from gross income, p. 459.

Cited in *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. 609, holding as to preferred stockholders, steel-rail betterments should not be charged to operating expenses; *Southern, etc.*, R. R. v. Commrs., 78 Fed. 266, holding expenses for station buildings, shops, etc., are charges against earnings; *Schmidt v. Louisville, etc.*, R. R., 95 Ky. 299, 25 S. W. 496, holding expense of handling business and proportionate part of operating expenses of leased road should be charged against gross earnings; *State v. Assessors*, 48 La. Ann. 1159, 20 So. 671, holding where earning capacity forms basis of assessment, payment of old debts should not be deducted; *Rosenberg v. Frank*, 58 Cal. 405, holding "pro rata" means disposition of fund in proportion to some standard.

99 U. S. 460-462, 25 L. 291, *UNITED STATES v. DENVER PAC. R. R. CO.*

Railroads.—Government subsidy bonds are a lien, and percentage of earnings is only demandable from the Kansas Pacific railway upon the aided portion of the railroad; hence government has no lien upon line of the Denver Pacific railway, which constituted the extension thereof, p. 462.

Approved in *United States v. Central, etc.*, R. R., 118 U. S. 240, 30 L. 175, 6 S. Ct. 1040.

99 U. S. 463-482, 25 L. 438, *RAILWAY CO. v. ALLING*.

Appeal and error.—Supreme Court will not order dismissal of appeal taken by corporation, acting through its officers and directors,

at instance of strangers to the decree, who have become stockholders in the concern, p. 472.

Railroads.— Act of June 8, 1872, to Denver and Rio Grande railway, was a grant of an immediate beneficial easement in a right of way through the Grande cañon, and when in good faith appropriated, title took effect as of the date of the act, p. 475.

Cited in *Noble v. Union River Logging R. R. Co.*, 147 U. S. 176, 37 L. 127, 13 S. Ct. 274, holding "right of way hereby granted," is a present grant; *New York Indians v. United States*, 170 U. S. 17, 42 L. 933, 18 S. Ct. 534, holding words "agree to set apart," in grant to Indians, imports present grant; *N. P. R. R. Co. v. St. Paul, etc., R. R.*, 26 Fed. 551, holding grant being in present, priority of grant determines title as to cross roads; *Lewis v. Rio Grande Western R. R.*, 17 Utah, 511, 54 Pac. 982, holding grant takes effect as of date of location of road; *Bybee v. Oregon, etc., R. R. Co.*, 11 Sawy. 485, 26 Fed. 590, holding grant to railroad is a present grant and paramount to ditch location; *Denver, etc., R. R. v. Hancum*, 19 Colo. 166, 34 Pac. 839, holding construction of road without filing map entitles road to land grant; *Kansas City, etc., R. R. v. Kansas City, etc., R. R.*, 120 Mo. 69, 31 S. W. 453, holding survey and location is part of construction of road; *Jackson v. Dines*, 13 Colo. 95, 96, 21 Pac. 919, 920, holding grants to railroads have the effect of law and a deed.

Distinguished in *Radke v. Winona, etc., R. R.*, 39 Minn. 265, 39 N. W. 625, *Spokane Falls R. R. v. Ziegler*, 64 Fed. 961, 29 U. S. App. 69, *Sioux City v. Chicago, etc., R. R.*, 27 Fed. 776, *McKeoin v. Northern Pac. R. R.*, 45 Fed. 465, and *Chicago, etc., R. R. v. Van Cleave*, 52 Kan. 673, 33 Pac. 475.

Railroads.— Denver and Rio Grande railway, acting under act of 1877 extending its license to build railroad through the Grande cañon, must be presumed to have consented to act of 1875, declaring that any other railway might have right of way through such cañon, p. 480.

Cited and above doctrine affirmed in *Denver, etc., R. R. v. Denver, etc., R. R.*, 5 McCrary, 444, 17 Fed. 867, holding where impracticable to put down more than one road, equity should establish the conditions upon which second road should be allowed to use cañon; *Montana, etc., R. R. v. Helena, etc., R. R.*, 6 Mont. 424, 12 Pac. 920 (see dissenting opinion, 6 Mont. 432, 437), holding necessity is a question for decision in the District Court in which cañon is located; *Joy v. St. Louis*, 138 U. S. 50, 34 L. 859, 11 S. Ct. 258, holding agreement to use right of way binding upon subsequent purchasers; *Indianapolis Street Ry. v. Citizens' Street Ry. Co.*, 127 Ind. 392, 24 N. E. 1061, 8 L. R. A. 548, holding street railway company first occupying street has exclusive right; *Africa v. Alderman*, 70 Fed. 736, 741, holding where street does not permit of two tracks, elder company entitled to priority; *Union, etc., R. R. Co. v. Chicago, etc.,*

R. R., 163 U. S. 602, 41 L. 278, 16 S. Ct. 1188, holding contract by which railroad permits other road to use track not ultra vires; Chicago, etc., R. R. v. Union, etc., R. R., 74 Fed. 992, Schmidt v. Louisville, etc., R. R., 101 Ky. 482, 41 S. W. 1027, 38 L. R. A. 822, both holding specific performance will be granted to carry out track contracts. Distinguished in Hamilton v. Spokane, etc., R. R., 2 Idaho, 907, 28 Pac. 411, United States v. Denver R. R., 150 U. S. 10, 37 L. 978, 14 S. Ct. 14, San Francisco Ry. v. Gould, 122 Cal. 605, 55 Pac. 413, and United States v. Denver, etc., R. R., 31 Fed. 888. Cited in dissenting opinion in Omnibus R. R. Co. v. Baldwin, 57 Cal. 179.

Miscellaneous.—Ex parte Railway Co., 101 U. S. 711, 25 L. 872.

99 U. S. 482-491, 25 L. 375, MONTGOMERY v. SAMARY.

Mortgages.—In Louisiana, where mortgaged premises were sold by sheriff on foreclosure and upon monition duly published, the sale was confirmed and homologated by the court, held, that the sale became res adjudicata, conclusive of rights of the parties, p. 491.

Cited in Roberts v. Zansler, 34 La. Ann. 209, affirming doctrine of principal case. See note to 29 Am. St. Rep. 491.

99 U. S. 491-492, 25 L. 292, UNITED STATES v. SIOUX CITY R. R. CO.

Railroads.—In ascertaining net earnings, for purpose of setting aside the 5 per cent. payable to the government therefrom, by a government-aided railroad, held, that interest paid on first mortgage bonds should first be deducted from income; hence, where net earnings all absorbed by such bonds, government cannot claim 5 per cent., p. 492.

Cited in Hazard v. Dillon, 34 Fed. 491.

99 U. S. 493-496, 25 L. 481, CLARK v. UNITED STATES.

United States.—On May 1, 1862, New Orleans ceased to be rebel territory, and action to recover cotton seized by government must be brought within six years from said date, under act of 1863, barring claim in Court of Claims after six years, p. 495.

Cited in Hammond v Johnston, 93 Mo. 221, 6 S. W. 92, holding statute of limitations was suspended as to residents of Tennessee from April 19, 1861, to April 2, 1866.

99 U. S. 496-498, 25 L. 330, SHERRY v. McKINLEY.

Taxation.—Sale under acts of Congress, 1862, 1863, taxing certain insurrectionary districts, upheld, the commissioner's certificate of sale, in due form, being prima facie evidence of regularity, p. 496.

Cited in *Edwards v. Sims*, 40 Kan. 242, 19 Pac. 714, holding recitals in tax deed must be given construction which words import; *Cooper v. Freeman Lumber Co.*, 61 Ark. 48, 32 S. W. 496, holding legislature may prescribe time and manner of listing property and of levying and assessing taxes; *Springer v. United States*, 102 U. S. 594, 26 L. 256, holding Congress may make warrant against public debtor conclusive evidence of facts recited; *In re Douglas*, 41 La. Ann. 768, 6 So. 676, holding legislature may validate tax proceedings which it might have authorized; *Henderson v. Ellerman*, 47 La. Ann. 314, 16 So. 824, holding certificate of commissioner evidence of compliance with preliminary requisites. See note to 4 Am. St. Rep. 188.

99 U. S. 499-504, 25 L. 330, *WILSON v. SALAMANCA*.

Municipal corporations.—It is no defense against bona fide holder of municipal bonds that they were issued in excess of the proportion allowed by law to county, p. 504.

Cited in *Coler v. County Commrs.*, 6 N. Mex. 131, 136, 27 Pac. 629, 631, holding county is estopped as against recitals to show that statutory amount was exceeded; *Sherman County v. Simmons*, 109 U. S. 737, 27 L. 1094, 3 S. Ct. 504, holding bona fide holder not bound to go behind the law and recitals to inquire amount of county indebtedness; *Gunnison County v. Rollins*, 173 U. S. 271, 19 S. Ct. 396, holding recitals that constitutional limit had not been exceeded, binding on county; *State v. Commissioners*, 39 Kan. 659, 7 Am. St. Rep. 570, 19 Pac. 926, holding county estopped from showing irregularities in election; *Dudley v. Lake County*, 80 Fed. 677, 49 U. S. App. 346, holding, in absence of public record, county estopped from showing outside indebtedness making bonds void; *Dallas County v. McKenzie*, 110 U. S. 687, 28 L. 286, 4 S. Ct. 184, holding recitals in bonds as to manner of issuance are binding upon the county; *Chaffee County v. Potter*, 142 U. S. 364, 35 L. 1043, 12 S. Ct. 219, holding recital that constitutional limit had not been exceeded binding upon the county; *Nolan County v. State*, 83 Tex. 195, 17 S. W. 827, holding, where county has authority, recital in bonds binding.

Distinguished in *Francis v. Howard County*, 50 Fed. 57, and *Kelley v. Millan*, 21 Fed. 861. See note, 64 Am. Dec. 437.

Municipal corporations.—Right to receive county subscription to railroad stock, and to receive county bonds in payment therefor, having been perfected by favorable county vote before consolidation of aided railroad with another, passes to the consolidated company, p. 504.

Cited in *Livingston County v. Portsmouth Bank*, 128 U. S. 119, 122, 126, 32 L. 365, 366, 367, 9 S. Ct. 24, 25, 27, *County of Tipton v. Locomotive Works*, 103 U. S. 533, 26 L. 344, *New Buffalo v. Iron*

Company, 105 U. S. 76, 26 L. 1025, and *Menasha v. Hazard*, 102 U. S. 95, 26 L. 85, all holding bonds voted in favor of one company may be issued to consolidated company. See note to 98 Am. Dec. 671.

99 U. S. 505-508, 25 L. 354, *GRIGSBY v. PURCELL*.

Courts—Appeal will be dismissed by Supreme Court, unless transcript is filed and case docketed during the term to which made returnable, and this may be done on the court's motion, p. 506.

Cited in *Killian v. Clark*, 111 U. S. 784, 28 L. 599, 4 S. Ct. 700, *Fayolle v. Texas*, etc., R. R., 124 U. S. 523, 31 L. 534, 8 S. Ct. 589, *The Tornado*, 109 U. S. 117, 27 L. 877, 3 S. Ct. 83, and *Wood Harvester Co. v. Heidel*, 4 N. Dak. 432, 61 N. W. 157, all holding appeal will be dismissed for failure to file transcript during the term; *The S. S. Osborn*, 105 U. S. 451, 26 L. 1066, holding cross-appellant must enter appearance and give security, although his adversary has docketed case against him; *Hilton v. Dickinson*, 108 U. S. 168, 27 L. 689, 2 S. Ct. 426, holding cross-appeals must be prosecuted like other appeals; *Morrison v. Kuhn*, 80 Fed. 741, 52 U. S. App. 180, holding cross-appeals not diligently prosecuted may be dismissed; *Credit Co. v. Ark. Cent. R. R. Co.*, 128 U. S. 259, 32 L. 449, 9 S. Ct. 107, holding appeal must be perfected during term, and time cannot be arrested by *nunc pro tunc* order; *Radford v. Folsom*, 123 U. S. 727, 31 L. 293, 8 S. Ct. 335, holding acceptance of bond after term does not operate as new appeal; *Farmers*, etc., *Trust Co. v. Chicago*, etc., R. R., 73 Fed. 317, 34 U. S. App. 626, holding citation may be waived or substituted by proof of equivalent notice; *Hewitt v. Filbert*, 116 U. S. 145, 29 L. 582, 6 S. Ct. 320, holding citation is necessary to give appellate court jurisdiction; *Green v. Elbert*, 137 U. S. 622, 34 L. 795, 11 S. Ct. 190, holding motion to dismiss may be made before hearing or by the court *sua sponte*; *Bucki v. Atlantic Lumber Co.*, 63 Fed. 765, holding appeal not prosecuted with diligence will be dismissed by court of its own motion; *State v. Demarest*, 110 U. S. 401, 28 L. 191, 4 S. Ct. 25, holding, unless transcript is filed within term, court will, of its own motion, dismiss the appeal; *Norton v. Brownsville*, 129 U. S. 506, 32 L. 785, 9 S. Ct. 331, and *Green v. Elbert*, 137 U. S. 621, 34 L. 795, 11 S. Ct. 190, both holding, if motion to dismiss not made, transcript may be filed at succeeding term, after which appeal is *functus officio*.

99 U. S. 508, 25 L. 355, *THOMAS v. PURCELL*.

Adjudged in conformity with *Grigsby v. Purcell*, *supra*.

Not cited.

99 U. S. 508-512, 25 L. 482, *UNITED STATES v. GERMANIE*.

Pensions.—Commissioner of pensions not being a head of department, surgeon appointed by him is not government officer within

meaning of act of 1825, punishing Federal officers guilty of extortion, p. 509.

Cited in *United States v. Mullan*, 71 Fed. 689, holding member of Indian police not an officer; *Auffmordt v. Hedden*, 137 U. S. 327, 34 L. 630, 11 S. Ct. 108, holding merchant appraiser not an officer; *United States v. Smith*, 124 U. S. 532, 31 L. 536, 8 S. Ct. 597, holding clerk of collector of customs not an officer of United States; *United States v. Mouat*, 124 U. S. 307, 31 L. 464, 8 S. Ct. 506, holding paymaster's clerk appointed by paymaster not an officer; *State v. Broome*, 61 N. J. L. 116, 38 Atl. 842, holding architect employed for construction of public building not an officer; *Moll v. Sbisa*, 51 La. Ann. 292, 25 So. 142, holding clerk of court an officer; *People v. Duane*, 121 N. Y. 375, 24 N. E. 847, holding retired army officer not an officer of the United States; *United States v. Perkins*, 116 U. S. 484, 29 L. 700, 6 S. Ct. 450, holding cadet is an officer of the United States; *United States v. McCrory*, 91 Fed. 296, 63 U. S. App. 362, holding letter carriers are officers of the United States; *Brown v. Smith*, 88 Fed. 565, and *Thompson v. Poole*, 70 Fed. 727, both holding receivers of national bank appointed by comptroller are officers; *Lewis v. Jersey City*, 51 N. J. L. 242, 17 Atl. 112, holding bridge-tender an officer. See valuable note in 63 Am. St. Rep. 189, 190.

Distinguished in *United States v. Saunders*, 120 U. S. 128, 30 L. 595, 7 S. Ct. 468, *United States v. Van Leuven*, 62 Fed. 64, 65, and *Rogers v. United States*, 32 Fed. 801.

99 U. S. 513-539, 25 L. 460, JACKSON v. LUDELING.

Railroads.—Purchasers of railroad at foreclosure, guilty of fraud, are nevertheless entitled to compensation for reconstructing, repairing and putting road in working order, p. 528.

Cited in *Wood v. Nichols*, 33 La. Ann. 751, holding administrator purchasing property, the sale being annulled, is entitled to reimbursement for constructions and improvements. Cited, *arguendo*, in *Chadwick v. Old Colony R. R. Co.*, 171 Mass. 243, 50 N. E. 630, *State v. Railroad Co.*, 34 La. Ann. 949, 950, and *Doe v. Rae*, 31 Fed. 99. See also *New Orleans, etc., R. R. v. Delamore*, 114 U. S. 509, 29 L. 247, 5 S. Ct. 1013.

Distinguished in *Loos v. Wilkinson*, 113 N. Y. 495, 10 Am. St. Rep. 500, 21 N. E. 394, 4 L. R. A. 357, and *n.*, and *Dean v. Feeley*, 69 Ga. 821.

99 U. S. 539-546, 25 L. 355, YULEE v. VOSE.

Removal of causes.—Where cause has been determined as to resident defendants and they are out of the case, non-resident defendant may procure removal, p. 544.

Cited, *Coakerley v. Great Northern R. R. Co.*, 70 Fed. 279, filing amended complaint, leaving out residents, enables non-resident to

remove; *Tremper v. Schwabacher*, 84 Fed. 416, holding defendant may procure removal where other defendants have not been served and have not appeared.

Removal of causes.—State court is not bound to surrender its jurisdiction unless record shows case for removal, p. 545.

Cited in *Bixby v. Blair*, 56 Iowa, 420, 9 N. W. 320, holding affidavits accompanying petition should be considered part thereof; *National Bank v. Dodge*, 42 N. J. L. 318, 320, holding determination of Federal court is paramount, and if in favor of removal all proceedings after filing petition are coram non judge; *Stone v. South Carolina*, 117 U. S. 432, 29 L. 962, 6 S. Ct. 799, holding State court not bound to surrender jurisdiction unless petition shows right; *Monroe v. Williamson*, 81 Fed. 984, holding presentation of proper petition and bond jurisdictional prerequisites; *Brown v. Murray*, 43 Fed. 615, holding where petition was not called to attention of court, it not being in session, this does not affect the right; *Hickman v. Missouri Co.*, 151 Mo. 654, 52 S. W. 353, holding suit instituted by State cannot be removed on ground of diverse citizenship.

Removal of causes.—Party has the right of removal at any time before trial, p. 546.

Cited in *Brayley v. Hedges*, 53 Iowa, 584, 5 N. W. 749, *Baltimore & Ohio R. R. Co. v. Bates*, 119 U. S. 467, 30 L. 438, 7 S. Ct. 286, and *Broadhead v. Shoemaker*, 44 Fed. 523, 11 L. R. A. 570, and n., all holding removal may be had after new trial granted; *Kalamazoo Wagon Co. v. Snavely*, 34 Fed. 824, holding removal may be had where defendant procures dismissal to be set aside and cause set for trial; *McLean v. St. Paul, etc., Ry.*, 16 Blatchf. 317, F. C. 8,892, holding removal may be had by averring diverse residence without alleging it existed at commencement of action; *Miller v. Tobin*, 9 Sawy. 412, 18 Fed. 616, holding removal may be had after order overruling demurrer; *Removal Cases*, 100 U. S. 474, 25 L. 600, holding, in order to bar removal, trial must be in actual progress.

Distinguished in *Rosenthal v. Coates*, 148 U. S. 147, 37 L. 400, 13 S. Ct. 577, and *Brooks v. Clark*, 119 U. S. 511, 512, 30 L. 485, 7 S. Ct. 304, where removal was under act of 1875.

99 U. S. 547-560, 25 L. 357, *HARTELL v. TILGHMAN*.

Courts.—Federal courts have no jurisdiction, in absence of diverse citizenship, of causes of action arising out of contracts for the use of patent, where defendants admit its validity, p. 555.

Cited in *McCarthy Hall Co. v. Glænzer*, 24 Blatchf. 269, 270, 30 Fed. 387, *Adams v. Meyrose*, 2 McCrary, 362, 7 Fed. 209, *Ingalls v. Tice*, 14 Fed. 352, *Jencks v. Langdon Mills*, 27 Fed. 624, *Willis v. McCullen*, 29 Fed. 641, *Williams v. Star Sand Co.*, 35 Fed. 370, *Densmore v. Three Rivers Mfg. Co.*, 38 Fed. 749, 750, *Standard Den-*

tal Mfg. Co. v. National Tooth Co., 95 Fed. 294, and Dale Tile Co. v. Hyatt, 125 U. S. 52, 53, 31 L. 686, 8 S. Ct. 758, 759, all holding Federal courts have no jurisdiction of controversies growing out of license contracts; Silver v. Holt, 84 Fed. 811, holding suit for accounting for use of copyright presents no Federal question; Fetter v. Newhall, 21 Blatchf. 449, 17 Fed. 844, holding, where party uses one claim and infringes another, Federal courts have jurisdiction; Seibert Co. v. Detroit Co., 34 Fed. 221, holding where citizenship is diverse, Federal court has jurisdiction to annul license contract; McKay v. Jackman, 17 Fed. 644, holding in suit to recover royalties where citizenship is diverse, successful party entitled to costs; United States v. Palmer, 128 U. S. 269, 32 L. 444, 9 S. Ct. 106, holding Court of Claims has jurisdiction of demands of patentees against United States; Holt v. Indiana Mfg. Co., 80 Fed. 3, 46 U. S. App. 717, holding suit to restrain collection of tax on patent rights does not arise under patent laws, and must be taken direct from Circuit to Supreme Court; Waterman v. Shipman, 130 N. Y. 307, 29 N. E. 113, holding action to determine existence of license, involves no Federal question; Pliable Shoe Co. v. Bryant, 81 Fed. 522, and Wren v. Annin, 34 Fed. 435, both holding suit to compel assignment of patent involves no Federal question; Montgomery Palace Stock-Car Co. v. Street-Car Line, 43 Fed. 331, holding Federal courts have no jurisdiction to determine question of assignment; Prime v. Brandon Mfg. Co., 16 Blatchf. 467, F. C. 11,421, holding an agreement to transfer an extension involves no Federal question; Siebert Co. v. Detroit Co., 34 Fed. 220, holding Federal courts have no jurisdiction of suit to collect royalties from licensee; Albright v. Teas, 106 U. S. 619, 620, 27 L. 298, 1 S. Ct. 555, 556, affirming 13 Fed. 412, holding suit for money due for transfer of patent involves no Federal question; Manhattan R. R. Co. v. New York, 18 Fed. 199, holding, unless Federal question involved, case does not arise under Constitution or laws of United States; White v. Lee, 3 Fed. 223, 224, holding breach of covenant does not, per se, work forfeiture of patent license; Winter v. Swinburne, 10 Biss. 463, 8 Fed. 55, holding Federal courts will not aid execution of admiralty money decree by creditor's bill; Havanna, etc., Drill Co. v. Ashurst, 148 Ill. 139, 35 N. E. 880, holding State courts have jurisdiction of contracts for use of patents; Mayer v. Hardy, 127 N. Y. 132, 27 N. E. 838, holding State courts have jurisdiction to construe license agreement; Hubbard v. Allen, 123 Pa. St. 208, 16 Atl. 774, holding State court has exclusive jurisdiction to enforce payment of royalties; Fuller, etc., Mfg. Co. v. Bartlett, 68 Wis. 79, 60 Am. Rep. 839, 31 N. W. 749, holding State court has jurisdiction to compel assignment of patents; Hyatt v. Ingalls, 124 N. Y. 102, 104, 26 N. E. 287, 288, holding State court has jurisdiction of action to forfeit license and recover royalties; Pentlarge v. Beaston, 18 Blatchf. 42, 44, 1 Fed. 865, 867, holding, where it is alleged article

is covered by foreign patent, State court has jurisdiction to set aside agreement. Cited, *arguendo*, in *Adamas v. Meyrose*, 10 Fed. 673, *Vail v. Hammond*, 60 Conn. 384, 25 Am. St. Rep. 336, 22 Atl. 957, *Curran v. Craig*, 22 Fed. 102, *Terry v. Schreveport*, 28 Fed. 211, 213, and *Atkins v. Parke*, 61 Fed. 957, 22 U. S. App. 404.

Distinguished in *Continental Co. v. Clark*, 100 N. Y. 369, 3 N. E. 336, *Lord v. Cannon*, 75 Ga. 307, *Pacific Contracting Co. v. Union Paving Co.*, 80 Fed. 738, *Heaton Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 291, 47 U. S. App. 146, 35 L. R. A. 780, *Dunham v. Bent*, 72 Fed. 61, *Wood Co. v. Harvester Co.*, 61 Fed. 258, *James v. Berger*, 58 Fed. 1007, *American Box Co. v. Crossman*, 57 Fed. 1026, *American Button Co. v. Empire Nail Co.*, 47 Fed. 742, *Washburn Mfg. Co. v. Cincinnati Barbed-Wire Co.*, 42 Fed. 678, *Hammacher v. Wilson*, 26 Fed. 240, *Seibert v. Manning*, 32 Fed. 626, 627, *Lilienthal v. Washburn*, 4 Woods, 68, 8 Fed. 709, *Smith v. Standard Laundry Machinery Co.*, 20 Blatchf. 362, 19 Fed. 826, *Campbell v. James*, 18 Blatchf. 98, 2 Fed. 345, *Pratt v. Paris Gas-Light Co.*, 168 U. S. 260, 42 L. 460, 18 S. Ct. 64, and *White v. Rankin*, 144 U. S. 636, 638, 639, 36 L. 572, 573, 12 S. Ct. 771, 772.

99 U. S. 560-566, 25 L. 484, *COLBY v. REED*.

Contracts.— Unless contract so provides, demand of performance need not be in writing, p. 564.

Contracts.— Where, on breach of contract, amount due plaintiff is clear, excessive demand will not defeat recovery, p. 564.

Contracts.— In action for breach of contract to deliver corporate stock, court will not compel plaintiff to accept such stock tendered in open court, in mitigation for damages, p. 566.

Cited in *Owen v. Weston*, 63 N. H. 602, 56 Am. Rep. 550, 4 Atl. 802, and *Twill v. Lawrence*, 59 N. H. 501, both holding, in actions of replevin or trover, defendant may be allowed to surrender all, or a part of the property in mitigation of damages. Cited, *arguendo*, in *Fletcher v. Chamberlain*, 61 N. H. 495, and *Wiswall v. Harriman*, 62 N. H. 672.

99 U. S. 567-573, 25 L. 378, *McBURNEY v. CARSON*.

Statutes.— Remedial statute of 1872, providing for constructive service in Circuit Court, in suits to establish a lien, where defendant not within the district, held applicable to pending causes, p. 569.

Trial.— Objection that defendants to an amended bill are necessary parties to supplemental bill, must be made at trial, p. 570.

Cited in *McArthur v. Allen*, 3 Fed. 321, holding executors not necessary parties to will contest.

Trustee.—Where trustee accepts Confederate money in payment of mortgage, beneficiary may repudiate and enforce the lien of the mortgage, p. 572.

Cited in *Taylor v. Dugger*, 66 Ala. 450, and *Ople v. Castleman*, 32 Fed. 514, both holding payment of mortgage to trustee in Confederate money not binding on non-consenting heirs. Cited, *arguendo*, in *Hyatt v. McBurney*, 18 S. C. 207, *Carson v. Dunham*, 149 Mass. 55, 14 Am. St. Rep. 399, 20 N. E. 313, 3 L. R. A. 205, and *n.*, *Carson v. Dunham*, 121 U. S. 424, 429, 30 L. 993, 995, 7 S. Ct. 1031, 1033, and *Carson v. Hyatt*, 118 U. S. 281, 30 L. 168, 6 S. Ct. 1051. See elaborate note in 40 Am. Dec. 510.

Executors and administrators.—Where will creates a trust, but names no trustee, executor must act, and his sureties are liable for his default, as well in matters of the trust as of administration, p. 572.

99 U. S. 573-577, 25 L. 292, *ELLIOTT v. RAILROAD CO.*

Penalties are never extended by implication, and, unless expressly imposed, cannot be enforced, p. 576.

Cited in *Rogers v. Kansas City, etc., R. R.*, 48 Kan. 474, 29 Pac. 762, holding penalty does not attach to taxes admitted to be due and tendered.

Internal revenue.—Penalty due from corporation under act of 1864, for failure to make return or pay tax, was not intended to be increased by act of 1870, p. 577.

99 U. S. 578-582, 25 L. 420, *PENCE v. LANGDON.*

Trial.—Direction to find can be properly given to the jury only when the state of the evidence leaves no room for doubt, p. 580.

Affirmed in *Finney v. Northern Pac. R. R.*, 3 Dak. 283, 16 N. W. 505.

Contracts.—Notice of rescission given on Sunday is not void, p. 580.

Sales.—Vendee of stock left on deposit with him, is not bound to receive and tender it back before exercising right of rescission for fraud, p. 580.

Appeal and error.—Where finding of jury is proper, failure of court to construe written evidence is not reversible error, p. 580.

Cited in *Minneapolis, etc., R. R. v. Columbus, etc., Mill Co.*, 119 U. S. 152, 30 L. 377, 7 S. Ct. 170, holding question of law submitted to jury not ground of exception if they decide it right.

Contracts.—Party seeking rescission must act promptly, p. 581.

Cited in *Bemett v. La Dow*, 66 Fed. 195, holding continuing to treat contract as existing after discovery of fraud, constitutes affirmation; *Hoyt v. Latham*, 143 U. S. 567, 36 L. 265, 12 S. Ct. 573, holding beneficiary who waits to see if sale will prove profitable is guilty of laches; *Mudsill Mining Co. v. Watrous*, 61 Fed. 186, 22 U. S. App. 12, holding erection of mill to test value of ore of salted mine, does not operate as a waiver; *Oliver v. Lansing*, 48 Neb. 357, 67 N. W. 199, holding publication that plaintiff had done wrong in commencing suit, does not prevent rescission; *Fitzgerald v. Construction Co.*, 44 Neb. 494, 62 N. W. 910, holding wrongdoer cannot impose extreme diligence as condition of rescission; *Engleman v. Taylor*, — W. Va. —, 33 S. E. 940, holding although means of knowledge open, party induced to rely on representations may rescind; *Kearney, etc., Elevator Co. v. Union Pac. Ry.*, 97 Iowa, 725, 59 Am. St. Rep. 439, 66 N. W. 1061, holding election to rescind, defeats right of stoppage in transitu; *Gay v. Osborn*, 102 Wis. 646, 78 N. W. 1080, holding ratification irrevocably fixes rights of parties; *Ankeny v. Clark*, 1 Wash. 557, 20 Pac. 587, holding where vendor gives bond for deed, he is entitled to bond upon rescission; *Loaiza v. Superior Court*, 85 Cal. 30, 20 Am. St. Rep. 208, 24 Pac. 711, 9 L. R. A. 380, holding party may ratify and sue for damages, or may rescind. See notes in 74 Am. Dec. 661, 662.

Contracts.—Where defense to suit for rescission for fraud, alleges failure to rescind promptly, burden of proving knowledge and time of discovery of fraud is on defendant, p. 582.

Cited and above doctrine affirmed in *Guild v. Parker*, 43 N. J. L. 437, *Mudsill Mining Co. v. Watrous*, 61 Fed. 188, 22 U. S. App. 12, and *Murray v. Heinze*, 17 Mont. 368, 42 Pac. 1063, all holding waiver is a relinquishment of a known right.

99 U. S. 582-592, 25 L. 331, UNITED STATES v. COUNTY OF MACON.

Municipal corporations.—Every holder of bonds is chargeable with notice of statute under which bond is issued; hence, if municipality has no power to levy tax to pay them, holder cannot require it, p. 590.

Cited in *Quincy v. Jackson*, 113 U. S. 338, 28 L. 1003, 5 S. Ct. 546, *Harshmann v. Knox County*, 122 U. S. 316, 30 L. 1154, 7 S. Ct. 1175, *Scotland County Court v. Hill*, 140 U. S. 46, 35 L. 353, 11 S. Ct. 699, and *United States v. School District of Monona*, 20 Fed. 295, all holding authorization to incur indebtedness imports authority to levy taxes to pay therefor; *Commissioners v. Call*, 123 N. C. 311, 31 S. E. 482, 44 L. R. A. 253, holding purchaser of bonds bound by constitutional provisions; *Forbes v. County Commrs.*, 23 Colo. 349, 47 Pac. 390, holding mode provided by legislature for payment of county warrants is exclusive; *United States v. Town of Cicero*,

50 Fed. 149, 9 U. S. App. 10, holding bondholders bound to know the provision made for payment; *Beaulieu v. City of Pleasant Hill*, 4 McCrary, 557, 14 Fed. 225, holding purchasers of bonds take them under limitation of taxing power; *United States v. Town of Cicero*, 41 Fed. 86, holding, where special power of taxation is given, there is no power by implication; *Byrne v. Parish of East Carroll*, 45 La. Ann. 395, 12 So. 522, holding condition that contractor should be paid out of fund if voted favorably, is binding; *United States v. Key West*, 78 Fed. 91, 41 U. S. App. 726, holding, if authority creating the debt limits the tax, bondholders are bound; *Raton Water Works v. Town of Raton*, — N. Mex. —, 49 Pac. 905, holding town may not exceed special tax authorized to build water works; *Ralls County Court v. United States*, 105 U. S. 736, 738, 26 L. 1222, holding law confining taxation to fixed per centum, inapplicable to extraordinary debt. Cited, *arguendo*, in *Knox County Court v. United States*, 109 U. S. 230, 27 L. 915, 3 S. Ct. 132, *Knox County v. National Bank*, 147 U. S. 94, 37 L. 94, 13 S. Ct. 268, *United States v. Knox County*, 51 Fed. 881, 882, and *Roberts v. Denver, etc., R. R.*, 8 Colo. App. 510, 46 Pac. 882, affirmed on authority of principal case, in *United States v. Macon County*, 144 U. S. 568, 36 L. 544, 12 S. Ct. 921. See note in 85 Am. Dec. 545.

Distinguished in *State v. City*, 36 La. Ann. 689, and *Kimball v. Board of Commissioners*, 21 Fed. 147, 148.

Municipal corporations.—Mandamus will not lie to compel municipal corporation to levy tax to pay its bonds, where municipality is without power to do so, p. 591.

Cited in *Railroad Co. v. Barker*, 6 Wyo. 399, 71 Am. St. Rep. 947, 45 Pac. 503, holding county cannot be compelled to levy taxes in excess of law, to pay bonds; *Hammond v. Place*, 116 Mich. 631, 74 N. W. 1003, holding where power of county is limited, levy beyond limitation will not be compelled; *State v. Trannell*, 106 Mo. 517, 17 S. W. 503, holding authorized tax is the only fund out of which bonds may be paid; *Portland Bank v. Montesano*, 14 Wash. 573, 45 Pac. 159, holding where corporations have levied to extent authorized, mandamus will not lie; *United States v. Macon Co. Court*, 35 Fed. 483, holding where law provides special tax, mandamus will not lie to compel larger levy; *Stryker v. Board of Commissioners*, 77 Fed. 574, 40 U. S. App. 583, holding mandamus will not lie to compel corporation to levy tax in excess of law; *Clough v. Curtis*, 2 Idaho, 494, 22 Pac. 10, holding mandamus will not lie to compel secretary of territory to expunge record.

Judgment creditor against county on its bonds, has no right to a levy of taxes which he did not have before judgment; it gives creditor no new rights in respect to means of payment, p. 591.

Cited in *Sheppard v. Tulare Irr. District*, 94 Fed. 5, holding judgment upon bonds does not enlarge fund out of which they are

payable; *Smith v. Broderick*, 107 Cal. 651, 653, 48 Am. St. Rep. 172, 174, 40 Pac. 1036, 1037, holding judgment upon claim payable out of revenue of one year, will not be enforced against revenue of another; *Clay County v. McAleer*, 115 U. S. 618, 29 L. 483, 6 S. Ct. 200, holding judgment creditor cannot compel levy by mandamus where county has exhausted its right.

Distinguished in *Tague v. Taxing District*, 36 Fed. 152.

99 U. S. 592, 25 L. 333, *COUNTY OF MACON v. HUIDEKOPER*.

Adjudged in conformity with *United States v. County Court of Macon County*, supra.

Not cited.

99 U. S. 592-593, 25 L. 293, *TERHUNE v. PHILLIPS*.

Evidence—Patents.—Supreme Court will take judicial notice that a thing patented was in general use before patent was issued, p. 593.

Cited in *King v. Gallun*, 109 U. S. 101, 102, 27 L. 871, 3 S. Ct. 86, 87, holding courts will take judicial notice of matters of common knowledge bearing on inventions; *Black Diamond Co. v. Excelsior Co.*, 156 U. S. 616, 39 L. 555, 15 S. Ct. 484, holding notice will be taken of devices in common use for purpose of determining patentability. In the following cases, court took judicial notice that articles were not patentable: *Office Specialty Mfg. Co. v. Fenton, etc., Mfg. Co.*, 174 U. S. 497, 19 S. Ct. 643, handholds for grasping books; *Quirolo v. Ardito*, 17 Blatchf. 401, 1 Fed. 610, stand for stereoscope; *McCloskey v. DuBois*, 19 Blatchf. 207, 8 Fed. 711, traps used for drainage; *Reed v. Lawrence*, 29 Fed. 919, spring tooth harrows; *Legowski Pigeon Co. v. American Clay-Bird Co.*, 34 Fed. 332, spring latch; *Phillips v. Detroit*, 111 U. S. 606, 28 L. 533, 4 S. Ct. 502, construction of pavement. Cited in *West v. Rae*, 33 Fed. 47, *Root v. Sontag*, 47 Fed. 310, and *Heaton Co. v. Schlochtmeier*, 69 Fed. 595, all holding where court from its common knowledge, and without reference to pleadings, can say patent is void, a demurrer will be sustained; *Wasson v. National Bank*, 107 Ind. 220, 8 N. E. 103, holding courts will take judicial notice of what constitutes money capital of State; *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. 571, holding court will take judicial notice that cider is an alcoholic beverage. Cited, *arguendo*, in *Eagleton Mfg. Co. v. West Bradley Mfg. Co.*, 18 Blatchf. 225, 2 Fed. 781. See 89 Am. Dec. 663, 694, note.

Distinguished in *Henderson v. Tompkins*, 60 Fed. 761.

Patents.—Substitution of metal for wood in showcases is destitute of patentable invention, p. 593.

Cited in *Potts v. Creager*, 155 U. S. 608, 39 L. 279, 15 S. Ct. 199, affirming 44 Fed. 683, holding substitution of steel for glass scrapers

is not invention; *Florsheim v. Schilling*, 137 U. S. 76, 34 L. 579, 11 S. Ct. 24, affirming 26 Fed. 260, holding substitution not involving change of method or novelty, not patentable; *National Sheet, etc., Co. v. Garwood*, 35 Fed. 660, holding substitution of material in the manufacture of tiles not patentable.

99 U. S. 593, 25 L. 399, *ALVORD v. UNITED STATES*.

Courts.— Counsel entering appearance under rule 9 of Supreme Court, will be held responsible for all that entry implies, until relieved by substitution of attorneys or otherwise, p. 593.

Courts.— Motion in Supreme Court to reinstate case, dismissed under rule 16, because not ready when reached, denied, p. 593.

Not cited.

99 U. S. 594-606, 25 L. 399, *WHISKEY CASES*.

District attorney has no right to agree to give immunity to accomplice testifying against one tried for offense against United States, p. 604.

Cited in *Whitney v. State*, 53 Neb. 305, 73 N. W. 702, holding agreement with prosecuting attorney, without consent of court, affords defendant no protection; *State v. Judge*, 48 La. Ann. 128, 18 So. 951, 35 L. R. A. 717, and n., holding district attorney may not enter "nolle" after conviction. See valuable notes in 40 Am. St. Rep. 768, 769, 774, and 31 Am. Rep. 522.

Distinguished in *Camron v. State*, 32 Tex. Cr. 182, 40 Am. St. Rep. 766, 22 S. W. 682, *Ex parte Greenhow*, — Tex. Cr. —, 53 S. W. 1026.

Pardon.— Fact that accomplice has testified fully and fairly in accordance with contract with district attorney, who has promised immunity from punishment, is not a bar, but he is entitled equitably to a pardon, p. 605.

Cited in *State v. Lyon*, 81 N. C. 602, 31 Am. Rep. 520, holding fact that accomplice testifies, gives him equitable right to pardon, but does not bar prosecution; *Ex parte Irvine*, 74 Fed. 964, holding equitable right to pardon does not do away with constitutional right that no person need be witness against himself; *Long v. State*, 86 Ala. 44, 5 So. 448, holding a witness who testifies without promise is not entitled to equity; *United States v. Simmons*, 7 Fed. 713, holding conspirator who testifies is entitled to immunity, but not entitled to reward of informer; *United States v. Hinz*, 13 Sawy. 276, 278, 35 Fed. 279, 280, holding defendant testifying frankly entitled to "nolle" and court will postpone trial in order that application may be made for pardon; *State v. Moran*, 15 Or. 271, 14 Pac. 424, holding where, under agreement, defendant testified at inquest and then escaped, his testimony may be used against him.

99 U. S. 607, 25 L. 446, *WHITNEY v. COOK*.

Courts.—Under Supreme Court rule 6, where record shows color of right to dismissal, motion to dismiss may be united with motion to affirm, p. 607.

Cited in *Hinckley v. Morton*, 103 U. S. 765, 26 L. 607, *The Alaska*, 130 U. S. 208, 32 L. 925, 9 S. Ct. 463, and *Chanute v. Trader*, 132 U. S. 213, 33 L. 346, 10 S. Ct. 68, all holding same as principal case; *School District v. Hall*, 106 U. S. 429, 27 L. 237, 1 S. Ct. 417, and *Davies v. Corbin*, 113 U. S. 689, 28 L. 1150, 5 S. Ct. 696, both holding unless there is color of right to dismiss, court will not entertain motion to affirm.

Distinguished in *Dzialynski v. Bank*, 23 Fla. 45, 46, 1 So. 339.

99 U. S. 608-610, 25 L. 362, *NATIONAL BANK v. BANK OF COMMERCE*.

Courts.—Where writ of error to judgment entered below, October 5th, was made returnable in Supreme Court on "second Monday in October next," held, that return day might be amended under revised statutes, section 1005, and made returnable two months after an application made at that term, p. 609.

Cited in *Walton v. Marietta Chair Co.*, 157 U. S. 346, 39 L. 727, 15 S. Ct. 628, holding writ of error may be amended by substituting name of administrator; *County Commrs. v. Atlantic, etc., R. R.*, 3 N. Mex. 440, 441, 9 Pac. 523, 524, holding teste in writ mere matter of form, and may be amended and return day added. Approved, *arguendo*, in *Sammis v. Wightman*, 25 Fla. 553, 6 So. 174.

99 U. S. 610-619, 25 L. 421, *STRINGFELLOW v. CAIN*.

Appeal and error.—Where case was tried by jury, appellate jurisdiction of Supreme Court from judgment of territorial court, is by appeal, p. 611.

Followed in *Murphy v. Ramsey*, 114 U. S. 35, 29 L. 54, 5 S. Ct. 758. Cited and relied upon in *Hecht v. Boughton*, 105 U. S. 236, 26 L. 1018, holding whether appeal or writ of error depends upon whether case was tried by court or by jury; *United States v. Hailey*, 118 U. S. 235, 30 L. 173, 6 S. Ct. 1049, holding where suit is at law, review is by writ of error; *Muhlenberg Co. v. Dyer*, 65 Fed. 635, 31 U. S. App. 109, holding mandamus being proceeding at law, review is by writ of error. Cited, *arguendo*, in *Cameron v. United States*, 148 U. S. 305, 37 L. 460, 13 S. Ct. 597.

Courts.—Findings of District Court, adopted by territorial appellate court, held sufficient statement of case, under act of 1874, on appeal to Supreme Court, p. 614.

Cited in *Haws v. Victoria Mining Co.*, 160 U. S. 313, 315, 40 L. 439, 440, 16 S. Ct. 286, 287, *Wasach Mining Co. v. Crescent Mining*

Co., 148 U. S. 297, 37 L. 457, 13 S. Ct. 601, *Cannon v. Pratt*, 99 U. S. 619, 621, 25 L. 447, *Davis v. Fredericks*, 104 U. S. 619, 26 L. 849, and *Bassett v. United States*, 137 U. S. 502, 34 L. 763, 11 S. Ct. 166, all holding bill of exceptions signed by trial judge may be used in Supreme Court of United States; *O'Reilly v. Campbell*, 116 U. S. 420, 29 L. 669, 6 S. Ct. 422, holding where territorial Supreme Court makes no findings, those of District Court may be used; *Eilers v. Boatman*, 111 U. S. 357, 28 L. 455, 4 S. Ct. 432, holding statement of fact as conclusion of law will be treated as statement of fact. Cited in *Mammoth Mining Co. v. Salt Lake Machine Co.*, 151 U. S. 450, 38 L. 230, 14 S. Ct. 385, *Haws v. Victoria Copper Mining Co.*, 160 U. S. 311, 313, 40 L. 438, 439, 16 S. Ct. 285, 286, *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 18, 41 L. 334, 17 S. Ct. 12, *Harrison v. Perea*, 168 U. S. 323, 42 L. 482, 18 S. Ct. 133, *Idaho Land Co. v. Bradbury*, 132 U. S. 515, 33 L. 437, 10 S. Ct. 179, *San Pedro Co. v. United States*, 146 U. S. 131, 36 L. 914, 13 S. Ct. 97, and *Næglin v. De Cordova*, 171 U. S. 640, 19 S. Ct. 36, all holding where findings support the judgment it will be affirmed. Cited, *arguendo*, in *Ogden City v. Armstrong*, 168 U. S. 235, 42 L. 451, 18 S. Ct. 102, *Salina Stock Co. v. Salina Creek Co.*, 163 U. S. 117, 41 L. 93, 16 S. Ct. 1039, *Neslin v. Wells, Fargo & Co.*, 104 U. S. 429, 26 L. 803, and *Gray v. Howe*, 108 U. S. 13, 14, 27 L. 634, 1 S. Ct. 137.

Public lands.—Under act of 1867, establishing trust for benefit of townsite occupants, an occupant's rights might descend, under Utah laws, to his widow and children, but where sold by them to non-resident, their rights were extinguished, p. 617.

Cited in *Missionary Society v. Dalles*, 107 U. S. 346, 27 L. 548, 2 S. Ct. 680, holding person who abandons public land waives all title and interest in it; *Clawson v. Wallace*, 16 Utah, 306, 52 Pac. 10, *Guthrie v. Beamer*, 3 Okl. 662, 41 Pac. 650, *Hagar v. Wikoff*, 2 Okl. 587, 39 Pac. 283, *United States v. Tithing Yard*, 9 Utah, 281, 34 Pac. 58, all holding townsite occupant has such an interest as he may sell and convey; *Lockwitz v. Larson*, 16 Utah, 280, 52 Pac. 281, holding trustee must convey to one who derives title from occupant; *Drake v. Reggel*, 10 Utah, 384, 37 Pac. 584, holding where right exists in a class, its laches, or actions, binds those unborn; *West v. Child*, 8 Utah, 229, 30 Pac. 756, holding interest of widow and children is lost unless possession is retained; *Goldberg v. Kidd*, 5 S. Dak. 180, 58 N. W. 577, holding occupant at time of entry is the real owner; *Cannon v. Pratt*, 99 U. S. 622, 25 L. 448, holding person in possession is entitled to conveyance; *Jones v. Improvement Co.*, 53 Ark. 194, 13 S. W. 1096, holding when patent issues to mayor, equitable title vests in the occupants; *Pueblo v. Budd*, 19 Colo. 592, 36 Pac. 603, holding ceasing to occupy does not affect occupant's right if he retains dominion over prop.

erty. Affirmed, generally, in *Folsom v. Dewey*, 103 U. S. 738, 26 L. 470.

99 U. S. 619-624, 25 L. 446, *CANNON v. PRATT*.

Appeal and error.—Case tried without jury by territorial court must be brought to Supreme Court by appeal, p. 620.

Affirmed in *Cameron v. United States*, 148 U. S. 305, 37 L. 460, 13 S. Ct. 597, and *Næglin v. De Cordoba*, 171 U. S. 640, 19 S. Ct. 36.

Courts.—Findings of District Court, adopted by appellate court of territory, may be used on appeal to Supreme Court, under act of 1874, p. 622.

Cited in *San Pedro Co. v. United States*, 146 U. S. 131, 36 L. 914, 13 S. Ct. 97, and *Idaho Land Co. v. Bradbury*, 132 U. S. 515, 33 L. 437, 10 S. Ct. 179, both holding, on appeal the weight and sufficiency of evidence will not be considered. Cited, *arguendo*, in *Gray v. Howe*, 108 U. S. 13, 27 L. 634, 1 S. Ct. 137.

Public lands.—Under act of 1867, establishing trust for townsite occupants, person in possession of townsite lot is entitled to the conveyance, p. 623.

Cited in *Guthrie v. Beamer*, 3 Okl. 662, 41 Pac. 650, holding occupant has such an interest as he may convey.

Appeal and error.—Error in excluding cumulative testimony is not ground for reversal unless injury is shown, p. 623.

Cited in *United States v. Shapleigh*, 54 Fed. 137, 12 U. S. App. 26, *Sipes v. Seymour*, 76 Fed. 118, 40 U. S. App. 185, and *Lancaster v. Collins*, 115 U. S. 227, 29 L. 375, 6 S. Ct. 35, all holding judgment will not be reversed unless error was prejudicial; *Kingman v. O'Callaghan*, 4 S. Dak. 635, 57 N. W. 914, holding presumption in cases of equity is that improper evidence was disregarded.

99 U. S. 624-628, 25 L. 333, *COMMISSIONERS v. LELLEN*.

Counties — Mandamus.—Where mandamus is awarded against a county in Kansas, the writ may be directed to the board of county commissioners and served upon the clerk; it does not abate if membership of board is changed. In this case peremptory writ was issued against the board, and alternative against its members, p. 627.

Cited in *Wren v. City of Indianapolis*, 96 Ind. 214, holding mandamus against common council is properly brought against it as a body; *Thompson v. United States*, 103 U. S. 484, 26 L. 523, holding mandamus may commence with one set of officers and terminate with another; *Norwalk Light Co. v. Common Council*, 71 Conn.

390, 42 Atl. 85, holding better practice for writ to run against the board; *State v. Judge*, 38 La. Ann. 45, 48, 58 Am. Rep. 159, 161, holding court has jurisdiction to punish members disobeying writ, where it is directed against the board; *Boody v. Watson*, 64 N. H. 193, 9 Atl. 817, holding mandamus issued to selectmen binds their successors; *Brown v. Assessors*, 53 N. J. L. 158, 20 Atl. 966, holding mandamus directed to board, binding on members and successors; *Osborn v. Kammer*, 96 Va. 229, 31 S. E. 20, holding order directing councilmen to make levy is an order directed to the council; *United States v. Lauderdale County*, 10 Fed. 462, holding officer who resigns is bound to obey unless his successor has qualified; *Fox v. Trinidad Water-Works Co.*, 7 Colo. App. 405, 43 Pac. 1053, holding writ cannot be enforced against city treasurer who has turned over his funds to successor; *State v. Warner*, 55 Wis. 287, 13 N. W. 260, holding where there is continuing duty on secretary of State to audit claims, writ will bind his successor; *State v. Supervisors*, 67 Wis. 278, 30 N. W. 362, holding writ may be served by delivering a copy and exhibiting original; *Board of Commissioners v. Young*, 3 Wyo. 687, 29 Pac. 1004, holding suit must be brought in the corporate name established by law; *Knox County v. Harshman*, 133 U. S. 156, 33 L. 588, 10 S. Ct. 258, holding, in suit against county, summons may be served on clerk of county court. Affirmed, generally, in *Leavenworth v. Kinney*, 154 U. S. 642, 25 L. 336, 14 S. Ct. 1198.

Distinguished in *Attorney-General v. Mayor of New Bedford*, 128 Mass. 312, *United States v. Elizabeth*, 24 Fed. 851, *United States v. Labette County*, 2 McCrary, 31, 7 Fed. 323, *Warner Valley Co. v. Smith*, 165 U. S. 31, 33, 41 L. 623, 17 S. Ct. 227, and *United States v. Butterworth*, 169 U. S. 604, 42 L. 874, 18 S. Ct. 442.

99 U. S. 628-635, 25 L. 448, NATIONAL BANK v. CASE.

Corporations.—Where the G. Bank, holding stock of a national bank as pledgee, took over the same, causing a new certificate to be issued to it, in its own name, it became liable as a stockholder, nor could it thereafter evade liability by a colorable transfer under agreement to reconvey, p. 631.

Approved and relied upon in *National Pipe Works v. Oconto Water Co.*, 68 Fed. 1011, *Poole v. West Point Cheese Assn.*, 30 Fed. 518, *State v. Bank of New England*, 70 Minn. 401, 68 Am. St. Rep. 540, 73 N. W. 154, *National Commercial Bank v. McDonnell*, 92 Ala. 392, 9 So. 150, *Bagley v. Tyler*, 43 Mo. App. 203, *Sleeper v. Goodwin*, 67 Wis. 593, 31 N. W. 342, *Aultman's Appeal*, 98 Pa. St. 516, 41 L. 846, 847, 848, 851, 17 S. Ct. 467, 468, 472, and *Pauly v. State Loan & Trust Co.*, 165 U. S. 611, 613, 614, 616, 624, all holding pledgee of stock having legal title is liable as a stockholder; *Baines v. Babcock*, 95 Cal. 593, 29 Am. St. Rep. 164, 27 Pac. 676, holding registered owner of bank stock liable although procured to enable

him to negotiate loan; *Scott v. Latimer*, 89 Fed. 853, 858, 60 U. S. App. 738, 745, holding one who for years has been stockholder in national bank is liable, although his subscription was procured by fraud; *Witters v. Sowles*, 24 Blatchf. 559, 32 Fed. 136, holding in valid sale of national bank stock for taxes does not change status of shareholder; *Bowden v. Johnson*, 107 U. S. 261, 27 L. 390, 2 S. Ct. 254, holding transfer by holder to avoid liability does not affect his status; *Case v. Small*, 4 Woods, 81, 10 Fed. 724, holding a person who purchases stock and has it transferred to a third person in trust is a shareholder; *Davis v. Stevens*, 17 Blatchf. 262, F. C. 3,653, holding person who, to conceal his ownership, takes stock in national bank in name of third person, is a shareholder; *Hobart v. Johnson*, 19 Blatchf. 362, 8 Fed. 495, holding married woman who purchases national bank stock through an agent is a shareholder; *Stuart v. Hayden*, 72 Fed. 405, 36 U. S. App. 462, holding transfer of national bank stock to escape liability, is void; *Foster v. Lincoln*, 79 Fed. 172, 45 U. S. App. 623, holding transfer of national bank stock to a daughter, in order to escape liability, is void; *McKim v. Glenn*, 66 Md. 484, 8 Atl. 132, holding broker who purchases stock for a customer, but who appears as owner, is liable as stockholder; *Hammond v. Strauss*, 53 Md. 16, holding standing on books, and receipt of dividends, unequivocal evidence of being stockholder; *Shipley v. City of Terre Haute*, 74 Ind. 300, holding city subscribing to stock in railroad liable as stockholder; *Ricaud v. Wilmington Trust Co.*, 70 Fed. 428, 25 U. S. App. 434, holding executor who has bank stock transferred to him without designating estate, is not a stockholder; *Welles v. Larrabee*, 36 Fed. 869, 2 L. R. A. 473, and *Baker v. Old National Bank*, 86 Fed. 1009, 63 U. S. App. 37, both holding pledgee of national bank stock designated on the books as pledgee, not a stockholder; *Simmons v. Hill*, 96 Mo. 685, 10 S. W. 63, 2 L. R. A. 478, holding one who levies upon transferred stock and obtains no title, is not a stockholder; *Cronin v. Patrick Co.*, 4 Hughes, 533, 89 Fed. 83, holding title does not pass to registered bond until transferred on books of obligor; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 483, 28 L. 480, 4 S. Ct. 527, holding unregistered pledgee, in good faith, incurs no liability. Cited in dissenting opinion in *Meares v. Finlayson*, 55 S. C. 118, 32 S. E. 989. Cited, arguendo, in *Western National Bank v. Armstrong*, 152 U. S. 354, 38 L. 474, 14 S. Ct. 575, *In re South Mt., etc., Mining Co.*, 7 Sawy. 31, 5 Fed. 405, *Corieck v. Richards*, 3 Lea, 28, *In re Argus Printing Co.*, 1 N. Dak. 437, 447, 26 Am. St. Rep. 642, 650, 48 N. W. 348, 351, 12 L. R. A. 784, 788, and n., *Hebberd v. Land & Cattle Co.*, 55 N. J. Eq. 34, 36 Atl. 128, *Richards v. National Bank*, 148 Mass. 195, 19 N. E. 356, 1 L. R. A. 784, and *Foster v. Broad*, — Mich. —, 79 N. W. 703.

Distinguished in *Robinson v. Southern National Bank*, 94 Fed. 966, *Sykes v. Holloway*, 81 Fed. 436, 437, 439, *Beal v. Essex Savings*

Bank, 67 Fed. 818, 33 U. S. App. 101, *Lesassuer v. Kennedy*, 36 La. Ann. 542. See elaborate notes in 75 Am. Dec. 321, 3 Am. St. Rep. 832, 841, 865, 57 Am. St. Rep. 81, and 68 Am. St. Rep. 542, 544, 545.

Corporations.—Transfer by stockholder for mere purpose of avoiding liability to corporate creditors, is a nullity as to them, p. 632.

Approved in *Stuart v. Hayden*, 169 U. S. 7, 42 L. 641, 18 S. Ct. 276, holding stockholder of national bank liable, notwithstanding transfer. See note to preceding syllabus.

Estoppel.—Bank cannot escape liability as stockholder in an insolvent concern by setting up its violation of law in becoming such, p. 633.

Cited in *First Nat. Bank v. Hawkins*, 79 Fed. 52, 53, 33 U. S. App. 747, holding national bank registered as stockholder in another national bank is estopped from denying its liability; *Simons v. Fisher*, 55 Fed. 909, 17 U. S. App. 1, 20 L. R. A. 557, holding bank cannot set up its want of legal capacity against payee of accommodation note made solely for its benefit; *California Bank v. Kennedy*, 167 U. S. 367, 42 L. 200, 17 S. Ct. 833, and *Kennedy v. Savings Bank*, 101 Cal. 498, 40 Am. St. Rep. 71, 35 Pac. 1040, both holding incidentally to its business, one national bank may become stockholder in another; *Chemical National Bank v. Havermale*, 120 Cal. 604, 65 Am. St. Rep. 208, 52 Pac. 1072, holding purchase of national bank stock by other national bank is ultra vires and void; *United States v. Baxter*, 46 Fed. 353, holding no man may set up in his own defense that he has violated the law. See 36 Am. St. Rep. 140, valuable note.

Distinguished in *Citizens' State Bank v. Hawkins*, 71 Fed. 371, 34 U. S. App. 423, *Norwalk Savings Bank v. Metal Spinning Co.*, 14 Ohio C. C. 6, and *Dayton National Bank v. Merchants' National Bank*, 37 Ohio St. 215.

Banks and banking.—Determination of comptroller is conclusive as to the extent to which liability of stockholders of insolvent national banks shall be enforced, p. 635.

Cited and above doctrine affirmed in *Columbia National Bank v. Matthews*, 85 Fed. 939, *O'Connor v. Witherby*, 111 Cal. 528, 44 Pac. 228, and *Fisher v. Simons*, 64 Fed. 314, 28 U. S. App. 95, all holding receiver cannot recover on note made for accommodation of national bank; *Hepburn v. Kincannon*, 74 Miss. 693, 21 So. 570, holding receiver of national bank may recover on note given in payment of capital stock. Affirmed, generally, in *Young v. Wempe*, 46 Fed. 355.

99 U. S. 635-645, 25 L. 336, **TRANSPORTATION CO. v. CHICAGO.**

Nuisance.—That which the law recognizes cannot be a nuisance, so as to give common-law right of action, p. 640.

Municipal corporation constructing tunnel, by authority of legislature, under navigable river which crosses street, not liable for consequential damages to persons specially injured, pp. 640, 641.

Cited in *Green Navigation Co. v. Chesapeake R. R. Co.*, 88 Ky. 8, 10 S. W. 8, 2 L. R. A. 543, and n., holding where Congress does not interfere, State may build bridge which obstructs navigation; *Huse v. Glover*, 11 Biss. 556, 15 Fed. 296, holding navigable waters wholly within State not outside of its jurisdiction.

Municipal corporation, in improving streets, acts as agent of State, p. 641.

Cited in *State v. Railroad Co.*, 140 Mo. 550, 62 Am. St. Rep. 748, 41 S. W. 957, 38 L. R. A. 221, holding State acts through city as its agent in granting franchise to street railroad.

Torts.—Acts done in exercise of governmental powers, not directly encroaching on private property, although its use may be impaired in consequence, do not constitute a taking for public use, entitling injured person to compensation, p. 642.

Cited in the following cases, in which it was held there was no taking for public use: *Talbot v. New York, etc., R. R.*, 151 N. Y. 162, 45 N. E. 384, change of grade on account of building bridge; *Atwater v. Trustees*, 124 N. Y. 608, 610, 27 N. E. 387, 388, erection of coffer-dam in building bridge, causing plaintiff's land to overflow for a season; *City of Omaha v. Flood*, 57 Neb. 729, 77 N. W. 381, street grading causing damage to abutting property-owner; *Kehrer v. Richmond City*, 81 Va. 748, damages resulting from elevating grade; *Genois v. St. Paul*, 35 Minn. 331, 29 N. W. 130, and *Garraux v. Greenville*, 53 S. C. 578, 31 S. E. 597, damages resulting from changing grade; *Stein v. Lafayette*, 6 Ind. App. 418, 33 N. E. 913, lowering grade so as to prevent ingress and egress; *Archer v. City of Denver*, 10 Colo. App. 418, 52 Pac. 88, fixing grade of street so as to prevent drainage; *Reardon v. San Francisco*, 66 Cal. 497, 500, 6 Pac. 320, 322, 56 Am. Rep. 111, damages resulting from street improvements; *Wabash R. R. Co. v. Defiance*, 167 U. S. 98, 42 L. 92, 17 S. Ct. 752, removing bridge crossing railroad and grading street to level of road; *Colclough v. Milwaukee*, 92 Wis. 186, 65 N. W. 1040, construction of viaduct the whole width of street; *Home Building Co. v. Roanoke*, 91 Va. 59, 62, 20 S. E. 897, building in a street of approach to a bridge; *Seldon v. Jacksonville*, 28 Fla. 588, 20 Am. St. Rep. 293, 10 So. 463, 14 L. R. A. 379, and n., erection in street of viaduct, preventing egress and ingress; *Lane v. Harbor, Commissioners*, 70 Conn. 695, 40 Atl. 1061, construction of new channel so as to cut off wharf; *Holyoke Water Co. v. Connecticut River Co.*, 52 Conn. 575, works constructed in aid of navigation; *Green v. State*, 73 Cal. 37, 14 Pac. 613, damages resulting from construction of canal; *High Bridge Lumber Co. v. United States*, 69 Fed. 324, 326, 37 U. S. App. 234, temporary flooding as the result

of improving navigable river; *Mills v. United States*, 46 Fed. 740, 742, 12 L. R. A. 677, 678, and n., construction of government dam which prevents drainage; *Rutz v. St. Louis*, 3 McCrary, 265, 10 Fed. 341, erection of dyke in navigable waters; *Willis v. Winona City*, 59 Minn. 34, 60 N. W. 815, building in street of approach to bridge supported by iron columns; *Garrett v. Lake Roland Ry.*, 79 Md. 282, 286, 29 Atl. 832, 833, 24 L. R. A. 397, 399, erection in center of street of stone abutment; *O'Brien v. Baltimore Belt R. R.*, 74 Md. 372, 374, 22 Atl. 143, 13 L. R. A. 129, 130, and n., construction in street of railroad by open cuts; *Indiana, etc., R. R. v. Eberle*, 110 Ind. 547, 59 Am. Rep. 228, 11 N. E. 469, construction of railroad embankment in street; *Meyer v. Richmond*, 172 U. S. 95, 96, 97, 19 S. Ct. 111, 112, permitting railroad to construct buildings and tracks in street; *Ottawa, etc., R. R. v. Larson*, 40 Kan. 308, 19 Pac. 664, 2 L. R. A. 63, and n., construction of railroad in street; *Black River Imp. Co. v. La Crosse, etc., Trans. Co.*, 54 Wis. 681, 41 Am. Rep. 72, 11 N. W. 453, diversion of water from riparian owners in order to improve navigation; *Payne v. Kansas City, etc., R. R.*, 112 Mo. 17, 20, 20 S. W. 324, 325, 17 L. R. A. 631, 632, erection of dam by city, causing occasional overflow; *Richmond v. Test*, 18 Ind. App. 497, 48 N. E. 615, construction of sewers along line of natural drainage, causing pollution of stream; *Cummings v. City of Seymour*, 79 Ind. 499, 41 Am. Rep. 624, using highway by municipality for drainage purposes; *Gibson v. United States*, 166 U. S. 275, 41 L. 1001, 17 S. Ct. 580, injury suffered by riparian owner from improvements in navigation; *Benner v. Atlantic D. Co.*, 134 N. Y. 162, 30 Am. St. Rep. 654, 31 N. E. 330, 17 L. R. A. 224, and n., injury to plaintiff's house, caused by vibration of blast fired to remove obstruction in harbor. Cited in *Costigan v. Penn. R. R. Co.*, 54 N. J. L. 240, 23 Atl. 812, holding building railroad embankment so as to force sale on abutting owner is a nuisance; *Chicago v. Taylor*, 125 U. S. 164, 31 L. 640, 8 S. Ct. 821, holding city is liable for constructing viaduct, causing premises to overflow; *Stearns v. City of Richmond*, 88 Va. 907, 29 Am. St. Rep. 762, 14 S. E. 849, holding damages to walls twenty feet from street, caused by excavation, may be recovered; *Vanderlip v. Grand Rapids*, 73 Mich. 536, 16 Am. St. Rep. 608, 41 N. W. 682, 3 L. R. A. 253, and n., holding raising of embankment in street so as to bury part of house is a taking; *Panse v. City of Atlanta*, 98 Ga. 99, 58 Am. St. Rep. 293, 26 S. E. 491, holding damages may be recovered by lessee where city builds bridge so close as to prevent ingress; *Rutz v. St. Louis*, 2 McCrary, 346, 7 Fed. 439, holding petition alleging overflow of land from building a dyke, good on demurrer; *Cohen v. Cleveland*, 43 Ohio St. 193, 1 N. E. 591, holding rule of principal case not followed in Ohio; *Van de Vere v. Kansas City*, 107 Mo. 88, 28 Am. St. Rep. 398, 17 S. W. 696, holding city will not be enjoined in consequence of noise and bustle incident to fire house; *Cantini v. Tillman*, 54 Fed. 974, holding prohibitory laws

are not a taking of property for public use; *Markey v. Queens Co.*, 154 N. Y. 683, 49 N. E. 73, 39 L. R. A. 54, holding county not liable for injuries sustained as result of defective bridge; *Burford v. Grand Rapids*, 53 Mich. 100, 51 Am. Rep. 106, 18 N. W. 572, holding municipal ordinance permitting coasting does not make city liable to pedestrians.

Cited, arguendo, in *Rhea v. Newport, N. & M. R. R. Co.*, 50 Fed. 20, 23, *Mugler v. Kansas*, 123 U. S. 668, 31 L. 213, 8 S. Ct. 300, *Monongahela Co. v. United States*, 148 U. S. 333, 37 L. 470, 13 S. Ct. 629, *Bauman v. Ross*, 167 U. S. 587, 42 L. 287, 17 S. Ct. 981, *Hughes v. N. P. R. R. Co.*, 9 Sawy. 328, 18 Fed. 117, *Smith v. Gould*, 59 Wis. 642, 18 N. W. 462, *Town of East Montpelier v. Wheelock*, 70 Vt. 396, 41 Atl. 434, *City Council v. Maddox*, 89 Ala. 183, 184, 7 So. 434, *Colton v. Onderdonk*, 69 Cal. 159, 58 Am. Rep. 557, 10 Pac. 397, *Hicks v. Drew*, 117 Cal. 311, 49 Pac. 191, and *Denner v. Bayer*, 7 Colo. 120, 125, 2 Pac. 10, 13. See elaborate note in 66 Am. Dec. 438, 16 Am. St. Rep. 612.

Distinguished in *Telephone Co. v. United Electric Co.*, 42 Fed. 279, 283, 12 L. R. A. 548, 550, *Rohan v. Port Jervis Gas-Light Co.*, 122 N. Y. 26, 25 N. E. 248, 9 L. R. A. 717, and n., *Story v. New York Elev. R. R. Co.*, 90 N. Y. 154, 176, 184, 185, 43 Am. Rep. 158, *Whitefield v. Town of Carrollton*, 50 Mo. App. 103; *Meyers v. St. Louis*, 8 Mo. App. 276, *Mathews v. St. Louis, etc., Ry.*, 121 Mo. 319, 24 S. W. 597, 25 L. R. A. 169, and n., *Railroad Co. v. Levee Commrs.*, 49 La. Ann. 572, 21 So. 766, *Pensacola, etc., R. R. v. State*, 25 Fla. 327, 5 So. 840, 3 L. R. A. 667, and n., *Hot Springs R. R. v. Williamson*, 45 Ark. 436, *Johnson v. Parksburch*, 16 W. Va. 420, 37 Am. Rep. 783, *Mason v. Harper's Ferry*, 17 W. Va. 420, *Parke v. Seattle*, 5 Wash. 9, 34 Am. St. Rep. 844, 31 Pac. 312, 20 L. R. A. 71, 5 Wash. 19, 21, 34, 32 Pac. 85, 86, 90, *Holyoke Co. v. Conn. River Co.*, 22 Blatchf. 144, 20 Fed. 79, *Willamette Iron Works v. Oregon Ry., etc., Co.*, 26 Or. 228, 46 Am. St. Rep. 622, 37 Pac. 1017, 29 L. R. A. 90.

Adjoining landowners.—One excavating on his own land must not remove land so near his neighbors that it will crumble away under its own weight, p. 645.

Adjoining landowners.—Right of lateral support does not extend to that which is placed upon the soil, increasing downward and lateral pressure, p. 645.

Cited in *Ulrick v. Dakota Loan, etc., Co.*, 2 S. Dak. 291, 49 N. W. 1055, holding owner entitled to support of land in its natural condition; *Tunstall v. Christian*, 80 Va. 4, 56 Am. Rep. 582, holding owner has no right to support of his building from soil of adjoining owner. See notes to 30 Am. St. Rep. 836, 33 Am. St. Rep. 453, 34 Am. St. Rep. 848, 66 Am. Dec. 648.

99 U. S. 645-659, 25 L. 487, *SPRING CO. v. EDGAR*.

Animals.—Whoever keeps an animal accustomed to attack mankind, with knowledge of its dangerous propensities, is *prima facie* liable to the person injured; hence defendant held liable to one injured by buck deer allowed to roam about defendant's park, kept open and accessible to the public, p. 656.

Cited in *Benoit v. Railroad Co.*, 154 N. Y. 225, 48 N. E. 524, holding the fact that a horse has once run away does not, of itself, constitute a vicious tendency; *Twig v. Ryland*, 62 Md. 386, 50 Am. Rep. 226, holding burden is on plaintiff to show defendant knew dog was vicious; *Bormann v. Milwaukee*, 93 Wis. 525, 67 N. W. 925, 33 L. R. A. 654, holding employee assumes risk of injury from elk and deer.

Witnesses.—In action for injury by buck deer, expert testimony as to its propensities held admissible, p. 657.

Cited in *Stevens v. Minneapolis*, 42 Minn. 138, 43 N. W. 843, holding not error to permit expert testimony as to value of services; *Lynch v. Grayson*, 5 N. Mex. 504, 25 Pac. 997, holding experts may testify that cattle may be infected with Texas fever without its being visible; *Niagara Fire Ins. Co. v. Green*, 77 Ind. 595, holding testimony admissible as to what constitutes a reasonable time in appointment of insurance agent; *Bryan v. Town of Branford*, 50 Conn. 249, holding engineer may testify as to probable cost of bridge; *Union Pac. R. R. Co. v. Novak*, 61 Fed. 580, 15 U. S. App. 400, holding conductor may testify as to the necessity of having two brakemen; *Erhardt v. Ballin*, 55 Fed. 970, 14 U. S. App. 376, holding expert may testify as to commercial designation "hemmed handkerchiefs;" *Pullman Palace-Car Co. v. Harkins*, 55 Fed. 936, 17 U. S. App. 27, holding expert may testify that revolving shafting is dangerous; *St. Louis, etc., R. R. v. Bradley*, 54 Fed. 633, 13 U. S. App. 68, holding opinion may be given as to effect of embankment in causing overflow; *Grayson v. Lynch*, 163 U. S. 481, 41 L. 235, 16 S. Ct. 1069, holding opinion of witnesses admissible that cattle were suffering from Texas fever; *Soquet v. State*, 72 Wis. 667, holding physician who has had no experience cannot testify as to the symptoms of arsenical poisoning.

Witnesses.—Whether witness is an expert is a preliminary question to be determined by the court, p. 658.

Cited in *Mutual Ins. Co. v. Alvord*, 61 Fed. 756, 21 U. S. App. 228, holding whether a witness is an expert is a matter of discretion with the court; *Inland Coasting Co. v. Tolson*, 139 U. S. 559, 35 L. 273, 11 S. Ct. 656, holding whether a person is an expert is a question of law, and decision of court is conclusive.

Trial.—In determining the correctness of a charge the whole scope and bearing of it must be taken together, p. 659.

Cited in *Pray v. Cadwell*, 50 Mich. 224, 15 N. W. 93, and *Bauskett v. Keitt*, 22 S. C. 191, both holding the accuracy of the charge is to be decided from a consideration of the whole.

99 U. S. 660-668, 25 L. 306, *EVANSTON v. GUNN*.

Trial.—Specified objection to evidence is waiver of all others, p. 665.

Cited in *Toplitz v. Hedden*, 146 U. S. 255, 36 L. 962, 13 S. Ct. 71, holding where no ground of objection is stated, not error to admit copy of agreement; *Hamilton v. South Nev. G. & M. Co.*, 13 Sawy. 120, 33 Fed. 568, holding objection that testimony is irrelevant and incompetent is too general; *Fischer v. Neil*, 6 Fed. 90, holding hearsay, unless objected to, admissible; *Wheaton v. Beecher*, 49 Mich. 352, 13 N. W. 770, holding exception must be confined to grounds of objection; *Railway Co. v. Hackett*, 58 Ark. 389, 41 Am. St. Rep. 108, 24 S. W. 883, holding objection that railroad company had no knowledge of employee's unfitness waives other objections.

Evidence.—Official registers, kept by persons in public office, are admissible in evidence; e. g., records of United States signal service officer to prove wind and snow, p. 666.

Cited in *State v. Spaulding*, 60 Vt. 234, 14 Atl. 771, holding copy of record in office of internal revenue collector admissible; *Goodrich v. Senate*, 92 Me. 251, 42 Atl. 410, holding calendar of sheriff, containing register of prisoners, prima facie evidence; *Standard Elevator Co. v. Crane Elevator Co.*, 76 Fed. 790, 46 U. S. App. 411, holding certified copy of patent office records sufficient proof of assignment; *Daly v. Webster*, 56 Fed. 486, 1 U. S. App. 573, holding entry by clerk of District Court, showing deposit of "title," evidence in copyright suit; *White v. United States*, 164 U. S. 104, 41 L. 366, 17 S. Ct. 39, holding entries by jailer of date of receiving prisoners admissible.

Distinguished in *Rollins v. Board of Commissioners*, 90 Fed. 579, 62 U. S. App. 262.

Municipal corporations.—Municipality is liable for injuries to person, resulting from defective sidewalk; e. g., from stepping into a hole improperly covered over, p. 667.

Cited in *Boston v. Crowley*, 38 Fed. 204, and *Greenwood v. Town of Westport*, 63 Conn. 591, 60 Atl. 569, both holding town liable for negligent operation of draw over navigable stream; *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 351, 35 S. W. 348, holding town responsible for failure to furnish water to extinguish fires; *City of Galveston v. Posnanisky*, 62 Tex. 129, holding city responsible for injuries resulting from defective walk.

Municipal corporations.—In action for injury from defective sidewalk, it is no defense that municipality was changing from

township to village organization, or that the authority to make the annual appropriations from the village funds was in abeyance, p. 667.

Appeal and error.—In determining correctness of charge to jury it must be taken as a whole; error will not be declared merely because a portion is unsound if read apart, p. 668.

Cited in *Chicago, etc., R. R. v. Linney*, 59 Fed. 49, 19 U. S. App. 315, holding charge as to duty of railroad to furnish safe coupling must be taken as a whole; *Schutz v. Jordan*, 32 Fed. 62, holding misapprehension as to law not error if court correctly instructed; *Souvais v. Leavitt*, 50 Mich. 111, 15 N. W. 39, holding instruction of court as to payment must be taken as a whole; *Baltimore, etc., R. R. v. Mackey*, 157 U. S. 87, 39 L. 629, 15 S. Ct. 495, holding charge of jury must be taken as a whole; *Spalding v. Castro*, 153 U. S. 39, 38 L. 627, 14 S. Ct. 768, holding charge, if correct, as applied to case will be sustained without reference to its general correctness; *Fidelity Mutual Life Ins. Co. v. Miller*, 92 Fed. 70, 63 U. S. App. 729, holding charge, with reference to suicide, taken as a whole, is correct; *St. Louis, etc., R. R. v. Needham*, 69 Fed. 826, 32 U. S. App. 635, holding erroneous instruction as to duty of master cured by subsequent instruction:

99 U. S. 668-674, 25 L. 265, *LYON v. POLLOCK*.

Principal and agent.—Letter expressing desire to sell held a sufficient authorization to enter into contract of sale but not to make conveyance, p. 672.

Cited in *Farrel v. Edwards*, 8 S. Dak. 431, 66 N. W. 813, holding authority to sell may be derived from letters and telegrams; *Glass v. Rowe*, 103 Mo. 536, 15 S. W. 340, holding power to sell includes power to make a valid contract; *Smith v. Allen*, 86 Mo. 190, holding letter expressing willingness to sell authorizes agent to enter into contract; *Kleinhans v. Jones*, 68 Fed. 746, 37 U. S. App. 185, holding parties may be bound by letters and telegrams. Followed in *Lyon v. Hernandez*, 99 U. S. 674, note, 25 L. 267.

Distinguished in *Carstens v. McReavy*, 1 Wash. 364, 25 Pac. 472.

Deed executed by agent, without proper power of attorney, though not good as conveyance, held good as contract to convey, and basis for decree ordering conveyance, p. 674.

99 U. S. 674, 25 L. 267, *LYON v. HERNANDEZ*.

Adjudged in conformity with *Lyon v. Pollock*, *supra*.

Not cited.

99 U. S. 674-676, 25 L. 308, **PERRIS v. HEXAMER.**

Copyright.—To infringe a copyright a substantial copy of the whole or part of book must be used, p. 675.

Cited in *Morrison v. Pettibone*, 87 Fed. 332, holding copies of photographs must be so perfected as to establish identity before constituting infringement; *Simms v. Stanton*, 75 Fed. 10, holding later writer on physiognomy may make a fair use of prior works; *Burnell v. Chown*, 69 Fed. 995, 996, holding no infringement where person, by original efforts, obtained information as to financial standing of business men; *White Dental Co. v. Sibley*, 38 Fed. 752, holding defendant's chart of teeth not being copy of plaintiff's, constitutes no infringement; *Munson v. New York*, 18 Blatchf. 238, 3 Fed. 338, holding bond and coupon register not subject to copyright.

Copyright of map does not entitle to exclusive use of signs and key adopted to render delineations intelligible, p. 676.

99 U. S. 676-683, 25 L. 404, **ORLEANS v. PLATT.**

Trial.—Where testimony is all one way, party has no right to ask a charge which assumes it is otherwise, p. 678.

Trial.—If facts are undisputed it is competent for court to direct the verdict, p. 678.

Cited and above doctrine affirmed in *Bank of Sherman v. Apperson*, 4 Fed. 28, *Rauber v. Sundback*, 1 S. Dak. 271, 46 N. W. 928, *Helena National Bank v. Telegraph Co.*, 20 Mont. 394, 63 Am. St. Rep. 635, 51 Pac. 834, *Finney v. Northern Pac. R. R. Co.*, 3 Dak. 283, 16 N. W. 505, and *National Exchange Bank v. White*, 30 Fed. 415.

Bills and notes.—Promissory note is sufficient consideration for sale of municipal bonds, p. 679.

Municipal corporations.—Railroad-aid bonds, issued under authority from county judge, and pending certiorari on appeal from his order, are valid in bona fide hands, though appellate court subsequently entered judgment of reversal, p. 681.

Municipal corporations.—Recitals in its bonds are binding upon municipality; hence where they show that the bond issue was made under the circumstances giving the requisite power, the municipality is estopped to dispute it, p. 682.

Cited in *Color v. Rhoda School Township*, 6 S. Dak. 653, 63 N. W. 162, holding recital that bonds were issued as the result of election, based on petition, binding upon county; *Pompton v. Cooper Union*, 101 U. S. 204, 25 L. 805, holding recitals that all the preliminary requirements had been complied with, binding upon county; *Walker v. Detroit Transit R. R.*, 47 Mich. 350, 11 N. W. 192, holding

company estopped from denying authority of person who issued the bonds; *Lane v. Embden*, 72 Me. 362, and *White v. Santa Cruz*, 69 Fed. 634, both holding recitals that requirement of statute has been complied with, binding upon the town; *Rich v. Town of Mentz*, 21 Blatchf. 496, 18 Fed. 55, holding where question is doubtful, bonds should be upheld; *Gunnison County v. Rollins*, 173 U. S. 264, 19 S. Ct. 393, holding municipality is estopped from denying truth of recitals; *Lyons v. Munson*, 99 U. S. 685, 686, 25 L. 451, holding where statutory authority is not denied, recitals operate as an estoppel; *State v. Hart*, 46 La. Ann. 51, 14 So. 511, holding fraud in diverting bonds from purpose intended does not affect innocent holder; *Lytle v. Lansing*, 147 U. S. 62, 37 L. 81, 13 S. Ct. 256, holding, where bonds are void, burden is on holder to show bona fides. Cited generally in *Strough v. Board of Suprs.*, 119 N. Y. 215, 23 N. E. 553, *Meyer v. Richards*, 163 U. S. 413, 41 L. 210, 16 S. Ct. 1158 (affirming 46 Fed. 728), and *State v. Caffrey*, 49 La. Ann. 1769, 22 So. 1016. See valuable notes in 98 Am. Dec. 674, 684, 685, 51 Am. St. Rep. 824.

Distinguished in *Hurt v. Hamilton*, 25 Kan. 79, *Pugh v. Moore*, 44 La. Ann. 245, 247, 10 So. 723, 724, *Town of Lyons v. Chamberlain*, 89 N. Y. 587, *Buchanan v. Litchfield*, 102 U. S. 290, 26 L. 140, *Lewis v. Barbour Co.*, 1 McCrary, 463, 3 Fed. 194, and *Audes v. Ely*, 158 U. S. 317, 39 L. 1000, 15 S. Ct. 956.

Lis pendens.—Doctrine of *lis pendens* has no application to commercial securities, p. 682.

Cited in *Tregea v. Modesto Irr. Co.*, 164 U. S. 187, 41 L. 398, 17 S. Ct. 55, holding adjudication that bonds are void not binding on innocent holder. Distinguished in *Stevens v. Railroad Co.*, 4 Fed. 102. Cited, arguendo, in *Day v. Holland*, 15 Or. 467, 15 Pac. 857, and *Salisbury v. County*, 59 N. H. 362.

99 U. S. 684-686, 25 L. 451, **LYONS v. MUNSON**.

Municipal corporations.—Judgment of County Court, having jurisdiction, and charged with duty of deciding an application of taxpayers for issue of county bonds, is final until reversal, p. 686.

Cited in *Andes v. Ely*, 158 U. S. 317, 39 L. 1000, 15 S. Ct. 956, holding judgment as to legality of bond issue cannot be attacked collaterally; *Scarborough v. Eubank*, — Tex. —, 53 S. W. 575, holding decision of officers as to competency of signers of petition for removal of county seat conclusive. Distinguished in *Town of Lyons v. Chamberlain*, 89 N. Y. 588.

Municipal corporations.—Bona fide holder of municipal bonds is not bound to look further than the recitals therein, where the municipality possessed the requisite power to issue them, p. 686.

99 U. S. 686-699, 25 L. 491, BLOCK v. COMMISSIONERS.

Judgment is conclusive evidence of every fact upon which it was necessarily founded; hence county bondholder is estopped by judgment against their validity to which he was party, p. 693.

Cited in *Snell v. Campbell*, 24 Fed. 883, holding former adjudication, as to validity of tax, conclusive in action to set aside tax sale; *Sauls v. Freeman*, 24 Fla. 224, 12 Am. St. Rep. 199, 4 So. 532, holding judgment of mandamus to call an election for removal of county seat, bar to an injunction to prevent removal; *Davis-Bradley M. Co. v. Eagle Co.*, 57 Fed. 990, 18 U. S. App. 349, holding decree in patent suit conclusive as to anticipations. Cited, *arguendo*, in *Washington Imp. Co. v. Kansas Pac. Ry.*, 5 Dill. 490, F. C. 17,242, and *Louis v. Brown Township*, 109 U. S. 166, 27 L. 893, 3 S. Ct. 94.

Municipal corporations.—Innocent purchaser of coupons need not look further than to ascertain that the county had legislative authority to issue the bonds, p. 694.

Cited in *Brown v. Milliken*, 42 Kan. 776, 23 Pac. 169, holding township estopped from showing irregularities as against innocent holder; *St. Paul v. Lamprecht County*, 88 Fed. 453, 60 U. S. App. 86, holding issuance of bonds is a determination that preliminary requisites were complied with; *Heed v. Cowley*, 82 Fed. 719, holding recitals that qualified majority voted for bond issuance, binding upon county; *Denison v. Columbus*, 62 Fed. 778, holding decision that conditions of issuance have been performed, conclusive in favor of innocent holder. Affirmed, *arguendo*, in *Rich v. Town of Mentz*, 21 Blatchf. 406, 18 Fed. 55, *Sheehan v. Martin*, 10 Mo. App. 288, and *Bank v. Stateville*, 84 N. C. 174.

Judgment.—One who is not a party to a suit, declaring municipal bonds invalid, is not bound by the judgment, p. 695.

Municipal corporations.—Under Kansas statute, a bond-aided railroad company may be described in the submission to popular vote without mentioning its corporate name, p. 698.

Cited in *Ninth National Bank v. Knox County*, 37 Fed. 81, holding where route is described, order submitting question of subscription to voters need not specify name of corporation.

Municipal corporations.—Determination of commissioner as to railroad-aid bond election, that the requisite number voted favorably, is conclusive in favor of innocent holder, it is immaterial that subsequent to their issuance, a later board of commissioners discovered errors in the count, p. 696.

Cited in *Smallwood v. Newbern*, 90 N. C. 40, holding declaration by proper authority of result of bond election, conclusive in favor of innocent holder; *Lewis v. Comanche County*, 35 Fed. 348, hold-

ing decision as to poll-books conclusive in favor of innocent holder. Cited, *arguendo*, in *Norment v. Charlotte*, 85 N. C. 392.

Courts.—Federal courts are not bound to follow decisions of State courts in suits to determine legality of municipal bonds, made after their issuance, and after rights of holders had become fixed, p. 699.

Cited in *Louisville Trust Co. v. Cincinnati*, 73 Fed. 730, holding judgment of State court, for recovery of license fees, binding on Federal courts. See elaborate note in 98 Am. Dec. 681.

99 U. S. 700-769, 25 L. 504, SINKING FUND CASES.

Constitutional law.—Act of Congress should not be declared void except in a clear case, p. 718.

Cited in *Sweet v. Rechel*, 159 U. S. 393, 40 L. 194, 16 S. Ct. 46, holding every presumption in favor of State law involving abatement of nuisance. Cited in dissenting opinion, in *Scott v. Donald*, 165 U. S. 106, 41 L. 647, 17 S. Ct. 274, dissenting opinion in *Pollack v. Farmers' Loan & Trust Co.*, 158 U. S. 699, 39 L. 1147, 15 S. Ct. 944, and dissenting opinion in *Civil Rights Cases*, 109 U. S. 27, 27 L. 845. Affirmed, *arguendo*, in *State v. Jones*, 51 Ohio St. 504, 37 N. E. 948.

Constitutional law.—One branch of the government should not encroach upon the other, p. 718.

Cited and doctrine approved in the following cases, in which the acts therein mentioned were held to be legislative: *People v. Board of Education*, 54 Cal. 376, action of board in adopting series of readers; *Smith v. Strother*, 68 Cal. 197, 198, 8 Pac. 854, imposing power on judges to fix stenographers' salaries; *Wulzen v. Board of Supervisors*, 101 Cal. 24, 40 Am. St. Rep. 26, 35 Pac. 356, opening and extension of street; *Quinchard v. Board of Trustees*, 113 Cal. 670, 45 Pac. 857, order of city council for street improvement; *Norwalk St. R. R. Co.'s Appeal*, 69 Conn. 594, 37 Atl. 1086, regulation, location, construction and operation of streets. Cited in *Board of Commissioners v. Northern Pac. R. R.*, 10 Mont. 420, 25 Pac. 1060, holding power to tax not a judicial purpose; *Evansville v. State*, 118 Ind. 442, 21 N. E. 272, 4 L. R. A. 99, and n., holding power to appoint to office is an executive purpose; *Clough v. Curtis*, 134 U. S. 371, 33 L. 949, 10 S. Ct. 576, holding Federal courts will not assume to determine which of two bodies is the lawful legislative assembly. Cited, *arguendo*, in *Robertson v. State*, 109 Ind. 137, 10 N. E. 609, and *State v. Hyde*, 121 Ind. 26, 22 N. E. 646. See notes in 40 Am. St. Rep. 38, 13 Am. St. Rep. 135, and 18 Am. Dec. 236.

United States are as much bound by their contracts as are individuals, p. 719.

Cited in *In re Pacific Railway Commission*, 12 Sawy. 589, 590, 592, 32 Fed. 260, 261, 262, holding *Central Pacific Railroad Company*

and United States stand upon equal footing as debtor and creditor; *United States v. Stanford*, 161 U. S. 433, 40 L. 760, 16 S. Ct. 584, affirming 70 Fed. 357, 360, 44 U. S. App. 68, 69 Fed. 38, holding Pacific railroad acts constituted a contract and imposed no personal liability upon stockholders of aided companies; *United States v. Board of R. R. Commrs.*, 71 Fed. 439, 441, holding government has such interest in aided road as to give it the right of intervention in suit brought by State to establish rates.

Corporations.—Central Pacific railroad being a corporation created for public purposes, is subject to legislative control so far as its business affects public interests, p. 719.

Constitutional law.—Reservation of power to amend or repeal corporate charter gives State power to control all rights, privileges and immunities granted by State; hence, under such power, a government-aided railway may be required to make provision in advance for payment of its existing debts by the establishment of a sinking fund, pp. 720, 721.

Cited and doctrine applied in the following cases, in which the exercise of the reserve power was held to be lawful: *Louisville Water Co. v. Clark*, 143 U. S. 14, 36 L. 59, 12 S. Ct. 350, repeal of immunity from taxation; *Mayor v. Twenty-third St. R. R. Co.*, 113 N. Y. 318, 21 N. E. 62, providing for payment by railroad of percentage of gross receipts instead of license; *Buffalo, etc., R. R. v. Buffalo, etc., R. R.*, 111 N. Y. 141, 19 N. E. 66, 2 L. R. A. 387, act reducing fares agreed upon between railroads; *State Board, etc. v. Morris, etc., R. R.*, 49 N. J. L. 222, 7 Atl. 840, act changing mode of ascertaining cost of railroad for purposes of taxation; *Attorney-General v. Tooker*, 111 Mich. 506, 69 N. W. 932, act giving minority stockholders right of cumulative voting; *Close v. Glenwood Cemetery*, 107 U. S. 476, 27 L. 412, 2 S. Ct. 274, congressional legislation for management and distribution of profits for benefit of stockholders; *Spring Valley Water Works v. Schottler*, 110 U. S. 353, 28 L. 176, 4 S. Ct. 51, and *Spring Valley Water Works v. Bartlett*, 8 Sawy. 572, 574, 576, 579, 580, 582, 583, 584, 588, 590, 16 Fed. 628, 630, 631, 634, 635, 636, 637, 638, 641, 643, acts changing body authorized to fix water rates; *Northern Pacific R. R. Co. v. Trail County*, 115 U. S. 609, 29 L. 479, 6 S. Ct. 203, holding Congress may compel land-grant road to pay cost of surveying, selecting and conveying land; *Phinney v. Sheppard*, 88 Md. 638, 42 Atl. 60, holding State may change name of corporation; *Webster v. Female Seminary*, 78 Md. 206, 28 Atl. 26, holding State may authorize female seminary to lease part of its buildings; *Jackson v. Walsh*, 75 Md. 312, 23 Atl. 779, holding State may provide for representation in board of trustees of agricultural college; *St. Louis, etc., R. R. v. Paul*, 64 Ark. 87, 89, 62 Am. St. Rep. 157, 159, 40 S. W. 706, 707, 37 L. R. A. 506, State may impose penalty on railroad companies for failure to pay employees at time of discharge; *Leep v. Railway Co.*, 58 Ark. 415, 431, 41 Am.

St. Rep. 113, 126, 25 S. W. 77, 82, 23 L. R. A. 268, 273, holding State may provide for continuance of wages of employees of corporations if not paid at time of discharge; *Greenwood v. Freight Co.*, 105 U. S. 21, 26 L. 965, holding rights, franchises and powers are lost by repeal; *Louisville, etc., R. R. v. Williams*, — Ky. —, 41 S. W. 287, and *Louisville, etc., R. R. v. Williams*, — Ky. —, 45 S. W. 230, both holding legislature may change charter of railroad, with reference to limitation of actions; *Norwood v. New York R. R.*, 161 Mass. 266, 37 N. E. 201, holding grade of railroad may be changed; *United States v. Central, etc., R. R.*, 138 U. S. 87, 34 L. 896, 11 S. Ct. 286, holding Congress may prospectively determine what are net earnings of railroad; *Sioux City R. R. Co. v. Sioux City*, 78 Iowa, 746, 39 N. W. 500, holding additional burden of paving outside of track may be imposed upon railroad; *Bullard v. Northern Pac. R. R.*, 10 Mont. 181, 25 Pac. 123, 11 L. R. A. 250, and n., holding right to regulate commerce paramount to right of railroads to enter into rebate contracts; *Scotfield v. Railway Co.*, 43 Ohio St. 619, 3 N. E. 920, holding courts had power to prevent discrimination in freight rates; *State v. Hamilton*, 47 Ohio St. 83, 86, 23 N. E. 942, 943, holding gas company's vested rights not impaired by city erecting its own works; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 580, 28 L. 1087, 5 S. Ct. 684, holding when corporation becomes insolvent or exceeds its franchise, State may reclaim charter; Opinion of the Justices, 66 N. H. 641, 33 Atl. 1083, holding State may take railroad under power of eminent domain; *Ragan v. Aiken*, 9 Lea, 621, 42 Am. Rep. 686, holding common carrier bound to carry at equal rates for customers in like condition; *Smyth v. Ames*, 169 U. S. 544, 42 L. 848, 18 S. Ct. 433, holding railroad company cannot fix its rates with reference solely to its own interest; *Interstate Commerce Commission v. Brimson*, 154 U. S. 474, 38 L. 1056, 14 S. Ct. 1132, holding act authorizing Circuit Courts to use their powers in aid of inquiries before interstate commission constitutional; *Larkin v. Safarans*, 15 Fed. 149, holding congressional act enlarging jurisdiction of Circuit Court of Appeals, applies to pending actions; *United States v. Western Union Telegraph Co.*, 50 Fed. 36, holding telegraph franchise granted to railroad company is inalienable; *Heath v. Union Oil & Paint Co.*, 83 Fed. 777, holding insolvency act, releasing attachment levied before passage, impairs obligation of contract; *Chicago, etc., R. R. v. Tompkins*, 90 Fed. 367, holding rates established by railroad commission are prima facie reasonable; *Coast Line R. R. v. Savannah*, 30 Fed. 650, 654, holding railroad cannot be compelled to pave greater portion of street than required by its charter; *Downing v. Board of Agriculture*, 129 Ind. 449, 28 N. E. 126, 12 L. R. A. 666, holding act transferring property of agricultural society unconstitutional; *Story v. New York Elev. R. R.*, 90 N. Y. 161, holding building elevated road is taking of property for public use, where city sells lots under agreement to maintain streets; *Detroit v. Detroit, etc., R. R.*, 43 Mich. 147, 5 N. W. 280,

holding ordinance forbidding turnpike road to maintain gates within extended limits of town is unconstitutional; *Railroad Tax. Case*, 8 Sawy. 280, 13 Fed. 756, holding corporations may not be assessed differently from individuals; *Parrotts' Chinese Case*, 6 Sawy. 355, 357, 358, 1 Fed. 487, 489, 490, holding State law forbidding corporations to employ Chinese is unconstitutional.

Cited in following cases, in which the exercise of the police power of the State was upheld: *State v. Peel Splint Coal Co.*, 36 W. Va. 838, 15 S. E. 1011, 17 L. R. A. 396, act making it a misdemeanor for corporations to issue scrip to its employees and providing manner of weighing coal; *State v. Holden*, 14 Utah, 90, 46 Pac. 760, 37 L. R. A. 106, eight-hour law as applied to miners; *Commonwealth v. Vrooman*, 164 Pa. St. 325, 30 Atl. 222, 25 L. R. A. 256, act regulating insurance; *Eagle Ins. Co. v. Ohio*, 153 U. S. 455, 38 L. 780, 14 S. Ct. 870, statute requiring returns to be made to State by insurance company; *Austin v. State*, 101 Tenn. 573, 70 Am. St. Rep. 709, 48 S. W. 308, act preventing bringing cigarettes into State; *McCullough v. Brown*, 41 S. C. 243, 19 S. E. 471, 23 L. R. A. 420, act giving State exclusive right to sell intoxicating liquors; *Mugler v. Kansas*, 123 U. S. 661, 31 L. 210, 8 S. Ct. 297, State prohibitory legislation; *Territory v. O'Connor*, 5 Dak. 413, 41 N. W. 752, 3 L. R. A. 361, local-option laws; *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. 256, 8 S. Ct. 995, prohibiting sale of oleomargarine; *Budd v. New York*, 143 U. S. 537, 36 L. 253, 12 S. Ct. 473, *People v. Budd*, 117 N. Y. 11, 16, 15 Am. St. Rep. 467, 471, 22 N. E. 674, 675, 5 L. R. A. 564, 566, and n., and *State v. Brass*, 2 N. Dak. 500, 52 N. W. 414, acts providing maximum charges for grain elevators; *White v. Highline Canal Co.*, 22 Colo. 197, 201, 43 Pac. 1030, 1031, 31 L. R. A. 830, 831, statute regulating distribution of water by irrigating companies; *Smith v. Bivens*, 56 Fed. 356, holding excepting piece of land from right of distraint for trespass not valid exercise of police power. Approved, *arguendo*, in *West Jersey Traction Co. v. Camden Horse R. R. Co.*, 52 N. J. Eq. 481, 29 Atl. 344, *Covington v. Kentucky*, 173 U. S. 239, 19 S. Ct. 386, *Gebhard v. Canadian Southern R. R.*, 17 Blatchf. 420, 1 Fed. 390, *Canadian Southern R. R. Co. v. Gebhard*, 109 U. S. 542, 27 L. 1026, 3 S. Ct. 373, *United States v. Union, etc., R. Co.*, 160 U. S. 33, 37, 40 L. 330, 332, 16 S. Ct. 202, 204, *United States v. Telegraph Co.*, 160 U. S. 67, 40 L. 342, 16 S. Ct. 215, *United States v. Central, etc., R. R.*, 118 U. S. 238, 30 L. 174, 6 S. Ct. 1039, *Southern Pac. R. R. Co. v. Poole*, 12 Sawy. 546, 32 Fed. 456, *Louisiana v. Jumel*, 107 U. S. 740, 27 L. 458, 2 S. Ct. 152, *St. Louis R. R. v. Paul*, 173 U. S. 409, 19 S. Ct. 421, and *Citizens' Savings Bank v. Owensboro*, 173 U. S. 647, 19 S. Ct. 534. Cited in dissenting opinions in *Spring Valley Water Co. v. San Francisco*, 61 Cal. 16, *Brass v. Stoesser*, 153 U. S. 405, 38 L. 762, 14 S. Ct. 862, and *Central Pac. R. R. v. California*, 162 U. S. 160, 40 L. 926, 16 S. Ct. 792. See notes in 7 Am. St. Rep. 721, 724, 25 Am. St. Rep. 889, and 44 Am. St. Rep. 613.

Distinguished in *Stevens v. Memphis, etc.*, R. R., 114 U. S. 698, 29 L. 293, 5 S. Ct. 991, lien created under Tennessee act of 1852 for its railroad-aid bonds, was to secure the State, not the bondholders; *Dow v. Railroad*, 67 N. H. 35, 36 Atl. 538, *Watson Seminary v. Pike Co.*, 149 Mo. 67, 50 S. W. 882, 45 L. R. A. 679, S. P. R. R. v. Commissioners, 78 Fed. 254, *People v. O'Brien*, 111 N. Y. 49, 7 Am. St. Rep. 703, 18 N. E. 703, 2 L. R. A. 264, and *n.*, and *Atlantic, etc.*, R. R. v. *Mingus*, 7 N. Mex. 399, 34 Pac. 605.

Railroads are a peculiar species of property and railroad corporations are peculiar corporations, and it is especially fitting that the government should by its supervision protect investments in their stocks and bonds from loss through improvident management, p. 722.

Cited in *State v. Central R. R. Co.*, 48 N. J. L. 300, 4 Atl. 617.

Corporations.—Stockholders have no right to earnings against the just demands of creditors, p. 724.

Railroads.—United States occupies towards Central Pacific railroad a dual relation, as sovereign and creditor; it is their duty as sovereign to see that the stockholders do not appropriate income which equitably belongs to creditors, pp. 724, 725.

Cited in *In re Pacific Ry. Commsn.*, 12 Sawy. 590, 32 Fed. 261, examining powers of railway commission.

Constitutional law.—Act of Congress of 1878, requiring Central Pacific railroad to pay certain moneys into sinking fund to provide payment of its debts, does not deprive company of its property without due process of law, p. 725.

Railroads.—Though the sinking fund provided for payment of Central Pacific railroad's debt to the United States, by act of 1878, makes the secretary of the treasury custodian of the fund, it is not a present payment pro tanto, but only a sinking fund for payment as debt matures, p. 725.

Distinguished in *Tennessee Bond Cases*, 114 U. S. 698, 29 L. 293, 5 S. Ct. 991.

Railroads.—Though the Central Pacific railroad was a California corporation, yet to extent of powers and privileges granted it by United States by acts of 1862 and 1864, Congress retained right of amendment and of regulating its administration, so far as not inconsistent with requirements of original State charter; hence Congress might require establishment of sinking fund, p. 730.

Cited in *United States v. Stanford*, 161 U. S. 433, 40 L. 760, 16 S. Ct. 584, affirming 69 Fed. 46, holding when State corporation accepted grant it submitted itself to congressional control; *Western Union Tel. Co. v. Union Pac. R. R.*, 1 McCrary, 592, 3 Fed. 731, holding State corporations accepting the benefits of Pacific railroad

acts are subject to all their provisions; *Central Pacific R. R. v. California*, 162 U. S. 119, 40 L. 912, 16 S. Ct. 776, holding State corporation remains such, although it has received Federal assistance and franchises.

Constitutional law.—Act of 1878, requiring Central Pacific railroad to establish a sinking fund to meet its obligations to the government, varied the existing contract and was an exercise of judicial powers forbidden to the legislative department, per Field, J., dissenting, pp. 759, 760.

Cited in *In re Pacific Ry. Commsn.*, 12 Sawy. 592, 593, 594, 32 Fed. 262, 263, holding United States cannot institute a compulsory investigation into affairs of Central Pacific.

Miscellaneous.—Miscited in *Cortesy v. Territory*, 7 N. Mex. 97, 32 Pac. 507, 19 L. R. A. 356.

The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series:

U. S.	175	Mo. App.	79
Law. Ed.	42	Mont.	22
Fed. Rep.	96	Neb.	56
U. S. Ap.	63	Nev.	23
(excepting 58)		N. H.	67
Ala.	119	N. J. Eq.	57
Ariz.	1	N. J. L.	62
Ark.	65	N. M.	8
Cal.	125	N. Y.	160
Colo.	25	N. C.	123
Colo. Ap.	12	N. D.	8
Conn.	71	Ohio	60
Dak.	6	Or.	33
Del. Pennewill	1	Pa.	192
Fla.	39	R. I.	19
Ga.	107	S. C.	54
Ida.	2	S. D.	10
Ill.	181	Tenn.	102
Ind.	152	Tex.	92
Ind. Ap.	22	Tex. Civ.	19
Iowa	107	Tex. Cr.	38
Kans.	60	Utah	18
Kans. Ap.	7	Vt.	70
Ky.	101	Va.	96
La. Ann.	51	Wash.	29
Md.	89	W. Va.	45
Me.	92	Wis.	102
Mass.	173	Wyo.	6
Mich.	117	Am. Dec.	100
Minn.	73	Am. Rep.	60
Miss.	76	Am. St. Rep.	71
Mo.	150	L. R. A.	45

with duplicate references to the Reporter System and later cases, including

Sup. Ct.	19	N. E.	53
Atl.	43	N. W.	80
Pac.	58	S. E.	33
So.	25	S. W.	53

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1879.

Vol. 100.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1879,

AND REPORTED HEREIN, 1880.

VOL. 100.

AS HAVE ALSO BEEN REPORTED IN

10. OTTO.

10 Otto.	Title.	Here in.	10 Otto.	Title.	Here in.
1	<i>Ex parte</i> French,	529	82	Trade-Mark Cases:	
4-5		530		United States v. Steffens,	
6	Tintzman v. National Bank,	530		United States v. Witteman,	
6		531		United States v. Johnson,	550
7-8	Garneau v. Dozier,	536	91-94		
8-9	Soule v. United States,	536	94-96	" " "	552
9-12	" " "	537	96-99	" " "	553
12	" " "	538	99	" " "	554
13-21	<i>Ex parte</i> Reed,	538	100	Hurt v. Hollingsworth,	569
21-23		539	100-103	" " "	570
24	Railroad Company v. Fraloff,	531	103-104	" " "	571
24-25	" " "	532	104-106	Ricker v. Powell,	527
25-28	" " "	533	106-109	" " "	528
28-31	" " "	534	109-110	" " "	529
31-32	" " "	535	110-112	Elastic Fabrics Company v. Smith,	547
33	United States v. Hirsch,	539	112-113	Railroad Company v. Trook,	571
34-36	" " "	540	113	Lansdale v. Daniels,	587
36	" " "	541	113-116	" " "	588
37	Mining Company v. Taylor,	541	116-119	" " "	589
40-42	" " "	542	119	" " "	590
42	" " "	543	119	United States v. Curtis,	
43	National Bank v. Insurance Com-			Curtis v. United States,	571
	pany,	547	123-124	" " "	572
43-46	Tillson v. United States,	543	124	Hatch v. Oil Company,	554
46-47	" " "	544	128-139	" " "	555
47-48	Fairfield v. County of Gallatin,	544	130-133	" " "	556
49-51	" " "	545	133-135	" " "	557
51-54	" " "	546	136-138	" " "	558
54-55	" " "	547	138	Brownsville v. Cavazos,	574
55	Cowell v. Springs Company,	547	139-140	" " "	575
56-57	" " "	548	140-143	" " "	576
57-60	" " "	549	143-145	" " "	577
60-61	" " "	550	145-146	Moore v. Simonds,	590
61	Emigrant Co. v. County of Adams,	563	146-147	" " "	591
62-64	" " "	564	147-148	Paving Company v. Mulford,	591
64-67	" " "	565	149-151	Clark v. Trust Company,	573
67-70	" " "	566	151-153	" " "	574
70-71	" " "	567	153	Hinckley v. Railroad Company,	591
72	Holden v. Trust Company,	567	154-156	" " "	592
72-74	" " "	568	156-157	" " "	593
75	Arthur v. Herold,	568	158-159	Dow v. Johnson,	632
77-78	" " "	569	159-162	" " "	633
78-81	Railway Company v. Twombly,	550	162-165	" " "	634

REFERENCE TABLE.

10 Otto.	Title.	Here in.	10 Otto.	Title.	Here in.
165-167	Dow v. Johnson,	635	333-336	Virginia v. Rives,	675
167-170	" "	636	336-338	" "	676
170-173	" "	637	339	Ex parte Virginia,	676
173-176	" "	638	340-341	" "	677
176-179	" "	639	341-344	" "	678
179-182	" "	640	344-347	" "	679
182-185	" "	641	347-350	" "	680
185-187	" "	642	350-353	" "	681
188-190	" "	643	353-356	" "	682
190-193	" "	644	356-358	" "	683
193-195	" "	645	358-361	" "	684
195-196	Savings Bank v. Ward,	621	361-364	" "	685
196-199	" "	622	364-367	" "	686
199-202	" "	623	367-370	" "	687
202-204	" "	624	370	" "	688
204-207	" "	625	371	Ex parte Siebold,	717
207-208	" "	626	373-375	" "	718
208-210	Phillips v. Moore,	603	375-378	" "	719
210-213	" "	604	378-381	" "	720
213	Hough v. Railway Company,	612	381-384	" "	721
214	" "	613	384-386	" "	722
214-216	" "	614	386-389	" "	723
216-219	" "	615	389-392	" "	724
219-222	" "	616	392-395	" "	725
222-225	" "	617	395-398	" "	726
225-226	" "	618	398-399	" "	727
226	Craig v. Smith,	577	399-401	Ex parte Clarke,	715
227-230	" "	578	401-404	" "	716
230-232	" "	579	404	" "	717
232-234	" "	580	404-406	" "	727
235	United States v. Perryman,	645	406-408	" "	728
235-238	" "	646	409-411	" "	729
238	" "	647	411-414	" "	730
239	Oates v. National Bank,	580	414-417	" "	731
239-241	" "	581	417-420	" "	732
241-244	" "	582	420-422	" "	733
244-247	" "	583	423-425	Packet Company v. St. Louis,	688
247-250	" "	584	425-427	" "	689
250	" "	585	427-430	" "	690
251-253	Trenouth v. San Francisco,	626	430	Vicksburg v. Tobin,	690
253-255	" "	627	430-433	" "	691
255-257	" "	628	433	" "	692
257	Tennessee v. Davis,	648	434	Guy v. Baltimore,	743
260-261	" "	649	437-439	" "	744
261-264	" "	650	439-442	" "	745
264-267	" "	651	442-444	" "	746
267-270	" "	652	444-445	Pierce v. Wade,	735
270-273	" "	653	445	Pierce v. Tough, Note,	735
273-276	" "	654	446-448	Case v. Bank,	695
276-279	" "	655	448-451	" "	696
279-282	" "	656	451-453	" "	697
282-285	" "	657	453-456	" "	698
285-287	" "	658	457	Removal Cases:	
288-290	" "	659		Meyer v. Construction Com-	
290-293	" "	660		pany,	
293-296	" "	661		Construction Company v.	
296-299	" "	662		Meyer,	
299-302	" "	663		Railroad Co. v. Meyer,	593
302	" "	664	468	" "	597
303-305	Strauder v. West Virginia,	664	468-471	" "	598
305-308	" "	665	471-474	" "	599
308-311	" "	666	474-477	" "	600
311-312	" "	667	477-479	" "	601
313	Virginia v. Rives,	667	479-483	" "	602
314-316	" "	668	483-484	Hauenstein v. Lynham,	628
316-319	" "	669	484-487	" "	629
319-322	" "	670	487-490	" "	630
322-325	" "	671	490-491	" "	631
325-328	" "	672	491	Kirtland v. Hotchkiss,	558
328-330	" "	673	496-497	" "	561
330-333	" "	674	497-499	" "	562

REFERENCE TABLE.

10 Otto.	Title.	Here in.	10 Otto.	Title.	Here in.
500-501	Parish v. United States,	763	615-617	Insurance Company v. Gridley,	747
501-504	" " "	764	617	Kidd v. Johnson,	769
504-506	" " "	765	617-620	" " "	770
507	" " "	766	620	" " "	771
508-512	United States v. Bowen,	631	621-625	Wills v. Russell,	607
512-514	" " "	632	625-628	" " "	608
514-521	Mount Pleasant v. Beckwith,	699	628-629	" " "	609
521-523	" " "	700	630-639	Savings Bank v. Creswell,	713
523-526	" " "	701	639-642	" " "	714
526-529	" " "	702	642-643	" " "	715
529-532	" " "	703	644-646	Railroad Company v. Schutte,	605
532-535	" " "	704	646-648	" " "	606
535	" " "	705	648-655	Improvement Company v. Slack,	609
535	Mount Pleasant v. Cornell, <i>Note</i> ,	699	655-658	" " "	610
536-538	United States v. Murray,	756	658-659	" " "	611
538	" " "	757	659-660	Railway Company v. Slack,	611
539-541	People v. Weaver,	705	660-661	" " "	612
541-544	" " "	706	661-662	Railroad Company v. Blair,	587
544-547	" " "	707	663	United States v. Lippitt,	747
547	Williams v. Weaver,	708	665-667	" " "	748
547-548	" " "	709	667-670	" " "	749
548	" " "	710	670	" " "	750
548-557	Newton v. Commissioners,	710	671-672	Burns v. Meyer,	738
557-560	" " "	711	672	" " "	739
560-563	" " "	712	673	Branch v. United States,	759
563	" " "	713	673	" " "	760
564	Meeks v. Olpherts,	735	673-674	" " "	761
564-567	" " "	736	675	Nagle v. Rutledge,	772
567-570	" " "	737	676	Machine Company v. Gage,	754
570-571	" " "	738	676-679	" " "	755
571-573	Montgomery v. Sawyer,	692	679	" " "	756
573-576	" " "	693	680-684	Embry v. United States,	772
576-578	" " "	694	684-685	" " "	773
578	Dickerson v. Colgrove,	618	686	National Bank v. Burkhardt,	766
578-581	" " "	619	686-688	" " "	767
581-584	" " "	620	688-691	" " "	768
584	" " "	621	691-693	" " "	769
585-591	County of Cass v. Gillett,	585	693-695	Manning v. Insurance Company,	761
591-594	" " "	586	695-697	" " "	762
594	" " "	587	697-699	" " "	763
595-598	Railroad Co. v. Collector,	647	699-700	National Bank v. Graham,	750
598-599	" " "	648	700-703	" " "	751
599-600	Jones v. Blackwell,	752	703-704	" " "	752
600-603	" " "	753	704	Cox v. National Bank,)	
603-605	" " "	754		Clardy v. National Bank, }	739
605	Shaw v. Railroad Company,	757	709-711	" " "	740
611	" " "	758	711-714	" " "	741
611-613	" " "	759	714-717	" " "	742
614-615	Insurance Company v. Gridley,	746	717-718	" " "	743

CASES REPORTED IN VOLUME 100.

A.		B.	
Adams County, Am. Emigrant Co. v.	563	Bank, First Nat., of Cin., v. Burkhardt,	766
American Emigrant Co. v. County of Adams,	563	Bank, First Nat., of Montgomery, Oates v.	580
Arthur, Coll., v. Herold,	568	Bank, First Nat., of Mt. Pleasant, Tinst-	
		man v.	530
		Bank, Nat., of Carlisle, v. Graham,	750
		Bank, Nat., of N. Y., Cox v.	739
Ballard Paving Co. v. Mulford,	591	Bank, Nat., of Republic, v. Miller,	529
Baltimore, Mayor, etc., Guy v.	743	Bank, Nat. Sav., of D. C. v. Creswell,	
Balt. & P. R. R. Co. v. Trook,	571	Com.,	713
Bank, Citizens', Case, Receiver, v.	695	Bank, Nat. Sav., of D. C. v. Ward,	621

CASES REPORTED.

B.		G.	
Bank, Nat., St. Louis v. U. S. Ins. Co.,	547	Garnau v. Dosier, v.	536
Beckwith, Town of Mt. Pleasant v.	699	Giblin, McIntyre v.	572
Blackwell, Jones, Exrx., v.	752	Gillett, Cass County v.	585
Blair, Chicago & Pacific R. R. Co. v.	587	Gilman, C. & S. R. R. Co., Hinckley, Receiver, v.	591
Bowen, United States v.	631	Glendale Elastic Fabric Co. v. Smith,	547
Bowie, Weatherly v.	606	Graham, First Nat. Bk. of Carlisle v.	750
Branch, Admr., v. United States,	759	Gridley, N. W. Mut. L. Ins. Co. v.	746
Brownsville v. Cavazos, Exr.,	574	Guy v. Mayor, etc., of Baltimore,	743
Burkhardt, First Nat. Bk. of Cin. v.	766		
Burns v. Meyer,	788	H.	
C.		<i>Habeas Corpus Cases,</i>	
Case, Receiver, v. Citizens' Bk.,	695	Halliday, The Louisville v.	715, 717
Cass County v. Gillett,	585	Hatch v. Standard Oil Co. of Cleveland,	771
Cavazos, Exr., City of Brownsville v.	574	Hauenstein v. Lynham,	554
Chicago & Pacific R. R. Co. v. Blair,	587	Herold, Arthur, Coll., v.	628
Citizens' Bk., Case, Receiver, v.	695	Hinckley, Receiver, v. Gilman, C. & S. R. R. Co.,	568
City and Co. of San Francisco, Treasurer v.	626	Hirsch, United States v.	591
"Clardy v. National Bank,"	739	Holden v. Freedman's Sav. & Trust Co.,	539
"Clark v. Trust Co.,"	573	Hollingsworth, Hurt v.	567
Clark, Trustee, v. Eaton, Comr.,	573	Hotchkiss, Kirtland v.	569
Clarke, <i>Ex Parte</i> ,	715	Hough v. Texas & Pacific R. R. Co.,	558
Colgrove, Dickerson v.	618	Howe Machine Co. v. Gage,	612
Colorado Springs Co., Cowell v.	547	Hurt v. Hollingsworth,	754
Comrs. of Mahoning Co., Newton v.	710		569
Connecticut Mut. L. Ins. Co., Sea v.	772	I.	
Construction Co., Del. R. R. v. Meyer, Trustee,	593	Improvement Co., Ky., v. Slack, Coll.,	609
County of Adams, Am. Emigrant Co. v.	563	Ins. Co., Conn. Mut. L., Sea v.	772
County of Cass v. Gillett,	585	Ins. Co., John Hancock Mut. L., Manning v.	761
County of Gallatin, Fairfield v.	544	Ins. Co., Knickerbocker L. v. Schneider, Admr.,	694
Cornell, Exr., Town of Mt. Pleasant v.	699	Ins. Co., N. W. Mut. L., v. Gridley,	746
Cowell v. Col. Springs Co.,	547	Ins. Co., U. S., St. L. Nat. Bank v.	547
Cox v. Nat. Bank of N. Y.	739		
Craig v. Smith,	577	J.	
Creswell, Comr., Nat. Sav. Bk. of D. C. v.	713	John Hancock Mut. L. Ins. Co., Manning v.	761
Curtis v. United States,	571	Johnson, Dow v.	632
D.		Johnson, Kidd v.	769
Daniels, Lansdale v.	587	Johnson, United States v.	550
Davis, Tennessee v.	648	Jones, Exrx., v. Blackwell,	752
Delaware R. R. Construction Co. v. Meyer, Trustee,	593	K.	
Dickerson v. Colgrove,	618	Kentucky Improvement Co. v. Slack, Coll.,	609
Dosier, Garnau v.	536	Kidd v. Johnson,	769
Dow v. Johnson,	632	Kirtland v. Hotchkiss,	558
E.		Knickerbocker L. Ins. Co. v. Schneider, Admr.,	694
Eaton, Comr., Clark, Trustee, v.	573	L.	
Embry v. United States,	772	Lammers v. Nissen,	562
Emigrant Co., Am., v. County of Adams,	563	Lansdale v. Daniels,	587
<i>Ex Parte</i> Clarke,	715	Lippitt, United States v.	747
<i>Ex Parte</i> French,	529	Little Rock & Ft. Smith Ry. Co., Shaw v.	757
<i>Ex Parte</i> Reed,	538	Louisville, The, v. Halliday,	771
<i>Ex Parte</i> Siebold,	717	Lynham, Hauenstein v.	628
<i>Ex Parte</i> Virginia,	667, 676	M.	
F.		McDonald, North, Assignee, v.	535
Fairfield v. County of Gallatin,	544	McIntyre v. Giblin,	572
First Nat. Bk. of Cincinnati v. Burkhardt,	766	Mahoning Co., Comrs. of, Newton v.	710
First Nat. Bk. of Montgomery, Oates v.	580	Manning v. John Hancock Mut. L. Ins. Co.,	761
First Nat. Bk. of Mt. Pleasant, Tinsman v.	580	Mayor, etc., of Baltimore, Guy v.	743
Florida Cent. R. R. Co. v. Schulte,	605	Meeks v. Olpherts,	735
Fraloff, N. Y. C. & H. R. R. Co. v.	531	Meyer, Burns v.	738
Freedman's Sav. & Trust Co., Holden v.	567	Meyer, Trustee, v. Delaware R. R. Const. Co.,	593
French, <i>Ex Parte</i> ,	529	Mich. Cent. R. R. Co. v. Slack, Coll.,	647
G.		Miller, Nat. Bank of Republic v.	529
Gage, Howe Machine Co. v.	754	Mining Co., Union Consol. Silver, v. Taylor,	541
Gaines, Comptroller, U. S., <i>ex rel.</i> v.	733	Montgomery v. Sawyer,	692
Gallatin County, Fairfield v.	544		

CASES REPORTED.

M.

Moore, Phillips v.	603
Moore v. Simonds, Admr.,	590
Mount Pleasant, Town of, v. Beckwith,	699
Mount Pleasant, Town of, v. Cornell, Exr.,	699
Mulford, Ballard Paving Co., v.	591
Murray, United States v.	756

N.

Nagle v. Rutledge,	772
"National Bank, Clardy v."	739
National Bank of Carlisle v. Graham,	750
National Bank of N. Y., Cox v.	739
National Bk. of Republic v. Miller,	529
"National Bk., Tintsmen v."	530
National Sav. Bk. of D. C. v. Creswell, Com. . . .	713
National Sav. Bk. of D. C. v. Ward,	621
Newton v. Comrs. of Mahoning County,	710
New York, People of, <i>ex rel.</i> , v. Weaver,	705
Nissen, Lammers v.	562
North, Assignee, v. McDonald,	535
Northwestern Mut. L. Ins. Co. v. Gridley,	688
Northwestern Union Packet Co. v. St. Louis, . . .	746
N. Y. C. & H. R. R. R. Co. v. Fraloff,	531

O.

Oates v. First Nat. Bk. of Montgomery,	580
Olpherts, Meeks v.	735

P.

Packet Co., N. W. Union, v. St. Louis,	688
Parish v. United States,	763
Paving Co., Ballard, v. Mulford,	591
People of N. Y., <i>ex rel.</i> , v. Weaver,	705
Perryman, United States v.	645
Phillips v. Moore,	603
Pierce v. Tough,	735
Pierce v. Wade,	735
Powell, Ricker v.	527

R.

R. R. Co., Balt. & P., v. Trook,	571
R. R. Co., Chicago & Pacific, v. Blair,	587
R. R. Co., Florida Cent., v. Schulte,	605
R. R. Co., Gilman, C. & S., Hinckley, Receiver, v.	591
R. R. Co., Mich. Cent., v. Slack, Coll.,	647
R. R. Co., N. Y. C. & H. R., v. Fraloff,	531
"R. R. Co. v. Shutte,"	605
R. R. Co., Texas & Pacific, Hough v.	612
Ry. Co., Eastern Kentucky, v. Slack, Coll., . . .	611
Ry. Co., Kansas Pacific, v. Twombly, Admr.,	550
Ry. Co., Little Rock & Ft. Smith, Shaw v. . . .	757
Reed, <i>Ex Parte</i> ,	538
"Removal Cases,"	593
Ricker v. Powell,	527
"Rives, Virginia v."	667
Russell, Coll., Wills v.	607
Rutledge, Nagle v.	772

S.

St. Louis Nat. Bank v. U. S. Ins. Co.,	547
St. Louis, N. W. Union Packet Co. v.	688
San Francisco, City and Co. of, Trenouth v. . . .	626
Savings, etc., Co., Freedman's, Holden v. . . .	567
Sawyer, Montgomery v.	692
Schneider, Admr., Knick. L. Ins. Co. v. . . .	694

S.

Schulte, Florida Cent. R. R. Co. v.	605
Sea v. Conn. Mut. L. Ins. Co.,	772
Shaw v. Little Rock & Ft. Smith Ry. Co. . . .	757
"Shutte, Railroad Co. v."	605
Siebold, <i>Ex Parte</i> ,	717
Simonds, Admr., Moore v.	590
Slack, Coll., Eastern Kentucky Ry. Co. v. . . .	611
Slack, Coll., Kentucky Improvement Co. v. . . .	609
Slack, Coll., Mich. Cent. R. R. Co. v. . . .	647
Smith, Craig v.	577
Smith, Glendale Elastic Fabric Co. v.	547
Soule v. United States,	536
Standard Oil Co. of Cleveland, Hatch v. . . .	554
Steffens, United States v.	550
Strauder v. West Virginia,	664

T.

Taylor, Union Consol. Silver Min. Co. v. . . .	541
Tennessee v. Davis,	648
Texas & Pacific R. R. Co., Hough v.	612
The Louisville v. Halliday,	771
Tillson v. United States,	543
Tintsmen v. First Nat. Bk. of Mt. Pleasant, . . .	530
"Tintsmen v. Nat. Bk.,"	530
Tobin, Mayor, etc., of Vicksburg v.	690
Tough, Pierce v.	735
Town of Mt. Pleasant v. Beckwith,	699
Town of Mt. Pleasant v. Cornell, Exr.,	699
"Trade-Mark Cases,"	550
Trenouth v. City and Co. of San Francisco, . . .	626
Trook, Balt. & P. R. R. Co., v.	571
"Trust Co., Clark v."	573
Twombly, Admr., Kan. Pac. Ry. Co. v. . . .	550

U.

Union Consol. Silver Min. Co. v. Taylor, . . .	541
United States v. Bowen,	631
United States, Branch, Admr., v.	759
United States v. Curtis,	571
United States, Embry v.	772
United States, <i>ex rel.</i> , v. Gaines, Comptroller, . . .	733
United States v. Hirsch,	539
United States Ins. Co., St. L. Nat. Bank v. . . .	547
United States v. Johnson,	550
United States v. Lippitt,	747
United States v. Murray,	756
United States v. Perryman,	645
United States, Soule v.	536
United States v. Steffens,	550
United States Tillson v.	543
United States v. Wittemann,	550

V.

Vicksburg, Mayor, etc., v. Tobin,	690
Virginia, <i>Ex Parte</i> ,	667, 676
"Virginia v. Rives,"	667

W.

Wade, Pierce v.	735
Ward, Nat. Sav. Bank of D. C. v.	621
Weatherly v. Bowie,	606
Weaver, People of N. Y., <i>ex rel.</i> , v.	705
Weaver, Williams v.	708
West Virginia, Strauder v.	664
Williams v. Weaver,	708
Wills v. Russell, Coll.,	607
Wittemann, United States v.	550

THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1879.

SHERMAN A. RICKER, *Appt.*,

v.

NATHAN POWELL ET AL.

(See S. C., 10 Otto, 104-110.)

Bill of review—requisites to—leave to file.

1. A bill of review on the ground of newly discovered matter, can only be filed on special leave, which depends on the sound discretion of the court to which the application is made.

2. The party asking for a bill of review must generally show that he has performed the decree; especially if it be a decree for the payment of money, and he must likewise pay the costs.

3. The right to file a bill of review without leave exists only when the bill is brought for error of law alone.

[No. 933.]

Submitted Oct. 15, 1879. Decided Oct. 27, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. The case is stated by the court.

Messrs. Melville W. Fuller and William C. Goudy, for appellant.

Messrs. Julius Rosenthal, A. M. Pence and E. S. Isham, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This is an appeal from an order of the circuit court refusing the appellant leave to file a bill of review in that court. The facts are as follows:

On the 8th of April, 1869, one H. H. Walker mortgaged to Powell, the appellee, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ sec. 5, T. 38, N. R. 14 E., 40 acres, to secure a note for \$40,500, payable twelve months after date, with interest at the rate of ten per cent. per annum. The land was afterwards subdivided into blocks, and sold and conveyed at different times to different purchasers. On the 23d of July, 1874, Powell filed a bill in equity in the Circuit Court for the Northern District of Illinois to foreclose this mortgage, making all persons parties who held title to the land under conveyances by the mortgagor. Among other parties were the appellant, Ricker, as owner of block No. 14; one Orvis, as owner of the south 100 feet of block No. 16; and Rogers, Greenbaum & Foreman, having

a claim, by way of mortgage or deed of trust, on the north 201 feet of block 16. Ricker, in his answer, claimed that his block 14 should not be sold until after block 18 and the two portions of block 16, above described, had been exhausted. The several questions presented were litigated between the defendants, there being no defense as against Powell, the mortgagee; and on the 5th of June, 1875, a decree was rendered finding due him the sum of \$14,853.33, and establishing his lien on the whole forty acres, but directing that the property be sold in the following order, to wit: 1. The north 201 feet of block 16, subject to the claim thereon of Rogers, Greenbaum & Foreman. 2. The south 100 feet of block 16. 3. Block 14. 4. The interest of Rogers, Greenbaum & Foreman in the north 201 feet of block 16. The estate of Greenbaum and others was not defined in the decree, but in their answer it was described as a deed of trust to Rogers, executed by one Kinney, to secure a note of \$12,000 given to Samuel J. Walker, bearing date Nov. 25, 1872, payable three years after date, with interest at the rate of eight per cent. per annum, and owned by Greenbaum & Foreman.

From this decree Orvis, as owner of the south 100 feet of block 16, appealed to this court, and the case was docketed here Sept. 23, 1875. The appeal came on for hearing at the last term, and the errors assigned were, in substance, that block 18 and the north 201 feet of block 16, without any reservation in favor of Greenbaum and others, should have been sold before the south 100 feet of block 16. Ricker did not appeal, but he appeared by counsel and filed a brief on the hearing of the appeal of Orvis. Early in the term the decree of the circuit court was affirmed, so far as the order of the sale was concerned. Later, a rehearing was granted and further arguments filed, but on the second hearing the same decree of affirmance was entered. The final mandate was sent down from here May 15, 1879, and on the 21st of the same month Ricker petitioned the circuit court for leave to file a bill of review, on the ground of errors of law apparent on the face of the record, and which are the same as those presented in this court on the appeal of Orvis; on the ground of fraud and surprise in the entry of the original decree, he having been led to suppose that the decree would be entered for the sale of the north 201 feet of block 16, without any reservation in favor of Greenbaum and others, and not knowing that anything had

NOTE.—Order of sale of mortgaged premises. See note to Orvis v. Powell, ante, 238.

See 10 OTTO.

been done to the contrary until he got the printed record in December, 1877, or January, 1878, when it was too late for him to appeal; and also on the ground of having discovered, since the original decree, evidence to show that when he, Ricker, bought block 14, the mortgagor was the owner of the note now held by Greenbaum & Foreman, and that he did not transfer it until September or October, 1873, and then only as collateral security for an antecedent debt which he owed of \$9,000 or \$9,500. No offer was made to perform the decree, so far as Powell was concerned, and the decree itself still remains unsatisfied.

Upon this showing the circuit court refused leave to file the bill of review, and this appeal from that refusal has been taken.

Without intending to decide that an appeal will lie to this court from an order of the circuit court refusing leave to file a bill of review for newly discovered matter, we are satisfied the refusal in this case was right. There is no dispute with Powell either as to the amount due him or as to his right to have the mortgaged property sold. The only controversies in the case are between the defendants as to the order in which their respective interests in the property shall be subjected. In these controversies Powell has no concern. His security is ample, and it is of no importance how he gets the money, which is his due, provided he gets it. He has already been kept out of it nearly five years because of the disputes between the different parties in interest as to their rights as between themselves. The delay thus far he has been compelled to submit to, because the parties were entitled to what was done as a matter of right. Now, however, they are asking a favor, for a bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made. *Thomas v. Harvie*, 10 Wheat., 146; *Rubber Co. v. Good-year*, 9 Wall., 805 [76 U. S., XIX., 828]; *Story*, Eq. Pl., 421 c; 2 Dan. Ch. Pr., 4th ed., 1577. "It may be refused, although the facts, if admitted, would change the decree, when the court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause, unadvisable." *Story*, Eq. Pl., sec. 417; *Griggs v. Gear*, 3 Gilm. [8 Ill.], 2.

As the decree stands, a very considerable portion of the mortgaged property must be sold before that of Ricker can be reached. If that sells for enough to pay the debt, the bill of review would be unnecessary. What it actually is worth, or what it will be likely to bring at the sale, nowhere appears.

The rule is well settled, subject, however, to some exceptions, that "Before a bill of review * * * can be filed the decree must be first obeyed and performed. * * * Thus, if money is directed to be paid it ought to be paid before the bill of review is filed; though it may afterwards be ordered to be refunded." 2 Dan. Ch. Pr., 4th ed., 1582; *Story*, Eq. Pl., sec. 406. *Chancellor Kent* thus states the rule and the reason of it in *Wiser v. Blachly*, 2 Johns. Ch., 488: "In the first place, the party asking for a bill of review must generally show that he has performed the decree; especially if it be * * * a decree for the payment of money, and he must likewise pay the costs, and nothing will excuse the

party from this duty but evidence of his inability to perform it. *Williams v. Mellish*, 1 Vern., 117; *Fittion v. Macclesfield*, 1 Vern., 264; *Cooper*, Eq. Pl., 90; note to *Bish. of Durham v. Liddell*, 2 Bro. (P. C.), 63. This appears to be a settled rule, laid down both in the ancient and modern books; but the petitioners have paid no attention to this rule, for there is no offer to perform any part of the decree or even to bring the money into court, or any pretext of poverty, want of assets, or other inability to do it. There is wisdom in the establishment of such a provision, and it ought to be duly enforced. Its object is to prevent abuse in the administration of justice, by filing of bills of review for delay and vexation, or otherwise protracting the litigation, to the discouragement and distress of the adverse party." These words of this learned Chancellor are peculiarly applicable to the facts of this case. The decree, so far as Powell is concerned, is for money, and that it be paid to him. There is no pretense of any performance of this decree, or any offer to perform. The money is all due, and ought to be paid. The effort on the part of Ricker is to increase the liability of the first piece of property to be sold, not with any view to protect the interests of Powell, but only his own. Orvis, whose property stands second in the order of sale, is in no position now to insist that the interest of Greenbaum & Foreman should be sold before his property, because that question was settled here on his appeal. The dispute now is between Greenbaum & Foreman and Ricker as to whether their property or his should be sold first. The true way is to let the sale go on according to the decree until the property of Ricker is reached. Then let him pay Powell the balance remaining due, and, if he chooses and can get the necessary leave, file his bill of review to reverse that part of the decree which puts the sale of the interest of Greenbaum & Foreman after his, and thereby charge what he may be compelled to pay on them instead of himself. He makes no such offer in his bill, and fails entirely to give any reason why he does not. Clearly, under these circumstances, he was not entitled to the leave he asked, and his petition was properly denied.

It is contended, however, that the right to file a bill of review can only be denied when the bill is for newly discovered matter *alone*, and that as this bill is for errors of law, as well as newly discovered matter, the refusal of leave was equivalent to the denial of a strict legal right, which did not in any manner depend on the discretion of the court. The proposition may, with equal propriety, be stated the other way, to wit: that the right to file a bill of review without leave exists only when the bill is brought for error of law alone, and as this bill is for newly discovered matter as well as error of law, it can only be filed on leave, which rests in the sound discretion of the court. The application was for leave to file the bill as a whole, and not in parts; and if as a whole it required leave, the part which, if it stood alone, could be put on file without, must stand or fall with the incumbrances that have been attached to it. This bill, as a whole, could only be filed with leave, and consequently as Ricker has, by the form of proceedings adopted, voluntarily waived his strict legal right to file for errors of law without

leave, he must abide the rules applicable to cases where leave is required.

As to the errors of law assigned, the bill is evidently bad, because the decree was rendered more than two years before the petition for leave to file was presented. *Thomas v. Harvie, supra*; but there is nothing now to prevent Ricker from asking leave to file another bill for the newly discovered matter, if he performs the decree as to Powell. Or he may wait until the property has been sold, which by the decree must be subjected before his, and then, on paying the balance remaining due, apply for leave to bring in the newly discovered evidence against Greenbaum & Foreman, and have their rights determined according to the facts as they shall thus be made to appear. But however that may be, upon the application as made below the leave was properly refused, and the decree to that effect is, consequently, affirmed.

Cited—2 McCrary, 229; 3 McCrary, 486.

THE NATIONAL BANK OF THE REPUBLIC, *Plff. in Err.*,

REES J. MILLER.

Jurisdiction as to amount—special allowance of writ of error.

1. When the matter in dispute, in a case brought from the Supreme Court of the District of Columbia, is less than \$2,500, the judgment is not reviewable here.

2. The special allowance of a writ of error to reverse a former judgment in the same cause under which a reversal was had, cannot be made applicable to this writ.

[No. 240.]

Submitted Oct. 27, 1879. Decided Nov. 3, 1879.

IN ERROR to the Supreme Court of the District of Columbia.

On motion to dismiss.

Mr. R. D. Murray, for defendant in error, cited 20 How., 481 (61 U. S., XV., 974).

Mr. J. H. Bradley, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The value of the matter in dispute in this case is less than \$2,500 and, therefore, under our ruling in *R. R. Co. v. Grant* [*ante*, 231], the judgment is not now reviewable here. The special allowance of a writ of error to reverse a former judgment in the same cause, under which a reversal was had, cannot be made applicable to this writ, because the case as now presented is entirely different from what it was before. In fact, after the case went back, it was made to conform to what, as was suggested in the opinion reported in 10 Wall., 157 [77 U. S., XIX., 899], might perhaps entitle the plaintiff to recover.

The motion to dismiss is granted, each party to pay his own costs.

Ex Parte IRA G. FRENCH.

(See S. C., 10 Otto, 1-5.)

Bonds on stay of execution—severable judgment—informal writ.

See 10 OTTO.

1. Where a writ of error has been sued out to obtain the reversal of an entire judgment, and a stay of execution is sought only as to certain specified parts, and the judgment is severable as between the defendants, the bonds for such stay are sufficient, where they are far in excess in each instance of the amount recovered against the several defendants who seek the stay.

2. Where all the defendants want the judgment reviewed, but a part only desire to have the execution against them stayed, they may all join in the writ, and separate when they ask for a stay.

3. If the writ is informal, the remedy is by motion to vacate the writ, and not by *mandamus* to have the judgment carried into execution.

[No. 8, Orig.]

Submitted Oct. 27, 1879. Decided Nov. 3, 1879.

PETITION for *mandamus*.

The case is stated by the court.

Messrs. John Reynolds and S. O. Houghton, for petitioner.

Messrs. A. T. Britton and W. H. Smith, opposed.

Mr. Chief Justice Waite delivered the opinion of the court:

Upon the showing made on this application, it appears that French the petitioner brought a suit in ejectment in the Circuit Court for the District of California, against Lincoln, O'Ness, Onesti, De Silva and others, to recover the possession of a large tract of land. On the trial the court found, among other things, that the defendant Lincoln was in the separate possession of a specific portion of the tract, and the defendants O'Ness, Onesti and De Silva in the possession of another portion. Judgment was rendered, October 7, 1878, in favor of French against all the defendants jointly, for the recovery of the entire tract and the costs of suit, amounting to \$959.25; and against Lincoln separately for \$330, damages for withholding possession; and against O'Ness, Onesti and De Silva for \$225, for like cause. Other separate judgments for damages were rendered against the other defendants, the aggregate of all the money judgments being \$6,091.

On the 28th of October a writ of error from this court was sued out in the name of all the defendants, and the circuit court on the same day made the following order:

"And now, on motion of the defendants' attorneys, it is ordered that the amount of the bond to stay the execution of the judgment in this case, as to the possession of the land found by the findings filed herein to be in the separate possession of the defendant Lincoln, and also as to the judgment against him for damages and costs, be and the same is hereby fixed at \$3,000. And it is further ordered that the amount of the bond to stay the execution of the judgment as to the land found by the findings filed herein to be in the separate possession of the defendants O'Ness, Onesti and De Silva, and also to stay the execution of the judgment against them for costs and damages, be and the same is hereby fixed at \$3,000."

On the following day separate bonds were filed by the defendants named in this order for the designated amounts, and conditioned as required by law for the stay of execution, which were approved and accepted in due form by the Circuit Judge, and on the 31st of October the following order was made by the circuit court:

"A writ of error having been sued out and perfected by the defendants in said action, and

defendant L. M. Lincoln having given the proper bond to operate as a *supersedeas* as to the judgment against him, and the defendants, Onesti, O'Ness and De Silva, having given a similar bond as to the judgment against them: ordered, that proceedings be stayed as to the moneys recovered against said Lincoln, and as to the sixty acres of land found by the court to be in his possession, as described in the findings in said cause; and also that the proceedings be stayed as to the judgment for damages and costs against said O'Ness, Onesti and De Silva, and as to the land found to be in their possession, as described in the findings of the court in this cause; and that a writ of restitution and execution issue as to the remaining defendants, and the remainder of the land recovered in the action."

Afterwards, French applied to the clerk of the circuit court to issue execution against all the defendants, as well those who had filed *supersedeas* bonds as the others; and this being refused, he moved the court to vacate its order of October 31, and direct the complete execution of the judgment. This also being refused, he now prays "That a writ of *mandamus* issue from this court to the circuit court, * * directing said circuit court to proceed and completely execute its said judgment, notwithstanding said writ of error and said orders of said circuit court."

The argument in support of this application is, that as when the judgment or decree is for the recovery of money not otherwise secured, the rule of this court (Rule 29) requires the bond for stay of execution to be for the whole amount of the judgment or decree; and as in this case the writ of error was sued out by all the defendants, and the aggregate of all the money judgments against them severally is more than \$6,000, the bonds that have been executed are insufficient, and therefore no stay of execution has been lawfully perfected. The object of the rule, which was made to put into form the practice that had prevailed before its promulgation, is to secure the eventual payment or performance of the judgment or decree, the execution of which is stayed by the *supersedeas*, in case the appeal or writ of error is not prosecuted to effect. Here, although the writ of error has been sued out to obtain the reversal of the entire judgment, a stay of execution is sought only as to certain specified parts. The judgment is severable as between the defendants, and has actually been severed by the court below for the purposes of the stay of execution. We see no impropriety in this, as in legal effect the judgment as it stands is against each of the several defendants for the lands they respectively occupy, and the damages they are respectively liable to pay. In this view of the case the bonds are sufficient in amount and form. So far as the money parts of the judgment are concerned, they are far in excess in each instance of the amount recovered against the several defendants who seek the stay; and as to the damages on account of the detention of the property, we decided in *Jerome v. McCarter*, 21 Wall., 17 [88 U. S., XXII., 515], that the amount of the bond rested in the discretion of the judge or justice who signed the citation or allowed the *supersedeas*, and would not be reconsidered here.

It said, however, that if the judgment is sepa-

rate, so that each defendant is entitled to a stay independently of the others, each must sue out his separate writ of error. To this we do not agree. The writ and the *supersedeas* are two separate things, and the writ can be sustained without a *supersedeas*. All the defendants want the judgment reviewed, but a part only desire to have the execution against them stayed; and we see no reason why they may not all join in the writ, and separate when they ask for a stay. There is certainly no settled practice against it, and very strong reasons can be found in its favor. The whole question is one of practice and not of statutory law. "Good and sufficient security that the plaintiff in error or the appellant * * * shall answer all damages and costs," "if he fail to make his plea good," is all the statute, R. S., sec. 1000, requires; and the rules of practice are satisfied if the indemnity is commensurate with the damages that may follow from the stay which is effected. But if the writ is informal, the remedy is by motion to vacate the writ, and not by *mandamus* to have the judgment carried into execution.

The petition is denied.

J. O. TINSTMAN, *Plf. in Err.*,

v.

FIRST NATIONAL BANK OF MOUNT PLEASANT.

(See S. C., "*Tinstman v. Natl. Bk.*," 10 Otto, 6.)

Jurisdiction as to amount.

Where the only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or \$3,134.20, this is the amount actually in dispute; and as it is less than \$5,000, this court has no jurisdiction.

[No. 842.]

Submitted Oct. 27, 1879. Decided Nov. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania.

On motion to dismiss.

The case is stated by the court.

Mr. D. T. Watson, in support of motion.

Mr. Welty McCullogh, *contra*.

Mr. Chief Justice Waite delivered the opinion of the court:

In *Gray v. Blanchard*, 97 U. S., 564 [XXIV., 1108], we held that a case must be dismissed, if, on examination of the whole record, it appeared that the value of the matter actually in dispute between the parties was less than our jurisdictional amount. This writ of error was brought by the defendant below to reverse a judgment against him of more than \$5,000; but on looking into the record, we find that the case was heard on an agreed statement of facts in the nature of a special verdict, in which it appeared

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy.* See note to *Gordon v. Ogden*, 28 U. S. (3 Pet.), 33.

that the plaintiff claimed of the defendant \$8,233.79, and interest from June 4, 1876. The defendant admitted that he owed this amount \$5,099.59, for which the plaintiff was entitled to a judgment. The only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or \$3,134.20. This, then, is the amount actually in dispute, and as it is less than \$5,000, we have no jurisdiction.

The motion to dismiss is granted.

Cited—106 U. S., 582; 108 U. S., 174; 110 U. S., 53, 304, 388.

NEW YORK CENTRAL AND HUDSON
RIVER RAILROAD COMPANY, *Plff. in*
Err.,

v.

OLGA DE MALUTA FRALOFF.

(See S. C., 10 Otto, 24-32.)

Carriers of passengers—liability for baggage—artifice—disclosure—what is baggage—excess of—statute.

*1. It is competent for passenger carriers by specific regulations distinctly brought to the knowledge of the passenger, which are reasonable and not inconsistent with any statute or its duties to the public, to protect itself against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk.

2. As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and demand extra compensation for any excess beyond that which the passenger may reasonably demand to be transported as baggage under the contract to carry the person.

3. The carrier may be discharged from liability for the full value of the passenger's baggage if the latter, by any device or artifice puts off inquiry as to such value, whereby is imposed upon the carrier a responsibility beyond what it is bound to assume, in consideration of the ordinary fare charged for the transportation of the person.

4. In absence of legislation, or of special regulations by the carrier, or of conduct by the passenger misleading the carrier as to value of baggage, the failure of the passenger, unasked, to disclose the value of his baggage is not, in itself, a fraud upon the carrier.

5. To the extent that articles, carried by a passenger for his personal use when traveling, exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer.

6. Whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case. And its determination of the facts—no error of law appearing—is not subject to re-examination in this court.

7. Section 4281, of Revised Statutes, has no reference to the liability of carriers by land for the baggage of passengers.

[No. 33.]

Argued Apr. 15, 1879. Decided Nov. 3, 1879.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.
The case is stated by the court.

* Head notes by Mr. Justice HARLAN.

NOTE.—What is included in baggage for which carrier is liable. See note to Hannibal & St. Jo. R. R. Co. v. Swift, 79 U. S., XX., 422.

See 10 OTTO.

Mr. Elliott F. Shepard, for plaintiff in error:

The plaintiff below was guilty of unfair dealing, amounting to fraud towards defendant, and deprived defendant of just compensation, and prevented it from protecting itself against the immense risk, to which she subjected it without notice.

1 Story, Eq., 187; *Gale v. Gale*, 19 Barb., 249; *Bacon v. Bronson*, 7 Johns. Ch., 194; *Bates v. Hewitt*, L. R., 2 Q. B., 595; *Richards v. Westcott*, 2 Bosw., 589; *Merrill v. Grinnell*, 30 N. Y., 616; *Chic. & A. R. R. Co. v. Thompson*, 19 Ill., 578; *Am. Exp. Co. v. Perkins*, 42 Ill., 458; *Relf v. Rapp*, 3 Watts & S., 21; *Kuter v. Mich. Cent. R. R. Co.*, 1 Biss., 35; *Hellman v. Holladay*, 1 Woolw., 365; *Orange Co. Bank v. Brown*, 9 Wend., 85; *Magnin v. Dinsmore*, 62 N. Y., 35; *Pardee v. Drew*, 25 Wend., 459; *Great N. Railway v. Shepherd*, 14 Eng. L. & E., 368.

It is fraud not to disclose the true value of articles intrusted to the care of a common carrier.

Westcott v. Fargo, 61 N. Y., 542; *Clay v. Wilan*, 1 H. Bl., 298; *Isett v. Mountain*, 4 East, 371; *Nicholson v. Willan*, 5 East, 507; *Bigbold v. Waterhouse*, 1 Mau. & S., 259; *Batson v. Donovan*, 4 B. & Ald., 21, and opinion of Holroyd, J.; *Parrott v. Anderson*, 14 Eng. L. & E., 371.

The carrier made no contract, and had no obligation to carry any baggage for this passenger. Her right (if any) to have her baggage carried, arose only from the indulgence and courtesy of the carrier, which did not include articles of such prodigious value.

(1.) The common law liability of carriers as insurers, applicable to freight, never extended to passengers and baggage.

Aston v. Heaven, 2 Esp., 533; *Feital v. R. R. Co.*, 109 Mass., 398; *McPadden v. N. Y. C. R. R. Co.*, 44 N. Y., 478; *Readhead v. Railway L. R.*, 2 Q. B., 412; *Meier v. Pa. R. Co.*, 64 Pa., 225; *Pitts., Ft. W. & C. R. R. Co. v. Hinds*, 53 Pa., 512; *Withers v. North Kent R. R. Co.*, 3 H. & N., 969; *Cleveland v. New Jersey St. Bt. Co.*, 68 N. Y., 310; *Queen's Bench, Cockburn, C. J., Stokes v. East. Cos. Railway*, 2 Post. & F., 691; *Wonder v. Balt. & O. R. R. Co.*, 32 Md., 411; *Boyce v. Anderson*, 2 Pet., 150; *Bowen v. N. Y. C. R. R. Co.*, 18 N. Y., 408; *Curtis v. Roch. & S. R. R. Co.*, 18 N. Y., 534; *Hammack v. White*, 11 C. B. (N. S.), 587, 594; *Frink v. Potter*, 17 Ill., 406; *Munroe v. Leach*, 7 Met., 274; *Crocheron v. N. Ferry Co.*, 56 N. Y., 656; *Dougan v. Champlain Trans. Co.*, 56 N. Y., 1.

If there is any common law regulation in New York State as to baggage, it is to be gathered from decisions in that State (3 Pet., 659) and it remains as stated and limited by Judge Nelson, in 1832, in *Orange Co. Bank v. Brown*, 9 Wend., 116; and, as he says, it grows out of the "custom or the courtesy of the carrier; * * * but courts ought not to allow this gratuity or custom to be abused; * * * nor to include articles not within the object or intent of the indulgence of the carrier."

Nordmeyer v. Loescher, 1 Hilt., 449; *Hawkins v. Hoffman*, 6 Hill, 586; *Merrill v. Grinnell*, 30 N. Y., 594; *Dexter v. Syracuse, B. & N. Y. R. R. Co.*, 42 N. Y., 326.

The American courts have decided that carriers are not liable for the following articles in a passenger's baggage, however convenient or useful to the passenger:

Not for silverware. *Bell v. Drew*, 4 E. D.

Smith, 59; *Knowlton v. Harlem R. R. Co.* (not reported), Marine Court, N. Y. City, 1874.

Not for merchandise or samples. *Pardee v. Drew*, 25 Wend., 459; *Hawkins v. Hoffman*, 6 Hill, 589. Same rule in England. *Great Nor. Railway Co. v. Shepherd*, 14 Eng. L. & E., 368; *Green v. Hudson River R. R. Co.*, MS.

Not for jewelry. *Richards v. Westcott*, 2 Bos., 589; *Nevins v. Bay St. Co.*, 4 Bos., 225; *The "Ionic,"* 5 Blatchf., 538; *Hannibal & St. Jo. R. R. Co. v. Swift*, 12 Wall., 263 (79 U. S., XX., 423).

Not for presents for friends. *Nevins v. Bay St. Steamboat Co.*, 4 Bos., 225. (Even though cloth for a dress.) *Dexter v. Syracuse, etc., R. R. Co.*, 42 N. Y., 326.

Not for Masonic regalia (although it is apparel); *Nevins Bay State Co. (supra)*.

Not for money. *Orange County Bank v. Brown*, 9 Wend., 85. "*The Ionic*," *supra*. *Chicago & A. R. R. Co. v. Thompson*, 19 Ill., 578; *Hickox v. Navigatuck R. R. Co.*, 31 Conn., 284.

Not for anything carried for the purpose of transportation. *Merrill v. Grinnell*, 30 N. Y., 594.

Not for two pistols. Both had been allowed by the jury, and the appellate court struck out one. *Chi., R. I. & Pac. R. R. Co. v. Collins*, 56 Ill., 212.

Not for an article of great value. *Hellman v. Holaday*, 1 Woolw., Miller, J., 365.

Not for unpublished manuscripts. *Hannibal & St. Jo. R. R. Co. v. Swift (supra)*.

Not for a trunk of laces. *Dibble v. Brown*, 12 Ga., 218, 227.

The general railroad law of New York provides for the carriage of ordinary baggage only, which these priceless cobwebs, these heirlooms, more valuable than gold or gems, and like nothing seen in this country before or since, are not.

Carriers are liable for ordinary baggage only, in moderate quantities, such as is usually taken by travellers; but plaintiff sues for extraordinary articles in immoderate quantities.

Nordmeyer v. Loescher, 1 Hill., 499; *Hawkins v. Hoffman*, 6 Hill, 586; *Dexter v. Syracuse, etc. R. R. Co.*, 42 N. Y., 326; *Hannibal & St. Jo. R. R. Co. v. Swift (supra)*.

Mr. **James W. Gerard**, for defendant in error:

As to the correctness of the law laid down by the Judge below, that carriers are responsible for reasonable and ordinary baggage for the journey according to the passenger's condition, we claim that the plaintiff can recover for the value of such articles of baggage as are shown to be suitable to her station in life; and the value and amount is to be estimated, not for the mere portion of her transit on which the baggage was lost, but may embrace the general contemplated journey, and may include such an allowance for apparel under various circumstances or accidents, and for sojourning by the way, as a reasonably prudent person would consider it necessary to make.

Merrill v. Grinnell, 30 N. Y., 594; *Nevins v. Bay State*, 4 Bos., 225.

Furthermore, the question, what articles in a passenger's trunk were necessary for the journey, is a question of fact to be determined by the jury.

Rawson v. Penn. R. R. Co., 2 Abb. N. S., 220; *Merrill v. Grinnell*, 30 N. Y., 594.

Whether, therefore, the articles lost were or were not ordinary and reasonable luggage under

the circumstances of the case, was a question of fact for the jury; and the general evidence in the case showed that the laces lost were commonly worn by the plaintiff, and could be changed from one dress to another, and were so used by her, and that they were part of a lady's dress generally worn by people of her position in life.

As to the great value of the laces in question, we have not claimed their full value, nor have the jury given it to us. All we have claimed is a reasonable satisfaction for such part of the loss as we would be entitled to recover under such circumstances. What is a reasonable amount was properly, under the court's direction, left to the jury, they having the right to apply their reason and their judgment to the case, under all the evidence given, just as they are always allowed to do in cases of this character, as is well sustained by authority.

Laces were evidently, by the common law, articles for the value of which a loss could have been recovered. The fact of the special exemption of them and other articles under the English Carriers Act, demonstrates that.

Cases show that judgments have been recovered against carriers as baggage, for dueling pistols, *Woods v. Devin*, 13 Ill., 746; valuable jewelry, *McGill v. Roiland*, 3 Barr., 451; *Rawson v. Pa. R. R. Co.*, 2 Abb. Pr. (N. S.), 220; five franc pieces, *Cam. & Amb. R. R. Co. v. Baldant*, 16 Pa., 67; feather beds, looking-glasses, dishes, *Parmalee v. Fischer*, 22 Ill., 212; watches, *Jones v. Voorhees*, 10 Ohio, 145; money, *Merrill v. Grinnell*, 30 N. Y., 594; manuscript books, *Hopkins v. Westcott*, 6 Blatchf., 64; see, also, *Dexter v. Syracuse, etc. R. R. Co.*, 42 N. Y., 326; *Glasco v. N. Y. C. R. R. Co.*, 36 Barb., 558; *Nevins v. Bay St. S. Co.*, 4 Bosw., N. Y., 225.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a writ of error to a judgment rendered against the New York Central and Hudson River Railroad Company, in an action to recover the value of certain articles of wearing apparel alleged to have been taken from the trunk of the defendant in error while a passenger upon the cars of the Company, and while the trunk was in its charge for transportation as part of her baggage.

There was evidence before the jury tending to establish the following facts:

The defendant in error, a subject of the Czar of Russia, possessing large wealth, and enjoying high social position among her own people, after traveling in Europe, Asia and Africa, spending some time in London and Paris, visited America in the year 1869, for the double purpose of benefiting her health and seeing this country. She brought with her to the United States six trunks of ordinary travel-worn appearance, containing a large quantity of wearing apparel, including many elegant, costly dresses, and also rare and valuable laces, which she had been accustomed to wear upon different dresses when on visits, or frequenting theaters, or attending dinners, balls and receptions. A portion of the laces was made by her ancestors upon their estates in Russia. After remaining some weeks in the City of New York she started upon a journey westward, going first

to Albany, and taking with her, among other things, two of the trunks brought to this country. Her ultimate purpose was to visit a warmer climate and, upon reaching Chicago, to determine whether to visit California, New Orleans, Havana and, probably, Rio Janeiro. After passing a day or so at Albany, she took passage on the cars of the New York Central and Hudson River Railroad Company for Niagara Falls, delivering to the authorized agents of the Company for transportation as her baggage the two trunks above described, which contained the larger portion of the dress laces brought with her from Europe. Upon arriving at Niagara Falls she ascertained that one of the trunks, during transportation from Albany to the Falls, had been materially injured, its locks broken, its contents disturbed and more than two hundred yards of dress-lace abstracted from the trunk in which it had been carefully placed before she left the City of New York. The Company declined to pay the sum demanded as the value of the missing laces; and, having denied all liability therefor, this action was instituted to recover the damages which the defendant in error claimed to have sustained by reason of the loss of her property.

Upon the first trial of the case in 1873, the jury, being unable to agree, was discharged. A second trial took place in the year 1875. Upon the conclusion of the evidence in chief at the last trial, the Company moved a dismissal of the action, and, at the same time, submitted numerous instructions which it asked to be then given to the jury, among which was one peremptorily directing a verdict in its favor. That motion was overruled, and the court declined to instruct the jury as requested. Subsequently, upon the conclusion of the evidence upon both sides, the motion for a peremptory instruction in behalf of the Company was renewed, and again overruled. The court thereupon gave its charge, to which the Company filed numerous exceptions, and also submitted written requests, forty-two in number, for instructions to the jury. The court refused to instruct the jury as asked, or otherwise than as shown in its own charge. To the action of the court in the several respects indicated, the Company excepted in due form. The jury returned a verdict against the Company for the sum of \$10,000, although the evidence, in some of its aspects, placed the value of the missing laces very far in excess of that amount.

It would extend this opinion to an improper length and could serve no useful purpose, were we to enter upon a discussion of the various exceptions, unusual in their number, to the action of the court in the admission and exclusion of evidence, as well as in refusing to charge the jury as requested by the Company. Certain controlling propositions are presented for our consideration, and upon their determination the substantial rights of parties seem to depend. If, in respect of these propositions, no error was committed, the judgment should be affirmed without any reference to points of a minor and merely technical nature, which do not involve the merits of the case, or the just rights of the parties.

In behalf of the Company it is earnestly claimed that the court erred in not giving a peremptory instruction for a verdict in its behalf. This position, however, is wholly untenable. Had there

been no serious controversy about the facts, and had the law upon the undisputed evidence precluded any recovery whatever against the Company, such an instruction would have been proper. *Schuchardt v. Allens*, 1 Wall., 369 [68 U. S., XVII., 646]; *Parks v. Ross*, 11 How., 372; *Richardson v. Boston*, 19 How., 269 [60 U. S., XV., 642]; *Pleasants v. Fant*, 22 Wall., 121 [89 U. S., XXII., 782]. The court could not have given such an instruction in this case without usurping the functions of the jury. This will, however, more clearly appear from what is said in the course of this opinion.

The main contention of the Company, upon the trial below, was, that good faith required the defendant in error, when delivering her trunks for transportation, to inform its agents of the peculiar character and extraordinary value of the laces in question; and that her failure in that respect, whether intentional or not, was, in itself, a fraud upon the carrier, which should prevent any recovery in this action.

The circuit court refused and, in our opinion, rightly, to so instruct the jury. We are not referred to any legislative enactment restricting or limiting the responsibility of passenger carriers by land for articles carried as baggage. Nor is it pretended that the plaintiff in error had, at the date of these transactions, established or promulgated any regulation as to the quantity or the value of baggage which passengers upon its cars might carry, without extra compensation, under the general contract to carry the person. Further, it is not claimed that any inquiry was made of the defendant in error, either when the trunks were taken into the custody of the carrier, or at any time prior to the alleged loss, as to the value of their contents. It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies. It is also undoubtedly true that the carrier may be discharged from liability for the full value of the passenger's baggage, if the latter, by false statements, or by any device or artifice, puts off inquiry as to such value, whereby is imposed upon the carrier responsibility beyond what it was bound to assume in consideration of the ordinary fare charged for the transportation of the person. But, in the absence of legislation limiting the responsibility of carriers for the baggage of passengers; in the absence of reasonable regulations upon the subject, by the carrier, of which the passenger has knowledge; in the absence of inquiry of the

passenger as to the value of the articles carried, under the name of baggage, for his personal use and convenience when traveling; and in the absence of conduct upon the part of the passenger misleading the carrier as to the value of his baggage, the court cannot, as matter of law, declare, as it was in effect requested in this case to do, that the mere failure of the passenger, unasked, to disclose the value of his baggage is a fraud upon the carrier, which defeats all right of recovery. The instructions asked by the Company virtually assumed that the general law governing the rights, duties and responsibilities of passenger carriers prescribed a definite, fixed limit of value, beyond which the carrier was not liable for baggage, except under a special contract or upon previous notice as to value. We are not, however, referred to any adjudged case, or to any elementary treatise which sustains that proposition, without qualification. In the very nature of things, no such rule could be established by the courts in virtue of any inherent power they possess. The quantity or kind or value of the baggage which a passenger may carry under the contract for the transportation of his person depends upon a variety of circumstances which do not exist in every case. "That which one traveler," says Erle, *C. J.*, in *Phelps v. Northwestern Railway Co.*, 19 C. B. (N. S.), 321, "would consider indispensable, would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind will be taken in the mind of the carrier when he receives a passenger for conveyance." Some of the cases seem to announce the broad doctrine that, by general law, in the absence of legislation, or special regulations by the carrier, of the character indicated, a passenger may take, without extra compensation, such articles adapted to personal use, as his necessities, comfort, convenience, or even gratification may suggest; and that whatever may be the quantity or value of such articles, the carrier is responsible for all damage or loss to them, from whatever source, unless from the act of God or the public enemy. But that, in our judgment, is not an accurate statement of the law. Whether articles of wearing apparel, in any particular case, constitute baggage, as that term is understood in the law, for which the carrier is responsible as insurer, depends upon the inquiry whether they are such in quantity and value as passengers under like circumstances ordinarily or usually carry for personal use when traveling. "The implied undertaking," says Mr. Angell, "of the proprietors of stage-coaches, railroads and steamboats to carry in safety the baggage of passengers is not unlimited, and cannot be extended beyond ordinary baggage, or such baggage as a traveller usually carries with him for his personal convenience." Ang. Car., sec. 115. In *R. R. Co. v. Swift*, 12 Wall., 272 [79 U. S., XX., 428], this court, speaking through Mr. Justice Field, said that the contract to carry the person "Only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." To the same effect is a decision of the

Queen's Bench in *Macrow v. Great W. R. Co.*, L. R., 6 Q. B., 612, where Chief Justice Cockburn announced the true rule to be "That whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage." 2 Pars. Cont., 199. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer. In cases of abuse by the passenger, of the privilege which the law gives him, the carrier secures such exemption from responsibility; not however because the passenger, uninquired of, failed to disclose the character and value of the articles carried, but because the articles themselves, in excess of the amount usually or ordinarily carried, under like circumstances, would not constitute baggage within the true meaning of the law. The laces in question confessedly constituted a part of the wearing apparel of the defendant in error. They were adapted to and exclusively designed for personal use, according to her convenience, comfort or tastes, during the extended journey upon which she had entered. They were not merchandise, nor is there any evidence that they were intended for sale or for purposes of business. Whether they were such articles, in quantity and value, as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases. It was for the jury to say to what extent, if any, the baggage of defendant in error exceeded in quantity and value that which was usually carried without extra compensation, and to disallow any claim for such excess.

Upon examining the carefully guarded instructions given to the jury, we are unable to see that the court below omitted anything essential to a clear comprehension of the issues, or announced any principle or doctrine not in harmony with settled law. After submitting to the jury the disputed question as to whether the laces were, in fact, in the trunk of the defendant in error, when delivered to the Company at Albany for transportation to Niagara Falls, the court charged the jury, in substance, that every traveler was entitled to provide for the exigencies of his journey in the way of baggage; was not limited to articles which were absolutely essential, but could carry such as were usually carried by persons traveling, for their comfort, convenience and gratification upon such journeys; that the liability of carriers could not be maintained to the extent of making them responsible for such unusual articles as the exceptional fancies, habits or idiosyncrasies of some particular individual may prompt him to carry; that their responsibility as insurers was limited to such articles as it was customary or reason-

able for travelers of the same class, in general, to take for such journeys as the one which was the subject of inquiry, and did not extend to those which the caprice of a particular traveler might lead that traveler to take; that if the Company delivered to the defendant in error, aside from the laces in question, baggage which had been carried and which was sufficient for her as reasonable baggage, within the rules laid down, she was not entitled to recover; that if she carried the laces in question for the purpose of having them safely kept and stored by railroad companies and hotel-keepers, and not for the purpose of using them, as occasion might require, for her gratification, comfort or convenience, the Company was not liable; that if *any portion* of the missing articles were reasonable and proper for her to carry, and all was not, they should allow her the value of *that portion*.

Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must, necessarily, have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the Company, or of which it can complain. No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict and overruled a motion for new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. *Parsons v. Bedford*, 3 Pet., 446; *Barreda v. Silsbee*, 21 How., 167 [62 U. S., XVI., 93]; *Ins. Co. v. Folsom*, 18 Wall., 249 [85 U. S., XXI., 833].

It is, perhaps, proper to refer to one other point suggested in the elaborate brief of counsel for the Company. Our attention is called to section 4281 of the Revised Statutes, which declares that "If any shipper of platina, gold, gold-dust, coins, jewelry, * * * trinkets, * * * silk in a manufactured or unmanufactured form, whether wrought up or not wrought up with any other material, furs or laces, or any of them, contained in any parcel, package or bundle, shall lade the same as freight or baggage on any vessel, without, at the time of such lading, giving to the master, clerk, agent or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any of such goods beyond the value and according to the character thereof, so notified and entered."

See 10 OTTO.

It is sufficient to say that the section has no application whatever to this case. It has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated. It has no reference to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers.

The judgment is affirmed.

Mr. Justice Field, dissenting:

I dissent from the judgment of the court in this case. I do not think that two hundred and seventy-five yards of lace, claimed by the owner to be worth \$75,000, and found by the jury to be of the value of \$10,000, can, as a matter of law, be properly considered as baggage of a passenger, for the loss of which the Railroad Company, in the absence of any special agreement, should be held liable; and I am authorized to state that *Mr. Justice Miller* and *Mr. Justice Strong* concur in this view.

Cited—103 U. S., 265; 104 U. S., 512; 107 U. S., 456; 109 U. S., 385; 112 U. S., 340.

ORLANDO NORTH ET AL, Assignees of RUSSEL THORP, a Bankrupt, *Plffs. in Err.*,

v.

WILLIAM McDONALD ET AL.

Nonsuit, when allowable.

This court will not disturb a judgment of nonsuit, where, if the case had been left to the jury and a judgment been rendered against the defendants, it would set it aside as against evidence.

[No. 41.]

Submitted Nov. 4, 1879. Decided Nov. 10, 1879.

IN ERROR to the Supreme Court of the Territory of Wyoming.

An action was brought in the District Court of Uintah County, by Orlando North and L. Newman, assignees in bankruptcy of Russel Thorp, against William McDonald and Harvey Booth, to recover the value of a large amount of horses, cattle, mules and other personal property alleged to have been sold by said bankrupt to the defendants on the 25th day of September, A. D. 1874, in contravention of the provisions of the Bankrupt Law of the United States. The venue in said action was subsequently changed to Sweetwater County. The petition in bankruptcy, upon which said Thorp was adjudicated a bankrupt, was filed in the third district court on the 17th day of December, 1874. The personal property herein referred to was sold to the defendants in the district court for the sum of \$3,005, while it was alleged in said plaintiff's petition, that said property, so as aforesaid transferred, was worth the sum of \$6,450.

The case came on for trial at the October Sweetwater Term, 1875, before *Chief Justice Fisher* and a jury. After the testimony of the plaintiffs had closed, the defendants moved for a nonsuit, upon the ground that said testimony failed to show the existence of a cause of action in favor of the plaintiffs and against the defendants, which motion was, after the argument of counsel, granted by the court. A motion was

subsequently made by counsel for the plaintiffs, to set aside such nonsuit, which second named motion was overruled and judgment ordered for the defendants against the plaintiffs for costs. The only error now complained of in the court below, and to be passed upon by this court, is the granting of said motion for nonsuit.

Messrs. C. W. Bramel and W. W. Corlett, for plaintiffs in error.

Mr. Edward P. Johnson, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The plaintiffs below evidently intended to bring this action under section 5129 of the Revised Statutes; but the averments in their petition are only sufficient to make a case under section 5046. While the court would certainly have been justified in leaving the question of fraud to the jury upon the evidence as it stood, we think, if a judgment had been rendered against the defendants, it might with propriety have been set aside, as being contrary to what had been proven. For this reason, although it might have been more in accordance with correct practice not to take the case from the jury, we will not disturb the judgment. No request was made for leave to amend the petition, and we must consider the case here as made by the pleadings, and not as the parties may have intended to make it.

The judgment is affirmed.

JOSEPH GARNAU, *Appt.*,

v.

DOSIER, WEYL & COMPANY ET AL.

(See S. C., 10 Otto, 7, 8.)

Transcript, how authenticated.

A transcript of the record is sufficiently authenticated, for the purposes of an appeal or a writ of error to this court, if it is signed by the deputy in the name of and for the clerk, and sealed with the seal of the court below.

[No. 301.]

Submitted Nov. 3, 1879. Decided Nov. 10, 1879.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

On motion to dismiss.

The case is sufficiently stated by the court.

Messrs. E. E. Wood and Edward Boyd, for appellees, in support of motion.

Mr. Robert H. Parkinson, for appellant, opposed.

Mr. Chief Justice Waite delivered the opinion of the court:

Since the Act of June 8, 1872, 17 Stat. at L., 330, R. S., 558, 624, 678, authorizing the appointment of deputies of the Clerks of the Courts of the United States, a transcript of the record is sufficiently authenticated for the purposes of an appeal or a writ of error to this court, if it is signed by the deputy in the name of and for the Clerk of Court from which the appeal comes, or to which the writ of error is directed, and

sealed with the seal of that court. The transcript sent up in this case comes within this rule.

The motion to dismiss is denied.

FRANK SOULE ET AL., *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 10 Otto, 8-12.)

Internal Revenue Collector—sureties—rights of—new bond.

1. The Fifth Auditor is the proper officer to audit the accounts of an Internal Revenue Collector.

2. Sureties of such collector are liable for moneys received by him under an Act passed subsequently to the execution of their bond.

3. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal.

4. A direction of the Commissioner to the Collector to execute a new bond, must be considered as the direction of the Secretary, as the Commissioner is a subordinate officer of the Treasury Department.

[No. 14.]

Submitted Oct. 27, 1879. Decided Nov. 10, 1879.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Mr. W. W. Morrow, for plaintiffs in error.

Mr. Chas. Devens, Atty-Gen., for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Internal Revenue Collectors are required, before entering upon the duties of their office, to execute a bond for such amount as shall be prescribed by the Commissioner, under the direction of the Secretary, with not less than five sureties, conditioned that the collector shall faithfully perform his duties, and account for and pay over to the United States all public moneys which may come into his hands and possession. 13 Stat. at L., 225.

Pursuant to that requirement, the defendant first named, having been appointed such collector, on the 12th of January, 1867, gave the bond described in the complaint, and the other defendants signed the same as his sureties, the charge in the complaint being that the collector failed to perform the conditions of the bond.

Service having been made, the defendants appeared and pleaded as follows: (1) That the allegations of the complaint are not true. (2) That the bond is void because executed under duress. (3) Performance.

Subsequently the parties went to trial, and the verdict and judgment were in favor of the plaintiff. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court.

Errors assigned here are as follows:

I. That the court erred in admitting in evidence the transcript of accounts as audited by the Fifth Auditor.

II. That the court erred in instructing the jury that the sureties were liable for the item charged in the transcript as the excess collected on the amount of gauger's fees.

III. That the court erred in instructing the jury that the transcript was *prima facie* evidence of the correctness of the item charged therein as the amount of error by the assessor in footing lists, as per report of the supervisor.

IV. That the court erred in instructing the jury that, upon the evidence given, the bond was a voluntary bond and was not extorted, and that the collector and his sureties were liable upon it.

V. That the court erred in instructing the jury that the direction to the collector contained in the letter of the Commissioner to execute the bond, he having previously given one, must be considered as the direction of the Secretary of the Treasury.

Five things are established by the Act of Congress: (1) That it is the duty of the Commissioner to pay over daily to the Treasurer all public moneys which may come into his possession. (2) That the Treasurer is required to give proper receipts for the money, and keep a faithful account of the same. (3) That it is also the duty of the Commissioner, at the end of each month, to render true and faithful accounts of all public moneys received or paid out or paid to the Treasurer, and to exhibit proper vouchers for the same. (4) That it is the duty of the Fifth Auditor to receive such vouchers and examine the same, and to certify the balance, if any, and to transmit the accounts with the vouchers and certificate to the first comptroller for his decision thereon. (5) That it is the duty of the Commissioner, when such accounts are settled as provided in that section, to transmit a copy thereof to the Secretary of the Treasury. 13 Stat. at L., 223.

Argument to show that by the true construction of that section the Fifth Auditor is the proper officer to audit such accounts is scarcely necessary, as it is clear that the Act contemplates that they should be audited, and that it does not devolve the duty upon any other officer. Conclusive support to that theory, if more be needed, is also derived from the first paragraph of section 277 of the Revised Statutes, which, among other things, provides that the Fifth Auditor shall receive and examine all reports of the Commissioner of Internal Revenue, which, of course, embraces such accounts as that of the collector in this case, as it includes all the accounts rendered in the department of the Commissioner. R. S., 2d ed., sec. 277, p. 46.

2. Authority to appoint gaugers was conferred by the 53d section of the Act imposing taxes on distilled spirits and tobacco, and for other purposes. 15 Stat. at L., 147. Fees for gauging and inspecting, as prescribed by the Commissioner, were to be paid to the collector by the owner or producer of the articles to be gauged and inspected. Such fees were to be retained by the collector until the last day of each month, when the aggregate amount of fees so retained was, under regulation of the Commissioner, to be paid to the officers performing that duty, not to exceed, however, the rate of \$3,000 per annum.

Four hundred and ninety-four dollars and thirty-eight cents, money collected from that source in excess of what the collector had paid out, remained in his hands, and was charged in the accounts as settled by the accounting officers of the Treasury. Due exception was taken by the See 10 Otto.

U. S., Book 25.

sureties to the ruling of the court, that they were liable for that charge. No objection was made to the charge as against the collector, but the objection was that the sureties were not liable, because the money was received under the subsequent Act.

Viewed in that light, it must be assumed that the charge was a proper one as against the collector and, inasmuch as it was money collected by law of the owner or producer of the articles to be gauged and inspected, it was clearly public money in his hands to which he had no legal right. By the terms of the bond in suit the sureties are to become responsible if their principal does not justly and faithfully account for and pay over to the United States all public moneys which may come into his hands or possession. Beyond doubt, the amount went into his hands and possession as public money, and in the judgment of the court here, the ruling of the court below, that the sureties are liable for it, is correct. *U. S. v. Powell*, 14 Wall., 493-502 [81 U. S., XX., 726-8]; *U. S. v. Singer*, 15 Wall., 111-121 [82 U. S., XXI., 49-51].

3. When suit is brought in any case of delinquency of a revenue officer or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department, certified by the register, and authenticated under the seal of the department, * * * shall be submitted as evidence; and the court trying the cause shall be authorized to grant judgment and award execution accordingly. R. S., sec. 886; *Bruce v. U. S.*, 17 How., 439 [58 U. S., XV., 130]; *Smith v. U. S.*, 5 Pet., 292; *Cox v. U. S.*, 6 Pet., 172; *Hoyt v. U. S.*, 10 How., 109.

Treasury settlements of the kind are only *prima facie* evidence of the correctness of the balance certified; but it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. *U. S. v. Eckford*, 1 How., 250. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account.

4. Sufficient appears to show that the principal defendant was appointed collector March 28, 1865, in the recess of the Senate, to hold until the expiration of the then next session of Congress, and no longer. On the 25th of July following, he was appointed to the same office by the President and was confirmed by the Senate. Due notice of his appointment was given, and he was furnished with a blank form of bond, which, on November 2, 1866, he executed with sureties; but the bond being several and not joint and several, as it should be, he was officially requested to execute a new bond correcting that error. In pursuance of that request, on the 12th of January of the next year he executed the bond described in the complaint, and from the date of the first bond to the date of the second his accounts were settled by the treasury officers under the first bond. When the second bond was offered in evidence, the defendant objected to its admissibility; but the court overruled the objection, and instructed the jury that it was not extorted, which instruction constitutes the fourth exception.

Evidence to support the charge of duress is entirely wanting. Instead of that, the defendant testified that he did not remember that he made any objection to executing the bond, and supposed that he did it because the Commissioner had given such directions.

5. Exception was also taken to the instruction of the court that the direction of the Commissioner to execute a new bond must be considered as the direction of the Secretary, which is so obviously correct as to require no argument in its support, as it is matter of common knowledge that the Commissioner is a subordinate officer of the Treasury Department. *Dugan v. U. S.*, 3 Wheat., 172; *U. S. v. Kirkpatrick*, 9 Wheat., 720; *Hamilton v. Dillin*, 21 Wall., 73 [88 U. S., XXII., 528].

Suffice it to say that in view of these suggestions it is clear that there is no error in the record.

Judgment affirmed.

Ex Parte ALVIN R. REED.

(See S. C., 10 Otto, 13-23.)

Naval court-martial—regulations of the navy—revision of sentence—jurisdiction—habeas corpus.

1. A naval court-martial has jurisdiction to try a paymaster's clerk.

2. The Secretary of the Navy is authorized to establish "Regulations of the Navy," with the approval of the President, which have the force of law.

3. The authority who ordered the court is competent to direct it to reconsider its proceedings and sentence, for the purpose of correcting any mistake which may have been committed. The proceedings must be sent back for revision before the court shall have been dissolved.

4. Where such court has jurisdiction over the person and the case, its proceedings cannot be collaterally impeached for any mere error or irregularity. Every act of a court beyond its jurisdiction is void.

5. A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner upon such writ, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void.

[No. 5, Original.]

Argued Oct. 27, 1879. Decided Nov. 10, 1879.

APPPLICATION for a writ of *habeas corpus*. The case is sufficiently stated by the court.

Mr. Geo. S. Boutwell, for petitioner.

Mr. Charles Devens, *Atty-Gen.*, in opposition.

Mr. Justice Swayne delivered the opinion of the court:

There is no controversy in this case about the facts. The questions we are called on to consider are all questions of law. A brief summary of the facts will, therefore, be sufficient.

The petitioner, Reed, was the clerk of a paymaster in the Navy of the United States. He was duly appointed, and had accepted by a letter, wherein, as required, he bound himself "To be subject to the laws and regulations for the government of the navy and the discipline of the vessel." His name was placed on the proper muster-roll, and he entered upon the discharge of his duties. While serving in this capacity, charges of malfeasance were preferred against him, and on the 26th of June, 1878, he was directed by Rear-Admiral Nichols to appear and

answer before a general court-martial, convened pursuant to the order of that officer on board the United States ship *Essex*, then stationed at Rio Janerio, in Brazil. The court found the petitioner guilty, and sentenced him accordingly. The admiral declined to approve the sentence and remitted the proceedings back to the court, that the sentence might be revised. The court thereupon pronounced the following sentence in substitution for the former one:

"That the said Alvin R. Reed, paymaster's clerk, U. S. Navy, be imprisoned in such place as the honorable Secretary of the Navy may designate, for the term of two years; to lose all pay which may become due him during such confinement, excepting the sum of \$10 per month, this loss amounting to \$1,960; to be fined in the sum of \$500, which fine must be paid before or at the end of the term of confinement. Should such fine not be paid at end of the term of confinement, to be detained in confinement without pay until such fine be paid, and at the expiration of the term of confinement to be dishonorably dismissed from the naval service of the United States."

This sentence was different from the preceding one in two particulars, and in both it was more severe. It was approved by the admiral, and ordered to be carried out. The court was subsequently dissolved. While in confinement, under the sentence, on board a naval vessel at Boston, the petitioner sued out a writ of *habeas corpus*, and brought his case before the Circuit Court of the United States for the District of Massachusetts. After a full hearing, that court adjudged against him, and ordered him back into the custody of the naval officer to whom the writ was addressed. The petitioner thereupon made this application in order that the conclusions reached by the circuit court may be reviewed by this tribunal.

It is supposed that courts-martial were intended originally to be a partial substitute for the court of chivalry of former times. 3 Christian's Bl., 68, 108; Bouv. L. Dic., tit. Courts-martial. The difference between military law and martial law is too well known to require any remark. 1 Kent, Com., 12th ed., 241, *n. a.*

"* * * The common law * * * knew no distinction between citizen and soldier; so that if a life-guardsman deserted, he could only be sued for a breach of contract; and if he struck his officer, he was only liable to an indictment or an action of battery." 2 Campbell, *Lives of Ch.*, 91.

The constitutionality of the Acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const., art. 1, sec. 8 and amendment 5. In *Dynes v. Hoover*, 20 How., 65 [61 U. S., XV., 388], the subject was fully considered and their validity affirmed.

The regularity of the original organization of the court here in question is not denied.

Three points in support of the petition have been brought to our attention. It is insisted:

1. That the court had no jurisdiction to try a paymaster's clerk.

2. That when the first sentence was pronounced, the power of the court was exhausted, and that the second sentence was, therefore, a nullity.

3. That the court could revise its former sentence only on the ground of mistake, and that there was no mistake and, consequently, no power of revision.

The first of these propositions is clearly not maintainable.

Where the punishment is death, or fine and imprisonment, the jurisdiction in question is extended to all persons "in the naval service of the United States," R. S., sec. 1624, arts. 4, 14; and it embraces, besides the frauds enumerated, "any other fraud against the United States." R. S., sec. 1624, art. 14.

In case of conviction, adequate punishment is required to be adjudged. R. S., sec. 1624, art. 51.

Except where the sentence is death or the dismissal of a commissioned or warrant officer, it may be executed when confirmed by the officer ordering the court. R. S., sec. 1624, art. 53.

The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the payroll, and are paid accordingly. They may also become entitled to a pension and to bounty land. Navy Reg. of August 7, 1876, p. 95; *In re Bogart*, 2 Sawy., 396; *U. S. v. Bogart*, 3 Ben., 257; R. S., secs. 4695, 2426.

The good order and efficiency of the service depend largely upon the faithful performance of their duties.

If these officers are not in the naval service, it may well be asked, who are.

The second and third points will be considered together.

The Secretary of the Navy is authorized to establish "Regulations of the Navy," with the approval of the President. 12 Stat. at L., 565; R. S., sec. 1547. Such "Regulations for the Administration of Law and Justice" were issued on the 15th of April 1870. Thereby it is declared as follows:

"The authority who ordered the court is competent to direct it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed.

It is not in the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

The proceedings must be sent back for revision before the court shall have been dissolved." Reg., ch. 5, secs. 262-264.

Such regulations have the force of law. *Gratiot v. U. S.*, 4 How., 80.

The proceedings with respect to the revision of the second sentence were in conformity to these provisions.

It is clear that the court was not dissolved until after the approval of the second sentence by the admiral.

See 10 OTTO.

The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court.

We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause. If a magistrate having authority to fine for assault and battery should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. Every act of a court beyond its jurisdiction is void. *Nash ("Cornett") v. Williams*, 20 Wall., 226 [87 U. S., XXII., 254]; *Windsor v. McVeigh*, 93 U. S., 274 [XXIII., 914]; 7 Wait, Act. and Def., 181. Here there was no defect of jurisdiction as to anything that was done. Beyond this we need not look into the record. Whatever was done, that the court could do under any circumstances, we must presume was properly done. If error was committed in the rightful exercise of authority, we cannot correct it.

A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void. *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 193; *Ex parte Milligan*, 4 Wall., 2 [71 U. S., XVIII., 281].

The application of the petitioner is, therefore, denied.

Cited—109 U. S., 340; 6 Sawy., 241.

UNITED STATES, *Plff.*,

v.

HERMAN HIRSCH ET AL.

(See S. C., 10 Otto, 33-36.)

Crimes under revenue laws—limitations as to.

1. The crimes of a false classification of goods as to value and quality, and effecting an entry of goods at less than the true weight or measure, arise under the revenue laws and are barred by the five years' Statute of Limitations.

2. A conspiracy to defraud the United States out of duties on imported merchandise, is not a crime, arising under the revenue laws, and is barred by the three years' Statute of Limitations.

[No. 179.]

Argued Oct. 23, 1879. Decided Nov. 10, 1879.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

The question on which the Judges were divided, sufficiently appears in the opinion of the Court.

Mr. S. F. Phillips, Solicitor-Gen., for plaintiff.

Messrs. Weeks & Foster and Geo. Hadly, for respondents.

Mr. Justice Miller delivered the opinion of the court:

The defendants were prosecuted on an indictment with four different counts, to all of which they pleaded the Statute of Limitations. The indictment was found on the 3d day of February, 1877, and the offenses were charged to have been committed on the 13th of September, 1873.

The first two counts are framed under section 5440 of the Revised Statutes, and set out a conspiracy to defraud the United States of the duties on certain goods imported from abroad.

The other two counts are drawn under section 5445, and charge the defendants with a false entry of the goods at the custom-house, by a fraudulent notice and by a false classification as to quality and value.

The Judges of the circuit court certify a division of opinion on the question, "whether the trial is barred by section 1044, the indictment having been found more than three years after the commission of the alleged offense, or whether it is within the provision of section 1046, as having been found within five years next after the commission of the offense."

Section 1044 enacts that "No person shall be prosecuted for any offense, not capital, except as provided in section 1046, unless the indictment is found within three years next after such offense shall have been committed." It is clear that this section is a bar to the prosecution, unless the case comes within the provision of section 1046. It is there declared that "No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave trade laws of the United States, unless the indictment is found, or the information is instituted, within five years next after the committing of such crime."

The question before us then is, whether the indictment describes crimes arising under the revenue laws of the United States. There can be little doubt that the crimes set out in the third and fourth counts, conforming as they do to the description of the offense found in section 5445, of a false classification of goods as to value and quality, and effecting an entry of goods at less than the true weight or measure, arise under the revenue laws. The section is one intended solely for the protection of the revenue arising from customs, and is found originally in the Act of March 4, 1863, 12 Stat. at L., 737, which is entitled "An Act to Prevent Frauds Upon the Revenue, and for Other Purposes." That this section which is section 3 of that statute is a revenue law, is beyond question, and the offense defined by it is, therefore, a crime arising under the revenue laws of the United States.

With regard to the first two counts, the answer is not so clear.

The *gravamen* of the offense here is the conspiracy. For this there must be more than one person engaged. And though by the statute

something more than the common law definition of a conspiracy is necessary to complete the offense, to wit: some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offense, and no party could be convicted on the overt Act under this section who had not joined in the previous conspiracy.

Nor does the section, as found in the Revised Statutes or in the original Act, make any special reference to the revenue or to revenue laws. Its language is: "If two or more persons conspire, either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more such parties do any act to effect the object of the conspiracy, all the parties shall be liable," etc.

The conspiracy here described is a conspiracy to commit *any* offense against the United States. The fraud mentioned is *any* fraud against the United States. The fraud may be against the coin, or to cheat the Government of its land or other property. The offense against the United States may be treason, and persons have been convicted under this statute for a conspiracy to do the acts which are defined to be treason.

Since, then, the section does not mention the revenue or the revenue laws, but is one which in terms includes every form of conspiracy against the United States, and every form of conspiracy to defraud the Government, it is difficult to see how the crimes which it creates and which are punishable under it, can be said to arise under the revenue laws. *Specific acts* which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to defraud the Government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws.

In support of the opposite view, it is said that section 5440 was originally section 30 of the Act of March 2, 1867, 14 Stat. at L., 484, and as that statute was a revenue law, this section must be held also to be a revenue law.

It must be admitted that, in construing any part of the Revised Statutes, it is admissible, and often necessary, to recur to its connection in the Act of which it was originally a part.

The force of the argument arising from finding an enactment in a statute directed mainly to a particular subject is much diminished by our experience of the manner in which incongruous legislation is combined in the same bill as passed by the two Houses of Congress. The important principle which was revolutionary in the law of evidence, by which parties to suits and persons having a pecuniary interest in the results are made competent witnesses, is found in a few words, inserted as a proviso to an appropriation bill.

The Act of 1867 is entitled "An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes," and it consists of thirty-four sections. Every section, except the one defining conspiracies, has reference to *internal* revenue and, if the argument is worth anything, the statute must be limited to that kind of revenue.

But the title indicates that other purposes than revenue may be found in the provisions of the Act.

Looking, then, to the section in question, which makes no mention of revenue whatever, which enacts a law against conspiracies in the most general terms, we are of opinion that it was one of the other purposes of the Act to pass this general penal statute, and that an offense punishable under that section alone is not a crime arising under the revenue laws, though the overt act necessary to be alleged may be one affecting the revenue of the United States.

It follows that the plea of the Statute of Limitations of three years is good in bar of the first two counts of the indictment, and is bad as to the third and fourth; and it is ordered to be so certified to the Circuit Court.

UNION CONSOLIDATED SILVER MINING COMPANY, *Plff. in Err.*,

JAMES D. TAYLOR.

(See S. C., 10 Otto, 37-42.)

Possession of tenant in common, not adverse—Nevada Statute of Limitations—finding of facts—mining claim—immaterial evidence.

1. The possession of one tenant in common is not adverse to his co-tenants.

2. The Statutes of Limitations of Nevada are held by the Supreme Court of that State to except foreign corporations from their protection.

3. A special finding of facts by the court need only find the ultimate facts, not the evidence.

4. A written conveyance is not necessary to the transfer of a mining claim.

5. The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error.

[No. 35.]

Submitted Apr. 18, 1879. Decided Nov. 10, 1879.

IN ERROR to the Circuit Court of the United States for the District of Nevada.

The case is stated by the court.

Exhibits A. and C. referred to in the opinion, are as follows:

Exhibit A, attached to the deposition of John W. Mackey.

Mining deed. Book A, page 456, C. C. R.

Cook & Payne to A. Kennedy & Co.

VIRGINIA CITY, Sept. 20, 1859.

This is to certify that we, D. B. Cook, J. Cook and E. Payne, have this day sold, bargained and conveyed all our rights and interest in a certain set of mining claims, to A. Kennedy & Co., said claims being situated as follows: lying and being in the Virginia district, north of the Comstock claims, and situated on the Comstock and Penrod vein; for and in consideration of which, A. Kennedy & Co. agree to prospect the same thoroughly, and when pay dirt is struck, then Cook, Payne & Co., agree to pay one half of the expense and come in equal partners to the same, Kennedy & Co., receiving one undivided half of six hundred feet.

D. B. COOK,
JAMES COOK,
E. PAYNE.

Witness.

S. McFadden.

Filed Sept. 7, '60 at 2½ P. M.

See 10 OTTO.

Rec'd Sept. 8, '60 at 3 P. M., page 548, Vol. B, Kinsey's records.

To the admission in evidence of the said exhibit A, counsel for defendant excepted, on the grounds that the same is not a deed and not an instrument under seal; that it conveys no interest in the premises; that it contains no words of grant or conveyance, and is immaterial and is irrelevant to the issues.

Exhibit C.

GOLD HILL, Utah Territory, }

July 20, 1859. }

This is ** show that I, Edward Payne, have this day admitted David B. Cook into the claim north of the Comstock and Co.'s stakes, as an equal partner in the six hundred feet of the quartz lead, and known as the Comstock lead and running north of the Comstock stakes, and also give the power to manage that claim, to work or let as he, D. B. Cook, sees fit.

EDWARD PAYNE,

JAMES COOK.

Recorded at request of C. H. Reynolds, August 29, 1862, at 4½ P. M.

Exhibit C was objected to, on the same ground as Exhibit A.

Messrs. D. L. Smoot and H. L. Thornton, for plaintiff in error.

Mr. W. E. F. Deal, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

This was an action of ejectment brought to recover the possession of an undivided interest, equal to five feet, of a mining claim and lode, part of the Comstock lode, and situate in the Virginia Mining District, in Storey County, State of Nevada. Under an agreement of the parties the case was tried by the circuit court without a jury. A finding of facts was made and on that finding a judgment was given for the plaintiff, Taylor, that he recover the undivided five feet for which he sued. The Mining Company now assigns four errors, in the record; the second, third and fourth raise the question whether upon the special finding of facts the plaintiff below was entitled to the judgment which was given. These assignments, therefore, may be considered together. The court found as facts that the parties were tenants in common of the mining claim known as the Union claim, for an undivided interest in which the suit was brought; that they claimed and derived title from the same source, namely: Payne and Cook, the original locators of the claim; that one Solomon Wood, on the 11th day of October, 1862, was the owner of at least an undivided fifty feet of the claim, having derived his title thereto regularly from the original locators, and that on that day he sold and conveyed by deed to the plaintiff an undivided five feet of the claim, describing it as "Five undivided feet interest in the claims of the Union Company, located upon the Comstock silver lode; said claims consist of three hundred feet bounded north by the claims of the Sierra Nevada Silver Mining Company, and on the south by the claims of the Ophir Silver Mining Company." The court further found that during the years 1860, 1861, 1862, 1863 and 1864, the original locators of the Union claim, and others deriving title from them, including Wood, the immediate grantor of the plaintiff and the plaintiff himself,

expended over \$30,000 in prospecting and developing the claim, though the plaintiff personally had done no work upon it since 1863, nor had any been done for him, except so far as the work done by his co-tenants can be considered work done for him; still further the court found that after the plaintiff's title had been acquired, namely: on the 30th day of September, 1863, C. H. Reynolds and others, all of whom had derived title from the original locators of the mining claim, sold and conveyed all their interests therein to a California corporation, styled the Union Gold and Silver Mining Company; and that, on the 27th day of May, 1874, that company sold and conveyed all its interest in the Union claim to the defendant, a California corporation, organized in and under the laws of that State.

The court further found that the defendant and its grantors had been in possession of the ground in controversy during more than two years before the commencement of this action; and were in possession when the suit was brought, and had been for more than five months before that time in possession of the Union claim, which extends on the Comstock lode a distance of three hundred feet, including the ground in dispute. Another fact found is that the plaintiff made no demand to be let into possession of the premises before commencing his action, but that the defendant was in the exclusive adverse possession before that time, and had in fact ousted the plaintiff from the possession.

Upon these facts it is evident that the plaintiff was entitled to recover, unless he was barred by the Statute of Limitations. Claiming, as both parties did, under Payne and Cook, the regularity and validity of the location of the mining claim is not in question. And when, in 1862, the plaintiff purchased from one of the owners of the claim an undivided interest therein, and went into possession with his grantor and with others deriving title from the original locators, expending large sums in prospecting and developing it (acts which the state statute declares shall constitute adverse possession), he became a tenant in common with those who were then the owners. He was such when the Union Gold and Silver Mining Company purchased the interest of other owners. By that purchase that Company succeeded to a tenancy in common with him, and so did the defendant when it became the purchaser. And though, after 1863, the plaintiff did no work personally upon the property, he did not thereby lose the possession he had after his purchase from Wood. The possession of his co-tenants was his possession. They held it for him until he was ousted. That this is a settled rule of law is not denied. And we find nothing in the statutes of Nevada to which we have been referred that is at variance with the rule, even when applicable to mining claims. That it does apply is expressly held in *Van Valkenburg v. Huff*, 1 Nev., 142. It follows that neither the defendant nor its grantor had any possession adverse to the plaintiff prior to the time when the ouster was made, and no ouster is found to have been made two years before the suit was brought. The finding that the defendants were in possession more than two years before suit was brought, is not a finding of an adverse possession during all that period, such as to constitute a bar under the

Statute of Limitations. Such a bar, therefore, does not exist, unless the ouster took place anterior to the commencement of those two years; and as that is a matter of defense, it should appear affirmatively, to be of any avail.

It is, however, useless to enlarge upon this, for the findings show clearly that the defendant has no protection under the Statutes of Limitation. The plaintiff was in possession with others who derived their title from the original locators, until the Union Gold and Silver Mining Company, a California corporation, acquired their title, in September, 1863. After that time the Statute could not run against him in favor of that corporation or its grantee, the defendant, also a foreign corporation. The Statutes of Limitations of Nevada are held by the Supreme Court of that State to except foreign corporations from their protection. *Robinson v. Silver M. Co.*, 5 Nev., 44; *Bartow v. Silver M. Co.*, 10 Nev., 386. Hence, those statutes cannot be set up by the defendant as a defense in this case; and as the circuit court found as a fact that the plaintiff had been ousted by the defendant from his property, no reason appears why he was not entitled to recover according to the interest which he held prior to the ouster.

It is insisted, however, that, if entitled to recover at all, judgment should have been given for no more than two and a half undivided feet of the mining claim. This position cannot be maintained. It is true the original locators claimed six hundred feet extending along the Comstock vein, but of more than three hundred feet they never had an undisputed title, and that three hundred feet lies next to the claim of the Ophir Company on the south. Indeed, the finding is express, that the Union claim begins at a point fifteen hundred feet north of the claim of the Ophir Company, and extends northward on the Comstock lode three hundred feet, including the ground in dispute. Of that claim Solomon Wood, the plaintiff's grantor, was the owner of at least fifty feet undivided; and he sold and conveyed to the plaintiff five undivided feet interest therein, describing the claim as consisting of three hundred feet, bounded on the south by the claim of the Ophir Company. There can be no doubt, therefore, what was intended to be conveyed. Plainly, it was five undivided feet of that three hundred, and, therefore, whether the whole claim in fact consisted of three hundred or six hundred feet can make no difference. Owning, as Wood did, fifty feet undivided, it was in his power to convey, as he did, an undivided interest of five feet in the southern three hundred.

It is objected by the plaintiff in error that the special finding of the court was not sufficiently full and formal to justify any judgment; that it did not find the essential facts, but left presumptions of fact to be drawn; that it did not find how Solomon Wood became the owner, or set out in words the conveyances under which the parties claimed. Whether a special finding of facts by the court must have all the requisites of a special verdict, it is not necessary now to assert or deny, for all that is essential to such a verdict is an ascertainment of the ultimate facts. A jury is not to find evidence. We think the ultimate facts were sufficiently found in this case. The ownership of Wood in 1862 was an ultimate fact, and even if Taylor had no other

right to the possession than that which he derived from Wood by conveyance, it was not necessary to set forth the chain of conveyances by which Wood became the owner. A transfer of possession is sufficient. They would have been but evidence of Wood's ownership. Besides, a written conveyance is not necessary to the transfer of a mining claim. *Table Mt. Tun. Co. v. Stranahan*, 20 Cal., 198. But Wood was in possession when he sold to Taylor, and Taylor then went into joint possession within. That possession is enough to justify a recovery by him against a disseisor.

The only other assignment of error is the first, and it needs no consideration. Apart from the fact that the defendant claims under Payne and Cook, and is, therefore, not at liberty to dispute their title, it is impossible to discover how it could have been injured by the reception of Exhibits A and C. The instrument C was certainly sufficient to transfer an interest in the mining claim, and the mining rules, at worst, were only immaterial. The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent, as in this case, that it cannot have affected the verdict or the finding injuriously to the plaintiff in error.

The judgment is affirmed.

Mr. Justice Field did not sit in this case.

ROBERT TILLSON ET AL., Partners, as
ROBERT TILLSON & Co., Appts.,
v.
UNITED STATES.

(See S. C., 10 Otto, 43-47.)

Interest, when allowed by Court of Claims.

1. Where an Act referring a claim for damages to the Court of Claims did not authorize it to allow interest, none can be allowed.
2. In addition to the practice which has long prevailed in the departments, of not allowing interest on claims presented, the statute under which the Court of Claims is organized expressly declares "That no interest shall be allowed on any claim, unless upon a contract expressly stipulating for interest."

[No. 21.]

Argued Oct. 28, 1879. Decided Nov. 10, 1879.

APPEAL from the Court of Claims.

This action was instituted pursuant to the following Act of Congress:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the claim of Robert Tillson & Company, of Quincy, Illinois, for loss and damage growing out of the failure of the Government of the United States to keep and perform the contract or contracts, as to time and manner of payment, under which certain horse equipments and infantry accoutrements were manufactured between the months of September, 1862, and July, 1864, by said Tillson & Company for said Government, be and the same is hereby referred to the Court of Claims, and such court is authorized and directed to investigate the same, and to ascertain, determine and adjudge the amount equitably due said firm, if

See 10 Otto.

any, for such loss and damage." Approved June 23, 1874.

The findings of fact by the Court of Claims were as follows:

I. The claimants and the defendant entered into the various contracts and agreements set forth in the petition.

II. The claimants, at various times between the 9th October, 1862, and the 24th October, 1864, delivered horse equipments and infantry accoutrements, under said contracts and agreements, to the defendant's officers at the United States Arsenal in St. Louis, to the amount of \$494,972.66.

III. There were one hundred and fifteen distinct deliveries of the above described goods made by the claimants, extending from the 9th October, 1862, to the 24th October, 1864, and the goods delivered were then, at the respective times of delivery, inspected and approved by the defendant's officers, and bills therefor were duly authenticated by the proper officers of the ordnance department, as provided by the contract, and no negligence or delay is attributable to the officers of the ordnance department in regard to the inspection of the goods or the issuing of the vouchers. The vouchers so received by the claimants were by them presented to the ordnance office in Washington, and were by the ordnance office transmitted to the Treasury, to be audited and paid, and no delay in so transmitting them is attributable to the ordnance office. After the vouchers reached the Treasury Department, intervals of different length occurred before they were audited and drafts issued in payment thereof. The shortest interval between the receipt of a voucher by the Treasury Department and the issuing of the draft in payment was seven days, and the longest was one hundred and fourteen days; the average was thirty-six days. During the period of the fulfillment of their contracts and agreements before described, the claimants' business necessities compelled them to borrow money by hypothecating or selling their vouchers, and the rate of discount paid by them generally was ten per cent per annum.

IV. A portion of the payments made to claimants on the vouchers before described were made, to the extent of twenty-five per cent thereof, by certificates of indebtedness, issued under the Act 1st March, 1862 12 Stat. at L., 352. These certificates were sent by mail to the claimants, accompanied by ordinary treasury drafts for the remaining seventy-five per cent of the payments. The claimants neither solicited such certificates, nor objected to them. Being below par in the market, the claimants sold them at a discount of seven and a half per cent. The total amount of the certificates so issued to them was \$77,000, and the discount or loss suffered by the claimants in disposing of them for cash, was \$5,775.

The court rendered judgment dismissing claimants' petition.

Messrs. M. H. Carpenter, H. E. Paine and B. F. Grafton, for appellants.

Mr. S. F. Phillips, Solicitor-Gen., for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

We have no doubt it was the wish of those

who procured the passage of the special statute under which the Court of Claims took jurisdiction of this suit, to obtain from Congress authority for that court to give a judgment against the United States at least for interest, in case it should be found that payments on the contracts held by the claimants had been unreasonably delayed. But if Congress had desired to grant such authority, it would have been easy to have said so in express terms; and because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power. By the statute, the court was required to investigate the claim, and "Ascertain, determine and adjudge the amount equitably due such firm, if any, for such loss or damage." There is nowhere any intimation that the investigation is to be conducted otherwise than judicially. The reference was made to the court as a court, and not to the Judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction. It is to be ascertained and determined what, if anything, is due the claimants from the Government, according to the rules of law applicable to the settlement in that court of controversies between the Government and its citizens. The special statute does not even provide that the adjustment shall be made upon principles applicable to suits between citizens. To our minds the word "equitably," as here used, means no more than that the rules of law applicable to the case shall be construed liberally in favor of the claimants.

As between citizens, no allowance could be made for loss of profits consequent on the advance in the price of materials while payments were withheld, nor for the discount on the certificates of indebtedness sold in the market. Such damages are too remote. Interest, however, would have been recoverable as against a citizen, if the payments were unreasonably delayed. But with the Government the rule is different, for in addition to the practice which has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for, the statute under which the Court of Claims is organized expressly declares "That no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the Court of Claims, unless upon a contract expressly stipulating for interest." R. S., sec. 1091. This is conclusive. No interest was stipulated for in this contract, and the prohibition against its allowance has not been removed in favor of the claimants.

Judgment affirmed.

GEORGE B. FAIRFIELD, *Plff. in Err.*,

v.

COUNTY OF GALLATIN.

(See, S. C., 10 Otto, 47-55.)

Donations to railroad companies—case overruled—state decisions—when conclusive.

1. In Illinois, donations by counties or other municipalities, to railroad companies were not prohibited by the new State Constitution of 1870, where they had been authorized, by a prior statute and by a vote of the people of the County or municipality before the adoption of such Constitution.

2. *Town of Concord v. Portsmouth Savings Bank*, 92 U. S., XXIII., 628, overruled.

3. This court will adopt and follow the decisions of the state courts in the construction of their own constitution and statutes.

4. This court will change its decision construing a State Constitution when no rights have been acquired under it, and when, before the decision was made, the highest tribunal of the State had interpreted the constitution differently, and that interpretation has within the State become a fixed rule of property.

[No. 526.]

Submitted Jan. 15, 1879. Decided Nov. 10, 1879.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This action was instituted in the court below by the plaintiff in error against the defendant in error upon certain coupons. Judgment was rendered for the County and the plaintiff sued out this writ of error.

The facts are stated in the opinion.

Messrs. Cullom, Scholes & Mather, O. J. Bailey and J. H. Sedgwick, for plaintiff in error.

Messrs. A. L. Knapp and Duff, Bowman & Wilson, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

The facts of this case, so far as they are needed to exhibit the question presented by the writ of error, are very few. The defendant, on and prior to Feb. 28, 1868, was a lawfully organized and existing County of the State of Illinois, through which was located the railroad of the Illinois Southeastern Railway Company, a company incorporated on the 25th of Feb., 1867. The County was authorized by the Legislature of the State to donate to the railroad company, as a bonus or inducement towards the building of the railroad, any sum not exceeding \$100,000, and was authorized to order the clerk of the county court, or Board of Supervisors of the County, to issue county bonds to the amount donated, and deliver them to the company, provided that no donation exceeding \$50,000 should be made until after the question of such larger donation should have been submitted to the legal voters of the County, at an election called and conducted in the usual manner. The statute further enacted, that if a majority of the ballots cast at such an election should be in favor of a donation, it should be the duty of the county court or Board of Supervisors to donate some amount, not less than \$50,000 nor more than \$100,000, to the company, and to order the issue of county bonds for the amount so donated.

On the 28th of Feb., 1868, in pursuance of these statutory enactments, an election of the legal voters of the County was held to determine whether the County would donate \$100,000

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws; power of state courts to construe their own statutes. See note to *Jackson v. Lamphire*, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions except when specially authorized to by statute. See note to *Com. Bk. v. Buckingham*, 46 U. S. (5 How.), 317.

of its bonds in aid of the said road, and the election resulted in authorizing their issue. The bonds were accordingly issued by the County Judge and county clerk, under the direction of the county court, and they were delivered to the railroad company on the 6th or 8th of October, 1870, after the conditions precedent to their delivery had been fulfilled. The plaintiff is the holder of coupons belonging to said issue, having purchased them before due, in the usual course of his business.

The defense set up is, in substance, that in consequence of a provision in the New Constitution of the State, which came into force July 2, 1870, the authority to issue and deliver the bonds had ceased to exist before the issue was made. The section of the Constitution relied upon is in the following words: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: *Provided, however,* That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities, prior to such adoption."

The question presented, then, is, whether a donation to a railroad company, by a county empowered by the Legislature to make such a donation, when approved by a majority of the legal voters of the county at an election held for that purpose, is forbidden by this clause of the Constitution, if it was authorized under laws then existing by a vote of the people of the county prior to the adoption of the Constitution? What should be the answer to the question depends upon the construction that must be given to the section thus quoted. Are donations, thus authorized by a popular vote, within the prohibition, or are they excepted out of it by the proviso?

In *Concord v. Bk.*, 92 U. S., 625 [XXIII., 628], we had occasion to construe this section of the State Constitution. We then held that donations by counties or other municipalities to railroad companies were prohibited by it, and that they could not lawfully be made after July 2, 1870, though they had been authorized by a prior statute and by a vote of the people of the county or municipality before the adoption of the Constitution. We were fully aware that it is the peculiar province of the Supreme Court of a State to interpret its organic law, as well as its statutes, and that it is the duty as well as the pleasure of this court to follow and adopt that court's interpretation. But we were not informed, when the case was decided, that any judicial construction had been given to the constitutional provision. It now appears that the Supreme Court of Illinois had previously considered it, and decided that donations, equally with subscriptions, if sanctioned by a popular vote before the adoption of the Constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. This was decided by that court in 1874, more than a year before *Concord v. Bk.* came before us; but the decision was not called to our notice, and it was not reported until 1877. It may now be found in *R. R. Co. v. Pinckney*, 74 Ill., 277.

See 10 OTTO.

The language of the court is very positive. We quote it at some length, as follows: "At the time the section of the Constitution referred to was framed, large sums of money in different parts of the State had been voted by municipalities to be subscribed and donated to railroad companies, on condition that railroads then being constructed should be completed within a given time; and the country, whether wisely and judiciously or not, seemed to demand that in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the Constitution, such subscription or donation should not be affected by the formation of the Constitution. And we have no doubt it was in view of this demand of a large portion of the State that the proviso was engrafted in the foregoing section." * * * "A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term, a donation is a subscription to the capital stock of a company. We have no doubt, at the time this section was framed, there were then in the State quite as many donations voted as there were subscriptions to stock in any other manner, and if a necessity or reason existed to protect a subscription, there was also the same reason and demand to protect a donation; and we entertain no doubt it was the intention of the framers of the Constitution, by adding the proviso to the section, to place subscriptions and donations on the same footing." This authoritative exposition of the meaning of the Constitution of the State by its highest court has repeatedly been recognized by that tribunal. *Middleport v. Ins. Co.*, 82 Ill., 562; *Lippincott v. Pana*, decided Oct. 1, 1879 [92 Ill., 24], not yet reported. It has also been the understanding of the Legislature of the State that donations, as well as subscriptions, if authorized by a vote of the People before the adoption of the Constitution, are saved by the proviso. In 1874 an Act of the General Assembly was passed which declared that the liability of all counties, cities, townships, towns or precincts that had voted aid, *donations* or subscriptions to the capital stock of any railroad company, in conformity with the laws of the State, should cease and determine at the expiration of three years after July 1 of that year, and that after that time no bonds should be issued on account of or upon authority of such vote. This implied that up to July, 1877, donations voted before July 2, 1870, were lawful and might be completed by the issue of bonds. It was an expression of the legislative understanding that such donations were not forbidden by the Constitution. Act of March 17, 1874. A similar Act was passed on the 29th of May, 1877, extending the time for issuing bonds for donations upon the authority of a vote of the people until July 1, 1880. It thus appears to have become a rule of property in the State that municipal bonds, issued to railroad companies on account of donations voted by the people before the adoption of the Constitution, are valid, though not issued until after the adoption. Such was the earliest exposition of the Constitution, made by the court of last resort in the State, twice since recognized by it, and recognized also by repeated legislative action. There

is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought and sold in the markets of the country.

In view of all this, ought this court to adhere to the construction we gave to the State Constitution in ignorance of the fact that the Supreme Court of the State had previously construed it in a different manner? At a very early day it was announced that in cases depending upon the Constitution or statutes of a State, this court would adopt the construction of the statutes or Constitution given by the courts of the State, when that construction could be ascertained. *Polk v. Wendal*, 9 Cranch, 87. In *Nesmith v. Sheldon*, 7 How., 812. it is declared to be the "Established doctrine that this court will adopt and follow the decisions of the state courts in the construction of their own Constitution and statutes, when that construction has been settled by the decisions of its highest tribunal." In *Walker v. Harbor Comrs.*, 17 Wall., 648 [84 U. S., XXI., 744], we said: "This court follows the adjudications of the highest court of the State" in the construction of its statutes. "Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness." See, also, *Elmendorf v. Taylor*, 10 Wheat., 152; *Green v. Neal*, 6 Pet., 291; *Leffingwell v. Warren*, 2 Black, 599 [67 U. S., XVII., 261]; *Sumner v. Hicks*, 2 Black, 532 [67 U. S., XVII., 355]; *Olcott v. Supervisors*, 16 Wall., 678 [83 U. S., XXI., 382]; *St. R. R. Tax Cases*, 92 U. S., 575 [XXIII., 663].

Such has been our general rule of decision. Undoubtedly, some exceptions to it have been recognized. One of them is, that when the highest court of a State has given different constructions to its Constitution and laws, at different times, and rights have been acquired under the former construction, we have followed that and disregarded the latter. The present case is not within that exception, for there have been no conflicting interpretations by the state court of the section of the Constitution we are now called upon to construe. And we are not constrained to refuse following the decision of the state court in order to save rights acquired on the faith of our ruling in *Concord v. Bk.* [supra]. *Groves v. Slaughter*, 15 Pet., 449 may seem to be an exception to the rule, but if carefully examined it will be found to be no exception. In that case, this court held that the Constitution of Mississippi did not, *ex proprio vigore*, prohibit the introduction of slaves into that State as merchandise or for sale, after the first day of May, 1833, and, therefore, that a promissory note given for the price of slaves thus introduced was not void. This was held, though it appeared that, prior to the decision, the Chancellor of the State had refused to enjoin a judgment at law recovered upon a bond for the purchase of slaves brought into the State for sale after May 1, 1833, and the Court of Errors, two Judges against one, had affirmed the refusal of the Chancellor. But the decision of the Chancellor was rested entirely upon the ground that the matter relied upon to obtain the injunction should have been set up as a defense in the suit at law. This was all that was really decided. The opinions expressed in the Court of Errors by the Judges upon the question whether the introduction of slaves after May 1, 1833, was

prohibited by the Constitution, were extrajudicial, and were so regarded by this court. It was said they were not sufficient to justify this court in considering that the construction of the Constitution in Mississippi had become so fixed and settled as to preclude the Federal Supreme Court from regarding it as an open question. *Groves v. Slaughter*, therefore, is not an exception to the rule that this court will follow the construction given by the highest court of a State to its Constitution. On the contrary the court assented to the rule.

Subsequently, the provision of the Constitution of Mississippi was brought before the courts of the State, and it was settled by the highest tribunals that it did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise, and for sale, and render all contracts for the sale of slaves, made after May 1, 1833, illegal and void. The case of *Rowan v. Runnels*, 5 How., 134, then came up to this court, where the same question was presented, and the construction given by this court to the State Constitution was adhered to in order to support a contract for slaves purchased, and apparently only for that reason. Chief Justice Taney, in delivering the opinion of the court, said that in *Groves v. Slaughter* the court was satisfied that the validity of these sales had not been brought into question in any of the tribunals of the State until long after the contract was made, and that as late as the beginning of 1841, when *Groves v. Slaughter* was decided, it did not appear from anything before the court that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the State. He added: "Undoubtedly, this court will always feel itself bound to respect the decisions of the state courts and, from the time they are made, will regard them as conclusive in all cases upon the construction of their own Constitution and laws. But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made."

That case is totally unlike the present. The bonds in question now were issued in October, 1870. In 1874, the highest court of the State decided that such bonds could be lawfully issued and that they were not forbidden by the Constitution. It was, therefore, conclusively settled more than a year before *Concord v. Bk.* was decided by us, what the meaning of the Constitution was. We are now asked to decline following the construction given and since recognized by the state court, and to adhere to that adopted by us in ignorance of the prior judgment of the state court, and that not, as in *Rowan v. Runnels*, to uphold contracts, but to strike them down, though they were made in accordance with the settled law of the State. We recognize the importance of the rule, *stare decisis*. We recognize also the other rule, that this court will follow the decisions of state courts, giving a construction to their constitutions and laws, and more especially when those decisions have become rules of property in the States, and when contracts must have been made, or purchases in reliance upon them. And it has been held that this court will abandon its former decision construing a state statute, if the state courts

have subsequently given to it a different construction. In *Green v. Neal* [*supra*], the question raised was, whether the court would adhere to its own decision in such a case, or would recede from it and follow the decisions of the state court. In two previous cases a certain construction had been given to a statute of Tennessee, in supposed harmony with decisions of the state court. But subsequently it was decided otherwise by the State Supreme Court; and it appeared that the decisions upon which this court had relied were made under peculiar circumstances, and were never in the State considered as fully settling the construction of the Act. This court, therefore, overruled its former two decisions, and followed the later construction adopted by the state court. See, also, *Suydam v. Williamson*, 24 How., 427 [65 U. S., XVI., 742]. With much more reason may we change our decision construing a State Constitution when no rights have been acquired under it, and when it is made to appear that before the decision was made the highest tribunal of the State had interpreted the Constitution differently, when that interpretation within the State fixed a rule of property and has never been abandoned. In such a case, we think it our duty to follow the state courts, and adopt as the true construction that which those courts have declared.

The judgment of the Circuit Court is reversed and the record is remitted, with instructions to give judgment for the plaintiff below on the findings made.

Cited—101 U. S., 686; 104 U. S., 471, 629; 105 U. S., 3, 295, 375; 112 U. S., 165; 12 N. W. Rep., 569; 6 Sawy., 570; 82 N. Y., 421; 37 Am. Rep., 580.

GLENDAL E ELASTIC FABRIC COMPANY, *Appt.*,

v.
WILLIAM SMITH.

(See S. C., 10 Otto, 110-112.)

Appeal from decree.

No appeal lies from a mere decree respecting costs and expenses.

[No. 44.]

Argued Nov. 4, 1879. Decided Nov. 10, 1879.

A PPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. Benj. Dean, for appellant.

Mr. R. P. Lowe, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

For all practical purposes, except costs, the appellant was successful in the court below. While the validity of the appellee's patent was sustained, it was a fruitless victory to him, because since the patent had expired he got no injunction and the court found he was not entitled to recover from the appellant either profits or damages. As the decree stands, it sustains an expired patent, and does no more. The appellant was left at liberty, when the decree against him was rendered, to use the patented machine in any way he chose, and he has not been required to pay anything for the use he

See 10 OTTO.

made of it while the patent was in force. The appeal, therefore, presents only a moot case except as to costs.

We think the disclaimer as to the re-issued patent, division B, had no effect on the costs in this case, because the question presented for decision was whether, notwithstanding that disclaimer, the other divisions of the re-issue should be sustained. The statute as to costs after a disclaimer, R. S., sec. 4923, therefore, has no application to this suit, and the appeal is practically reduced to the single question whether, if the decree below should be reversed, the appellee ought to have his costs in that court and, if so, how much. As no appeal lies from a mere decree respecting costs and expenses (*Canter v. Ins. Co.*, 3 Pet., 307). And as this case comes within the reason of that rule, we affirm the decree below without examining the merits.

Affirmed.

Cited—104 U. S., 792; 105 U. S., 437, 772.

ST. LOUIS NATIONAL BANK, *Appt.*

v.

UNITED STATES INSURANCE COMPANY OF ST. LOUIS ET AL.

(See S. C., 10 Otto, 43.)

Motions to dismiss.

This court will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests.

[No. 920.]

Submitted Nov. 10, 1879. Postponed to arg't on merits, Nov. 17, 1879.

Motion to dismiss.

The case is stated by the court.

Mr. W. H. Phillips, in support of motion.

Mr. Lucien Eaton, *contra*.

Mr. Chief Justice Waite delivered the opinion of the court:

The further consideration of this motion is postponed until the case is heard on its merits. The record has not been printed, and counsel do not agree as to what it contains. We will not decide motions to dismiss before the record is printed, when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file.

DAVID A. COWELL, *Plff. in Err.*,

v.

COLORADO SPRINGS COMPANY.

(See S. C., 10 Otto, 55-61.)

Condition in deed—breach of—estoppel—patent to trustee—corporations of another State—real property of.

NOTE.—Conditions precedent and subsequent in deeds; who may perform and their effect; conditions not raised by implication; condition unperformed. See note to *Taylor v. Mason*, 22 U. S. (9 Wheat.), 325; and note to *U. S. v. Clarke*, 34 U. S. (9 Pet.), 168.

*1. A condition in a deed conveying land, that intoxicating liquors shall never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort on the premises, and that if this condition be broken by the grantee, his assigns, or legal representatives, the deed shall become null and void, and the title to the premises shall revert to the grantor, is not repugnant to the estate granted nor is it unlawful or against public policy.

2. Upon breach of the condition the grantor had a right to treat the estate as having reverted and bring ejectment for the premises without previous entry upon them or demand for their possession, such entry or demand being unnecessary under a Statute of Colorado, where the premises are situated.

3. When a patent for land issued by the United States, adds to the name of the patentee the word "trustee," without mention of any trusts upon which he is to hold the property, such addition does not prevent the legal title from passing by the patentee's conveyance. If any trust be in fact created, it is for the *cestui que trust*, and no one else, to complain of the patentee's action.

4. By the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, corporations created in one State or Territory are permitted to carry on any lawful business in another State or Territory, and to acquire, hold and convey property there equally as individuals.

5. When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the government of the State and the corporation, and is no concern of third parties.

6. When a grantee of land from a corporation by deed, which contains a condition that if he manufactures or sells intoxicating liquors, to be used as a beverage at any place of public resort on the premises, the title shall revert to his grantor, goes into possession of the land under the deed, he is estopped, when sued by the grantor for the premises upon breach of the condition, from denying the corporate existence of his grantor, or the validity of the title conveyed by its deed.

[No. 46.]

Submitted Nov. 5, 1879. Decided Nov 17, 1879.

IN ERROR to the Supreme Court of the Territory of Colorado.

This was an action of ejectment commenced by the defendant in error, in the District Court for the County of El Paso, Colorado, where judgment was rendered for the plaintiff, but set aside on motion and a change of venue granted to the County of Pueblo, where judgment was also rendered for the plaintiff. This judgment having been affirmed by the Supreme Court of the Territory, the present writ of error was sued out.

The case is stated by the court.

Mr. H. C. Alleman, for plaintiff in error:

The condition is void, being repugnant to the grant in fee simple. The conveyance of an estate in fee simple imports absolute ownership in the grantee, and any restriction or condition imposed, inconsistent with or repugnant to the estate so granted is void.

Gadberry v. Sheppard, 27 Miss., 205; 2 Co. Litt., 223 b; 2 Bac. Abr., 301, l; 4 Kent, Com., 131; *Bank v. Davis*, 21 Pick., 42; *De Peyster v. Michael*, 6 N. Y., 468; *Taylor v. Mason*, 9 Wheat., 325; *Greenl. Cruise, Real Prop.*, Vol. 1, 470; *Bradley v. Peizoto*, 3 Ves., 326; *Newkirk v. Newkirk*, 2 Cal., 345.

Mr. F. W. Pitkin, for defendant in error, cited, in support of the validity of the condition in the deed:

Gray v. Blanchard, 8 Pick., Mass., 289; *Shep. Touch.*, 129; *Dorr v. Harrahan*, 101 Mass., 531; *Parker v. Nightingale*, 6 Allen, 341; *O'Brien v.*

Wetherell, 14 Kan., 616; *Collins Mfg. Co. v. Marcy*, 25 Conn., 242; *Plumb v. Tubbs*, 41 N. Y., 443; *Craig v. Wells*, 11 N. Y., 315; *Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y., 121; *Wilson v. Hart*, 14 W. R., 748; *Wilson v. Hart*, L. R., 1 Ch. App., 463; *Richards v. Revett*, 26 W. R., 166.

Mr. Justice Field delivered the opinion of the court:

In May, 1873, the plaintiff in the court below, the Colorado Springs Company, sold and conveyed to the defendant, Cowell, two parcels of land, situated in the Town of Colorado Springs, in the then Territory of Colorado. The deed of conveyance stated that the consideration of its execution was \$250, and an agreement between the parties that intoxicating liquors should never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort on the premises. And it was expressly declared that in case this condition was broken by the grantee, his assigns or legal representatives, the deed should become null and void, and the title to the premises conveyed should revert to the grantor; and that the grantee, in accepting the deed, agreed to this condition. The defendant went into possession of the premises under the deed, and soon afterwards opened a billiard saloon in a building thereon, which became a place of public resort, where he sold and disposed of intoxicating liquors as a beverage. The grantor thereupon brought the present action of ejectment for the possession of the premises, the title to which, it claimed, had reverted to it upon breach of the condition contained in its deed; and it recovered judgment. It does not appear that the Company had made any previous entry upon the premises or any demand for their possession.

The principal questions, therefore, for our determination are: the validity of the condition and, on its breach, the right of the plaintiff to maintain the action without previous entry or demand of possession.

The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that, as the granting words of the deed purport to transfer the land and the entire interest of the Company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he, therefore, insists that it is repugnant to the estate granted. But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character. *Sheppard Touch.*, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries and machine-shops have, in a multitude of instances, been excluded from particular

*Head notes by Mr. Justice FIELD.

localities, which, thus freed from unpleasant sights, noxious vapors, or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods.

The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but, on the contrary, it was imposed in the interest of public health and morality.

A condition in a deed, not materially different from that under consideration here, was held valid and not repugnant to the grant by the Court of Appeals of New York in *Plumb v. Tubbs*, 41 N. Y., 442. And a similar condition was held by the Supreme Court of Kansas to be a valid condition subsequent, upon the continued observance of which the estate conveyed depended. *O'Brien v. Witherell*, 14 Kan., 616; see, also, *Doe v. Keeling*, 1 Maule & S., 95, and *Gray v. Blanchard*, 8 Pick., 284.

We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the Company had a right to treat the estate as having reverted to it, and to bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute, in Colorado, it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser or otherwise. The commencement of the action there stands in lieu of entry and demand of possession. See, also, *Austin v. Cambridgeport*, 21 Pick., 215; *Cornelius v. Ivins* 2 Dutch., 376; *Ruch v. Rock Island*, 97 U. S., 693 [XXIV., 1101].

The other objections urged to the title of the plaintiff are equally untenable. It seems that its title is derived through *mesne* conveyances from one Lamborn, to whom, in September, 1870, a patent of the United States was issued embracing the demanded premises. This patent adds to Lamborn's name the word "trustee," without mention of any trust upon which he is to hold the property. It is, therefore, contended that he must be considered as holding it for some undeclared use of the grantor, and that, consequently, he could not convey it without the consent or direction of the latter, in this case the government. But the answer to this position is given in the patent itself, by the recital that the land was purchased by the patentee of the government, thus negating the inference that the latter retained any interest in the property or advanced the purchase money. And besides, if any trust was in fact created, it was for the *cestui que trust*, and no one else, to complain of the action of the patentee and enforce the trust; it did not prevent the legal title from passing by his conveyance. *Perry, Tr.*, sec. 334.

In March, 1872, the patentee conveyed the
See 10 OTTO.

premises to the National Land Improvement Company of El Paso County, Colorado, a corporation created under the laws of Pennsylvania, with power to receive, hold and grant real and personal property; explore, locate and improve lands; transport emigrants and merchandise; construct houses and buildings, manufacture, trade and traffic; colonize, organize and form settlements; operate mineral and other lands and improve and work the same, provided such lands be located in Utah, Arizona or adjoining States and Territories lying west of the Mississippi; and to do such acts as should be necessary to promote the success of the corporation and the public good. The defendant contends that this Corporation, invested with these extensive powers to settle up the country and advance its own interests and the public welfare, had not the capacity to act in the Territory of Colorado, and to hold and convey real property there. By the Law of March 2, 1867, then in force, the Legislatures of the several Territories of the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing and other industrial pursuits. 14 Stat. at L., 426. His position is that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State and Territory, and to acquire, hold and transfer property there equally as individuals. If the policy of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden.

The National Land and Improvement Company, the day following the receipt of the deed of Lombard, conveyed the premises to the plaintiff, the Colorado Springs Company. This Company was incorporated in 1871 for the purpose of aiding, encouraging and inviting immigration to the Territory, and to purchase, hold and dispose of lands, town lots, mineral springs and other property; also to construct and operate ditches, wagon-roads and railroads, and mills for manufacturing lumber, and generally

to do all things authorized by the laws of the Territory which might tend to accomplish the purposes stated. At that time the Legislature was restricted, as already mentioned, in its power to create, by general law, corporations. It was not empowered to authorize the formation of companies to aid and encourage immigration, and for that purpose to take, possess and convey real property in the Territory. Therefore, the defendant contends that the Company could not acquire a right to the premises in controversy. But the answer to this position is, that, for some of the purposes designated in the articles of incorporation, the law in existence authorized the incorporation of companies; therefore, the incorporation here was not wholly illegal; a corporate body competent to exercise some of the powers mentioned was created, and under the statute of the Territory could acquire and hold or convey, by deed or otherwise any real or personal estate whatever, necessary to enable it to carry on its business. Whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the State, succeeding that of the Territory and the Corporation, and is no concern of the defendant. It would create great inconveniences and embarrassments if, in actions by corporations to recover the possession of their real property, an investigation was permitted into the necessity of such property for the purposes of their incorporation, and the title made to rest upon the proof of that necessity. *Water and M. Co. v. Clarkin*, 14 Cal., 552.

But there is another and general answer to this objection. The defendant, as already stated, went into possession of the premises in controversy under the deed of the plaintiff. He took his title from the Company, with a condition that if he manufactured or sold intoxicating liquors, to be used as a beverage, at any place of public resort on the premises, the title should revert to his grantor; and he is, therefore, estopped, when sued by the grantor for the premises, upon breach of the condition, from denying the corporate existence of the plaintiff, or the validity of the title conveyed by its deed. Upon obvious principles, he cannot be permitted to retain the property which he received upon condition that it should be restored to his grantor on a certain contingency, by denying, when the contingency has happened, that his grantor ever had any right to it. *Gill v. Fauntleroy*, 8 B. Mon. (Ky.), 185; *Miller v. Shackelford*, 4 Dana (Ky.), 287, 288; *Fitch v. Baldwin*, 17 Johns., 161.

Judgment affirmed.

Cited—101 U. S., 356; 8 N. W. Rep., 390.

KANSAS PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

LOUISA TWOMBLY, *Admrx., etc.*

v.

(See S. C., 10 Otto, 78-81.)

NOTE.—Effect of repeal of statute on pending action. See note to U. S. v. Tynen, 78 U. S., XX., 153.

Motion for new trial, review of—repeal of statute—affirmance of judgment.

1. The refusal of the district court, on a motion for a new trial, to set aside the verdict because not sustained by the evidence, cannot be re-examined here on a writ of error.

2. This court cannot send a case back to the court below, with instructions to enter a judgment of nonsuit, where, since the judgment below and while the writ of error has been pending, the statute authorizing the action has been repealed.

3. Where no errors are found in the record, all this court can do is to affirm the judgment.

[No. 62.]

Argued Nov. 11, 1879. Decided Nov. 17, 1879.

IN ERROR to the Supreme Court of the Territory of Colorado.

The case is sufficiently stated by the court.

Messrs. **J. P. Usher, S. Shellabarger** and **C. E. Bretherton**, for plaintiff in error.

Mr. J. Q. Charles, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We think that the court below was right in holding that the bill of exceptions only presented for review the refusal of the district court, on the motion for a new trial, to set aside the verdict because not sustained by the evidence. It is well settled that such a question cannot be re-examined here on a writ of error. *Ins. Co. v. Young*, 5 Cranch, 187; *Barr v. Gratz*, 4 Wheat., 213; *Mulhall v. Keenan*, 18 Wall., 342 [85 U. S., XXI., 808].

Neither can we, as is asked, send the case back to the court below, with instructions to enter a judgment of nonsuit, because, since the judgment below and while this writ of error has been pending, the statute authorizing the action has been repealed. A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition. Here there are no such errors. All we can do, therefore, is to affirm the judgment, and send our mandate to that effect to the court below.

The judgment is affirmed.

Cited—103 U. S., 98.

UNITED STATES, *Plff.*,

v.

EMIL STEFFENS.

UNITED STATES, *Plff.*,

v.

ADOLPH WITTEMANN.

UNITED STATES, *Plff.*,

v.

W. W. JOHNSON ET AL.

(See S. C., "Trade-Mark Cases," 40 Otto, 82-99).

Trade-mark—invention—common law—Act of Congress.

1. The right to a trade-mark is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity. This right was not created by Act of Congress, but has long been recognized by the common law.

2. The ordinary trade-mark has no necessary relation to invention or discovery.

3. At common law the exclusive right to it grows out of its use, and not its mere adoption.

4. The Acts of 1870 and of 1876 in regard to trade-marks are not valid and constitutional.

[Nos. 705, 711, 719.]

Argued Oct. 22, 1879. Decided Nov. 17, 1879.

NOS. 705 and 711. On certificates of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

No. 719, on a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

The cases are stated by the court.

Mr. Chas. Devens, Atty-Gen., and **Rowland Cox,** for United States, in No. 705.

Mr. Chas. Devens, Atty-Gen., and **F. R. Coudert,** for United States, in No. 711.

Mr. Chas. Devens, Atty-Gen., for United States, in No. 719.

Mr. Geo. Hoadly, for defendants, in No. 719.

Mr. Justice Miller delivered the opinion of the court:

The three cases whose titles stand at the head of this opinion are criminal prosecutions for violations of what is known as the trade mark legislation of Congress. The first two are indictments in the Southern District of New York and the last is an information in the Southern District of Ohio. In all of them the Judges of the Circuit Courts in which they are pending have certified to a difference of opinion on what is substantially the same question, namely: are the Acts of Congress on the subject of trade-marks founded on any rightful authority in the Constitution of the United States?

The entire legislation of Congress in regard to trade-marks is of very recent origin. It is first seen in sections 77 to 84, inclusive, of the Act of July 8, 1870, 16 Stat. at L. 198, entitled "An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights." The part of this Act relating to trade-marks is embodied in chap. 2, tit. 60, secs. 4937-4947, of the Revised Statutes.

It is sufficient at present to say that they provide for the registration, in the Patent Office, of any device in the nature of a trade-mark to which any person has, by usage, established an exclusive right, or which the person so registering intends to appropriate by that act to his exclusive use; and they make the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit for damages. Six years later we have the Act of August 14, 1876, 19 Stat. at L. 141, punishing by fine and imprisonment the fraudulent use, sale and counterfeiting of trade-marks registered in pursuance of the statutes of the United States, on which the informations and indictments are founded in the cases before us.

The right to adopt and use a symbol or a device to distinguish the goods or property made

or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right, for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity, with compensation for past infringement. This property and the exclusive right to its use were not created by the Act of Congress, and do not now depend upon that Act for their enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to the Act of Congress, and remain in full force since its passage.

These propositions are so well understood as to need no citation of authorities or elaborate argument to prove them.

The property in trade-marks and the right to their exclusive use resting on the laws of the States in the same manner that other property does, and depending, like the great body of the rights of person and of property, for their security and protection on those laws, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall depend, the period of their duration, and the legal remedies for their protection, if such power exist at all, must be found in some clause of the Constitution of the United States, the instrument which is the source of all the powers that Congress can lawfully exercise.

In the argument of these cases this seems to be conceded, and the advocates for the validity of the Acts of Congress on this subject point to two clauses of that instrument, in one or in both of which, as they assert, sufficient warrant may be found for this legislation.

The first of these is the eighth clause of section 8 of the first article of the Constitution. That section, manifestly intended to be an enumeration of the powers expressly granted to Congress, and closing with the declaration of a rule for the ascertainment of such powers as are necessary by way of implication to carry into efficient operation those expressly given, authorizes Congress, by the clause referred to, "To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

As the first and only attempt by Congress to regulate the *right of trade-marks* is to be found in the Act to which we have referred, entitled "An Act to Revise, Consolidate and Amend the Statutes Relating to *Patents and Copyrights*," terms which have long since become technical, as referring, the one to inventions and the other to writings of authors, it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution. It may also be safely assumed that until a critical examination of the subject in the courts became necessary, it was mainly if not wholly to this clause that the advocates of the law looked for its support.

Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that

the effort is surrounded with insurmountable difficulties.

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design, and when under the Act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science or art is in any way essential to the right conferred by that Act. If we should endeavor to classify it, under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, there is required originality. And while the word *writings* may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are the *fruits of intellectual labor*, embodied in the form of books, prints, engravings and the like. The trade-mark may be and, generally, is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of the *use* of it, and not its mere adoption. By the Act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the statute for any other qualification or condition. If the symbol, however plain, simple, old or well known, has been first appropriated by the claimant as his distinctive trade-mark, he may, by registration, secure the right to its exclusive use. While such legislation may be a judicious aid to the common law on the subject of trade-marks, and may be within the competency of Legislatures whose general powers embrace that class of subjects, we are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries.

The other clause of the Constitution supposed to supply the requisite authority in Congress is the third of the same section, which, read in connection with the granting clause, is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

The argument is, that the use of a trade-mark—that which alone gives it any value—is to identify a particular class or quality of goods as the manufacture, produce or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the above provision of the Constitution belongs to Congress, and that the Act in question is a lawful exercise of this power.

It is not every species of property which is the subject of commerce, or which is used or even essential in commerce, which is brought by this clause of the Constitution within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain

articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. *Nathan v. Louisiana*, 8 How., 73. In the case of *Paul v. Virginia*, 8 Wall., 168 [75 U.S., XIX., 357], this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause of the Constitution we are considering. "They are not," says the court, "commodities to be shipped or forwarded from one State to another, and then put up for sale." On the other hand, in the case of *Almy v. California*, 24 How., 169 [65 U.S., XVI., 644], it was held that a stamp duty imposed by the Legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution of the United States, because such instruments were a necessity to the transaction of commerce, and the duty was a tax upon exports.

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. We adopt this course because when this court is called on in the course of the administration of the law to consider whether an Act of Congress, or any other department of the Government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the Government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty.

In such cases it is manifestly the dictate of wisdom and judicial propriety to decide no more than is necessary to the case in hand. That such has been the uniform course of this court in regard to statutes passed by Congress will readily appear to anyone who will consider the vast amount of argument presented to us assailing such statutes as unconstitutional, and will count, as he may do on his fingers, the instances in which this court has declared an Act of Congress void for want of constitutional power.

Governed by this view of our duty, we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian Tribes; and while bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation

of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. We would naturally look for this in the description of the class of persons who are entitled to register a trade-mark, or in reference to the goods to which the trade-mark should be applied. If, for instance, it described persons engaged in a commerce between the different States, and related to its use in such commerce, it would be evident that Congress believed it was acting under the clause of the Constitution which authorizes it to regulate commerce among the States. So if, when the trade-mark has been registered, Congress had protected its use on goods sold by a citizen of one State to another, or by a citizen of a foreign State to a citizen of the United States, it would be seen that Congress was at least intending to exercise the power of regulation conferred by that clause of the Constitution. But no such idea is found or suggested in this statute. Its language is: "Any person or firm domiciled in the United States, and any corporation created by the United States, or of any State or Territory thereof," or any person residing in a foreign country which by treaty or convention affords similar privileges to our citizens, may by registration obtain protection for his trade-mark. Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate. It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish "A statement of the class of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated," there is no hint that it is goods to be transported from one State to another, or between the United States and foreign countries. Section 4939 is intended to impose some restriction upon the Commissioner of Patents in the matter of registration, but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution. When we come to the remedies provided by the Act for the infringement of the rights of the owner of the registered trade-mark there is no restriction of the right of action or suit, to a case of trade-mark used in foreign or interstate commerce.

It is, therefore, manifest that no such distinction is found in the Act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it

was to be applied, or the locality of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here.

It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: first, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade marks used in that kind of commerce. Second, while it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in the case of the *U. S. v. Reese*, 92 U. S., 214 [XXIII., 563]. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude.

It was urged, however, that the more general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said, through the *Chief Justice*: "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting words that are not there now. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute as now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the Act of Congress, and in others under state law. *Cooley*, Const. Lim., 178, 179; *Com. v. Hitchings*, 5 Gray, 482.

In what we have here said, we wish to be understood as leaving the whole question of the treaty-making power of the General Government over trade-marks, and of the duty of

Congress to pass any laws necessary to carry such treaties into effect, untouched.

While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the Act of 1870, and the civil remedy which that Act provided, it was because the criminal offenses described in the Act of 1876 are, by their express terms, solely referable to frauds, counterfeits and unlawful use of trade-marks which have been registered under the provisions of the former Act. If that Act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.

The questions in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative; and it will be so certified to the proper Circuit Courts.

Copy, foregoing opinion duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—102 U. S., 544; 105 U. S., 312; 1 McCrary, 386.

ALONZO S. HATCH, *Plff. in Err.*,

v.

STANDARD OIL COMPANY OF CLEVELAND.

(See S. C., 10 Otto, 124-138.)

Sale of goods—title, when passes—sale of staves.

1. A contract for the sale of specific, ascertained goods vests the property immediately in the buyer, and gives to the seller a right to the price, unless it is shown that such was not the intention of the parties.

2. Where there has been a complete delivery of the property, the title passes, although something remains to be done in order to ascertain the total value of the goods at the rates specified in the contract.

3. A contract for the sale of staves to be made, piled and counted, held to pass the title to the vendee upon those things being done.

[No. 40.]

Submitted Nov. 3, 1879. Decided Nov. 17, 1879.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action of replevin, brought in the court below by the Standard Oil Company, to recover a certain number of staves which it claimed to own and which the defendant, now plaintiff in error, had taken possession of as sheriff, under writs of execution against third parties.

Judgment was rendered for the plaintiff, and the defendant sued out this writ of error.

The case is stated in the opinion.

Messrs. Ashley Pond and H. Greer, for plaintiff in error:

1. The interest of the Standard Oil Company in the staves in controversy at the time they were seized by plaintiff in error upon process against the Merritts, was that of mortgagees, and the legal title as owners was in the Merritts.

2. Up to the time of the seizure of the staves in controversy by the plaintiff in error, there had been no delivery of them to the Oil Company, and no actual and continued change of possession from the Merritts to the Oil Com-

pany within the meaning of section 4703, of the Statutes of Michigan.

Doyle v. Stevens, 4 Mich., 93.

3. As the conveyance of the staves in controversy from the Merritts to the Oil Company, was in the nature of a mortgage, and as there was no actual and continued change of possession of such staves, the conveyance was absolutely void as against creditors of the Merritts. Such is the language of the statute, and the courts have invariably construed the statute to mean just what its language imports.

This statute was taken from the statutes of New York, and has frequently been construed by the courts of New York.

Tyler v. Strang, 21 Barb., 198; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb., 484; *Stevens v. R. R. Co.*, 31 Barb., 590.

Similar statutes have received similar construction.

Robinson v. Willoughby, 70 N. C., 358; *Bevans v. Bolton*, 31 Mo., 437.

4. Assuming that the agreement between the Merritts and the Oil Company operated as a sale, and not as a mortgage of the staves in controversy, the title to the 50,000 staves, which the record shows were never piled upon the land covered by the lease from the Merritts to the Oil Company, had not vested in the Oil Company at the time they were seized by the plaintiff in error, under process against the Merritts.

Messrs. Moore, Canfield & Warner, for defendant in error:

In the case at bar, all the staves except some 50,000 had actually been delivered to the vendees upon their premises, which was the place agreed upon as the place of delivery; they had been counted; and the advance payment of more than \$15,000 had actually been made before they were seized by the plaintiff in error. Both parties had acted according to contract.

As between them we submit it cannot be successfully contended that the title to the staves had not passed; and as no charge of fraud is made against either the Oil Company or the Merritts, the attaching creditors stand in no better position than the Merritts themselves.

We think our argument is abundantly sustained by the authorities of which we cite the following:

Benj. Sales, sec. 311, and *note G*; 2 Schouler *Pers. Prop.*, 221; *Blackb. Sales*, 147, 149; *Lingham v. Eggleston*, 27 Mich., 324; *Whitcomb v. Whitney*, 24 Mich., 486; *Wilkinson v. Holiday*, 33 Mich., 388; *Ortman v. Green*, 26 Mich., 209; *Nat. Bank v. Crowley*, 24 Mich., 494; *Macomber v. Parker*, 13 Pick., 175; *Riddle v. Varnum*, 20 Pick., 280; *Williams v. Jackman*, 16 Gray, 517; *Foster v. Ropes*, 111 Mass., 10; *Morse v. Sherman*, 106 Mass., 430; *Marble v. Moore*, 102 Mass., 443; *Chapman v. Shepard*, 39 Conn., 413; *Waldron v. Chase*, 37 Me., 414; *Fuller v. Bean*, 34 N. H., 290; *Crofoot v. Bennett*, 2 N. Y., 258; *Terry v. Wheeler*, 25 N. Y., 520; *Russell v. Carrington*, 42 N. Y., 118; *Burrows v. Whitaker*, 71 N. Y., 291; *Turley v. Bates*, 2 Hurl. & C., 200; *Armington v. Houston*, 38 Vt., 448; *Shelton v. Franklin*, 68 Ill., 338; *Graff v. Fitch*, 53 Ill., 377; *MacNamara v. Edmister*, 11 Hun, 597; *Young v. Matthews*, L. R., 2 C. P., 127; *Martineau v. Kitching*, L. R., 7 Q. B., 436; *Ogg v. Skuter*, L. R., 10 C. P., 159; *Rugg v. Minett*, 11 East, 210; *Benj. Sales*, sec. 358; 2 Schouler

Pers. Prop., 248; *Aldridge v. Johnson*, 7 El. & Bl., 885; *Brown v. Hare*, 3 Hurls. & N., 483; *Langton v. Higgins*, 4 Hurls. & N., 400; *Tregelles v. Sewell*, 7 Hurls. & N., 573; *Hyde v. Lathrop*, 3 Keyes (N. Y.), 597; *Bank v. Bangs*, 102 Mass., 291; *Groff v. Belche*, 62 Mo., 400.

The provision in the contract for the shipping and forwarding of the staves to Cleveland, and that there should be a final inspection there by the vendees, is not sufficient to prevent an immediate transfer, upon delivery at Lapeer. Nor does the clause in the contract respecting insurance and risk in case of destruction by fire.

There was no need of the stipulation that the risk or any part of the risk should be with the Merritts, after the staves were delivered at Lapeer, if it was not intended that the title should then pass to the Oil Company.

Martineau v. Kitching, L. R., 7 Q. B., 436; *Elgee Cotton Cases*, 22 Wall., 194 (89 U. S., XXII., 869).

The agreement between the Standard Oil Company and the Merritts has none of the necessary elements of a chattel mortgage.

1. In order to create a chattel mortgage, there must be a debt which one party has contracted, and which he is liable to pay. The mortgage is simply a security for such payment.

2. There must be a right of redemption upon payment of the debt.

Van Brunt v. Wakelee, 11 Mich., 177, and cases there cited; *Cary v. Hewitt*, 26 Mich., 228; 2 Story, Eq. Jur., secs. 1030, 1031.

Mr. Justice Clifford delivered the opinion of the court:

Contracts for the purchase and sale of chattels, if complete and unconditional and not within the Statute of Frauds, are sufficient, as between the parties, to vest the property in the purchaser, even without delivery; the rule being that such a contract constitutes a sale of the thing, and that its effect is, if not prejudicial to creditors, to transfer the property to the purchaser against every person not holding the same under a *bona fide* title for a valuable consideration without notice. *The Sarah Ann*, 2 Sumn., 211; *Gibson v. Stevens*, 8 How., 384, 399; 2 Kent, Com., 12th ed., 493; *Leonard v. Davis*, 1 Black, 476-483 [66 U. S., XVII., 222-225].

Nine hundred and forty-four thousand white-oak barrel staves, of the value of \$17,500, were attached by the defendant as sheriff of the county, under certain processes *mesne* and final, which he held for service against the manufacturers of the staves, to secure certain debts which they owed to their creditors. No irregularity in the proceedings is suggested, but the plaintiffs claimed to be the owners of the staves by purchase from the manufacturers, and they brought replevin to recover the property. Service was made, and the defendant appeared and demanded a trial of the matters set forth in the declaration. Issue having been joined between the parties, they went to trial, and the verdict and judgment were in favor of the plaintiffs. Exceptions were filed by the defendant, and he sued out the present writ of error.

Errors assigned in the court are as follows: (1) That the court erred in instructing the jury that, as soon as the staves were piled and counted, as provided in the second agreement, the

title to the same vested in the plaintiff Company as vendee, and in refusing to instruct the jury that the only interest the plaintiffs acquired in the staves before they were delivered was as security for advances in the nature of a mortgage interest. (2) That the court erred in refusing to instruct the jury that if there was no actual delivery of the property and change of possession the agreement of sale was void as against the creditors of the manufacturers, because not recorded as required by statute. (3) That the court erred in refusing to instruct the jury that if the evidence did not show that the fifty thousand staves not piled on the leased land were not counted, the title to that parcel did not pass to the plaintiffs for any purpose, and that the defendant, as to that parcel, was entitled to their verdict. (4) That the court erred in refusing to instruct the jury that under the agreement no title to any of the staves passed to the plaintiffs until they were actually placed upon the leased land and were counted by the designated person, and in instructing the jury that the title to the staves piled near the leased land passed to the plaintiffs. (5) That the court erred in refusing to instruct the jury that no title to any staves passed to the plaintiffs other than those contracted to be sold by the first agreement, and that if the jury find that there was any portion of the staves replevied not of that description, that as to such portion the plaintiffs are not entitled to recover. (6) That the court erred in excluding the testimony offered by the defendant, as set forth in the record.

Sufficient appears to show that the manufacturers of the staves, on the day alleged, contracted with the plaintiffs to sell them one million of white-oak barrel staves of certain described dimensions, to be delivered as therein provided, for the price of \$30 per thousand, subject to count and inspection by the plaintiffs, who agreed to receive and pay for the same as fast as inspected. But before the staves had been furnished, to wit: on the 28th of August in the same year, the parties entered into a new agreement in regard to the staves, in which they refer to the prior one, and stipulate that it is to continue in operation, subject to modifications made in the new contract, of which the following are very material to the present investigation: (1) That the manufacturers shall make and deliver the staves properly piled in some convenient place, to be agreed between the parties, on land in Deerfield, to be controlled by the plaintiffs, and that the delivery shall be made as fast as the staves are sawed. (2) That the plaintiff shall furnish a man to count the staves from week to week as the same shall be piled. (3) That when the staves shall be so piled and counted, the person counting the same shall give the manufacturers a certificate of the amount, which, when presented to the plaintiffs, shall entitle the party to a payment of \$17 per thousand as part of the purchase price. (4) That, upon the piling and counting of the staves as provided, "The delivery of the same shall be deemed complete, and that said staves shall then become and thenceforth be the property of the plaintiffs absolutely and unconditionally."

Other material modifications of the first agreement were made by the second, some of which

it is not deemed necessary to consider in disposing of the case.

Early measures were adopted to perfect the arrangement, as appears from the fact that the manufacturers, October 4 in the same year, leased to the plaintiffs a small tract of land to be used for piling and storing the staves; and the case shows that all the staves except fifty thousand were piled on that site, the fifty thousand staves being piled on land owned by the manufacturers, about one hundred or one hundred and fifty feet distant from the pile on the leased tract, on which were certain buildings owned and occupied by the lessors, the mill where the staves were manufactured being situated on the same section a little distant from the other buildings. None of the staves were manufactured when the contracts were made.

It was admitted by the plaintiffs that the lease was never filed in the clerk's office and that it was never recorded in the office of the county register of deeds. Certain admissions were also made by the defendant, as follows: that the parties to the contracts acted in good faith in making the same, and that the contracts and lease were duly executed; that all the staves seized were manufactured by the said contractors, and that all except fifty thousand of the same were piled on the leased tract.

Nothing was required at common law to give validity to a sale of personal property except the mutual assent of the parties to the contract. As soon as it was shown by competent evidence that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was considered as completely proven and binding on both parties. If the property by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. Ambiguity or incompleteness of language in the one or the other frequently leads to litigation; but it is ordinarily correct to say, that, whenever a controversy arises in such a case as to the true character of the agreement, the question is rather one of intention than of strict law; the general rule being that the agreement is just what the parties intended to make it, if the intent can be collected from the language employed, the subject-matter, and the attendant circumstances.

Where the specific goods to which the contract is to attach are not specified, the ordinary conclusion is that the parties only contemplated an executory agreement. Reported cases illustrate and confirm that proposition, and many show that where the goods to be transferred are clearly specified and the terms of sale, including the price, are explicitly given, the property, as between the parties, passes to the buyer even without actual payment or delivery. 2 Kent, Com., 12th ed., 492; *Tome v. Dubois*, 6 Wall., 548, 554 [73 U. S., XVIII., 943, 946]; *Carpenter v. Hale*, 8 Gray, 157; *Martineau v.*

Kitching, L. R., 7 Q. B., 436, 449; *Story, Sales*, sec. 300.

Standard authorities also show that where there is no manifestation of intention, except what arises from the terms of sale, the presumption is, if the thing to be sold is specified and it is ready for the immediate delivery, that the contract is an actual sale, unless there is something in the subject-matter or attendant circumstances to indicate a different intention. Well founded doubt upon that subject cannot be entertained if the terms of bargain and sale, including the price, are explicit; but when the thing to be sold is not specified, or if when specified something remains to be done to the same by the vendor, either to put it into a deliverable state or to ascertain the price, the contract is only executory. In the former case there is no reason for imputing to the parties any intention to suspend the transfer, inasmuch as the thing to be sold and the price have been specified and agreed by mutual consent, and nothing remains to be done. Quite unlike that, something material remains to be done by the seller in the latter case before delivery, from which it may be presumed that the parties intended to make the transfer dependent upon the performance of the things yet to be done.

Suppose that is so; still every presumption of the kind must yield to proof of a contrary intent, and it may safely be affirmed that the parties may effectually agree that the property in the specific thing sold, if ready for delivery, shall pass to the buyer before such requirements are fulfilled, even though the thing remains in the possession of the seller.

Where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *Bailey, J.*, said the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. *Simmons v. Swift*, 5 Barn. & C., 857.

Sales of goods not specified stand upon a different footing, the general rule being that no property in such goods passes until delivery, because until then the very goods sold are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the same and to pay the stipulated price, the parties, says *Parke, J.*, are thus in the same situation as they would be after a delivery of goods under a general contract, for the reason that the very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. *Dixon v. Yates*, 5 B. & Ad., 313, 340; *Shep. Touch.*, 224.

When the agreement for sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to ascertain the price to be paid by the buyer, the contract is merely an executory agreement, unless it contains words warranting a different construction, or there be something in the subject-matter or the circumstances to indicate a different intention. *Benj.*

Sales, 2d ed., 257; Blackb. Sales, 151; *Young v. Matthews*, L. R., 2 C. P., 127-129; *Logan v. LeMesurier*, 6 Moore (P. C.), 116; *Ogg v. Shuter*, L. R., 10 C. P., 159-162; *Langton v. Higgins*, 4 Hurls. & N., 400; *Turley v. Bates*, 2 Hurls. & C., 200-208.

Exactly the same views are expressed by the Supreme Court of the State as those maintained in the preceding cases. Speaking to the same point, Cooley, *Ch. J.*, says, when, under a contract for the purchase of personal property, something remains to be done to identify the property or to put it in a condition for delivery, or to determine the sum that shall be paid for it, the presumption is always very strong that, by the understanding of the parties, the title is not to pass until such act has been fully accomplished. Such a presumption, however, is by no means conclusive; for if one bargains with another for the purchase of such property, and the parties agree that what they do in respect to its transfer shall have the effect to vest the title in the buyer, he will become the owner, as the question is merely one of mutual assent, the rule being, that if the minds of the parties have met, and they have agreed that the title shall pass, nothing further, as between themselves, is required, unless the case is one within the Statute of Frauds. Consequently, it was held by the same court that if one purchases gold bullion by weight, and receives delivery before it becomes convenient to weigh it, and on the understanding that the weighing shall be done afterwards, the bullion would become the property of the buyer and be at his risk, unless there were some qualifying circumstances in the case. *Wilkinson v. Holiday*, 33 Mich., 386-388; *Lingham v. Eggleston*, 27 Mich., 324, 328; *Ortman v. Green*, 26 Mich., 209, 212.

Decisions of other States are to the same effect, of which the following are examples: *Iron Works v. R. R. Co.*, 62 N. Y., 272, 274; *Groff v. Belche*, 62 Mo., 400-402; *Morse v. Sherman*, 106 Mass., 430, 433; *Riddle v. Varnum*, 20 Pick., 280, 283; *Chapman v. Shepard*, 39 Conn., 413-419; *Fuller v. Bean*, 34 N. H., 290-300.

Modern decisions of the most recent date support the proposition that a contract for the sale of specific ascertained goods vests the property immediately in the buyer, and that it gives to the seller a right to the price, unless it is shown that such was not the intention of the parties. *Gilmour v. Supple*, 11 Moore (P. C.), 551; *Benj. Sales*, 2d ed., 280; *Dunlop v. Lambert*, 6 Cl. & F., 600; *Calcutta Co. v. DeMattos*, 32 L. J. (N. S.), 2 Q. B., 322-338.

There is no rule of law, says Blackburn, *J.*, to prevent the parties in such cases from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply the same, on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered or not, such an intention is effectual to pass the title. *S. C.* on appeal, 33 L. J. (N. S.), 2 Q. B., 214; *Calcutta Co. v. DeMattos*, 11 W. R., 1024, 1027.

Support in some of the cases cited is found to the theory that the terms of the bargain and sale in this case, inasmuch as they indicate that the intention of the sellers was to appropriate

the staves when manufactured to the contract, are sufficient to vest the property in the buyer when the agreed sum to be advanced was paid even without any delivery; but it is quite unnecessary to decide that question in view of the evidence and what follows in the second contract between the parties.

Provision was made that a convenient place should be designated by the parties where the staves should be piled as fast as they should be sawed. Such a place was provided to the acceptance of both parties, and the plaintiffs furnished a man as agreed to count the same from week to week as the staves were piled. Enough appears to show that all the staves except as aforesaid, were piled and delivered at that agreed place.

In a contract of sale, if no place of delivery is specified in the contract, the articles sold must, in general, be delivered at the place where they are at the time of the sale, unless some other place is required by the nature of the article or by the usage of the trade or the previous course of dealing between the parties, or is to be inferred from the circumstances of the case. Decided cases to that effect are numerous; but the rule is universal, that if a place of delivery is prescribed as a part of the contract, the vendee is not bound to accept a tender of the goods made in any other place, nor is the vendor obliged to make a tender elsewhere. *Story, Sales*, 4th ed., sec. 308.

Where, by the terms of the contract, the article is to be delivered at a particular place, the seller, before he can recover his pay, is bound to prove the delivery at that place. *Mfg. Co. v. Armstrong*, 19 Me., 147.

So when the intention of the parties as to the place of delivery can be collected from the contract, and the circumstances proved in relation to it, the delivery should be made at such place, even though some alterations have been made in the place designated. *Howard v. Miner*, 20 Me., 325-330.

Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous and decisive. *Hyde v. Lathrop*, 3 Keyes, 597; *Macomber v. Parker*, 13 Pick., 175, 183.

In an action for goods sold and delivered, if the plaintiff proves delivery at the place agreed and that there remained nothing further for him to do, he need not show an acceptance by the defendant. *Nichols v. Morse*, 100 Mass., 523.

Even when a place of delivery is specified, it does not necessarily follow that the title does not pass before they reach the designated place, as that may depend upon the intention of the parties; and whether they did or did not intend that the title should vest before that, is a question for the jury, to be determined by the words, acts and conduct of the parties and all the circumstances. *Dyer v. Libby*, 61 Me., 45.

Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract. *Burrows v. Whitaker*, 71 N. Y., 291-296; *Crofoot v. Bennett*,

2 N. Y., 258; *Graff v. Fitch*, 58 Ill., 373; *Russell v. Carrington*, 42 N. Y., 118, 125; *Terry v. Wheeler*, 25 N. Y., 520, 525.

Beyond controversy, such must be the rule in this case, because the contract provides that upon the piling and counting the staves as required by the instrument, the delivery of the same shall be deemed complete, and that the staves shall then become and henceforth be the property of the plaintiffs absolutely and unconditionally.

Except the fifty thousand before named, all the staves were so piled and counted; and the case shows that the person designated to count the same approved fourteen certificates specifying the respective amounts of the several parcels delivered, and that the plaintiffs paid on each the \$17 per thousand advance as agreed, amounting in all to \$15,148.

Personal property may be purchased in an unfinished condition, and the buyer may acquire the title to the same though the possession be retained by the vendor in order that he may fit it for delivery, if the intention of the parties to that effect is fully proved. *Elgee Cotton Cases*, 22 Wall., 180 [89 U. S., XXII., 863].

After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the appropriation of specific goods to the contract, as the sole element deficient in a perfect sale is thus supplied. *Benj. Sales*, 2d ed., 263; *Rohde v. Thwaites*, 6 Barn. & C., 388.

Examples of the kind are numerous in cases where the goods are not specified, and the decided cases show that if the seller subsequently selects the goods and the buyer adopts his acts, the contract which before was a mere agreement is converted into an actual sale and the property passes to the buyer. One hundred quarters of barley out of a bulk in a granary were agreed to be purchased by the plaintiff, he having agreed to send his own sacks, in which the same might be conveyed to an agreed place. He sent sacks enough to contain a certain part of the barley, which the seller filled, but, being on the eve of bankruptcy, he refused to deliver any part of the quantity sold, and emptied the barley in the sacks back into the bulk in the granary. Held, in an action brought to recover the whole amount, that the quantity placed in the sacks passed to the purchaser, as that part was appropriated by the bankrupt to the plaintiff. *Aldridge v. Johnson*, 7 El. & Bl., 855; *Browne v. Hare*, 3 Hurls. & N., 484; *S. C.*, 4 Hurls. & N., 821; *Tregelles v. Sewell*, 7 Hurls. & N., 573.

Stipulations in respect to the forwarding and shipping the staves are also contained in the second agreement, but it is not necessary to enter into any discussion of that topic, as it appears that the manufacturers, if they did anything in that regard, were to act as the agents of the plaintiffs, and if they failed to transport the same to the place of shipment seasonably, the plaintiffs were authorized to do it at their expense. Nor is it necessary to discuss the stipulations as to insurance, as it is clear that they contain nothing inconsistent with the theory that the property vested in the plaintiffs as soon as the staves were piled and delivered at the agreed place of delivery.

558

Proof, of a satisfactory character, was exhibited that much the greater portion of the staves were piled upon the leased site, and that the residue were piled on land adjoining, and within a hundred or a hundred and fifty feet from the larger pile. Witnesses examined the staves piled there several times, and one of them testified that he was there July 10, 1875, with one of the sellers, and made a thorough count of the staves, the number counted being 780,000, and he states that he counted the staves in both piles, and that there were no other white-oak staves on the premises.

Taken as a whole, the evidence shows that the parties treated both piles of the staves as delivered under the contract, the one as much as the other, and that they regarded both as properly included in the adjustment of the amounts to be advanced. When the agent of the plaintiffs went there, as before explained, with one of the sellers, it is certain that they counted both piles, and it is clear that in view of the evidence and the circumstances the jury were warranted in finding that the property in all the white-oak staves piled there passed to the plaintiffs when they were piled and delivered at that place, neither party having objected to the place where the smaller parcel was piled.

Actual delivery of the staves having been proved, it is not necessary to make any reply to the defense set up under the state statute in respect to the sale of goods unaccompanied by a change of possession. Objection is also made that the lease of the premises designated as the place of delivery was not recorded, which is so obviously without merit that it requires no consideration.

Viewed in the light of these suggestions, it is obvious that the first five assignments of error must be overruled.

Exception was also taken to the ruling of the court below in excluding certain testimony offered by the defendant to show that the staves were not cut and made at the time some of the certificates were given to secure the advance, and to show that the staves included in the small pile were never in fact counted, and that no certificate specially applicable to them was ever given. Responsive to the objection of the defendant, the court below remarked, that, if the staves were subsequently piled there to the satisfaction of the plaintiffs, the title passed, it appearing that the certificates were given and the advance paid, which is all that need be said upon the subject, as it is plain that the ruling is without just exception.

Judgment affirmed.

CHARLES W. KIRTLAND, *Plff. in Err.*,

v.

LEONARD L. HOTCHKISS.

(See S. C., 10 Otto, 491-499.)

State taxation—on bonds and mortgages in another State—domicil of owner.

1. So long as a State, by its laws prescribing the mode and subject of taxation, does not intrench

NOTE.—*Power of States to tax.* See note to *Providence Bank v. Billings*, 29 U. S. (4 Pet.), 514; and note to *Dobbins v. Erie Co.*, 41 U. S. (16 Pet.), 435.

100 U. S.

upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against state taxation, however unjust, oppressive or onerous.

2. The Constitution does not prohibit a State from taxing one of its resident citizens for a debt held by him, due by a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

3. A debt, for purposes of taxation, is situated at the domicile of the creditor, although secured by mortgage upon real estate situated in another State. [No. 23.]

Argued Oct. 30, 1879. Decided Nov. 17, 1879.

IN ERROR to the Supreme Court of Errors, Litchfield County, State of Connecticut.

This action was brought in the Superior Court of Litchfield County, Connecticut, by Charles W. Kirtland, a citizen of Connecticut, to obtain a perpetual injunction against Leonard L. Hotchkiss, collector of taxes of the Town of Woodbury, in that county, to restrain said Hotchkiss and his successors in the office of collector of taxes, from the enforcement of certain tax warrants levied upon real estate of Kirtland, in said Town of Woodbury, and from the collection from said real estate of certain taxes claimed by Kirtland to have been unlawfully assessed.

These taxes were assessed against Kirtland by reason of his ownership of certain bonds held in the City of Chicago, Illinois, secured by a mortgage of real estate in said city.

In the progress of the cause the following stipulation was entered into:

"The parties agree that the only question in the case is, whether said bonds owned by the petitioner, drawn in the form and secured in the manner and form as above stated, were or were not liable to taxation under the statute in such case made and provided. If they were so liable, then the injunction to be dismissed; if not, then the injunction to be made perpetual."

Upon the inception of the action, a temporary injunction was granted against the enforcement of the alleged illegal taxes.

By agreement of the parties, in accordance with the practice of the State of Connecticut, the cause was submitted upon a statement or finding of facts, to the Supreme Court of Errors of Connecticut, as to what decree should be passed, and what judgment rendered, by the Superior Court upon these facts. In accordance with the advice of the Supreme Court of Errors, a decree was entered in the Superior Court dismissing the petition of Kirtland and dissolving the temporary injunction. Kirtland thereupon assigned errors, and made a motion in error to the Supreme Court of Errors, by which latter court the judgment of the Superior Court was affirmed; whereupon Kirtland sued out this writ of error.

Messrs. William Cothren, Ashbel Green and Julien T. Davies, for plaintiff in error:

1. The Statute of Connecticut above set forth, by its terms, directs the taxation that is here complained of.

No question is raised with respect to a want of compliance with the statute by the state officials.

2. Either property or acts of business situated without the jurisdiction of the State of Connecticut.

icut, are burdened by the taxation of the plaintiff in error by reason of his ownership of the bonds in question.

The court below says that the right of the plaintiff in error to receive his principal and interest is "a personal right, and accompanies the person of the creditor."

Kirtland v. Hotchkiss, 42 Conn., p. 438.

This maxim has no force independent of international comity.

See Savigny, *System des Heutigen, Romischen, Rechts*, Vol. 8, p. 171, sec. 366; Story, *Conf. L.*, sec. 379; Whart. *Int. Law*, sec. 11; Westlake, *Private Int. L.*, 126; *Guillander v. Howell*, 35 N. Y., 658.

This court has adopted, in the application of the doctrine that personal property follows the owner, the rule that this fiction "yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined."

Green v. Van Buskirk, 7 Wall., 150 (74 U. S., XIX., 113). See, also, *Hervey v. R. I. Locomotive Works*, 93 U. S., 664 (XXIII., 1003). See *Doe, J., Birtwhistle v. Vardill*, 5 Barn. & C., 438; *Downie v. Downie's Trustees*, Cases Court of Sessions, 3d series, Vol. 4, p. 1067.

For cases of taxation, where it has been held that visible, tangible property could not be taxed when situate beyond the jurisdiction of the taxing States, see, *People v. Comr. of Taxes*, 23 N. Y., 224; *Pacific Steamship Co. v. Comr. of Taxes*, 46 How. Pr., 815; *Foreign Held Bonds Case*, 15 Wall., 300 (82 U. S., XXI., 179).

Negotiable choses in action must now be regarded as possessing the incidents of property, and as capable of a *situs* of their own.

Foreign Held Bonds Case (supra); *British Com. L. Ins. Co. v. Comr. of Taxes*, 31 N. Y., 32; S. C., 28 How. Pr. 41; *State v. St. Louis Co. Ct.*, 47 Mo., 594; *People v. Home Ins. Co.*, 29 Cal., 533; *Atty-Gen. v. Bouwens*, 4 Mees. & W., 172.

In many instances and for many purposes, it has been held that non-negotiable choses in action do not follow the person of the owner.

Beers v. Shannon, 73 N. Y., 292; *Gold v. Strode*, Carth., 148; *Yeomans v. Bradshaw*, Carth., 373; *Noonan v. Bradley*, 9 Wall., 405 (76 U. S., XIX., 761); *Miller v. U. S.*, 11 Wall., 296 (78 U. S., XX., 141); *Brown v. Kennedy*, 15 Wall., 591 (82 U. S., XXI., 193).

In the case of a foreign bankrupt, an attaching creditor can collect from the bankrupt's debtor at the domicile of the latter, a debt due the bankrupt, and hold it against assignees, or the other creditors by operation of law.

Ogden v. Saunders, 12 Wheat., 358; *Harrison v. Sterry*, 5 Cranch, 289.

It becomes necessary to examine: (1) What is the subject of taxation by the State of Connecticut in imposing the taxes complained of; and (2) What *situs* or habitat, shall be assigned to that subject?

This court, by a happy generalization, has decided that the subjects of taxation are "persons, property and business."

Foreign Held Bonds Case (supra).

Does the tax in question fall upon a person? It by no means follows that the tax falls upon that person who first pays it.

St. Louis v. Ferry Co., 11 Wall., 423 (78 U. S., XX., 192); *Ward v. Maryland*, 12 Wall., 426 (79 U. S., XX., 451); *State Freight Tax*, 15 Wall.,

232 (82 U. S., XXI., 146); see, *Bank of Commerce v. N. Y. City*, 2 Black, 620 (67 U. S., XVII., 451); *Bank Tax Case*, 2 Wall., 200 (69 U. S., XVII., 793).

The interposition of the person in whose possession any property may be, in the process of raising a tax, is in the stage of its assessment. The person is assessed, not taxed, with reference to any particular property. It is the property that is taxed. Real estate, that is often not in the open and notorious possession of anyone, is quite as conveniently assessed to unknown owners or to no owners at all, as to any particular person. Personal property, if worth taxing, is always in the possession of some one; but the tax on it could be raised without difficulty, if the assessment were to no person, provided the tax collector were sure of finding this personal property at hand, and where it could be levied upon, when the tax came to be paid. Assessing a person with respect to personal property makes him the tax collector of the State, so far as that particular piece of property is concerned, but it is not necessary to the legality or validity of the exercise of the taxing power, and does not change the burden of taxation from the property to the person. The taxes complained of do not therefore fall upon a "person."

Is this a tax on property? The Statute of Connecticut speaks of money at interest as the subject of the taxing power. But it is clear that the money lent by Kirtland cannot be taxed.

R. R. Co. v. Jackson, 7 Wall., 263 (74 U. S. XIX., 88); *Kirtland v. Hotchkiss* (*supra*).

Kirtland has received for his money certain paper writings called bonds, secured by deeds of trust on Cummings's land in Chicago. These paper writings, the case shows, never have been in Connecticut, and always have been in Illinois.

The tax, therefore, cannot be upheld, if it be laid upon the bonds themselves of Kirtland, as property subject to taxation by Connecticut.

People v. Commissioners of Taxes, 23 N. Y., 224; *Foreign Held Bonds Case* (*supra*).

This court has recognized the distinction between a debt or credit and its evidence.

Pelham v. Rose, 9 Wall., 103 (76 U. S., XIX., 602); *Pelham v. Way*, 15 Wall., 196 (82 U. S., XXI., 55); *People v. Hibernian Sav. & L. Soc.*, 51 Cal., 243.

If Connecticut has the right to tax these bonds, that right existed when the bonds were made, and affected the contracts themselves. The borrowing power of Cummings was affected by the existence of that right.

Weston v. Charleston, 2 Pet., 449.

A burden upon Cummings' property is, therefore, laid by the taxation of these debts.

People v. Hibernian Sav. & L. Soc. (*supra*); *Hepburn v. School Directors*, 23 Wall., 480 (90 U. S., XXIII., 112).

So far as actual property is concerned, Cummings' property that is to pay these bonds, is all the property that there is in existence to bear the burden of Connecticut's taxes. That property is situated in Illinois, out of the jurisdiction of Connecticut.

If the taxes complained of fall on property, they burden either (see *supra*).

- (a) The money lent by Kirtland.
- (b) The bonds themselves (the paper writings).
- (c) The property of Cummings. Or,
- (d) The debts owned by the plaintiff in error,

i. e., his rights in the property of his debtor, Cummings.

Each and every one of these possible subjects of the taxes complained of, must be assigned a *situs* beyond the territorial limits of Connecticut.

If the taxes complained of cannot be sustained as "taxes on property," to which a *situs* can be assigned within the State of Connecticut, can the acts of "business" performed by the parties to the bonds of the plaintiff in error already performed, and in the future to be performed in the State of Illinois, be assigned such a *situs*?

The whole question resolves itself into this:

Are acts of business, performed out of the territorial jurisdiction of the State of Connecticut, by any theory, to be regarded as within that State for purposes of taxation?

See, *State v. Township Com. of Readington, etc.*, 36 N. J., 66; *Cooley, Const. Lim.*, 493.

The "business," of the plaintiff in error, with respect to the bonds in question, has been and is to be actually performed in Illinois; is not protected by Connecticut, either by her material power or against direct competitors, and for the purposes of taxation by that State, must be held to have a *situs* beyond her jurisdiction.

3. The Statute of Connecticut here complained of, is repugnant to the provisions of the Constitution of the United States, for the reason that, in directing the taxation of a subject that is beyond its jurisdiction, it violates and interferes with the sovereignty of the State of Illinois.

Mager v. Grima, 8 How., 490; *Story, Confl. L.*, sec. 257; *The Apollon*, 9 Wheat., 370; see, also, *Ogden v. Saunders*, 12 Wheat., 213; *Hervy v. R. I. Locomotive Works* (*supra*); *Pennoyer v. Neff*, 95 U. S., 720, 722 (XXIV., 568); *Guilander v. Howell* (*supra*); *Reynolds v. Geary*, 26 Conn., 179; *Lamb v. Bowser*, 7 Biss., 372; *Baldwin v. Hale*, 1 Wall., 223 (68 U. S., XVII., 531); *Green v. Collins*, 3 Cliff., 494; *D'Arcy v. Ketchum*, 11 How., 173; *Whitcomb v. Phoenix Ins. Co.*, Vol. 8, *Ins. Law Jour.*, 624; *Ward v. Maryland* (*supra*); *Crandall v. The State of Nevada*, 6 Wall., 35 (73 U. S., XVIII., 745); *Passenger Cases*, 7 How., 283; *Edwards v. Kearzey*, 96 U. S., 595 (XXIV., 793); *Walker v. Whitehead*, 16 Wall., 314 (83 U. S., XXI., 357).

4. The Statute of Connecticut here complained of, is repugnant to the 10th section of the 1st article of the Constitution of the United States, by which it is provided that "No State shall * * * pass any * * * law impairing the obligation of contracts."

Edward v. Kearzey (*supra*); *Walker v. Whitehead* (*supra*); *Foreign Held Bonds Case* (*supra*); *Planters' Bank v. Sharp*, 6 How., 301.

5. The Statute of Connecticut here complained of, is repugnant to the Fourteenth Amendment of the Constitution of the United States, by which the States are forbidden to deprive any citizen of life, liberty or property "without due process of law."

U. S. v. Rice, 4 Wheat., 246; *Mills v. Duryee*, 7 Cranch, 481; *Green v. Van Buskirk*, 7 Wall., 139 (74 U. S., XIX., 109); affirmed in *Crapo v. Kelly*, 16 Wall., 610 (83 U. S., XXI., 430); *St. Louis v. The Ferry Company* (*supra*); *Foreign Held Bonds Case* (*supra*); *Tappan v. Merchants' Bank*, 19 Wall., 490 (86 U. S., XXII., 189); *The Delaware Railroad Tax*, 18 Wall., 229 (85 U. S.,

XXI., 895); *Loan Association v. Topeka*, 20 Wall., 658 (87 U. S., XXII., 459).

6. The Statute of Connecticut here complained of, is repugnant to section 2, article IV., of the Constitution of the United States, by which it is provided that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Coryfield v. Coryell, 4 Wash. (C.C.), 371; *Paul v. Virginia*, 8 Wall., 168 (75 U. S., XIX., 357); *Williams v. Bruffy*, 96 U. S., 176 (XXIV., 716); *Slaughter-House Cases*, 16 Wall., 36 (83 U. S., XXI., 394); *Bradwell v. State*, 16 Wall., 130 (83 U. S., XXI., 442); *Ward v. Maryland* (*supra*); *The Passenger Cases* (*supra*); *Weston v. Charleston*, 2 Pet., 462; *People v. Hibernian Sav. & L. Soc.* (*supra*).

VII. If the Statute of Connecticut complained of is constitutional, its effect is to restrict the making of similar contracts, the result of business transactions had outside of the State of Connecticut.

Mr. Morris W. Seymour, for defendant in error:

The Connecticut court, as its decision discloses, discussed carefully and philosophically the nature and character of the property, the taxation of which it upheld. Its *situs*, for the purposes of taxation, was exhaustively considered. And it is but another form of expressing a claim already made, to assert that substantially the only question in this case, as it is presented by the record, is whether said court erred in holding the *situs* of the debt due Kirtland to be in Woodbury for the purposes of taxation, under our statute.

Our position, that the Connecticut court did not err in its conclusion as to the *situs* of the property, seems to be sustained by the decisions of this court.

Foreign Held Bonds Case, 15 Wall., 300 (82 U. S., XXI., 179); see, also, *Cooley, Tax.*, pp. 15 16; *Latrobe v. Baltimore*, 19 Md., 13.

Hilliard in his work on the Law of Taxation, page 132, says: "Debts and choses in action, being a species of intangible property, are deemed, for purposes of taxation, to be situated at the domicile of the owner. Thus choses in action are properly assessed in the county where the owner resides. So money loaned by one in a certain city and made payable there, cannot be taxed him as personal property, he not being during the year a resident either of the city or of the State."

Burroughs, Taxation, secs. 41, 134, 482; *Catlin v. Hull*, 21 Vt., 152; *Thomas v. Mason Co. Ct.*, 4 Bush., 135; *People v. Commissioners of Taxes*, 23 N. Y., 224; *People v. Park*, 23 Cal., 138; *Johnson v. Oregon City*, 3 Oreg., 13; *Hall v. Co. Comrs. of Middlesex*, 10 Allen, 102.

The provision in the bonds, that principal and interest shall be payable in Chicago, in the State of Illinois, and the provision in regard to taxes, in no way affect the conclusiveness of the argument as to the *situs* of the property in question. See article in the Am. Law Reg., January, 1879, p. 1 to 8, citing on this point, page 3, *Black v. Zacharie*, 3 How, 513; *Far. Bk. of Md. v. Iglehart*, 6 Gill., 56; *Balt. City Pass. R. Co. v. Sewell*, 35 Md., 252, 253.

Mr. Justice Harlan delivered the opinion of the court:

See 10 OTTO.

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all the limitations which exist upon the exercise of that power, whether such limitations arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from a brief statement of the more important facts of this case.

The plaintiff in error, a citizen of Connecticut, instituted this action for the purpose of restraining the enforcement of certain tax warrants levied upon his real estate in the town in which he resided, in satisfaction of certain state taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership, during those years, of certain bonds, executed in Chicago, and made payable to him, his executors, administrators or assigns in that city, at such place as he or they should by writing appoint and, in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that "It is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the City of Chicago, by the said Charles W. Kirtland to the said Edmund A. Cummings, on the day of the date hereof." They were all secured by deeds of trust, executed by the obligor to one Perkins, of that city, upon real estate there situated, the trustee having power by the terms of the deed to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The Statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State or elsewhere should be deemed, for purposes of taxation, to include all moneys, *credits, choses in action, bonds, notes, stocks*, except United States stocks, chattels or effects, or any interest thereon; and that such personal property or interest thereon, *being the property of any person resident in the State*, should be valued and assessed at its just and true value in the tax list of the town *where the owner resides*. The statute expressly exempts from its operation money or property actually invested in the business of merchandising or manufacturing, when located out of the State. Conn. Revision of 1866, p. 709, tit. 64, ch. 1, sec. 8.

The highest court of the State held that the assessments complained of were in conformity to the state law, and that the law itself did not infringe any constitutional right of the plaintiff.

This writ of error is prosecuted upon the ground, as asserted by the plaintiff, that the Statute of Connecticut, thus interpreted and sustained by its highest court, is repugnant to the Constitution of the United States.

In *McCulloch v. Maryland*, 4 Wheat., 428, this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "That the power of taxing the people and their property is essential to the very existence of govern-

ment, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, it was further said: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

"This vital power," said this court in *Bk. v. Billings*, 4 Pet., 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State Governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis v. Ferry Co.*, 11 Wall., 423 [78 U. S., XX., 192], and in *State Tax on Foreign Held Bonds*, 15 Wall., 300 [82 U. S., XXI., 179], the language of the court was equally emphatic.

In the last named case we said that "Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which under the Constitution of the United States exist between the Federal and State Governments. Upon their strict observance depends, in no small degree, the harmonious working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its system of taxation, does not trench upon the legitimate authority of the Union, or violate any right recognized or secured to the citizen by the Constitution of the United States, this court, as between the citizen and his State, can afford no relief against state taxation, however unjust, oppressive or onerous.

Plainly, therefore, our only duty is to inquire whether the Federal Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by that citizen upon a resident of another State, such debt being evidenced by the bond of the debtor, and the payment of the debt or bond secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt which he holds against the resident of Illinois is property in his hands. 15 Wall., 320 [82 U. S., XXI., 187]. It constitutes a portion of his wealth, and from that wealth he is under the very highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

The debt in question although a species of in-

tangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is, at best, only evidence of the debt, not the debt itself. The bond may be destroyed, but the debt—the right to demand the repayment of the money loaned, with the stipulated interest—remains. Nor is the locality of the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held by this court in 15 Wall., 323 [188], already cited, the right of the creditor "To proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, * * has no locality independent of the party in whom it resides. It may, undoubtedly, be taxed by the State when held by a resident therein," etc. *Cooley, Tax.*, 15, 63, 134 and 270. The debt in question, then, having its *situs* at the creditor's residence and constituting a portion of his estate there, both he and the debt are, for purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard is beyond the power of the Federal Government in any of its departments to supervise or control for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exertion by Congress of the power to regulate commerce among the several States. *Nathan v. Louisiana*, 8 How., 73; *Cooley, Tax.*, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, and with which the Federal Government cannot rightly interfere.

Judgment affirmed.

Copy, foregoing opinion duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—104 U. S., 80, 111; 35 Ohio St., 36; 36 Ohio 36; 38 Am. Rep., 549.

JOHN LAMMERS, *Plff. in Err.*,

v.

P. C. NISSEN ET AL.

Review of state judgment.

Where there is no dispute as to the law, and the only question is one of fact, and the finding of the trial court has been affirmed by the higher State

Court, this court will not disturb the judgment of the State Court unless the error is clear.

[No. 72.]

Argued Nov. 17, 1879. Decided Nov. 24, 1879.

IN ERROR to the Supreme Court of the State of Nebraska.

The case appears in the opinion.

Messrs. M. H. Carpenter, S. W. Packard, Jas. Coleman and G. C. Moody, for plaintiff in error.

Messrs. W. H. Powell, Bartlett, Tripp, B. F. Grafton and H. E. Paine, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The only question in this case is, whether, as a matter of fact, when Lammers, the plaintiff in error, purchased from the United States lot 1, sec. 12, T. 33, R. 1, Dakota City land district, there was in front and outside of the meandered line of the lot any land that could be cultivated or that bore trees of value or grass sufficient for grazing purposes. There is no dispute between the parties as to the law. The District Court of Cedar County found there was such land and this finding has been affirmed by the Supreme Court of Nebraska on appeal. Under such circumstances we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way, on a question of fact.

After a careful examination of the evidence, we are satisfied with the result reached by the court below and the judgment is, consequently, affirmed.

AMERICAN EMIGRANT COMPANY,

*Appl.,
v.*

COUNTY OF ADAMS.

(See S. C., 10 Otto, 61-71).

Swamp land grant to States—grant by State—valid contract—purchaser from county.

*1. Though the grant made by Congress by the Act of Sep. 28, 1850, of the swamp and overflowed lands to the States in which they lie, is expressed to be for the exclusive purpose of enabling said States, with the proceeds thereof, to reclaim the lands by means of levees and drains; it is questionable whether the security for the due application of such proceeds does not rest upon the good faith of the State alone, and whether the State may not exercise its discretion in this behalf without being liable to be called to account, and without affecting the title to the lands: at all events, it seems that Congress alone has the power to enforce the conditions of the grant (by revocation or otherwise), in a clear case of violation of the trust; and since, by the Act, the proceeds of the lands are to be applied to the designated purposes only "as far as necessary," the State has, at least, a large discretion as to the "necessity" of employing the proceeds of the lands to the reclamation thereof.

2. A grant, by a State, of its swamp and overflowed lands to the several counties in which they are situated, to be disposed of for general county purposes subject to the conditions of the Act of Congress (Sep. 28, 1850), is valid, and a disposition of such lands made by a county by contract in pursuance of the state grant cannot be retracted or rescinded by the county on the ground of its being a violation of the Act of Congress.

3. In Iowa, such a disposition of lands by a county,

*Head notes by *Mr. Justice BRADLEY*.

See 10 OTTO.

if approved by a vote of the people under the Act of the Legislature of that State passed in 1858, is valid, though made for less than one dollar and a quarter per acre, the minimum for the ordinary sales of such lands; and, if the contract for disposing of the county's swamp lands include also a sale of its claim against the United States for indemnity for lands sold by the latter, the county cannot, against its own act, maintain a bill in equity for setting aside such sale, though within the law prohibiting the assignment of claims against the government.

4. If the purchaser from the county under such a contract was bound thereby to do certain acts, such as to introduce a certain number of settlers within a certain period, or to reclaim the lands, the obligation to perform such acts, if not made a condition of the sale, lies in covenant merely, and does not avoid the sale. It is only when covenants are mutual and dependent, or when their performance is made an express condition, that a breach involves an avoidance of the contract.

[No. 16.]

Argued Nov. 27, Dec. 2, 3, 1878. Decided Dec. 16, 1878. Decree rescinded and case ordered for reargument Apr. 21, 1879. Reargued Oct. 27, 28, 1879, and finally decided Nov. 24, 1879.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Messrs. N. M. Hubbard, J. A. Harvey, Benj. F. Butler, C. C. Nourse and O. D. Barrett, for appellant:

It was argued in the circuit court that the Act of the Legislature of 1858, authorizing this contract, legislated a diversion of the grant, and therefore this contract was invalid.

That question cannot be raised in this case. No such issue is made in the bill.

1 Dan. Ch. Pr., 4th ed., 327; *Montesquieu v. Sandys*, 18 Ves., 302; *Glasscott v. Lang*, 2 Phil., 310; *Gresl. Eq. Ev.*, 231-2; *Brainard v. Arnold*, 27 Conn., 617; *Bailey v. Ryder*, 10 N. Y., 363.

The contract cannot be invalid for that reason, because it is well settled that the Act of 1850, known as the "swamp land grant," was an absolute grant of the lands to the States, and passed the title at once; and if an absolute grant, then, of course, as courts have already often held, the State took absolute title, clogged with no condition, and can dispose of it and give absolute title; that the trust is not one that attaches to the land, but is one reposed in the good faith of the States; and that the execution of the trust is a question of expediency, of political economy, rightfully intrusted to the state sovereignty, and is a question in which no private rights are involved, and one which no private rights can affect.

Barrett v. Brooks, 21 Iowa, 148; *Suprs. of White-side Co. v. Burchell*, 31 Ill., 648; *Dunklin Co. v. Dist. Court*, 23 Mo., 450; *Cooper v. Roberts*, 18 How., 181 (59 U. S., XV., 341); *Kansas v. Stringfellow*, 2 Kan., 321; *Parks v. I. C. R. Co.*, 24 Ia., 189; *Pease v. Hubbard*, 37 Ill., 257; *Newell v. Bureau Co.*, 37 Ill., 253; *Allison v. Halfacre*, 11 Ia., 450; *People v. Auditor-General*, 12 Mich., 171; *People v. Pritchard*, 17 Mich., 260; *Fremont Co. v. B. & M. R. R. Co.*, 22 Ia., 91; *S. C.*, in 9 Wall., 89 (76 U. S., XIX., 563); *R. R. Co. v. Smith*, 9 Wall., 95 (76 U. S., XIX., 599).

The principle established in these authorities is in harmony with the legislation of the several States on the subject. Their statutes will show that nearly all the States receiving lands under this grant regarded their title as absolute, and disposed of them under Acts, in many cases much more objectionable in this respect than

the Iowa Act of 1858, more especially Illinois, Missouri, Indiana, Michigan, Wisconsin, Oregon and Arkansas. If this Act is, for the reason suggested, invalid, then so are the statutes of these several States, and the titles to millions of acres of land disposed of under them are worthless. This legislation of the States, supported by express sanction of their courts, and acquiesced in by the General Government, for a period longer than is required under our limitation law to give absolute repose to titles, cannot be disturbed without seriously endangering the title to millions of dollars worth of property, purchased on the faith of such legislation and decisions.

In any event the court cannot, for that reason, declare this contract void. If the power of disposition in the State is absolute, and the trust rests in the faith of the State to apply the proceeds, then the title of the Company is complete, and the land discharged of the trust. But if the trust attaches to the land, then it takes and holds it subject to the trust, and the remedy is by bill to enforce its execution.

Messrs. Frank M. Davis and R. P. Lowe, for appellee:

The lands involved in this suit are swamp. It is so alleged in the petition and admitted in the answer.

Swamp lands, under the Act of 28th September, 1850, is defined as being "Such lands as are usually unfit for cultivation, in ordinary staple crops, such as corn, wheat, oats, etc., in ordinary and average years; not such as are utterly worthless by reason of overflow, but such as cannot ordinarily be successfully cultivated."

Thompson v. Thornton, 50 Cal., 142; *Keeran v. Griffith*, 31 Cal., 465; *Keeran v. Allen*, 33 Cal., 542; *Keller v. Brickey*, 78 Ill., 133.

That municipal organizations, such as counties, may take title to land and execute trusts, is held by the following cases:

Vidal v. Girard's Executors, 2 How., 127; *Chambers v. St. Louis*, 29 Mo., 543; *Hill, Trustees*, 3d Am. ed. (marg.), 45; *Dill. Mun. Corp.*, sec. 437; *Bell Co. v. Alexander*, 22 Tex., 350-364.

When a trustee has an interest in the trust property and conveys the property, the deed is void, except as to the interest of the trustee; and no property, public or private, can be acquired in the trust property in violation of the terms of the trust.

Price v. Methodist Church, 4 Ohio, 547; *Story, Eq. Jur.*, secs. 1257, 1258, n. 2 and 3; *Church v. Marine Ins. Co.*, 1 Mas., 341.

A trustee will not be allowed to purchase at his own sale, nor acquire a profit out of the trust property at the expense of the trust.

Story, Eq. Jur., secs. 465, 1258; *Fox v. Horah*, 1 Ired., Ch., 358; *Tiff. & Bull. Tr.*, 418.

Mr. Justice Bradley delivered the opinion of the court:

This case arises upon a bill in equity originally filed by Adams County against the appellant, in the District Court of Adams County, Iowa, and afterwards transferred to the Circuit Court of the United States. The object of the bill was to rescind a certain contract between the County of Adams and the American Emigrant Company, made in September, 1862, whereby the County agreed to convey to the Company its swamp lands, and its claim against the gov-

ernment for indemnity on account of swamp lands belonging to it, and which had been sold by the public land officers; also to rescind a deed executed on behalf of the County in pursuance of the said contract; and to recover back the moneys and proceeds which the defendant had realized from the property and the said claim. The case is of the same general character as that of the *Emigrant Co. v. Wright Co.*, decided at the Term of December, 1877, and not yet reported [97 U. S., 339, XXIV., 912]. The Act of Congress, and the laws of the State of Iowa which bear upon the case, and the character of the general operations of the defendant, are fully set forth in the opinion in that case, and need not be repeated here. Suffice it to say that, on the 30th day of September, 1862, a written contract, similar to the contract in that case, for the sale of the swamp lands of Adams County, and of all the fund and claim of the county on the General Government therefor, was signed by the chairman and clerk of the Board of Supervisors of said County, and by the American Emigrant Company, by its agent, F. C. D. McKay, and was recorded among the proceedings of the Board. By this contract the Company agreed to take the lands and fund and claim and to make for the County any public work or improvements therefor which the Board of Supervisors might request, and which were authorized by law, to the amount of \$2,000, at any time after October 1, 1863; or to pay the Board, if they preferred to do the work themselves, the sum of \$2,000 in money by the 1st of January, 1865. It was further agreed that the lands should not be taxed as long as the County held the legal title; and the Company agreed to settle all the lands fit for settlement with white settlers and purchasers—by selling farms of the usual size, one third in three years, another third in five years, and the whole in eight years. It was also declared that the Company took the lands subject to the provisions of the Act of Congress of September 28, 1850, 9 Stat. at L., 519, and expressly released the State of Iowa and the County from all liability in reclaiming said lands, or in the draining thereof; and that any contract existing between the County and any person, in relation to said lands or funds, was to be respected and fulfilled by the Company.

Subsequently a deed was executed in pursuance of this contract by the Supervisors of the County, bearing date the 7th of September, 1863, and purporting, for the consideration of \$2,000, to convey to certain trustees, in trust for the American Emigrant Company, certain lands particularly described, stated to amount in the aggregate to 3,680⁵¹/₁₀₀ acres, although the several parcels foot up only 2,235 acres, and the parties concede that, after certain reservations mentioned in the contract, the actual quantity conveyed by the deed was only a trifle over 2,000 acres. The deed contained an agreement on the part of the County that the lands within the County which might at any time be duly selected as swamp or overflowed lands, and all such lands as might not be included in the conveyance, if any, should be conveyed on request, and that any proceeds of the claim on the United States, if any should be received, should, on like request, be assigned and transferred to said American Emigrant Company, its trustees or as-

signs; and that any lands that should be located under or by any scrip, which might be obtained on said claim should also be conveyed, on request, to said Company, its trustees or assigns.

It appears from the proofs that the defendant, the American Emigrant Company, has sold about 1,500 acres of the land, upon some of which the purchasers have made improvements; and has paid to the County the said sum of \$2,000 mentioned in the contract, which was paid in June, 1865, and has also paid certain expenses incurred on behalf of sixteen different counties with whom the Company had like contracts, of which Adams County was one, the one sixteenth part of which, as stated by the defendant, amounts to \$4,562; and a further sum of \$1,200 paid to one Grinnell as agent of Page, Adams and Montgomery Counties, all together, on behalf of Adams County, about \$7,000.

On the other hand, the Company has received under the contract, from the United States, in cash, the sum of \$6,075.11; and in addition to the lands specifically conveyed, patents have been issued to the County for 2,043 acres, to which the defendant is entitled if the contract is carried out; and there is still an unadjusted claim for about 3,000 acres more.

The circuit court decreed the contract and deed to be void, and ordered a restitution of all moneys and securities received by either party by virtue thereof, saving the rights of *bona fide* purchasers, and referred the matter to a master to take the necessary account. This decree is appealed from; and the question for us to decide is, whether it is or is not sustained by the pleadings and proofs in the cause.

The grounds laid by the bill of complaint for avoiding the contract are, in substance, as follows: *first*, that the sale of the County's swamp lands was made at a much less price than the law allowed them to be sold for; that by an Act of the Legislature of Iowa, then in force, regulating the disposal of such lands, it was made unlawful to sell the same at a less price than \$1.25 per acre, whereas, by the said contract, nearly 8,000 acres were sold for \$2,000; *second*, that the sale of the County's claim against the United States for indemnity was void, as being contrary to law; *third*, that the contract and deed were procured by false and fraudulent representations, both as to the quantity of lands comprised therein, and as to the validity and condition of the claim against the United States for indemnity, it being represented that the County was entitled to only about 2,000 acres of land, and that the claim for indemnity had been rejected and was of no value; that these representations were made by agents of the defendant, who well knew the falsity thereof, to the officers and agents of the County, who were entirely ignorant in the premises, and liable to be easily imposed upon; *fourth*, that false representations were made as to the object of buying the lands, namely: that the defendant desired them only for immediate settlement and improvement, whereas it has never made any effort to drain or cultivate them, and never had any intention of doing so; *fifth*, that the delivery of the deed was procured by fraud, the same having been executed as an escrow, and left with the clerk of the Board of Supervisors to be delivered only upon the execution and delivery of a mortgage upon all the lands to secure a compliance with

See 10 OTTO,

the terms of the contract; whereas, by a fraudulent combination with said clerk, the defendant procured the delivery and recording of said deed without giving any such mortgage. The bill also set up insufficient consideration for said lands and the indemnity claim, and failure of consideration; that the defendant had failed to drain or improve the lands, and to release the County from its obligations in that behalf; that it had refused to pay a certain claim for over \$2,000 against said County for services of an agent, in consequence of which the County had been prosecuted and obliged to pay \$2,700 for judgment and costs. It was also charged that the defendant had made use of fraudulent misrepresentations and bribery to procure a vote of the people of the County in favor of the sale, which was required by the laws of the State. The bill further stated that, on discovery of the frauds thus charged, the Board of Supervisors passed a resolution repudiating and rescinding the contract; and concluded by praying that the contract be declared void, and for an account.

The answer specifically denies the charges of the bill, and claims, in substance, that the contract was fairly entered into, and that the complainant had failed to perform its part thereof, and had prevented the defendant from fulfilling its part, so far as it remained unfulfilled. The answer not being sworn to, except by an agent of the defendant, who was not a party to the bill, of course is not evidence.

A great deal of evidence was produced, showing the proceedings had in the General Land Office and in the State in relation to the claim and location of the swamp lands, and in relation to the claim for indemnity against the Government; the services of agents; the negotiations between the parties respecting the contract in question; the representations that were made; the proceeds and value of the lands and the disposition thereof. And although it is evident to us, from all the evidence taken together, that the agents of the defendant were well informed in regard to the rights of the County, and that the Supervisors of the County were quite ignorant thereof, and liable to be easily imposed upon; and although it is very clear that the latter believed that the lands to which the County was entitled were only about 2,000 acres, and that the claim for indemnity against the government was of no value, yet we see no sufficient proof that the contract was procured by false and fraudulent representations; and we are unable to sustain the decree of the circuit court on this ground. The case, in this respect, as to the character of the proofs, is very far short of that of the *Emigrant Co. v. Wright Co.* [*supra*].

But there was one aspect of it which, at the conclusion of the first hearing, we thought deserving of consideration, and that was the general character of the transaction, viewed in connection with the Act of Congress by which the swamp and overflowed lands were granted to the State. This Act was passed September 28, 1850, 9 Stat. at L., 519, and is entitled "An Act to Enable the State of Arkansas and Other States to Reclaim the 'Swamp Lands' Within Their Limits." By the 1st section it was enacted: "That, to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands,

made unfit thereby for cultivation, which shall remain unsold at the passage of this Act, shall be and are hereby granted to said State." The 4th section declared that the provisions of the Act should be extended to and their benefits be conferred upon each of the other States of the Union in which such swamp or overflowed lands might be situated. These lands, therefore, were granted to the several States in which they lie for a purpose expressed on the face of the Act; and that purpose was "To enable the State to construct the necessary levees and drains to reclaim them." The 2d section of the Act, after prescribing the method in which the lands should be designated and patented to the State, concluded with the following proviso: "*Provided, however,* That the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid." Our first view was, that this trust was so explicit and controlling as to invalidate the scheme finally devised by the Legislature of Iowa for the disposal of the land, and under which the contract in question was made. But on more mature reflection, after hearing additional argument, we are satisfied that such a result did not necessarily follow. The history of the state legislation on the subject is briefly as follows:

The Legislature of Iowa, by an Act passed in January, 1853, granted the lands to the several counties in which they were situated, subject to the conditions of the Act of Congress and such laws as the Legislature might thereafter pass. It created a drainage commissioner's office, and county surveyors to lay out drains; after draining, the lands were to be appraised and sold at auction to the highest bidder in small tracts; and it provided for reclamation of the lands in detail. Other Acts were subsequently passed in pursuance and furtherance of this general scheme, which was clearly conformable to the purposes of the congressional grant. The difficulty we had arose upon the subsequent Act of the Legislature of Iowa, passed in 1858, by which it was declared (by section 1) that it should be competent and lawful for the counties owning swamp and overflowed lands to devote the same, or the proceeds thereof, either in whole or in part, to the erection of public buildings for the purpose of education, the building of bridges, roads and highways, or for building institutions of learning, or for making railroads through the county or counties to which such lands belonged; and (by section 2) it was enacted that the proper officers of any county might contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds thereof, or otherwise appropriate the same to such person or company, or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the 1st section. It was further provided that, before any such contract could take effect, the proposition should be submitted to a vote of the people of the county for their approval or rejection. There was a proviso in the 3d section that no such sale should be valid, unless the person or company purchasing should take the lands sold subject to all the provisions of the Act of Congress (before referred to), and should expressly release the State of Iowa and the county from

all liability for reclaiming said lands. A supplement was passed in 1862, proving that no county should be released from its obligation to make the necessary drains and levees contemplated by the Act of Congress passed Sep. 28, 1850, and the Act of Assembly passed in 1853.

The contract in dispute was made under this law, and our first impression was that it introduced a scheme subversive of the trust imposed upon the State by the Act of Congress; that its effect was to devote the lands and proceeds thereof to purposes different from those which the original grant was intended to secure; that it threw off, or endeavored to throw off, all public responsibility in relation to the trust; and hence that the scheme itself and the contract based upon it were void. But a reconsideration of the subject has brought us to a contrary conclusion. The argument against the validity of the scheme is, that it effects a diversion of the proceeds of the lands from the objects and purposes of the congressional grant. These were declared to be to enable the State to reclaim the lands by means of levees and drains. The proviso of the 2d section of the Act of Congress declared that the proceeds of the lands, whether from sale or direct appropriation in kind, should be applied exclusively, as far as necessary, to these purposes. This language implies that the State was to have the full power of disposition of the lands; and only gives direction as to the application of the proceeds, and of this application only "as far as necessary" to secure the object specified. It is very questionable whether the security for the application of the proceeds thus pointed out does not rest upon the good faith of the State, and whether the State may not exercise its discretion in that behalf without being liable to be called to account, and without affecting the titles to the lands disposed of. At all events, it would seem that Congress alone has the power to enforce the conditions of the grant, either by a revocation thereof or other suitable action, in a clear case of violation of the conditions. And as the application of the proceeds to the named objects is only prescribed "as far as necessary," room is left for the exercise by the State of a large discretion as to the extent of the necessity. In the present case it is not shown by allegations in the bill, or otherwise (if such a showing would be admissible), that any necessity existed for devoting the proceeds of the lands in question to the purposes of drainage. No case is shown as the basis of any complaint, even on the part of the General Government, much less on the part of the County of Adams, which voluntarily entered into the arrangement complained of. Our conclusion, therefore, is, that this objection to the validity of the contract cannot prevail.

Having disposed of the questions of fraud and of the supposed invalidity of the state legislation, the other grounds alleged for setting aside the contract will not require extended discussion.

One of these grounds is that the sale of the County's swamp lands was made at a much less price than the law allowed them to be sold for; that, by an Act of the Legislature of Iowa then in force, regulating the disposal of such lands, it was made unlawful to sell them at a less price than \$1.25 per acre. This question has been

decided adversely to this view by the Supreme Court of Iowa in the case of *Audubon Co. v. Emigrant Co.*, 40 Iowa, 460. It was there held that, when a county devotes its swamp lands to purposes specified in the Act of March 28, 1858, it is not limited in price to \$1.25 per acre, but may devote them to such purposes, upon such terms as may be agreed on, if the contract be approved by a vote of the people. The contract in that case was substantially the same as in this, and was sustained. As this is a question of state law, if we had any doubt upon it, we should defer to the decision of the state court.

Another question suggested for relief is, that the sale of the County's claim against the United States for indemnity for lands sold by the government was contrary to law, and void. If the law prohibiting assignments of claims against the government applies to such a claim as that which was the subject of the contract in this case, the government might have refused to pay it; but after it was paid, the County being *particeps criminis*, cannot, against its own act, have a standing in a court of equity either to recover it from the appellants, or to have the contract avoided. So far as the state laws are concerned, the Supreme Court of Iowa has frequently sustained contracts precisely like that now under consideration. See, *Audubon Co. v. Emigrant Co.* [supra]; *Allen v. Cerro Gordo Co.*, 34 Iowa, 54; *Page Co. v. Emigrant Co.*, 41 Iowa, 115; *Ringgold Co. v. Allen*, 42 Iowa, 697.

The allegations of the bill to the effect that the Emigrant Company has not fulfilled its engagements with respect to the drainage and settlement of the land, rest in covenant merely, and afford no ground for avoiding the contract. Where covenants are mutual and dependent, the failure of one party to perform, absolves the other and authorizes him to rescind the contract. But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was not made a condition, but, as before stated, rested in covenant. In case of a breach, they would lay the foundation of an action, but nothing more.

To the same category belongs the question whether the appellants ought to have paid the claim of Frank M. Davis. The agreement required them to respect and fulfill any contracts then existing between the County and any person in relation to the lands and funds which formed the subject of negotiation. Davis had a claim against the County for services in surveying the lands and in prosecuting the indemnity claim. The County insisted that the appellants should pay this claim, which they refused to do, alleging it to be unjust and collusive. In 1866, Davis sued the County, and obtained judgment for \$2,200. In 1869, this judgment, with interest and costs, then amounting to over \$2,700, being paid by the County, was formally demanded of the appellants, and they again refused to pay it. It is claimed that this refusal entitles the County to repudiate the whole contract. We do not think so. It is one of those matters that rest in agreement merely, and is not in the form of a condition. The agreement is an independent one, a part of the consideration of the contract, it is true; but its

See 10 OTTO.

non-performance raises an action merely, and does not annul the entire contract. We are disposed to think that as the appellants had notice of Davis' suit, and co-operated in its defense, the claim of the County is valid; but, being a mere legal demand, it cannot be recovered in this suit; and we are satisfied that it constitutes no proper ground for the relief sought by the bill.

Looking at the whole case as presented to us, we think that the complainants below were not entitled to a decree, and that the bill should have been dismissed.

The decree of the Circuit Court is reversed and the cause remanded, with directions to enter a decree dismissing the bill without prejudice to the right of the County to bring an action at law for any breach of the terms of the contract.

Cited—107 U. S., 564; 10 N. W. Rep., 51; 15 N. W. Rep., 621.

CHARLES H. HOLDEN, *Appt.*,
v.

FREEDMAN'S SAVINGS AND TRUST
COMPANY ET AL.

(See S. C., 10 Otto, 72-74.)

Interest, rate of.

Where the local law allows the rate of interest to be fixed by the contract of the parties, the rule adopted by this court is to give the contract rate up to the maturity of the contract; and thereafter the rate prescribed for cases where the parties themselves have fixed no rate.

[No. 47.]

Argued Nov. 6, 1879. Decided Nov. 24, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. William A. Meloy, for appellant, cited, on the question of interest, *Brewster v. Wakefield*, 22 How., 118 (63 U. S., XVI., 301); *Burnhisel v. Firman*, 22 Wall., 170 (89 U. S., XXII., 766); *Macomber v. Dunham*, 8 Wend., 553; *U. S. Bank v. Chapin*, 9 Wend., 471; *Ludwick v. Huntzinger*, 5 W. & S., 60.

Messrs. Thomas H. Talbot, Enoch Totten and A. J. Cresswell, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This record presents no ground for controversy as to the facts, and only one legal point that requires consideration. But for the importance of that point as a matter of local law we should dispose of the case without a formal opinion.

On the 13th of October, 1870, at the City of Washington, Charles H. Holden, the appellant, made his promissory note of that date to John B. Wheeler, or order, for \$5,000, payable four years from date at the Bank of Washington, with interest at the rate of ten per cent, payable semi-annually. On the same day he executed

NOTE.—The rule for calculation of interest. See note to *Story v. Livingston*, 38 U. S. (13 Pet.), 359.

When interest is recoverable as damages, or on money. See note to *Sneed v. Wistar*, 21 U. S. (8 Wheat.), 690.

to David L. Eaton a deed of trust of certain property in the City of Washington, to secure the payment of the principal and interest of the note as they should respectively fall due. On the 19th of October, 1870, Wheeler indorsed and delivered the note to the appellee, Talbot, who paid him at the time, as the consideration of the transfer, the sum of \$5,000. Talbot thereupon became a *bona fide* holder of the instrument. On the 28th of July, 1873, he executed to his co appellee—the Savings and Trust Company—his promissory note for \$1,500, payable at ninety days, and pledged the note of Holden as collateral security. Talbot's note is still unpaid. The interest on Holden's note was paid up to the 13th of April, 1873, and \$75 on account of interest was paid subsequently. The principal and the residue of the interest are unpaid. Eaton, the trustee in the deed of trust, died on the 13th of February, 1873. On the 30th of September, 1871, Holden conveyed the trust premises to John Chester, one of the defendants. This bill was filed on the 18th of November, 1874. It prayed that a trustee should be appointed in place of Eaton; that the successor so appointed should be directed to execute the trust; and for general relief. The court below found, among other things, that Holden was indebted to Talbot on the note in the sum of \$5,000, "with interest thereon at the rate of ten per cent per annum from the 13th of April, 1873, less the sum of \$75," and that the Savings and Trust Company had a lien on the debt for \$1,500, and interest from April 13, 1875. It was decreed that a new trustee should be, and he was thereby, appointed, and that in default of payment of the amount due from Holden, and the costs, the trustee should proceed to sell the premises described in the deed of trust, etc. From this decree Holden appealed to this court.

The note of Holden, including days of grace, matured on the 16th of October, 1874. Up to that time there can be no doubt that the rate of interest to be paid was that called for by the note. But what is the rate chargeable thereafter? The court below allowed continuously the rate expressed in the note. Was this correct? This is the question we are called upon to decide.

The subject of interest in its historical aspect was considered by this court in *Nat. Bk. v. Mech. Nat. Bk.*, 94 U. S., 437 [XXIV., 176].

The statutory provisions relating to interest in the District of Columbia are as follows:

(1) The rate of six per cent per annum is allowed upon all moneys due, where there is no contract upon the subject.

(2) Parties may stipulate in writing for ten per cent per annum, or any less rate.

(3) If more than ten per cent is taken upon any contract, all the interest received may be recovered back, if it be sued for within a year.

The rule heretofore applied by this court, under the circumstances of this case, has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate: *Brewster v. Wakefield*, 22 How., 118 [63 U. S., XVI., 301]; *Burnhisel v. Firman*, 22 Wall., 170 [89 U. S., XXII., 766]. Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law.

This subject was fully examined in the recent case in this court of *Cromwell v. Sac Co.*, 94 U. S., 351 [XXIV., 195]. We need not go over the same ground again.

Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that, it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intent cannot be inferred. The analogies relied upon to support a different view are obviously distinguishable from the case in hand.

The decree will be altered according to these views.

It appears that since this appeal was taken, Thomas J. D. Fuller, Esq., the trustee appointed in place of Eaton, has also died. Another trustee in his stead will be appointed here.

As modified in these two particulars, the decree will be affirmed and remitted to the court below for execution.

Cited—103 U. S., 698; 68 Ind., 205; 84 Ind., 378; 43 Am. Rep., 99; 129 Mass., 82; 37 Am. Rep., 313; 95 N. Y., 490; 47 Am. Rep., 65.

CHESTER A. ARTHUR, COLLECTOR, *Plff. in Err.*,
v.

EMIL HEROLD.

(See S. C., 10 Otto, 75-78.)

Duty Act—question for jury.

1. Under the Act of June 30, 1864, imposing a duty on ground chicory, it was not error for the court to say to the jury that ground chicory was the same thing as burnt chicory.

2. Whether or not the article imported was a new preparation and something other than ground chicory, was a question of fact for the jury.

[No. 77.]

Argued Nov 18, 1879. Decided Nov. 24, 1879.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the defendant in error, to recover an alleged excess in duties collected by the defendant, now plaintiff in error. Upon the trial, evidence was introduced showing the importations by the plaintiffs from a foreign port into the Port of New York, in the year 1873, of certain merchandise upon which a duty had been assessed by the defendant, at the rate of five cents per pound, under section 11 of the Act of Congress, entitled, "An Act to Increase the Duty on Imports, and for Other Purposes," approved January 30, 1864, which provides a duty "on chicory root, four cents per pound; ground, burnt or prepared, five cents per pound." Upon the ascertainment and liquidation of said duties, the

plaintiffs duly protested and appealed to the Secretary of the Treasury, and brought this action in due season, pursuant to the requirements of the Act of Congress, entitled "An Act to Reduce the Duties on Imports and to Reduce Internal Taxes, and for Other Purposes," approved June 6, 1872, which provides a duty in lieu of former duties "On chicory root, ground or unground, one cent per pound."

The testimony which was offered by the plaintiff tended to show that the article in question was commercially known as "finely ground chicory, in papers," or "paper chicory," and was pulverized chicory; that chicory is grown extensively in Germany, where it is largely used as a substitute for coffee. The root, when dug from the ground, is first washed and scraped, then split and cut by machinery into pieces or sections which are partially dried in the sun and then kiln-dried in which latter condition it becomes an article of commerce to this country. Of this there are two forms, "light kiln-dried" and "extra kiln-dried," neither of which are burnt or roasted, except such as is necessarily incident to the process of kiln-drying.

The next process is burning or roasting, which is done in heated cylinders. It is necessarily roasted before it can be ground. Then it is ground in mills, from which it emerges in coarse and fine particles commingled, in which condition, or when simply burnt or roasted, it is not an article of commerce. The chicory is then passed through sieves, by which the coarse and fine particles are separated from each other. The coarse particles are packed in barrels or casks for shipment, and is called in trade "coarsely ground," or "granulated chicory," the finer particles, after being again ground and reduced to powder, are packed in small paper bags, weighing ordinarily one quarter of a pound each, sometimes half a pound, which are packed in casks. This kind is called "finely ground chicory, in papers," or "paper chicory." Both forms are drier than the atmosphere, and absorb moisture from it; the first more slowly than the second, because the particles are larger.

The cases or paper packages of "paper chicory" are placed in damp cellars or vaults attached to and a part of the large chicory manufactories, some of which are exclusively for the manufacture of paper chicory, in order to hasten the absorption of moisture, and in some factories the hastening of absorption is further facilitated by allowing steam to escape into the cellars. The greater quantity of moisture in finely ground chicory over that which is absorbed in the "granulated," makes the paper chicory from 15 to 30 per cent. less per pound than the "granulated."

Paper chicory, when taken out of the cellars, has the consistency of paste, and hardens as it is exposed to the air. The granulated chicory also hardens by exposure.

The granulated chicory is usually sold by importers in this country, to coffee dealers and coffee roasters, to adulterate coffee; the paper chicory is sold exclusively to consumers, mostly Germans and Scandinavians in the Western States, who use it as a substitute for coffee.

The defendant introduced evidence to show that the natural absorption of moisture was hastened by artificial means, *e. g.*, by steam introduced through pipes in the vaults or cellars, See 10 OTTO.

and that this operation was an essential and usual process in the preparation of the paper chicory. On the part of the plaintiff, evidence was offered that nothing had been done to the chicory in these vaults, except to allow the natural absorption of moisture to take place by exposing the paper chicory to the air. Some of the witnesses testified that paper chicory had different traits, as to taste and smell, from granulated chicory.

The plaintiffs gave some evidence to show that a different article from the imported article called "patent chicory," or "chicory coffee," was made by an admixture of water and foreign ingredients. It was not claimed that the plaintiff's goods contained any admixture of foreign ingredients.

Verdict and judgment were for the plaintiff, and the defendant sued out this writ of error.

The case further appears in the opinion.

Mr. Edwin B. Smith, Asst. Atty-Gen., for plaintiff in error.

Mr. Stephen G. Clarke, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We think it was not error for the court to say to the jury that ground chicory was the same thing as burnt chicory. The chicory root cannot be ground until it is burned, and burnt chicory is not an article of commerce until it is ground. Whether or not the article imported was a new preparation, and something other than ground chicory; that is to say, whether it was prepared chicory and not simply ground chicory, was a question of fact that was properly left to the jury.

Affirmed.

ISAAC S. HURT, *Plff. in Err.*,

v.

D. M. HOLLINGSWORTH.

(See S. C., 10 Otto, 100-104.)

Union of equitable and legal causes of action.

*In the Federal Courts the union of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, declaring that in suits in equity, in the Circuit and District Courts of the United States the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. So held in a case transferred to the Federal Court from a court of Texas in which State the union of equitable and legal causes of action in one suit is permitted.

[No. 49.]

Argued Nov. 6, 7, 1879. Decided, Nov. 24, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas.

The case is stated by the court.

Messrs. P. Phillips, W. P. Ballinger and W. Hallett Phillips, for plaintiff in error.

Mr. James Lowndes, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

This suit was brought by the plaintiff in a District Court of Texas to quiet his title to certain real property situated in Galveston, in that State. On application of the defendant it was

*Head note by *Mr. Justice FIELD*.

removed to the Circuit Court of the United States.

The petition, which is the first pleading in a suit according to the practice which obtains in Texas, sets forth that the plaintiff is the owner of the premises; that he purchased them of one Molsberger and wife, in June, 1874; that those parties acquired them in December, 1865, and had subsequently, until the sale to the plaintiff, claimed and held them as a homestead; that in April, 1867, certain parties designated as Marsh, Denman & Co., recovered judgment against Molsberger in the County Court of Galveston on a debt contracted in 1866, while the premises constituted the homestead of himself and family; and in October, 1873, under an execution issued thereon, the premises were sold by the sheriff of the county, for the sum of \$30, to the defendant, Hollingsworth, one of the members of that firm, and to him the sheriff executed a deed of the premises, which has been recorded in the county.

The petition avers that this deed is a cloud upon the title of the plaintiff, and prays that the cloud may be removed and his title quieted. The defendant filed in the circuit court an answer to this petition, in which he admits that the plaintiff was in possession of the premises, and had obtained a deed of them from Molsberger and wife, who had purchased them in 1865, but denies that they constituted a homestead of Molsberger and family continuously from that time until the alleged sale to the plaintiff, or that they were such homestead when the sale was made by the sheriff to him.

The answer then avers that the defendant became the owner of the premises by his purchase; that the plaintiff wrongfully withholds the possession from him, and the rents and profits, which are of the value of \$75 a month. He, therefore, prays that the title may be declared to be in him, and that he may have judgment for the possession of the premises and the value of the rents.

These pleadings were subsequently amended so as to show the value of the property and the amount of its rents, and in some other particulars not material to the question now presented.

The case was considered by counsel and treated by the court as an action at law, and by stipulation made at the December Term of 1875, the parties waived a jury trial and submitted "the matters therein, as well of facts as of law, to the court." The evidence was then heard; and at a subsequent Term the court gave judgment that the plaintiff take nothing by his action, and that the defendant recover the title and possession of the property; and also the sum of \$420, as damages for its use and occupation, and have a writ of possession.

This judgment was subsequently vacated and a rehearing granted, when a motion was made by the plaintiff to transfer the cause, it being one seeking equitable relief, from the law docket of the court, upon the ground that it had been improvidently placed there by the defendant, to the chancery docket, to be there proceeded with according to the rules and practice of the circuit court sitting in chancery; and also a motion to take from the files of the court so much of the answer as purported to be "a cross suit, reconvention suit, or cross-bill," because

the court, sitting as a law court, had no jurisdiction to grant in that suit the relief prayed by the defendant. These motions were accompanied with a petition for leave to amend the bill of complaint. But the court, considering that the case was on its law docket, and had been submitted for its judgment, refused to sustain the motions. In disposing of them, it observed that it was a court both of law and equity, and had cognizance of both kinds of cases; that though the cause was an equity cause, the court had cognizance of it, and the question presented was, therefore, simply one of regularity of pleadings and proceedings; that the parties had waived all matters of mere form by going to final hearing on the merits and submitting the case to the court, and that their substantial rights had not been violated by this mode of proceeding. The court thereupon heard the evidence presented by the parties, which related principally to the point whether the premises had been abandoned as a homestead at the time of the sheriff's sale mentioned in the pleadings; and rendered a similar judgment to that previously entered. The case is brought here both on writ of error and on appeal, the plaintiff adopting both modes to obviate a possible objection, which otherwise might have been taken to our jurisdiction.

There would be great force in the observations of the court below, if the different causes of action presented by the parties could, by the usual forms of proceeding, either at law or in equity, be disposed of in one suit. It might, then, very well be said that as by stipulation the case had been submitted to the court for determination, it was too late to object to the form of the proceedings. If it was an equity case, then it was properly before the court; if it was a case at law, a jury having been waived, it was also properly there. In either view, the relief warranted by the facts would be administered. But here no such disposition could be made of the case presented by the petition and the one presented by the answer. The first is strictly a suit in equity seeking special relief, which only a court of chancery can grant.

The second is an action at law for the recovery of real property, with the rents and profits. The two cases are entirely different in their nature, and can be determined, where the distinctions between legal and equitable proceedings are maintained, only in separate suits. In the one case, if the allegations of the plaintiff be sustained, the judgment must be declaratory and prohibitory, adjudging that the deed of the sheriff to the defendant constitutes a cloud upon his title, and enjoining the defendant from asserting any claim to the premises under it. In the other case, if the defendant establishes his averments, the judgment must be for the possession of the premises and the rents and profits.

In the Federal Courts such a blending of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, which declares that in suits in equity, in the Circuit and District Courts of the United States, the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. 1 Stat. at L., 276, sec. 2; R. S., sec. 913. This requirement has

always been held obligatory upon parties and the court whenever the question has been raised. *Thompson v. R. R. Co.*, 6 Wall., 134 [73 U. S., XVIII., 765]. A party who claims a legal title must, therefore, proceed at law; and a party whose title or claim is an equitable one must follow the forms and rules of equity proceedings as prescribed by this court under the authority of the Act of August 23, 1842, 5 Stat. at L., 518, sec. 6. The case of *Hornbuckle v. Toombs*, reported in the 18th of Wallace, 648 [85 U. S., XXI., 966], does not conflict with this view; it only decides that the Process Act of 1792 does not extend to proceedings in the courts of the several Territories, which may be regulated by their respective Legislatures.

In this case there is nothing in the answer of the defendant which would render it good as a cross-bill, even had it been drawn in due form and filed as such bill by leave of the court, for it seeks legal and not equitable relief. *Story, Eq. Pl.*, sec. 398.

We are of opinion, therefore, that the court below should have granted the motions of the plaintiff. So long as the Process Act, respecting the modes and forms of procedure in equity cases, remains in force, parties have a right to insist that its provisions, however variant from the practice of the state courts, or open to objection, shall be followed, and should be permitted to recede from a stipulation waiving them, improvidently made, as the one in this case evidently was, at any time before final hearing and judgment.

There is an additional reason for sending the case back: that the evidence as to the abandonment of the homestead of the plaintiff is very unsatisfactory, and leaves great doubt on our minds whether the conclusion reached by the court below on this point was correct. We do not think that a homestead can be considered as abandoned because occupied by tenants, and the owner is temporarily residing elsewhere. According to the decisions of the Supreme Court of Texas, it would appear that, in order to work a forfeiture of the right to the homestead, the owner's cessation of occupancy must be with an intention of total relinquishment, shown by clear and decisive circumstances. The trifling sum at which the premises were suffered to be struck off would seem to indicate that at the sale little confidence was felt in the validity of the title which would be acquired. On the re-hearing, this matter will receive a more full and careful consideration.

The judgment will be reversed and the cause remanded, with directions to the court below to allow the plaintiff to amend his petition, or bill of complaint, as he now designates it, and to strike out of the answer of the defendant his prayer for the possession of the premises and the value of the rents and profits; and it is so ordered.

Cited—106 U. S., 678; 111 U. S., 386.

BALTIMORE AND POTOMAC RAILROAD COMPANY, *Plff. in Err.*,

JOHN N. TROOK.

(See S. C., 10 Otto, 112, 113.)

NOTE.—*Jurisdiction of U. S. Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be*

See 10 Otto.

Jurisdiction as to amount—part of judgment remitted.

1. In cases brought here by writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs.

2. Where the judgment, after \$1,500 had been remitted to avoid a new trial did not exceed \$2,500, under the rule established, in *R. R. Co. v. Grant*, ante, 201, this court has no jurisdiction.

[No. 436.]

Submitted Nov. 17, 1879. Decided Nov. 24, 1879.

IN ERROR to the Supreme Court of the District of Columbia.

On motion to dismiss.

The grounds for the motion for dismissal sufficiently appear in the opinion of the court.

Mr. J. G. Payne, for defendant, in support of motion.

Mr. Enoch Totten, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

In cases brought here by writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the amount of the judgment affirmed without adding interest or costs. The judgment in this case, after the \$1,500 had been remitted to avoid a new trial, did not exceed \$2,500. Such being the case, under the rule established in *R. R. Co. v. Grant* [ante, 231], our jurisdiction has been taken away.

The motion to dismiss is granted, each party to pay his own costs.

UNITED STATES, *Plff. in Err.*,

v.

JAMES O. CURTIS ET AL.

JAMES O. CURTIS ET AL., *Plffs. in Err.*,

v.

UNITED STATES.

(See S. C., 10 Otto, 119-124.)

Paymaster's bond—breach of condition.

1. A breach of a paymaster's bond does not occur until he or his legal representatives, or sureties are required to refund moneys in his hands.

2. Until there is a breach of the condition of the bond, which renders him or his sureties liable, there can be no right to interest on account of such breach.

[No. 706, 707.]

Argued Nov. 6, 1879. Decided Nov. 24, 1879.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for United States.

Mr. Thos. H. Talbot, opposed.

Mr. Justice Miller delivered the opinion of the court:

The defendants in the circuit court, Curtis and Foster, were sued, on a bond which they

shown; what cases reviewable without regard to sum in controversy. See note to *Gordon v. Ogden*, 28 U. S. (3 Pet.), 33.

had given as sureties of Oliver Holman, Paymaster in the Army of the United States. Holman, though dead, was named in the writ. The bond was for the sum of \$20,000, and was subject to three conditions, namely: that he should faithfully discharge his duties as paymaster, that he should regularly account when thereunto required for all moneys received by him, and "Should refund at any time when thereunto required any public moneys remaining in his hands unaccounted for."

The only breach of this bond alleged in this declaration is that he did not refund when thereunto required the sum of \$3,320.02, with interest. The defendants were duly served with process and after appearance by attorney, and after several continuances from May Term, 1873; until June, 1876, made default. On the assessment of damages they appeared at the hearing and an agreed statement of facts was filed. On this the court entered a judgment for the sum claimed in the declaration and interest from the service of the writ, to which judgment both parties bring writs of error.

To the error assigned by the defendants it is sufficient to say that, having been served with the writ and appeared by counsel, and having thereafter suffered a voluntary default, that default was a confession of indebtedness on account of the breach of the bond assigned, namely: the failure of Holman, their principal, to pay over the moneys in his hands when thereunto required and of such demand as raised the obligation to pay by his sureties. There remained only the question of the amount due from him on account of money in his hands, and of this the auditor's statement of account was evidence which was uncontradicted. There is, therefore, no error of which they can complain.

The United States, however, asserted a right to interest on the amount found due by the auditor from the date at which Holman ceased to be paymaster, namely: Nov. 30, 1865.

Without attempting to decide any other case but this, we are of opinion that the breach of the bond on which the defendants were sued did not occur until Holman, his legal representatives, or his sureties, were required to refund moneys in his hands; that is, until some notice was given that a definite sum had been found in his hands, due the United States, by the proper accounting officer. Of course, until there was a breach of the condition of the bond, which rendered him or his sureties liable, there could be no right to interest on account of such breach.

The agreed statement shows that no such statement was made or rendered to Holman in his lifetime, or any demand to refund. Nor does it appear that any such statement was rendered to his executors, or a demand made of them or of the sureties, except as it was made by the service of the writ.

We are, therefore, of opinion that the earliest moment at which anyone became liable on account of the breach of the condition of the bond now sued on was the service of the writ on the defendants, and that such service was a sufficient demand.

As the court properly allowed interest on this basis, the judgment is affirmed.

Cited—106 U. S., 535.

WILLIAM MCINTYRE, *Plff. in Err.*,

v.

JOHN GIBLIN.

Negligent shooting—damages for.

1. In an action for negligent shooting and wounding plaintiff, there is no error in the charge to the jury, that, in computing the damages, they might take into consideration "a fair compensation for the physical and mental suffering caused by the injury."

2. The charge was not erroneous because the words "and mental" were included.

[No. 173.]

Submitted Nov. 24, 1879. Decided Dec. 1, 1879.

IN ERROR to the Supreme Court of the Territory of Utah.

The case is sufficiently stated by the court.

Messrs. **Sheeks & Rawlins** and **S. A. Merritt**, for plaintiff in error:

Only in actions for willful and malicious injuries, not for injuries arising from negligence, can damages for mental suffering be recovered.

Johnson v. Wells, 6 Nev., 224; *Wilson v. Young*, 31 Wis., 574; *Field, Dam.*, sec. 630; 2 *Greenl. Ev.*, sec. 267, and *note*; *Sedg. Dam. (marg.)*, 35-37; *Wadsworth v. Treat*, 43 Me., 163; *Curtis v. R. R. Co.*, 18 N. Y., 534.

Messrs. **Hoge & Jonasson** and **E. D. Hoge**, for defendant in error:

That compensation for mental, in connection with physical, suffering may be recovered in an action like the present, is well established.

Sher. & Redf. Neg., sec. 606; *R. R. Co. v. Barron*, 5 Wall., 90, 105 (72 U. S., XVIII., 591, 594); *Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y., 415; *Curtiss v. R. R. Co.*, 20 Barb., 285; *S. C.*, 18 N. Y., 534; *Morse v. Auburn, etc.*, *R. R. Co.*, 10 Barb., 621; *Peoria Bridge Asso. v. Loomis*, 20 Ill., 235; *Beardsley v. Swann*, 4 McLean, 333; *Oliver v. N. Pacif. Tr. Co.*, 3 Oreg., 84; *West v. Forrest*, 22 Mo., 344; *Masters v. Warren*, 27 Conn., 293; *Memphis, etc.*, *R. R. Co. v. Whitfield*, 44 Miss., 466; *Seger v. Barkhamsted*, 22 Conn., 290; *Canning v. Williamstown*, 1 Cush., 451; *Hanson v. Fowle*, 1 Sawy., 497; *Koch v. Oregon Steamship Co.*, reported in *Forum*, Oct. 1875, p. 683; *Pa. & O. Canal Co. v. Graham*, 63 Pa., 290; *Smith v. Holcomb*, 99 Mass., 552; *Holyoke v. R. R. Co.*, 48 N. H., 541; *Matteson v. R. R. Co.*, 62 Barb., 364; *Smith v. Overby*, 30 Ga., 241; *Cox v. Vanderkleed*, 21 Ind., 164; *Gould v. Christianson*, *Blatchf. & H.*, 507; *Cooper v. Mullins*, 30 Ga., 152.

The only case which seems to give expression to a contrary doctrine from that stated in the above authorities, is the case of *Johnson v. Wells*, 6 Nev., 224.

But that case has been overruled by the same court, in the case *Quigley v. C. P. R. R. Co.*, 11 Nev. 369.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This was a suit to recover damages for the careless and negligent shooting and wounding of Giblin, the plaintiff below, by McIntyre, the defendant. On the trial the court charged the jury that in computing the damages, they might take into consideration "A fair compensation for the physical and mental suffering caused by the injury," and the only question submitted to us now is, whether this charge was erroneous because the words "and mental" were included.

We think, with the court below, that the effect of this instruction was no more than to allow the jury to give compensation for the personal suffering of the plaintiff caused by the injury, and that in this there was no error.

Judgment affirmed.

EDWARD CLARK, Trustee, and LOUISA MCGHAN, *Appts.*,

v.

FRANCIS W. EATON, COMMISSIONER OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY, ET AL.

(See S. C., "*Clark v. Trust Co.*" 10 Otto, 149-153.)

Inadequacy of price—invalid sale.

1. That the price which property brought at a trustee's sale was grossly inadequate, does not alone constitute a sufficient reason to impeach the genuineness or validity of the sale, unless the inadequacy was such as to shock the conscience, or raise a presumption of fraud or unfairness.

2. That the trustee, at the date of the deed to him and when the sale was made, was the actuary of the Trust Company, whose debt it was given to secure, does not invalidate a sale made under it to the company, which was in conformity to the deed and free from fraud.

[No. 58.]

Argued Nov. 10, 1879. Decided Dec. 1, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. Shellabarger & Wilson and J. G. Bigelow, for appellants.

Messrs. Enoch Totten and A. C. Bradley, for appellees.

Mr Justice Harlan delivered the opinion of the court:

The preliminary question in this case involves the validity and effect of the sale made at public auction by Eaton, or rather by the auctioneer under his directions and as his agent.

McGhan and wife, by indenture dated August 15, 1864, and duly acknowledged on 18th November, 1864, conveyed the premises in controversy to Edward Clark, in trust for the sole use and benefit of Mrs. McGhan, for and during her natural life, permitting her to use and occupy the same, and to receive and apply the rents and profits thereof, and in trust also to sell and convey absolutely in fee simple or by way of mortgage, to such person or persons and for such use and purposes as Mrs. McGhan should, in writing, request and direct, her then or any future coverture notwithstanding. The indenture also contained a provision that, upon the death of Mrs. McGhan, the premises, or so much thereof as remained undisposed of, should be conveyed to the husband, his heirs or assigns.

By an indenture executed and duly acknowledged on 20th June, 1870, McGhan and his wife, together with Clark, the trustee, conveyed the property to Daniel Eaton, of the City of Washington, in trust to secure the payment of

a debt due from McGhan and wife to the Freedman's Savings and Trust Company, for the sum of \$10,000, evidenced by their joint and several promissory note to that Company, of like date with the indenture, and payable twelve months thereafter to the order of the Company, with interest at the rate of ten per cent per annum, interest payable half-yearly. That conveyance was in part upon these trusts: 1. To permit Mrs. McGhan and husband to occupy the premises, and the rents and profits to have and apply to their sole use and benefit, until default be made in the payment of the note or interest thereon, or any proper charge or expense in and about the property; and, upon payment of the note, interest and costs, to release and reconvey the premises to Clark, the trustee, for Mrs. McGhan; 2. Upon default in any of the said respects, quoting from the deed itself, "To sell the said piece or parcel of ground and premises at public auction upon such terms and conditions, and at such time and place, and after such previous public advertisement, as the said party of the second part or his heirs in the execution of this trust shall deem advantageous and proper, and to convey the same in fee simple to the purchaser or purchasers thereof at his, her or their cost or expense; and of the proceeds of said sale or sales first to pay all proper costs, charges and expenses, and to retain as compensation a commission of five per cent out of the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to the said Louisa McGhan, her heirs or assigns."

On or about April 5, 1872, the note held by the Company being unpaid, and interest to the amount of \$1,400 having accrued thereon, Eaton, the trustee, made public advertisement that he would sell the mortgaged property at public auction to the highest bidder, at a designated hour, on April 24, 1872, giving the terms of such proposed sale. The sale was postponed from time to time until July 1, 1872, when it took place, the Freedman's Savings and Trust Company, by one of its officers, becoming the purchaser at the price of \$13,000.

We find in the record a writing signed by Eaton, purporting to be an indenture executed July 1, 1872, whereby, in consideration of the sum of \$13,000 in hand paid, he conveyed to the purchaser the property so sold at public auction.

It purports to have been "Signed, sealed and delivered in presence of—Brainerd H. Warner," and to have been acknowledged before said Warner as a notary public for the District of Columbia. As printed in the transcript, that writing shows no seal attached to the signature of Eaton, and the certificate of acknowledgment before the notary is without date. That writing was placed upon record on the 4th of February, 1873; but, for the want of a seal to Eaton's signature, complainants claim that it was ineffective for any purpose. Subsequent to that sale, the Freedman's Savings and Trust Company commenced proceedings in ejectment against McGhan and wife and Clark, to recover possession of the property. The defendants in that action failing to appear, judgment by default was entered against them on

NOTE.—*Inadequacy of price, to impeach or set aside sale.* See note to *Erwin v. Farham*, 53 U. S. (12 How.), 197.

See 10 OTTO.

November 7, 1872, and, under a writ of possession, McGhan and wife were ejected and the Company put in possession of the property.

In 1873, Bradley purchased the same property from the Company, and subsequently sold and conveyed it to Shepherd. Eaton died on the 16th of February, 1873, and McGhan died on October 27, 1874.

In this action, commenced April 5, 1875, by Mrs. McGhan, and by Clark, as trustee in the deed already referred to, it is sought to redeem the property sold by Eaton under the deed of June 20, 1872. To that end the complainants, among other things, prayed that the deed from Eaton to the Freedman's Savings and Trust Company, and the subsequent conveyance under which Bradley and Shepherd (who are alleged not to have been *bona fide* purchasers) claim, be declared null and void, and the notes given by Bradley to that Company be canceled; that an accounting be had of the rents, issues and profits of the premises, and that the amount thereof be applied on account of the said note of \$10,000; and that the lease of the premises may be decreed to inure to the benefit of the complainants.

The court below having dismissed the bill, this appeal has been prosecuted, and the assignments of error present several propositions of law for our consideration. But, in the view we take of the case, it is only necessary to determine the preliminary question already stated, in reference to the validity and effect of the sale at public auction by Eaton, the trustee, on the first of July, 1872.

That sale is attempted to be impeached upon several grounds, viz.:

1. That a proper opportunity was not afforded, to persons desirous to purchase the property, to bid at the sale; that, had there been, the property would have brought, at least, \$2,000 more.

Upon a careful examination of all the evidence, we find nothing of a positive, substantial character sustaining this position. While there is some little conflict in the evidence as to what occurred upon the occasion of the sale, the overwhelming preponderance of testimony shows that the sale was duly advertised and was fairly and properly conducted.

2. It is next contended that relief should be given because the price which the property brought was grossly inadequate. That fact alone does not constitute a sufficient reason to impeach the genuineness or validity of the sale. Besides, the inadequacy was not such as to shock the conscience, or raise a presumption of fraud or unfairness. *Hill, Tr.*, 152, *n.*; [*Cooper v. Galbraith*], 3 Wash. (C. C.), 546; [*Hubbard v. Jarrell*], 23 Md., 66.

3. The sale is assailed upon the further ground that Eaton, at the date of the deed to him, as well as when the sale was made, was the actuary of the Freedman's Savings and Trust Company, and that, consequently, no sale made by him, under the authority conferred by the deed of June 20, 1870, would cut off the equity of redemption.

Touching this objection, it is sufficient to say that the deed was not made to Eaton in his capacity as an officer of the Company, nor did he act in that capacity when exerting the authority conferred upon him. The fact that he held official relations to that Company did not inca-

pacitate him from accepting the trust set out in the deed of June 22, 1870, or from discharging the duties thereby imposed. It is true that his relations to the Company would make it the duty of the court to scrutinize very closely all that he did in the execution of the trust; but we find nothing in the evidence to justify the belief that he acted otherwise than honestly and faithfully in the discharge of his duty. The evidence does not justify the charge that he bid off the property for the Company.

What we have said leads to the conclusion that the sale of July 1, 1872, was a valid sale, which the purchaser was entitled to have consummated by a conveyance executed and acknowledged in proper form. It is, therefore, of no consequence in this suit to inquire whether the writing executed by Eaton to the Company, in pursuance of the sale made at public auction, was or was not sufficient to pass the title from him.

If he was bound, as we hold that he was, to have executed a sufficient conveyance, the court should not, by granting the relief asked, defeat the sale altogether. An ineffectual attempt, upon the part of Eaton, to consummate the sale, does not authorize a decree setting aside the sale, which, as we have said, was in conformity to the deed, and was free from fraud or imposition, or such inadequacy of price as, upon recognized principles of equity, constitutes ground for relief.

We are all of opinion that the decree must be affirmed, and it is so ordered.

CITY OF BROWNSVILLE, *Plff. in Err.*,

v.
PEDRO J. CAVAZOS, *Exr.* of MARIA JOSEFA CAVAZOS, Deceased, *ET AL.*

(See S. C., 10 Otto, 138-145.)

Lands of Mexican pueblo—private lands for public use—former adjudication—prescription.

*1. By the laws of Mexico in force in 1826, *pueblos* or towns, when recognized as such by public authority, became entitled for their use and benefit and the use and benefit of their inhabitants, to certain lands embracing the site of such *pueblos* or towns and adjoining territory to the extent of four square leagues, which were to be measured and assigned to them.

2. By the Constitution of Tamaulipas, one of the States of Mexico, in force in 1826, the property of an individual could not be expropriated; that is, divested of its private character, for an object of common recognized utility, without previous compensation, and the amount of such compensation could only be estimated by arbiters appointed by the State and the owner. If such compensation was not made, though the failure to make it was caused by the owner's refusal to appoint an arbiter, the title was not divested, and the owner and his grantees could recover the same after the change of government over the country by the Treaty of Guadalupe Hidalgo.

3. By the law of Texas, a judgment against a plaintiff, in an action for the possession of real property, is conclusive, unless he commence a second action within a year. Held, that, in an action commenced within the year by the former defendant against the grantees of the former plaintiff for the same property, the latter are not precluded by the judgment in the original action from setting up their claim to the land.

4. Where there was a mixed possession of the property in controversy, and a continued contest and litigation of the parties over it up to the commencement of the action, and an absence of actual

*Head notes by Mr. Justice FIELD.

possession by either, of a large portion of the property; it was held that no prescription could be claimed by either, and that the case must be determined on the documentary evidence of title.

[No. 71.]

Argued Nov. 14, 1879. Decided Dec. 8, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas.

This action was commenced by the City of Brownsville, now plaintiff in error, in the District Court of Cameron County, State of Texas, against Maria Josefa Cavazos, Elizabeth P. Stillman and others. The petitioner alleged that the defendants were guilty of various trespasses upon a certain tract of land, of which the petitioner was lawfully possessed in fee simple. The petitioner asked judgment, declaring it to be the true and lawful owner in fee simple of the tract in question, and that a writ of possession, in due form, issue, commanding the sheriff of the county to put the petitioner in the full and lawful possession of such tract of land, and that the claims and pretenses to title thereto set up by the defendants be adjudged invalid.

The case was removed to the Circuit Court of the United States by the defendants.

The property in question is within the boundary line tract of fifty-nine and one half leagues, called the Espiritu Santo tracts, granted by the Spanish Government to one De la Garza in 1781, which grant was recognized by the Legislature of the State of Texas by the "Act to relinquish the right of the State to certain lands therein named," approved February 10, 1852. It is conceded by both parties, that for several years prior and up to 1826, one Doña Maria Francisca Cavazos was seised of the Espiritu Santo tracts (including the land in dispute), by regular derangement of title under said grant. Madam Cavazos died in 1835, and devised the Espiritu Santo tract to three parties, one of whom was Doña Maria Josefa Cavazos, the first of the defendants above named, who, by an act of partition between the parties, became seised of that portion of the tract which is in question. A portion of these premises she subsequently conveyed to other persons, under whom the other defendants claim by regular derangement of title.

The title set up by the City arises from a proceeding for expropriation by which, as is alleged by the plaintiff, the premises in dispute were expropriated as part of the *ejidos* or town lands of the City of Matamoras, in 1826 and 1827. The principal question in the case is as to the validity and the effect of these expropriation proceedings.

The following was the decision of the court below:

"We find against both parties in fact, under the issue of prescription; and, as a matter of law, we find for the defendants on the question of title, namely: that the defendants are respectively seised in fee of the respective parts and portions of the lands claimed by the petition for which they respectively defend, and that the plaintiff is not so seised; and, as a consequence of this finding, we also find the defendants not guilty as they have severally pleaded, subject, however, to the disclaimer filed by the defendants; lands and premises disclaimed not being embraced in this judgment. And we give judgment for the defendants, that they severally re-

See 10 OTTO.

cover the said lands in the parts and portions respectively claimed by them in the pleadings in the cause, and that as to the action and demand of the plaintiff, they go thereof without day and recover their costs."

The plaintiff below brought the case to this court by writ of error.

The case is further stated in the opinion.

Messrs. *Stephen Powers* and *Durant & Horner*, for plaintiff in error.

Mr. James R. Cox, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

This is an action for the possession of certain real property in Brownsville, a City of Texas, situated on the left bank of the Rio Grande, opposite the Town of Matamoras. Previous to the revolution which separated Texas from the Republic of Mexico, Brownsville constituted a portion of Matamoras, which was recognized as a town in 1826 by a decree of the Congress of Tamaulipas, one of the States of Mexico. By the laws of Mexico in force at the time, *pueblos* or towns, when recognized as such by public authority, became entitled for their use and benefit and the use and benefit of their inhabitants, to certain lands embracing the site of such *pueblos* or towns and adjoining territory, to the extent of four square leagues. This right was held by the cities and towns of Spain for a long period before her conquests in America, and was recognized in her laws and ordinances for the government of her colonies here. L. of the Indies, in White, *Recop.*, Vol. II., 44; *Townsend v. Greeley*, 5 Wall., 326 [72 U. S., XVIII., 547]; *Grisar v. McDowell*, 6 Wall., 363 [73 U. S., XVIII., 863]; *The Pueblo Case*, 4 Sawy., 563. By them provision was made for the measurement of the lands and their assignment to the *pueblos* or towns, when once they were officially recognized. If any portion of the lands which fell within the four square leagues, laid off in the usual way in a square or oblong form, had previously become vested in private proprietorship, authority was sometimes given to take the necessary proceedings to divest the property of its private character—to expropriate it, as it was termed—and subject it to the uses of the town. Such was the case here. The four square leagues measured off and assigned to Matamoras crossed the Rio Grande and embraced the site of the present City of Brownsville, which was then the private property of one Doña Maria Francisca Cavazos. The premises were a part of a tract called the Espiritu Santo tract, granted by the Spanish Government, in 1781, to one De la Garza. The grant was recognized as valid by the Legislature of Texas in 1852, when it relinquished to the heirs and assignees of the grantee all the right and interest of the State therein. For the expropriation of the premises thus embraced within the limits of the land assigned to the municipality, proceedings were taken soon after the town was established, in 1826. For some years immediately preceding their institution, Madam Cavazos was seised of the Espiritu Santo tract by regular derangement of title from the grantee; and so continued until her death in 1835, unless she was divested of that portion assigned to the town by the proceedings for its expropriation. She devised the tract to three parties, one of whom is

the defendant, *Dña Josefa Cavazos*, who, on partition with the others, became seised of that part which includes the premises in controversy, portions of which she conveyed to persons from whom the other defendants derive their title to the parcels which they severally claim.

The principal inquiry, therefore, presented for our consideration relates to the validity of the proceedings taken for the expropriation of the premises assigned to Matamoras as common lands—or *ejidos*, as they are termed in the Spanish language—on the left bank of the Rio Grande. And on this point we can add nothing to the clear and satisfactory exposition of the law contained in the opinion of the presiding Justice at the circuit. We can do little more than repeat his argument and adopt his conclusions. *Brownsville v. Cavazos*, 2 Woods, 293.

After the separation of Mexico from the mother country, the several States composing the Republic formed new constitutions of government, retaining the old Spanish laws so far as they were applicable to their new condition. The State of Tamaulipas, which embraced territory on both sides of the Rio Grande, in 1825 adopted a Constitution containing an article which declared that "Neither the Congress nor any other authority shall be able to take the property, even that of the least importance, of any private individual. When it shall become necessary for an object of a common recognized utility to take the property of any person, he shall first be compensated upon the examination of arbiters appointed by the Government of the State and the interested party."

Under this article, in order to divest the title of Madam Cavazos to the property taken, it became necessary to make to her compensation; and its amount could only be determined by arbiters, of whom one was to be chosen by her. But she declined to appoint an arbiter, or to participate in the proceedings. She desired to retain the farm occupied by her, from which she drew her support, and specially wished that it should be reserved from the *ejidos* or common lands. Various efforts were made for more than a year to induce her to act in the matter, but she persistently refused. Finally, in October, 1827, the Congress of the State interfered, and by its decree declared that the government, in the exercise of its powers, would see that the civil authorities of Matamoras compelled her to obey the Constitution and laws; that if, on being notified a second and third time, she should refuse to appoint an arbiter for the appraisement of her lands, which were to be taken for the town, the Common Council should proceed to their occupation and survey without further citation to her; and that should she or her heirs afterwards ask for indemnification, and be willing to name an arbiter, a new measurement should be made if desired, and the land she asked should be given to her.

It is upon this decree that the plaintiff, the City of Brownsville, relies to sustain its case, contending that the decree was an adjudication *in rem* for the expropriation of the property without compensation to Madam Cavazos, if she persisted in her refusal to name an arbiter; reserving, however, to her, the right to claim compensation at a subsequent period upon complying with the law. On the other hand, the defendants insist that the decree merely author-

ized the use of the lands without expropriation until indemnification to her should be provided as proposed by the government.

The presiding Justice at the circuit was of opinion that the court was not at liberty to question the validity of this decree, but must regard it as an act of the supreme authority of the State, in its dealings with its citizens, and that the inquiry of the court was, therefore, limited to its meaning and effect. This doctrine may, perhaps, be subject to some qualification, as the Congress of Tamaulipas was restrained by a written Constitution. But assuming that even a partial expropriation—a temporary possession of private property without compensation, in the case of an obstinate owner refusing to appoint an appraiser of its value—was permissible, we are of opinion that the position of the defendants is the only tenable one, and for several reasons:

In the first place, absolute expropriation was forbidden by the Constitution of Tamaulipas, without previous compensation. Until that was made, private ownership of the property was not divested. The State could have resorted to coercive measures to compel the owner to appoint an arbiter to act with its own appointee in estimating the amount to be paid. The decree states that the government would use its powers for that purpose, but it does not appear that any such measures were adopted. Its efforts did not go beyond a solicitation to her to act in the matter, and a summons in 1834 to all owners of lands within the *ejidos* to attend at the capital, "So that, hearing the Attorney-General of Finance, the indemnification to all might be agreed upon." Madam Cavazos declined to attend upon this summons, giving her old age as an excuse, but stating that she would receive her indemnification in money, and submit to whatever the government might order. It does not appear what action was then taken by the government. There is no evidence that any money was ever paid to her for the property, or that any mode was ever devised for appraising its value, other than that prescribed by the Constitution.

In the second place, the action of the Congress of Tamaulipas in 1848 upon this subject is persuasive, if not conclusive, evidence of the intent and meaning of the decree.

By the Treaty of Guadalupe Hidalgo, ratified on the 30th of May, 1848, 9 Stat. at L. 922, the Rio Grande was acknowledged to be the boundary between Mexico and the United States, when, of course, the jurisdiction of Tamaulipas over the premises in controversy ceased. But rights of private property previously existing in the territory east of the Rio Grande were in no respect affected. If they had arisen before the independence of Texas, their validity was to be determined by the laws of Mexico or Tamaulipas then in force. The authorities of Matamoras, claiming the *ejidos* under the decree in question, and believing that after the Treaty it would be difficult to enforce contracts with respect to the lands east of the Rio Grande, proposed to sell those now in controversy to various parties from the United States. Thereupon one John Treanor, representing the Cavazos family, and particularly *Dña Josefa*, one of the defendants in this suit, applied to the Congress of Tamaulipas for protection; in effect asking that the municipality be restrained

from making the contemplated sale, on the ground that it possessed no just claim to the property, and that such action would be of serious injury to the owners. To this application the Common Council of Matamoras replied by setting up the claim of the City. The matter was then presented to the Congress, and referred to a committee, who gave to the subject extended consideration, and finally made an elaborate report, to the effect that compensation had never been made to the owners of the property; that such compensation was an indispensable requisite to its expropriation; and as such expropriation could not now be made in consequence of the change of government over the country, they were entitled to receive back their lands, and were not confined to compensation; and that the alienation of the lands by the City, under these circumstances would not be subjecting them to a public use, but disposing of them for purposes of speculation; adding, that the right of expropriation had another and more noble origin, its object being not to increase the public revenues, but to provide for the well-being of the community. The committee further suggested that the alienation might produce complications with the Government of the United States, as the latter would probably contend that, if the lands belonged to the municipality, they must be considered as public property. The Congress, therefore, passed a Resolution to the effect that as article thirteen of the ancient Constitution of the State and article seventy-one of the then existing Constitution prescribed that in no case could an expropriation be established without previous compensation; and as this had not been made for the *ejidos* situated on the left bank of the Rio Grande, the Corporation of Matamoras had not acquired any property in them, and that in consequence they were preserved to their ancient owners. This Resolution bears date the 20th of October, 1848. As between the City of Matamoras and the applicants it is conclusive; the Congress had jurisdiction of these parties; neither questioned its power, and both accepted its judgment as a finality.

Although this Resolution may not bind the State of Texas, or previous purchasers or alienees of Matamoras, it is entitled to the highest consideration and respect as a decision touching the law of Tamaulipas, and as an interpretation given to its Constitution upon the expropriation of private property, and to its own previous legislation. It accords with the obvious and natural meaning of the Decree of 1827, which only proposed to allow the City to occupy the lands in advance of compensation, and it is supported by all the attendant and subsequent circumstances of the transaction. We, therefore, adopt it as at once a just and reasonable disposition of the matter.

This conclusion renders it unnecessary to inquire as to the possible interpretation which the language of the charter of Brownsville might receive, or what rights that City might have had, if Matamoras had held property on the east bank of the Rio Grande which, upon the independence of Texas, passed either to her successor or to the State.

It remains only to consider the pleas of *res judicata* and prescription interposed by the See 10 OTTO.

plaintiff in bar of the title set up by the defendants.

It appears that certain parties by the name of Basse & Ford, under whom some of the defendants trace their title, brought suit for the property now claimed against the City of Brownsville, which resulted in a judgment of dismissal in June, 1872; and a new suit under the law of Texas was not brought by them within one year afterwards. By that law a judgment against a plaintiff in an action for the possession of real property—or an action of trespass to try the title, as it is termed in the law—is conclusive unless he commence a second action for the property within a year. But the answer to the objection that the judgment here is conclusive against the defendants is, that before the year elapsed and, indeed, within ten days after the dismissal, the City commenced the present suit for the same property, in which all their rights were again brought into litigation. The law which gives to the dissatisfied party a right within one year to re-litigate a second time a controversy respecting land in Texas, does not bar him or his grantees from setting up his or their claim, if within the required period a similar suit respecting the same land is commenced against him or them by the former defendant. The object of allowing a second litigation of the same title, and of requiring such litigation to be speedily instituted, is equally accomplished.

As to the plea of prescription, we agree with the court below that, under the circumstances, the mixed possession of the parties, their continued contest and litigation from 1854 to the present time, and the absence of actual possession by either, of a large portion of the property, no prescription can be claimed and that the case must be determined on the documentary evidence of title.

We are satisfied with the conclusions reached by the Circuit Court, and its judgment is, in all respects, affirmed.

SAMUEL F. CRAIG, *Appt.*,

v.

JACOB SMITH ET AL.

(See S. C., 10 Otto, 226-234.)

Original papers, when to be transmitted on appeal—affidavits—new evidence on bill of review—discretion.

1. The power of the courts below, and of this court, over the transmission of original papers to this court on appeal, is and should be confined to such as require actual inspection as originals, in order to give them their full effect in the determination of the suit.

2. The original affidavits, which have been sent up by the clerk below, are no part of the transcript in the cause, and the clerk of this court was right in not having them printed.

3. There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review, to prove facts which were in issue on the former hearing.

4. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.

[No. 3.]

Argued Oct. 27, 1879. Decided Dec. 8, 1879.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The case is stated by the court.

Mr. Charles S. Whitman, for appellant.
Messrs. Thomas I. Gardner, Jno. Guthrie, Jas. Coleman and Matt. H. Carpenter, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

Craig, the appellant, on the 2d of February, 1872, filed a bill in equity against the defendants in the circuit court to enjoin them from using an improved well-tube, for which he claimed to have a patent. The defendants answered, attacking the validity of the patent: 1. Because the patented invention had been described in a certain printed publication publicly circulated and distributed prior to the supposed discovery by Craig; 2. Because it had been anticipated by certain other persons whose names and places of residence were given; and 3. Because it had been in public use more than two years before the date of the alleged patent. A replication to this answer was filed, and proofs taken. The cause was heard June 5, 1873, and a decree entered sustaining the patent, and ordering a reference to a master to take an account of profits. The master made his report December 12, 1873, and on the same day leave was granted the defendants by the court to file a petition for rehearing within forty days. This petition was filed Jan. 21, 1874, and set forth that, since the hearing, the defendants had discovered evidence of new and substantive facts which they had not been able to discover before, and which they were advised and believed were material and pertinent to the issues. This new matter was: 1. A patent to Charles Batcheller, of Keene, New Hampshire, as early as Dec. 12, 1865, for an invention alleged to be substantially like that of Craig; and, 2, an extensive prior knowledge and use during the years 1865 and 1866, in various places throughout the United States, of well-tubes in all material respects like that in dispute. The names and places of residence of twenty-five persons who had this prior knowledge of the thing patented, and who knew of its prior use, were given, and in addition affidavits of each one of these persons, showing what they knew and had seen, were attached to the petition as exhibits.

The petition further stated that the defendants were general hardware dealers at Topeka, Kansas, and sold the well-tubes, claimed to be an infringement, in their business; that when the suit was commenced they employed counsel, naming him, to conduct their defense; that, as they believed, he used due diligence in procuring evidence, but that notwithstanding his and their efforts they never really obtained any available clew to the facts until after the former hearing; that the patent to Batcheller was not found until Sep., 1873, and it was after that date when they actually ascertained that they could prove, by the persons named, the facts set out in the affidavits, made exhibits; "That, since the commencement of the suit, through all such likely sources as they could

discover or were informed of, the said defendants have made persistent inquiry and search after the facts material and pertinent to the issues in said cause; but owing to the often uncertain character of their information, the scattered situation of the sources of information, and, withal, the delay and obstacles not easily surmounted, which were necessarily attendant upon such inquiry and search, they wholly failed to discover any of the evidence herewith exhibited until long after the submission, hearing and decree in said cause as aforesaid." Attached to the petition as an exhibit was an affidavit of the counsel showing his diligence in the premises. The petition was sworn to by one of the defendants.

On the 24th of January, 1874, a supplemental petition was filed, setting forth a considerable number of rejected applications for patents for improvements in well-tubes, which, it was claimed, described the complainant's patented invention. All the several applications were attached to the supplemental petition as exhibits. On the 18th of February, 1874, Craig asked and obtained leave until April 1, for the filing of counter affidavits, and the defendants were allowed until May 1, for such further steps on their part as they should be advised were necessary.

On the 27th of April, Craig filed his answer to the petition and supplement. In this he insisted that the newly discovered matter was wholly inadmissible, in fact and in law, for the purpose of obtaining a rehearing, because it all existed before the former hearing, and no sufficient reason was shown for the omission to procure it, and because it was cumulative only. He then denied that the patent to Batcheller anticipated his invention, and denied that the several persons named ever saw in use well-tubes like his before his patent was granted. He then took up the several affidavits filed with the petition as exhibits, and gave his reasons in each case why they did not sustain the claims of the defendants. In addition to this, he produced a large number of counter affidavits, which he attached and made exhibits to his answer.

On the 9th of June, the defendants filed a replication to the answer of Craig, and on the same day the following order was entered on the journal of the court:

"This cause coming to be further heard on a petition of the defendants for a rehearing, and it appearing that the decree had been enrolled before the said petition for a rehearing was filed in this court, it is ordered by the court, the parties consenting, that the petition for rehearing stand as and for a bill of review, and that the answer to said petition stand as an answer to said bill of review, and that the replication stand as a replication to the said answer. It is further ordered by the court, upon the consent of the parties hereto, that the affidavits taken by the parties and filed herein stand and be treated as depositions, and as such be read on the hearing. And the said cause being submitted by the parties to the court on the original bill, answer and replication, and the bill of review, answer and replication thereto, and the proofs, exhibits and drawings exhibited from the Patent Office, and models filed in the case, as well those used on the original bill, answer and replication as those taken and filed with the bill of

review, answer and reply, was taken under advisement."

At the next Term, the bill of review was sustained, the original decree reversed, and the bill of the complainant dismissed with costs. At the same Term, an appeal from this decree to this court was allowed, and the following order made:

"And it is ordered by the court that the clerk of this court transmit to the Supreme Court of the United States the original exhibits, patent certificates, schedules, drawings and models on file, along with and as part of the record and transcript in this cause."

In making up the transcript of the record, the clerk below omitted all the affidavits filed with the bill of review and answer thereto, and sent up the originals. In printing the record for the use of the court those affidavits were omitted, and the court declining to allow them to be used at the hearing on that account, the appellant moved that they be printed, and the hearing suspended until that could be done.

It is necessary to determine at the outset whether the affidavits which were attached as exhibits to the bill of review and the answer thereto, and brought here as original papers and not copied into the transcript, will be considered as part of the proofs in the case.

In the Act of 1803, 2 Stat. at L., 244, which first authorized appeals to this court in "cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize," it was provided "that, upon such appeal, a transcript of the libel, bill, answer, depositions and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court; and that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes." Under this statute it was held, in the case of *The El sineur*, 1 Wheat., 439, that, where an inspection of original documents was material to the decision of a prize cause, this court would order the original paper to be sent up from the court below. This decision was made in 1816, and the next year the following rule was promulgated, 2 Wheat., vii.: "Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in the Supreme Court on appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings." This rule, with some slight modifications, not at all important to the present inquiry is still in force as part 4, Rule 8. In 1823, the following rule was adopted, 8 Wheat., vi.: "No cause will hereafter be heard until a complete record shall be filed, containing in itself, without references *alivunde*, all the papers, exhibits, depositions and other proceedings which are necessary to the hearing in this court." This rule is still in force as part 3, Rule 8. The statute law regulating this subject remained unchanged until 1864, when the "Act to Regulate Prize Proceedings and the Distribution of Prize money, and for Other Purposes," 13 Stat. at L., 306, was passed. Section 13 of that Act pro-

vided for appeals in prize causes direct from the district courts, and for the transfer, on proper application, of causes then pending in the circuit courts to the Supreme Court. Then followed this language:

"All appeals to the Supreme Court from the Circuit Court, in prize causes, now remaining therein, shall be claimed and allowed in the same manner as in cases of appeal from the district court to the Supreme Court. In any case of appeal or transfer the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

From this it is clear to our minds that it was the intention of Congress to confine its legislation on this subject to prize causes, leaving the rules of court alone in force as to other cases; but in the revision of this statute this special provision of the Act of 1864, was reproduced in section 698, which is as follows:

"Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court: *Provided*, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes."

Construing this statute in the light of those from which it was taken, and the practice that had prevailed in the courts, which it was, undoubtedly, intended to confirm, we think the power of the courts below and of this court, over the transmission of original papers to this court on appeal, is and should be confined to such as require actual inspection as originals in order to give them their full effect in the determination of the suit. We will not undertake to control the discretion of the courts below in sending up papers which, in their judgment, require inspection; but where papers come up that ought not to be sent, we will look closely to the language of the order below to see whether they are included within its provisions.

Here the papers which have come up are what were used below as ordinary depositions, and there certainly appears to be no good reason why they should not be copied into the transcript. No complaint was made of their authenticity, and, so far as any representations have been made to us, there can be no possible necessity for their inspection. The order of the court was for the transmission of "The original exhibits, patent certificates, schedules, drawings and models on file, along with and as part of the record and transcript." It is true that the affidavits were attached as exhibits to the bill of review and answer, but we think the term "exhibit" was not used in that sense in the order. The evident purpose of the court was not to send here the original of what was to be read simply, but of what was to be looked at for the impression it was to produce. They ordered up what had been *exhibited* below as contradistinguished from what had been *read*. In that sense, the order

conforms to what has always been the practice, from which we are not inclined to depart. Prudence requires that papers which properly belong on the files of a court should never be removed, except in cases of positive necessity, and anything which has an opposite tendency should be promptly discouraged here and elsewhere.

For these reasons, we hold that the original affidavits which have been sent up by the clerk below are no part of the transcript in the cause, and that the clerk of this court was right in not having them printed. The motion to print them now is also overruled, because, if printed, they cannot be considered by us a part of the proof. This being so, we must, under the understanding by which the hearing was permitted to go on, consider the case as it was argued; that is to say, as upon a demurrer to the bill of review, or, more properly, perhaps, as if the allegations made in the bill of review had been established by the evidence. In this condition of the case we may lay aside all the allegations in respect to the prior undiscovered patent issued to Batcheller, and all the newly discovered applications for patents on file in the Patent Office, rejected for want of patentability or otherwise. There is still left all that relates to the newly discovered evidence of the prior knowledge and use of machines like that patented. The averments as to this are full and complete, and notice of the names and places of residence of the persons alleged to have had such knowledge and to have seen the use is given with sufficient particularity. If the averments in this respect were true, and the newly discovered evidence was such as could be made available by bill of review, there can be no doubt that the original decree was wrong.

It is contended, however, that the evidence could not be used because it related to matters which existed at and prior to the former hearing, and by the use of proper diligence it might have been found and produced at that time, and also because the evidence was cumulative only. The bill avers that due diligence was used to find the evidence, but without success. This is one of the facts which, for the purposes of this hearing, we are to consider as proved by the evidence submitted below, but not sent here.

There is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence, under a bill of review, to prove facts which were in issue on the former hearing. "But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause." Such was the language of *Mr. Justice Story*, in *Wood v. Mann*, 2 Sumn., 334, and he states the rule none too strongly. In the absence of the evidence produced below, we are to presume that this case was brought within this requirement. In the original answer, a prior invention of one Young was set up, which, it was said, was like that of Craig, and the public use of this machine with the consent and allowance of Young in Mobile and Memphis. The new matter alleged in the bill of review relates to other machines used in other places. In legal effect, the bill of review gave new notice of prior knowledge and use by different persons and in differ-

ent places from those set out in the answer. That a proper case was made for the admission of the evidence may fairly be inferred from the fact that, without submitting that question to the court, all parties went to a hearing, by consent, upon the merits of the case as presented under the original bill and the bill of review.

It is also contended that, even though the review was right, it was wrong to dismiss the original bill on the first hearing, and without an answer on file giving notice of the new matter; that is to say, of the names and places of residence of the persons alleged to have been discovered, who had knowledge of the prior invention and prior use, as required by section 4920 of the Revised Statutes. It is a sufficient answer to this to say that the cause was submitted by the parties "On the original bill, answer and replication, and the bill of review, answer and replication thereto, and the proofs, * * * as well those used on the original bill, answer and replication, as those taken and filed with the bill of review, answer and reply." This was clearly a submission of the whole case on the merits after a review granted. The bill of review contained all the notice to Craig that he could demand, and as it was filed more than thirty days before the final submission of the cause, all the requirements of sec. 4920, R. S., were substantially complied with.

Decree affirmed.

WILLIAM C. OATES, *Plff. in Err.*,

v.

FIRST NATIONAL BANK OF MONTGOMERY.

(See S. C., 10 Otto, 239-250.)

State decisions—holder for value of negotiable paper—Alabama law—interpretation of statutes—national bank—usurious interest.

*1. The statutes of Alabama examined, and held to place bills of exchange and promissory notes, payable in money at "a certain place of payment designated therein," upon the same basis as to immunity from set-off, discount or equities, as bills and notes payable at a bank or private banking house. Such declared to be the intention and effect of the Act of April 8, 1873, amending section 1833 of Revised Code of Alabama.

2. The intention of the Legislature, clearly expressed in a constitutional enactment, should not be defeated by too rigid adherence to the letter of the statute, or by technical rules of construction. Any construction should be disregarded which leads to absurd consequences.

3. The Federal Courts are not bound by decisions of state courts upon questions of general commercial law.

4. A creditor who takes a negotiable note before maturity, so indorsed that he becomes a party to the instrument, as collateral security for a pre-existing debt, in consideration of an extension of time to the debtor, actually granted, is, according to the law-merchant, a holder for value, and his rights as such, are not affected by equities between antecedent parties of which he had no notice.

5. A national bank, at the request of its debtor, gave further time in consideration of the transfer before maturity, of a negotiable note, as collateral security, and in consideration also, of the payment, in advance, of usurious interest, for the period of extension. The note was so indorsed as to make the bank a party to the instrument, responsible for

*Head notes by *Mr. Justice HARLAN*.

NOTE.—In what instances U. S. courts do not follow state decisions. See note to U. S. v. Muscatine, 75 U. S., XIX., 490.

its due presentation and for due notice of non-payment. The consideration was, in part, legal and, in part, vicious. The former was itself sufficient to sustain the contract of extension and transfer, and to constitute the bank a holder for value. While the bank was subject to the penalties denounced by law for taking usurious interest, the statute under which it was organized had not declared the contract of indorsement void. No such penalty being prescribed, the courts could not superadd it.

[No. 74.]

Argued Nov. 18, 1879. Decided Dec. 8, 1879.

IN ERROR to the Circuit Court of the United States for the Middle District of Alabama.

This action was commenced in the court below, by the defendant in error against Oates, the plaintiff in error, on a promissory note. Upon the first trial in the circuit court, a verdict was rendered for the defendant in that court. This verdict, however, was set aside and a new trial granted. In the second trial verdict and judgment were in favor of the Bank, from which judgment Oates has sued out the present writ of error.

Messrs. **W. Hallett Phillips, P. Phillips, Hilary A. Herbert and William C. Oates**, for plaintiff in error:

How can the Bank be a *bona fide* holder in the usual course of trade, when it acquired the note on a usurious contract? There is a solecism on the face of the expression, "*a bona fide purchaser on usury*," said the Supreme Court of New York.

Ramsdell v. Morgan, 16 Wend., 574.

The Supreme Court of Alabama has decided repeatedly, that the purchaser of negotiable paper on a usurious contract is not a *bona fide* purchaser, and that the equities of the maker against the payee, are available against the paper in the hands of such a purchaser.

Saltmarsh v. Tuthill, 13 Ala., 390; *Carlisle v. Hill*, 16 Ala., 405; *Hunt v. Acre*, 28 Ala., 596; *Woods v. Armstrong*, 54 Ala., 150.

See, also, *Cram v. Hendricks*, 7 Wend., 573; *Gaither v. F. & M. Bank*, 1 Pet., 37; *Lloyd v. Scott*, 4 Pet., 205; *Harrison v. Hannel*, 5 Taunt., 780; *Dean v. Howell*, Hill & D., 39; *Keutgen v. Parks*, 2 Sandf., 60.

Mr. **H. C. Semple**, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is a writ of error to a judgment in behalf of the First National Bank of Montgomery, against Oates, the plaintiff in error, upon a promissory note for \$5,200, executed by him at Eufala, Alabama, on the 25th day of July, 1873, and made payable on the 1st of December thereafter, to the order of B. H. Micow, President, at the office of the Tallassee Manufacturing Company, No. 1, in the City of Montgomery. The consideration of the note was fifty shares of the capital stock of that company purchased by Oates, and for which, at the time, he received a certificate in the customary form. As part of the contract of purchase, he took from the company a separate written obligation, reserving to him the option, on the 1st of December, 1873, at the maturity of the note, of surrendering the certificate of stock and receiving his note duly canceled. It appears that Oates was induced to buy the stock upon certain representations of the special agent of the company as to its financial condition. These represen-

tations were subsequently ascertained by him to have been false and fraudulent.

On or about November 4, 1873, Micow applied to the Bank for an extension of time upon certain indebtedness then held by it against the company, amounting to about \$40,000, and all of which matured thereafter and in that month. That indebtedness had been previously extended, on several occasions, at usurious rates of interest, paid invariably in advance. The Bank signified its willingness to give an extension for 30, 60, 90 and 120 days, upon collateral security being furnished, and upon the payment in advance for such extension of interest at the rate of one and one quarter per cent. per month, upon the different classes of the company's paper by it held. These conditions were complied with, and the extension was accordingly made for the periods stated. The required interest was not carried into the extension bills, but was paid in advance. Among the collaterals placed with the Bank, under this arrangement, was the note for \$5,200 already described, indorsed in blank, "B. H. Micow, Prest."

The evidence was somewhat conflicting as to whether the officers of the Bank, at the time of receiving the note in question, had actual notice from Oates as to its consideration. It was, however, conceded that its president had reason to believe the note was given for stock of the company. Oates, although residing at Eufala, was a stockholder and director of the Bank. No inquiry was made of him by the officers of the Bank, before receiving the note as collateral security, as to any defense which he might have against its payment. But it was proven by them that, when the extension was given to the company, they had no notice of any defect in or defense to the note, or of any equities, except such notice as might be implied from the foregoing facts and the relations of the parties. It is not claimed, that the Bank had, at that time, any notice of the separate written obligation of the manufacturing company to which we have already referred.

On the 24th of November, 1873, the Bank gave written notice to Oates that it held his note as collateral security for the indebtedness of the company. A few days thereafter he transmitted to the Bank the company's agreement or obligation, under which he had purchased the stock and given his note, informing its officers that he had, by the same mail, returned his stock certificate to the company, and demanded the surrender and cancellation of his note. The Bank, replying to this notification, stated that it had purchased the note as negotiable paper, in good faith, for a valuable consideration, and without notice of any private understanding between Oates and the company, its officers or agents.

These are the essential facts developed in the record. We are to inquire whether the court below committed any error of law to the prejudice of the plaintiff in error.

The first contention of the plaintiff in error is, that, by the terms of the contract under which he purchased the stock and gave his note and, in view of the false and fraudulent representations of the company's agent as to its financial condition, he was entitled, as of absolute right, to surrender the certificate of stock and have his note returned or canceled; and, further,

that his defense, upon that ground, was secured to him by the statutes of the State of Alabama, in force when the contract was made.

It is clear that, as between the Tallasse Manufacturing Company and Oates, the defense of the latter is perfect. And it would undoubtedly be sustained, even against the defendant in error, were it true, as claimed, that, by the statutes of Alabama, the transfer of the note was without prejudice to any defense which the maker might assert against the payee. This renders it necessary that we should ascertain to what extent, if at all, the rights of parties are affected or controlled by the statutes of Alabama.

By section 1833 of the Revised Code of that State it is declared that "Bills of exchange and promissory notes payable in money, at a bank or private banking house, are governed by the commercial law, except so far as the same is changed by this Code." Section 1839 declares that "All contracts or writings, except bills of exchange, promissory notes payable in money at a bank or private banking house, and paper issued to circulate as money, are subject to all payments, set-offs and discounts had or possessed against the same, previous to notice of the assignment or transfer."

Thus stood the law of Alabama until April 8, 1873, when by statute of that date, entitled "An Act to Amend Section 1833 of the Revised Code of Alabama," it was enacted that section 1833 (copied in full in the Act) "be so amended as to read as follows: 'Bills and notes payable at a banker's or a designated place of payment, are negotiable instruments; bills of exchange and promissory notes payable in money at a bank or a certain place of payment therein designated, are governed by the commercial law.'" Acts 1872-73, p. 111. By the same statute, section 1839, as it then stood in the Revised Code, was expressly repealed. It should be observed that the words "except so far as the same is changed by this Code," in section 1833 as it originally stood, are omitted from that section as remodeled by the Act of 1873.

The argument of the plaintiff in error is, that, although by the explicit declaration in the Act of 1873, "Bills and notes payable in money at a certain place of payment, therein designated," are negotiable instruments, to be governed by the commercial law, such bills and notes are, nevertheless, under section 1839, "subject to all payments, set-offs and discounts had or possessed against the same, previous to notice of the assignment or transfer." We concur with the court below in holding that construction to be wholly inadmissible. It seems that upon this precise point there has been no direct adjudication by the Supreme Court of Alabama, to which primarily belongs the duty of giving authoritative construction of the statutes of that State. The only case in that court to which we are referred that has any bearing upon this question, is *Cook v. Ins. Co.*, 53 Ala., 37. Jones, it seems, gave to *Cook*, in 1871, a promissory note, payable to the order of the latter at the office of W. H. Roberts, Mobile, and indorsed by the payee to the insurance company. In an action instituted by the insurance company against *Cook*, the question arose as to whether the note was commercial paper, protected in the hands of a *bona fide* holder for value, against

defenses resting upon payment, set-off or discount. The inferior state court ruled that it was paper of that kind; but the Supreme Court of Alabama held that the note, when made, was not commercial paper, and that the rights and liabilities of the parties were to be determined by the statute in force at the date of its execution. That court, speaking by its *Chief Justice*, said: "Since the making of the promissory note, on the indorsement of which this suit is founded, the Statute of April 8, 1873, has converted promissory notes, payable in money at a designated place, into negotiable instruments governed by the commercial law. It operates on the nature and obligation of the contract of the parties to such notes, and cannot be construed as affecting notes made and indorsed prior to its passage. The law of force when the note is made and indorsed regulates and defines the liability of the parties." No other reasons are assigned in support of the conclusion that the Act of 1873 did not control the case. It is quite manifest from the language employed by the court, that, had the note there in suit been executed subsequently to the Act of 1873, it would have sustained the ruling of the inferior state court, and excluded all defenses inconsistent with the established doctrines of the commercial law. Such, in our opinion, must have been its determination upon any proper construction of the Act of 1873. It is true that that statute does not in express words amend section 1839, whereby only "Bills of exchange and promissory notes, payable in money at a bank or private banking house, and paper issued to circulate as money," are in terms, protected against payments, set-offs and discounts, which the maker might assert in the case of all other contracts and writings. But it is perfectly evident that the object of the Act of 1873 was to place bills of exchange and promissory notes, payable at a certain designated place of payment, upon exactly the same basis, as to immunity from set-off, discount or equities, as the statute prescribed in reference to bills and notes payable at a bank or private banking house. In declaring that bills and notes of the former class were negotiable instruments, to be governed by the commercial law, the Legislature necessarily intended to throw around such paper the same protection that had previously been given by statute to bills and notes payable at banks or private banking houses. If such was not its object, then confessedly, the Act of 1873 was both meaningless and illusory. The duty of the court, being satisfied of the intention of the Legislature, clearly expressed in a constitutional enactment is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction (*Wilkinson v. Leland*, 2 Pet., 627; *Sedgwick, Const. and Stat. Constr.*, 196) and we should discard any construction that would lead to absurd consequences. *U. S. v. Kirby*, 7 Wall., 482 [74 U. S., XIX., 278]. We ought, rather, adopting the language of Lord Hale, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the law-making power when thus expressed. The defense of the plaintiff in error would be good under section 1839, if no regard was had to the Act of 1873; but since that statute expressly included notes payable at a certain designated

place in the class of negotiable instruments to be governed by the commercial law, which could not be if section 1839 be enforced according to its literal import, the judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction. "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers." [*Suckley v. Furse*], 15 Johns., 338; [*People v. Ins. Co.*], 15 Johns., 358, 380.

For these reasons we are of opinion that the statutes of Alabama do not permit, as against a *bona fide* holder, for value, of a "promissory note, payable in money at a certain place of payment therein designated," defenses which are disallowed in cases where the note is payable at a bank or private banking house.

2. Giving to the Alabama Statute the construction indicated, our next inquiry is, whether the Bank, under the circumstances disclosed in this case, became, according to the recognized principles of commercial law, a *bona fide* holder for value of the note in suit. That it acquired the note in good faith, without fraud, we are not permitted by the evidence to doubt. Its officers were not bound to inquire of the plaintiff in error, before they took the note, whether he had any defense or set-off. They rightfully supposed, as the face of the note imported, that he had undertaken absolutely to pay the amount specified at the time and place designated. That the President of the Bank had reason to believe it was given for stock of the Tallassee Manufacturing Company is a fact of no significance whatever in determining the question of good faith. Having no knowledge or notice of the private agreement between Oates and the Company, as set forth in the separate obligation of the latter, which was withheld from the public, the bank officers justly assumed that there was no circumstance attending the sale of the stock which could lessen the obligation of Oates to pay the note according to its tenor and effect.

But it is contended that, by the rules of commercial law, as recognized by the Supreme Court of Alabama, one who receives a promissory note as collateral security for a pre-existing debt does not become a purchaser for value, in the course of business, so as to cut off equities which the maker may have against the payee. Such was declared to be the settled doctrine of that court in *Fenouille v. Hamilton*, 35 Ala., 319. But the opinion in that case contains some passages which apply with peculiar force to a suit like this. The court said: "In this case there was no other consideration for the transfer of the note to the defendant than the security of the pre-existing indebtedness of the defendant's indorsee. The fact that the defendant may have been led to grant indulgence, or forbear to enforce his remedies for the collection of the debts, does not prove that such indulgence or forbearance was an element of the contract, or the consideration upon which it was made. If there was any forbearance by the defendant, it was a voluntary act to which he may have been persuaded by the collateral security, and may have resulted from a consciousness of security; but such forbearance

was not the result of contract, and is not shown to have been the consideration of it." Had there been, in that case, a present consideration for the transfer of the note beyond giving security for a pre-existing debt, or had the forbearance of the creditor to enforce his remedies been an element in a binding contract, under which the collateral security was furnished, we are persuaded that the Alabama court would have ruled that the creditor, in receiving the collateral became a holder for value in the course of business. But, if we are mistaken in our interpretation of the decision of the Supreme Court of Alabama, the result will not follow for which plaintiff in error so earnestly contends. While the Federal Courts must regard the laws of the several States, and their construction by the state courts (except when the Constitution, treaties or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. *Swift v. Tyson*, 16 Pet., 1; *Carpenter v. Ins. Co.*, 16 Pet., 495; *Watson v. Turpley*, 18 How., 517 [59 U. S., XV., 509]. We have already seen that the statutes of Alabama placed under the protection of the commercial law promissory notes, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal Courts to determine upon their own judgment as to what these rules and doctrines are.

Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a *bona fide* holder for value of the note in suit. In *Swift v. Tyson* [supra], cited by counsel, this court, speaking by *Mr. Justice Story*, said that it entertained no doubt "That a *bona fide* holder for a pre-existing debt of a negotiable instrument is not affected by any equities between antecedent parties, when he has received the same before it became due, without notice of any such equities." In some of the state courts the authority of that case has been disputed, so far as the language of the court referred to collateral security received for a pre-existing debt, upon the ground that the note there in suit was transferred in payment of and not as security for a pre-existing debt, and that, consequently, the opinion expressed in the language just quoted was unnecessary to the decision of the point in issue. In the more recent case of *Goodman v. Simonds*, 20 How., 343 [61 U. S., XV., 334], it was contended that a party who took negotiable paper merely as collateral security for a pre-existing debt did not acquire it in the usual course of business, but took it subject to prior equities. The court being of opinion that no such question was presented by the record, waived its consideration. But after an extended review of the authorities, American and English, the court, speaking through *Mr. Justice Clifford*, said: "It seems now to be agreed that, if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a

negotiable instrument, before its maturity, as a collateral security to a pre-existing debt, without knowledge of the facts which impeached the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt, for which it is used as collateral."

That language would seem to be conclusive of the question under consideration. There was here a present consideration at the time of the transfer, independent of the indebtedness of the manufacturing company to the Bank. That consideration as to the Bank was the unconditional extension of time upon all the company's indebtedness, for different periods reaching beyond the maturity of the note transferred as collateral security. Such extension for fixed periods was a cardinal element of the contract. The creditor forbore pursuit of the remedies which the law supplied for the enforcement of his demands, then soon to mature, in consideration of collateral security being furnished, and in consideration also of the payment by the debtor of usurious interest in advance. Besides, having received the note, indorsed so that it became a party thereto, the Bank was bound to observe all the rules of the law-merchant as to presentation, protest and notice of non-payment. It did not receive the note as the agent of the debtor, and merely for collection. It took it under all the responsibility as to presentation, protest and notice of dishonor, which attached to absolute ownership, and became liable to have the note treated as payment *pro tanto*, if there were a failure to make due presentation, and, in the event of non-payment, to give proper notice to the creditor. The debtor could not withdraw his indorsement after delivering the note, under the contract for extension, nor could the Bank, after receiving the note under that contract, disregard its agreement for forbearance. Nor was the Bank any the less bound by the contract for extension because of the payment in advance of usurious interest by its debtor. Although the taking of usurious interest subjected the Bank to certain forfeitures prescribed by law, and to an action by the debtor, if he so elected, to recover twice the amount so paid by him, it could not, of its own volition or by its own act, avoid the contract for indulgence because of such payment of usury. The payment in advance was itself a sufficient consideration for the extension, in the sense that the Bank would not be allowed to repudiate its agreement, upon the ground that it had taken usurious interest in violation of law. 2 Dan. Neg. Inst., sec. 1317. But independent of that aspect of the case, and throwing out of view altogether the usurious feature of the contract, we are of opinion that a creditor, who takes a negotiable note before maturity, so indorsed that he becomes a party to the instrument as collateral security for a pre-existing debt, and in consideration of an extension of time to the debtor, actually granted, is, according to the law merchant, a holder for value, and that his rights as such holder cannot be affected by equities between antecedent parties, of which he had no notice. *Goodman v. Simonds* [supra]; 1 Pars., Notes and B., 221-228; Story, Prom. N., sec. 195, n., 7th ed., by Thorndike; 1 Dan., Neg.

Inst., 2d ed., secs. 820, 832, and n.; Lead. Cas. upon Bills of Exch. and Prom. N., by Redf. and Big., 186-217, and n. Whether the taking of such note merely as collateral security for antecedent debts, without any binding contract for indulgence, would constitute a valuable consideration within the established rules of commercial law, protecting the creditor against defenses or equities between antecedent parties, of which he had no notice, it is not necessary now to decide. That precise question is not presented in this case, and we forbear to express any opinion upon it.

One other question remains to be considered. Counsel for plaintiff in error have pressed with much vigor the suggestion that the Bank, consistently with public policy, should not be regarded as a *bona fide* holder for value of the note in suit, since the contract under which it received the note involved in its execution a direct violation of the statutes against usury. We are referred in support of that position to several decisions of the Supreme Court of Alabama which, it must be conceded, announce the broad doctrine that one "who has become the indorsee of a bill, by violating the provisions of a statute, cannot with any degree of propriety be said to be a *bona fide* holder in the usual course of trade." *Saltmarsh v. Tuthill*, 13 Ala. 410; *Saltmarsh v. Bk.*, 14 Ala., 668; *Carlisle v. Hill*, 16 Ala., 406. Without extending this opinion by a critical examination of those cases, we repeat that in the determination of such a question we are not bound by the decisions of the state court. The question is one of general law, and depends in nowise for its solution upon local laws and usages.

We are referred, in this connection, to two cases in this court, *Levy v. Gadsby*, 3 Cranch, 180, and *Gaither v. Bk.*, 1 Pet., 37. The case in 3 Cranch is so meagerly reported that it is difficult to see the precise ground upon which the conclusion of the court was rested. That in 1 Peters, is clearly distinguishable from this case. There, a note was indorsed and delivered as collateral security for a pre-existing debt, evidenced by a note given on an usurious contract. The case was held to be governed by the statute of Maryland, which declared "All bonds, contracts and assurances whatever, taken on an usurious contract," to be utterly void. Under that statute, the contract of indorsement was held to be void. In the eye of the law, it was as though it had never existed and, consequently, no cause of action, it was adjudged, passed to the indorsee.

The case in hand is altogether different. The statute under which the Bank was organized, known as the National Banking Act, does not declare the contract, under which the usurious interest is paid, to be void.

It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void and, consequently, that no right of action passed to the Bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. "On what principle could this court add another to the penalties declared by the law itself?" *De Wolf v. Johnson*, 10 Wheat., 367; *Bk.*

v. *Dearing*, 91 U. S., 29 [XXIII., 196]; *Barnet v. Bk.* [ante, 212].

Besides, in this case, the forbearance extended to the debtor was not upon the sole consideration of usurious interest paid in advance; it was upon the additional and substantial consideration that the debtor Corporation gave collateral security for the payment of indebtedness about to mature, and which it confessed its inability to meet. We have already seen that the transfer of the note before maturity, as collateral security and so indorsed that the Bank became a party to the instrument under obligation to make due presentment and give due notice of non-payment, was itself a sufficient consideration to constitute the Bank a *bona fide* holder for value, within the recognized principles of the law merchant. The presence, then, in the contract under which the note was indorsed and delivered to the Bank, of an additional consideration—the payment in advance of usurious interest—which the law declares to be vicious and illegal, ought not to destroy the entire contract of indorsement, when there is a sufficient consideration, aside from the usury paid, upon which it may rest.

We are of opinion that no error of law was committed by the court below, and the judgment should be affirmed. It is so ordered.

Cited—102 U. S., 31, 56; 107 U. S., 35, 541; 110 U. S., 294; 33 N. J. Eq., 187; 94 Ill., 221; 82 N. Y., 41; 37 Am. Rep., 577.

COUNTY OF CASS, *Plff. in Err.*,

v.

SOLOMON L. GILLETT.

(See S. C., 10 Otto, 585-594.)

Case followed—Missouri Act—constructive notice—subscription to stock.

1. County of Henry v. Nicolay, followed.
2. The Missouri Act of 1860, being an amendment to the general railroad law, does not apply to companies having special charters, in which special power is given to counties and townships to subscribe stock in aid thereof.
3. A *bona fide* purchaser of negotiable securities before maturity, is not affected with constructive notice of a suit respecting such paper.
4. An actual manual subscription on the books of a railroad company is not necessary to entitle a county to the stock of such company, nor to bind it as a subscriber thereto.

[No. 68.]

Argued Nov. 14, 1879. Decided Dec. 8, 1879.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

The case is stated by the court.

Messrs. **James O. Broadhead, J. F. Phillips** and **A. Comingo**, for plaintiff in error,

Mr. T. K. Skinker, for defendant in error.

Mr. Justice Bradley delivered the opinion of the court:

The action in this case was brought to recover the amount of certain interest coupons annexed to certain bonds of Cass County, Missouri, issued in payment of a subscription to the capital stock of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad Company.

See 10 OTTO.

U. S., Book 25.

The case was tried by the court below without a jury, and judgment given for the plaintiff upon special findings of fact.

The case is almost precisely similar to that of *Henry Co. v. Nicolay*, reported in 95 U. S., 619 [XXIV., 394], the authority for issuing the bonds being claimed under the same charter, that of the Tebo and Neosho Railroad Company, and being pursued under the same general Act of March 21, 1868, as in that case; and the same defense, amongst others, being set up, to wit: that the subscription to the capital stock of the road was made and the bonds issued by the Act of the county court alone, without a vote of the people, as required by the Constitution of 1865. This is the ground relied on in the first assignment of error.

The only material difference between the present case and that of *Henry County*, in reference to the point in question, arises from the circumstance that in this case the order of the county court for making the subscription to the capital stock of the road was not made until after the assignment by the Tebo and Neosho Railroad Company of a portion of its franchises to the Missouri, Kansas and Texas Railway Company; whilst in the *Henry County* case the order for a subscription was made before the said assignment. But we do not regard this difference as material. In both cases, the branch railroad was authorized to be constructed by a resolution of the Board of Directors of the Tebo and Neosho Railroad Company before the assignment, and a committee was appointed to take charge of its construction and solicit subscriptions therefor; and in both cases the bonds of the County were issued after the said assignment. The authority of the Tebo and Neosho Railroad Company to establish independent branches under its charter, and pursuant to the provisions of the Act of March 21, 1868, entitled "An Act to Aid in the Building of Branch Railroads in the State of Missouri," was considered in the *Henry County* case, and need not be again discussed. The resolution for establishing the branch road, to aid which the bonds now in question were given, was adopted on the 6th of June, 1870 and was as follows:

"Resolved, by the Board of Directors of the Tebo and Neosho Railroad Company, that it is the desire of this company to build a branch railroad from a point on the main line of the road of said company, at or near the Town of Clinton, Henry County, northwardly in the general direction of Kansas City, to a point either on the Pacific Railroad easterly of said city, or to a point at said city on the line of road lately known as the Cameron and Kansas City Railroad, said branch railroad to be designated and known as the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, and that the same is designated and established under the provisions of the charter of this company and the Act of the General Assembly of Missouri, entitled 'An Act to Aid in the Building of Branch Railroads in the State of Missouri,' approved," etc.

The findings also show that the Tebo and Neosho Railroad Company authorized a committee to take charge of the construction of said branch road, and to use the name of the company, and to solicit subscriptions in its name to the use of said branch. As far, therefore, as

depended upon the Tebo and Neosho Railroad Company proper, its powers were exerted, before the assignment of its franchises, in the establishment and organization of the branch road. The branch being thus organized and set in operation, became invested with the powers and privileges conferred by the charter of the company, to enable it to lay out and construct its road, and to procure the requisite means of accomplishing these objects; and the counties through which it was located thereupon became authorized to subscribe stock in aid of its construction. These powers, having thus been brought into existence, were not extinguished by the subsequent partial assignment of its franchises by the parent company to the Missouri, Kansas and Texas Railway Company. Whether the application to the County for aid was made before or after said assignment, could make no difference. As stated in the *Henry County* case, the Tebo and Neosho Railroad Company still continued in existence, invested with a large portion of its franchises.

The County of Cass thus having the power to subscribe capital stock in aid of the branch road, the county court, on application made to it for that purpose, on the 28th of February, 1871, did order and adjudge "That the County of Cass do subscribe for and agree to take three thousand shares of the capital stock of the Tebo and Neosho Railroad Company (now in part the Missouri, Kansas and Texas Railway Company), in the name of and for the use and benefit of the Clinton and Kansas City Branch of the Tebo and Neosho Railroad, and to aid in the construction thereof, each share being of the denomination of \$100, and amounting in the aggregate to the sum of \$300,000, under and by virtue of the authority in the charter of the Tebo and Neosho Railroad Company contained, and under the Act of the General Assembly of the State of Missouri, entitled 'An Act to Aid the Building of Branch Railroads in the State of Missouri,' approved March 21, 1868, and in accordance with the resolutions and orders of the Board of Directors of said Tebo and Neosho Railroad Company establishing said branch railroad and authorizing subscriptions to said capital stock to aid in the construction thereof, adopted on the 6th day of June, 1870; the said stock to be paid for by the issue and delivery to the committee appointed to construct said branch railroad, or to their successors in office, of the coupon bonds of the County of Cass, of the denomination of \$1,000 each, bearing date the first day of February, 1871, with interest at the rate of ten per cent. per annum, payable semi-annually," etc.

The order then prescribed certain conditions as to the time and circumstances under which the bonds were to be delivered, which are not relevant to the point under consideration.

In pursuance of this order, the bonds were signed by the officers of the County, and were issued in August, 1871; and the court finds that the plaintiff is an innocent holder for value of the coupons seen on.

We think that the case is entirely within the decision in *Henry Co. v. Nicolay*, and that the constitutional provision does not apply to it.

But the defendant, in its second assignment of error, relies on the Act of the Missouri Legislature passed January 14th, 1860, which re-

quired, as a condition precedent to the subscription of stock to a railroad company, and the issue of bonds to pay therefor, that an election should be held in the County to test the sense of the tax payers on the question of subscription.

The same objection was raised in the case of *Schuyler Co. v. Thomas* [ante, 88], and we overruled it on the authority of *Smith v. Clark Co.*, 54 Mo., 58. We see no reason to change that opinion. The Act of 1860 was an amendment to the general Railroad Law, and is held not to apply to companies having special charters, in which special power is given to counties and townships to subscribe stock in aid thereof.

The third assignment of error relates to the supposed effect of the assignment by the Tebo and Neosho Railroad Company, of its franchises, to the Missouri, Kansas and Texas Railway Company, which has already been sufficiently discussed.

The fourth assignment is based on the fact that the bonds were issued pending and in violation of an injunction of the Circuit Court of the County of Cass, directed to the Justices of the County Court; and it is argued that this was notice to all the world of the objections to the regularity and validity of the bonds. It seems that the bonds were in the keeping of the National Park Bank of the City of New York, which was not made a party to the injunction suit. It also appears by certain proceedings of the County Court of Cass County, had on the 25th day of September, 1871, and set forth in the findings of fact, that the bonds were delivered to the construction committee of the branch railroad; but under what circumstances they were delivered is not shown. The coupons subsequently came into the hands of the plaintiff as an innocent purchaser for value. The question of *lis pendens*, as applicable to negotiable securities, was fully considered by us in the case of *Warren Co. v. Marcy*, 97 U. S., 107 [XXIV., 981], and we there held that a *bona fide* purchaser before maturity is not affected with constructive notice of a suit respecting such paper. That decision applies to the present case, and the objection cannot prevail to invalidate the plaintiff's title.

The fifth and last assignment of error is as follows: it does not appear from the finding of the facts by the court that the County Court of Cass County made any valid contract with the Tebo and Neosho Railroad Company, or any other person or company, for the issue of stock to said County, nor that there was, in fact, any valid subscription by said county court to the stock of any company; and the court, therefore, erred in rendering judgment for the plaintiff below, on the special finding of facts.

To this it may be answered, that it does appear that the county court on behalf of the County made an order to subscribe to the capital stock of the Tebo and Neosho Railroad Company for the use of the Clinton and Kansas City Branch; that it dealt with the construction committee of the branch road, and that the bonds in question were issued to the said committee in payment of said stock. That this was a transaction which entitled the County to the amount of stock subscribed, cannot be doubted. An actual manual subscription on the books of the company was

not necessary to entitle the County to the stock, or to bind it as a subscriber thereto. In the case of *Moultrie Co. v. Bk.*, 92 U. S., 631 [XXIII., 631], where the Board of Supervisors of the county ordered that a subscription to the stock of a railroad company be made by the County, and that bonds should be issued in payment thereof; and the order was recorded in the minutes of the Board, and bonds were actually issued to the railroad company in pursuance thereof, though no subscription to the stock was actually made on the books of the company, we held that, whether the action of the Board was in substance and legal effect a subscription, or only an undertaking to subscribe, accepted by the company, a valid contract existed between the County and the company. The committee of construction in the present case represented the branch railroad as a separate interest from that of the parent company, and the acts of the committee were, as to the branch, the acts of the company which the latter could not control or gainsay. The stock subscribed, or agreed to be subscribed, for the use of the branch, was separate stock, not under the control of the parent company, but under the control of the committee. As the dealings of the county court were with the committee, though the name of the company was used, the transaction was complete without any confirmatory action of the company, and the County was entitled to its stock whether certificates therefor were actually issued or not. We think that this assignment of error cannot be sustained.

The judgment of the Circuit Court is affirmed.

Dissenting, *Mr. Justice Harlan.*

Cited—105 U. S., 458, 731; 109 U. S., 104.

CHICAGO AND PACIFIC RAILROAD
COMPANY ET AL., *Appts.*,
v.

JOHN J. BLAIR ET AL.

(See S. C., 10 Otto, 661, 662.)

Citation on appeal—when necessary—practice.

1. When the appeal is taken and perfected in open court during the term at which the decree complained of is actually entered, a citation is not necessary.

2. When the appeal was allowed in court when the appellees were present by their solicitors, but at a term subsequent to the rendition of the decree, a citation was necessary to bring the appellees to this court.

3. Where the appellants might well have supposed that a citation would be waived, this court will not dismiss the appeal absolutely, but order that a citation be issued and served, or that the appeal will be dismissed.

[No. 987.]

Submitted Dec. 1, 1879. Decided Dec. 8, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. Lyman Trumbull, for appellants.

Messrs. E. C. and W. C. Larned, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

See 10 Otto.

The decree appealed from in this case was rendered February 12, 1879, during the December Term, 1878, of the circuit court. The appeal was not allowed until April 14, 1879, which was during the March Term, 1879. The practice only dispenses with a citation when the appeal is taken and perfected in open court during the term at which the decree complained of is actually entered; and, to be technically sufficient, so as to render a citation unnecessary, the taking of the appeal should, in some form, appear on the records of the court. The theory of the rule is, that as a party to a suit is constructively present in court during the entire term at which his cause is for hearing, and as the doings of the court are matter of record at the time, he is chargeable with notice of all that is done during the term affecting his suit; because, if actually absent when an order is made, he can on his return obtain full information by an examination of the minutes. Still, an appeal otherwise regular would not probably be dismissed absolutely for want of a citation, if it appeared by clear and unmistakable evidence, outside of the record, that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done.

The records of the court in this case show an allowance of the appeal in court when the appellees were present by their solicitors. It was, however, at a Term subsequent to the rendition of the decree and, under the practice, a citation was necessary to bring the appellees to this court. The case was docketed promptly here at the Term to which the appeal was returnable, and as the appellants might well have supposed that a citation would be waived, we will not dismiss the appeal absolutely, but apply the rule acted upon in *Dayton v. Lash*, 94 U. S., 112 [XXIV., 33], and "grant summary relief" "by imposing such terms upon the appellants as under the circumstances may be legal and proper."

An order may be entered that, unless the appellants cause a citation, returnable on the first Monday of February next, to be issued and served upon the appellees before that date, *the appeal be dismissed.*

NOTE.—In the similar case, *Gurnee v. Blair*, No. 988, argued at the same time, similar order was made.

Cited—110 U. S., 229.

FLETCHER T. LANSDALE, *Plff. in Err.*,

v.

HIBBARD S. DANIELS.

(See S. C., 10 Otto, 113-119.)

Preemption—notice for—superior equity.

1. Under the Act of March 3, 1853, a person, to acquire a preemption right in land, must file the requisite notice of his claim in the land-office for the district, within three months after the plats of the survey of the lands are returned to the land-office.

2. Such notice, if given before the time allowed by law, is a nullity; but where it is filed subsequent to the period prescribed by the amendatory Act it is operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim.

3. Where neither of the parties complied strictly with the law in filing the declaratory statement,

but the plaintiff holds the legal title and the superior equity, the defendant has no such standing in court as will justify a court of equity in interfering in his behalf.

[No. 88.]

Argued Dec. 1, 1879. Decided Dec. 15, 1879.

ERROR to the Supreme Court of the State of California.

The case is stated by the court.

Messrs. R. Mason and John S. Hauke, for plaintiff in error.

Messrs. W. W. Cope and Walter Van Dyke, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Preemption rights of the kind in controversy are regulated by the Act of March 3, 1853, from which it appears that unsurveyed as well as surveyed lands, not exempted by the same Act, are subject to the preemption laws, with all the exceptions, conditions and limitations expressed in such, unless otherwise herein provided. Provision is also made for the appointment of a Surveyor-General and of a register and receiver, with the same powers and duties as conferred and prescribed under the prior preemption laws. Official surveys were to be made, and the same section which gives the right to pre-empt the lands provides that, where unsurveyed lands are claimed, the usual notice of such claim shall be filed within three months after the returns of the plats of surveys to the land-office. 10 Stat. at L., 244.

Proceedings in the nature of an action of ejectment were instituted by the plaintiff to recover certain lands situated in Humboldt County, and damages for their detention. Service was made; and the defendant appeared and filed what is called in the state practice, an answer and cross complaint, in which he admits possession but denies that it is wrongful, and sets up a preemption title to the lands.

Complete title to the lands is claimed by the plaintiff under a patent from the United States, issued to him as a preceptor. On the other hand, the defendant claims that he was justly and legally entitled to the patent, which was wrongfully issued to the plaintiff; and the object of the cross complaint is to establish a trust in favor of the defendant, and to compel the plaintiff to convey the lands to the defendant.

Every allegation of the cross complaint being denied by the plaintiff, he demurred to the same, and showed for cause as follows: (1) That it does not appear by the allegation of the same that the defendant filed the required notice of his claim in the land-office for the district within three months after the plats of the survey of the lands were returned to the said land-office. (2) That it appears that all the matters in controversy had previously been determined and adjudicated by a competent tribunal in an issue respecting the title to the same property between the same parties. (3) That it does not appear that the defendant ever made the proof required by law before the register and receiver of the land-offices, prior to the day appointed for the commencement of the sale of the land. (4) Because the cross complaint shows that the defendant did not in person occupy the land for nearly a year before the cross complaint was filed.

Hearing was had; and the court of original jurisdiction sustained the demurrer and rendered judgment for the plaintiff, which, on appeal, was affirmed by the Supreme Court.

Being dissatisfied with the judgment, the defendant sued out a writ of error, and removed the cause into this court.

Errors assigned here are as follows: (1) That the court below erred in sustaining the demurrer to the cross complaint. (2) That the court erred in affirming the judgment of the subordinate state court. (3) That the court erred in holding that the declaratory statement of the defendant was a nullity because it was filed before the plats of survey were returned into the land-office by the Surveyor-General.

Sufficient appears, to show that the land was unsurveyed and that the plaintiff made entry and settlement of the land in controversy on the first day of November, 1853, before the plats of survey were made; that the defendant made entry and settlement on the same quarter section the 22d of February, 1854, the land being still unsurveyed. Nothing is exhibited in the record to enable the court to ascertain the precise date of the survey, but it appears that the defendant filed his notice of claim or declaratory statement prior to the return of the plats of survey to the local land-office, the record showing that the declaratory statement of the defendant was filed on the 20th day of February, 1856, and that the plats of the surveys of the land were not returned into the local land office until the 26th of April following.

Congress has provided that where unsurveyed lands are claimed by preemption, the usual notice of such claim shall be filed within three months after the return of plats of surveys to the land-officer, and proof and payment shall be made prior to the day appointed by the President's Proclamation for the commencement of the sale, including such lands. 10 Stat. at L., 244.

Declaratory statements under the original Act might be made within three months after the return of the plats of surveys to the local land-offices, and it was effectual as a step to secure the right, if it was made within one year from the passage of the Act, which last provision was amended by a subsequent Act, and extended to settlements made prior to and within two years after the passage of the amendatory Act. 12 Stat. at L., 410.

Due settlement of the quarter section in controversy was made by the plaintiff more than four months before the defendant entered upon it and commenced his settlement, but he did not file the usual notice of claim or declaratory statement until the 11th of October, 1858, more than two years after the amendatory Act went into operation. Authority to file such a declaratory statement within three months after the plats of survey are returned into the local land-offices is expressly given by the Act of Congress; but there is no authority given to file before that time, from which it appears that the declaratory statement filed by the defendant was premature. Attention to that subject was called on the trial of the case in the court below, and the Supreme Court of the State held that the statement of the defendant, inasmuch as it was filed without authority of

law, was a nullity, and this court adopts that conclusion as correct.

System and order are essential, in administering the land-offices, and if a party may anticipate the time for such an act as prescribed by law for two months, it is not perceived why he may not for two years, or even for a longer period, which would necessarily introduce confusion, uncertainty and irregularity of practice in the local offices of the Land Department. For these reasons the court is of the opinion that the declaratory statement filed by the defendant is inoperative and without any legal effect. *Daniels v. Lansdale*, 43 Cal., 41; 1 Lester, Land L., 400; Copp, Land L., 420.

He filed his declaratory statement more than two months before the return of the plats of survey, and in direct violation of the law upon the subject, which required it to be filed within three months after such return, as appears from the explicit language of the Act; nor can the court relieve the defendant from the consequences of his failure to comply with the express requirement.

Opposed to that is the suggestion that the statement remained in the local land-office when the plats of survey were returned there; but that circumstance will not remove the difficulty, as it was made and filed without authority of law, and was, in every sense, an unofficial document not belonging to the office. Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.

Attempt is made to show that the plaintiff failed to comply with the requirements of the preemption laws as to the settlement, occupancy and cultivation of land entered for preemption; but the court is of the opinion that the defense in that regard is wholly unsustained. Nothing of moment is alleged in the answer to support the alleged defect, except that the plaintiff purchased a dwelling-house, instead of erecting the one which he occupied. His entry and occupancy of the tract are admitted; and the court is of the opinion that it is immaterial whether he built the dwelling-house himself or hired an agent to erect it for him, or whether he purchased it after it was built by another, provided it appears that he was the lawful owner of the dwelling-house, and made the entry and settlement in good faith, and continued to occupy and cultivate the land, as required by the preemption laws. Enough appears to show that the dwelling-house was there on the land, and that it was owned, possessed and occupied by the plaintiff as his home more than three months before the defendant entered and attempted to make his settlement. 1 Lester, Land L., 424.

Suppose that is so; still the defendant insists that he was entitled to the patent because the plaintiff did not file his declaratory statement until more than two years after the plats of the survey of the land were returned into the local offices. Grant that, but it only shows that both parties settled upon the land while it was unsurveyed, and that each was to some extent in fault in filing his declaratory statement, the difference being that the defendant filed his before he had any right to file it under the Preemption Act, which rendered it a nullity, and

that the plaintiff did not file the required notice of claim until the time allowed by the amendatory Act had expired. Such a notice, if given before the time allowed by law, is a nullity; but the rule is otherwise where it is filed subsequent to the period prescribed by the amendatory Act, as in the latter event it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim. *Johnson v. Townsley*, 13 Wall., 72, 91 [80 U. S., XX., 485, 489].

Tested by that rule, it is clear that the equity of the plaintiff is superior to that of the defendant, as the latter never filed any other notice of claim than that which preceded the return of the plats of survey into the local land-offices.

Other defenses failing, the defendant contends that the plaintiff failed to comply with the requirements of the preemption laws in other respects; but the court is of the opinion that the defense in that regard is not made out, it appearing that he had a dwelling-house thereon, of which he was the lawful owner, and that his occupancy was continuous, either in person or by his tenant. 5 Stat. at L., 455, sec. 10; 1 Lester, Land L., 424.

Beyond doubt, the declaratory statement of the defendant was a nullity, as it was filed at a time when the Act of Congress gave it no effect; and it is equally clear that the notice of claim was not seasonably filed by the plaintiff, but the entry and settlement of the plaintiff were first made; from which it follows that the equity, as between him and the defendant, is decidedly in his favor, the universal rule in such cases being that in the adjustment of such controversies the superior equity must prevail. Story, Eq. Jur., 9th ed. sec 64 d. *Qui prior est in tempore, potior est in jure*. Jeremy, Eq. Jur., 285, 286; *Boone v. Chiles*, 10 Pet., 177; Adams, Eq., ed. 1872, 148.

Nor does the plaintiff rely entirely upon the proposition that his is the superior equity, which of itself is sufficient to show that the judgment below must be affirmed; but it also appears that the parties were fully heard before the Land Department, where the decision was in his favor, and that he now holds the patent for the land; from which it follows that the legal title is in the plaintiff.

Neither of the parties complied strictly with the law in filing the declaratory statement; but, inasmuch as the plaintiff holds the legal title and the superior equity, it is clear that the defendant has no such standing in court as will justify a court of equity in interfering in his behalf.

Complaint is made by the defendant, of the decision of the Land Department in granting the patent to the plaintiff, but it is too clear for argument that no case is made to warrant the court here in reversing that decision. *Shepley v. Cowan*, 91 U. S., 330 [XXIII., 424]; *Moore v. Robbins*, 96 U. S., 530 [XXIV., 848].

Reference to these authorities is sufficient to show that the defendant is not entitled to the relief asked; but if the law were otherwise, it would not benefit the defendant, as he does not show what questions were litigated before the land-officers, nor does the record contain any specification as to what the rulings of the officers were in regard to any particular point. It

appears that there was a contest between the parties there, and that the case was decided in favor of the plaintiff, but the grounds of the decision are not stated. Such being the state of the pleadings, it is impossible to say that any error of law was committed by the tribunal.

Viewed in any light, it is clear that there is no error in the record, and the assignment of errors must be overruled.

Judgment affirmed.

Cited—104 U. S., 285.

JOHN T. MOORE & COMPANY, a Commercial firm composed of JOHN T. MOORE and JOHN T. MOORE, JR., Interveners, *Appts.*,

v.

AMANDA M. F. SIMONDS, Admr. of JOHN S. SIMONDS, ET AL.

(See S. C., 10 Otto, 145-147.)

Misnomer in appeal—mortgage on vessel.

1. Where an appeal should have been taken in the name of the individual members of a commercial firm, but instead thereof is taken in the name of the firm, the defect is one that may be amended under the law as it now stands, and for that reason this court will not dismiss the appeal.

2. A mortgage on a vessel, under the Act of Congress, as between the parties, and as against persons having actual notice thereof, is valid without acknowledgment or record.

[No. 213.]

Submitted Dec. 8, 1879. Decided Dec. 15, 1879.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This cause was commenced by libel filed in the District Court of the United States for the District of Louisiana, against the steamboat John T. Moore. The cause was transferred to the circuit court, after various proceedings had when the decree appealed from was rendered.

The case is sufficiently stated by the court.

Mr. Richard De Gray, for appellees.

Messrs. Charles Singleton and Singleton & Browne, for appellants.

Mr. Chief Justice Waite delivered the opinion of the court:

Technically, this appeal should have been taken in the names of the individual members of the commercial firm of John T. Moore & Co., instead of in the name of the firm, and because of such an irregularity an appeal was dismissed in the case of *The Protector*, 11 Wall., 82 [78 U. S., XX., 47]. That case was decided before the Act of June 1, 1872, 17 Stat. at L., 196, sec. 3, now sec. 1005, R. S., allowing amendments of writs of error in certain cases, and it does not appear that the defect could have been remedied by reference to anything in the appeal papers. Here, however, section 1005 was in force when the appeal was taken, and the bond shows that the firm in whose favor the appeal was allowed was composed of John T. Moore and John T. Moore, Jr. We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for that reason we will not dismiss the appeal. But on looking into the record we find that the only question involved is whether the lien of the appellants' mortgage on the steamboat John T. Moore is superior to that of another mortgage in favor of Swift's Iron and Steel Works and Dennis Long. From the findings of fact it appears that the last named mortgage was executed Jan. 27, 1871; that it was signed and acknowledged by the owner of the boat in the presence of two witnesses, one of whom was a notary public; that the witnesses attested the execution of the mortgage, but the notary did not sign officially; that there was no other or further acknowledgment of the mortgage before a notary; and that this mortgage was not recorded in the office of the collector of customs where the boat was permanently enrolled. The mortgage to Moore & Co., the appellants, was executed Jan. 3, 1872, and was duly recorded in accordance with the Act of Congress; but when it was taken, Moore & Co. had actual notice of the existence of that to the appellees. Upon this state of facts the court below held

NOTE.—Record of mortgages on vessels of U. S.

The mortgage on a vessel of the United States must be recorded in the office of the collector of customs where such vessel is registered or enrolled. U. S. R. S., sec. 4192; 9 Stat. at L., 440; Act of July 29, 1850; *Veazie v. Somerby*, 5 Allen, 280; *Mott v. Ruckman*, 3 Blatchf., 378; *The Wm. T. Graves*, 14 Blatchf., 189; *White's Bk. v. Smith*, 74 U. S., XIX., 211.

The mortgage on vessel is valid against persons having actual notice of it, although not acknowledged and recorded. *Moore v. Simonds*, *supra*; *The Parker Mills v. Jacob*, 8 Bosw., 161; *Cape Fear Steamboat Co. v. Conner*, 3 Rich., 335; *Hobbs v. The Interchange*, 1 W. Va., 57; *The John T. Moore*, 3 Woods, 61.

The requirement as to record is limited to vessels of the U. S., which have been enrolled and licensed as the statute provides. Act of Dec. 31, 1792; 1 Stat. at L., 287; Act of Feb. 13, 1793; 1 Stat. at L., 305; *Weaver v. The S. G. Owens*, 1 Wall., Jr., 359; *Veazie v. Somerby*, 5 Allen, 280; *Best v. Staple*, 61 N. Y., 71.

Before a vessel is registered or enrolled, a mortgage of it will be valid if recorded according to the laws of the State where the vessel is at the time. *Perkins v. Emerson*, 59 Me., 319; *Foster v. Perkins*, 42 Me., 165.

But after it is registered or enrolled, the laws of the U. S., which supersede state laws, must be complied with. *Shaw v. McCandless*, 36 Miss., 296; *Wood*

v. Stockwell, 55 Me., 76; *Perkins v. Emerson*, 59 Me., 319; *Cunningham v. Tucker*, 14 Fla., 251; *Robinson v. Rice*, 3 Mich., 235; *Aldrich v. Aetna Ins. Co.*, 75 U. S., XIX., 473; *The Martha Washington*, 15 Law Rep. N. S., 22.

The mortgage on a vessel creates no priority over maritime claims of any class for which maritime law gives a lien. If the mortgagee wishes to avoid claims against the mortgaged vessel he should take possession. *The Alice Getty*, 2 Flippin, 13; *The General Burnside*, 2 Flippin, 144; *Fox v. Holt*, 36 Conn., 558; *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *Reeder v. The George's Creek*, 3 Am. L. Reg., 252; 3 Hughes, 584; *The Desmet*, 10 Fed. Rep., 453; *The Paragon*, 1 Ware, 322; *The Hiawatha*, 5 Sawy., 160.

If the mortgage permits a vessel to sail, he cannot defeat debts for repairs and supplies on the credit of the vessel, any more than a purchaser. *The Alice Getty*, 2 Flippin, 13; *The Acme*, 7 Blackf., 366; 2 Ben., 386; *Scott v. Delahunt*, 5 Lans., 47; 65 N. Y., 128; *The Wm. T. Graves*, 8 Ben., 568; 14 Blatchf., 189; *The Canada*, 7 Sawy., 173; *Hatton v. The Melita*, 3 Hughes, 494; *The Emily Souder*, 84 U. S., XXXI., 683; *Williams v. Allsup*, 10 C. B. N. S., 417.

It has been held that a duly recorded mortgage upon a vessel is entitled to priority over a claim for supplies and materials furnished in the home port. *The Kate Hinchman*, 7 Biss., 238; *The John T. Moore*, 3 Woods, 61; *The Skylark*, 2 Biss., 251; *The Island City*, 1 Low. Dec., 875; *Hilton v. Miller*, 62 Ill., 230.

that the mortgage of the appellants was inferior in lien to that of the appellees; and this was so clearly right that we are not inclined to hear an argument upon the question.

The Act of Congress relied on by the appellants is now found in sections 4192 and 4193 of the Revised Statutes. These, so far as they are material to the present inquiry, are as follows:

"Sec. 4192. No bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of the collector of customs where such vessel is registered or enrolled.

* * *

Sec. 4193. * * * But no bill of sale, mortgage, hypothecation or conveyance or discharge of mortgage, or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgment of deeds."

To our minds, there is no doubt that Congress only intended to require that a mortgage on a vessel should be acknowledged for the purpose of authenticating it for record; and that, as between the parties and as against persons having actual notice thereof, it was valid without acknowledgment or record. As this was the decision of the court below, we deny the motion to dismiss, and grant that made under Rule 6, to affirm.

Affirmed.

BALLARD PAVING COMPANY ET AL.,

Appts.,

v.

JOHN C. MULFORD ET AL.

(See S. C., 10 Otto, 147, 148.)

Jurisdiction as to amount—uniting claims.

1. In a suit in equity against two persons, in which there is no pretense of a joint obligation, and in no event can there be a recovery against either of them separately for more than \$2,500, this court has no jurisdiction.

2. Neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction on an appeal.

[No. 441.]

Argued Dec. 10, 11, 1879. Decided Dec. 15, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. A. S. Worthington, for appellants.

Mr. William A. Cook, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit in equity brought by the Ballard Paving Company against Michael Mandle, and sundry persons who claimed to be pur-

chaser from Mandle of certain certificates of the Auditor of the Board of Public Works of the District of Columbia, which it was alleged were the property of the Paving Company. Mulford and Campbell, the appellees, were two of the defendants, but they were proceeded against as holders of separate and distinct certificates. Their liability as set forth in the bill was several only. There was no pretense of a joint obligation, and it is conceded that in no event could there be a recovery against either of them separately for more than \$2,500. On the hearing, the bill was dismissed as to these defendants, and the Paving Company has appealed.

NOTE.—Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy. See note to *Gordon v. Ogden*, 28 U. S. (3 Pet.), 33.

See 10 OTTO.

We think it clear that we have no jurisdiction in this case. Although many defendants have been brought into the suit, the proceeding is, in fact, against each of the several purchasers, to enforce his separate and distinct liability. It is a joinder of distinct causes of action against distinct parties. The same decree is to be entered against each as in case of separate suits. The recovery, if any, must be against each defendant separately for the amount he may personally be found accountable. Such being the case, the value of the matter in dispute with each defendant must be the sum for which he is separately liable. It is well settled that neither co-defendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal. *Seaver v. Bigelow*, 5 Wall., 208 [72 U. S., XVIII., 595]; *Rich v. Lambert*, 12 How., 347; *Oliver v. Alexander*, 6 Pet., 143; *Stratton v. Jarvis*, 8 Pet., 4. In such cases the appeal of each separate defendant or complainant must stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. The same principle applies here. For the purposes of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount involved sufficient to give us jurisdiction.

For this reason the appeal is dismissed.

Cited—106 U. S., 6; 105 U. S., 233, 304.

FRANCIS E. HINCKLEY, LATE RECEIVER,
ETC., *Appt.*,

v.

GILMAN, CLINTON AND SPRINGFIELD
RAILROAD COMPANY.

(See S. C., 10 Otto, 153-157.)

Receiver, accounting of—when chargeable with interest.

1. A receiver in a suit in a state court, which was subsequently removed into the Federal Court, may be required to account in the latter court.

2. Where the receiver deposited the fund to his private account, and when examined declined to make explanation, he was properly chargeable with interest on it.

[No. 90.]

Argued Dec. 2, 1879. Decided Dec. 15, 1879.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Messrs. G. W. & J. T. Kretzinger, H. Crawford and S. P. McConnell, for appellant.
Mr. R. Biddle Roberts, for appellee.

Mr Justice Miller delivered the opinion of the court:

The main features of this case, as presented here on appeal, are embodied in the following statement signed by counsel:

"To obviate the necessity of examining a large part of the very voluminous record filed in this cause, the following statement is agreed upon between the counsel of the parties to this branch of the case:

Levi P. Morton *et al.*, the holders of sundry bonds issued by the Gilman, Clinton and Springfield Railroad Company, secured by a deed of trust made to Thomas A. Scott and Hugh J. Jewett, as trustees, filed a bill in the Circuit Court of McLean County, State of Illinois, seeking a foreclosure of the trust-deed and a sale of the property for their benefit.

Shortly prior to the filing of this bill, Joseph J. Kelly had filed a bill as a stockholder of said railroad in the same court, and Francis E. Hinckley, a citizen of Chicago, had been appointed receiver, and continued to discharge the duties of such officer pending the proceedings in both cases along the road.

On June 23, 1875, Thomas A. Scott and Hugh J. Jewett, the trustees named in the deed of trust, came into said Circuit Court of McLean County, and became parties to the said suit of Morton *et al.* against the railroad; and from that time the litigation was carried on in their names, the receiver still acting in both cases, and reporting to the Circuit Court of McLean County.

On the 13th day of December, 1875, the said cause was removed to the Circuit Court of the United States for the Southern District of Illinois, under the provisions of the Act of Congress of March 8, 1875.

Prior to this, on August 12, 1875, the property was ordered to be turned over to the trustees under the provisions of the mortgage, by order of the Circuit Court of McLean County, and the receiver directed to settle his accounts up to that date; and his accountability as such receiver ceased from the 28th day of August, 1875, the property having at that time been handed over by him to the agent of the trustees as aforesaid.

The subsequent proceedings in the Circuit Court of the United States for the Southern District of Illinois aforesaid were carried to completion, the sole parties then in court being the trustees and their *cestuis que trust*, and the said Gilman, Clinton and Springfield Railroad Company and its receiver, all other parties having been dismissed from the record, the final decree having been had, and the road having been sold by virtue thereof and a deed for the same duly executed and approved by the said court, and no appeal ever having been prayed."

The remainder of the record before us consists solely of the proceedings in the Circuit Court of the United States against Hinckley, as receiver, to bring him to account, resulting in

a decree against him for \$18,776.25, from which this appeal is taken.

The first appearance of appellant in the Circuit Court of the United States, as far as this record discloses, is by a report made to that court entitled as of the case of *Kelly v. R. R. Co.* In this paper, after showing a balance of \$12,799.78, in his hands as receiver, he proceeds to state sundry liabilities of that fund, for which he asks of the court an order that he may pay them. This report was filed March 23, 1876, and on that day an order was made that he pay the sum so admitted to be in his hands into court. It seems, however, that after this the whole matter of the receiver's account was referred to a master, on whose report, after exceptions by the receiver, the decree was rendered which is now under review.

The chief reliance of counsel in this court for a reversal of the decree is upon the proposition that Hinckley was never receiver of any other court but the McLean Circuit Court of Illinois, in the suit in which Kelly and others were plaintiffs, and that he could be called to account only by the court to which he was responsible in that suit.

But the agreed case shows that, shortly after his appointment as receiver in the Kelly suit, the foreclosure suit of Levi P. Morton and others, bondholders, was commenced in the same court, and afterwards adopted by Scott and Jewett, trustees for said bondholders, and that thereafter "The litigation was carried on in their names, the receiver still acting in both cases, and reporting to the Circuit Court of McLean County."

This is also stated in a previous paragraph.

We can reach no other conclusion from this agreement, in the absence of the record of the McLean Circuit Court on the subject, than that Mr. Hinckley was receiver in the principal case, which was removed into the Federal Court. There is other evidence that it was so understood by Hinckley. The order of removal was made December 13, 1875, and on the 23d of March 1876, we find him reporting, without objection, to that court, and asking for orders in the nature of instructions as to the disposition of the money in his hands. For aught that appears, this report was his own voluntary act, as well as his duty.

Nor does any such objection appear in the exceptions to the master's report, nor was any exception taken to the order of reference.

It does not appear from this record that the Kelly suit was prosecuted any further after the removal of the foreclosure suit into the Federal Court, nor do we know enough of its character to decide whether anything of it was left after the order of removal, or whether its subject-matter was not necessarily removed with the other suit.

No attempt to bring Hinckley to account in the state court is shown.

Being voluntarily in the United States Court, in a suit where the funds in his hands might properly be distributed, at least under supposable circumstances, and having money in his hands as receiver in the suit removed into that court, we can see no want of authority to make him account for these funds.

It is also urged that since the agreed facts show that the road had been finally sold and

conveyed under the mortgage, the trustees had no right to the money in the receiver's hands. The sufficient answer to this is, that the decree from which this appeal is taken merely orders the appellant to pay the money into court, and makes no order for its distribution. In that Mr. Hinckley has no interest, and when made it will be for other parties to contest it if they desire.

Two objections are taken by appellant to the statement of the account by the master. The first is, that for nearly two years' service the master allowed him only \$10,000, whereas he ought to have allowed him \$1,000 per month.

The principal witnesses of appellant to sustain this exception are two gentlemen who were themselves receivers of other roads, and thought they rightfully received \$900 in one case and \$1,000 in the other, per month. Perhaps they were the best judges of the value of their own services; but such is not always the case, and as there is conflicting testimony, and as this is the first time we have been called on to review the allowance made to railroad receivers by the circuit courts, we do not see that the economical administration of insolvent companies will be promoted, or that justice requires a higher standard of compensation than these courts generally give, to whose discretion the subject must be largely remitted.

Appellant also complains that he is wrongfully charged with \$4,300 for the use of the money held by him as receiver. It does not very clearly appear how much of this money he so used, or how long he held it. But it does appear that the money as received was deposited in a bank at Springfield to his account as receiver, and that most of it was drawn from there on his check, and deposited to his private account with a bank in Chicago; and when on his examination as a witness he was asked to give explanations of this matter, and to state what sums he had so deposited, he declined to answer. Appellant was dealing with a trust fund. It was his duty to keep this money separate from his own. And if he used a bank for the custody of it, he should have had the account so kept as to show the fund to which it belonged. It was also his unquestionable duty, when called on in a proper case for accounting, as this was, to give all the information he had on the subject. His refusal to answer proper questions is wholly unjustifiable, and leaves his conduct open to criticism as to his motive.

As he had it in his power to furnish the facts on which a just and true account could be stated, and refused to do so, we do not in this appeal feel authorized to reverse the finding of the master and the decree of the circuit court.

The decree is, therefore, affirmed.

Cited—103 U. S., 764.

LEWIS H. MEYER ET AL., Trustees, *Plffs.*

in Err.,

v.

DELAWARE RAILROAD CONSTRUCTION COMPANY.

See 10 OTTO.

DELAWARE RAILROAD CONSTRUCTION COMPANY, *Appt.,*

v.

LEWIS H. MEYER ET AL., Trustees.

DELAWARE RAILROAD CONSTRUCTION COMPANY AND DELAWARE COUNTY RAILROAD COMPANY, *Appts.,*

v.

SAME.

(See "Removal Cases," 10 Otto, 457-482.)

Removal of causes—form of petition—bond—application when made—before trial—failure to remove—mechanics' lien—security.

1. Under the Act of March 3, 1875, when the controversy about which a suit in the state court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either plaintiffs or defendants may remove the suit to the circuit court.

2. The due form of a petition for removal, considered.

3. Where no objection was made in the state court on account of the petition not being signed, an objection on that account was too late in the circuit court.

4. The Act of Congress does not make it necessary that two persons should sign the bond as sureties. Where no objection was made to the pecuniary responsibility of one of the persons who signed as surety, and he was competent under the laws of the State to do so, it was error for the court to refuse to accept the bond because a second surety was an attorney of the court.

5. In suits pending when the Act was passed, the application was in time, if made at the first term of the court thereafter.

6. The petition must be filed in a way that it may be said to have been presented to the court before the trial is in good faith entered upon. The case must be actually on trial, before the right of removal is gone.

7. If a party fails in his efforts to obtain a removal and is forced to trial, he loses none of his rights by defending against the action.

8. By the laws of Iowa, a mechanics' lien, for work done under a contract, takes precedence of all incumbrances put on the property by mortgage or otherwise after the work was commenced.

9. A clause in a contract between a construction company and a railroad company, that all the money for the work was to be paid from a certain source, does not give the construction company collateral security, and thus vitiate the lien.

[Nos. 29, 30, 260.]

Argued Oct. 30, 1879. Decided Dec. 15, 1879.

IN ERROR to the Supreme Court of the State of Iowa, and

Appeals from the Circuit Court of the United States for the District of Iowa.

Statement of the case by *Mr. Chief Justice Waite.*

These cases present the following facts:

On the 6th of August, 1870, the Delaware [Davenport] and St. Paul Railroad Company, an Iowa Corporation, contracted with the Dela-

NOTE.—Removal of causes under Act of 1875; citizenship.

There must be a controversy between citizens of different States when the petition for removal is filed, as well as at the commencement of the suit. The Removal Cases, *supra*; Chic., St. L. & N. O. R. R. Co. v. McComb, 17 Blatchf., 371; Beebe v. Cheehey, 11 Reporter, 364; Bruce v. Gibson, 9 Fed. Rep., 540; Curtin v. Decker, 5 Fed. Rep., 385; Kaiser v. Ill. Cent. R. R. Co., 6 Fed. Rep., 1.

One of the parties must be a citizen of the State where the suit is brought; if the plaintiff is an alien,

ware Railroad Construction Company, also an Iowa Corporation, for the construction of that part of its railroad lying in Delaware County, Iowa. The contract contained full specifications of the work to be performed and the prices to be paid, and concluded as follows:

"The prices above specified are to be in full compensation for all materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract. In order to enable the contractor to prosecute the work advantageously, the said engineer shall make an estimate from time to time, not oftener than once per month, as the work progresses, both on work done and materials delivered on the line of said railroad. The said party of the second part will pay in current money eighty per cent of the amount of said estimate; twenty (20) per cent of the estimates, as they are made to the party of the first part, may be retained by the party of the second part as damages in case of a forfeiture of this contract; which said (20) twenty per cent, together with the whole amount of this contract, according to the terms thereof, and on the estimate of the engineer, shall be paid to the party of the first part within thirty days after all the work herein contracted for is completed and accepted by the engineer. 'Qualified below.'

The above payments on estimates shall be made every thirty (30) days, at the office of the President of said Davenport and St. Paul Railroad Company, in Davenport. The Davenport and St. Paul Railroad Company may stop all work at any time, without payment of damages, by giving thirty days' notice.

Whenever five consecutive miles of work from the south line of Delaware County are completed by the party of the first part, and accepted by the party of the second part, the party of the second part shall pay the full amount of the contract price for said work on said five miles within thirty days after said work is accepted, without the deduction of said twenty per cent, and for every additional five consecutive miles of the south end of the work completed by said first party, said second party shall pay in like manner within thirty days after the same has been accepted, and so on through the county from south to north.

Signed this 6th day of August, A. D. 1870.

R. EDDY, *Pres.*

J. M. BRAXTON, *Secy.*

F. B. DOOLITTLE, *Treas.*

Board of Directors of the Delaware Railroad Construction Company.

All the money for the work hereinbefore specified to be paid by the citizens of Delaware County.

H. PRICE,

Prest. Dav. and St. Paul R. R. Co."

The work under this contract was commenced September 29, 1870, and completed October 31, 1872. On the 20th of December, 1872, the Construction Company filed in the office of the clerk of the District Court of Delaware County the statements and accounts required by the laws of Iowa to secure a mechanics' lien on the part of the railroad which had thus been completed. The balance claimed to be due was \$71,165.58.

On the 4th of June, 1872, there was filed for record in the office of the recorder of Delaware County a mortgage, bearing date July 1, 1871, but acknowledged May 16, 1872, whereby the Railroad Company conveyed its entire line of railroad, including with the rest that built by the Construction Company, to William Dennison, a citizen of the State of Ohio, and J. Edgar Thompson, a citizen of the State of Pennsylvania, as trustees, to secure the payment of a proposed issue of bonds, amounting in the aggregate to \$6,000,000. Provision was made for the appointment of a new trustee in case of the death of either of those named in the deed.

On the 15th of January, 1874, the Construction Company commenced a suit in equity in the Circuit Court for the County of Delaware, a state court to enforce its mechanic's lien and, in the petition, priority was claimed for this lien over that of the mortgage. In this suit the Railroad Company, Thompson and Dennison as trustees, the Davenport Railway Construction Company, an Iowa corporation, and Lucius Howard, were named as defendants, but process was served only on the Railroad Company. On the 23th of January, the Railroad Company appeared and filed an answer, substantially admitting the allegations in the petition except as to the amount due. Credits were claimed, however, beyond those acknowledged by the Construction Company, and a reference was asked for a statement of the accounts. To this answer a reply was filed January 30. On the 6th of February the Construction Company and the Railroad Company appeared by their respective counsel, and a motion by the Railroad Company for a reference being overruled, the court proceeded to receive evidence in the cause. In this state of the case, it was agreed between the parties then appearing, to wit: the Construction Company and the Railroad Company, as follows:

"The case as to these parties is referred to Henry Harger, Esq., who appears in open court

the defendant cannot remove the suit. *Knickerbocker L. Ins. Co. v. Gerbach*, 70 Pa. St., 150; *Germania Fire Ins. Co. v. Francis*, 78 U. S., XX., 77; *Hurst v. R. R. Co.*, 93 U. S., 71, XXIII., 805; *Am. Bible Society v. Grove*, 101 U. S., 610, *post*.

All of the parties on one side must be of different citizenship from the parties on the other side of the action. *Martin v. Coons*, 24 La. Ann., 169; *Burke v. Flood*, 6 Sawy., 220; *The Removal Cases*, *supra*; *Blake v. McKim*, 103 U. S., 336, XXVI.; *Hyde v. Rubie*, 3 Morr. Trans., 516; *Beery v. Irick*, 22 Gratt., 484; *Bryant v. Scott*, 67 N. C., 391; *Hazard v. Durant*, 9 R. I., 402; *Fisk v. Chic.*, R. I. & P. R. R. Co., 53 Barb., 472.

The circuit court, under section 2 of Act of Mar. 3, 1875, has no jurisdiction between a citizen of one State and citizens of the same State and another State (*Karns v. Atlantic & O. R. R. Co.*, 10 Fed. Rep., 309); nor of a suit brought by an alien against an alien. *Sawyer v. S. M. Ins. Co.*, 14 Blatchf., 451;

Orosco v. Gagliardo, 22 Cal., 83; *Barrowcliffe v. La Caisse Generale*, 58 How. Fr., 131.

A case cannot be removed when some of the defendants are citizens of the State where the suit is brought. *Hanover F. Ins. Co. v. Keogh*, 7 Fed. Rep., 764; *Merwin v. Wexel*, 40 How. Fr., 115; *Bryant v. Rich*, 106 Mass., 180; *Cooke v. State Nat. Bk.*, 52 N. Y., 96; *S. C.*, 1 Lans., 494; 50 Barb., 339; *Grover & Baker Sewing-Machine Co. v. Florence Sewing Machine Co.*, 85 U. S., XXII., 914; *S. C.*, 110 Mass., 70; *Vannevar v. Bryant*, 88 U. S., XXII., 476; *Bixby v. Crouse*, 8 Blatchf., 73; *George v. Pilcher*, 28 Gratt., 299; *W. A. & W. R. R. Co. v. A. W. R. R. Co.*, 19 Gratt., 592; *Ex parte Andrews*, 40 Ala., 639; *Swann v. Myers*, 70 N. C., 101; *Burch v. D. & S. P. E. R. Co.*, 46 Iowa, 449; *Miller v. Finn*, 1 Neb., 254; *Waggoner v. Cheek*, 2 Dill., 560; *N. J. Zinc Co. v. Trotter*, 23 Int. Rev. Rec., 410; *contra*, *Florence Sew. M. Co. v. Grover & B.*, 40, 1 Holmes, 235.

and accepts the appointment of referee, with power to examine witnesses, books and papers and accounts, and upon the findings of said referee being reported to the Judge of this court, a judgment, by agreement of said parties in open court, is to be entered for the amount due, and a decree for a mechanics' lien to be made establishing such lien, the hearing to commence on Monday morning, February 9, 1874, at nine o'clock A. M., at the office of said Harger in Delhi, Iowa, and to continue from day to day until completed.

And by said agreement of said parties the judgment is to be entered as of the last day of this January Term, 1874, of this court, and the cause is by order of court continued as to all the defendants except said Davenport and St. Paul Railroad Company."

The referee proceeded to the hearing and presented his report, which was approved by the Circuit Judge on the 13th of February, and the Judge at the same time directed the clerk to enter a judgment in accordance with the finding as of February 6, the last day of the preceding Term. On the 14th of February the referee filed his report and the indorsement of the Judge thereon with the clerk, and the clerk entered a judgment in favor of the Construction Company for \$51,930.54, with interest at six per cent. from February 6, and establishing a lien upon the railroad in the county to secure the payment. A special execution for the sale of the property in accordance with this judgment was also ordered. On the 17th of February, such an execution was issued, and on the 4th of May the property was sold by the sheriff to the Construction Company for \$53,000, and a conveyance made to its treasurer in trust. Afterwards the property was conveyed by the treasurer to the Delaware County Railroad Company, an Iowa Corporation created and organized for the purpose of taking the conveyance and holding the property. This new Corporation was composed of substantially the same stockholders as the Construction Company.

On the 6th of April, 1874, an affidavit was made and filed in the suit by the attorney of the Construction Company, to the effect "That personal service of original notice in said suit cannot be made upon the defendants, J. Edgar Thompson and William Dennison, trustees of certain bondholders of said railroad, within the State of Iowa, and they are non-residents of said State of Iowa." The next day a supplemental petition was filed in the cause, as follows:

"And now comes the plaintiff in this suit and states that since the commencement of this suit, to wit: on the 6th day of February, A. D. 1874, a decree has been rendered by this court against the Davenport and St. Paul Railroad Company, a copy of said decree being hereto annexed, and made a part of this supplemental petition, by which judgment was rendered against said Railroad Company in favor of said plaintiff for the sum of \$51,930.54, besides costs of suit, and the mechanic's lien claimed in the original petition in this suit was established as claimed in said petition.

Wherefore plaintiff asks that the remaining defendants be foreclosed of all rights of redemption of the property described in said original petition; that said lien be established against the remaining defendants in said suit; that it

See 10 OTTO.

be declared paramount to all claims of said defendant, and that plaintiff have such other and further relief as may be equitable."

Notice to these defendants of the pendency of the original and supplemental petitions was published in the Delhi Monitor, a newspaper published weekly at Delhi, Delaware County, four successive weeks, commencing April 9 and ending April 30, requiring them to appear and answer before the 19th of May then next, or default would be entered against them, and judgment and decree rendered as prayed for. On the 22d of May, proof of the publication of this notice having been made, a decree was entered on default, granting the relief asked for, and foreclosing the defendants, Thompson and Dennison, "From all right of redemption of, in or to the said property, and every part thereof," and declaring that the rights of the Construction Company were "superior and paramount to any and all claims or rights of said defendants to the same or any part thereof." At the same time the cause was dismissed as to the defendant Lucius Howard. The Davenport Railway Construction Company never appeared in the suit, and it nowhere appears what its interest in the controversy was.

Thompson, one of the trustees, died May 23, the next day after this decree was entered, and on the 26th of January, 1875, the following proceedings were had in the cause on the application of Dennison:

"Now, on this 26th day of January, 1875, comes William Dennison, the surviving trustee for certain bondholders of the Davenport and St. Paul Railroad Company, who were defendants in the above entitled cause, and files with the clerk of this court a motion for a new trial in this cause, on behalf of the said William Dennison, surviving trustee as aforesaid, and brings into court a bond for security for costs of retrial of said cause, as required by the statute in such cases made and provided, and offers to be filed the answer of the said surviving trustee, William Dennison. Whereupon, it appearing to the court that the service upon the said surviving trustee was by publication only, and that he and those whom he represents are entitled to a new trial under the law; and it further appearing to the court that the said surviving trustee has furnished security for the costs of new trial herein satisfactory to the said plaintiff, it is ordered by the court that a new trial in this cause be granted to the said surviving trustee, William Dennison, that the answer offered by the said defendant be filed, and that this cause stand continued to the next Term of this court."

On the 2d of February, the Construction Company filed a motion in the cause, to strike the answer of Dennison from the files because it was not verified. This motion was granted at the next Term of the court, on the 17th of May, and the Construction Company thereupon asked for a judgment by default, but on the 19th of May an amended answer was filed on leave, in which a defense was set up against the priority of the lien of the Construction Company. On the same day, Lewis H. Meyer, a citizen of the State of New York, claiming to have been appointed a trustee under the mortgage in the place of Thompson, moved the court to be substituted for Thompson as a party to the suit.

On the same day, and during the regular Term of the court, Meyer and Dennison filed with the clerk a petition as follows:

"In the Circuit Court of Delaware County, Iowa.

THE DELAWARE RAILROAD CONSTRUCTION Co.

v.

LEWIS H. MEYER and WM. DENNISON,
Trustees.

Now come your petitioners, Lewis H. Meyer and Wm. Dennison, trustees, and state:

That the Delaware Railroad Construction Company and all persons who have come in as interveners in the above entitled cause are citizens of the State of Iowa; that Lewis H. Meyer is a citizen of the State of New York, and William Dennison a citizen of the State of Ohio.

That they have reason to believe and do believe that, from prejudice or local influence, they will not be able to secure justice, by reason of such prejudice or local influence,

That said cause can be fully and finally determined in the United States Circuit Court for the District of Iowa.

That the amount in controversy in said cause amounts to more than the sum of five hundred dollars, exclusive of costs, and they make and file in this court a bond, with good and sufficient security, for their entering in such circuit court, on the first day of its next session, a copy of the records in said suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that said suit shall be wrongfully or improperly transferred thereto, and also for the appearing and entering special bail in such suit, if special bail was originally requisite therein, and they pray of said court to accept said petition and bond, and order the transfer of the said cause to the said Circuit Court of the United States."

This petition was not signed or sworn to, but was accompanied by a bond as follows:

"In the Circuit Court of Delaware County, Iowa.

Know all men by these presents, that we, Lewis H. Meyer and Wm. Dennison, principals, and John E. Henry and Charles Whitaker, as sureties, are held and firmly bound unto the Delaware Railroad Construction Company, and all other persons whom it may concern, in the penal sum of one thousand dollars, to which payment we bind ourselves and each of us by these presents. Given under our hands this 15th day of May, 1875.

The conditions of this obligation are these: the said Lewis H. Meyer and Wm. Dennison have applied to the Circuit Court of said county to remove a certain cause pending in said court, wherein the Delaware Railroad Construction Company are plaintiffs, and the said Lewis H. Meyer, trustee, successor to John Edgar Thompson, and William Dennison, trustees, and many others are defendants, from the said circuit court to the Circuit Court of the United States for the District of Iowa:

Now, if said Meyer and Dennison shall enter in the said Circuit Court of the United States for the District of Iowa, on the first day of the next Term thereof, a copy of the record of said suit, and shall pay all the costs that may accrue or be awarded by said circuit court if it shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and en-

ter special bail in said circuit court in said suit if special bail was originally required therein, then this obligation shall be void; otherwise in full force.

WM. DENNISON and L. H. MEYER, Trustees.

By GRANT and SMITH, Their Attys.

C. WHITAKER,

JOHN E. HENRY, Sureties."

Whitaker, one of the sureties, made affidavit that he was a citizen of Iowa and worth double the amount of the bond over and above all debts, and had property subject to execution. The further proceedings in the state court are thus described in the decree:

"And now, further, on the 21st day of May, 1875, this cause coming on for further hearing, comes Lewis H. Meyer, by Grant & Smith and L. M. Fisher, and asks to be made a party defendant in this cause, and calls up his motion for that purpose, filed in this cause on the 19th day of May, 1875, whereupon plaintiff, by its attorney, objects to said Meyer being made a party defendant in this cause, for the reason that no evidence of the appointment of said Meyer as trustee is before this court, and said motion and the objections thereto having been duly considered by the court, it is ordered that the application of said Meyer to be made a party defendant be refused, and the objections thereto be, and they are, sustained; to which ruling of the court said Meyer, by his counsel, excepts, and asks that his exceptions in this behalf be made a matter of record in this cause, which is accordingly done. Plaintiff now offers in evidence the contract sued on in this cause, whereupon the defendant, William Dennison, trustee, asks leave to file an amended petition and bond for the transfer of this cause to the United States Circuit Court, a petition and bond for that purpose appearing to have been filed with the clerk of this court on the 20th day of May, 1875, one of the regular days of the present Term of court, to wit: on the 20th day of May, 1875, aforesaid; but no notice of the filing of the same having been brought to the court, plaintiff, by its attorney, objects that the bond is insufficient, one surety being an attorney, and not eligible as a surety on a bond in court under the law; and further, that the application to transfer this cause is too late, the cause being now reached for trial, and the trial of the same commenced; whereupon the court sustained the objections of plaintiff in this behalf, to which ruling of the court the defendant, William Dennison, trustee, by his counsel, excepts, and asks that his exception be made a matter of record, which is accordingly done, when, pending further proceedings in said cause, court adjourns to May 22, 1875.

And now, on this 22d day of May, 1875, it being one of the days of the regular May Term, 1875, of said court, the court proceeds with the further hearing of said cause, whereupon defendant William Dennison, trustee, now moves the court to proceed no further with the trial of said cause, and asks that said defendant be allowed to file a new bond for the transfer of said cause to the U. S. Circuit Court, or to deposit money for costs of the same. Plaintiff objects on the ground that the cause is now on trial on its merits. Objection sustained, and said defendant, by his counsel, excepts and asks that this, his exception, be made a matter of record,

which is accordingly done; whereupon plaintiff, by his counsel, asks leave to file reply, to the filing of which, defendant, Dennison, by his counsel, objects. Objection overruled, and defendant, Dennison, by his counsel, excepts and asks that this, his exception, be made a matter of record, which is accordingly done; whereupon plaintiff files reply, and thereupon defendant, Dennison, by his counsel, asks leave and files his amended answer, and the court now proceeds with the trial of said cause on the issues joined therein; and, after full hearing and argument of counsel, the same is duly submitted to the court, and by consent of parties the court takes the same under advisement, with the understanding that judgment shall be rendered by the court in vacation, and entered as of the last day of this Term. And the court finds the issues in favor of plaintiff, and files and renders his decision that plaintiff's lien is paramount to that of defendant, and orders judgment in favor of said plaintiff.

It is, therefore, ordered and adjudged and decreed that the lien of said plaintiff is paramount to that of the defendant, William Dennison, trustee, etc.; and it is ordered, adjudged and decreed that the former decree and judgment of this court, rendered at the May Term, A. D. 1874, be confirmed, and that the plaintiff's claim for a mechanic's lien, as prayed in his petitions, be established as against the said defendants, upon the property described in the decree in this suit at the February Term of this court, A. D. 1874, and as therein established, against the Davenport and St. Paul Railroad Company, and that the defendants be forever barred and foreclosed of and from all right of redemption of, in, or to said property, and every part thereof; and that the rights of plaintiff be declared to be superior and paramount to any and all claims and rights of said defendants to the same or any part thereof; and that the defendant, William Dennison, trustee, etc., pay the costs of the retrial of this suit. Thus ordered, adjudged and decreed, this 14th day of October, A. D. 1875."

From this decree Dennison appealed to the Supreme Court of the State, and there contended, among other things, that the court below lost its jurisdiction by the filing of his petition and bond for the removal of the cause to the circuit court. The court, however, decided otherwise and affirmed the decree below. To reverse this judgment of the Supreme Court a writ of error has been sued out to this court, and that cause is the first of those mentioned in the title, and No. 260 on the docket of the Term.

After the refusal of the state court to withhold further proceedings in the cause, Meyer and Dennison obtained from the clerk of that court a copy of the record, and on the 9th of October filed it in the clerk's office of the Circuit Court of the United States for the District of Iowa. This was the second day of the next session of that court after the petition for removal, but the delay in filing was explained by an affidavit of the clerk of the state court exonerating the defendants from all blame. The cause was thereupon docketed in the Circuit Court of the United States. On the 13th of October, 1875, the Construction Company moved that court to dismiss the suit for want of jurisdiction. This motion was overruled, and on the 14th of January, 1876, the parties stipulated that

See 10 OTTO.

the case should stand "As it stood at the time of the trial in the court below after the filing of the petition for removal, but with Lewis H. Meyer, a defendant, joining in the answer of Dennison," this agreement, however, "not to be regarded as a waiver of the plaintiff's objections to the right of this court to try this cause." Some further amendments were made in the pleadings, and some further stipulations entered into by the parties to speed the cause, and on the 8th of June, 1876, after hearing both parties, a decree was rendered annulling the decrees of the state court and establishing the lien of the mortgage over that of the Construction Company. From that decree the Construction Company appealed to this court, and that appeal is the second of the causes named in the title, and No. 30 on the docket of the Term.

On the 4th of May, 1875, proceedings were commenced by Meyer and Dennison in the Circuit Court of the United States for the foreclosure of their mortgage. To this suit the Railroad Company, the Construction Company, and the Delaware County Railroad Company, with others, were defendants. In an answer the Construction Company asserted the priority of its lien, and the Delaware County Railroad Company claimed title to the railroad in Delaware County under the sheriff's sale in the suit in the state court, free of the lien of the mortgage. On the 8th of June, 1876, this part of the controversy in the Meyer and Dennison suit was heard in the circuit court, and resulted in a decree establishing the superiority of the mortgage lien over that of the Construction Company and the setting aside of the decrees of the state court against Thompson and Dennison, as well as the sheriff's sale and deed under which the Delaware County Railroad Company claimed. From this decree the Construction Company and the Delaware County Railroad Company appealed, and that appeal is the last of the suits mentioned in the title, and No. 29 on the docket of the Term. No other part of the suit commenced by Meyer and Dennison has been brought up on this appeal, except that which relates to the priority of liens and the title of the Delaware County Railroad Company.

Messrs. Geo. G. Wright, M. W. Tyler, and John M. Brayton, for appellants in 29 and 30, and defendant in error in 260.

Messrs. Grant & Grant, Charles F. Southmayd, Joseph H. Choate, William M. Everts and James S. Stearns, for appellees and plaintiffs in error.

Mr. Chief Justice Waite delivered the opinion of the court:

Three principal questions are presented by these cases. They are:

1. Was the suit, pending in the state court, one which could by law be removed to the Circuit Court of the United States?

2. If it could, was the application for removal made in time, and was it sufficient in form to effect a transfer? and,

3. If the transfer was lawfully made, are the decrees of the circuit court, giving the mortgage priority over the mechanics' lien and the title of the Delaware County Railroad Company, right?

These will be considered in their order.

1. As to the right of removal.

The Act of March 3, 1875, 18 Stat. at L., 470, was in force when the application for removal was made, but not when the new trial was granted to Dennison. The 2d section of that Act contains, among others, the following provision: "That any suit of a civil nature, at law or in equity, now pending * * * in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, * * * in which there shall be a controversy between citizens of different States, * * * either party may remove said suit into the Circuit Court of the United States for the proper district."

This we understand to mean that when the controversy about which a suit in the state court is brought, is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the circuit court, without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purposes of a removal the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute. If in such arrangement it appears that those on one side are all citizens of different States from those on the other, the suit may be removed. Under the old law the pleadings only were looked at, and the rights of the parties in respect to a removal were determined solely according to the position they occupied as plaintiffs or defendants in the suit. *Coal Co. v. Blatchford*, 11 Wall., 174 [78 U. S., XX., 180]. Under the new law the mere form of the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts. This being done, when all those on one side desire a removal, it may be had, if the necessary citizenship exists.

In the present case, it appears that the suit was originally brought, by a citizen of Iowa, against another citizen of Iowa and citizens of Pennsylvania and Ohio. There were, then, according to the pleadings, two matters about which there might be dispute: one between the Construction Company and the Railroad Company, both citizens of Iowa, as to the amount due the Construction Company and the actual existence of a mechanics' lien, and the other between the Construction Company and the trustees of the mortgage, citizens of different States, as to the priority of the mortgage over the mechanics' lien. But before the trustees of the mortgage were actually brought into court by service of process, the dispute between the Construction Company and the Railroad Company had been finally disposed of. The amount due the Construction Company had been ascertained so far as that Company and the Railroad Company were concerned, the mechanics' lien established, and the property sold under the lien to pay the debt. There was after that nothing left of the suit except that part which related solely and exclusively to the priority of the mortgage lien, and as to this the controversy was between the Construction Company on the one side, and the mortgage trustees on the other. If the Railroad Company still continued a party to the suit, it was a nominal party only, and its interests were in no way whatever connected with those of the trustees. It did not, therefore, oc-

cupy a position in the controversy on the same side with them. This being the case, it is apparent that in the then condition of the suit the only controversy to be settled was between the mortgage trustees, citizens of Pennsylvania and Ohio, on one side, and the Construction Company and Railroad Company, citizens of Iowa, on the other. As such, under the construction we have given this provision of the statute, the suit was removable by reason of that provision. This makes it unnecessary to give an interpretation to that part of the same section of the Act of 1875, 18 Stat. at L., 470, which, for the purposes of statement, may be read as follows:

"That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, when the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

We reserve the consideration of this provision until a case requiring it arises. This suit, when the petition for removal was filed, was one in which the only controversy to be decided was between citizens of different States and, therefore, provided for in the first clause. Necessarily a removal would take the whole suit to the circuit court, because, in its then condition, the suit related to a single controversy only. Whether, as argued, a removal could also have been had under the last clause, we do not decide.

2. As to the removal.

The 3d section of the Act of 1875, so far as it is applicable to this case, reads as follows:

"That, whenever either party, * * * entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such state court before or at the Term at which said cause could be first tried, and before the trial thereof for the removal of such suit into the circuit court, to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court."

The petition filed in this case was sufficient in form. Enough appeared on its face to entitle the petitioner to his removal. While it included a statement of belief that, from prejudice or

local influence, justice could not be secured by a trial in the state court, no affidavit to that effect was filed; and this statement could be rejected as surplusage, leaving still good cause for the removal on account of the citizenship of the parties. Although Meyer's name was included as a petitioner, that of Dennison was included also; and as Meyer was not a party to the suit, his name could be rejected as surplusage, and the petition left to stand as that of Dennison alone. The paper was evidently drafted and put on file under the belief that Meyer would be substituted for Thompson as a party to the suit. This having been unexpectedly refused, it was presented to the court by the counsel of Dennison, without amendment, as in legal effect the petition of Dennison alone. This, we think, might lawfully be done. Under the circumstances, it was the duty of the court to treat the application as coming from Dennison only.

The petition was not signed. No objection was made on this account in the state court; and it came too late in the circuit court. If it had been made in the state court, the defect, if in fact there was one, would, no doubt, have been cured at once by the signature of counsel. The petition was in writing. On its face, it purported to be the petition of Meyer and Dennison; and it was, in fact, the petition of Dennison. This the court knew, because it was actually presented by the counsel of Dennison, and was accompanied by a bond purporting also to be signed in the name of Meyer and Dennison. In short, everything in the whole proceeding showed that it was, in fact, what, under the circumstances, it purported to be, the application of Dennison, made in good faith, for the removal of the cause.

The bond was sufficient in form. The condition was such as the statute required. There was no special bail in the case. Nothing was, therefore, to be secured by the bond but the filing of the transcript in the circuit court, on the first day of its then next Term, and the payment of any costs that might be awarded by that court, in case it should hold that the suit had been wrongfully or improperly removed. No objection was made to the sufficiency of the surety. The only complaint seems to have been that one of the persons who signed the bond as a surety was an attorney of the court, which was forbidden by the laws of Iowa and the practice of the state court. Without determining whether this would have justified the court in not accepting the bond, if he had been the only surety, it is sufficient to say that the Act of Congress does not make it necessary that two persons should sign the bond as sureties. "Good and sufficient surety" is all that is required; and this is satisfied if there is one surety able to respond to the condition of the bond. The question here is, not whether the court below had the right to pass upon the sufficiency of the surety, but whether, upon the facts as they appear in this record, it was justified in refusing to accept this bond. We are now examining the case, after judgment below, in reference to errors which are alleged to have occurred in the progress of the cause. If the state court refuses to accept a bond offered by a petitioner for removal which has "good and sufficient surety" in law, it is error that may be reviewed here. That court has no discretion in such a matter. Its action

is governed by fixed rules. Here, as no objection was made to the pecuniary responsibility of the one person who signed as surety, and was competent under the laws of Iowa to do so, it was clearly error for the court to refuse to accept the bond because a second surety was an attorney of the court. Such being the case, we are clearly of the opinion that, so far as the form of the application was concerned, the state court was not justified in refusing to accept the petition and bond, and in proceeding further in the cause.

We think also the application was made in time. It is conceded that the petition was filed during the first term of the court at which the suit could be tried, after the Act of 1875 went into operation. It has, so far, as we know, been uniformly held on the circuit, and to our minds correctly, that, in suits pending when the Act was passed, the application was in time, if made at the first term of the court thereafter. *Baker v. Peterson*, 4 Dill., 562; *Hoadley v. San Francisco*, 3 Sawy., 553; *Andrews v. Garrett*, 2 Cent. L. J., 797; *Bk. v. Wheeler*, 13 Blatchf., 218; *Crane v. Reeder*, 15 Alb. L. J., 103. This disposes of one objection made to the time when the petition was filed.

It has, however, been argued, with great earnestness, that the petition for removal was not actually presented to the court "before trial." We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the court before the trial is in good faith entered upon. There may be exceptions to this rule; but we think it clear that Congress did not intend, by the expression "before trial," to allow a party to experiment on his case in the state court, and if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal. But, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone.

Upon the facts in this case it is apparent, to our minds, that the trial had in no sense begun when Dennison presented his petition formally to the court for a removal. It is equally apparent that the counsel for the Construction Company attempted to get up a race of diligence with his adversary, in which he should come out ahead. As soon as the court decided not to admit Meyer as a party to the suit, he seems to have offered the contract sued on in evidence; but, unfortunately for him, in so doing he did not keep himself inside the orderly course of proceedings. It is evident that at that time the cause was not up for hearing on its merits; and it nowhere appears that the court accepted then the offer of the counsel to put in his evidence. Before any action was taken by the court on that subject, Dennison presented his petition, which had been on file ready to be presented, as soon as the motion of Meyer was decided. Immediately after the application of Dennison was disposed of, the court adjourned until the next day; and, when it again met, Dennison renewed his application. This being refused, the Construction Company asked leave to file a reply, which

up to that time had not been done, and which was necessary to complete the pleadings, and make up the issues for trial. That being done, and a motion by Dennison for leave to amend his answer overruled, the court proceeded "with the trial of said cause on the issues joined therein." A statement of these facts is sufficient to show that, when Dennison presented his petition in form to the court, the trial had in no just sense begun. As in the case of *Yulee v. Vose* [ante, 355], "The most that can be said is, that preparations were being made for trial."

It is further claimed that the citizenship of Dennison in Ohio was not proved. As in the case of the sufficiency of the bond, the question here is not whether, if the statements of the petitioner in that particular had been denied, it would have been competent for the state court to institute an inquiry on that subject, but whether, on the facts as they appear on the face of this record, which also shows how they should have appeared to the court below, that court was justified in proceeding further in the suit. We fully recognize the principle heretofore asserted in many cases, that the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right. But here, to say nothing of the statements in the petition which were not disputed, the record is full of evidence that Dennison was a citizen of Ohio. In the mortgage, Thompson is described as of Pennsylvania, and Dennison as of Ohio. In addition to this, in order to bring them into court, the affidavit of the counsel for the Construction Company was put on file, in which it is directly stated, under date of April 6, 1874, that personal service of process could not be made on them within the State, and that they were non-residents. Under these circumstances, it was certainly error for the state court to retain the cause because it was not shown that the citizenship of the adverse parties was in different States. The citizenship of the two corporations in Iowa is averred by the Construction Company in its own pleadings.

It is still further claimed that even though the lower court ought to have accepted the petition and bond and withheld all further proceedings in the suit, that error was waived by the subsequent appearance of Dennison and going to a hearing, and that for this reason it was right for the Supreme Court not to reverse the judgment because of the original fault. This question is settled by the case of *Ins. Co. v. Dunn*, 19 Wall., 214 [86 U.S., XXII., 68], where it is distinctly held that if a party failed in his efforts to obtain a removal and was forced to trial, he lost none of his rights by defending against the action. This record is full of protests on the part of Dennison against going on with the suit, and of exceptions to the ruling which kept him in court. Indeed, it is difficult to see what more he could have done than he did do to get out of court and take his suit with him. He remained simply because he was forced to remain, and is certainly now in a condition to have the original error of which he complained corrected in any court having jurisdiction for that purpose. In addition to this, we now know that he did take his suit to the circuit court, and carried his adversaries with him. It is true, by reason of the fault of the clerk of

the state court, he was unable to file his transcript of the record in the circuit court on the first day of the Term, but he did so on the second, and had the cause regularly docketed, after which a trial was had, all parties appearing. It is also true that the Construction Company objected to the delay, but that objection was, as we think, properly overruled. While the Act of Congress requires security that the transcript shall be filed on the first day, it nowhere appears that the circuit court is to be deprived of its jurisdiction if, by accident, the party is delayed until a later day in the term. If the circuit court, for good cause shown, accepts the transfer after the day and during the term, its jurisdiction will, as a general rule, be complete and the removal properly effected.

We must, therefore, hold that the Supreme Court of the State erred in not reversing the judgment of the circuit court of the county and sending the cause back with instructions to that court to proceed no further with the suit.

3. As to the priority of liens.

It is conceded that, by the laws of Iowa, a mechanics' lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise after the work was commenced. Such has been the uniform course of decisions by the highest court of the State.

It is also conceded that, by a statute of the State Code, 1873, section 385, there can be no mechanics' lien in favor of one who takes collateral security on the contract under which he does his work.

Such being the law, it is clear that, as the mortgage was not recorded until June 4, 1872, and work under the contract of the Construction Company was commenced September 29, 1870, the mechanics' lien must have precedence, unless the Construction Company took collateral security on their contract, or something equivalent was done.

It is contended that the words, "All the money for the work hereinbefore specified to be paid by the citizens of Delaware County," which appear above the signature of the President of the Railroad Company to the contract, give the Construction Company collateral security, and thus vitiate the lien. We cannot so interpret the contract. In the body of the instrument the obligation of the Railroad Company, to pay, is absolute and unconditional. The additional clause does not purport to transfer to the Construction Company the moneys that are due or that may become due from the citizens of Delaware County. No control is given the Construction Company over these moneys. The most that can be said of the clause is that it contains an implied obligation on the part of the Railroad Company to use the money which came into its hands from the citizens of Delaware County to discharge its obligations under the contract, and a corresponding obligation on the part of the Construction Company to wait a reasonable time for the collection of these moneys before putting the Railroad Company in default for non-payment.

In *Christmas v. Russell*, 14 Wall., 69 [81 U.S., XX., 762], we said: "An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment; a covenant in the most solemn form has no greater

effect. * * * The assignor must not retain any control over the fund, any power to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee." It seems to us that this is conclusive of the present case. The Railroad Company has nowhere by its agreement given the Construction Company any power to collect. The amount due is nowhere specified; neither does it appear from the instrument itself what was the nature of the obligations the citizens of Delaware County were under to make the payment. It is not even said that the payments thus to be made grew out of any obligations of the citizens of Delaware County to the Railroad Company. According to the construction claimed, the addition of these somewhat indefinite words at the end of the contract, and after a part of the signatures had been affixed, must have the effect of changing the whole tenor of the contract as set out in the body of the instrument, and substituting the citizens of Delaware County as obligors and bound absolutely for the payment of the work to be performed, instead of the Railroad Company. Such we cannot believe was the intention of the parties, and everything which occurred afterwards is entirely inconsistent with any such idea. It now appears from the evidence that there had been very considerable subscriptions to the capital stock of the Railroad Company by the citizens of Delaware County, and that taxes had been levied by the county, or some of the townships in the county, to aid in the construction of the railroad. It also appears that all of this money was collected by and paid to the Railroad Company. In no single instance, so far as we can discover, was it paid to the Construction Company. The full amount subscribed and levied was not sufficient to pay all that was due that Company. Much of it was paid over, but all of it was not. Of the amount paid the Construction Company by the Railroad Company a very considerable portion was collected from other sources.

Without pursuing the subject further, it is sufficient to say that, in our opinion, the Construction Company has done nothing to waive or deprive it of the right to assert a mechanics' lien, and that the decrees of the circuit court establishing the superiority of the lien of the mortgage were wrong and must be reversed. As the sale under the execution from the state court, by which the Delaware County Railroad Company now holds and claims title, was made in a suit to which the trustees of the mortgage were not at the time parties served with process, the sale did not cut off their interest as mortgagees of the property sold. Neither are they bound by the decree in the state court finding the amount due the Construction Company. The Delaware County Railroad Company took by its purchase only such title as the Construction Company had to convey, and as the interest of the mortgagees was not cut off by the sale to the Construction Company, it is not cut off by the transfer to the Delaware County Company.

We, therefore, order and adjudge as follows:

1. That the judgment of the Supreme Court of Iowa in the case of *Meyer v. R. R. Construction Co.* (No. 260), be reversed with costs, and that the cause be remanded, with instructions to reverse the decree of the Circuit Court of

See 10 Orto.

U. S., Book 25.

Delaware County, and direct that court to proceed no further with the suit.

2. That the decree of the Circuit Court of the United States in the case of *The Delaware Railroad Construction Company v. Meyer and Dennison* (No. 30), be reversed, with costs, and that the cause be remanded with instructions to ascertain the amount due the Construction Company under its contract, and to enter a decree establishing the lien of that Company as prior in right to that of the mortgage, and in default of payment of the amount due by a day to be named, directing the sale of that part of the Railroad Company which lies in Delaware County, to pay the debt. Such provision for redemption is to be made as is allowed in such cases by the laws of Iowa."

3. The decree of the circuit court in the case of the *Delaware County Railroad Company and the Delaware Railroad Construction Company v. Meyer and Dennison* (No. 29), is also reversed, with costs, and the cause remanded with instructions to enter a decree establishing the lien of the Construction Company as superior to that of the mortgage, and declaring the title of the Delaware County Railroad Company, by reason of the sheriff's sale in the state court, to be invalid and not sufficient to pass title as against the lien of the mortgage, and for such other proceedings as justice requires.

Copy, foregoing statement and opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Strong, J. I concur in the judgment, but not in the construction given by the majority of the court to the 2d section of the Act of 1875, respecting removals from state courts.

Mr. Justice Bradley delivered the following opinion, concurring in the judgment of the court:

I concur in the judgment in these cases, but dissent from so much of the opinion as seems to assume that one condition of federal jurisdiction, in the removal of a cause from a state court, under the first clause of section 2, Act of 1875, 18 Stat. at L., 470, is, that each party on one side of the controversy must be a citizen of a different State from that of which either of the parties on the other side is a citizen. This portion of the Act gives the right of removal to either party, in any suit in which there is "A controversy between citizens of different States." In my judgment, a controversy is such, as that expression is used in the Constitution and in the law, when any of the parties on one side thereof are citizens of a different State or States from that of which any of the parties on the other side are citizens. It is true, if there are other parties on opposite sides of the controversy who are citizens of a common State, it may also be a controversy between citizens of the same State. In other words, a controversy may be, at the same time, both a controversy between citizens of the same State and between citizens of different States. But the fact that it is both, does not take away the federal jurisdiction. Neither the Constitution, nor the law, declares that there shall not be such jurisdiction if any of the contestants on opposite sides of the controversy are citizens of the same State; but they do declare that there shall be such

jurisdiction if the controversy is between citizens of different States. The gift of judicial power by the Constitution, and the gift of jurisdiction by the law, are in affirmative terms; and those terms include as well the case when only part of the contestants opposed to each other are citizens of different States, as that in which they are all of different States. And I see no good reason why both the Constitution and the law should not receive a construction as broad as that of the terms which they employ. On the contrary, I think there is just reason for giving to those terms their full effect. The object of extending the judicial power to controversies between citizens of different States was, to establish a common and impartial tribunal, equally related to both parties, for the purpose of deciding between them. This object would be defeated in many cases, if the fact that a single one of many contestants on one side of a controversy being a citizen of the same State with one or more of the contestants on the other side should have the effect of depriving the Federal Courts of jurisdiction. This absurdity became so glaring under the construction formerly given by this court to the Judiciary Act of 1789, 1 Stat. at L., 73, in the case of corporations, when every stockholder was held to be a party, that the court was at length impelled to regard a corporation as a citizen of the State which created it, without regard to the citizenship of its members; thus getting rid of the troublesome stockholder who happened to be a citizen of the same State with the opposite party, and who almost always appeared in the case.

If we give the same construction to the present law which was given to the Judiciary Act, we shall certainly meet with like embarrassment and difficulty in exercising the fair and proper jurisdiction of the Federal Courts. No cases are more appropriate to this jurisdiction, or more urgently call for its exercise, than those which relate to the foreclosure and sale of railroads extending into two or more States, and winding up the affairs of the companies that own them; since, in addition to the convenience of a single jurisdiction having cognizance of the whole matter (which could readily be conferred, if it is not so) the local tribunals in such cases, however upright and pure, are naturally more or less favorably affected towards the interests of their own citizens; and yet, it is almost always essential, in order to do complete justice in these cases, to call before the court some parties on opposite sides of the controversy who are citizens of the same State. If this fact is to deprive the Federal Courts of jurisdiction, without regard to the numerous and important contestants on opposite sides who are citizens of different States, the value of the institution of National Courts, for taking cognizance of controversies between citizens of different States, will be greatly impaired.

But it seems to me clear that, in construing the present law, we are not bound by the construction given to the old Judiciary Act. The words of that Act, conferring jurisdiction upon the circuit courts in respect of citizenship, were not the same as those used by the present law or by the Constitution. It only conferred jurisdiction when "The suit is between a citizen of the State where the suit is brought and a citizen of another State." The singular number only was

used; and the courts, in applying the law to cases in which there was a plurality of plaintiffs or defendants, construed it, perhaps justly, as requiring that each plaintiff and each defendant should have the citizenship required by the law. But now it is not so. The present law follows the words of the Constitution, and gives jurisdiction to the circuit courts in the broadest terms, namely: whenever, in any suit, there is "A controversy between citizens of different States;" and this broad and general expression, as I think I have shown, gives jurisdiction where any of the contestants on opposite sides of the controversy are citizens of different States.

The only objection to this construction which has been seriously pressed, is drawn from the argument *ab inconvenientie*, namely: that if in a controversy where the contestants are numerous, a single case of diverse citizenship between opposite parties should give federal jurisdiction, the Courts of the United States would be overwhelmed with business; litigants would be unnecessarily drawn away from the domestic tribunals, and the intent of the Constitution would be subverted. Now, whilst I am satisfied that the apprehended inconveniences are greatly exaggerated, the inconveniences which would result from a contrary interpretation to that contended for would be at least equally great in depriving the Federal Courts of jurisdiction by a single case of common citizenship between opposite parties, though a large majority of the opposing litigants are citizens of different States; and, thus, one inconvenience would balance the other, and we should still be left to seek the true construction of the Constitution and the law, from the words which they use. But the inconveniences would not be equal. To deprive the Federal Courts of jurisdiction by a partial community of citizenship between the opposite parties would, in many instances, actually defeat the very object which the Constitution and the law have in view.

Even if it should happen that, upon the construction contended for, many cases might be brought into the Federal Courts in which a partial community of citizenship did exist between the opposing parties, what harm would ensue? Ought it not to be presumed that the courts, which are courts of the common country of all the parties, will as well do equal and exact justice between them as the state courts could do? If the judicial force is not sufficient to meet the exigency, let it be increased. If the courts are not held at sufficiently convenient places, that difficulty can easily be remedied. The phrase in question, "controversies between citizens of different States," is a constitutional one; and the construction which we may give to it will affect the judicial powers of the Federal Government for all time; and any temporary inconvenience arising from existing arrangements, which can be remedied by legislation, ought not to stand in the way of a fair construction of the organic law.

But it is not necessary to pass upon this question in this case. The present controversy is wholly between citizens of different States; and we are all agreed as to the decision that ought to be made. When the question does come squarely before us and it becomes necessary to decide it, it is to be hoped that it may receive the fullest consideration.

I am authorized to say that *Mr. Justice Swayne* concurs with me in this opinion.

Cited—101 U. S., 187, 298, 612; 102 U. S., 141, 179; 103 U. S., 211, 337, 492, 567; 104 U. S., 14, 48, 409; 105 U. S., 578; 106 U. S., 194, 555; 107 U. S., 547; 108 U. S., 215; 110 U. S., 397; 111 U. S., 137, 476, 774; 112 U. S., 191, 192, 231; 9 Biss., 318, 373; 17 Blatchf., 387, 457; 2 McCrary, 159; 6 Sawy., 221; 51 Wis., 576; 8 N. W. Rep., 298; 9 N. W., Rep., 658, 662.

WILLIAM J. PHILLIPS ET AL., *Plffs. in Err.*,

v.

ALBERT G. MOORE.

(See S. C., 10 Otto, 208-213.)

Title of alien—new petition—trial of issues of fact.

*1. A sale of land in Texas, previous to her separation from Mexico, by a citizen of the State to a non-resident alien, passed the title from the vendor, and the purchaser acquired a defeasible estate in the land, which he could hold until deprived of the property by the supreme authority upon an official ascertainment of the fact of his non-residence and alienage, or upon the denouncement of a private citizen.

2. The allowance of the court below to the plaintiff, to file a new petition in the case in place of the original, which was lost, approved, the loss being without the fault of the plaintiff and the new petition not differing from the original in any substantial particular.

3. The concluding clause of the 3d section of the Act of March 3d, 1875, "to Determine the Jurisdiction of the Circuit Courts of the United States and to Regulate the Removal of Causes from State Courts, and for Other Purposes" (18 Stat. 471), does not repeal the provision of the Revised Statutes authorizing a trial by the court of issues of fact without the intervention of a jury, upon the stipulation of parties.

[No. 54.]

Submitted Nov. 7, 1879. Decided Dec. 22, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas.

The case is stated by the court.

Messrs. **W. P. Ballinger** and *George Quinan*, for plaintiffs in error.

Mr. Daniel D. Atchison, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

This is an action to recover the possession of one fourth of a league of land, situated in the County of Wharton, in the State of Texas. The plaintiff claims the land under a grant of the State of Coahuila and Texas, made in April, 1833, to one John Dinsmore, a colonist, under the contract with the *Empresario*, Stephen Austin. The defendants assert title to it under a previous grant from that State, made in August, 1824, to one Bartlett Sims, a similar colonist. No question is raised as to the genuineness or validity of this grant to Sims, which was for one league; but, in May, 1828, he sold one fourth of it, constituting the property in controversy, to one Kinchen Holliman, a resident and citizen of Mississippi, who never became a resident or citizen of Mexico or Texas. In 1833, Dinsmore presented a petition to the commissioner of the State appointed to distribute lands to the colonists, and to issue titles to them, in which he denounced the tract thus sold as vacant land,

by reason of the non-residence and alienage of Holliman, and prayed a grant of it to himself. Upon reference of the petition to the agent of the *Empresario* and to the alcalde of the place, the sale of the premises to Holliman and his alienage and non-residence were officially established, and their opinion obtained that he could not, under the laws, retain a right to the tract. The commissioner thereupon declared the land to be vacant and conceded it to the petitioner, and directed that a survey be made of it, preparatory to the issue of the title. Such survey having been made, a formal document, as evidence of the transfer of the title, was issued to the petitioner, by which the commissioner, in the name of the State of Coahuila and Texas, granted to him the property in question. The validity of this grant is the principal question presented for our determination.

The contention of the defendants is, that the sale of Sims to Holliman was invalid by reason of the latter's alienage and non-residence, and as a consequence that the title did not pass to him, but remained in Sims, and the tract sold was not subject to be regranted as vacant land.

There is some conflict of opinion in the decisions of the Supreme Court of Texas as to the effect upon the title, of a sale of real property to a non-resident alien. Language properly applicable to grants to aliens under the colonization laws, and the instructions to the commissioner under the contract with the *Empresario*, Austin, has sometimes been used with reference to sales to them by private parties. Such grants to non-resident aliens were inhibited by positive statutory provisions, and for the obvious reason that the object of the colonization laws was to induce a settlement of the country by the introduction of persons who would cultivate the lands and become permanent residents; and this object would have been defeated, if such residence and cultivation had not been essential conditions upon which the bounty of the government was bestowed. For a similar reason, an abandonment of the country by the settler, after receiving his grant, without previous alienation of it, worked a forfeiture of the property, which immediately reverted to the mass of the public domain. The settler, after the performance of certain conditions, could, however, alienate his land, subject to some restrictions. In the early cases, particularly in *Holliman v. Peebles*, 1 Tex., 673, an opinion was expressed, that under the laws of Spain, which remained in force in Mexico after her independence, and those subsequently enacted by her, an alien could not acquire real property in that Republic. And in *Clay v. Clay*, in the 26th of Texas 24, the invalidity of a sale of land to a non-resident alien was expressly adjudged. But in the later case of *Barrett v. Kelly*, in the 31st of Texas 476, where land had been sold, in 1833, to citizens of the United States, then non-resident aliens, it was held that, unless there was an adjudication by some court or political authority upon their alienage, while it existed, their rights were not divested. The decision proceeded upon the ground that the title had passed to the grantees, notwithstanding their alienage, though subject to be divested upon an official determination of that fact.

According to this decision, considered with reference to the general prohibitory language of

* Head notes by *Mr. Justice Field*.

See 10 OTTO.

the laws of Mexico, respecting the acquisition of real property by aliens, in force in Texas previous to the latter's independence, the rule which there obtained may be stated to have been substantially this: that a non-resident alien could not acquire, under a sale by a citizen, such an interest in land as to be able to hold it against the government, or to prevent it being denounced and adjudged to be vacant land, subject to be regranted; but that the title would pass out of the vendor, so as to denude him of all estate in the land and consequent dominion over it; and the purchaser would take the title and hold it until, in some official way, the fact of non-residence and alienage was authoritatively established, when the general law would come into operation, and restore the property to the public domain. Certain it is that, by the sale to the alien, the right of the vendor was deemed to be divested; and, so far as the present case is concerned, it is immaterial whether the title be considered as thereupon at once vesting in the government by reason of the attempted transfer of the property to a person incapable of taking it, or be deemed to pass to the alien, to be held until the government, upon its own motion or the denouncement of a private citizen, should determine to claim the property. We are led to the latter view as the more reasonable one, and as being in harmony with the general doctrine obtaining in other cases, that a forfeiture incurred is inoperative to defeat a title until the party authorized to enforce it claims its benefit.

This conclusion is strengthened by the Act of the Mexican Congress of March 12, 1828, in relation to passports and the mode of acquiring property by foreigners. Its 6th article provides that foreigners, introduced and established in the country in conformity to prescribed regulations, shall be protected by the laws, and enjoy the same rights conferred upon Mexicans, with the exception of acquiring landed property, which, by existing law, unnaturalized persons cannot hold. But yet the 11th article of the same Act declares that property acquired by unnaturalized foreigners, in fraud of the law, may be denounced by any Mexican, to whom it will be adjudged as soon as such fraud is proved. It would thus seem that, notwithstanding the prohibitory language of the 6th article, title may pass to a foreigner not naturalized, though it be one which is defeasible, upon the denouncement of a private citizen.

The Supreme Court of California, on the question as to the validity of a conveyance of land in Mexico, by a private citizen to an alien, held, after a full and elaborate consideration, that the conveyance was not absolutely void, but that the grantor by it was divested of the property which he had undertaken to convey, and the grantee invested with a defeasible estate therein, which he would hold until divested by the supreme authority, or by an inquisition had upon its denouncement. *Merlev v. Matthews*, 26 Cal., 456.

By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law

as "office found." It removes the fact, upon the existence of which the law divests the estate and transfers it to the government, from the region of uncertainty and makes it a matter of record. It was devised, according to the old law writers, as an authentic means to give the King his right by solemn matter of record, without which he, in general, could neither take nor part with anything; for it was deemed "A part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seize any man's possessions upon bare surmises, without the intervention of a jury."

By the civil law, some proceeding, equivalent in its substantive features, was also essential to take the fact of alienage from being a matter of mere surmise and conjecture, and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the government, or upon the denouncement of a private citizen. The course pursued in the present case seems to have been in conformity with common usage. The fact of alienage and non-residence was thus officially established; it became matter of record, and the subsequent declaration of the commissioner that the land was vacant, was the judgment which the law prescribed in such cases. The land was then subject to be regranted by the commissioner, as fully as though no previous grant to Sims had ever been made.

It remains to consider the objections urged to the order of the court, allowing a new petition to be filed in place of the original, which was lost, and to the trial of the case by the court, without the intervention of a jury. We do not consider either of these objections to be well taken. It was not only proper to allow the filing of a new petition, when the original was lost, and no copy was to be had, but it would have been the subject of just complaint had this allowance been refused. The affidavit states that the loss was without the fault of the plaintiff, and there is no pretense that the fact was otherwise. The original petition was in the ordinary form in use in actions of trespass to try the title to land and was for the recovery of one fourth of a league; and there is no suggestion that the new petition differs from it in any substantial particular.

As to the trial by the court, it is sufficient to observe that a jury was waived by stipulation of the parties, filed with the clerk under the Act of Congress. R. S., sec. 649. The concluding clause of the 3d section of the Act of March 3d, 1875, "To Determine the Jurisdiction of the Circuit Courts of the United States, and to Regulate the Removal of Causes from State Courts, and for Other Purposes," does not repeal the previous law, authorizing a trial by the court, without the intervention of a jury, upon such stipulation. It was only intended to conserve to parties, in the cases removed to the circuit courts, the same right of jury trial which parties possess in cases brought originally in those courts, not to prevent the waiver of a jury by consent. The provision is similar to the one in the Judiciary Act of 1879. 1 Stat. at L., 73; 18 Stat. at L., 471; *Kearney v. Case*, 12 Wall., 281 [79 U. S., XX., 396].

Judgment affirmed.

FLORIDA CENTRAL RAILROAD COMPANY ET AL., *Appts.*,

v.

J. FRED SCHULTE ET AL.

(See S. C., "*Railroad Co. v. Shutte*," 10 Otto, 644-648.)

Supersedeas—when vacated—correction of transcript.

1. This court will vacate the *supersedeas*, when the approval of the *supersedeas* bond, by the justice of this court who allowed the appeal, was obtained by fraud and perjury. In a case of this kind, fraud is always open to inquiry.

2. Where the *supersedeas* is vacated for such reasons, this court will refuse to accept a new bond.

3. Where the appellant selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript, the court will order that he file in this court, as part of the record, copies of such papers omitted as the appellee deems necessary, or the appeal will be dismissed.

[No. 1022.]

Argued Dec. 9, 1879. Decided Dec. 22, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

Motions, stated by the court.

The case is sufficiently stated by the court.

Messrs. S. F. Phillips, James M. Baker, P. Phillips, W. A. Maury and J. B. Stewart, for appellant.

Messrs. M. H. Carpenter, C. D. Willard and Wayne MacVeagh, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

In this case the appellees have moved:

1. To vacate the *supersedeas*, because the approval of the *supersedeas* bond by the justice of this court, who allowed the appeal, was obtained by fraud and perjury; and,

2. To dismiss the appeal, because the transcript of the record which has been filed in this court is not complete, and is not properly certified.

The appellants, also, have moved for leave to file a new bond in case the old one shall be set aside.

1. As to the vacation of the *supersedeas*.

That the approval of the bond was brought about by gross fraud and perjury is so conclusively shown that no attempt has been made to deny it. The evidence also shows with equal certainty that the bond was obtained in the most irregular way. A lawyer who, to say the least, was an entire stranger to all the parties in interest, was employed to procure, within thirty-six or forty-eight hours, sureties for the appellants sufficient to secure the payment of \$100,000. He was to be paid for his services six bonds of \$1,000 each of the appellant Corporation, which were then of no marketable value. In due time he produced the requisite number of persons to sign as sureties. When they came, the "usual form of justification of about four lines in length" was "ignored," and a full affidavit was drawn for each surety, wherein was set forth "The name and residence of the surety, the amount of his real estate, its location, its value, whether or not incumbered, if so, to what amount; next, the amount of his personal property, its character, whether or not incumbered, and if so,

to what amount; next, whether or not the surety was upon any other bond; next, whether or not there were any judgments against the surety; and finally summing up that he owned so much over all his debts and liabilities, naming the sum. Each of these questions each surety answered favorably, and swore to. The justifications were extraordinary in their minuteness, as the affidavits will show."

This being done, a bond sufficient in form was signed by the "procured" sureties. One of the persons who signed, said to be a "very wealthy man," was paid \$125 for what he did. Another, "the son of a former Judge of the Supreme Court of the State of New York," received \$12.50; another, a colored porter in a lawyer's office, \$10; another was paid \$10; and another was promised \$50, but actually paid nothing. They were all irresponsible pecuniarily, and known to or suspected by the police of the City of New York as "purchasable sureties." The money to pay them for their fraudulent work was furnished by an agent of the appellant Company under the form of buying back one of the worthless bonds promised, as a reward for what was done.

After the bond was executed by the sureties thus obtained, the president of the appellant Corporation was called in. He signed officially the name of the Corporation, and affixed the corporate seal, but did not see or ask to see any of the persons who had become bound with his Company. Neither he nor any other person actually interested in the litigation became in any manner personally bound.

With such a bond, procured in such a way, the president of the Corporation presented himself at the last moment to the Justice of this court, who heard the cause in the circuit court at his summer residence in Vermont, and asked that the bond be approved. On its presentation, as we are informed by the testimony of the president himself, the Justice read and seemed to be impressed "with the fullness and particularity of the justifications." He said: "This seems to be a good bond." The reply was: "Yes, Judge, I believe it to be a very good bond." He then asked as to one of the parties whose name appeared, and the reply was: "I am informed that he is the son of a former Judge of the Supreme Court of the State of New York of that name," adding that another of the signers, "I am advised, is a very wealthy man."

Under these circumstances, the bond was approved. To allow it to stand and to operate as a stay of execution upon an important decree until the case can be reached in its order on our crowded docket, would be a reproach upon the administration of justice. We are aware that in *Jerome v. McCarter*, 21 Wall., 17 [88 U. S., XXII., 515], we said, "That upon facts existing at the time the security was accepted, the action of the Justice, within the statute and within the rules of practice adopted for his guidance, is final," and that we would "presume that when he acted, every fact was presented to him that could have been." We are not inclined to depart from that rule, but, in a case of this kind, fraud is always open to inquiry. When discovered, justice requires that summary relief should be afforded, whenever and wherever it may be done consistently with the forms of orderly judicial procedure. This bond is as much

false as if it had been forged. The persons who signed it are not in fact what they were represented to be. We have no hesitation in setting aside the approval of the bond.

2. As to the acceptance of a new bond in the place of the old one.

This application is addressed to our judicial discretion, and is based on the alleged ignorance of the officers and agents of the appellant Corporation as to the character of the bond they got accepted. They insist in the most positive manner that they were deceived, and that they actually believed the security they offered was ample. The character of the president is vouched for under oath by many persons occupying high positions in public and private life, and they all say "They do not believe he would knowingly countenance or in any way participate in or suffer an attempt to impose on the Supreme Court of the United States, or any justice thereof, a fraudulent or worthless bond;" but the fact still remains that he did present such a bond, and if he was ignorant of the wrong that was being done, the other agents of the company were not. Taking the whole case together, we think it quite as incumbent on us to refuse to accept a new bond as it is to set aside the old one.

The motion to vacate the *supersedeas* is granted.

3. As to dismissing the appeal.

The evidence shows that after the bond was accepted the president of the Railroad Company went with his own copyists to the office of the clerk of the circuit court and, in the absence of the principal clerk, selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript. This being done, he caused a certificate to be added, signed in the name of the clerk by a deputy, and sealed with the seal of the court, to the effect that the transcript annexed contained copies of such entries, papers and proofs as were "necessary on the hearing of the appeal prayed and allowed in the said cause." It is now alleged that many important papers and documents used on the hearing below, and necessary for the proper determination of the cause here, have been omitted from the transcript as filed.

While we desire to encourage in every proper way all attempts made in good faith to exclude immaterial matter from the transcripts brought here on appeals or writs of error, it will not do to permit the appellant or plaintiff in error to make up a record to suit himself, without any regard to the wishes of his opponents or the rules and practice of the court. We, therefore, order:

That the appellees file with the clerk of this court and with the counsel for the appellants, on or before the first day of February next, a statement of the papers, documents and proofs used on the hearing below, and omitted in the transcript now on file, which they deem necessary for the proper presentation of the cause; and that unless the appellees shall, on or before the 15th day of March, file in this court as part of the record copies of such papers, duly certified by the clerk of the circuit court or his deputy, under the seal of the court, this appeal be dismissed.

If in this way unnecessary papers are brought

up, we will, on application, make such order in respect to costs as may under the circumstances be proper.

Cited—102 U. S., 371; 103 U. S., 136.

JOHN R. WEATHERLY, *Plff. in Err.*,

v.

MATILDA J. BOWIE ET AL.,

Jurisdiction over state judgments—abandoned question.

1. This court may look into the opinions of the Supreme Court of Louisiana, for the purpose of determining whether a federal question was raised and decided in a case coming from that court.

2. Where this court finds that the only federal question there is in the record was not presented to the Supreme Court either in brief or in oral argument, and that court says it presumes the question was abandoned, this is not such a decision of the question as will give this court jurisdiction.

[No. 790.]

Motion Submitted Nov. 3, 1879. Motion to postpone to merits, Nov. 10, 1879. Motion re-submitted Nov. 17, 1879. Decided, Jan. 5, 1880.

IN ERROR to the Supreme Court of the State of Louisiana.

On motion to dismiss.

This was a petitory action commenced by the defendants in error in the Thirteenth Judicial Court for the Parish of Tensas, in the State of Louisiana, to recover a certain tract of land which they alleged John R. Weatherly, plaintiff in error, had illegally taken possession of.

The plaintiff in error presented a petition to remove the cause to the Circuit Court of the United States. The Judge granted an order of removal; but, on motion of the defendants in error, this order was rescinded. The cause was tried in the district court, and judgment rendered for the plaintiffs in that court. This judgment was affirmed on appeal by the Supreme Court of the State. The opinion of that court contains the following:

"On the petition of Weatherly the court ordered the case to be remanded into the Circuit Court of the United States under the Act of Congress approved 3d of March, 1875, which order was afterwards rescinded on motion of plaintiffs. In his petition for removal Weatherly states that he is a citizen of the State of Mississippi. All the plaintiffs are citizens of the State of Mississippi except one, who is a citizen of the State of Louisiana. It is manifest, therefore, that the circuit court could not have taken jurisdiction. Act of 3d March, 1875; *Sewing-Machine Cas.*, 18 Wall., 553 (85 U. S., XXI., 914). We presume the idea of removal was abandoned, as the question was not raised in this court, either in brief or in oral argument."

Mr. John H. Kennard, for defendants in error.

Messrs. Thos. J. Semmes and Jas. Lowndes, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

We may look into the opinions of the Supreme Court of Louisiana for the purpose of determining whether a federal question was raised and decided in a case coming up from that court. *Armstrong v. Treas. Athens Co.*, 16 Pet., 285; *Cousin v. Labatut*, 19 How., 207 [60 U. S., XV., 604].

To give us jurisdiction in a writ of error to a state court, a federal question must not only exist in the record, but it must have been decided against the party who sues out the writ. *Murdock v. Memphis*, 20 Wall., 626 [87 U. S., XXII., 441].

"Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings, can be considered by us upon error." *Fashnacht v. Frank*, 23 Wall., 416 [90 U. S., XXIII., 81].

On looking into the opinion in this case, we find that the only federal question there is in the record was not presented to the Supreme court, "either in brief or oral argument." The Court also say they presume the question was abandoned, and as one of their reasons for that presumption they say: "It is manifest that the circuit court could not have taken jurisdiction." We think this is not such a decision of the question as will give us jurisdiction.

Dismissed.

R. A. WILLS ET AL., Copartners, as WILLS,
EDMANDS & COMPANY, *Plffs. in Err.*,

v.

THOMAS RUSSELL, LATE COLLECTOR OF
CUSTOMS.

(See S. C., 10 Otto, 621-629.)

Cross-examination of witness—order of evidence—question of fact.

1. A party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, except to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements.

2. The order and time of introducing evidence are matters belonging very largely to the practice of the court where the case is tried, and if the court refuse to enforce this rule, it will not be error, unless it appears that it worked serious injury to the opposite party.

3. Where, in an action to recover back duties paid under protest on an importation of "jute rejections," the court instructed the jury that it was for them to find whether or not jute rejections were of a class of non-enumerated substances similar to the enumerated articles in the Act under which they were imported; *held*, that the instruction was correct, as the question was one of fact.

[No. 126.]

Argued Dec. 19, 1879. Decided Jan. 5, 1880.

ERROR to the Circuit Court of the United States for the District of Massachusetts. The case is stated by the court.

Mr. Charles L. Woodbury, for plaintiffs in error.

Mr. Edwin B. Smith, *Asst. Atty.-Gen.*, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Five dollars per ton import duties were, by
See 10 OTTO.

the Act of the 14th of July, 1862, levied on jute, Sisal grass, sun hemp, coir, and other vegetable substances not enumerated, except flax, tow of flax, Russia and Manilla hemp, and codilla or tow of hemp. 12 Stat. at L., 554.

By the prior Act, jute, Sisal grass, sun hemp, coir and other vegetable substances, if not enumerated and used for cordage, were subject to a specific duty of \$10 per ton. Jute butts paid \$5 per ton, and codilla or tow of hemp paid the same duty as non-enumerated vegetable substances used for cordage. Pages of the volume are filled with the enumerated list; but the 24th section provides that all articles, raw and unmanufactured, not therein enumerated or otherwise taxed, shall pay a duty of ten per centum *ad valorem*. 12 Stat. at L., 188, 196.

Products called jute rejections, to the amount of one hundred and twenty-five bales, were imported by the plaintiffs from Calcutta. Due entry of the importation for consumption was made by the importers, and the collector assessed an import duty on the goods of ten per centum *ad valorem* and a specific duty of \$5 per ton. 12 Stat. at L., 196, 554.

Pursuant to the requirement of law in such cases, the plaintiffs filed a written protest, objecting to the levy of the specific duty, in which they claimed that the products imported should be classed as non-enumerated articles, raw and unmanufactured, and be subject to a duty of ten per centum *ad valorem* and no more; or, if regarded as partially manufactured, that the importation should be subjected to a duty of twenty per centum *ad valorem*, and no more.

Payment of the amount exacted was made by the plaintiffs to obtain possession of the goods, and redress being refused, the plaintiffs instituted the present suit to recover back the amount and lawful interest. Service was made; and, the defendant having appeared, the parties went to trial, and verdict and judgment were in favor of the defendant, and the plaintiffs excepted and sued out the present writ of error.

Six errors are assigned here, as follows: (1) That the court erred in permitting a witness for the plaintiffs to be cross-examined on a matter not within his testimony in chief. (2) That the court erred in refusing to permit the plaintiffs to introduce evidence to prove that jute rejections were not and could not be used for cordage, and that jute and the other vegetable substances mentioned in the Act of Congress were used for that purpose. (3) That the court erred in permitting the defendant to introduce evidence to prove that jute rejections were one of the vegetable substances referred to in the Act of Congress. (4) That the court erred in refusing each of the four prayers for instruction presented by the plaintiffs. (5) That the court erred in instructing the jury that it was for them to determine whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the articles enumerated in the 11th section of the Act, under which the importation was made. (6) That the court erred in not defining in what the required similarity would consist to bring the importation in question within the Act of Congress.

Testimony was introduced by the plaintiffs to prove that they paid the duties, and they read the protest in evidence to show that they had complied with that condition precedent to a

right to recover back the amount paid. Witnesses were called by them to prove payment and protest; and one of them having testified to the payment of the duties, and to the fact of protest and appeal, the defendant claimed the right to cross-examine him as to whether jute rejections were a vegetable substance similar to the articles enumerated in the second clause of the 11th section of the Tariff Act, under which the duties were exacted. Objection was made by the plaintiffs; but the court overruled the objection and admitted the evidence. Exception was taken by the plaintiffs to the ruling of the court, and that exception constitutes the basis of the first assignment of error.

Authorities of the highest character show that the established rule of practice in the Federal Courts and in most other jurisdictions in this country is, that a party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. Subject to those exceptions, the general rule is, that if the party wishes to examine the witness as to other matters, he must, in general, do so by making him his own witness and calling him as such in the subsequent progress of the cause. *R. R. Co. v. Stimpson*, 14 Pet., 448, 459; *Houghton v. Jones*, 1 Wall., 702, 706 [68 U. S., XVII., 503, 505]; 1 Greenl. Ev., 12th ed., sec. 445-447; 1 Whart. Ev., sec. 529.

It has been twice so ruled by this court, and is, undoubtedly, a valuable rule of practice, and one well calculated to promote regularity and logical order in jury trials; but it is equally well settled by the same authorities that the mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury. Both of the cases referred to by the plaintiffs show that the judgment will not be reversed merely because it appears that the rule limiting the cross examination to the matters opened by the examination in chief was applied and enforced; but those cases do not decide the converse of the proposition, nor is attention called to any case where it is held that the judgment will be reversed because the court trying the issue of fact relaxed the rule and allowed the cross examination to extend to other matters pertinent to the issue.

Cases not infrequently arise where the convenience of the witness or of the court or the party producing the witness will be promoted by a relaxation of the rule, to enable the witness to be discharged from further attendance; and if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party. Nothing of the kind is shown or pretended in this case. Instead of that, it is conceded that the ruling of the court did not work any injury to the plaintiffs, and in that view the first assignment of error is overruled. *Jackson v. Litch*, 62 Pa. St., 451, 455.

Enough appears to show that the importation in this case was made under the Tariff Act temporarily increasing the duties on imports, which imposes a duty of \$5 per ton in addition to the duties theretofore imposed on the articles therein enumerated, and other vegetable substances not enumerated, except flax, tow of flax, hemp of two descriptions, and codilla or tow of hemp. Products such as those imported, called jute rejections, it is admitted, are vegetable products, and that the article or product is not enumerated in that Tariff Act; but it is contended by the plaintiffs that the words "used for cordage," found in the 15th section of the former Act must be implied, to come in after the word "enumerated," as used in the said section of the antecedent Act. Grant that, and it would follow that the plaintiffs must prevail, as the evidence shows that jute rejections are not used for cordage.

Hemp, under the prior Act, unmanufactured, paid a duty of \$37 per ton, and Manila and other hems of India paid a duty of \$15 per ton. Jute, Sisal grass, sun hemp and coir were enumerated articles in that Tariff Act, and they, with other vegetable substances not enumerated, if used for cordage, paid a duty of \$10 per ton, and codilla or tow of hemp paid a duty of the same amount.

None of these suggestions are controverted, nor can it be controverted that jute, Sisal grass, sun hemp, coir and other vegetable substances are required in terms by the new Act increasing the duties on imports to pay \$5 per ton in addition to the duties previously imposed by law. All that is conceded; still the plaintiffs contend that the words "used for cordage," found in the prior Act, should, by implication, be incorporated, as before explained, into the subsequent Act increasing import duties; but the court is not able to adopt that construction of the new provision, for several reasons: (1) Because there is nothing in either Act, or in the two when read together, to justify such a construction, or even to indicate that such was the intention of Congress. (2) Because nothing short of legislation would justify such a conclusion. (3) Because the exceptions contained in the new provision afford satisfactory proof that such was not the intention of Congress.

Attempt is made to support the theory of the plaintiffs by the fact that the words "used for cordage" are restored in the Revised Statutes; but the court is of the opinion that no aid can be drawn from that provision in favor of the views of the plaintiffs, as it imposes a duty of \$15 per ton on the articles named, including other vegetable substances not enumerated. Sec. 2504, sched. C, entitled, Hemp, Jute and Flax Goods.

Evidently the provision in the Revised Statutes referred to was borrowed from a later Act, and cannot in any sense be regarded as a legislative construction of the clause in the Tariff Act under consideration. 16 Stat. at L., 264.

Three of the prayers for instruction presented by the plaintiffs are covered by the preceding suggestions, and nothing need be added to show that they were properly rejected. Their fourth prayer was also rejected; but the court instructed the jury in its stead that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in section 11

of the Act under which the same were imported; adding, that if they were, then the duty was properly assessed; that if they were not, then their verdict should be for the plaintiffs.

New products or articles of importation frequently appear, and hence it is that Congress finds it necessary to impose duties by some general designation, in order that non-enumerated articles may not escape from their just share of the public burden. Non-enumerated articles under the first Act in question were subjected to a duty of ten per centum *ad valorem*, but the Act increasing import duties included some of those articles in the enumerated list, and imposed on them a duty of \$5 per ton in addition to the duties previously imposed by the prior Act. Appended to the class so enumerated in the clause of the second Act under consideration was the phrase, "and other vegetable substances not enumerated," which were by the same clause made subject to the same additional specific duty.

Both the appraisers and the collector as well as the commissioner regarded the products imported as vegetable substances similar to the articles enumerated in the preceding part of the same clause; and if their theory is correct, then it was immaterial whether the jute rejections were or were not used for cordage, as those words, though incorporated into the corresponding clause in the prior Act, were left out of the clause in the subsequent Act increasing import duties.

It is the theory of the plaintiffs that the clause in the second Act means the same thing as the clause in the antecedent Act, but the circuit court held otherwise; and the court here fully concurs in the view of the circuit court, that the duties were properly assessed if the products imported were of a class of non-enumerated vegetable substances similar to the enumerated articles mentioned in the clause of section 11, which imposes the duty in question.

Plainly the question was one of fact; and the court is of the opinion that it was properly submitted to the jury in connection with the converse of the proposition, that if the products were not of that class, then their verdict should be for the plaintiffs.

Complaint is also made by the plaintiffs that when they offered evidence to show that jute rejections were never used for cordage, the court rejected the evidence as immaterial; but the court here is of the opinion that the ruling was correct, as it is clear that the words "used for cordage" is no part of the clause of section 11, under which the duties were assessed.

Dissatisfaction is expressed by the plaintiffs that the Circuit Judge did not give the jury some better standard to guide them in the performance of their duty; but it is not perceived that there is any just ground for that complaint, as he gave them the very criterion which the Tariff Act prescribes; that if the importation was of an article non-enumerated and of a class of vegetable substances similar to the enumerated articles preceding that phrase in the same clause, then the duty was properly assessed, but, if not, then the plaintiffs were entitled to the verdict.

For these reasons the court is of the opinion that there is no error in the record.

Judgment affirmed.

See 10 OTTO.

KENTUCKY IMPROVEMENT COMPANY, *Pf. in Err.*,

v.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

(See S. C., 10 Otto, 648-659.)

Railroad company, what is.

An improvement company, with authority to construct a railroad, which it did construct and use, is, within the meaning of the Act of Congress of July 13, 1868, a railroad company, and liable to the tax of five per cent. imposed by such Act on coupons of bonds issued for its indebtedness.

[No. 123.]

Argued Dec. 19, 1879. Decided Jan. 5, 1880.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. Francis W. Palfrey, for plaintiff in error.

Mr. S. F. Phillips, *Solicitor-Gen.*, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Moneys involuntarily paid for internal revenue taxes illegally exacted may be recovered back from the collector in an action of *assumpsit*.

Taxes of the kind to the amount of \$750, were paid to the collector by the plaintiffs, after an unsuccessful appeal to the Commissioner. Redress being refused, the plaintiffs instituted the present suit in the state court, where the defendant appeared and removed the cause into the circuit court for the same district. Subsequently both parties appeared in the circuit court and submitted the cause to the circuit court upon the agreed statement of facts exhibited in the transcript.

Bonds with coupons annexed, it appears, were issued by the plaintiff Company in the sum of \$500,000, bearing interest at the rate of six per cent payable semi-annually. Sufficient appears also to show that the tax in question was a tax of five per cent upon \$15,000 of those coupons which fell due at the time specified in the agreed statement. Payment of the tax was resisted, upon the ground that the plaintiffs were not a railroad company, and the claim to recover back the money paid for the tax, with interest, is made upon the same ground. Judgment was rendered in favor of the defendant in the circuit court, and the plaintiffs sued out the present writ of error.

Errors assigned in this court are as follows: (1) That the circuit court erred in rendering judgment for the defendant. (2) That the court erred in finding that the plaintiffs were a railroad company. (3) That the court erred in holding that the plaintiffs were not protected from paying the tax by the provision in the amendatory Act. 14 Stat. at L., 139.

I. When first organized under their original charter, it is, doubtless, true that the plaintiffs were a mining and manufacturing company, covering a very large field of operations, and with some quite extraordinary powers; as, for example, they might lock and dam Little Sandy River up to their mines and property, and for that purpose they might exercise the same power

in condemning lands and property as was authorized by law for the condemnation of mill-sites.

Had the case stopped there, the question would be attended with difficulty, and perhaps would require a reversal of the judgment; but it does not stop there. Instead of that, the agreed statement shows that the name of the Company was subsequently changed to that of the Kentucky Improvement Company, and the powers and privileges of the Company were not only greatly enlarged, but were extended to objects and purposes other than those relating to mining and manufacturing. Authority is given to the Company by the 4th section of the new Act to construct one or more rail tracks from any lands owned or improved by the Corporation to convenient points on the Ohio or Little Sandy River, or both, *or to connect with other railways*, and to maintain said track or tracks, and to draw cars over the same by any suitable motive power.

Under the enlarged power conferred by the new Act, the Company may not only construct railway tracks and connect with other railways, but they may condemn and appropriate such lands and materials as may be necessary for the construction and convenient and proper use and maintenance of such railroad, without any limitation except that the same proceedings shall be had in effecting such condemnation as are required by law for the condemnation of lands and materials for turnpikes and plank roads, and that the lands condemned for any railroad track shall not exceed in width one hundred feet.

Tested by the terms of the charter, it is clear that the powers granted were more comprehensive than are usually found in railroad charters, both in respect to the routes it may establish and the lands and materials the Company may condemn and appropriate to such uses. For aught that appears to the contrary, they might construct an indefinite number of tracks in any direction from their own lands, and might connect with every other railroad in the State; and in constructing such tracks or making such connections they might, without limit, condemn and appropriate all such lands and materials as might be necessary and convenient in constructing and maintaining the same, provided the width for the railroad track did not exceed one hundred feet.

Confirmation of the proposition that the plaintiffs are a railroad company is also derived from the evidence reported, which shows that the plaintiffs, after their road was constructed and equipped with rolling stock, used it not only to transport their own products and manufactures, but as a public highway for the conveyance of freight and passengers.

Two suggestions are made by the plaintiffs in explanation of the evidence introduced to prove that the railroad was used for the public accommodation: (1) That the annual receipt from that source of employment was less than that derived from mining and manufacturing; but it is a sufficient answer to that suggestion to say that it does not appear that they did not accommodate all shippers and passengers who applied for any such services.

II. That the charter does not, in terms, authorize the Company to convey freight or pas-

sengers for hire. Suppose that is so; still it remains that power is given to the plaintiffs to construct a railroad and, if so, it must be inferred that the builders and owners of it have a right to use it, and to charge a reasonable price for its use.

Ample power to lock and dam Little Sandy River and flow the water to their property was given by the Act of incorporation, nor is there any ground to suppose that that power was taken away or withdrawn by the amendatory charter, as the latter provides that if the Company shall lock and dam that river they shall build two bridges over the river, sufficient for the accommodation of the public, at the points specified in the 8th section of the Act, which warrants the conclusion that the power to construct railroads and to lock and dam the river named are both included in the charter as amended. Enough appears to show that the plaintiffs adopted the Act changing their corporate name, and that the Company was duly organized under the new charter, and that they continued operations under it until the Company ceased to exist.

Meetings were held by the stockholders, and at an adjourned meeting they resolved to authorize the building of a railroad, and to provide locomotives, cars and other facilities for the transportation of coal and other productions to market from the canal openings to a certain landing on the Ohio River. What that distance is the resolution does not state, but it is supposed to be about twenty miles.

They also resolved that a sum not exceeding \$500,000 be raised for the purpose of building and equipping said railroad, and to afford facilities for transportation to market for the mineral and other productions of the Company's property. Officers had previously been elected, and the shareholders also empowered the president and directors to issue bonds for the amount raised, to be secured by mortgage of all their landed property and improvements, the bonds bearing six per cent interest, payable semi-annually. Bonds to that amount were accordingly issued and were secured as indicated, and it appears that the coupons taxed in this case were a part of the coupons attached to those bonds.

Two years later, the railroad was finished and opened for business, and it appears that the Company within one year and eight months transported passengers and freight over its railroad for hire to the amount of \$8,700 in addition to their own freight and passengers not paying fare.

Viewed in the light of these suggestions, it is so clear that the plaintiffs are a railroad company and that their road is a railroad, that it is not deemed necessary further to pursue the argument.

Grant that; and still it is insisted by the plaintiffs that the tax was illegally exacted, because the Company of the plaintiffs was not a railroad company indebted for any money for which bonds had been issued.

Congress enacted to the effect that any railroad indebted for any money for which bonds or other evidences of indebtedness have been issued, subject to interest, or with coupons representing interest, shall pay a tax of five per centum on the amount of all such interest or coupons. 14 Stat. at L., 138; *Barnes v. The Railroads* 17 Wall., 294-299 [84 U. S., XXI., 544, 545].

Express authority was given to the plaintiffs as an improvement Company to construct one or more rail tracks as before explained, or to connect with other railways, and to maintain said track or tracks and draw cars over the same, by any suitable motive power, before the plaintiffs as such improvement Company resolved to build said railroad and to provide locomotives, cars and other facilities for the purposes antecedently mentioned; and it was for the purpose of constructing and equipping that railroad that the shareholders of the Company resolved to raise the said sum of \$500,000, and to issue the coupon bonds for the amount. Coupon bonds were accordingly issued, and the record shows that the tax in question was assessed on \$15,000 of such coupons.

Examined in the light of these suggestions, as the case should be, and it follows that the Company of the plaintiffs was a railroad company indebted for money for which bonds had been issued.

III. Concede both of the preceding conclusions, and still the plaintiffs contend that they should recover, because they insist that the receipts of the Company derived from the public use of their railroad were insufficient to pay the semi-annual interest of the bonds, and that they are protected from such a tax by the proviso added by the 22d section of the amendatory Act. 14 Stat. at L., 139.

Nothing is shown in support of the theory of fact assumed in the proposition, except what is found in the table exhibited in the transcript. Even suppose that that is correct; it by no means follows that it will avail the plaintiffs in the present case, for several reasons: (1) Because, if the interest was, in fact, paid by the plaintiffs, it is of no consequence where they obtained the money, it being clear that in order to raise the question there must be an actual failure to make the payment. (2) Where the interest is paid, the presumption is conclusive that every other circumstance existed to justify the assessment of the tax. (3) Proof to show that the interest has never been paid is not exhibited, nor is the table referred to of a character to satisfy the court that it shows the whole amount of the pecuniary advantage which the plaintiffs derived from their railroad. Without more, these remarks are sufficient to show that each of the assignments of error must be overruled.

Judgment affirmed.

Mr. Justice Field, dissenting:

I dissent from the judgment of the court in this case. The construction of the short railway by the Company for its own use, to carry the products of its mine to the Ohio River, did not, in my opinion, convert the Improvement Company, which was organized to mine for coal, iron and other materials, into a railroad company, so as to bring it within the statute providing for a tax upon the coupons of bonds issued by such companies, and I am authorized to state that *Mr. Chief Justice Waite* and *Mr. Justice Harlan* concur with me in this opinion.

See 10 OTTO.

EASTERN KENTUCKY RAILWAY COMPANY, *Plff. in Err.*,

v.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

(See S. C., 10 Otto, 659-661.)

Improvement Company v. Slack, *ante*, 609, followed.

[No. 122.]

Argued Dec. 19, 1879. Decided Jan. 5, 1880.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. F. W. Palfrey, for plaintiff in error.

Mr. S. F. Phillips *Solicitor Gen.*, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Statutory authority was given to the plaintiff as a Railway Company to purchase, acquire and hold any line of railway, finished or unfinished, lying on or near their line or crossing the same or between the *termini* of their railway, and to make payment for such purchase or acquisition on such terms as should be agreed between the parties. Pursuant to that authority, the plaintiffs purchased all the property of the Kentucky Improvement Company, real, personal and mixed, including their franchise, subject, however, to the mortgage previously made by the grantors of their lands and improvements to secure a certain issue of bonds, amounting to \$500,000, as therein more fully set forth. Due conveyance of the same was made to it by deed dated February 28, 1870, as appears by the agreed statement of facts.

Coupons were attached to the bonds, and it appears that an internal revenue tax of two and a half per cent. was assessed thereon by the official assessor. Payment of the tax, after an unsuccessful appeal to the Commissioner, was made by the plaintiffs; and they instituted the present suit to recover back the amount paid, with interest, as having been illegally exacted. Service was made; and the parties appeared, and, having consented to the agreed statement of facts exhibited in the record, submitted the cause to the court without a jury. Hearing was had; and the court rendered judgment in favor of the defendant, and the plaintiffs removed the cause into this court.

Two errors are assigned: (1) That the court erred in finding that the grantors of the plaintiffs were a railroad company, and liable to the tax assessed upon the coupons attached to their bonds. (2) That the court erred in finding that the plaintiffs were liable for the tax assessed.

I. Railroad companies were by law made subject to an internal revenue tax for the year 1871 of two and a half per cent. on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date. 16 Stat. at L., 260.

Such taxes for the year specified in the Act cited were assessed against the plaintiffs, and the present suit was instituted to recover back the amount paid with lawful interest.

It appears by the Act of incorporation that the plaintiffs were created a body politic and

corporate for the purpose of constructing a railroad with a single or double track, with all the privileges and rights usual to such corporations. Power to make the purchase of the line of railroad constructed by the Improvement Company, as described in the opinion just read, is admitted. Nor is it necessary to enter into any explanation as to the circumstances under which the bonds of the Improvement Company were issued, as it is admitted in the agreed statement of facts filed in this case, that those circumstances are fully shown in the agreed statement of facts filed in that case.

Viewed in the light of these suggestions, it is quite clear that any discussion of the question presented in the first assignment of errors is unnecessary, except to refer to the decision in the former case, and the reasons there given for the conclusion that the Company in that case was a railroad company.

II. Suppose that is so; then it is conceded by the plaintiffs in this case that they cannot sustain their second assignment of errors which is all that need be said upon the subject.

Judgment affirmed.

ANNIE HOUGH, in her own right, and as natural guardian and next friend of JAMES H. HOUGH, *Plff. in Err.*,

v.

TEXAS AND PACIFIC RAILROAD COMPANY.

(See S. C., 10 Otto, 213-226.)

Master's liability for injuries to servants—diligence—suitable machinery—superior officer—contributory negligence.

*1. The general rule exempting the common master from liability to one servant, for injuries caused by the negligence of a fellow-servant, considered and recognized.

2. But to that rule there are numerous well de-

*Head notes by Mr. Justice HARLAN.

NOTE.—*The freedom of plaintiff from contributory negligence, necessary to entitle him to recover.* See note to Stokes v. Saltonstall, 38 U. S. (13 Pet.), 181.

Who are co-employees or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant.

"To constitute fellow-laborers, within the meaning of the doctrine which protects the master from responsibility for injuries sustained by one servant through the wrongful act or carelessness of another, it is not necessary that the servant causing and the servant sustaining the injury shall both be engaged in precisely the same, or even similar acts; nor need their rank be the same. The negligent servant may be superior to the injured servant, in his grade of employment. Bartonshill Coal Co. v. Reid, 3 Macq., 295; Blake v. Maine Cent. R. R. Co., 67 Me., 60; S. C., 35 Am. Rep., 297; Lawley v. A. R. R. Co., 62 Me., 463; S. C., 16 Am. Rep., 492; Albro v. Agawam Can. Co., 6 Cush., 75; Thayer v. St. L., A., etc., R. R. Co., 22 Ind., 26; Hornagle v. N. Y. C. & H. R. R. Co., 55 N. Y., 608; Malone v. Hathaway, 64 N. Y., 5; S. C., 21 Am. Rep., 573; Peterson v. Whitebreast C. & M. Co., 5 Iowa, 673; S. C., 32 Am. Rep., 143; McLean v. Blue Point Gravel M. Co., 51 Cal., 255; Collier v. Steinhart, 51 Cal., 116; O'Connor v. Roberts, 120 Mass., 227; Zeigler v. Day, 123 Mass., 152; Shanck v. N. C. R. R. Co., 25 Md., 462; Brown v. Maxwell, 6 Ill., 592; S. C., 41 Am. Dec., 771.

A common laborer conveyed to and from his labor by the railroad company employing him, is a co-employee of those who have charge of the train

fining exceptions, one of which arises from the obligation of the master, whether a natural person or a corporation, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

3. To that end the master, whether a natural person or a corporation, although not to be held as guaranteeing the absolute safety or perfection of machinery or other apparatus provided for the servant, is bound to observe all the care which the exigencies of the situation reasonably require, in furnishing instrumentalities adequately safe for use.

4. Those, at least, in the organization of a railroad corporation who are invested with a controlling or superior duty in that regard, represent its personality; their negligence from which the injury results is the negligence of the corporation.

5. If the servant, having knowledge of a defect in machinery, gives notice thereof to the proper officer, and is promised that such defect shall be remedied, his subsequent use of the machinery, in the belief, well grounded, that it will be put in proper condition within a reasonable time, does not, necessarily, or as matter of law, make him guilty of contributory negligence. It is for the jury to say whether he was in the exercise of due care, in relying upon such promise, and in using the machinery, after knowledge of its defective or insufficient condition. The burden of proof, in such a case, is upon the company to show contributory negligence.

[No. 79.]

Submitted Nov. 21, 1879. Decided Jan. 12, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Texas.

This action was commenced in the District Court of Harrison County, Texas, by the plaintiff in error, to recover damages for the death of her husband, while he was in the employ of the defendant. The cause was removed to the court below, where judgment was rendered for the defendant.

The case is stated by the court.

Messrs. James Turner and W. S. Herndon, for plaintiff in error:

In case of a railway company, that does all its business through agents and servants, the one above and superior to another, those superior being charged with all the powers of the master, fellow-servants are those employed under him, who obey his orders, move at his commands, and who can be removed and discharged

conveying him. Kan. Pac. R. R. Co. v. Salmon, 11 Kan., 83; Gilshannon v. Stony Brook R. R. Co., 10 Cush., 298; Seaver v. Boston & Me. R. R. Co., 14 Gray, 466; Tunney v. Midland R. R. Co., 1 L. R. C. P., 291; Russell v. Hudson R. R. Co., 17 N. Y., 134.

A fellow-servant is anyone who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the carelessness of fellow-servants, it may probably expose them to injury. McAndrews v. Burns, 30 N. J. L., 117.

A proper test is, whether the negligence of one servant was likely to inflict injury on another. Valdez v. O. & M. Ry. Co., 85 Ill., 500; Chic. & A. R. R. Co. v. Murphy, 53 Ill., 336; S. C., 5 Am. Rep., 48.

In Illinois it is held that when servants are not associated together in the discharge of their duties, where their employment does not require co-operation, and does not result in mutual contact or bring them together in such relation that they may exercise upon each other an influence promotive of safety or caution, the reason of the rule making those in different departments co-employees does not apply. C. & N. W. R. R. Co. v. Swett, 45 Ill., 197; S. C., 14 Am. Rep., 32; Ryan v. C. & N. W. R. R. Co., 60 Ill., 171; T. W. & W. R. R. Co. v. O'Connor, 77 Ill., 391; C. & N. W. R. R. Co. v. Moranda, 93 Ill., 302; S. C., 34 Am. Rep., 168.

A carpenter, working as such for a railway company, while being conveyed to or from his work, is

at his pleasure, we maintain that the chief of a department, exercising such necessary control over his inferiors, is the representative of the master, and that his negligence is the negligence of the master.

L. C. & L. Ry. Co. v. Cavens, 9 Bush (Ky.), 559; *L. & N. Ry. Co. v. Collins*, 2 Duv., 114; *R. R. Co. v. Fort*, 17 Wall., 553 (84 U. S., XXI., 739); *Lit. M. Ry. Co. v. Stevens*, 20 Ohio, 415; *Cooper v. Mullens*, 30 Ga., 146; *Ry. Co. v. Keary*, 3 Ohio St., 202; *K. P. Ry. Co. v. Little*, 19 Kan., 271.

Hough was, in no sense of the word, a fellow-servant of any person employed by the defendant in its machine or repair shop, and in no sense of the word was he a fellow-servant of the master mechanics of defendant's road, or of the foreman of its roundhouse. The Judge was in error when he charged the jury that they were fellow-servants.

Ry. Co. v. Dunham, 46 Tex., 181; *Brabbitts v. Ry. Co.*, 38 Wis., 289; *Bass v. Ry. Co.*, 36 Wis., 450; *R. R. Co. v. Fort* (supra); *Ford v. Ry. Co.*, 110 Mass., 260; *Chic. N. Ry. Co. v. Jackson*, 55 Ill., 492; *Fitzpatrick v. Ry. Co.*, 7 Ind., 436; *Chamberlain v. Ry. Co.*, 11 Wis., 248; *Snow v. Ry. Co.*, 8 Allen, 447; *Keegan v. Ry. Co.*, 8 N. Y., 180; *Lanning v. Ry. Co.*, 49 N. Y., 521; *Swainson v. Ry. Co.*, 18 Am. R. R., 569; *Chic., etc., Ry. Co. v. Gregory*, 58 Ill., 273; *Ryan v. Ry. Co.*, 60 Ill., 171; *Shear. & Redf., Neg.*, sec. 102.

If Hough knew of the defective condition of the engine and reported the defect, but continued to run it under the promise of the master mechanic that it should be repaired, he was not guilty of such contributory negligence as would prevent a recovery here.

Brabbitts v. Ry. Co., 38 Wis., 289; *Ford v. Ry. Co.* (supra).

See, Cent. L. J., Vol. 2, p. 639; *Snow v. Ry. Co.*, 8 Allen, 441; *McGrew v. Stone*, 53 Pa., 457.

Messrs. Jno. C. Brown and Casey Young, for defendant in error:

The plaintiff's counsel insists that the master mechanic, being in charge of the motive power of the road and of its repair, and having the right to control and discharge the engineers who run the locomotives, and power to determine

what engineer and what engine shall do a particular service, and when and how it shall be done, with the right to determine whether an engine needs repairs, and to order what repairs shall be made and how made; that such master mechanic is, in no sense, a fellow servant or co-employed with an engineer, and that, therefore, any negligence of the master mechanic is the negligence of the Company.

One or two of the authorities cited by the learned counsel sustain his general proposition, but the preponderance of American authority, as well as English, is against it.

Price v. Houston Direct Nav. Co., 46 Tex., 535; *Robinson v. Houston & Tex. Cent. R. R. Co.*, 46 Tex., 540; *Priestley v. Fowler*, 3 Mees. & W., 1; *Coon v. R. R. Co.*, 5 N. Y., 492; *Warner v. Erie Ry. Co.*, 39 N. Y., 468; *Columbus, etc., R. R. Co. v. Arnold*, 31 Ind., 174; *Chic., etc., R. R. Co. v. Murphy*, 53 Ill., 336; *Albro v. Canal Co.*, 6 Cush., 75; *Hard v. Vt. & Can. R. R. Co.*, 32 Vt., 473; *Merch. Ins. Co. v. Butler*, 20 Md., 42; *Ryan v. R. R. Co.*, 23 Pa., 384; *Wigmore v. Jay*, 5 Exch., 354; *Feltham v. England L. R.*, 2 Q. B., 33; *R. R. Co. v. Barber*, 5 Ohio St., 560; *Whart. Neg.*, sec. 232; *Kelley v. Norcross*, 121 Mass., 508; *Clarke v. Holmes*, 7 H. & N., 937; *Gibson v. R. R. Co.*, 63 N. Y., 452; *Whart. Neg.*, sec. 214; *Chic., etc., R. R. Co. v. Swett*, 45 Ill., 198; *Chic., etc., R. R. Co. v. Ward*, 61 Ill., 131; *Deppe v. R. R. Co.*, 38 Iowa, 592; *Ladd v. R. R. Co.*, 119 Mass., 412.

Mr. Justice Harlan delivered the opinion of the court:

Plaintiffs in error, the widow and child of W. C. Hough, deceased, seek in this action to recover against the Texas and Pacific Railway Company damages, compensatory and exemplary, on account of his death, which occurred in 1874, while he was in its employment as an engineer.

In substance, the case is this:

The evidence in behalf of the plaintiffs tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown from the track, over an embankment, whereby the whistle, fastened to the boiler, was blown or knocked out, and from the opening

not a fellow-servant of the employees running the train or repairing the track. *O'Donnell v. Allegheny Val. R. R. Co.*, 59 Pa. St., 239.

A conductor being conveyed on his employers' railroad, under instructions to proceed to a certain point and there take charge of a train, is a fellow-servant of those who have the management of the cars in which he is riding. *Manville v. C. & T. R. R. Co.*, 11 Ohio, 417. St.

If the parties are subject to the same general control, and the employment is a common one, they are co-servants, although engaged in separate and distinct departments of the service. *Ohio & M. R. Co. v. Hammersley*, 28 Ind., 371; *Col. & Ind. Cent. R. R. Co. v. Arnold*, 31 Ind., 174; *Slattery v. T. & W. Ry. Co.*, 23 Ind., 81; *Whaalan v. M. R. & L. E. R. R. Co.*, 8 Ohio St., 249; *Ry. Co. v. Lewis*, 33 Ohio St., 196; *Hodgkins v. Eastern R. R. Co.*, 119 Mass., 419; *Foster v. Minn. Cent. R. R. Co.*, 14 Minn., 360; *Coon v. Syracuse & U. R. R. Co.*, 5 N. Y., 492; *Baulec v. N. Y. & H. R. R. Co.*, 59 N. Y., 356; *S. C.*, 17 Am. Rep., 325; *Sammon v. N. Y. & H. R. R. Co.*, 62 N. Y., 251; *Kielley v. Belcher S. M. Co.*, 3 Sawy., 500; *Cooper v. M. & P. C. R. R. Co.*, 23 Wis., 688; *C. & A. R. R. Co. v. Murphy*, 53 Ill., 336; *S. C.*, 5 Am. Rep., 48; *St. L. & S. E. Ry. Co. v. Britz*, 72 Ill., 256.

Where one railway company runs trains on the track of another, the servants of either company are not co-servants of the servants of the other. *Smith v. N. Y. & H. R. R. Co.*, 19 N. Y., 127; *Carroll v. Minn. Val. R. R. Co.*, 13 Minn., 30; *N. & C. R. R. Co. v. Car-*

roll, 6 Heisk., 347; *Sawyer v. R. & B. R. R. Co.*, 27 Vt., 370; *C. R. R. Co. v. Armstrong*, 49 Pa. St., 186.

Servants of subcontractor building bridges on line of railway are not co-servants of those operating the road and managing trains. *Donaldson v. Miss. & Mo. R. R. Co.*, 18 Iowa, 280.

Servants of a contractor and those of a subcontractor are not co-servants. *Goodfellow v. B. H. & E. R. R. Co.*, 106 Mass., 461; *Curley v. Harris*, 11 Allen, 113; *Abrahams v. Reynolds*, 5 H. & N., 142; *Murphy v. Caralli*, 3 H. & C., 462; *Riley v. State L. S. S. Co.*, 29 La. Ann., 791; *S. C.*, 29 Am. Rep., 349; *Svenson v. Steamship Co.*, 57 N. Y., 108; *Young v. N. Y. C. R. R. Co.*, 30 Barb., 229; *Murray v. Currie*, 6 L. R. C. P., 24; *Hunt v. Pa. R. R.*, 51 Pa. St., 475; *Hass v. Phila. & S. M. S. Co.*, 88 Pa. St., 269; *S. C.*, 32 Am. Rep., 462.

Engineers and brakemen are in the same class or line of employment, and fellow-servants (*L. & N. R. R. Co. v. Robinson*, 4 Bush., 507; *Sherman v. Roch. & S. R. R. Co.*, 17 N. Y., 153); so are a brakeman and a switch-tender (*Slattery v. T. & W. R. R. Co.*, 23 Ind., 81); so are a car-repairer and an engine-driver having charge of a switch engine (*Chic. & A. R. R. Co. v. Murphy*, 53 Ill., 336); so are laborers on a construction train and the conductor of the same having charge of them (*Chic. & A. R. R. Co. v. Keefe*, 47 Ill., 108); so is a person employed to couple cars and the engineer and conductor having charge of them (*Wilson v. Madison, & C. R. Co.*, 18 Ind., 226); so are the engineer of a gravel train and the hands employed in loading and unloading it (*Ohio & Miss.*

thus made hot water and steam issued; scalding the deceased to death; that the engine was thrown from the track because the cow-catcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the Company's master mechanic, and of the foreman of the roundhouse at Marshall; that to the former was committed the exclusive management of the motive power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control and discharge them at pleasure; that all engineers were required to report for orders to those officers, and under their directions alone could engines go out upon the road; that deceased knew of the defective condition of the cow-catcher or pilot, and, having complained thereof to both the master mechanic and foreman of the roundhouse, he was promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but, by reason of the negligence of those officers, it was not put on the engine.

The evidence in behalf of the Company concluded to show that the engine was not defective; that due care had been exercised, as well in its purchase as in the selection of the officers charged with the duty of keeping it in proper condition; that the defective cow-catcher or pilot was not the cause of the engine being thrown from the track; that the whistle was securely fastened, and did not blow out, but the cab being torn away, the safety-valve was opened, whereby the deceased was scalded; that if any of the alleged defects existed, it was because of the negligence of the master mechanic and the foreman of the roundhouse, for which negligence the Company claims that it was not responsible.

The principal question arising upon the assignments of error requires the consideration, in some of its aspects, of the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow servant in the same employment.

"The general rule," said *Chief Justice Shaw*, in *Farwell v. R. Co.*, 4 Met., 49, "resulting

from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; and, in legal contemplation, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other."

To prevent misapprehension as to the scope of the decision, it was deemed necessary, in a subsequent portion of his opinion, to add: "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company, are questions on which we give no opinion."

As to the general doctrine to which we have adverted, very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in its practical application in the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages; what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation; who, within the true sense of the rule, or upon grounds of public policy, are to be deemed fellow-servants in the same common

R. R. Co. v. Tindall, 13 Ind., 366; *contra*, *Dobbin v. R. & D. R. Co.*, 81 N. C., 446; S. C., 31 Am. Rep., 512; so are the master machinist having charge of the machinery and control of the engineers and firemen on the railroad (*Fort v. Union Pac. R. Co.*, 2 Dill., 259); so are a trackman to follow passenger trains in a hand and car, see that the track is in order and the managers of the train (*Coon v. Syracuse & U. R. Co.*, 5 N. Y., 492); so are those running a passenger train and a laborer employed to gravel a new and unfinished track. *Boldt v. N. Y. C. R. R. Co.*, 18 N. Y., 432.

Unless they are subject to the same general control, the fact that they are engaged in the same common pursuit does not make them co-servants. *Svenson v. Steamship Co.*, 57 N. Y., 108; *Abrahams v. Reynolds*, 5 H. & N., 142.

An express agent in the employ of an express company is not a co-employee of the train hands on the train on which he travels. *Yeomans v. C. C. S. Nav. Co.*, 44 Cal., 71.

Recovery for injuries from negligence of co-servant is only precluded as against the common employer; the rule does not apply as to strangers. *Busch v. Buffalo C. R. Co.*, 29 Hun, 112; S. C., 16 Week. Dig., 417.

Where the owners of two steam boats agree to divide profits at the end of the season they are partners, but the crew of either boat are not fellow-servants of the crew of the other. *Connolly v. Davidson*, 15 Minn., 519; S. C., 2 Am. Rep., 154.

Roadmaster having charge of repairs to a culvert is a co-servant with the workmen repairing same. *Lawley v. Androscoggin R. Co.*, 62 Me., 463; S. C., 16 Am. Rep., 492.

A train hand is not a fellow-servant of a person who was engineer, conductor, superintendent and master of a gravel and material train, and had entire charge of that branch of the business on a section, with power to employ and discharge men. *Dobbin v. Richmond & D. R. Co.*, 81 N. C., 446; S. C., 31 Am. Rep., 512.

When the servant, by whose negligence other servants of the common employer have received injury, is the *alter ego* of the master and to whom everything has been left, his negligence is the negligence of the employer, for which the latter is liable. *Malone v. Hathaway*, 64 N. Y., 5; S. C., 21 Am. Rep., 573; *Corcoran v. Holbrook*, 59 N. Y., 517; S. C., 17 Am. Rep., 369; *Murphy v. Smith*, 19 C. B. N. S., 361; *Laning v. N. Y. C. R. Co.*, 49 N. Y., 521; S. C., 10 Am. Rep., 417; *Siegel v. Schantz*, 2 T. & C. (N. Y.), 353; *Wright v. N. Y. C. R. Co.*, 28 Barb., 80; *Flike v. B. & A. R. Co.*, 53 N. Y., 551; S. C., 13 Am. Rep., 545; *Brothers v. Carter*, 52 Mo., 373; S. C., 14 Am. Rep., 424; *Allen v. New Gas Co.*, 1 L. R. Ex. D., 251; *Grizzle v. Frost*, 3 F. & F., 622; *Munn v. Oriental Print Works*, 11 R. L., 187; *Brickner v. R. R. Co.*, 46 N. Y., 672; affg. 2 Lans., 506; *Brabbits v. R. R. Co.*, 38 Wis., 289; *Tarlant v. Webb*, 18 C. B., 797; *Ford v. Fitchburg R. Co.*, 110 Mass., 240; S. C., 14 Am. Rep., 598; *Kelley v. Norcross*, 121 Mass., 508.

adventure or undertaking, are questions in reference to which much contrariety of opinion exists in the courts of the several States. Many of the cases are very wide apart in the solution of those questions.

It would far exceed the limits to be observed in this opinion, and it is not essential in this case to enter upon an elaborate or critical review of the authorities upon those several points. Nor shall we attempt to lay down any general rule applicable to all cases involving the liability of the common employer to one *employé* for the negligence of a *co-employé* in the same service. It is sufficient to say, that, while the general doctrine, as stated by *Chief Justice Shaw*, is sustained by elementary writers of high authority, and by numerous adjudications of the American and English courts, there are well defined exceptions, which, resting as they clearly do upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

One and, perhaps, the most important of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master.

In considering what dangers the servant is presumed to risk, the court, in *R. R. Co. v. Fort*, 17 Wall., 553, 557 [84 U. S., XXI., 739, 740], said: "But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparations to an *employé* in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in

the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate *employés* of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they fail to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction."

A railroad corporation may be controlled by competent, watchful and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the Company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its *employés*, an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.

To guard against misapplication of these principles, we should say that the Corporation is not to be held as guarantying or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of *employés*. Its duty in that respect to its *employés* is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by *employés*.

The principles we have announced are sustained by the great weight of authority in this country as an examination of adjudged cases and elementary treatises will abundantly show.

A leading case is *Ford v. R. R. Co.*, 110 Mass., 241. That was an action by an engineer to recover damages for injuries caused by the explosion of his engine, which was old and out of repair. His right to recover was disputed, upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs.

But the court said: "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who

enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require." In a subsequent portion of the same opinion, the court said: "The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep, its machinery in safe condition."

The same views, substantially, are expressed by Mr. Wharton in his treatise on the Law of Negligence. The author (sec. 211) says: "The question is that of duty; and, without making the unnecessary and inadequate assumption of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of an employer inviting *employees* to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use." Again (sec. 212): "At the same time we must remember that where a master, personally or through his representatives, exercises due care in the purchase or construction of buildings and machinery, and in their repair, he cannot be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care, either by himself or his representatives. The duty of repairing is his own; and, as we shall hereafter see, the better opinion is, that he is directly liable for the negligence of agents when acting in this respect in his behalf. If the master 'knows, or, in the exercise of due care, might have known,' that * * * his structures or engines were insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty." Still further, in reference to the obligation upon the master to supply suitable machinery for working use (sec. 232 a): "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases in which it is impossible for it to be negligent personally. But if this be true, it would relieve corporations from all liability to servants. The true view is, that, as the corporation can act only through superintending officers, the negligences of those officers, in respect to other servants, are the negligences of the corporation."

The current of decisions in this country is in the same direction; as will be seen from an examination of the authorities, some of which are cited in the note at the end of this opinion.

It is, however, insisted that the defense is sustained by the settled course of decisions in the English courts. It is, undoubtedly, true that the general doctrine of the immunity of the master from responsibility for injuries re-

ceived by his servant from a fellow-servant in the same employment has, in some cases, been carried much further by the English than by the American courts. But we cannot see that, upon the precise question we have been considering, there is any substantial conflict between them. That question was not, as is supposed, involved, it certainly was not decided, in *Priestley v. Fowler*, 3 Mees. & W., 1. The decision there was placed by Lord Abinger partly upon the ground that, in the "sort of employment especially described in the declaration [transporting goods of the master by one servant, in a van, conducted by another of his servants], * * * the plaintiff must have known as well as the master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." But even in that case, although the court declared it was not called upon to decide how far knowledge upon the part of the master of vices or imperfections in the carriage used by the servant injured would make him liable, it was said: "He (the master) is, no doubt, bound to provide for the safety of the servant in the course of his employment, to the best of his judgment, information and belief."

The question came before the House of Lords in *Patterson v. Wallace*, 1 Macq. H. L. Cas., 748, and again, in 1858, in *Coal Co. v. Reid*, 3 Macq. H. L. Cas., 266. In the last named case, Lord Cranworth said that it was a principle, established by many preceding cases, "That when a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." This he held to be the law in both Scotland and England. At the same sitting of the House of Lords, *Coal Co. v. McGuire*, 3 Macq. H. L. Cas., 307, was determined. In that case, Lord Chancellor Chelmsford delivered the principal opinion, concurring in what was said in the *Reid* case. After referring to the general doctrine as announced in *Priestley v. Fowler*, and recognized subsequently in other cases in the English courts, he said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service,' or 'common employment,' and, perhaps, it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the fellow-servants are fellow-laborers in the same work, because although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him."

Upon the same occasion, Lord Brougham, referring to the remark of a Scotch Judge, to the effect that an absolute and inflexible rule, releasing the master from responsibility in every

case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said: "But, my Lords, it is utterly unknown to the laws of England also. To bring the case within the exemption, there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that employment." *Coal Co. v. Reid*, 3 Macq. H. L. Cas., 313.

An instructive case is *Clarke v. Holmes*, decided in 1862, in the Exchequer Chamber, upon appeal from the Court of Exchequer, 7 Hurl. & N., 937. There, the plaintiff was employed by the defendant to oil dangerous machinery, and he was injured in consequence of its remaining unfenced. He had complained of the condition of the machinery, and the manager of the defendant, in the latter's presence, promised that the fencing should be restored. In the course of the argument, counsel for the defendant relied upon *Priestley v. Fowler*, claiming it to have decided that whenever a servant accepts a dangerous occupation he must bear the risk. He was, however, interrupted by Cockburn, *C. J.*, with the remark, "That is, whatever is fairly within the scope of the occupation, including the negligence of fellow-servants; here, it is the negligence of the master." Crompton, *J.*, also said: "It cannot be made part of the contract, that the master shall not be liable for his own negligence."

In the opinion delivered by Cockburn, *C. J.*, it was said: "I consider the doctrine laid down by the House of Lords, in the case of *Coal Co. v. Reid*, as the law of Scotland with reference to the duty of a master, as applicable to the law of England also, namely: that when a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur." Again, in the same opinion: "The rule I am laying down goes only to this, that the danger contemplated on entering into the contract shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had a right to expect that it would be kept."

Byles, *J.*: "But I think the master liable on the broader ground, to wit: that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. * * * The master is neither, on the one hand, at liberty to neglect all care; nor, on the other, is he to insure safety, but he is to use due and reasonable care. * * * Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow-servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable."

To the same effect is the recent case of *Murphy v. Phillips*, decided in 1876 in the Exchequer Division of the High Court of Justice, 35 L. Times (N. S.), 477.

See 10 OTTO.

U. S., Book 25.

It is scarcely necessary to say that the jury were not correctly informed by the court below as to the legal principles governing this case. It is impossible to reconcile the general charge or the specific instructions with the rules which we have laid down. They were, taken together, equivalent to a peremptory instruction to find for the Company. The jury may have believed, from the evidence, that the defects complained of constituted the efficient proximate cause of the death of the engineer; that such defects would not have existed had the master mechanic and foreman of the roundhouse exercised reasonable care and diligence in the discharge of their respective duties touching the machinery and physical appliances supplied to *employés* engaged in running trains; and that the deceased was not chargeable with contributory negligence; yet, consistently with any fair interpretation of the charge, and the specific instructions, they were precluded from finding a verdict against the Company.

One other question, arising upon the instructions, and which has been discussed with some fullness by counsel, deserves notice at our hands. It is contended by counsel that the engineer was guilty of such contributory negligence as to prevent the plaintiffs from recovering. The instruction upon that branch of the case was misleading and erroneous.

The defect in the engine, of which the engineer had knowledge, was that which existed in the cow-catcher or pilot. It is not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect, was of such a character that he should have become advised of it while using the engine on the road. But he did have knowledge of the defective condition of the cow-catcher or pilot, and complained thereof to both the master mechanic and the foreman of the roundhouse. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consequence to the complaint made by the engineer, followed, as it was, by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the Company, although he may have been justified in relying upon those assurances.

If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the Company, he would, undoubtedly, have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But "There can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." *Shearman & R. Negl.*,

sec. 96; *Conroy v. Iron Works*, 62 Mo., 35; *Patterson v. R. R. Co.*, 76 Pa., 389; *LeClair v. R. R. Co.*, 20 Minn., 9; *Brabbits v. R. W. Co.*, 38 Mo., 289; *Ford v. Fitchburg R. R. Co.* 110 Mass., 240. "If the servant," says Mr. Cooley, in his work on Torts, 559, "having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks."

And such seems to be the rule recognized in the English courts. *Holmes v. Worthington*, 2 Fos. & F., 533; *Holmes v. Clarke*, 6 Hurls. & N., 349; *Clarke v. Holmes*, 7 Hurls. & N., 937. We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the Company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances and as matter of law, absolutely conclusive of want of due care on his part. *Ford v. R. R. Co.*, 110 Mass., 261; *Lanning v. R. R. Co.*, 49 N.Y., 521. In such a case as that here presented, the burden of proof to show contributory negligence was upon the defendant. *R. R. Co. v. Gladmon*, 15 Wall., 401 [82 U. S., XXI., 114]; *Whart. Negl.*, sec. 423, and authorities there cited in n. 1; *R. R. Co. v. Horst*, 93 U. S., 291 [XXIII., 898].

Our attention has been called to two cases determined in the Supreme Court of Texas and which, it is urged, sustain the principles announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of positive statute, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts.

*The judgment is reversed and the cause remanded, with directions to set aside the verdict and award a new trial, and for such other proceedings as may be consistent with this opinion.**

Cited.—107 U. S., 109, 459; 109 U. S., 483; 111 U. S., 319; 4 Hughes, 188, 189, 198, 201; 1 McCrary, 519, 520; 3 McCrary, 364; 33 Hun, 459; 13 N. W. Rep., 352; 21 N. W. Rep., 8; 50 Conn., 460; 47 Am. Rep., 656; 107 Ill., 44; 47 Am. Rep., 429; 31 Minn., 248; 47 Am. Rep., 787; 84 N. C., 314; 37 Am. Rep., 349; 40 Ohio, St., 148; 48 Am. Rep., 672; 18 S. C., 273; 44 Am. Rep., 577; 55 Vt., 93; 45 Am. Rep., 596.

* NOTE.—73 N.Y., 40; 49 *Id.*, 590; 53 *Id.*, 551; 59 *Id.*, 517; 13 Allen, 440; 48 Me., 116; 66 *Id.*, 425; 3 Dillon, 321; 55 Ill., 492; 45 *Id.*, 197; 60 *Id.*, 175; 8 Allen, 441; 1 Coldw., 613; 38 Wis., 293; 78 Pa. St., 32; 46 Mo., 169; 20 Minn., 9; 3 Sawyer, 444; *Wharton, Negligence* (2d ed.), secs. 199-242 and notes.

ORLANDO B. DICKERSON, Survivor, *Plff.*

in Err.,

v.

CALVIN COLGROVE ET AL.

(See S. C., 10 Otto, 578-584.)

Estoppel—by letter—legal defense—quitclaim.

1. He who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

2. An estoppel *in pais* in regard to real estate may be created by letter, disavowing all intention to claim the same.

3. Such defense is available at law, as well as in equity.

4. A grantee by deed of quitclaim is not a *bona fide* holder.

[No. 118.]

Argued Dec. 19, 1879. Decided Jan. 12, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is stated by the court.

Messrs. George W. Lawton, Edward Bacon and J. B. Fitzgerald, for plaintiff in error:

If there is no more than an equitable estoppel, it is without effect in this action of ejectment; but there is not even an equitable estoppel here.

Oaksmith's Lessee v. Johnston, 92 U. S., 343 (XXIII., 682); *Brant v. Va. Coal & Iron Co.*, 93 U. S., 327 (XXIII., 927); *Hayes v. Livingston*, 34 Mich., 384; *Branson v. Wirth*, 17 Wall., 41 (84 U. S., XXI., 569); *Morgan v. R. R. Co.*, 96 U. S., 716 (XXIV., 743); *Conrad v. Long*, 33 Mich., 80; *Walker v. Walker*, 9 Wall., 755 (76 U. S., XIX., 819).

Messrs. Hughes, O'Brien & Smiley, for defendants in error:

The letter of April 1, 1867, operates as an estoppel upon Chauncey and his grantee, the plaintiff.

Faxon v. Faxon, 28 Mich., 159; *Harkness v. Toulmin*, 25 Mich., 80; *Truesdail v. Ward*, 24 Mich., 117; *Gregg v. Von Phul*, 1 Wall., 281 (68 U. S., XVII., 537); *Swain v. Seamens*, 9 Wall., 273 (76 U. S., XIX., 560); *Stowe v. U. S.*, 19 Wall., 14 (86 U. S., XXII., 144); *Lyon v. Pollock*, No. 78, Oct. Term, 1878 (*ante*, 265).

If Edwin Chauncey cannot assert this title against the defendants, his grantee cannot.

First. For the reason that the plaintiff, his grantee, took by quitclaim deed, and one who purchases by quitclaim cannot be a *bona fide* purchaser, but takes with notice of any equity that exists against the land in favor of other persons.

Villa v. Rodriguez, 12 Wall., 339 (79 U. S., XX., 410); *May v. LeClaire*, 11 Wall., 232 (78 U. S., XX., 53); *Oliver v. Piatt*, 3 How., 363.

Second. The defendants were in possession of this property, and that was sufficient to put the plaintiff upon inquiry as to all the rights and equities which the defendants had in the property.

Russell v. Sweezey, 22 Mich., 236.

This matter of estoppel may be taken advantage of in law as well as in equity.

Durham v. Alden, 20 Me., 228; *Rangeley v.*

NOTE.—*Estoppel in pais*. See note to *Stowe v. U. S.*, 86 U. S., XXII., 146.

Spring, 21 Me., 137; *Hatch v. Kimball*, 16 Me., 146; *Mariner v. Railroad Co.*, 26 Wis., 84; *Brown v. Bowen*, 30 N. Y., 519; *Copeland v. Copeland*, 28 Me., 525; *Stevens v. McNamara*, 36 Me., 176; *Bigelow v. Foss*, 59 Me., 162; *McCune v. McMichael*, 29 Ga., 312; *Beaupland v. McKeen*, 28 Pa., 124; *Shaw v. Beebe*, 35 Vt., 205; *Brown v. Wheeler*, 17 Conn., 345; *Barham v. Turbeville*, 1 Swan, 437.

The authorities which object to the doctrine, place their objection upon the ground that the Statute of Frauds requires conveyances to be by deed or in writing.

See, *Hayes v. Livingstone*, 34 Mich., 384; *Big Est.*, 534, 535, 2d ed.

This objection cannot apply to this case, as here the matter relied upon rests in writing.

Mr. Justice Swayne delivered the opinion of the court:

This is an action of ejectment prosecuted in the court below by the plaintiff in error and a co-complainant who died during the progress of the suit. The parties agreed, in writing, to submit the case to the court without the intervention of a jury. The court found the facts. So far as it is necessary to state them, they may be thus summarized: Micajah Chauncey owned the land in controversy. He died on the — day of February, 1853, leaving two children, Edmund Chauncey and Sarah Kline. They were his only heirs at law. He is the common source of title of all the parties in this litigation. On the 3d of March, 1853, John Kline and Sarah, his wife, conveyed by warranty deed the entire premises to Lowell Morton. The deed was duly recorded on the 6th of March, 1854, and on the 1st of April, 1854, Lowell Morton entered into possession of the premises. He and the defendants have ever since been in actual possession, claiming to own and hold the property as tenants in common. The latter were in possession at the commencement of this suit, claiming title through conveyances from Lowell Morton. Prior to the 1st of April, 1856, Lowell Morton learned that Edmund Chauncey was one of the children of Micajah Chauncey, and that he lived in California. Whereupon Lowell Morton procured Eleazer Morton to write to Edmund Chauncey to learn whether he made any claim to the premises. On the 1st of April, 1856, Edmund Chauncey, still living in California, addressed a letter to his sister, Sarah Kline, then living in Michigan, wherein he disavowed, in strong terms, the intention ever to assert such a claim.

The contents of this letter subsequently came to the knowledge of Lowell Morton, who thereafter conveyed to the defendants by warranty deeds. Under these deeds they have since held and claimed title, and have occupied and improved the property. On the 9th of July, 1865, Edmund Chauncey conveyed the undivided half of the premises, by quitclaim deed, to Orlando B. Dickerson and James Witherell. On the 1st of May, 1868, Witherell conveyed all his right, title and interest to William W. Wheeler, one of the original plaintiffs, who died since the commencement of this action. The suit was instituted on the 6th of March, 1873. Lowell Morton and the defendants had then been in possession eighteen years and eleven months. The court below held, as conclusions of law, that

the action was barred by the Statute of Limitations of Michigan of 1863, and by an estoppel *in pais*, and gave judgment accordingly. The plaintiff thereupon sued out this writ of error.

Both the conclusions of law are relied upon as errors for the reversal of the judgment. Our remarks will be confined to the point of estoppel.

This defense is founded upon the letter of Edmund Chauncey. The contents of the letter of Morton to which it refers, are not given in the finding of facts, but the subject of that letter and the inquiry which it made appear clearly in the letter of Chauncey. He said: "Mr. Morton wrote me a letter. He wanted to know if I intended to claim any of the Conger farm," meaning the premises in controversy. "You can tell Mr. Morton for me, he need not fear anything from me. Thank God, I am well off here, and you can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it." The phrase, "I intended to give," etc., implies that he knew his half of the farm had already been sold to Morton, and that he could not, therefore, give his sister, to whom the letter was addressed, any part of that property. It does not appear that there was any other property held by them as coparceners. He says further, that he intended to give her more if she needed it. All this was communicated to Lowell Morton. What was the effect upon him? He was lulled into security. He took no measures to perfect his title, nor to procure any redress from the Klines, who had conveyed and been paid for the whole of the property while they owned but the half. On the contrary, he gave thereafter deeds of warranty to all the defendants—who are sixty-two in number—and he and they occupied and improved the premises down to the commencement of this suit. Between that time and the date of the letter was a period of nearly seventeen years. What improvements were made and how far the property had risen in value are not disclosed, nor does it appear what stimulated Chauncey to violate his promise and commence this attack on the defendants.

The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked. Here, according to the finding of the court, the time of adverse possession lacked but a year and a month of being twenty years, when, it is conceded the statutory bar would have been complete.

In *Faxon v. Faxon*, 28 Mich., 159, a mortgage, holding several mortgages, prevailed on a

son of the deceased mortgagor, then intending to remove to a distance, to remain on the premises and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held to be estopped by his assurances upon which the son had acted. The court said: "The complainant may have estopped himself without any positive agreement, if he intentionally led the defendants to do or abstain from doing anything involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages. In *Harkness v. Toulmin*, 25 Mich., 80 and *Truesdail v. Ward*, 24 Mich., 117, this principle was applied; in the former case, to the extent of destroying a chattel mortgage; and in the latter, of forfeiting rights under a land contract, where parties were led to believe they were abandoned. There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." Cooley, *Justice*, was inclined to doubt the sufficiency of the proof, but said, finally: "His (the mortgagee's) assurances have undoubtedly been relied upon and acted upon by the defendants, and, considering the great lapse of time without any claim under the mortgages on the part of the complainant, I am not disposed to dissent from the conclusion of my brethren." The case before us arose, also, in Michigan. In *Evans v. Snyder*, 64 Mo., 516, the heirs assailed an administrator's sale. No order of sale could be found. This was held to be a fatal defect. But the Supreme Court of the State held that where they stand silently by for years, while the occupant was making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, his heirs would be estopped from afterwards asserting their claim. Here, as by *Judge Cooley*, stress is laid upon the lapse of time. This is also a feature of the case in hand.

Other authorities to the same effect are very numerous. They may be readily found. It is unnecessary to extend this opinion by referring to them.

We think the facts disclosed in the record make a complete case of estoppel *in pais*.

But it is said this objection to the plaintiff's claim is not available at law, and must be set up in equity.

"This is certainly not the common law. Littleton says: 'And so a man can see one thing in this case, that a man shall be estopped by matter of fact, though there be no writing, by deed or otherwise.'" Lord Coke, commenting hereon, gives an instance of estoppel by matter in fact—this very case of partition. Co. Litt., 356, sec. 667. And such an award has been held sufficient to estop a party against whom ejectment was brought. *Doe v. Rosser*, 3 East, 15." *Brown v. Wheeler*, 17 Conn., 345, 353.

In *Cincinnati v. White*, 6 Pet., 431, the proprietors of the city plat, in 1789, dedicated the ground between Front Street and the Ohio River to the public for commercial and other purposes. The legal title had not then emanated from the Government of the United States. In this state of things the Statute of Limitations does not run. White long subsequently acquired the legal title and brought ejectment for the premises. This court said (p. 441): "This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession, and whatever takes away this right of possession will deprive him of the remedy by ejectment. *Adams, Ej.*, 32; *Stark.*, part 4, 505-507." This is the rule laid down by Lord Mansfield, in *Atkyns v. Horde*, 1 Burr., 119. "Ejectment," says he, "is a possessory remedy, and only competent where the lessor of the plaintiff may enter, and every plaintiff in ejectment must show a right of possession as well as of property." If the plaintiff in the present case was not entitled to possession, how, according to this authority, could he recover? If he had recovered, and a court of equity would have enjoined him from executing the judgment by a writ of possession, we ask, again, how could he recover in this action? Is not the concession that relief could be had in equity fatal to the proposition we are considering? In *Stoddard v. Chambers*, 2 How., 284, it was said by this court: "On a title by estoppel, an action of ejectment can be maintained." We do not overlook the fact that a land claim had been conveyed before it was confirmed by an Act of Congress to the assignor and his legal representatives. It was held that on such confirmation the legal title became vested in the former, "and inured, by way of estoppel, to his grantee and those who claimed by deed under him." In that case, as in this, there was no formal transfer of the title. The transfer was made, as under a Statute of Limitations, when the bar is complete, by operation of law. *Leffingwell v. Warren*, 2 Black, 599 [67 U. S., XVII., 261]. Why may not a like transfer be held to have been made in this case? The reason given for the rule of inurement and estoppel by virtue of conveyances is, that it avoids circuitry of action. Does not the same consideration apply, with equal force, in cases of estoppel *in pais*? Why is it necessary to go into equity in one case and not in the other?

It has never been held that the Statute of Frauds applies to cases of inurement, and it has been conceded that it does not affect cases of dedication. Where is the difference in principle in this respect between those cases and the one before us? But here this point cannot arise, because the promise relied upon was in writing. In *Cincinnati v. White* [*supra*], this court speaking of the dedication there in question, said: "The law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication," and that a grant might have been presumed, "if that had been necessary, and the fee might be considered in abeyance until a competent grantee appeared to receive it; which was as early as the year 1802, when the city was incorporated." Here there was a grantee capable of taking the fee all the time from the date of the letter. The common law is reason dealing by the light of experience with human affairs. One of its merits is that it

has the capacity to reach the ends of justice by the shortest paths.

The passage of a title by inurement and estoppel is its work without the help of legislation. We think no sound reason can be given why the same thing should not follow in cases of estoppel *in pais* where land is concerned.

This subject has been carefully examined in Bigelow on Estoppel, pp. 603, 606, 607. The learned author comes to no final conclusion whether in cases like this the defense may be made at law, or whether a resort to equity is necessary. Such is our view. Whether the title passed or not, it was fatal to the action, that the plaintiff was not entitled to possession of the premises.

Chauncey conveyed to the plaintiff in error by deed of quitclaim. He is not, therefore, a *bona fide* purchaser. *Oliver v. Piatt*, 3 How., 333; *May v. Le Claire*, 11 Wall., 217 [78 U. S., XX., 50]. Morton and the defendants were in possession. For both these reasons, he took whatever title he acquired subject to all the rights, legal and equitable, of Morton and of the defendants, who deraigned their titles from the latter.

The judgment of the Circuit Court is affirmed.

Cited—101 U. S., 499; 102 U. S., 73, 570; 19 Blatchf. 97.

NATIONAL SAVINGS BANK OF THE DISTRICT OF COLUMBIA, *Plff. in Err.*,

v.

WILLIAM H. WARD.

(See S. C., 10 Otto, 195-208.)

Attorney at law, liability of.

*1. Attorneys, employed by the purchaser of real estate to examine the title to the same prior to the conveyance, impliedly contract with their employer to exercise reasonable care and skill in the performance of the undertaking.

2. Reasonable care and skill is also required by law, of an attorney, when employed to investigate the title to real estate with a view to ascertain whether it is a safe and sufficient security for a loan of money, and in either case if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and loss ensues to his employer from such negligence or want of care and skill, he may be held liable to his employer for the consequences of such negligence.

3. When a person adopts the legal profession and assumes to exercise its duties in behalf of another, for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties, and if injury results to the client from the want of such care and skill, the attorney may be held to respond in damages to his client for the injury sustained.

4. Proof of employment and the want of reasonable care and skill in the performance of the stipulated service are prerequisites to the maintenance of the action, and those matters must be alleged and proved.

5. Legal advice often becomes necessary in purchasing and conveying real estate, and it is well settled law that an attorney may be held liable to his client for negligence or want of reasonable care and skill in making such an investigation, whether the client be the purchaser or the grantor.

6. Where there is neither fraud, falsehood nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of the designated service is to the client and not to a third party; the rule being that the attorney, where no such wrongful elements exist, is not liable for the want of reasonable care and skill at the suit of anyone between whom and himself the

relation of attorney and client does not in some manner exist.

7. Cases where fraud and collusion are alleged and proved constitute a well recognized exception to the general rule; but where the cause of action consists merely in the charge of the want of reasonable care and skill in the performance of a professional duty, the attorney is only liable to his client.

8. Actions for negligence, where the act of negligence imputed is one immediately dangerous to the lives of others, stand upon a different footing, and the rule in such cases is that the wrong-doer may be liable to the injured party whether there be any privity of contract between them or not.

9. Apothecaries, who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, become liable to all persons who without fault on their part are injured by using it, as such medicine, in consequence of the false label.

10. Surgeons who treat a patient unskillfully may be liable to the injured party as wrong-doers, even though it was the father or some friend or third person who contracted with the surgeon to perform the service.

11. Liabilities of the kind are not infrequent, but where the wrongful act is not of a dangerous character, and was not performed pursuant to a legal duty, the negligent party is in general liable only to the person with whom he contracted, and upon the ground that negligence is a breach of the contract.

12. Decided cases, in great numbers, fully sustain these several propositions.

13. None of these, however, give any support to such an action where it appears, as in this case, that the plaintiffs never employed the defendant to investigate the title or make the report, and that he never performed any such service at their request or in their behalf. Instead of that, he was employed by the claimant of the lot, and was paid for his services by his employer.

14. Some evidence of usage was introduced, but the court held that usage will not make a contract where none was made by the parties, and that the ruling of the court below in that regard is correct.

[No. 142.]

Argued Jan. 8, 1880. Decided Jan. 19, 1880.

ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. R. Ross Perry, for plaintiff in error.

Messrs. Joseph H. Bradley and John J. Johnson, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Attorneys, employed by the purchasers of real property to investigate the title of the grantor, prior to the purchase, impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. *Add. Cont.*, 6th ed., 400.

Like care and skill are also required of attorneys when employed to investigate titles to real estate, to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. *Add. Torts*, Wood's ed., 615.

Pursuant to that rule of law the plaintiffs sued the defendant, and alleged as the cause of action that they retained and employed him to examine and ascertain the title of the possessor of the premises described in the declaration,

and to report to them the nature and extent of his title to the same; and they allege that he, the defendant, accepted the employment, and reported to them that the title of the possessor of the premises was good and unincumbered.

Their theory, as alleged in the declaration, is that they procured that report with a view to the making of a loan, and they allege that upon the faith and credit of it they loaned the sum of \$3,500 to the pretended owner of the premises, and accepted as security for the same a trust-deed of the property, whereas the borrower of the money was insolvent and had no title whatever to the premises, as fully and explicitly appears by a prior deed of conveyance duly recorded.

Process was duly served, and the defendant appeared and pleaded the general issue, which was duly joined by the plaintiffs. Continuance followed, and at the opening of the next Term the parties went to trial, and the verdict and judgment were in favor of the defendant. Exceptions were filed by the plaintiffs, and they sued out the present writ of error.

Six errors are assigned in this court, of which three will be separately examined. They are as follows: (1) That the court erred in ruling that some privity of contract, arising from an actual employment of the defendant by the plaintiffs, is necessary to enable the latter to maintain the action. (2) That the court erred in holding that the evidence introduced did not establish such a privity of contract between the parties as entitled the plaintiffs to recover. (3) That the court erred in instructing the jury that upon the whole evidence the verdict should be for the defendant.

Evidence was introduced by the plaintiffs tending to prove that the defendant is an attorney at law doing business in the city, and that he held himself out to the public as a person skilled in the examination of titles to real estate situated in the District. That the claimant of the lot described in the transcript employed the defendant, in his professional character, to examine his title to that lot, and to report to him the condition of the same, and that the defendant, pursuant to that employment, reported to his employer that his title to the lot is good and that the property is unincumbered, the report being signed by the defendant and his son.

It is not pretended by the plaintiffs that they ever employed the defendant to examine the title to the lot, and it appears that the report was made at the sole request of the claimant of the lot, without any knowledge on the part of the defendant as to the purpose for which it was obtained. All that is conceded by the plaintiffs; but they gave evidence to show that the claimant of the lot presented the certificate to certain brokers, and employed them to negotiate a loan upon the property in his favor for \$3,500, on the faith of that certificate. Detailed statement is given in the transcript, of the steps taken by the brokers to obtain the required loan, the substance of which is, that they required the party to give a negotiable note for the amount, payable in one year, with ten per cent. interest, and that he and his wife should execute a trust deed of the lot to them as trustees to secure the payment of the note when due.

Preliminaries being arranged, the brokers ap-

plied to the plaintiffs for the loan and obtained the same, giving the note and deed of trust with the certificate as security for the payment. Before accepting the papers, the plaintiffs, through their agent, required the brokers to sign the name of the borrower to the formal application for the loan, as exhibited in the transcript, and that the certificate as to the title should be continued to the date of the transaction.

Throughout, the negotiation for the loan was conducted entirely by the brokers with the plaintiffs, and it was the borrower who procured the second certificate from the defendant; the evidence showing that the defendant never came in contact either with the plaintiffs or the brokers.

Payment of the note was not made at maturity, and when it was attempted to sell the premises under the trust-deed, it was discovered that the certificates were untrue, and that the grantors, on the 13th of March previous, had conveyed the premises in fee simple, by deed duly executed and recorded.

Attorneys at law are officers of the court, admitted as such by its order; but it is a mistake to suppose that they are officers of the United States, as they are neither elected or appointed in the manner prescribed by the Constitution for the election or appointment of such officers. *Ex parte Garland*, 4 Wall., 333, 378 [71 U. S., XVIII., 366, 370].

When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained. Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be held responsible to his client for every error of judgment in the conduct of his client's cause. Instead of that, the rule is, that if he acts with a proper degree of skill and with reasonable care and to the best of his knowledge, he will not be held responsible. *Bowman v. Tallman*, 27 How. Pr., 212.

If he fails in any of these respects he may, and sometimes does, not only forfeit all claim for compensation, but may also render himself liable to his client for any damage he may sustain from such neglect. Such liabilities frequently arise, and an attorney may also be liable to his client for the consequences of his want of reasonable care or skill in matters not in litigation. Business men not infrequently seek legal advice in making or receiving conveyances of real property, and it is well settled that an attorney may be liable to his client for negligence or want of reasonable care and skill in examining titles in such cases, whether the error occurs in respect to the title of property purchased or in the covenants in the instrument of conveyance, where the property is sold.

Where the relation of attorney and client exists, there is seldom any serious difficulty in determining whether the client has or has not a cause of action, or its nature and extent if one

exists. Criteria of standard character are established in legal decisions by which every such controversy may be determined; but in the case before the court, the defendant was never retained or employed by the plaintiffs, nor did they ever pay him anything for making the certificates, nor did he ever perform any service at their request or in their behalf.

Neither fraud nor collusion is alleged or proved; and it is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same or to whom they were to be presented. None of those matters are controverted; but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he, the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.

Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as used in this country; and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence and skill. Authorities everywhere support that proposition; but attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard. Unless the client is injured by the deficiencies of his attorney, he cannot maintain any action for damages; but if he is injured, the true rule is that the attorney is liable for the want of such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.

Both parties concur in these suggestions; but the defendant insists that, in order that such a liability may arise, there must be some privity of contract between the parties to enable the plaintiffs to maintain the action; that, inasmuch as the defendant was never retained or employed by the plaintiffs, and never rendered any service at their request or in their behalf, he cannot be held liable to them for any negligence or want of reasonable care, skill or diligence in giving to a third party the certificates in question.

Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. *Sher. & Redf. Negl.*, sec. 215. Conclusive support to that rule is found in several cases of high authority. *Fish v. Kelly*, 17 C. B. (N. S.), 194.

Argument, to show that the direct question was involved in that case, is unnecessary, as the affirmative of the proposition sufficiently ap-

pears in the head note, which is as follows: That an attorney is not liable to an action for negligence, at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of the deed.

Although the inquiry was addressed directly to the defendant, and the case shows that the answer was given to the person making it, the court held, *Erie, C. J.*, giving the opinion, that that there was no relation between the parties from which any contract could be implied, nor any relation between the parties from which any duty could arise. Mention is then made of the fact that the defendant was the solicitor of the trustees of a certain estate, and that the plaintiff was a workman in the employ of the trustees; from which the court deduced the conclusion that the parties did not stand in such a relation to each other as to make it any part of the duty of the defendant to give the plaintiff any professional advice. His answer was entirely erroneous; but the court decided that he could not be held responsible, unless it could be shown that at the time he made it he knew it to be false.

Sufficient appears, even in that case alone, to show that the ruling of the subordinate court is correct, but it is a mistake to suppose that the proposition is without other support than what is derived from the reasons there assigned for the conclusion. Prior to that, the same question was decided by the highest court of the same country in the same way. Application to an insurance company was made by a certain party for a loan of money, which the company agreed to make if the party would insure his life, and assign to them the policy and give sureties for the payment of interest on the loan. It appears that the plaintiffs became sureties for the applicant, and that the defendant, a law agent employed by the principal who applied for the loan, drew up the papers in the transaction, among which was one intended for the security of the sureties, which proved to be incomplete. Loss was sustained by the sureties, and they brought suit against the law agent, charging that the loss was occasioned by his negligence and want of skill and other fault. Appearance was entered by the defendant, and he denied the alleged employment. Judgment was rendered for the plaintiffs in the lower court, and the defendant appealed to the House of Lords, where the appeal was argued by very able counsel. Opinions *seriatim* were delivered by the law Lords. In substance and effect, Lord Campbell said that he never had any doubt of the soundness of the proposition that would maintain the action in such a case, and added, that there must be a privity of contract between the parties, which was not proved in that case.

No attempt was made by the appellee to controvert that proposition, but his counsel contended that the law of Scotland was different; that, by the law of the latter country, a law agent, in respect of damage occasioned by his neglects, is responsible to those who suffer by his default, although there may not have subsisted the relation of principal and agent between them. It was Lord Cranworth who responded to that proposition, and in the course of his judgment he commented upon all the authorities cited in

support of the same, and showed that they failed to establish it.

Emphatic concurrence in the conclusion announced by the Chancellor was expressed by Lord Wensleydale, to the effect following: that "He only who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms."

By the law of England the right of action depends entirely upon the question between whom the relation of principal and agent, client and attorney, subsists. Nothing more decisive of the question need be sought; and we have the authority of that great magistrate to say that it is impossible to support, by a single case in that country, so extraordinary a proposition as that persons who were not, by themselves or their agents, employers of law agents to do an act, could have remedy against such agents for the negligent performance of it.

Speaking to the same point, Lord Chelmsford said, it is clear that this general proposition, abstracted from the facts of the case, cannot be maintained to its full extent, as it would apply to cases where there is no privity of contract between the parties, when it is conceded that no liability would arise. *Robertson v. Fleming*, 4 Macq. H. of L. Cas., 167, 209.

Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not everyone who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, *Ch. J.*, is, that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect. *Kahl v. Love*, 37 N. J. L., 5, 8.

Injury was received by the driver of a mail-coach, which broke down from defects in its construction. He brought suit against the constructor of the coach who sold the same to the owner of the line in whose employment the plaintiff was engaged when the accident happened. Held, by the whole court, that the action would not lie, as there is no privity of contract between the parties. Unless we confine the operation of such contracts as this to the parties who entered into them, said Lord Abinger, the most absurd consequences, to which no limit can be seen, will ensue; and *Baron Alderson* remarked, if we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. *Winterbottom v. Wright*, 10 Mees. & W., 109, 115.

Cases where fraud and collusion are alleged and proved constitute exceptions to that rule,

and *Parke, B.*, very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. *Longmeid v. Holliday*, 6 Exch., 761-767.

Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand, in many respects, upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made; and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrong doer. Reported cases of the kind are cited by the plaintiffs, but it is obvious that they have no proper application to the case before the court. *Pippin and Wife v. Sheppard*, 11 Price, 400; *Gladwell v. Steggall*, 5 Bing. (N. C.), 733; *George v. Skivington*, L. R., 5 Exch., 1; *R. R. Co. v. Derby*, 14 How., 468, 484.

Many judicial decisions in this country besides those cited also adopt the same rule and fully recognize the same class of exceptions.

Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrong-doer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 6 N. Y., 397, 410.

Such an act of negligence being imminently dangerous to the lives of others, the wrong-doer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract. *Collis v. Selden*, L. R., 3 C. P., 496.

Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents or injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. *Albany v. Cunkiff*, 2 N. Y., 165, 174.

Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence, and such negligence is not an act imminently dangerous to human life. *Loop v. Litchfield*, 42 N. Y., 351-358.

So where the manufacturer of a steam boiler

sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials, or for want of care and skill in its construction; and if, after delivery to and acceptance by the purchaser and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. *Loose v. Clute*, 51 N. Y., 494-496.

Exactly the same rule prevails in the State of Pennsylvania, independent of any statutory regulation upon the subject, the Supreme Court of the State holding that the liability of the recorder in such a case is to the party who asks and pays for the certificate, and not to his assigns or alienee. *Houseman v. Building & Loan Assn.*, 81 Pa., 256.

Satisfactory proof is exhibited that the defendant was duly employed by the pretended owner of the lot to examine his title to the same; and it is conceded that he did so, or that his son made the search for him, and that he made and signed the certificates in question, and that he was paid for his services by his employer; nor is it questioned that the title was defective as alleged. Concede that, and it follows as an implication of law that the defendant assumed to possess the requisite knowledge and experience to perform the stipulated service, and that he contracted with his employer that he would use reasonable care and skill in the performance of the duties. For a failure in either of these respects, if it resulted in damage to his employer, he, the employer, is entitled to recover compensation. *Chase v. Heaney*, 70 Ill., 268.

Decisions of the courts, of the highest authority, support that proposition; but the difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the title or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him anything for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law as expounded by the decisions of the court.

Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is one imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty. *Langridge v. Levy*, 2 Mees. & W., 519, 530.

We agree, said Lord Denman, *C. J.*, and affirm the judgment, on the ground stated by Parke, *B.*, that as there is fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of the results, the party guilty of the fraud is responsible to the party injured. *Levy v. Langridge*, 4 Mees. & W., 337.

Abstracts of titles and certificates of the same are frequently if not usually made by recorders, prothonotaries or clerks, and in some States See 10 OTTO.

their liability is prescribed and regulated by statute. Sess. L. (Pa.), 1872, 1040.

By that Act those officers are declared liable for all loss or damage which may happen by reason of any false or erroneous certificate of search, not only to the person or persons to, for, or upon whose order the said certificate of search is made or given, but also to any person or persons claiming title through, from or under such person or persons, or who may suffer loss by reason of the making or giving of any such false or erroneous certificate. But it is unnecessary to enter into any discussion of such regulations, as it is clear that there are none such in this District which can have any application in this case.

Testimony was introduced at the trial, tending to show that there is a local usage in the District that the attorney examining the title of such an applicant for a loan shall be considered as also acting for the lender of the money, and complaint is made that the court below did not submit that evidence to the jury, with proper instructions. Evidence of usage is not admissible to contradict or vary what is clear and unambiguous, or to restrict or enlarge what requires no explanation. Omissions may be supplied in some cases by such proof, but it cannot prevail over or nullify the express provisions of the contract. So, where there is no contract, proof of usage will not make one, and it can only be admitted either to interpret the meaning of the language employed by the parties, or where the meaning is equivocal or obscure. *Thompson v. Riggs*, 5 Wall., 663, 679 [72 U. S., XVIII., 704, 707].

Suffice it to say these parties never met, and there was no communication of any kind between the defendant and the brokers, or the lenders of the money. Nothing of the kind is pretended, the only suggestion in that direction being that it may be held that the applicant for the loan, when he employed the defendant, may be regarded as the agent of the plaintiffs. Such suggestion being entirely without evidence to support it, is entitled to no weight, especially as it appears that the principal certificate was procured several days before any interview upon the subject of the loan took place between the brokers and the plaintiffs.

Judgment affirmed.

Mr. Chief Justice Waite, dissenting:

I am unable to agree to the judgment in this case. I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found. That, as it seems to me, is this case. Ward was employed by Chapman to examine and certify to the title to a certain lot in Washington. The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person as evidence of the facts certified to. In examining

the records he overlooked a deed, in all respects properly recorded, which showed on its face that Chapman had conveyed the lot away in fee simple, and certified as follows: "Lot 55, in Chapman's subdivision of lots, in square 364. The title of Leonard S. Chapman to the above lot is good and the property is unincumbered. Wm. H. Ward." The National Savings Bank, relying on this certificate as true, loaned Chapman \$3,500, taking for security a deed of trust of the lot. It seems to me that, under these circumstances, Ward is liable to the Bank for any loss it may sustain by reason of his erroneous certificate.

I am authorized to say that *Mr. Justice Swayne* and *Mr. Justice Bradley* concur in this dissent.

Cited—89 Ind., 365, 366; 46 Am. Rep., 170, 171.

WILLIAM TRENOUTH, *Plff. in Err.*,

v.

CITY AND COUNTY OF SAN FRANCISCO, JOHN H. BAIRD ET AL.

(See S. C., 10 Otto, 251-257.)

San Francisco lands—conveyance of—preemption right.

*1. The history of the title of San Francisco to her municipal lands stated.

2. The Act of Congress of March 8, 1866, "To quiet the title to certain lands within the corporate limits of the City of San Francisco," having confirmed the claim of the City in trust that certain lands should be disposed of and conveyed to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of the Act; held, that parties who were at that time in possession of land as intruders and trespassers upon the prior possession of others, and who were afterwards, by legal proceedings, ejected from the premises were not entitled to a conveyance from the City as beneficiaries under the Act; but that the prior possessors who recovered the possession were such beneficiaries.

3. A preemption right under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others, nor to lands in California, a claim to which, under a foreign title, was at the time pending before the tribunals of the United States for confirmation.

[No. 141.]

Argued Jan. 8, 1880. Decided Jan. 19, 1880.

IN ERROR to the Supreme Court of the State of California.

The case is stated by the court.

Messrs. W. W. Foote and *Walter Van Dyke*, for plaintiff in error.

Messrs. S. M. Wilson, E. L. Goold and *Edward Janin*, for defendants in error.

Mr. Justice Field delivered the opinion of the court:

This was a suit to charge the defendants as trustees of certain land in the City of San Francisco, and to compel a conveyance of the legal title to the plaintiff. The case is free from difficulty, but to understand the positions of the plaintiff it will be necessary to state briefly the history of the titles to lands in that City.

*Head note by *Mr. Justice Field*.

NOTE.—*Preemption rights.* See note to *U. S. v. Fitzgerald*, 40 U. S. (15 Pet.), 407.

At the time of the conquest of California by the forces of the United States, on the 7th of July, 1846, there was a Mexican *pueblo* at the site of the present City of San Francisco. This term "*pueblo*," in its original signification, means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement or village, as well as to a regularly organized municipality. *Grisar v. McDowell*, 6 Wall., 363 [73 U. S., XVIII., 863]. The *pueblo* at San Francisco was a small settlement, but it was of sufficient importance, as early as 1835, to have an *ayuntamiento*, composed of *alcaldes* and other officers; and it was under their government for some years. At the time of the conquest, and for some time afterwards, it was under the government of justices of the peace, or *alcaldes*.

By the laws of Mexico, in force in California on the acquisition of the country, *pueblos* or towns, when once recognized by public authority, became entitled, for their benefit and that of their inhabitants, to the use of the land embracing the site of such *pueblos* or towns and adjoining territory within the limits of four square leagues, to be measured and assigned to them by the officers of the government. Under those laws the *pueblo* of San Francisco asserted a claim to four square leagues, to be measured off from the northern portion of the peninsula upon which the present City is situated.

The *alcaldes* of a *pueblo* exercised the power of distributing the lands of the town in small parcels to its inhabitants for building, cultivation or other uses, the remainder being generally retained for commons or other public purposes.

When the Town of San Francisco was occupied by our forces, citizens of the United States were appointed by the military or the naval commanders to act as *alcaldes* in the place of the Mexican officers. Upon the sudden increase of population at that place, following the discovery of gold, the *alcaldes* were called upon for building lots in great numbers, and those officers distributed them with a generous liberality usually attending the grant of other people's property. Numerous persons, however, arriving at the town were not disposed to recognize the authority in this respect of the American magistrates, and finding it less troublesome to appropriate what land they needed than to apply to the magistrates for it, they asserted that the land on which the *pueblo* was situated belonged to the United States and, as evidence of the sincerity of their convictions, immediately proceeded to take as much of it for themselves as they could conveniently inclose and hold. Thus the town was soon filled with an active and restless population, making large and expensive improvements upon lands held in some instances under grants from the *alcaldes*, and in others by the right of prior possession. Sometimes the same parcel was claimed by different parties; by one party as a settler, and by another as the holder of an *alcalde* grant. Disputes, both in and out of the courts, the natural consequence of this difference in the origin of the titles of the claimants, were greatly increased in bitterness by the enormous value which in a short period the lands acquired.

In April, 1850, soon after the organization of the State Government, San Francisco was incorporated as a City by the Legislature. She at once made claim to the lands of the *pueblo*, as its successor; and, when the Board of Land Commissioners was created under the Act of Congress of March 3, 1851, 9 Stat. at L., 631, she presented the claim for confirmation. In December, 1854, the Board confirmed the claim for only a portion of the four square leagues. Dissatisfied with the limitation of the claim, the City appealed from the decree of the Commissioners to the District Court of the United States. The government also appealed, though subsequently it withdrew its appeal. The case remained in the district court undetermined until September, 1864, a period of nearly ten years, when, under the authority of an Act of Congress, that court transferred the case to the circuit court, where it was decided in the following October. The decree, finally settled and entered May 18, 1865, confirmed the claim to a tract of land embracing so much of the upper portion of the peninsula upon which the City is situated, above the ordinary high water-mark of 1846, as would contain an area of four square leagues; the tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, drawn so as to include the area designated, subject to certain deductions, which it is unnecessary to mention here. The lands were confirmed to San Francisco in trust for the benefit of lot holders under grants from the *pueblo*, town or city, or other competent authority, and as to any residue, in trust for the use and benefit of the inhabitants of the City. As already stated, the City was incorporated in April, 1850. The charter she then received was repealed, and a new charter granted in April, 1851. The limits of the City, as defined by this latter charter, embraced an area of over two miles square. The lands lying outside of these charter limits are designated in the subsequent legislation of the City and State and frequently in the decisions of the courts, as outside lands.

Pending the appeal of the *pueblo* claim in the district court, the City passed an ordinance, known in its history, from the name of its author, as the Van Ness Ordinance, the object of which was to settle and quiet the title of persons holding land in the City. It relinquished and granted all the right and claim of the City to land within the corporate limits as defined by the charter of 1851, with certain exceptions, to parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the Common Council, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that, for all the purposes contemplated by the ordinance, persons should be deemed possessors who held titles to lands within those limits by virtue of a grant made by any *ayuntamiento*, town council, alcalde or justice of the peace of the former *pueblo*, before the 7th of July, 1846, or by virtue of a grant subsequently made by those authorities, within certain limits of the City, previous to its incorporation by the State, provided the grant, or a See 10 OTTO.

material portion of it, had been recorded in a proper book of records in the control of the recorder of the County previous to April 3, 1851. In March, 1858, the Legislature ratified and confirmed this ordinance; and on the 1st of July, 1864, 13 Stat. at L., 332, Congress relinquished and granted to the City all the interest of the United States to the lands within the corporate limits of 1851, in trust for the uses and purposes of the ordinance. Thus the contention of the different claimants to land within those limits was settled, their titles secured, and the usual result of quieting titles, progress and prosperity, followed.

But appeals were prosecuted to the Supreme Court, both by the United States and by the City, by the United States from the whole decree, and by the City from so much of it as included the reservations in the estimate of the quantity of land confirmed. Whilst these appeals were pending, and on the 8th of March, 1866, 14 Stat. at L., 4, Congress passed an Act to quiet the title to certain lands within the corporate limits of the City. At this time, the limits had been extended so as to be coincident with those of the County, and embraced the whole of the four square leagues confirmed. By this Act, all the right and title of the United States to the land covered by the decree of the circuit court were relinquished and granted to the City, and the claim to the land was confirmed; subject, however, to certain reservations and exceptions, and upon trust that all the land not previously granted to the City should be disposed of and conveyed by the City to the parties in the *bona fide actual possession thereof, by themselves or tenants, on the passage of the Act*, in such quantities and upon such terms and conditions as the Legislature of the State of California might prescribe, except such parcels thereof as might be reserved and set apart by ordinance of the City for public uses. The appeals to the Supreme Court were accordingly dismissed. *Townsend v. Greeley*, 5 Wall., 326 [72 U. S., XVIII., 547]. The title of the City to the land within the four square leagues rests, therefore, upon the decree of the circuit court, as entered on the 18th of May, 1865, and this confirmatory Act of Congress. By this Act, the government expressed its will with respect to the claim of the City, and the conditions upon which it should be recognized and confirmed. As was said by this court, in *Grisar v. McDowell*, "In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special Board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode; and, having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim resting upon an imperfect right which it may choose. It may declare the action of the special Board final; it may make it subject to appeal; it may require the appeal to go through one or more courts; and it may arrest the action of Board or courts at any stage. 6 Wall., 379 [73 U. S., XVIII., 867].

The title of the City being thus settled, its authorities proceeded under the provisions of

the confirmatory Act, and reserved and set apart grounds for parks and other public purposes. But, as these grounds were in many instances occupied, the City passed an ordinance known as No. 800, subsequently ratified by the Legislature, by which a general assessment was levied upon all the lands conveyed to occupants as a condition of receiving deeds from the City, the money thus raised to be applied towards compensating those whose lands were thus taken for public purposes.

Some of the defendants, and parties through whom the others claim, had been in the actual possession of the land in controversy here before the passage of the Act of 1866; but their possession had been intruded upon by violence and they driven from the land by parties through whom the plaintiff claims. One of the intruding parties afterwards set up a claim that he entered as a preemptor under the laws of the United States. Subsequently, the excluded parties recovered possession by suit; and the judgment in their favor was affirmed on appeal by the Supreme Court of the State. They then transferred the property, for the sake of convenience and expedition in securing the title, to one of their number, who applied to the city authorities and obtained a deed of the premises, first paying the assessment levied upon it and the taxes due. Under this deed the defendants hold the property. The plaintiff, representing the claims of the intruding and subsequently ejected parties, and insisting that they were beneficiaries under the Act of Congress, because upon its passage they were in the actual possession of the property, brought the present suit to charge the defendants as trustees of the legal title for his benefit. The District Court and the Supreme Court of the State were of opinion that, upon his own showing, his grantors, the intruders mentioned, were never in the *bona fide* possession of the property, within the meaning of the Act of Congress; and we agree with them in this respect. The claim of one of the intruders as a preemptor was equally unfounded: 1st, because the right of preemption, under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others; 2d, because the lands were claimed under a foreign title, that of the *pueblo* from Mexico, the claim to which was then pending before the tribunals of the United States.

The possession obtained by the intrusion and trespass of the plaintiff's grantors constitutes no ground for equitable relief against the holders of the city title; and the assertion of a possession thus obtained has as little merit as the lawless and unjustifiable conduct of the intruders in seizing the property.

Judgment affirmed.

Cited—6 Sawy., 508.

HENRY HAUSTEIN ET AL., *Plffs. in Err.*,
v.

JOHN A. LYNHAM, ESCHAEATOR FOR THE COMMONWEALTH OF VIRGINIA.

(See S. C., 10 Otto, 483-491.)

Alien—real estate in Virginia—limitations—Treaty, construction of—authority of.

1. Where a citizen of Switzerland removed thence to Virginia, and there is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland, his original citizenship is to be presumed to have continued.

2. Where such citizen leaves real estate in Virginia, his heirs, citizens of Switzerland, have, by the Treaty between the United States and the Swiss Confederation, of the 25th of November, 1850, the absolute right to sell said property, and to withdraw and export the proceeds thereof within such time as the laws of Virginia permit.

3. Where there is no statute of limitations applicable to the case, there can be no default arising from lapse of time.

4. Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.

5. Every treaty made by the authority of the United States is superior to the Constitution and laws of any individual State. If the law of a State is contrary to a treaty, it is void.

[No. 133.]

Argued Dec. 24, 1879. Decided Jan. 19, 1880.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

The case is stated by the court.

Messrs. **Wm. L. Royall** and **Bradley A. Johnson**, for plaintiffs in error.

Messrs. **J. G. Field**, *Atty-Gen. of Virginia*, and **J. A. Lynham**, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

Solomon Hauenstein died in the City of Richmond in the year 1861 or 1862, intestate, unmarried and without children. The precise date of his death is not material. At that time, he owned and held considerable real estate in the City of Richmond. An inquisition of escheat was prosecuted by the escheator for that district. A verdict and judgment were rendered in his favor. When he was about to sell the property, the plaintiffs in error, pursuant to a law of the State, filed their petition, setting forth that they were the heirs at law of the deceased, and praying that the proceeds of the sale of the property should be paid over to them. Testimony was taken to prove their heirship as alleged, but the court was of opinion that, conceding that fact to be established, they could have no valid claim, and dismissed the petition. They removed the case to the Court of Appeals. That court, entertaining the same views as the court below, affirmed the judgment. They thereupon sued out this writ of error.

The plaintiffs in error are all citizens of Switzerland. The deceased was also a citizen of that country, and removed thence to Virginia, where he lived and acquired the property to which this controversy relates, and where he died. The validity of his title is not questioned. There is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland. His original citizenship is, therefore, to be presumed to have continued. Best on Presumptions, 186. According to the record his domicile, not his citizenship, was changed. The testimony as to the heirship of the plaintiffs in error is entirely satisfactory. There was no controversy on this subject in the argument here. The parties were at one as to all the facts. Their controversy was rested entirely upon legal grounds.

The common law as to aliens, except so far as it has been modified by her Legislature, is the local law of Virginia. 2 Tucker's Bl., App.,

note c. By that law "Aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them." 2 Bl. Com., 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, but such a title is always liable to be divested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, cannot pass the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. *Fairfax v. Hunter*, 7 Cranch, 603.

The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. Vattel, B. 2, ch. 8, sec. 114. In our country, this authority is primarily in the States where the property is situated.

The Revised Code of Virginia of 1860, ch. 115, sec. 1, provides that an alien, upon declaring on oath before a court of record that he intends to reside in the State, and having the declaration entered of record, may inherit or purchase and hold real estate there as if he were a citizen.

Section 2 of the same chapter provides that such alien may convey or devise his real estate, and if he shall die intestate that it shall descend to his heirs; and if the alienee, devisee or heir shall be an alien, that he may take and hold, by being in the State and making under oath and having recorded, within five years, a like declaration with that prescribed by the preceding section.

The 6th section declares that when, by a treaty between the United States and any foreign country, a citizen of such country is allowed to sell real estate in Virginia, he may sell and convey within the time prescribed by the treaty; and when by such treaty citizens of the United States are allowed to inherit, hold, sell and convey real estate situate in such country, the citizens and subjects of that country may in like manner inherit, hold, sell and convey real estate lying in Virginia, provided that these several provisions shall apply only to real estate acquired thereafter by the citizens or subjects of such foreign country.

Section 2 has no application to the present case, because the declaration which it permits has not been made by the plaintiffs in error; and section 6 has none, because all the real estate of the deceased was acquired before the date of the Act.

The Revised Code of 1873 has obliterated nearly all the distinctions between aliens and citizens with respect to their rights as to both real and personal property. See, ch. 4, sec. 18, p. 130, and ch. 119, secs. 4 and 10, pp. 917, 918. As it is not claimed that any of these provisions affect the present case, we shall pass them by without further remark.

This brings us to the consideration of the 5th article of the Treaty between the United States and the Swiss Confederation, of the 25th of November, 1850. 11 Stat. at L., 587. It has been earnestly pressed upon our attention, and is the hinge of the controversy between the parties.

The first part of the article is devoted to per-

sonal property, and gives the fullest power to the citizens of each country touching such property belonging to them in the other, including the power to dispose of it as the owner may think proper. It then proceeds as follows:

"The foregoing provisions shall be applicable to real estate situate within the States of the American Union, or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, *there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated.*"

The plaintiffs in error are exactly within the latter category. This is too clear to require discussion. A corresponding provision for like cases is found in article 2, in the previous Treaty of the 18th of May, 1847, between the same parties. 9 Stat. at L., 902. By that article it is declared "That if, by the death of a person owning real property in the territory of one of the high contracting parties, such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, *a term of not less than three years shall be allowed him to dispose of such property and collect and withdraw the proceeds thereof, without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated.*"

It was clearly the intention of the clause in question in the Treaty of 1850 to secure to the beneficiaries absolutely the right "to sell said property," and "to withdraw and export the proceeds thereof without difficulty." Otherwise the language used is a sham and a mockery. The only qualification is as to the time within which the right must be exercised. It has been earnestly contended, in behalf of the defendant in error, that the State, having fixed no time within which this must be done, it cannot be done at all, and that the entire provision thus becomes a nullity, and is as if it were not.

The terms of the limitation imply clearly that *some time*, and not that *none*, was to be allowed. If it had been proposed to those who negotiated the Treaty to express in it the effect of this construction in plain language, can it be doubted that it would have been promptly rejected by both sides as a solecism and contrary to the intent of the parties?

Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks v. Dupont*, 3 Pet., 242. Such is the settled rule in this court.

It was well remarked in the able opinion of

the dissenting Judge in the Court of Appeals, that if this case were to be decided under the Treaty of 1847, there could not be a doubt as to the result. In this we concur, and we think the case is equally clear under the Treaty of 1850, which governs the rights of the parties.

The provision as to time in the earlier Treaty is, in effect, a Statute of Limitation. It applied with procrustean sameness in all the States and in all the cantons. In the latter Treaty this limitation was dropped, and the time was to be such "as the laws of the State or canton will permit." In other words, it was left to the laws of the several States and cantons respectively to fix the limitation in this as in other cases. This was consonant to the policy of our Judiciary Act of 1789, 1 Stat. at L., 73, which gave to the State Statutes of Limitation the same effect in the local courts of the United States which they had in the courts of the States respectively that enacted them. The procrustean uniformity prescribed by the former Treaty was thus abandoned, and it is fair to presume that the harmonious results in this respect which must necessarily follow, everywhere within the territory covered by the Treaty, both at home and abroad, were the considerations by which those who made the change were animated. If a State or canton had a law which imposed a limitation in this class of cases, nothing more was necessary. If it had not such a law, it was competent to enact one, and until one exists there can be no bar arising from the lapse of time. A party entitled can sue whenever he chooses to do so, and he is clothed with all the rights of any other litigant asserting a claim where there is no statute of limitation applicable to the case. This we understand to be the position of Virginia, and such are the legal consequences necessarily flowing from it.

This construction of the Treaty derives support from the fact that the Treaty provides (art. 6) that any controversy which may arise among the claimants to the succession, "Shall be decided according to the laws and by the judges of the country where the property is situated."

It remains to consider the effect of the Treaty thus construed upon the rights of the parties.

That the laws of the State, irrespective of the Treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error.

The efficacy of the Treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the 4th day of March, 1789. In 1796, but a few years later, this court said: "If doubts could exist before the adoption of the present National Government, they must be entirely removed by the 6th article of the Constitution, which provides that 'All treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land,' and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions or to make them yield to the General Government and to treaties made by their authority. A treaty cannot be the su-

preme law of the land, that is, of all the United States, if any Act of a State Legislature can stand in its way. If the Constitution of a State, which is the fundamental law of the State and paramount to its Legislature, must give way to a treaty and fall before it, can it be questioned whether the less power, an Act of the State Legislature must not be prostrate? It is the declared will of the People of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State, contrary to a treaty, is not void but voidable only, by a repeal or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." *Ware v. Hylton*, 3 Dall., 199.

It will be observed that the treaty-making clause is retroactive as well as prospective. The Treaty in question, in *Ware v. Hylton*, was the British Treaty of 1783, which terminated the War of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties "made and to be made."

We have quoted from the opinion of Judge Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country.

In *Chirac v. Chirac*, 2 Wheat., 259, it was held by this court that a Treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was re-affirmed touching this Treaty in *Carneal v. Banks*, 10 Wheat., 181, and with respect to the British Treaty of 1794, in *Hughes v. Edwards*, 9 Wheat., 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr v. Hodgson*, 4 Wheat., 453. By the British Treaty of 1794, 8 Stat. at L., 116, "All impediment of alienage was absolutely leveled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax v. Hunter*, 7 Cranch, 627; see, *Ware v. Hylton*, 3 Dall., 242." *Droit v. D'Aubaine*, 8 Ops. Attys-Gen., 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: "Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it." Treat. on the Const. and Gov. of the U. S., 204.

If the National Government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to "enter into any treaty, alliance, or confederation." Const., art. 1, sec. 10.

It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks v. Dupont*, 3 Pet., 242; *Foster v. Neilson*, 2 Pet. 253; *Cherokee Tobacco*, 11 Wall., 616 [78 U. S., XX., 227]; Mr. Pinkney's Speech, 3 Elliot, Const. Deb., 231; *People v. Gerke*, 5 Cal., 381.

We have no doubt that this Treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect. We forbear to pursue the topic further. In the able argument before us, it was insisted upon one side, and not denied on the other, that, if the Treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction. There are, doubtless, limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purposes of this opinion.

During the argument here, our attention was called to the amount that might be taken from the fund with respect to compensation to the escheator and to his counsel in the event of our judgment being against him.

Under the circumstances, he can have no claim as escheator, but he may properly receive the percentage allowed by law for making sales of real property in ordinary cases. It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute.

The judgment of the Court of Appeals of Virginia, so far as it concerns the claim of the plaintiff's in error, is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Cited—6 Sawy., 370; 65 How Pr., 247.

UNITED STATES, *Appt.*,

v.

CHARLES BOWEN.

(See S. C., 10 Otto, 508-514.)

Soldiers' Home.

*1. The Revised Statutes of the United States must be treated as a legislative declaration by Congress of the statute law on the subjects which they embrace, on the first day of December, 1873; and when the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision.

2. But when it becomes necessary to construe language used in the revision which leaves a substantial doubt of its meaning, the original statutes may be resorted to for ascertaining that meaning.

3. The language used in section 4820 of the revision, admits of no other reasonable construction than that only invalid pensioners who had not contributed to the funds of the Soldiers' Home were bound to surrender to it their pensions while receiving its benefits, and there is no occasion, therefore, to look at the law as it existed before the revision.

[No. 875.]

Argued Dec. 17, 1879. Decided Jan. 19, 1880.

*Head notes by Mr. Justice MILLER.
See 10 OTTO.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. Chas. Devens, Atty-Gen., for United States.

Messrs. Matt. H. Carpenter and James Coleman, for appellee.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from a judgment of the Court of Claims in favor of appellee for \$264.00, for pension money withheld by the Government.

The action of the government officers in that respect was founded on their opinion that Bowen, who was cared for in the Soldiers' Home, belonged to the class who, by section 4820 of the revision, surrendered their pensions while inmates of the Home. That section enacts that "The fact that one to whom a pension has been granted, for wounds or disability received in the military service, has not contributed to the funds of the Soldiers' Home, shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain there and voluntarily receive its benefits."

Bowen was the recipient of an invalid pension, but he had contributed to the funds of the Soldiers' Home, and the single question in the case is whether that fact withdraws him from the clause which requires pensioners to surrender their pensions to the Home while inmates of it.

If the qualifying word *such* is restricted to pensioners described in the sentence which immediately precedes it, then Bowen does not belong to that class, and is not bound to surrender his pension. There is no other class of pensioners described in that section to whom the word *such* can refer than those who have not contributed to the funds of the Home, and Bowen does not belong to that class. The history of the institution affords good reason for that interpretation. The Soldiers' Home was bought and built and is supported now very largely by money deducted from the monthly pay of the soldiers of the Regular Army. But there is a class of persons who have received wounds in the military service, or incurred ill health while in such service, from whose pay no deduction was made as a contribution to the Home, who received pensions as invalids, and, by virtue of this section, are entitled to be cared for at that place. There is a manifest propriety in a rule which requires of this class that, when supported out of the fund to which they did not contribute, their pensions should go to increase that fund; while those who have been giving of their monthly pay for years should receive its benefits when they come to need them, without giving also the pension which is the bounty of a grateful government. There is no antecedent use of the word "pensioners" in the chapter of which section 4820 is a part, and which embraces the legislation of Congress concerning the Soldiers' Home, to which the word *such* can refer, but the immediately preceding sentence in the same section. If the construction claimed by counsel for the Government be correct, that word is useless, for it would express the idea with precision by reading, "But all pensioners shall surrender their pensions to the Soldiers' Home during the time they remain

therein and voluntarily receive its benefits." The question, therefore, is, whether we shall read the section "all pensioners" or "all such pensioners."

The word, however, as there used, has an appropriate reference to the class of pensioners who have not contributed to the funds of the institution, and no sound canon of construction will authorize us to disregard it, when to do so changes very materially the meaning of the section.

It is urged in opposition to this view that as the law stood prior to the revision, as shown by the Act of March 3, 1859, 11 Stat. at L., 431, all invalid pensioners who accepted the benefit of the Home were bound to surrender to its use their pensions while there; and it must be conceded that such was the law.

But, as the revision embraces that Act as well as all others on the subject, it is, by the express language of the repealing clause, section 5596, no longer in force. Counsel for Government, admitting that it is no longer in force, independently of the section of the revision which we are called on to construe, insist that a resort may be had to the law which was the subject of revision, to interpret anything left in doubt by the language of the revisers.

This principle is, undoubtedly, sound; and, where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress. If, then, in the case before us, the language of section 4820 was fairly susceptible of the construction claimed by the Government, as well as of the opposite one, the argument from the provision of the statute as it stood before the revision would be conclusive. But, for the reasons already given, we are of opinion that the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation, leave room for no other construction than that only invalid pensioners who had *not* contributed to the funds of the Soldiers' Home were bound to purchase its benefits by surrendering to it their pensions.

As the Court of Claims acted on this construction, its judgment is affirmed.

Cited—101 U. S., 36; 102 U. S., 11; 104 U. S., 499; 34 Hun., 190.

NEAL DOW, *Plff. in Err.*
v.

BRADISH JOHNSON.

(See S. C., 10 Otto, 158-195.)

Division of opinion—liability of army officer—laws of insurgent States—jurisdiction of State Court.

*1. When on the trial or hearing of a cause the Judges of the Circuit Court are opposed in opinion on a material question of law, the opinion of the presiding Judge is to prevail and be considered the opinion of the court for the time being, but the judgment or decree rendered may be reviewed on writ of error or appeal, without regard to its amount, upon a certificate of the Judges stating the question upon which they differed.

2. An officer of the Army of the United States, whilst in service during the late war in the enemy's country, was not liable to a civil action in the courts of that country for injuries resulting from acts of war ordered by him in his military character; nor could he be called upon to justify or explain his military conduct in a civil tribunal upon any allegation of the injured party that the acts complained of were not justified by the necessities of war. He was responsible only to his own government, and only by its laws, administered by its authority, could he be called to account.

3. When any portion of the enemy's country was in the military occupation of the United States during the late war, the municipal laws were generally continued in force and administered through the ordinary tribunals for the protection and benefit of the inhabitants and others not in the military service, but not for the protection or control of the army or its officers or soldiers.

4. Accordingly, when a brigadier-general in the Army of the United States, during the war, in command of the troops in Louisiana was sued in a district court of that State—continued in existence after the military occupation of the United States and authorized by the commanding general to hear causes between parties—for ordering a military company to seize and carry off as supplies for the army certain personal property of the plaintiff which seizure was alleged by him to have been unauthorized by the necessities of war, or martial law, or by the superiors of the brigadier-general, and judgment by default was rendered against the brigadier-general for the value of the property, it was held, in a suit brought in the Circuit Court of the United States upon the judgment thus rendered, that the state court had no jurisdiction of the alleged cause of action, and that its judgment was void.

[No. 76.]

Argued Nov. 20, 1879. Decided Feb. 2, 1880.

[N ERROR to the Circuit Court of the United States for the District of Maine.

The case is stated by the court.

Messrs. Charles Devens, Atty-Gen., J. H. Drummond and Edwin B. Smith, Asst. Atty-Gen., for plaintiff in error.

Messrs. Bion Bradbury and Durant & Horner, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

The defendant in the court below, the plaintiff in error here, Neal Dow, was a brigadier-general in the Army of the United States during the late civil war, and in 1862 and 1863 was stationed in Louisiana in command of Forts Jackson and St. Phillip, on the Mississippi River, below New Orleans. These forts surrendered to the forces of the United States in April, 1862. The fleet under Admiral Farragut had passed them and reached New Orleans on the 25th of the month, and soon afterwards the city was occupied by the forces of the United States under General Butler. On taking possession of the city, the general issued a proclamation, bearing date on the 1st of May, 1862, in which, among other things, he declared that until the restoration of the authority of the United States the city would be governed by martial law; that all disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, would "be referred to a military court for trial and punishment;" that other misdemeanors would be

*Head notes by *Mr. Justice FIELD*.

subject to the municipal authority, if it desired to act; and that civil causes between parties would "be referred to the ordinary tribunals." Under this proclamation, the Sixth District Court of the City and Parish of New Orleans was allowed to continue in existence, the Judge having taken the oath of allegiance to the United States.

In January, 1863, General Dow was sued in that court by Bradish Johnson, the plaintiff in this case. The petition, which is the designation given in the system of procedure in Louisiana to the first pleading in a civil action, set forth that the plaintiff was a citizen of New York, and for several years had been the owner of a plantation and slaves in Louisiana, on the Mississippi River, about forty-three miles from New Orleans; that on the 6th of September, 1862, during his temporary absence, the steamer *Avery*, in charge of Captain Snell, of Company B, of the Thirteenth Maine Regiment, with a force under his command, had stopped at the plantation and taken from it twenty-five hogheads of sugar; and that said force had plundered the dwelling-house of the plantation and carried off a silver pitcher, half a dozen silver knives, and other table ware, the private property of the plaintiff, the whole property taken amounting in value to \$1,611.29; that these acts of Captain Snell and of the officers and soldiers under his command, which the petition characterized as "illegal, wanton, oppressive, and unjustifiable," were perpetrated under a verbal and secret order of Brigadier General Neal Dow, then in the service of the United States, and in command of Forts Jackson and St. Philip, who, by his secret orders, which the petition declared were "unauthorized by his superiors, or by any provision of martial law, or by any requirements of necessity growing out of a state of war," wantonly abused his power, and inflicted upon the plaintiff the wrongs of which he complained; and, therefore, he prayed judgment against the general for the value of the property.

To this suit General Dow, though personally served with citation, made no appearance. He may have thought that during the existence of the war, in a district where insurrection had recently been suppressed, and was only kept from breaking out again by the presence of the armed forces of the United States, he was not called upon by any rule of law to answer to a civil tribunal for his military orders, and satisfy it that they were authorized by his superiors, or by the necessities growing out of a state of war. He may have supposed that for his military conduct he was responsible only to his military superiors and the government whose officer he was.

Be that as it may, or whatever other reason he may have had, he made no response to the petition; he was, therefore, defaulted. The Sixth District Court of the Parish of New Orleans did not seem to consider that it was at all inconsistent with his duty as an officer in the Army of the United States to leave his post at the forts, which guarded the passage of the Mississippi, nearly a hundred miles distant, and attend upon its summons to justify his military orders, or seek counsel and procure evidence for his defense. Nor does it appear to have occurred to the court that, if its jurisdiction over him was recognized, there might spring up such a multitude of suits as to keep the officers of the

army stationed in its district so busy that they would have little time to look after the enemy and guard against his attacks. The default of the general being entered, testimony was received showing that the articles mentioned were seized by a military detachment sent by him and removed from the plantation, and that their value amounted to \$1,454.81. Judgment was thereupon entered in favor of the plaintiff for that sum, with interest and costs. It bears date April 9, 1863.

Upon this judgment the present action was brought in the Circuit Court of the United States for the District of Maine. The declaration states the recovery of the judgment mentioned, and makes proof of an authenticated copy. To it the defendant pleaded the general issue, *nul tiel record*, and three special pleas. The object of the special pleas is to show that the district court had no jurisdiction to render the judgment in question, for the reason that at the time its district was a part of the country in insurrection against the Government of the United States, and making war against it, and was only held in subjection by its armed forces. It is not important to state at length the averments of each of these pleas. It will be sufficient to state the material parts of the second plea and a single averment of the third. The second plea, in substance, sets up that as early as February, 1861, the State of Louisiana adopted an ordinance of secession, by which she attempted to withdraw from the Union and establish an independent government; that from that time until after April 9, 1863, the date of the judgment in question, she was in rebellion against the Government of the United States, making war against its authority; that in consequence the military forces of the United States engaged in suppressing the rebellion took forcible possession of that portion of the State comprising the district of the Sixth District Court of New Orleans, and held military occupation of it until long after April 9, 1863, during which time martial law was established there and enforced; that the defendant was then a brigadier-general in the military service of the United States, duly commissioned by the President, and acting in that State under his orders and the Articles of War; that by the general order of the President of July 22, 1862, military commanders within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas were directed, in an orderly manner, to seize and use any property, real or personal, which might be necessary or convenient for their several commands as supplies, or for other military purposes; that the defendant, in the performance of his duty as a brigadier-general, was in command of troops of the United States in Louisiana; and that the troops by his order seized from the plaintiff, then a citizen of that State, certain chattels necessary and convenient for supplies for the Army of the United States, and other military purposes; and that for that seizure the action was brought in the Sixth District Court of New Orleans against him, in which the judgment in question was rendered; but that the district court had no jurisdiction of the action or over the defendant at its commencement, or at the rendition of the judgment.

The third plea also avers that, for the purpose

of suppressing the rebellion and restoring the national authority, the Government of the United States, through its proper officers, declared and maintained martial law in Louisiana, from May 1, 1862, until long after the 9th of April, 1863, and deprived all the courts in that State, including the Sixth District Court of New Orleans, of all jurisdiction, except such as should be conferred on them by authority of the officer commanding the forces of the United States in that State, and that no jurisdiction over persons in the military service of the United States, for acts performed in the line of their duty, was by such authority conferred upon that court.

To the first plea, that of *nul tiel record*, the plaintiff replied that there was such a record, of which he prayed inspection; and the record being produced, the court found in his favor. To the special pleas the plaintiff replied that the district court had lawful jurisdiction over parties and causes of action within its district at the time and place mentioned, and to render the judgment in question. To the replication the defendant demurred; and upon the demurrer two questions arose, upon which the Judges in the Circuit Court were opposed in opinion, namely: 1, whether the replication is a good and sufficient reply to the special pleas; and, 2, whether the Sixth District Court, at the time and place mentioned, had jurisdiction of the parties and cause of action, to render the judgment in question.

By statute, when the Judges of the Circuit Court are opposed in opinion upon any question arising on the trial of a cause, the opinion of the presiding justice prevails, and judgment is entered in conformity with it. Here the presiding Justice was of opinion that the replication was a sufficient reply to the special pleas, and that the district court had jurisdiction over the parties and the cause, and to render the judgment in question. Accordingly, the plaintiff had final judgment upon the demurrer, which was entered for \$2,659.67 and costs; and the defendant has brought the cause here by writ of error on a certificate of division of opinion.

The important question thus presented for our determination is, whether an officer of the Army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war.

But before proceeding to its consideration there is a preliminary question of jurisdiction to be disposed of. The Act of Feb. 16, 1875, "To Facilitate the Disposition of Cases in the Supreme Court of the United States, and for Other Purposes," provided, that whenever by the laws *then in force* it was required that the matter in dispute should exceed the sum or value of \$2,000, exclusive of costs, in order that the judgments and decrees of the Circuit Courts of the United States might be re-examined in the Supreme Court, such judgments and decrees thereafter rendered should not be re-examined in the Supreme Court, unless the matter in dispute should exceed the sum or value of \$5,000, exclusive of costs. 18 Stat. at L., 315. It is, therefore, contended that a judgment can-

not be reviewed by this court, upon a certificate of division of opinion between the Judges of the Circuit Court, if the judgment be under \$5,000; and the judgment in the present case is under that amount. We do not think, however, that this conclusion is warranted by the language of the Act in question. That Act makes no change in the previous laws, except as to amounts necessary to give the court jurisdiction, when the amount is material. Where before \$2,000 was the sum required for that purpose, afterwards \$5,000 was the sum. But before that Act questions arising in the progress of a trial could be brought to this court for determination upon a certificate of division of opinion, without reference to the amount in controversy in the case. The original Act of 1802, allowing this mode of procedure, was always held to extend our appellate jurisdiction to material questions of law arising in all cases, criminal as well as civil, without regard to the amount in controversy or the condition of the litigation. Its defect consisted in the delays it created by frequently suspending proceedings in the midst of a trial. To obviate this defect the 1st section of the Act of June, 1872, 17 Stat. at L., 196, was passed, requiring the case to proceed, notwithstanding the division, the opinion of the presiding justice to prevail for the time being; and this feature is retained in the Revised Statutes. Secs. 650, 652, 693. The benefit of the certificate can now be had after judgment upon a writ of error or appeal. That is the only material change from the original law. We have no doubt, therefore, of our jurisdiction in this case.

This brings us to the consideration of the main question involved, which we do not regard as at all difficult of solution, when reference is had to the character of the late war. That war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war. It was waged between people occupying different territories, separated from each other by well defined lines. It attained proportions seldom reached in the wars of modern nations. Armies of greater magnitude and more formidable in their equipments than any known in the present century were put into the field by the contending parties. The insurgent States united in an organization known as the Confederate States, by which they acted through a central authority guiding their military movements; and to them belligerent rights were accorded by the Federal Government. This was shown in: the treatment of captives as prisoners of war, the exchange of prisoners, the release of officers on parole, and in numerous arrangements to mitigate as far as possible the inevitable suffering and miseries attending the conflict. The people of the loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other, and were liable to be dealt with as such without reference to their individual opinions or dispositions. Commercial intercourse and correspondence between them were prohibited, as well by express enactments of Congress as by the accepted doctrines of public law. The enforcement of contracts previously made between them was suspended, partnerships were dissolved, and the courts of each belligerent were closed to the citizens of the other, and its

territory was to the other, enemy's country. When, therefore, our armies marched into the country which acknowledged the authority of the Confederate Government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman v. Tenn.* [97 U. S., 509., XXIV., 1118], it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*, reported in the 7th of Cranch, 116. Much more must this exemption prevail where a hostile army invades an enemy's country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest; its correctness is evident upon its bare announcement, and no additional force can be given to it by any amount of statement as to the proper conduct of war. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed. Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the bombardment unnecessary and cruel. Would it be pretended that he could call the commanding general, who ordered it, before a local tribunal to show its necessity or be mulcted in damages? The owner of supplies seized or property destroyed would have no difficulty, as human nature is constituted, in believing and affirming that the seizure and destruction were wanton and needless. All this is too plain for discussion, and will be readily admitted.

Nor is the position of the invading belligerent affected, or his relation to the local tribunals changed, by his temporary occupation and domination of any portion of the enemy's country. As a necessary consequence of such occupation and domination, the political relations of its people to their former government are, for the time, severed. But for their protection and benefit, and the protection and benefit of others not in the military service, or, in other words, in order that the ordinary pursuits and business

of society may not be unnecessarily deranged, the municipal laws, that is, such as affect private rights of persons and property, and provide for the punishment of crime, are generally allowed to continue in force, and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing, unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army, or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.

If, now, we apply the views thus expressed to the case at bar, there will be no difficulty in disposing of it. The condition of New Orleans and of the district connected with it, at the time of the seizure of the property of the plaintiff and the entry of the judgment against Dow, was not that of a country restored to its nominal relations to the Union, by the fact that they had been captured by our forces, and were held in subjection. A feeling of intense hostility against the Government of the Union prevailed, as before, with the people, which was ready to break out into insurrection upon the appearance of the enemy in force, or upon the withdrawal of our troops. The country was under martial law; and its armed occupation gave no jurisdiction to the civil tribunals over the officers and soldiers of the occupying army. They were not to be harassed and mulcted at the complaint of any person aggrieved by their action. The jurisdiction which the district court was authorized to exercise over civil causes between parties, by the proclamation of General Butler, did not extend to cases against them. The third special plea alleges that the court was deprived by the General Government of all jurisdiction except such as was conferred by the commanding general, and that no jurisdiction over persons in the military service for acts performed in the line of their duty was ever thus conferred upon it. It was not for their control in any way, or the settlement of complaints against them, that the court was allowed to continue in existence. It was, as already stated, for the protection and benefit of the inhabitants of the conquered country and others there not engaged in the military service.

If private property there was taken by an officer or a soldier of the occupying army, acting in his military character, when, by the laws of war, or the proclamation of the commanding general, it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution, or sent the offending party before a military tribunal, as circumstances might have required, or he could have had recourse to the government for redress. But there could be no doubt of the right of the army to appropriate any property there, although belonging to

private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated, when required by the necessities or convenience of the army, though the owner of property taken in such case may have had a just claim against the government for indemnity.

The case of *Elphinstone v. Bedreechund* is an authority, if any were needed, that a municipal court has no jurisdiction to adjudge upon the validity of a hostile seizure of property; that is, a seizure made in the exercise of a belligerent right. There it appeared that a city of India had been captured by the British forces and a provisional government established, which subsequently held undisturbed possession of the place. Several months after its occupation, the members of the provisional government seized the private property of a native, under the belief that it was public property intrusted to his care by the hostile sovereign. The native had been refused the benefit of the articles of capitulation of a fortress, of which he was Governor, but had been permitted to reside under military surveillance in his own house in the city, where the seizure was made. At the time there were no hostilities in the immediate neighborhood, and the civil courts were sitting for the administration of justice; but the war was not at an end throughout the country, and there was a feeling of great hostility on the part of the people of the place, which was only prevented from breaking out into insurrection by the presence of an armed force. In these respects the position of the place was similar to that of New Orleans and the adjacent country under the command of General Butler. The property seized consisted of gold coin, jewels and shawls; and the owner having died, an action for their value was brought by his executor against the members of the provisional government who ordered the seizure, and judgment was rendered against them in the Supreme Court of Bombay. That court appeared to be controlled in its decision by the fact that for some months before the seizure the city had been in the undisturbed possession of the provisional government, and that civil courts, under its authority, were sitting there for the administration of justice. But on appeal to the Privy Council the judgment was reversed. "We think," said Lord Tenterden, speaking for the Council, "the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person; and, consequently, that the municipal court had no jurisdiction to adjudge upon the subject, but that, if anything was done amiss, recourse could only be had to the government for redress. 1 Knapp, 316. Here, the special pleas allege that the articles of property taken by the military detachment under General Dow were seized by his order, as necessary and convenient supplies for the occupying army. It was a hostile seizure, as much so as that of the property in the case cited, being made, like that one, in the exercise of a belligerent right, upon the propriety or

necessity of which the municipal court had no authority to adjudge.

This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate Army, when in Pennsylvania, as to members of the National Army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war. It follows that, in our judgment, the District Court of New Orleans was without jurisdiction to render the judgment in question, and the special pleas in this case constituted a perfect answer to the declaration. See, *Coleman v. Tenn.* [*supra*]; *Ford v. Surget*, 97 U. S., 594 [XXIV., 1018]; also, *LeCaux v. Eden*, 2 Doug., 594; *Lamar v. Browne*, 92 U. S., 187 [XXIII., 650], and *Coolidge v. Guthrie*, 8 Am. L. Reg. (N. S.), 22.

We fully agree with the presiding Justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free People is, that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of *Mitchell v. Harmony*, [13 How., 115]; on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our Government. The question here is: what is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law, the law of war, and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home and, in time of peace, is essential to the preservation of liberty.

Our decision upon the questions certified to us, is, that the replication is not a good and sufficient reply to the special pleas; and that the Sixth District Court of New Orleans, at the time and place mentioned, had not jurisdiction of the parties and cause of action to render the judgment in question. *The judgment of the Circuit Court must, therefore, be reversed and the cause remanded, with directions to that court to enter final judgment for the defendant on the demurrer to the replications; and it is so ordered.*

Mr. Justice Clifford, dissenting:

Officers and soldiers in the military service are not amenable, in time of war, to process from the civil tribunals for any act done in the performance of their duties; but if the injurious act done to person or property was wholly outside of the duty of the actor, and was willfully and wantonly inflicted, for the mere purpose of oppression or private gain, the party by whom or by whose orders it was committed

may be answerable in the ordinary courts of justice, except when the civil tribunals are silenced by the exigencies of military rule or martial law. *Luther v. Borden*, 7 How., 1, 46.

Private property, in case of extreme necessity, in time of war or of immediate and impending public danger, may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner and without antecedent compensation. Extreme cases of the kind may, doubtless, arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or to supply food or clothing to a suffering or famishing army, destitute of such necessities and without other means of such supplies.

Such emergencies in the public service have and may hereafter occur in time of war, and in such cases no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency; but the public danger must be imminent and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or a resort to any other source of supply.

Exigencies of the kind do arise in time of war or impending public danger; but it is the emergency only that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. *U. S. v. Russell*, 13 Wall., 623 [80 U. S., XX., 474].

Public convenience authorizes the exercise of the right of eminent domain, subject to the condition that due provision is made for compensation; and public necessity, in time of war or impending public danger, may authorize the taking of private property without any such provision, to supply for the moment the public wants, to the extent of the public exigency, which cannot be supplied in any other way. 2 Kent, Com., 12th ed., 338.

Nothing but the emergency will warrant the taking; and it is settled law in this court that the officer who makes the seizure cannot justify his trespass merely by showing the orders of his superior, the rule being that an order to commit a trespass can afford no justification to the person by whom it is executed. *Mitchell v. Harmony*, 13 How., 115.

Support to all the principles before enunciated is found in the very able opinion of the court, given by Chief Justice Taney, in which he fully admits that private property may be taken by a military commander to prevent it from falling into the hands of the enemy, and that it may also be taken, in certain extreme cases, for public use without just compensation. Reasonable doubt upon that subject cannot be entertained; but he proceeds to show, what is equally plain, that it cannot be done in the first case unless it appears that the danger was immediate and impending, nor in the second, unless it appeared that the necessity and urgency were such as would not admit of delay. *Farm-er v. Lewis*, 1 Bush, 66.

Where a trader during war is engaged in trading with a portion of the enemy country that has been reduced to subjection, and his trading there

is permitted and encouraged by the invading army, his goods cannot be seized on the ground that he is engaged in an unlawful trade with the enemy. In such a case, the officer seizing the property becomes liable for the abuse of his authority, and the owner of the goods is entitled to recover in trespass for the damage suffered. *Harmony v. Mitchell*, 1 Blatchf., 549.

Judgment was rendered, April 9, 1863, against the defendant in the Sixth District Court of New Orleans, in an action of trespass for the unlawful taking and conversion of the goods and chattels of the plaintiff described in the schedule annexed to the writ. Payment of the judgment being refused, the plaintiff brought an action of debt on the same against the defendant in the Circuit Court for the Maine District, where the defendant resides. Service was made, and the defendant appeared and pleaded *nul tiel record* and three special pleas, as follows: (1) That the court which rendered the judgment had no jurisdiction of the case, for the reason that the military forces of the United States, prior to the rendition of the judgment, took forcible possession of New Orleans, and held such military possession of the locality. (2) That the said court had no jurisdiction of the case, for the reason that he, as a military commander, seized the goods and chattels mentioned as supplies for the army. (3) That the said court had no jurisdiction of the case, for the reason that he was a military officer, and that, in taking the goods and chattels, he acted in obedience to the orders of his superior officers.

These pleas, containing as they did new special matters, properly concluded with a verification, which made it necessary for the replication, if in the general form as now allowed, to tender an issue to the country. Instead of adding the *similiter*, the defendant filed a general demurrer to the replication; and the objection now is, that the replication is defective in form, it being too general to amount to a traverse of the new matters set forth in the special pleas.

Two answers to that may be given: (1) That the form accords with that given by the most approved text-writers upon the subject. Steph. Pl., 9th Am. ed., 60; 1 Chit. Pl., 16th ed., 606. (2) That the demurrer should have been special, in order to avail the defendant. 1 Chit. Pl., 16th ed., 694; Steph. Pl., 9th ed., 40.

Hearing was had, and the court, both Judges concurring, found in favor of the plaintiff, that there is such a record as that set forth and described in the declaration.

Two questions also arose under the demurrer of the defendant to the replication of the plaintiff filed to the three special pleas. Those questions are as follows: (1) Whether the replication is a good and sufficient reply to the three special pleas of the defendant. (2) Whether said Sixth District Court at the time and place aforesaid had jurisdiction of the parties and the cause of action alleged in the declaration.

Certificates of division of opinion between the Judges of the Circuit Court under a former Act gave the Supreme Court jurisdiction of the questions certified, but the universal rule was that the Supreme Court would only consider the single question or questions certified. *Ogle v. Lee*, 2 Cranch, 33.

Nothing could come before the court under such certificate except the single question or questions certified here by the Circuit Judges, in respect to which they were divided in opinion. *Ward v. Chamberlain*, 2 Black, 430-434 [67 U. S., XVII., 319-322]; R. S., sec. 652.

Jurisdiction acquired in that mode of proceeding was limited to the points certified, and could not be extended by a certificate of division to anything except what would be open to revision here under a writ of error or appeal. *Davis v. Braden*, 10 Pet., 286; *Packer v. Nixon*, 10 Pet., 408; *Wayman v. Southard*, 10 Wheat., 1-50.

Both of those questions were certified at the time and were duly entered of record; and the Act of Congress provides, that whenever such a difference occurs, the opinion of the presiding justice shall prevail and be considered the opinion of the court for the time being. Pursuant to that statutory regulation, the presiding Justice proceeded to state that he was of the opinion: (1) That the replication of the plaintiff is a good and sufficient reply to the three special pleas pleaded by the defendant. (2) That the said Sixth District Court of New Orleans did, at the time and place aforesaid, have jurisdiction of the parties and the cause of action to render the judgment set forth and described in the declaration.

Having sustained the replication as a sufficient reply to the three special pleas, he overruled the demurrer to the replication and adjudged the special pleas bad, and rendered judgment for the plaintiff in the amount of the prior judgment and lawful interest.

Errors assigned in this court are as follows: (1) That the court erred in finding that there is such a record as that mentioned in the declaration. (2) That the court erred in ruling that the replication is a good and sufficient reply to the three special pleas. (3) That the court erred in ruling that the Sixth District Court had jurisdiction of the parties and the cause of action. (4) That the court erred in the rendition of the judgment.

Before discussing those matters, it becomes necessary to determine the preliminary question whether this court, under existing laws, has jurisdiction to re-examine the judgment of the circuit court in this case. Prior to the Act of the 16th of February, 1875, all judgments or decrees of the circuit courts in civil actions at common law or suits in equity, where the matter in dispute exceeded the sum or value of \$2,000, exclusive of costs, might be re-examined in the Supreme Court by a writ of error or appeal. 1 Stat. at L., 84; 2 Stat. at L., 244; 17 Stat. at L., 196.

Alterations of great moment in the mode of removing certain final judgments and decrees from the circuit court to the Supreme Court had been made before the passage of that Act; but the Congress on that day enacted that "Such judgments and decrees hereafter rendered shall not be re-examined in the Supreme Court, unless the matter in dispute shall exceed the sum or value of \$5,000, exclusive of costs." 18 Stat. at L., 316.

Beyond all doubt, the exclusion of jurisdiction to the Supreme Court is universal in respect to all judgments and decrees of the circuit court where the matter in dispute does not ex-

ceed the sum or value of \$5,000. Words more fitting to express such an intent, or more effectual to that end, cannot be found in our language, and it is equally clear that they will admit of no exception unless they are emasculated of their universal meaning; and yet it is suggested that the final judgment or decree of a circuit court may still, if the record contains a certificate of the Judges of the Circuit Court that they were opposed in opinion upon any point in the case, be re-examined in this court even though the matter barely exceeds the sum or value of \$500, exclusive of costs, which is the smallest amount cognizable in the circuit court in civil actions at common law or in suits in equity.

When our judicial system was organized, jurisdiction was given to the circuit courts, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. More than ninety years have elapsed since that provision was enacted, and yet no alteration has been made in it as to the amount required to give the circuit courts jurisdiction in suits of a civil nature at common law or in equity. 1 Stat. at L., 78; 18 Stat. at L., 470; R. S., sec. 629.

Judges of the Circuit Court are required to certify, at the request of either party, or their counsel, any division of opinion occurring between them on the trial or hearing of such a suit, and the provision is that such certificate shall be entered of record. R. S., sec. 652.

Beyond doubt, either party may require such a certificate to be entered if any such division of opinion occurred in any civil action or suit in equity cognizable in the circuit court, no matter if the amount in controversy only exceeds by one cent, exclusive of costs, the sum or value of \$500. Provision is made that in admiralty causes the circuit court shall find and state the facts and conclusions of law separately, but the requirement does not extend to suits in equity; from which it follows that if the opinion just read is correct, the Supreme Court must re-examine the facts as well as the law in every such final decree brought here, even though the amount in dispute barely exceeds \$500, merely because the record contains such a certificate of division of opinion, in spite of the express enactment of Congress that such final decrees shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of \$5,000.

Certificates of the kind, both in civil and criminal cases, when made before judgment, as directed by the original Act, were certified under the seal of the circuit court to the Supreme Court, and their effect was to suspend all proceedings in the cause which would prejudice the merits, until the mandate of the Supreme Court went down and was filed. 2 Stat. at L., 159.

More points were sent up under the 6th section of that Act, nor was the proceeding any bar in a civil suit to a writ of error or appeal, subsequent to the final judgment or decree, to

remove the whole case into the Supreme Court for re-examination. Matters of difference of opinion between the Judges of the Circuit Court in criminal cases are still required to be certified here before judgment or sentence in that mode of procedure, without any change whatever. Every day's experience proves that proposition; but regulations of a very different character have been provided where the difference of opinion occurs in civil actions or suits in equity. 17 Stat. at L., 196; R. S., secs. 650-652.

Whenever such a difference of opinion shall occur between the Judges of the Circuit Court in a civil action or suit in equity, the provision is that the opinion of the Circuit Justice or Circuit Judge shall prevail, and be considered the opinion of the court for the time being; but when the final judgment or decree in such action or suit shall be entered, it is made the duty of the Judges, in case such a difference of opinion occurred in the trial or hearing, to make the required certificate of the same, in which event it is provided that either party may remove such final judgment or decree into the Supreme Court on writ of error or appeal.

Like the original Act, the Revised Statutes require that the points in difference shall be stated by the judges and certified, and that such certificate shall be *entered of record* without any requirement, as in the original Act, that it shall be certified under the seal of the circuit court to the Supreme Court at their next session. Evidently no such proceeding is required, as it is not contemplated that the certificate of division will ever come before the Supreme Court for re-examination unless the final judgment or decree is removed here by writ of error or appeal. R. S., sec. 652.

Existing laws require that final judgments in civil actions shall precede the writ of error or appeal, to remove the cause into this court for re-examination, no matter whether the questions for revision are raised in the record by a bill of exceptions, a certificate of division of opinion, an agreed statement of facts, or by demurrer, or even by a special finding of the court, or by a special verdict. Jurisdictional limitation, prior to the passage of the Act of the 16th of February, 1875, was that the matter in dispute must exceed the sum or value of \$2,000, exclusive of costs; but that Act raised the *minimum* of jurisdiction from \$2,000 to \$5,000, as already explained, in all civil actions, the same section providing that the certificate of division of opinion in criminal cases shall be made as before, and be certified under the seal of the circuit court to the Supreme Court. 18 Stat. at L., 316; R. S., sec. 650.

Circuit court judgments or decrees in civil actions or suits in equity, in order that they may be re-examinable in the Supreme Court must be final, and the matter in dispute must exceed the sum or value of \$5,000, exclusive of costs; and they must be removed into the Supreme Court by writ of error or appeal, and they cannot be removed here in any other way which will give this court jurisdiction to reverse or affirm the judgment or decree. R. S., sec. 691; 18 Stat. at L., 316.

Power to re-examine any judgment or decree of the circuit court is not given to the Supreme Court unless the case comes within that category, the Act of Congress now in force provides

that such judgments and decrees, entered after the Act went into operation "*Shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of \$5,000, exclusive of costs.*"

Prior to the Act of June 1, 1872, the certificate of division of opinion gave the Supreme Court jurisdiction to decide the questions in difference without regard to the amount in dispute, as it applied both to civil and criminal cases, and in both had the effect to suspend action prejudicial to the merits until the decision of the Supreme Court was received. It preceded final judgment or decree, and was certified to the Supreme Court under the seal of the circuit court. Such certificates in criminal cases are still required to be certified in that way, and still give the Supreme Court jurisdiction of the points certified, wholly irrespective of the merits or of any other question in the case. 17 Stat. at L., 196.

Since the passage of that Act, the proceeding in civil cases and suits in equity is altogether different, the office of the certificate of division of opinion, like that of a bill of exceptions, being merely to raise the questions in the record, the requirement that it shall be certified under the seal of the circuit court to the Supreme Court at its next session being entirely omitted in the new regulation.

Bills of exception are required to place on the record what rested in parol, and they are allowed in the circuit court, irrespective of the amount in dispute; but a writ of error will not lie to remove the cause into the Supreme Court unless the amount in dispute exceeds the sum or value of \$5,000, exclusive of costs. Where the amount in dispute is less than that amount, the review takes place on a motion for new trial in the circuit court.

Differences of opinion between the Circuit Judges may be certified by them when they sit together, irrespective of the amount, and the effect is that the certificate becomes part of the record; and if the amount in dispute is sufficient to give the Supreme Court jurisdiction, the cause may be removed here by writ of error or appeal for re-examination; but if the amount in dispute is insufficient for that purpose, then the only remedy for the losing party is a motion for new trial in the circuit court.

Other modes for raising questions for review in appellate courts are well known: as, for example, it may be done by an agreed statement of facts, or by demurrer to the declaration or a material pleading, or by a special finding of the court, or by a special verdict, in all of which cases the final judgment or decree may be removed into the Supreme Court by writ of error or appeal, if the matter in dispute exceeds the sum or value of \$5,000, exclusive of costs; but if the amount in dispute does not exceed that amount, the Act of Congress is peremptory that it shall not be re-examined in the Supreme Court.

Under the original Act the Judges of the Circuit Court were required to make the certificate and cause it to be certified to the Supreme Court before final judgment was rendered, but under the new Act the final judgment in civil cases is required to precede the certificate; nor is there any requirement that the difference of opinion shall ever be certified to the Supreme Court

under the seal of the circuit court. 17 Stat. at L., 196.

None of these propositions, it is believed, can be successfully controverted; and, if not, it follows to a demonstration that this court has no jurisdiction of the case to reverse or affirm the decree of the circuit court, it affirming that the judgment of the circuit court was only for the sum of \$2,650.67. It seems absurd to hold that jurisdiction exists in such a case, when the Act of Congress provides that judgments and decrees of the circuit courts shall not be re-examined in the Supreme Court unless the matter in dispute shall exceed the sum or value of \$5,000, exclusive of costs.

Suppose I am wrong in this; then it becomes necessary to re-examine the question whether the Sixth District Court of New Orleans had jurisdiction of the cause of action and of the parties at the time the judgment described in the declaration was rendered.

It appears that the plaintiff, who was a loyal citizen of New York, owned a valuable plantation in the Parish of Plaquemines, situated on the right bank of the Mississippi River, about forty miles from New Orleans, and that the defendant, at the time of the service of the writ and of the rendition of the judgment, was a military officer in the service of the United States, stationed at the Parapet, near the city; that on the 5th of September, 1862, a small military detachment, acting under the verbal and secret orders of the defendant, landed at the plantation of the plaintiff, and wrongfully, as alleged, took therefrom and from his dwelling-house there situated the goods and chattels mentioned in the schedule annexed to the petition for redress, of the value of \$1,611.29. Redress being refused, the plaintiff instituted the present suit to recover the value of the property wrongfully seized and detained. Personal service having been made, and the defendant having neglected and refused to appear, he was defaulted. Testimony was taken as to the circumstances of the seizure and as to the value of the property converted; and the court, after due consideration, rendered judgment in favor of the plaintiff for the sum of \$1,454.81. Execution issued, and the sheriff returned that the defendant could not be found. Satisfaction of the execution being refused, the plaintiff, on the 30th of March, 1866, instituted the present action of debt to recover the amount of that judgment.

Apart from the technical defenses already considered, the only defense is, that the Sixth District Court of New Orleans had no jurisdiction of the parties or of the cause of action to render this judgment. Attempt is made to maintain that defense solely upon the ground that, inasmuch as the defendant was a military officer in the service of the United States, he was not amenable to civil process from a court of justice for the taking of the goods and chattels of the plaintiff at the time and place when and where the same were seized and carried away.

Support to that defense is attempted to be drawn from the fact that the State, on the 26th of January, 1861, passed an ordinance of secession and joined the rebellion; that war between the Confederacy and the United States ensued; and that the war, at the time the action was commenced and the judgment rendered, was still

flagrant and not ended. Military officers, it is contended, are not subject to civil process under such circumstances, even though the acts which are the subject of complaint constitute an abuse of power and were perpetrated without authority.

War undoubtedly followed secession, and it is equally true that, prior to May 1, 1862, New Orleans was occupied by the Confederate forces. Rebel dominion in the city, from the passage of the secession ordinance to the date last mentioned, was complete. Vice-Admiral Farragut reached New Orleans on the 25th of April and, as flag-officer, he demanded the surrender of the city; but the surrender was not made. Transports conveying the troops under the command of Major-General Butler arrived on the first day of May. Certain proceedings followed, which are fully detailed in a prior decision. Suffice it to say, that this court decided in that case that the military occupation of the city by the Union forces became complete May 1, which is the date of the proclamation published by General Butler. *The Venice*, 2 Wall., 258-274 [69 U. S., XVII., 866]. There was no hostile demonstration then nor any subsequent disturbance, and this court unanimously determined that all the rights and obligations resulting from such occupation and from the terms of the proclamation might properly be regarded as existing from that date.

Two clauses of the proclamation may be referred to as evidencing the intent and public import of the document: (1.) That "All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States." (2.) That "All foreigners who have not made oath of allegiance" to the Confederacy "will be protected in their persons and property as heretofore."

Wherever the national forces were successful in re-establishing the national authority, the rights of persons and of property were immediately respected and enforced. Persons of intelligence everywhere will see that that proclamation was framed in the same spirit and with the same intent as that which actuated Congress in passing the first Act to suppress insurrection. 12 Stat. at L., 256, sec. 5.

Authority was given to the President by that Act, under certain conditions, to declare by proclamation that the inhabitants of a State or part of a State were in a state of insurrection; and the provision was, that when that was done all commercial intercourse between such insurrectionary district and the rest of the United States should cease and be unlawful so long as *such condition of hostility should continue*. *The Reform*, 3 Wall., 628 [70 U. S., XVIII., 109].

Certain States and parts of States were declared to be in insurrection in the Proclamation made by the President, August, 16, 1861, and in that document he expressly exempted from that condition all districts or parts of districts which might from time to time be occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents. Intercourse for commercial purposes was not prohibited with such places or districts while so occupied and controlled. They were not regarded as in actual insurrection, or their inhabitants as subject to treatment as enemies. 12 Stat. at L., 1262.

Commercial intercourse was never wholly interdited, and the regulations were framed in the same spirit of forbearance towards the places and districts where the national authority was re-established. "As far as possible," said *Chief Justice Chase*, "the people of such parts of the insurgent States as came under the national occupation and control were treated as if their relations to the National Government had never been interrupted." *The Venice* [supra].

Sufficient appears in the Code of Practice of the State to support the proposition that the District Courts of Louisiana were, before the rebellion, courts of general jurisdiction, as it provides that their jurisdiction extends over all civil causes where the amount in dispute exceeds \$50; and this court, in construing that provision, held that its legal import was to render those tribunals courts of general jurisdiction in all civil causes not embraced within the exception. *Fourniquet v. Perkins*, 7 How., 160, 169; *White v. Cannon*, 6 Wall., 443-450 [73 U. S., XVIII., 923-5].

Judgment in this case was rendered in the Sixth District Court of New Orleans, which was established before the rebellion and had jurisdiction in all civil causes. R. S. (La.), tit. Judiciary, sec. 72.

Enough appears, to show that the Sixth District Court was created by statute more than fifteen years before the insurrection, and that it was in the full exercise of its jurisdiction when the secession ordinance was passed; that it was never abolished or suspended by any military or other order or power; that it was kept open subsequent to the proclamation of General Butler, the judge and clerk being in attendance from day to day, as business demanded. "Civil causes between party and party," said the proclamation, "will be referred to the ordinary tribunals." After General Shepley was appointed Military Governor, in August following, the Sixth District Court held its regular sessions at the time and place fixed by the state statute. Early after the capture of the city the judge took the oath of allegiance and resumed the proper functions of his office, with the recognition and approbation of the military authorities. From the moment the Judge of the Sixth District Court took the oath of allegiance, as required by the commanding general, June 14, 1862, the court continued in the exercise of all its powers, the same as before the rebellion, and was the only court that did, until General Shepley, in the fall of that year, appointed Judges in the First, Second and Third Judicial Districts.

Military conquerors of foreign States in time of war may, doubtless, displace the courts of the conquered country, and may establish civil tribunals in their place for administering justice; and in such cases it is, unquestionably, true that the jurisdiction of suits of every description is transferred to the new tribunals. *U. S. v. Rice*, 4 Wheat., 246; *Cross v. Harrison*, 16 How., 164. But that concession proves nothing in this case, as it is universally conceded that the mere occupancy of the territory does not necessarily displace the local tribunals of justice. *Pepin v. Lachenmeyer*, 45 N. Y., 27-33. They were not displaced in this case, but suffered to continue in the exercise of their judicial powers, with the recognition and approbation of the military commander.

See 10 OTTO.

Important differences exist between a foreign war waged for conquest and a civil war waged to restore insurrectionary districts to their allegiance to the rightful sovereign. Nor could the commander of the department, after the date of the proclamation of General Butler, seize private property as booty of war, or make any order confiscating it. *Planters' Bk. v. Union Bk.*, 16 Wall., 483 [83 U. S., XXI., 473].

On the 17th of August in the same year, General Butler, as the commander of the department, issued an order requiring the banks of the city to pay over to the Chief Quartermaster of the Army all money in their possession belonging to hostile corporations or hostile official persons. Payments were made by the defendant bank, pursuant to that order, of a large amount deposited by the plaintiff bank. Re-imbursement having been refused, the plaintiff bank brought suit to recover the amount, and judgment was ultimately rendered in favor of the plaintiff in the sum of \$24,713. Exceptions were filed by the defendant, and the cause was removed into this court, where the judgment was affirmed.

Two points were ruled by this court: (1) That the order was one which the commanding general had no authority to make, and that it was wholly invalid. (2) That payment to the chief quartermaster did not satisfy the debt.

In disposing of the case, *Mr. Justice Strong* remarked, that the City of New Orleans was then in the quiet possession of the United States forces; that it had been captured fifteen months before that time, and that undisturbed possession had been maintained ever after its capture; that the order was not an attempt to seize the property *flagrante bello*, nor was it a seizure for the immediate use of the army; that it was an attempt to confiscate private property, which, though it may be subjected to confiscation by legislative authority is according to the modern law of nations, exempt from capture as booty of war.

Concede all that; and still the defendant rests his defense on the proposition of his third special plea, that the Sixth District Court had no jurisdiction over the person of the defendant, because he was a military officer in the Army of the United States, acting under the orders of his superiors. But this is not the case of a foreign war in which the courts of the enemy assumed jurisdiction over an officer of the invading army. Nothing of the kind is pretended, and if it were, it could not be supported for a moment. Instead of that, the United States, throughout the active hostilities, were engaged in putting down the insurrection and in suppressing the rebellion, with a view to the re-establishment and complete restoration of the national authority. Throughout the whole period of the civil war the government, maintained that the Ordinances of Secession were void, and that they did not and could not have the effect to take a State out of the Union or to annul its Constitution or laws.

War followed insurrection, but all know that as soon as the military forces of the United States wrested any portion of the national territory from the rebellious authorities, and acquired full and complete control of it, the normal condition of affairs became restored, as indicated in the first Act of Congress upon the subject, and the Proclamation of the President,

which soon followed the passage of that Act.

Towns, provinces and territories, says Halleck, which are retaken from the conqueror during the war, or which are restored to their former sovereign by the Treaty of Peace, are entitled to the right of postliminy; and the original sovereign owner, on recovering his dominion over them, whether by force of arms or by treaty, is bound to restore them to their former state. In other words, he acquires no new right over them, either by the act of recapture or of restoration. * * * He rules not by any newly acquired title which relates back to any former period, but by his antecedent title, which, in contemplation of law, has never been divested. Halleck, *Int. L.*, 871.

When a town, reduced by the enemy's arms, is retaken by those of her own sovereign, says Vattel, she is restored to her former condition, and re-instated in all her rights. Vattel, *ed.* by Chit., 395.

Pressing emergency in time of war may authorize the seizure of private property before providing for compensation, but, to justify the taking without the consent of the owner, the necessity must be apparent, leaving no available alternative.

Four months before the marauding expedition, acting under the verbal and secret orders of the defendant, entered the plantation and dwelling house of the plaintiff, during his temporary absence, and seized the goods and chattels mentioned, the City of New Orleans had fallen into the undisturbed possession of the Union forces under the command of General Butler, who never authorized the defendant to perpetrate the acts of plunder charged in the declaration. Evidence of necessity in this case is wholly wanting, without which the acts charged in the declaration cannot be justified. *Sellards v. Zomes*, 5 Bush, 90.

Beyond doubt, he might have appealed to the commanding general for an order that the suit should be discontinued; but he did not, and it may be that his reason for not doing so was that he knew if he did a court of inquiry would be ordered. Public order was fully restored in the city, and the courts were open, and every person was in the full enjoyment of the protection promised in the military proclamation issued four months before, when the Union forces entered the city. Process, in due form of law, was issued, and personal service having been made, the defendant, if he had any defense, was bound to appear and plead it.

Actual insurrection in that locality had ceased, and the military control of the Union forces was substantial, complete and permanent; and, being such, it drew after it the full measure of protection to persons and property consistent with the fact that the war outside and in other localities had not terminated. Rebel authority was replaced by the national authority, and all the inhabitants were in the enjoyment of the protection and rights promised in the military proclamation then in force.

Hostilities having ceased in that locality, the defendant was not engaged in any active military operations. His military duties did not prevent his attendance at the court to make his defense. No evidence is exhibited in the pleadings showing any condition of affairs, military or civil, excusing the defendant from refusing

to obey a judicial summons; and if the court had no jurisdiction, he should have appeared and so pleaded. Having neglected to do that at the time, he cannot now attack the judgment collaterally in a suit brought upon it in another jurisdiction. When the jurisdiction has attached, the judgment is conclusive for all purposes and is not open to inquiry upon the merits; and if conclusive in the State where it was pronounced, it is equally conclusive everywhere in the courts of the United States. 2 Story, *Const.*, sec. 1813; *Christmas v. Russell*, 5 Wall., 290, 302 [72 U. S., XVIII., 475, 478]; *Mills v. Duryee*, 7 Cranch, 438.

It is not even suggested that the military authorities ever interfered to prevent the suit, and, as matter of fact, it is known that no such interference ever took place. Instead of that, the clear inference is that the defendant preferred to submit to the jurisdiction of the court where the suit was brought, rather than subject himself to a military court of inquiry; and, if so, it was his own choice, and he cannot now be permitted to attack the judgment which was rendered in consequence of his own negligence to appear and plead his defense.

Confirmation of the proposition that it was the duty of the defendant to appear and plead his defense, is derived from the Act of Congress passed for the protection of those prosecuted for any search, seizure, arrest or imprisonment made, done or committed, or acts omitted to be done under and by virtue of any order of the President or under his authority, or under color of any law of Congress, the provision being that "Such defense may be made by special plea or under the general issue, in the insurrectionary districts in which the national authority had been restored by *undisturbed possession and control*." 12 Stat. at L., 756, sec. 4.

By the 5th section of the same Act, it is provided that all civil suits and criminal prosecutions of the character described in the 4th section, in which final judgment may be rendered in the circuit court, may be carried by writ of error to the Supreme Court, whatever may be the amount of the judgment. At the date of the rendition of the judgment in question, the United States had undisturbed possession and control of the territory embraced within the jurisdiction of the Sixth District Court, which was fully recognized by the Military Governor of the State as a tribunal having full jurisdiction of all civil causes arising within the judicial district. If the defendant could be justified, under the 4th section of that Act, for the alleged trespass charged against him, the same section made it his duty to appear and answer to the judicial summons, and make his defense by plea.

Reported cases in great numbers and of high authority, support the proposition that a military officer, except when war is flagrant, or when the courts are silenced by the exigencies of military rule or martial law, is subject to judicial process for the abuse of his authority or for wrongful acts done outside of his military jurisdiction. *Mostyn v. Fabrigas*, 1 Cowp., 161, 175.

Trespass for false imprisonment was brought in that case against the Governor of Minorca, charging that he, the Governor, had beat and wounded the defendant, and imprisoned him for

the space of ten months, without reasonable or probable cause. Plea, the general issue. Trial in the Common Pleas, and verdict for the plaintiff in the sum of £3,000. Exceptions were filed by the defendant, and he sued out a writ of error and removed the cause into the King's Bench, where Lord Mansfield gave the opinion of the court, all the other Judges of the court concurring. He held that trespass would lie for an abuse of power, and he supported the conclusion of the court by stating a case that occurred in early time, while he was at the bar, in which a captain in a train of artillery sued the Military Governor of Gibraltar, who had confirmed the sentence of a court-martial by which the plaintiff had been tried and sentenced to be whipped. His Lordship brought the action, and he says that the Governor was ably defended, and he added that nobody ever thought that the action would not lie.

Two other cases were mentioned by that great magistrate, which were tried before him in the circuit, one of which was a suit against a military captain, and the other was a suit against an admiral in the navy, both of which resulted in favor of the plaintiff. Errors were assigned in the principal case, and the report shows that the questions were elaborately argued, and that the judgment of the lower court was unanimously affirmed. *McLaughlin v. Green*, 50 Miss., 453-462; *Bellamont's Case*, 2 Salk., 625; *Wey v. Yally*, 6 Mod., 195.

Examples of the kind in the courts of the parent country are quite numerous, and in every case the alleged wrong-doer was put to his justification; and if it appeared that the wrongful act was done without lawful authority, the plaintiff recovered compensation for the injury. *Mostyn v. Fabrigas*, 1 Smith, L. Cas., 7th ed., par. 11., 1035.

Where the captain of a company imposed a fine upon a soldier, and issued a warrant for its collection, under which the soldier was imprisoned, and it appeared that the statute conferred no authority upon the captain to issue warrants for the collection of fines in such cases, it was held, in an action of trespass brought by the soldier against the captain, that the plaintiff was entitled to recover. *Mallory v. Merritt*, 17 Conn., 178; 6 Waite, Act. and Def., 49.

Acts of military officers within the scope of their jurisdiction are protected, while such as are in excess of their jurisdiction are actionable. Waite, Act. and Def., 107.

When and where the civil power is suspended, the President has a right to govern by the military forces, but in all other cases the civil power excludes martial law and government by the war power. *Griffin v. Wilcox*, 21 Ind., 370; 7 Waite, Act. and Def., 314.

A soldier cannot justify on the ground that he was obeying the orders of his superior officer, if such orders were illegal and not justified by the rules and usages of war, and such that a person of ordinary intelligence would know that obedience would be illegal and criminal. *Riggs v. State*, 3 Cold., 87; *Wise v. Withers*, 3 Cranch, 331, 337; *Com. v. Palmer*, 2 Bush, 570.

It follows that the military commander, after the capture of New Orleans, had no right to seize private property as booty, or to confiscate it, for the reason that hostilities had ceased and the courts were open. *Planters' Bk. v. Union*
See 10 OTTO.

Bk., 16 Wall., 483 [83 U. S., XXI., 473]; 7 Waite, Act. and Def., 315.

Without proof of a direct order from the commandant of the place, the defendant cannot justify his acts as having been authorized by his superior officer, even if that would afford a justification; for, as Dr. Lushington said in a celebrated case, if the act which he did was in itself wrongful and produced damage to the plaintiff, he, the plaintiff, must have the same remedy by action against the wrong doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. Agents in such cases are responsible for their tortious acts; but the government is morally bound to give them indemnity, the rule being, as the court held in that case, that "The right to compensation in the party injured is paramount to that consideration." *Rogers v. Dutt*, 13 Moore (P. C.), 209, 236; *Wilson v. Franklin*, 63 N. C., 259.

It is not to be questioned, said Phelps, J., that, if a military officer transcend the limits of his authority and take cognizance of a matter not within his jurisdiction, his acts are void, and will afford no justification to those who act under him. *Darling v. Bowen*, 10 Vt., 148, 151. Conclusive support to that proposition, if any be needed, is found in several English cases of undoubted authority. *Warden v. Bailey*, 4 Taunt., 65-87.

During the argument, reference was made to the military order of the 16th of August, 1862, which purported to authorize commanders in certain States to seize property, real and personal, necessary or convenient for their commands or other military purposes; but it is clear that that order had no application in localities within the peaceable possession of the Union forces, for several reasons, either one of which is sufficient to show that it is a mere afterthought:

1. It could not apply to New Orleans, because if it did it would contradict and supersede the proclamation of General Butler, in which he promised that all the rights of property of whatever kind should be held inviolate.

2. Because it has been solemnly decided by this court that a military commander of that district, after the said proclamation, could not seize private property as booty of war. *Planters' Bk. v. Union Bk.* [supra].

3. Because the record shows that the whole district had been restored to the Union, and that all the inhabitants were in cheerful submission to the Federal Constitution.

4. Because there was no more necessity for seizing private property as supplies than there would have been if the Union forces had been encamped in any one of the great loyal cities of the North.

Concede the correctness of these suggestions, and two conclusions follow: (1) That this court has no jurisdiction to reverse or affirm the judgment of the circuit court. (2) That, if this court has such jurisdiction, then the judgment of the circuit court should be affirmed.

Attention was not called to the question of jurisdiction in the court below; nor is it probable that the result would have been different if it had been, as the universal practice in the circuit court is to favor appeals and render every facility to promote a re-examination of the judg-

ment, unless the right has been denied by some express decision of the Supreme Court, or by some explicit and unambiguous congressional regulation.

Mr. Justice Miller dissenting:

I concur with my brother Clifford in holding that this court is without jurisdiction, because the amount in controversy does not exceed \$5,000, and am content to rest that point on what he has said.

I also believe that the judgment of the circuit court should have been affirmed, for a single reason, which I will state in as few words as possible.

It is apparent that, very soon after the capture of New Orleans by the forces under General Butler, the enforcement of the law as between individuals was remitted to the civil courts, and the proclamation of the commanding general showed that it was his purpose that the assertion of such rights as required judicial proceedings should be had in the ordinary tribunals, with as little interruption as possible, and as little interference by the military authority. One of the evidences of this proposition is to be found in the fact that, without any change in the Judge, who had taken the oath of allegiance, the Sixth District Court of New Orleans was continued in the exercise of all its functions, which under the proclamation, included "civil causes between party and party."

The Sixth District Court was a court of the State of Louisiana exercising jurisdiction both by general law and by the express proclamation of the commanding general. The locality was a part of the United States. The parties were citizens of the United States. And no active military operations were being carried on within the City of New Orleans or against it; and for the very reason of the perfect security of its military possession by the loyal forces, the civil courts had been restored to the exercise of their ordinary functions between man and man, or, as the proclamation expressed it, between party and party. The condition, therefore, was very different from that of a military force invading the county of a foreign enemy, and before any treaty of peace, or the declaration of any purpose to annex the country seized to that of the conqueror, the military hold it in armed hostility to its rightful sovereign, and solely by the strong hand. In such a case, submission of the inhabitants can only be enforced by obedience to military power; and to subject that power to the jurisdiction of the courts of the country, is to abdicate wholly the control of the country so subjugated in war.

But in New Orleans it was far otherwise. Though the military were rightfully there, they were in their own country, among citizens subject to the same law that controlled the military, who owed allegiance to the same government. The citizens who had been only a few months in insurrection, were invited to submit themselves again to the same laws, and to have their contested rights decided by the same courts, and, in this case, by the same Judge.

In this condition of affairs, Johnson, who was a resident and citizen, against whose loyalty no charge is made, filed his petition, in due form of law before that court, in which he set forth that certain persons had, with force and

violence, committed a trespass on his home, and taken therefrom personal property of the value of several thousand dollars, and he charged Dow with being guilty of this trespass.

The usual process of summons was served on Dow in person, and on his failure to appear or answer, either by himself or attorney, a default was entered, and judgment for the value of the property taken. From this judgment an appeal was never taken, and being unpaid the present suit was brought in the Circuit Court of the United States for the District of Maine, where Dow resides, to enforce it.

The defense, the only defense which could be relied on, is a total and absolute want of any jurisdiction in the Sixth District Court over the case.

But surely that court did have jurisdiction of an action of trespass. Johnson the plaintiff was a person competent to sue, and if the cause of action was such as he alleged, he was entitled to a remedy in that court.

It is not denied that if the trespasser had been any other person than one of the United States military force he would have been liable to be sued and bound to answer. But it is said that because Dow was such military officer he was not bound to answer.

I hold it to be a principle of universal prevalence in all courts that when a proper plaintiff brings an actionable case before a court of which it has jurisdiction and proper service of process is made on the defendant that any personal exemption from the force of such process or from the jurisdiction of the court must be made by plea or some other appropriate mode of bringing the personal exemption before the court. I know of no exception to this rule laid down by all the works on pleading, from Chitty to the present time. There is no other way in which the court can know of the exemption if it be not unnecessarily stated in plaintiff's pleading. A party so sued is bound to answer at his peril. There is jurisdiction in the court, as the case stands. The court must pronounce the judgment of the law and if the party for any reason stays away or remains silent, he does so at the peril of having a judgment rendered against him by a court of competent jurisdiction of the parties and of the subject-matter of the suit, which cannot be assailed collaterally.

Much is said of the evil of dragging all military officers into the courts under such circumstances. But the military power can make such general orders as will protect themselves against the abuse of the right which it has expressly recognized. So, the idea that Dow ought not to be compelled to leave his post at Fort St. Philip, to defend this suit in New Orleans, is of little force. If he had to be found at the fort for service of process, he could easily have employed a lawyer to put in his plea in abatement that he was acting under military authority and, therefore, not liable to the suit.

Every man is liable to be sued wrongfully or without cause, but he is, by the very genius of our laws, bound to submit to this evil and make defense. Why should not this class of men of all others who exercise most despotic power, be required to show the authority by which they are authorized to do so?

If I am not mistaken in these principles, I see no escape from their controlling influence

in the case before us. It is too well settled to admit of controversy, that a judgment rendered by a court, which had jurisdiction over the parties and the subject-matter of the suit, can only be impeached by some direct proceeding to avoid it and that when an action is brought on such judgment in any other court, no defense can be made to it which might rightfully have been made in the former suit. General Dow could not, therefore, set up in the circuit court as a defense to that judgment the same matters which he should have relied on in the court that rendered it and which was bound to render the judgment it did.

It is impossible in discussing this matter that memory should fail to recall a very famous case of historical interest, involving many of the same principles, which occurred about half a century before this, and of which the same city was the theater.

During what has been called the siege of New Orleans, at the close of the war with Great Britain, the commanding general of our forces declared martial law in the city. This was unpleasant to many citizens, and to others who claimed to be foreigners domiciled there at the time. Some of these, becoming restive under its restraints, made publication in the newspapers of a seditious character for which General Jackson ordered them to be arrested, and when *Judge Hall*, of the proper civil court, issued a writ of *habeas corpus* for their release, he tore up the writ and sent *Judge Hall* by force beyond his lines. Within a very few days after this, the victory of the 8th January, 1815, and receipt of the news of a Treaty of Peace caused the revocation of the declaration of martial law and the restoration of *Judge Hall* to his judicial functions. The first use he made of it was to issue a process against General Jackson for contempt of court in his action in reference to the writ of *habeas corpus*.

That distinguished man, though in the midst of the adulation consequent on the great victory, did not act as the defendant in this case did, by paying no attention to the process, but came to the court in a citizen's dress, attended only by a single member of his military family and with his legal adviser. He offered to read the same paper which his counsel had read against issuing the process for contempt, and, when the court declined to hear it, he submitted himself without more to its judgment. At this there was such a demonstration of ill-feeling in the crowded court room that the Judge said he could not proceed, and would adjourn the court. But the noble defender of the city declared that he was equally ready to defend the court, and begged that the Judge would proceed without fear to do what he might think his duty required. A fine of \$1,000 was entered up against him, which he paid at once, and used his authority, which was needed, to disperse the mob, who were inclined to violence against the Judge.

I confess I have always been taught to believe that *Judge Hall* was right in imposing the fine, and that General Jackson earned the brightest page in his history by paying it, and by his graceful submission to the judicial power; and such I believe is the judgment of history and of thoughtful judicial inquirers; though a grateful country very properly restored to her fa-

vorite general the sum he had paid for a necessary but unauthorized exercise of military power. I have no doubt that General Dow had good reason for all he did, and I think he would have acted more wisely if, respecting the courts in the proper exercise of their functions, he had made his defense at the right time before the appropriate tribunal.

Mr. Justice Swayne, dissenting:

With respect to the jurisdictional point involved in this case I concur in the views of *Mr. Justice Clifford* and *Mr. Justice Miller*. Upon the merits I unite in the opinion of the majority as delivered by *Mr. Justice Field*.

Copy, foregoing, duly authenticated by James H. McKenney Esq., Clerk Supreme Court, U. S.

UNITED STATES, *Appt.*,

v.

SANFORD PERRYMAN.

(See S. C., 10 Otto, 235-238.)

Property stolen from Indian—statutory right.

1. The United States, under sections 2154 and 2155 of the Revised Statutes, are not liable to pay the value of property stolen by a negro from a friendly Indian, within the Indian country.
2. Where a right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute.

[No. 153.]

Argued Jan. 16, 1880. Decided Feb. 2, 1880.

A PPEAL from the Court of Claims.

The case is sufficiently stated in the opinion of the court.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for appellant.

Mr. R. S. Davis, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

This suit was brought to enforce an alleged liability of the United States, under sections 2154 and 2155 of the Revised Statutes, to pay the value of twenty-three head of beef cattle, stolen from the claimant, a friendly Indian within the Indian country.

These sections are as follows:

"Sec. 2154. Whenever, in the commission, by a white person, of any crime, offense or misdemeanor within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offense or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured or destroyed.

Sec. 2155. If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of

the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the Nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence."

This is a substantial reproduction of section 16 of the Act "To Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers," approved June 30, 1834, 4 Stat. at L., 731, and which continued in force until the Revised Statutes went into effect.

The facts are briefly these: on the 18th of December, 1874, Henry Carter, a negro, and not an Indian, and John Conner, a white man, stole from the claimant, a friendly Creek Indian, in the Indian country, the cattle sued for. At the May Term, 1875, of the District Court of the United States for the Western District of Arkansas, both Carter and Conner were indicted for the larceny. Afterwards, a *nolle prosequi* was entered as to Conner and he was discharged; but Carter was tried, found guilty, and sentenced to pay to the claimant double the value of the cattle stolen, and be imprisoned in the penitentiary. He being unable to pay the judgment, this suit was brought. The Court of Claims was divided on the question whether the United States were liable in such a case for a theft committed by a negro, and, in order to allow an appeal, gave judgment *pro forma* for the claimant. From this judgment the United States appealed.

The single question we have to consider is, whether the United States are liable under the statute to the claimant, since the only offender who has been convicted and sentenced to pay for the property stolen was a negro, and not a white person. The term "white person," in the Revised Statutes, must be given the same meaning it had in the original Act of 1834. Congress has nowhere manifested an intention of using it in a different sense. While the negro, under the operation of the constitutional amendments, has been endowed with certain civil and political rights which he did not have in 1834, he is no more, in fact, a white person now than he was then. He is a citizen and free. No State can abridge his privileges and immunities as a citizen of the United States or deny him the equal protection of the laws; but his race and color are the same, and he is no more included now within the descriptive term of a "white person," than he always has been. If, then, this term was used in the Act of 1834 to exclude the liability of the United States for the depredations of the negroes in the Indian country, it must be considered as having been so used in the Revised Statutes. There may be no good reason for restricting any longer this liability to acts of whites; but until Congress sees fit to change the statute in this particular, the courts are not at liberty to disregard the law as it is left to stand. The question is not as to the effect of the constitutional amendments on an existing statute affecting the civil or political rights of the negro himself, but as to the meaning of the words "white person," when used as words of description in a statute making the United States liable

for the acts of the persons described. No rights of the negro himself, as a citizen or otherwise, are in any way involved.

It is contended, however, that the term "white person," as here used, means no more than "not an Indian;" in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian Territory who were not themselves Indians. Such, we think, is not the true construction of the statute. The Act of 1834 was not the first statute upon this subject. On the 19th of May, 1796, an Act was passed "To Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers." 1 Stat. at L., 469. In this statute various provisions were made in respect to "Any citizen of, or other person resident in, the United States or either of the territorial districts of the United States;" and the liability of the United States for depredations, etc., was extended to certain specified acts of all such persons. Sec. 4. This statute expired by its own limitation in 1799, and on the 3d of March of that year another was passed with similar provisions, which continued in force for three years. 1 Stat. at L., 743. On the 30th of March, 1802, a permanent statute on the same subject was passed, 2 Stat. at L., 139, making much the same general provisions. In this also various penalties were prescribed for certain acts by "Any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States." The liability of the United States for injuries to the property of friendly Indians was extended to the enumerated Acts of all "such citizens or other persons," the same as in the Statute of 1796. This continued in force until that of 1834, *supra*, was passed. In the Statute of 1834 the phrase "any citizen or other person residing within the United States or the territory thereof" is retained in all the provisions for penalties, etc., except in section 16, which was evidently intended to take the place of section 4 in the Statute of 1802, providing for the liability of the United States for injuries by certain persons to the property of friendly Indians. In that section (16) the words "a white person" were substituted for "any such citizen or other person;" that is to say "any citizen or other person resident of the United States," etc. It is impossible to believe that this was not done for a purpose. Had the phraseology throughout the entire statute been correspondingly changed, the question might have been different; but, confined as the change was to this particular section, we cannot but think that Congress meant just what the language used conveys to the popular mind. The Cherokee Nation, which had given the State of Georgia so much trouble, was about to remove to its new home west of the Mississippi. It was, no doubt, thought if the United States made themselves liable only for such depredations as were committed by the whites, these and other Indians would be less likely to tolerate fugitive blacks in their country. Hence, as a means of preventing the escape of slaves, the change in the law was made. Although the reason of the change no longer exists, Congress has seen fit to keep the law as it was. As the right is statutory, the

claimant cannot recover unless he brings himself within the terms of the statute. That he has not done.

The judgment of the Court of Claims is reversed and the cause remanded, with instructions to dismiss the petition.

MICHIGAN CENTRAL RAILROAD COMPANY, *Plff. in Err.*,

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

(See S. C., 10 Otto, 595-599.)

Internal revenue tax—on corporations—on dividends due foreigner.

*1. The tax on interest paid by corporations under section 122 of the Internal Revenue Law, as amended by the Act of 1866, is an excise tax on the business of these corporations, to be paid by them out of their earnings, income and profits.

2. In order to secure payment of this tax, it was laid by Congress on the subjects to which these earnings were applied in the usual course of business of such corporations, namely: dividends, interest on funded debt, construction, or some reserve fund held by the company.

3. Such a tax is not invalidated by the provision that the amount of it may be withheld from the dividend or interest going to the stockholder or bondholder, though the latter be a citizen or subject of a foreign government, with no residence in this country.

[No. 124.]

Argued Dec. 22, 1879. Decided Feb. 2, 1880.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. F. W. Palfrey, for plaintiff in error.

Mr. S. F. Phillips, *Solicitor-Gen.*, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

This was a suit in the Circuit Court for the District of Massachusetts by the Railroad Company to recover the sum of \$860.33, paid to defendant, as Collector of Internal Revenue, under protest, in which that court rendered judgment for defendant.

As the sum is small, and the law under which the tax was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.

The tax in question was assessed under section 122 of the Internal Revenue Law, as amended by the Act of 1866, 14 Stat. at L., 138. What is pertinent to this case reads as follows:

"Any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for con-

struction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends due and payable, as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or coupon on the bonds, or other evidences of their indebtedness so held by any person or party whatever, except where said companies have contracted otherwise." 14 Stat. at L., 138.

The agreed statement on which the case was tried shows that the tax was for interest paid by the Company on sterling bonds in London, which bonds were issued long before the Internal Revenue Law was enacted, and it is, perhaps, fairly to be inferred from the statement that the bonds were held at the time by foreigners.

It is on this latter feature of the case that resistance to the tax is founded. It is urged that it is a tax on the property, if property it may be called, of persons not subject to the jurisdiction of this government and, therefore, beyond the power of Congress to levy or enforce.

That the tax was actually collected without resistance, and the present suit is brought to recover it back, is sufficient answer to the assertion that it could not be enforced.

Whether Congress, having the power to enforce the law, has the authority to levy such a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the government no allegiance, is a question which we do not think necessary to the decision of this case.

The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. The section is a part of the system of taxing incomes, earnings and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely. The corporations mentioned in this section are those engaged in furnishing road-ways and water-ways for the transportation of persons and property, and the manifest purpose of the law was to levy the tax on the net earnings of such companies. How were these "earnings, profits, incomes or gains" to be most certainly ascertained? In every well conducted corporation of this character these profits were disposed of in one of four methods, namely: distributed to its stockholders as dividends, used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in the hands of the Company. Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, and as less liable to evasion than any other, the tax is imposed upon all of them. The books and records of the Company are thus made evidence of the profits they have made, and the Corporation itself is made responsible for the payment of the tax.

* Head notes by *Mr. Justice MILLER*.

Manifestly, such a mode of ascertaining the net earnings of the Company would not be complete unless the sums paid as interest on their bonded debts were taken into the account.

Of course it was competent for Congress to tax only the earnings after deducting this interest paid on their debt, or to treat the sum so paid as part of the net earnings, and paid out of them as dividends were. It adopted the latter policy.

It results from this course of observation that the tax was not laid on the bondholder who received the interest, but on the earnings of the Corporation which paid the interest.

It is very true that the Act went further, and declared that, except when the Company had contracted otherwise, it might deduct this tax from the amount due the bondholders. And where the bondholder was subject to congressional legislation by reason of citizenship, residence or *situs* of the property taxed, it was within the lawful power of Congress to do so. Whether, as a question of international law, this declaration would relieve the Corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss; for this court, on all such subjects, is bound by the legislative and political departments of its own government. The tax is laid by Congress on the net earnings, which are the results of the business of the Corporation, on which Congress had clearly a right to lay it; and being lawfully assessed and paid, it cannot be recovered back by reason of any inefficiency or ethical objection to the remedy over against the bondholder.

Judgment affirmed.

Cited—101 U. S., 550; 106 U. S., 115, 330, 337; 108 U. S., 234, 236, 279; 9 Ben., 68.

STATE OF TENNESSEE, *Plff.*,

v.
JAMES M. DAVIS.

(See S. C., 10 Otto, 257-302.)

Removal of suits against U. S. Officers—indictment for murder—government authority—state authority—constitutional provision—jurisdiction—sovereignty.

*1. Section 643 of the Revised Statutes of the United States.
*Head notes by Mr. Justice STRONG.

NOTE.—Homicide by officers in making an arrest, when justifiable.

Killing by officers in riots and unlawful assemblies, if necessary to arrest offenders, is justifiable. *Pon v. People*, 8 Mich., 150; 1 Hale P. C., 495; 4 Bl. Com., 180.

An officer having a warrant is justified in killing one accused of felony if he resists or flies; and also without a warrant, on probable suspicion founded on his own knowledge or the information of others. 1 East, P. C., 298; 2 Hale, P. C., 85; *State v. Garrett*, Winst., 144; *Reg. v. Dadson*, 2 Denison C. C., 25; *U. S. v. Rice*, 1 Hughes, 560; *State v. Anderson*, 1 Hill (S.C.), 327; *Wolff v. State*, 18 Ohio St., 298; *Clements v. State*, 50 Ala., 117.

A killing to prevent an escape after a felony actually committed, is justifiable, but necessity alone will justify it, and the authority to arrest must have been known. *State v. Rutherford*, 1 Hawks, 456; *State v. Roane*, 2 Dev., 581; *Williams v. State*, 44 Ala., 41; 1 Hale, P. C., 498; 2 Hale, P. C., 85; 4 Bl. Com., 180; 3 Inst., 118, 220, 221; 1 East, P. C., 298; *Rex v. Hagan*, 8 C. & P., 167; *U. S. v. Travers*, 2 Wheel. C. C., 510; *U. S. v. Jailer*, 2 Abb., 286.

The officer must secure his prisoner, if possible, without resort to deadly weapons. *Reneau v. State*, 2 Lea, 720; S. C., 2 Am. Cr. R., 624.

ed States, which declares that "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court," etc., is not in conflict with the Federal Constitution.

2. D. was indicted for murder in a state court of Tennessee. In his petition duly verified, for removal of the prosecution to the Federal Court, he stated, that, although indicted for murder, no murder was committed; that the killing was done in the petitioner's own necessary self-defense, to save his own life; that at the time when the alleged act for which he was indicted was committed he was, and still is, an officer of the United States, to wit: a deputy-collector of internal revenue; that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy-collector, and while acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his said office; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that while so attempting to enforce the revenue laws of the United States, as deputy-collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire, which is the killing mentioned in the indictment. Held, that the petition was in conformity with the statute, and, upon being filed, the prosecution was removed to the Circuit Court of the United States for that district.

3. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State can exclude it from exercising any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

4. The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. It can act only through its officers and agents and they must act within the States. If, when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the General Government may at any time be arrested at the will of one of its members.

In civil cases and in misdemeanors, life can only be taken where person arrested resists by force, and not in case of an escape. *Fost.*, 271; 1 Hale, P. C., 481; 1 East, P. C., 302; *Forster's Case*, 1 Lew. C.C., 187; *Reneau v. State*, 2 Lea, 720; S. C., 2 Am. Cr. R., 624; *State v. Oliver*, *Houst.*, 585; 1 Russ. Cr., 643.

To kill one who interferes to prevent a felony is murder. *Dill v. State*, 25 Ala., 15; *Com. v. Riley*, *Thatch. C. C.*, 471.

Where several resolve to resist officers, to a commission of a breach of the peace, they are principals in the murder or manslaughter which ensues, if they acted in the common design; but not in the commission of collateral crimes. *U. S. v. Ross*, 1 Gall., 624; *Reg. v. Turner*, 4 Fost. & F., 339; *U. S. v. Gilbert*, 2 Sum., 19; *Reg. v. Skeet*, 4 Fost. & F., 931; *Reg. v. Price*, 8 Cox, C. C., 96; *Rex v. Warner*, 5 Car. & P., 525; *Huling v. State*, 17 Ohio St., 583; *Washington v. State*, 36 Tex., 222; *Ruloff v. People*, 45 N. Y., 213; *Brennan v. People*, 15 Ill., 511; *State v. Simmons*, 6 Jones (N. C.), 21.

Rioters are not responsible for a homicide by those suppressing the riot. *Com. v. Campbell*, 7 Allen, 541; *Rex v. Murphy*, 6 Car. & P., 103; 1 Whart. Cr. L., 8th ed., sec. 398.

No such element of weakness is to be found in the Constitution.

5. The judicial power of the United States by the express words of the Constitution, extends "To all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

6. That provision embraces alike civil and criminal cases arising under the Constitution and Laws of the United States (*Cohens v. Virginia*, 6 Wheat., 399). Both are equally within the domain of the judicial power of the United States.

7. A case arises under the Constitution of the United States, not merely where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty, but wherever its correct decision as to the rights or defense of either party depends upon the construction of either. It is in the power of Congress to give the Circuit Courts of the United States jurisdiction of such a case, although other questions of fact or of law may be involved in it.

8. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the Federal Court is no invasion of state domain. On the contrary, a denial of the right of the General Government to remove them, to take charge of and try any case arising under the Constitution and Laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it. It is a denial of a doctrine necessary for the preservation of the acknowledged powers of the government. The power to remove is as ample in criminal as in civil cases. The exercise of that power as to criminal prosecutions is seen in the Act of February 4, 1815, again in the Act of March 2, 1833, ch. 57, sec. 3, and more recently in the Act of July 13, 1866.

[No. 720.]

Argued Oct. 22, 1879. Decided Mar. 1, 1880.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Middle District of Tennessee.

The questions upon which the Judges were divided appear in the opinion of the court.

Messrs. B. J. Lea and James G. Field, for plaintiff.

Messrs. Chas. Devens, Atty-Gen., and Edwin B. Smith, Asst. Atty-Gen., for defendant.

Mr. Justice Strong delivered the opinion of the court:

The defendant in this case was indicted for murder in the Circuit Court for Grundy County, in the State of Tennessee, and on the 29th day of August, 1878, before the trial of the indictment, he presented his petition to the Circuit Court of the United States for the proper district, praying for a removal of the case into that court, and praying for a *certiorari*, etc.

The record having been returned, in compliance with the writ, a motion was made to remand the case to the state court; and, on the hearing of the motion, the Judges were divided in opinion upon the following questions:

First. Whether an indictment of a revenue officer (of the United States) for murder, found in a state court, under the facts alleged in the petition for removal in this case, is removable to the Circuit Court of the United States, under section 643 of the Revised Statutes.

Second. Whether, if removable from the state court, there is any mode and manner of procedure in the trial prescribed by the Act of Congress.

And third. Whether, if not, a trial of the guilt or innocence of the defendant can be had in the United States Circuit Court.

This difference of opinion has been certified

to us, together with a transcript of the record and proceedings in the cause. The first of the questions certified is one of great importance, bringing as it does into consideration the relation of the General Government to the government of the States, and bringing also into view not merely the construction of an Act of Congress, but its constitutionality. That, in this case, the defendant's petition for removal of the cause was in the form prescribed by the Act of Congress, admits of no doubt. It represented that he had been indicted for murder in the Circuit Court of Grundy County, and that the indictment and criminal prosecution were still pending. It represented further, that no murder was committed, but that, on the other hand, the killing was committed in the petitioner's own necessary self-defense, to save his own life; that at the time when the alleged act for which he was indicted was committed he was and still is an officer of the United States, to wit: a deputy-collector of internal revenue, and that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy-collector; that he was acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his office, to wit: as deputy-collector of internal revenue; that it was his duty to seize illicit distilleries and the apparatus that is used for the illicit and unlawful distillation of spirits; and that, while so attempting to enforce the revenue laws of the United States as deputy-collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire. The petition was verified by oath, and the certificate required by the Act of Congress to be given by the petitioner's legal counsel was appended thereto. There is, therefore, no room for reasonable doubt that a case was made for the removal of the indictment into the Circuit Court of the United States, if section 643 of the Revised Statutes embraces criminal prosecutions in a state court, and makes them removable, and if that Act of Congress was not unauthorized by the Constitution. The language of the statute, so far as it is necessary at present to refer to it, is as follows: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law," the case may be removed into the Federal Court. Now, certainly the petition for the removal represented that the act for which the defendant was indicted was done not merely under color of his office as a revenue collector, or under color of the revenue laws; not merely while he was engaged in performing his duties as a revenue officer, but that it was done under and by right of his office, and while he was resisted by an armed force in his attempts to discharge his official duty. This is more than a claim of right and authority under the law of the United States for the act for which he has been indicted. It is a positive assertion of the

existence of such authority. But the Act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, or claimed to have been done, in the discharge of his duty as a federal officer. It makes such a claim a basis for the assumption of federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.

That the Act of Congress does provide for the removal of criminal prosecutions for offenses against the state laws, when there arises in them the claim of the federal right or authority, is too plain to admit of denial. Such is its positive language, and it is not to be argued away by presenting the supposed incongruity of administering state criminal laws by other courts than those established by the State. It has been strenuously urged that murder within a State is not made a crime by any Act of Congress, and that it is an offense against the peace and dignity of the State alone. Hence it is inferred that its trial and punishment can be conducted only in state tribunals, and it is argued that the Act of Congress cannot mean what it says, but that it must intend only such prosecutions in State Courts as are for offenses against the United States, offenses against the revenue laws. But there can be no criminal prosecution initiated in any State Court for that which is merely an offense against the General Government. If, therefore, the statute is to be allowed any meaning, when it speaks of criminal prosecutions in state courts, it must intend those that are instituted for alleged violations of state laws, in which defenses are set up or claimed under United States laws or authority.

We come, then, to the inquiry, most discussed during the argument, whether section 643 is a constitutional exercise of the power vested in Congress. Has the Constitution conferred upon Congress the power to authorize the removal, from a State Court to a Federal Court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a federal question or a claim to a federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Governments' preserving its own existence. As was said in *Martin v. Hunter*, 1 Wheat., 363, "The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court; the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally federal law, in

such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the People of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State Government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

By the last clause of the 8th section of the 1st article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution, not only all the powers previously specified, but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. Among these is the judicial power of the government. That is declared by the 2d section of the 3d article to "Extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc. This provision embraces alike civil and criminal cases arising under the Constitution and laws. *Cohens v. Virginia*, 6 Wheat., 399. Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const., sec. 1647; *Cohens v. Virginia*, 6 Wheat., 379. It was said in *Osborn v. Bk.*, 9 Wheat., 823, "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States, when it arises out of the implication of the law. Chief Justice Marshall said, in the case last cited. "It is not unusual for a legislative Act to involve

consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from state control." * * * "The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any Act of Congress. It is incidental to and is implied in the several Acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from state courts before trial, those doubts soon disappeared. Whether removal from a State to a Federal Court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, section 1745, or an indirect mode of exercising original jurisdiction, as intimated in *R. Co. v. Whitton*, 18 Wall., 270 [80 U. S., XX., 571], we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But if there is power in Congress to direct a removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the Courts of the National Government superior jurisdiction over cases involving authority and rights under the laws of the United States, are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to an uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the General Government by declaring that the Constitution and laws of the United States made in pursuance thereof, and the treaties made or which shall be made under the authority of the United States, shall be the supreme laws of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State
See 10 OTTO.

Courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the National Government cannot take control of it, whether it be civil or criminal, in any stage of its progress, its judicial power is, at least, temporarily silenced, instead of being at all times supreme. In criminal as well as in civil proceedings in State Courts, cases under the Constitution and laws of the United States might have been expected to arise, as, in fact, they do. Indeed, the powers of the General Government and the lawfulness of authority exercised or claimed under it, are quite as frequently in question in criminal cases in State Courts as they are in civil cases, in proportion to their number.

The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the General Government the trial of prosecutions for alleged offenses against the criminal laws of a State, even though the defense presents a case arising out of an Act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the National Government was formed, some of the attributes of state sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered, the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal Courts, is, therefore, no invasion of state domain. On the contrary, a denial of the right of the General Government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

It is true, the Act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the Federal Courts all the judicial power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required, the removal of civil cases from State Courts into the Circuit Courts of the United States, and the constitutionality of such authorization has met with general acquiescence. It has been sustained by the decisions of this court.

Nor has the removal of civil cases alone been

authorized. On the 4th of February, 1815, an Act was passed, 3 Stat. at L., 198, providing that if any suit or *prosecution* should be commenced in any State Court against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeably to the provisions of the Act, or under color thereof, for any act done or omitted to be done as an officer of the customs, or for anything done by virtue of the Act or under color thereof, it might be removed before trial into the Circuit Court of the United States, provided the Act should not apply to any offenses involving corporal punishment. This Act expressly applied to a criminal action or prosecution. It was intended to be of short duration, but it was extended by the Act of March 3, 1815, 3 Stat. at L., p. 233, sec. 6, and re-enacted in 1817 for a period of four years.

So, in 1833, by the Act of March 2d, 4 Stat. at L., 632 ch. 57, sec. 3, it was enacted that in any case where suit or *prosecution* should be commenced in a State Court of any State against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority or title set up or claimed by such officer, or other person, under any such law of the United States, the suit or prosecution might be removed, before trial, into the Federal Circuit Court of the proper district. The history of this Act is well known. It was passed in consequence of an attempt by one of the States of the Union to make penal the collection, by United States officers within the State, of duties under the tariff laws. It was recommended by President Jackson in a special message, and passed in the Senate by a vote of 32 to 1, and in the House by a majority of ninety-two. It undoubtedly embraced both civil and criminal cases. It was so understood and intended when it was passed. The chairman of the Judiciary Committee, who introduced the bill, said: "It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the state tribunals. *Whether in criminal or civil cases, it gives this right of removal.* Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the 2d section of the 3d Article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. * * * It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

The provisions of the Act of July 13, 1866, 14 Stat. at L., 171, sec. 67, relative to the removal of suits or prosecutions in State Courts against internal revenue officers, provisions re-enacted in section 643 of the Revised Statutes, are almost identical with those of the Act of 1833, the only noticeable difference being, that in the latter Act the adjective "criminal" is inserted before the word "prosecution." This

made no change in the meaning. The well understood legal signification of the word "prosecution" is, a criminal proceeding at the suit of the government. Thus it appears that all along our history the legislative understanding of the Constitution has been that it authorizes the removal from State Courts to the Circuit Courts of the United States, alike civil and criminal cases, arising under the laws, the Constitution or treaties.

The subject has more than once been before this court, and it has been fully considered. In *Martin v. Hunter*, 1 Wheat., 304, it was admitted in argument by Messrs. Tucker and Dexter that there might be a removal before judgment, though it was contended there could not be after; but the contention was overruled, and it was declared that Congress might authorize a removal either before or after judgment; that the time, the process and the manner must be subject to its absolute legislative control. In that case, also, it was said that the remedy of the removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only upon the parties, and not upon the state courts. Judge Story, who delivered the opinion, adding: "In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable, and, in respect to civil suits, there would in many cases be rights without corresponding remedies. * * * In respect to criminal prosecutions there would at once be an end of all control, and, the state decisions would be paramount to the Constitution." The expression, that the difficulty in the way of the removal of criminal prosecutions seems admitted to be insurmountable, has been laid hold of here, in argument, as a declaration of the court that criminal prosecutions cannot be removed. It is a very short-sighted and unwarranted inference. What the court said was, that the remedy in such cases seems to be insurmountable, *if it could not act upon State Courts as well as parties*; and it was ruled that it does thus act. The expression must be read in its connection. In *Martin v. Hunter* the removal was by writ of error after final judgment in the State Court; which certainly seems more an invasion of state jurisdiction than a removal before trial. The case was followed by *Cohens v. Virginia*, 6 Wheat., 264, a criminal case, in which the defendant set up against a criminal prosecution an authority under an Act of Congress. There it was decided that cases might be removed in which a State was a party. This, also, was a writ of error after a final judgment; but it, as well as the former case, recognized the right of Congress to authorize removals either before or after trial, and neither case made any distinction between civil and criminal proceedings.

In *Mayor v. Cooper*, 6 Wall., 247 [73 U. S., XVIII., 851], the validity of the removal Acts of 1863, March 3, sec. 5 of ch. 81, 12 Stat. at L., 756, and its amendment of May 11, 1866, 14 Stat. at L., 46, which embraced not only civil cases but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: "The constitutional power is given in general terms. No limitation is imposed. The broadest language is used. All cases so arising are embraced. * * How jurisdiction shall be acquired by the inferior court" (of the United

States), "whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. The Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the Legislature." "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power, extending as well to the courts of the States as to those of the Nation, is permitted. There is no distinction in this respect between civil and criminal cases. Both are within its scope. Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient." The court added, "We entertain no doubt of the constitutionality of the jurisdiction given by the Act under which this case has arisen." See, also, *Com. v. Artman*, 3 Grant, Cas., 436; 3 Grant, Cas., 416-418; *State v. Hoskins*, 77 N. C., 530, decided in 1877, where the constitutionality of section 643 of the Revised Statutes was affirmed after a full and instructive discussion.

It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offenses against state laws from State Courts to the Circuit Courts of the United States, when there arises a federal question in them, is as ample as its power to authorize the removal of a civil case. Many of the cases referred to, and others, set out with great force the indispensability of such a power to the enforcement of federal law.

It follows that the first question certified to us from the Circuit Court of Tennessee must be answered in the affirmative.

The second question is: "Whether, if the case be removable from the State Court, there is any mode and manner of procedure in the trial prescribed by the Act of Congress."

Whether there is or not, is totally immaterial to the inquiry whether the case is removable; and this question can hardly have arisen on the motion to remand the case. The imaginary difficulties and incongruities supposed to be in the way of trying in the circuit court an indictment for an alleged offense against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in section 643 nor in the Act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered, the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The Circuit Courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the state's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The

See 10 OTTO.

supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the General Government, grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood, and it is time it should be, it will not appear strange that, even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

The third question certified has been sufficiently answered in what we have said respecting the second. It must be answered in the affirmative.

Question first, answered in the affirmative.

Question second, answered as in the opinion.

Question third, answered in the affirmative.

Copy, foregoing opinion and head notes duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Mr. Justice Clifford, dissenting:

Civil suits or criminal prosecutions, commenced in a State Court against a revenue officer of the United States, on account of any act done under color of his office, or on account of any right, title or authority claimed by such officer under such law, may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, in the manner prescribed in the section conferring the right. R. S., sec. 643.

Sufficient appears, to show that the prisoner was formally indicted for murder in the first degree by the grand jury of the State; that the indictment was duly filed in the proper State Court for trial, and that it was subsequently removed into the Circuit Court of the United States for the district, on motion of the accused. Neither the indictment nor the order of removal is exhibited in the transcript. Instead of that, the statement is that the Attorney-General of the State moved in the Circuit Court to remand the cause to the State Court in which the indictment was found. Hearing was had, and it appears that the Judges of the Circuit Court were divided in opinion whether the motion of the Attorney-General ought or ought not to be granted.

Appended to the first question certified by the Judges of the court is a paper which purports to be the petition of the prisoner under which the order of removal was granted. From that, it appears that the homicide charged is admitted, but that the defense is that the killing by the prisoner was in self-defense to save his own life; that he was and still is a deputy-collector of internal revenue; and that the act for which he is indicted, as he alleges, was performed in self-defense while he was engaged in the performance of the duties of his office. Speaking more specifically, he states that it is his duty to seize illicit distilleries and the apparatus that is being used for the illicit and unlawful distillation of spirits, and that, while attempting to enforce the revenue laws, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire.

Three questions are certified, as follows: (1) Is an indictment in a State Court for murder, under the facts set forth in the petition for removal in this case, removable to the Circuit Court, under section 643 of the Revised Statutes? (2) If removable from the State Court, is there any mode of procedure in the trial prescribed by an Act of Congress? (3) And if not, can a trial of the guilt or innocence of the prisoner be had in the circuit court?

Questions of greater importance than those certified here by the Circuit Court could hardly be presented for discussion, as they involve the necessity of an inquiry into the nature, extent and limitation of the judicial power both of the United States and of the Circuit Courts established by Congress. Judicial power, like other powers granted to the United States by the Constitution, is defined by the instrument making the grant. Governed by that rule, we find that the 2d section of the 3d article ordains that the judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, which provision describes the whole extent of the judicial power of the United States conferred by the Constitution that it is necessary to examine in the present case. Other clauses in the same section enumerate numerous other subject-matters falling within the cognizance either of the Supreme Court or of the inferior courts created by Congress; but it will not be necessary to examine those clauses, as they have no bearing upon the questions to be answered.

Pursuant to the 1st section of the 3d article, the Congress passed the Judiciary Act, making provision for the organization of the Supreme Court, and establishing the Circuit and District Courts. 1 Stat. at L., 73.

Jurisdiction of crimes and offenses committed within their respective districts, and cognizable under the authority of the United States to a limited extent, was by that Act conferred upon the District Courts; but the 11th section of the Act provided that the Circuit Courts should have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the Act otherwise provides, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable in those courts. 1 Stat. at L., 78.

Neither the District nor Circuit Courts have jurisdiction of any crimes or offenses by that Act, unless the same are cognizable under the authority of the United States. Criminal jurisdiction is not by the Constitution conferred upon any court, and it is settled law that Congress must, in all cases, make an act criminal and define the offense before either the District or Circuit Courts can take cognizance of an indictment charging the act as an offense against the authority of the United States. Obvious and undoubted as the proposition is, it admits of but little illustration, and needs nothing more.

Powers expressly enumerated are granted to Congress, and such as shall be necessary and proper for carrying the enumerated powers into execution, or, in other words, the powers of Congress are made up of concessions from the People of the several States, with such implied powers as are necessary and proper to carry the express concessions into effect, subject to the

limitation that whatever is not expressly granted or necessarily or properly implied to carry the granted powers into effect is reserved to the States respectively, or to the People. Like the other powers specified, the judicial power of the United States is a constituent part of those concessions from the several States and, as was held by this court at a very early period, it is to be exercised by the Supreme Court or such inferior courts as the Congress may from time to time ordain and establish.

Of all the courts which the United States may, under their general powers, constitute, one only (the Supreme Court) possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts organized by the General Government possess no jurisdiction but what is given by the power that created them, and they can be vested with none except what the power ceded to the United States will authorize the Congress to confer. Certain implied powers, it is admitted, must necessarily result to courts of justice—such as to fine for contempt or imprison for contumacy; but the jurisdiction of crimes against the authority of the United States is not among such implied powers, the universal rule in the Federal Courts being that the legislative authority of the Union must first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction of such an indictment, before any federal tribunal can determine the guilt or innocence of the supposed offender. *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat., 415; 1 Whart. Cr. L., 7th ed., sec. 163.

In accordance with that rule, it was held by the whole court, Marshall, *Ch. J.*, delivering the opinion, that the Circuit Court could not take cognizance of the crime of murder committed on board of one of our ships of war lying in a harbor within state jurisdiction, because the 8th section of the Crimes Act, by which alone any provision had been made for the punishment of such a crime on shipboard, only defines offenses perpetrated upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular State. *U. S. v. Bevens*, 3 Wheat., 336, 387.

It was argued in behalf of the prosecution in that case that the jurisdiction existed because the homicide was committed on board a ship of war; but Mr. Webster denied the proposition, and contended that the jurisdiction of the circuit court was only such as had been given to it by an Act of Congress, and insisted that it was sufficient to maintain for the prisoner that no Act of Congress authorized the circuit court to take cognizance of any offenses merely because they were committed on ships of war. Instead of that, he insisted that it was the nature of the place in which the ship lies and not the character of the ship itself that decides the question of jurisdiction; and added, that if committed within the territorial jurisdiction of the State it excluded the jurisdiction of the circuit court by express exception, the language of the Act only giving authority to try and punish offenders for offenses committed upon the high seas, or in any river, haven, basin or bay out of the jurisdiction of any particular State.

Commenting upon that provision, the *Chief*
100 U. S.

Justice said: It is not the offense, but the bay in which it is committed, which must be out of the jurisdiction of the State, adding that, unless the place itself be out of the jurisdiction of the State, Congress has not given cognizance of the offense to the Circuit Courts: *U. S. v. Willberger*, 5 Wheat., 76, 96.

Apply the conclusion reached in those two cases to the question under discussion, and it is clear that, in order to ascertain the jurisdiction of the Federal Courts in criminal cases, resort must be had to the Acts of Congress providing for the punishment of crimes; for although such courts are unquestionably to look to the common law, in the absence of statutory provision, for rules of guidance in the exercise of their functions in criminal as well as in civil cases, it is to the Acts of Congress passed in pursuance of the Constitution alone that they must have recourse to determine what constitutes an offense against the authority of the United States, it being settled law that the United States have no unwritten Code to which resort can be had as a source of jurisdiction. *Conk. Tr.*, 5th ed., 181.

Courts of the United States derive no jurisdiction in criminal cases from the common law, nor can such tribunals take cognizance of any act of an individual as a public offense, or declare it punishable as such, until it has been defined as an offense by an Act of Congress passed in pursuance of the Constitution. Argument to show that Congress has never defined the act of murder, at a place within the exclusive jurisdiction of a State, as an offense against the authority of the United States, is certainly unnecessary, as no sane man will venture to advance such a proposition; nor will anyone who ever looked into the record of this case deny that the place where the homicide, which is the subject of inquiry, was committed is in the exclusive jurisdiction of the State whose laws were violated by the perpetrator of the felonious act. None of these matters can be denied consistently with the truth of the facts as judicially known to every member of the court.

Offenses against the authority of the United States, defined by an Act of Congress passed in pursuance of the Constitution, are cognizable in the Circuit Courts by virtue of the 11th section of the Judiciary Act, whether committed upon the high seas or in any river, haven, basin or bay out of the jurisdiction of any particular State, or in any fort, dockyard, arsenal, armory or magazine, or any other place the exclusive jurisdiction of which is ceded to the United States. Cognizance in criminal cases may also be given to those courts, of offenses against the national authority, if properly defined by an Act of Congress, when they are committed in violation of such an Act passed pursuant to the 2d section of the 3d article of the Constitution, which extends the judicial power to all cases in law and equity arising under the Constitution, the laws of Congress, and the treaties therein specified. 1 *Whart. Cr. L.* 7th ed., 174-180, inclusive.

Exceptional cases undoubtedly arise where it may properly be said that the citizen owes allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either, where the same act is a transgression and defined offense under the laws of both. Thus, an assault on the marshal or hindering

him in the execution of legal process is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may also be a gross breach of the peace of the State, if it results in a riot, assault or murder, and may subject the same person to the punishment prescribed by the state laws. *Moore v. Ill.*, 14 How., 13.

Federal sovereignty, as well as the sovereignty of the States, is limited and restricted by the Constitution. Certain powers, legislative, executive and judicial, are possessed by each, independent of the other; and in the exercise of such powers all agree that they act as separately and independently of each other as if the line of division was traced by landmarks visible to the eye. *Ableman v. Booth*, 21 How., 506, 516 [62 U. S., XVI., 169, 173].

Both governments, though there be but one act, if the jurisdiction is dual, and the act charged is defined by the laws of each as an offense, may subject the offender to punishment; nor can he plead the conviction and sentence in one forum in bar to an indictment in the other, as the act committed was an offense against the authority of each. *Fox v. Ohio*, 5 How., 410; *U. S. v. Marigold*, 9 How., 560.

Passing and uttering counterfeit coin was the charge in the first case, and it appears that the defendant, having been convicted in the State Court, removed the cause into this court, and assigned for error that the court below had no jurisdiction of the offense; but this court held that the state law was valid, that offenders falling within the power of different sovereignties may be triable in each for the same act, and may properly be subjected to the penalties which each assigns to the perpetration of the act. When carefully examined, it will be found that the second case decides the same point in the same way; that the same act may, in certain cases, constitute an offense against both the State and the United States, and that it may draw to its commission the penalties denounced by each for the commission of the act. *U. S. v. Amy*, 14 Md., 149, *n.*, per Taney, *Ch. J.*; *Cooley*, *Const. Lim.*, 4th ed., 25.

Viewed in the light of these suggestions, it seems reasonable to conclude that Congress might define the malicious killing of a revenue collector with malice aforethought, while in the performance of his official duties, as murder, and might make provision for the trial and punishment of the offender, even though the homicide was committed at a place within the exclusive jurisdiction of the State. Congress may provide for the appointment of officers to collect the public revenue and, if so, they may pass constitutional laws for their protection; but Congress has not defined the act charged in the state indictment as an offense against the authority of the United States, nor does any Act of Congress prescribe the punishment to be inflicted for its commission, or declare what court shall have jurisdiction of the offense.

Ample power, it was conceded, was vested in Congress to provide for the punishment of murder committed by a person serving on board a public ship of war, wherever the ship might be; but, inasmuch as Congress had not defined the act of killing at that place as a crime nor affixed a punishment to it nor declared the court that should have jurisdiction of the of-

fense, this court unanimously decided, Marshall, *Ch. J.*, giving the opinion, that a murder committed on board a ship of war lying within the harbor of Boston was not cognizable in the Circuit Court of the District of Massachusetts, and the case was remanded with a certificate to that effect. *U. S. v. Bevans*, 3 Wheat., 336, 391.

Since that decision, the law has been considered as settled, that the circuit courts have no jurisdiction to try and sentence an offender, unless it appears that the offense charged is defined by an Act of Congress, and that the Act defining the offense, or some other Act, prescribes the punishment to be imposed, and specifies the court that shall have jurisdiction of the offense. *U. S. v. Wiltberger*, 5 Wheat., 76.

Homicide resulting from the acts of a party in opposing an officer, employed in the enrollment of men for the military service during the late rebellion, was defined by an Act of Congress to be murder and punishable with death; and the same section enacted that the conviction of the party of that offense in the Circuit Court should not relieve him from liability for any crime committed by him against the laws of the State. 13 Stat. at L., p. 8, sec. 12; *U. S. v. Gleason*, 1 Woolw., 75; *U. S. v. Gleason*, 1 Woolw., 128.

Decided cases everywhere hold, that, unless Congress first defines the offense affixes the punishment and declares, in some way, the court that shall have jurisdiction of the accusation, the Circuit Court can neither try the accused nor sentence him to punishment. Even the power of Congress to define offenses and provide for the punishment of offenders is limited to such subjects and circumstances as relate and are peculiar to the Federal Government. Money may be coined by that government and, therefore, Congress may provide for the punishment of counterfeiting the national coin. Congress may establish postoffices and post-roads and, therefore, the Legislative Department may pass laws providing for the punishment of persons robbing the mails; but the Congress cannot enact laws for punishing persons for counterfeiting state bank issues, or for robbing express companies established by state authority. *U. S. v. Ward*, 1 Woolw., 17, 20.

Officers may be created by a law of Congress, and officers to execute the duties of the same may be appointed in the manner specified in the Constitution; and it is not doubted that Congress may pass laws for their protection, and for that purpose may define the offense of killing such an officer when in the discharge of his duties. Concede that, and it follows that if the punishment for the offense is affixed, and the jurisdiction is given to the Circuit Courts, those courts may try the offender, if legally indicted, and if duly convicted may sentence him to the punishment which the Act of Congress prescribes. Beyond all question, the jurisdiction of the Circuit Court over such an indictment would be complete; but the difficulty in the way of the prosecutor in this case is, that there is no Act of Congress defining the offense charged in the indictment, nor is there any provision in such law providing for the punishment of such an offense, or which gives the Circuit Court or any other Federal Court jurisdiction to try or sentence the offender.

Enough appears in these observations to show

that, even if the indictment in this case had been found against a citizen of the State, for murdering the revenue officer while engaged in the discharge of his official duties, the Circuit Court would not, under existing laws, have jurisdiction to try and sentence the offender, for the reason that the offense is not defined by any Act of Congress, nor is there any Act of Congress giving such jurisdiction to the Circuit Courts.

Judicial authorities to that effect are numerous and decisive; but the principal question, in this case, is of a very different character, as the indictment is against the officer of the revenue for murdering a citizen of the State having in no way any official connection with the collection of the public revenue. Neither the Constitution nor the Acts of Congress give a revenue officer or any other officer of the United States an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender.

Unquestionable jurisdiction to try and punish offenders against the authority of the United States is conferred upon the Circuit and District Courts; but the Acts of Congress give those courts no jurisdiction whatever of offenses committed against the authority of a State. Criminal homicide, committed in a State, is an offense against the authority of the State, unless it was committed in a place within the exclusive jurisdiction of the United States. Congress has never defined such an offense when committed within the territorial limits of a State under the circumstances described in the transcript; nor is there any pretense for the suggestion, either that the Circuit or District Courts have any jurisdiction of the case, or that there is any conflict of jurisdiction between the judicial authorities of the State and those of the United States.

Matters of fact are not in dispute; and it appears by the record that the prisoner, at the time mentioned in the petition, was duly indicted of the crime of willful murder, with malice aforethought, by the grand jury of the county where the homicide was committed, and that the indictment is still pending in the proper court of the State where it was filed. Adjudged cases are not necessary to show that no Federal Court created by Congress had jurisdiction of the offense, as the homicide was committed on land within the State, and not within any place over which the United States had exclusive jurisdiction. None of these matters can be successfully controverted; and, if not, then it follows that the exclusive jurisdiction of the offense was vested in the State Court, unless it can be held that the prisoner, merely because he was a deputy-collector of the revenue, is privileged to remove the state indictment found by the grand jury of the State into the Circuit Court for trial.

Nobody before ever pretended that such an offense ever was or could be defined by an Act of Congress as an offense against the federal authority, or that the Circuit Court or any other Federal Court has or ever had any jurisdiction of such a case to try or sentence such an offender for such an offense. Federal Courts have no common law jurisdiction in criminal cases, nor can such courts proceed to try or punish any offender, except when authorized by an Act of Congress, passed in pursuance of the Constitution. *Pa. v. Wheeling Br. Co.*, 13 How., 518, 563; *U. S. v. Worrall*, 2 Dall., 384, 393; *Cooley*,

Const. Lim., 4th ed., 26; *Ex parte Bollman*, 4 Cranch, 75, 98.

Murder is defined by the law of the State as follows: if any person of sound memory and discretion unlawfully kill any reasonable creature, in being and under the peace of the State, with malice aforethought, either express or implied, such person shall be guilty of murder. 3 State Stat. 43. When perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or in the perpetration of or attempt to perpetrate certain other enumerated crimes, it is murder in the first degree; and the petition of the prisoner, in this case, shows that the charge against him is murder in the first degree, as defined by the state statute.

Such an offense has never been defined by an Act of Congress when committed against the authority of the State, nor even when committed against the national authority, unless when the killing was perpetrated on navigable waters, out of the jurisdiction of any particular State, or in some place within the exclusive jurisdiction of the federal authority.

Crimes defined by an Act of Congress, and within the jurisdiction of the Federal Courts, may be divided into two general classes: (1) Such as are committed on the high seas or on navigable waters out of the jurisdiction of any particular State, or within some place under the exclusive jurisdiction of the United States. (2) Such as relate to subjects committed to the charge of the Nation, which are comprised within the grant of judicial power over all cases arising under the Constitution, laws and treaties of the United States, and cases affecting ambassadors or other public ministers and consuls.

Underexisting laws the *Circuit Courts* have no jurisdiction whatever to re-examine the judgments of the State Courts in any case, civil or criminal, the power to exercise such a revision, even in civil cases involving federal questions, being vested exclusively in the Supreme Court. Neither the Supreme Court nor the Circuit Courts can re-examine the conviction, sentence or judgment of the District Court in a criminal case in any form, either by writ of error or appeal. Final judgments or decrees of a State Court falling within the condition specified in the 25th section of the Judiciary Act or the 2d section of the Act passed to amend the prior Act upon the subject, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. 14 Stat. at L., 386; R. S. sec. 709.

Appellate power in criminal cases decided in the District and Circuit Courts has not been vested in the Supreme Court by any Act of Congress, and of course the power of the court in respect to such cases pending in those tribunals is confined to certificates of division of opinion. *U. S. v. More*, 3 Cranch, 159; *Ex parte Kearney*, 7 Wheat., 38; *Ex parte Watkins*, 3 Pet., 193. Grant that; but federal judicial power extends to all cases in law or equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, and every such question may be re-examined by writ of error in the Supreme Court under the Act of Congress passed as a substitute for the before mentioned section of the Judiciary Act.

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Cases which involve some one or more of those questions are often presented in the State Courts; and where that occurs and the decision is adverse to the party setting up the title, right, or exemption, whether the suit be a civil or criminal one, he may, when the case is determined by the highest court of the State, sue out a writ of error and remove the cause into the Supreme Court for re-examination. *Murdock v. Memphis*, 20 Wall., 590, 636 [87 U. S., XXII., 429, 444].

Writs of error of the kind are within every day's experience; but the rule is universal that, if the transcript when entered here does not present a federal question for re-examination, the case will be dismissed; which shows to a demonstration that it is only the questions which arise under the Constitution, the laws of the United States, and treaties made under their authority which this court is authorized to re-examine.

Convincing support to that proposition is found in the countless cases which this court dismisses at every session, for the want of jurisdiction; the invariable rule being that, if the transcript does not exhibit some one of the questions specified in the section to which reference has been made, the case must be dismissed. 1 Stat. at L., 85, sec. 25; 14 Stat. at L., 386, sec. 2. Process to remove the judgment or decree from the State Court to the Supreme Court is not allowed as matter of right. Instead of that, the practice is to submit the record of the State Court to a Justice of the Supreme Court, whose duty it is to ascertain whether, in his opinion, any question cognizable in the appellate tribunal is involved and was decided by the proper State Court in a way to justify the allowance of the writ; and, if not, to refuse to direct that it shall be issued.

Two other differences between the writ of error to the State Court and the common law writ issued under the 22d section of the Judiciary Act deserve to be noticed. By the 22d section no case is re-examinable unless the matter in dispute exceeds the sum or value of a prescribed amount; but the section granting the writ of error to the State Court makes no reference to the value involved in the controversy, the condition being that some one of the questions specified in the section must have been raised and decided adversely to the applicant for the writ. They also differ in this: that the 22d section confines the appellate power to final judgments and decrees in civil cases, but the other provision, when the proper case is presented, extends to criminal as well as civil cases. *Twitchell v. Com.*, 7 Wall., 321 [74 U. S., XIX., 223]; *Phil. Prac.*, rev. ed., 144.

Where the matter in dispute is sufficient in value, the common law writ of error to the Circuit Court will lie in every case, if the judgment is final in the court to which the writ of error is addressed; but the writ of error to the State Court will not lie at all, unless the construction of some clause of the Constitution, or some Act of Congress, or treaty, is drawn in question, and the decision was adverse to the party setting up such right or title. If those conditions concur, the writ will lie, irrespective of the amount in dispute, provided it appears that the right or title set up depends on the construction of the Constitution, an Act of Con-

gress, or some constitutional treaty. *Williams v. Norris*, 12 Wheat., 117.

Power to re-examine such cases arises under that clause of the Constitution which provides that the judicial power of the United States shall extend to all cases in law or equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority. State Courts have no jurisdiction whatever, of cases affecting ambassadors, other public ministers, or consuls; nor of cases of admiralty and maritime cognizance. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court, as the Constitution provides, "shall have original jurisdiction." In all other cases mentioned in the article of the Constitution granting judicial power, the provision is that "The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Early legislation of Congress gave the Circuit Courts original cognizance concurrent with the several States of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of a State where the suit is brought and a citizen of another State. 1 Stat. at L., 78.

By the same section it is also provided to the effect, as before explained, that the Circuit Courts shall also have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as therein otherwise provided.

Jurisdiction, both of civil and criminal cases, is, beyond doubt, conferred upon the General Government by several of the clauses of the third article of the Constitution describing the judicial power, entirely exclusive of that possessed by the tribunals of the States; but it is equally clear that none of them, except the introductory clause of section 2 of that article, authorize any Federal Court to re-examine the judgment of a State Court in a criminal case, or to supersede the power of a State Court to exercise its lawful jurisdiction in such a case.

When the judicial system was organized under the Constitution, Congress provided in the 25th section of the Judiciary Act, that cases falling within that clause of the judicial article of the Constitution might be reversed or affirmed upon a writ of error, in the same manner and under the same regulations as if the judgment or decree had been rendered or passed in the Circuit Court. For eighty years that provision remained without any alteration; and the new provision, so far as respects the question before the court, is exactly the same as the original enactment. 1 Stat. at L., 85; 14 Stat. at L., 386.

Earnest opposition was made to that provision when it first went into operation, and it continued to increase until it culminated in two important cases reported in the volumes containing the decisions of the Supreme Court of that period. *Martin v. Hunter*, 1 Wheat., 304, 325; *Cohens v. Va.*, 6 Pet., 264, 275.

Attempt is made in argument to support the

proceeding in this case, by which the indictment was removed from the State Court into the Circuit Court, and the refusal of the Circuit Court to remand the same by the judgment of the Supreme Court in those two cases; but it is clear that those judgments do not afford any justification either for the proceeding or the refusal to remand, as both were transferred into the Supreme Court by writ of error under the 25th section of the Judiciary Act. Both of those cases were rightfully removed into the Supreme Court under that section of the Judiciary Act, as appears by the respective transcripts annexed to the writs of error, and as appears by the countless cases since decided by this court, and a great number, probably more than one hundred, standing on the docket of the present Term for re-examination.

Nor is it necessary to look beyond these cases to establish the proposition that they were re-examined under the 25th section of the Judiciary Act. Take the first case. It was an action of ejectment brought in a subordinate state court, for the recovery of a large parcel of land situated in that part of Virginia then called the Northern Neck. Service was made, and the defendant, Martin, appeared and pleaded the general issue upon the usual terms of confessing lease, entry and ouster. Title was claimed by the defendant under a royal grant made prior to the Revolution, and he claimed that his title was protected by the Treaty. Leave of court being obtained, the parties agreed as to the facts, and the subordinate court rendered judgment in favor of the plaintiff. Prompt appeal was taken by the defendant to the Court of Appeals, and the appellate court reversed the judgment of the court of original jurisdiction, and rendered judgment for the defendant.

Dissatisfied with the judgment of the Court of Appeals, the plaintiff sued out a writ of error under the 25th section of the Judiciary Act, and removed the cause into this court, where the judgment of the Court of Appeals was reversed. Pursuant to the usual course, this court sent down its mandate to the Court of Appeals, which that court refused to execute. No new proceedings took place, but a new writ of error was sued out, and the opinion of the court as reported is the one given in the case when brought here under the second writ of error.

Aid and comfort are attempted to be derived from certain remarks of the court in that case, as warranting the proceedings in the case before the court; but it is clear that they cannot have any such effect, as no such question was involved in the case and, of course, the remarks of the court must be understood as applicable only to the matter then in decision. Important federal questions were involved in the case; and we have the authority of the Justice who delivered the opinion for saying that the judgment drew in question and denied the validity of a statute of the United States, as appeared on the face of the record, and the court also held that the principles and rules of decision to be applied under the second writ of error were the same as under the first, when the mandate was sent down.

Comment upon the opinion of the court in the second case is hardly necessary, as it does not appear to contain anything relating to the present theory of the government, except that

it proves, what everybody admits, that a writ of error under the 25th section of the Judiciary Act will lie, in a proper case and when the question is properly presented, as well in a criminal as in a civil case, irrespective of the amount in controversy.

Cohens was prosecuted in a state court for vending and selling lottery tickets contrary to the statute of the State. Regular process issued and he was arrested, and the parties entered into an agreed statement of facts. Authority was given to the City of Washington, under an Act of Congress, to permit the drawing of lotteries for effecting certain improvements in the city, and the defendant, besides pleading the general issue, pleaded a justification under the Act of Congress. Extended hearing was had, and the State Court rendered judgment against the defendant; and he sued out a writ of error under the 25th section of the Judiciary Act, and removed the cause into this court.

Due appearance was entered for the State, and her counsel moved to dismiss the case for want of jurisdiction. Three causes were assigned in the motion for the dismissal of the writ of error: (1) That a State is the defendant. (2) That no writ of error lies from this court to a State Court. (3) That the Supreme Court had no right to review the judgment of the State Court, because neither the Constitution nor any law of the United States had been violated by the judgment of the State Court.

Extreme views were advanced on behalf of the State, among which was the proposition that the Constitution did not provide any tribunal for its final construction, and that in the last resort the courts of the respective States may exercise that power. Responding to that extraordinary proposition, Marshall, *Ch. J.*, speaking for the court, said that jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on *the character of the cause*, whoever may be the parties, and comprehends "All cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority;" and, he added, that that clause extends the jurisdiction to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party.

His description of the second class is, that it comprehends controversies between two or more States, between a State and a citizen of another State, and between a State and foreign States, citizens or subjects. Of course the second proposition of the *Chief Justice* must be subject to what is ordained in the Eleventh Amendment to the Constitution. 2 Story, Const., sec. 1724.

Original jurisdiction is vested in the Supreme Court in certain enumerated cases, and the Constitution also gives the same tribunal appellate jurisdiction in all other specified cases. Among those in which the jurisdiction must be exercised in the appellate form, are cases arising under the first clause of the 2d section, including such as relate to the construction of the Constitution, the Acts of Congress and treaties. If a State is a party, the jurisdiction is original, except when the cases arise under the first clause of the 2d section, in which event the jurisdiction is appellate, as in such a case the jurisdiction

can only be practically exercised in that form. Where a State is a party, and the case is such as to admit of its originating in the Supreme Court, in the opinion of the *Chief Justice* as there expressed, the case ought to originate in the Supreme Court; but where, from the nature of the case, it cannot originate here, he holds that the proper construction of the clause is that the jurisdiction is appellate.

When correctly understood, it is clear that the second case cannot have any tendency whatever to support the proposition that an indictment for willful and felonious murder with malice aforethought, pending in a State Court and found by a grand jury of the State under a statute of the State, not involving any federal question, may be removed from the State Court into the Circuit Court for trial, merely because the prisoner at the time he committed the homicide was a deputy-collector of the internal revenue.

Such a proposition, unsupported as it is by any respectable judicial authority, is only calculated to excite amazement, as the case cited is a direct and conclusive authority the other way, showing to a demonstration that the Federal Courts cannot exercise any jurisdiction whatever in a criminal case properly pending in a State Court, unless it involves some question arising under the first clause of the 2d section of the article describing the judicial power conferred by the Constitution. 2 Story, Const., sec. 1721, 1740; 1 Kent, Com., 12th ed., 299; Sergeant, Const., 59; Curtis, Com., sec. 9; Pomeroy, Const., 2d ed., sec. 760.

Commentators on the Constitution seem to agree that Congress enacted the 25th section of the Judiciary Act in order to define the classes of cases originating in state tribunals to which the appellate power of the National Courts might extend by means of the writ of error, to preserve the supremacy and to secure the uniform construction of the Constitution, Acts of Congress and international treaties. Curtis, Com., sec. 210.

All agree that the original jurisdiction of the Supreme Court is defined and limited by the Constitution, and that it can neither be extended nor restricted by an Act of Congress; and it is equally undeniable that the appellate jurisdiction of that tribunal is granted, subject to such exceptions and regulations as the Congress may make, from which it follows that appellate jurisdiction can only be exercised by the Supreme Court in such cases and to such extent as the Acts of Congress authorize. *Wiscart v. Dauchy*, 3 Dall., 321, 327; 1 Kent, Com., 12th ed., 324; *Clarke v. Bazadone*, 1 Cranch, 212.

Acts of Congress having been passed providing for the exercise of appellate judicial power, the established rule is that the affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in all other cases. *Durosean v. U. S.*, 6 Cranch, 307, 314; *U. S. v. More*, 3 Cranch, 159, 170.

Legislative power is, undoubtedly, vested in Congress to pass laws to define and punish offenses against the authority of the United States; but it does not follow, by any means, that a prisoner charged with murder committed in violation of the laws of a State may claim to be tried in a Federal Circuit Court, or that a state indictment for such an offense constitutes a case

arising under the Constitution or the laws of the United States, or that it can in any way become cognizable in such a tribunal; certainly not unless it can be removed there in pursuance of some Act of Congress defining the offense and providing for the trial and punishment of the offender. Persons charged with offenses against the authority of the States find ample guaranties of a fair trial in the laws of the States and the usages of the State Courts, and if the federal officers need more, it belongs to Congress to provide the remedy in some mode authorized by the Constitution. 1 Kent, Com., 12th ed., 340.

Adjudged cases admit that the power of removal instead of the writ of error, as prescribed in the 25th section of the Judiciary Act, may also be exerted when the subject-matter of the suit is such as to bring the case within the first clause of the 2d section of the article describing the federal judicial power. Frequent cases of the kind of a civil nature arise, and if they could not be transferred to the Circuit Courts by removal under proper regulations, it might often happen that the object intended to be accomplished by the appellate tribunal would be defeated. Appellate power in the cases mentioned in the provision before referred to is given in the Constitution, and it is left to Congress to enact the manner of its exercise. Curtis, Com., sec. 148; *Martin v. Hunter*, 1 Wheat., 304, 349.

Whether the appellate power is employed by removal or writ of error, the right and extent of jurisdiction is the same; and in both the extent is limited by the constitutional grant, and cannot be extended beyond cases in law and equity arising under the Constitution, the Acts of Congress, and such treaties as are therein described.

Legislative provision of a restricted character for the removal of civil causes from the State Courts into the Circuit Courts was made by the Judiciary Act which was passed to organize our judicial system. 1 Stat. at L., 79. Since that many other Acts of Congress have been passed upon the subject, by which the power in civil cases has been very much enlarged. Proceedings were also prescribed by a later Act, not now in force, which authorized the officers appointed for the collection of the customs to remove any suit or prosecution commenced or pending against them in a State Court for acts done by them as such officers or under color of their respective offices, into the Circuit Court for trial; but the court is not furnished with any evidence that any such jurisdiction was ever exercised by the Circuit Court under that enactment in a criminal prosecution. 3 Stat. at L., 198.

Special reference is also made to the 2d section in the still later Act of Congress, usually denominated the Force Bill. 4 Stat. at L., 632. Jurisdiction of the Circuit Courts was by that section extended to all cases in law and equity arising under the revenue laws, for which other provisions are not already made by law, and provision was made to the effect that any revenue officer injured in his person or property, on account of any act done by him for the protection of the revenue, might maintain a suit for such damages in the Circuit Court for the district where the wrong-doer resided.

Property taken or detained by a revenue officer was declared to be irrepleviable, and that

it should be deemed in the custody of the law and subject only to the orders and decrees of the Federal Court having jurisdiction of the same. Offenders who should dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained were to be deemed guilty of a misdemeanor, and punished as therein directed.

Section 3 of the same Act empowered any such revenue officer to remove any suit or prosecution commenced against him in a State Court, on account of any act done by him for the protection of the revenue, into the proper Circuit Court, for trial in the mode therein prescribed.

Properly construed, the Act, as originally passed, was intended to furnish protection to the officers engaged in collecting import duties, and a subsequent Act provided that it should not be so construed as to apply to cases arising under the Internal Revenue Acts. Unlike that, the 50th section of the Act to Increase Duties on Imports extended the provisions of the Act to cases arising under the laws for the collection of internal duties. Had legislation stopped there, it would be correct to say that the Force Bill is still in force; but the still later Act, passed July 13, 1866, repealed that section altogether, subject to a proviso inapplicable to the present case. *Philadelphia v. Collector*, 5 Wall., 728 [72 U. S., XVIII., 615]; 13 Stat. at L., 241; 14 Stat. at L., 172; *Hornthall v. Collector*, 9 Wall., 560, 566 [76 U. S., XIX., 560, 562]; *Assessors v. Osborne*, 9 Wall., 567, 573 [76 U. S., XIX., 748, 750].

Much stress in the argument was laid upon the word "prosecution," found in the 3d section of the Act; but neither the written nor the oral argument furnished any evidence to show that any indictment found in the State where the difficulty arose which induced Congress to pass the Act was ever removed from the State Court into the Circuit Court for trial, and it is well known as a historical fact that no such removal of an indictment in that State was ever made. Civil cases pending in the tribunals of other States were, in several instances, removed under that Act into the Circuit Court, and were there adjudicated to final judgment; but there is no authentic account that any state indictment for an offense against the authority of a State was ever removed under that Act into the Circuit Court for trial or sentence.

Grave doubts are entertained whether the Congress, in the use of the word "prosecution," intended to extend the operation of the Act to such an indictment, as ample provision existed at the time of its passage for the re-examination of every question of federal cognizance arising on the trial of such an indictment, by a writ of error sued out pursuant to the authority given in the 25th section of the Judiciary Act. 1 Kent, Com., 12th ed., 219.

Litigations of a civil nature, even when the jurisdiction of the Circuit Court depends entirely upon the character of the parties, may, under regulations enacted by Congress, be removed from the State Court into the Circuit Court for trial; but there is no just pretense that a state indictment for an offense against the authority of the state can be removed from the State Court where found into the Circuit Court, for trial in any form of proceeding, unless the case, whether a suit at law or in equity, involves some question

arising under the Constitution, the laws of Congress, or treaties made, or which shall be made, under their authority. *Com. v. Casey*, 12 Allen, 214, 217.

Nothing is contained in the section which has any tendency to support the opposite construction, except the words "suit or prosecution;" and it should not be overlooked that it employs no words exclusively applicable to an indictment, and contains many expressions utterly repugnant to the theory that the proceedings to effect the removal of process were intended to extend to a criminal and indictable offense.

Every word of the section speaks a different intent, as is conclusively shown by the distinguished Judge who gave the opinion of the court in the case last cited. Confirmation of that view is also derived from the fact that every reported case, where the removal was effected under that Act, was a civil action, as appears from the following examples: *Wood v. Matthews*, 2 Blatchf., 370; *Dennistown v. Draper*, 5 Blatchf., 336; *Murray v. Patrie*, 5 Blatchf., 343; *Pisk v. R. R. Co.*, 6 Blatchf., 362; *S. C.*, 8 Blatchf., 243; *Todd v. Fanfield, Ct. Com. Pl.*, 15 Ohio St., 377, 387.

Formal application to the Supreme Court of Maine was made under that Act of Congress to remove an indictment, for an offense against the authority of the State, into the Circuit Court of the district for trial, but the court unanimously denied the application, for the same reasons as those given by the Supreme Court of Massachusetts in the case before cited. *State v. Elder*, 54 Me., 381.

Taken together, these two cases ought to be regarded as decisive that a state indictment for an offense against the authority of the State could not be removed from the State Court, under that Act of Congress, into the Circuit Court for trial. Subordinate Federal Courts find no other rules to guide them in the exercise of their functions than are to be found in the Acts of Congress, and they can have no other recourse than to those enactments to determine what constitutes an offense against the authority of the United States. *Conk. Tr.*, 5th ed., 181. Offenses against the Nation are defined and their punishment prescribed by Acts of Congress. *Cooley, Const. Lim.*, 4th ed., 26.

Like power was given to the defendant, by the Act relating to *habeas corpus*, for the removal into the Circuit Courts, after judgment of suits or prosecutions commenced in a State Court against officers, civil or military, for acts done or committed by virtue of an order of the President, or pursuant to an Act of Congress. 12 Stat. at L., 756.

Pending an action in a State Court against a marshal, in which the verdict and judgment were, in favor of the plaintiff, the defendant instituted proceedings in the State Court for the removal of the cause into the Circuit Court, but the State Court refused to send up the case. Thereupon the Circuit Court issued an alternative *mandamus* to the State Court, which was followed by the peremptory process, when the plaintiff sued out a writ of error, and removed the cause into this court. Due hearing was had here, and this court *unanimously* held that so much of the Act as provided for the removal of a judgment in a State Court, in which the issue was tried by a jury, is not in pursuance

of the Constitution, and is void. *Justices v. Murray*, 9 Wall., 274 [76 U. S., XIX., 658]; *McKee v. Rains*, 10 Wall., 22, 25 [77 U. S., XIX., 860, 861].

Governed by that rule of decision, it must be considered that the power of removal, when the facts have been found by a jury, cannot be exercised in such a case after judgment.

Statutory power to remove an action from a State Court into the Circuit, says *Judge Story*, if it exists before judgment because it is included in the appellate power, must exist after judgment for the same reason, as he held that the same objection exists as to the removal before judgment as after, and that both must stand or fall together. *Martin v. Hunter*, 1 Wheat., 304, 349; 2 Story, Const., sec. 1745.

None of the advocates of the power of removal as applied to criminal cases pretend that it may be exercised after judgment in any other mode than by a writ of error; from which it would seem to follow, if the authorities cited are good law, that a state indictment for an offense against the authority of the State cannot be removed at all into the Circuit Court for trial, nor into the Supreme Court, except by writ of error.

Section 643 of the Revised Statutes, under which the removal in this case was made, is a revision of the 67th section of the Act to Reduce Internal Taxation. 14 Stat. at L., 171. Officers appointed under that Act may, before trial, in any case, civil or criminal, where suit or prosecution is commenced against them in a State Court, remove the said suit or prosecution into the Circuit Court for trial. R. S., 643.

Further remarks in exposition of the enactment seem to be unnecessary, as it is clear that it is, in all essential respects, the same as its predecessors, some of which were passed and went into operation even before the actual close of the second War of Independence.

Considering the long period the provision has been in operation, it would naturally be expected, if it was intended by its framers to include state indictments pending in State Courts for offenses against the authority of the State, that the advocates of such a construction would be able to produce some authoritative exposition of the enactment to support such an improbable and extraordinary theory. Nothing of the kind is produced, and for the best possible reason, that no removal of such an indictment from a State Court into the Circuit Court for trial was ever before made in our judicial history.

Should it be suggested that a recent case, cited in the brief for the prisoner, is a precedent where a criminal case was removed from a State Court into the Circuit Court for trial, the answer to the suggestion is, that the case does not support the proposition, for several reasons: (1) Because the order of removal was never carried into effect. (2) Because nothing was done in the Circuit Court except to pass the order for removal. (3) Because the opinion of the court as reported admits that the Circuit Courts have no power to try offenses against the peace and dignity of the State, nor to control the State Courts in any such case. (4) Because the court admit in that case that no man charged with an offense against the authority of the State can defend himself by the fact that he is a federal officer. (5) Because it does not appear that the

state indictment was ever transferred into the Circuit Court for trial. (6) Because it appears that the court giving the opinion in that case entirely overlooked the settled rule that the Circuit Courts have no jurisdiction of any act of an individual as an offense, unless the same is defined as such by an Act of Congress; nor unless some Act of Congress prescribes the punishment annexed to the commission of the offense, and designates the court to try and sentence the offender. (7) Because the indictment, for aught that appears to the contrary, is still pending in the State Court, the report failing to show that it has ever been in fact transferred into the Circuit Court. *State v. Hoskins*, 77 N.C., 530, 546.

Viewed in any light, the proposition to remove a state indictment for felony, from a State Court having jurisdiction of the case into the Circuit Court, where it is substantially admitted that the prisoner cannot be tried until Congress shall enact some mode of procedure, approaches so near to what seems to me both absurd and ridiculous, that I fear I shall never be able to comprehend the practical wisdom which it, doubtless, contains. Were the object to give felons an immunity to commit crime, and to provide a way for their escape from punishment, it seems to me that it would be difficult to devise any mode more effectual to that end than the theory embodied in that proposition.

Difficulties almost without number would arise if any attempt should be made to try such an indictment in a Circuit Court.

It was suggested at the argument that the Attorney-General of the State might appear in the Circuit Court as the public prosecutor, but he may not deem it any part of his duty to conduct criminal prosecutions in any other tribunals than those of the State from which he received his commission. Public prosecutions against the authority of the United States are in the Circuit Courts within the exclusive direction of the district attorneys, but they have nothing to do with prosecutions against the statutes, peace and dignity of a State. *Confiscation Cases*, 7 Wall., 454 [74 U. S., XIX., 196].

Service of process is often required in a criminal case, and the question would arise whether it should be made by the sheriff or marshal. Subpoenas must be issued, and the inquiry would arise whether they should be issued in the name of the State or of the President. Expenses must be incurred for the service of process and for the travel and attendance of witnesses, and it would at once become a question whether the amount would be chargeable to the United States or to the State, and if to the latter, may the State be compelled to respond to the claim?

Persons indicted of murder and other high crimes are entitled to a copy of the indictment and process to compel the attendance of witnesses, and the inquiry arises whether it would be the duty of the circuit court clerk or the clerk of the State Court to comply with that constitutional requirement. Under the state law the prisoner, if the charge is of felony punishable with death, is entitled to thirty-five challenges, whereas under the Act of Congress he is entitled only to twenty; and the inquiry

would immediately arise, whether the right of the prisoner in that regard must be governed by the Act of Congress or the state law. 2 State Stat., sec. 4014; R. S., sec. 819.

By the common law it was error, for which the judgment might be reversed, if the clerk did not in capital felonies inquire of the prisoner before sentence whether he had anything to say why judgment of death should not be pronounced against him; and the question would arise whether this inquiry should be made by the clerk of the State Court whose laws were offended by his crime, or by the clerk of the Circuit Court to which the indictment had been transferred. 1 Chit. Cr. L., 700, 717.

Juries in the Federal Courts are not the judges of the law as well as the fact; consequently they are usually sworn in capital cases that they will well and truly try and true deliverance make of the prisoner they have in charge, according to the law and the evidence. Where such is the practice the question will arise whether the law referred to is federal or state law, or both combined, including the common law, as is suggested for the other rules of decision in conducting the trial.

State rules of evidence or of procedure, adopted since the passage of the Act of Congress organizing the Federal Courts, do not apply in criminal cases where the indictment is found in the circuit courts; and the question may immediately arise, which system of evidence and of procedure will furnish the rule of decision where the indictment is found in the State Court and the prisoner is tried in the Circuit Court. *U. S. v. Reid*, 12 How., 361, 365.

It was in view of these and many other equally embarrassing questions which might be suggested that induced Judge Story to remark, in one of his leading judgments upon the subject, that in respect to criminal prosecutions the difficulty seems admitted to be insurmountable, which is fully equivalent to a declaration that the power of removal in such a case does not exist. *Martin v. Hunter*, 1 Wheat., 304, 349.

Ingenious effort was made in the argument at the bar to show that such was not the meaning of the learned Justice when he gave utterance to that important qualification to his antecedent remarks in the same connection; but the effort is in vain, as the same learned Magistrate made the same admission in his valuable Commentaries on the Constitution, published nearly twenty years later. 2 Story, Const., 3d ed., sec. 1746.

Whether conclusive or not, it must be conceded that great weight is due to those admissions, and they are also much strengthened by a similar admission in the commentaries of another learned writer upon constitutional law. Curtis, Com., sec. 15.

Embarrassing questions, it is admitted, may arise in the exercise of such a peculiar and hitherto unknown jurisdiction; but the attempt is made to furnish a *panacea* for them all by referring to section 722 of the Revised Statutes, which seems to contemplate that where the laws of the United States are insufficient to define offenses and punish offenders, resort may be had to the common law as modified and changed by the State wherein the Federal Court exercising jurisdiction is held, both in the trial of the accused and in the infliction of punishment.

Examined in the most favorable light, the provision is a mere jumble of federal law, common law, and state law, consisting of incongruous and irreconcilable regulations, which, in legal effect, amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by any one of the three systems.

Unless some better remedy than what is contained in that section can be found, it seems to me that it would be better to close the discussion without suggesting any, as it is plain that there is nothing in that enactment which will enable the judge sitting in such a criminal trial to solve any considerable number of the embarrassing questions, which it may well be expected will arise in the trial of such a criminal case.

State police, in its widest sense, comprehends the whole system of internal regulation by which the State seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to everyone the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others. Public police, is, in effect, defined by the great commentator of the common law as the due regulation of domestic order, whereby the citizens of a State are bound to conform to the rules of propriety and good conduct, and to be moral, industrious and inoffensive in their respective stations. 4 Bl. Com., 162.

Police, says Bentham, is a system of precaution, either for the prevention of crimes or calamities; and he divides the subject into many heads, of which three only will be mentioned: (1) Police for the prevention of offenses. (2) Police for the prevention of calamities. (3) Police for the prevention of endemic diseases. Bentham's Works, title Offenses against Police, Vol. III., p. 169, Edinburgh ed.

Unlike the conceded right to appropriate private property when the public exigency requires it, the power in question is one, says Shaw, *Ch. J.*, vested in the Legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the State and of the subjects of the same. *Com. v. Alger*, 7 Cush., 53, 85.

It extends, says another eminent Judge, to the protection of the lives, limbs, health, comfort and quiet of all persons and of all property within the State, as exemplified in the maxim, *Sic utere tuo ut alienum non laedas*. *Thorpe v. R. R. Co.*, 27 Vt., 140, 147.

Ordinary regulations of police, says Cooley, have been left with the States, nor can it be taken from them and exercised under legislation by Congress. Nor can the National Government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty.

ereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the Nation, or deprive any citizen of rights guarantied by the Federal Constitution. Cooley, Const. Lim., 4th ed., 715.

No direct general power over these objects, says Marshall, *Ch. J.*, is granted to Congress and, consequently, they remain subject to state legislation. *Gibbons v. Ogden*, 9 Wheat., 203.

Within state limits, says Chase, *Ch. J.*, an Act of Congress upon the subject can have no constitutional operation. *U. S. v. De Witt*, 9 Wall., 41-45 [76 U. S., XIX., 593, 594].

Acts of Congress cannot properly supersede the police powers of the State, nor can the police powers of the State override the national authority, as the power of the State in that regard extends only to a just regulation of rights with a view to the due protection and enjoyment of all; and if the police law of the State does not deprive anyone of that which is justly and properly his own, it is obvious that its possession by the State and its exercise for the regulation of the actions of the citizens can never constitute an invasion of national jurisdiction or afford a basis for an appeal to the protection of the national authorities.

Startling propositions are advanced in argument; but it is not probable that anyone will contend that it would be competent for Congress to define as murder, against the authority of the United States, the homicide charged in the petition for removal, or that such act of homicide is now defined as murder by any Act of Congress now in operation or which was ever passed by the Legislative Department since the Constitution was adopted.

Had the officer been killed, the proposition of removal would be less astonishing than the one set forth in the petition. Judging from the petition, the indictment is against the officer for willfully, premeditatedly and deliberately killing and murdering the deceased, against the peace and dignity of the State. No special ground is set forth for the removal nor anything that can be tortured into a reason for withdrawing the case from the jurisdiction of the State Court, unless it be that the prisoner is a deputy-collector of the revenue, and that he alleges in the petition that the killing was in his own necessary self-defense to save his own life, which is a defense that can as well be made in the State Court as in the Circuit Court, unless it be assumed that a federal officer is entitled as a matter of right to transfer every indictment against him for crime, when found in a State Court, into a Federal Court for trial.

Persons accused of capital or otherwise infamous crimes must be indicted by a grand jury, and when the offense is committed in a State, they must be tried in the State where it was committed; but attention is not called to any article or section of the Constitution that forbids that a federal officer shall be tried in a State Court for murder committed in the open State, against the peace and dignity of the State, and contrary to the form of the state statute defining the offense.

Large concessions were made by the States to the United States, but they never ceded to the National Government their police powers or the power to define and punish offenses against their authority, as admitted by all courts and all com-

mentators upon the Constitution, which leads me to the following conclusions: (1) That the section of the Revised Statutes in question does not authorize the removal of a state indictment for an offense against the laws of the State from the State Court where it is pending into the Circuit Court of the United States for trial. (2) That if it does purport to confer that authority, it is unconstitutional and void. (3) That the answer to each of the three questions certified here from the Circuit Court should be in the negative.

Also dissenting, *Mr. Justice Field*.

Cited—100 U. S., 312, 345; 102 U. S., 140; 107 U. S., 599; 1 McCrary, 600.

TAYLOR STRAUDER, *Plff. in. Err.*,

v.

STATE OF WEST VIRGINIA.

(See S. C., 10 Otto, 303-312.)

Constitutional amendment—privileges of citizenship—colored race—W. Virginia law—discrimination—removal of suit.

*1. The Fourteenth Amendment of the Federal Constitution considered, and held to be one of a series of constitutional provisions having a common purpose, namely: to secure to a race recently emancipated and held in slavery through many generations, all the civil rights that the superior race enjoy, and to give to them the protection of the General Government, in the enjoyment of such rights, whenever they should be denied by the States. Whether it had other, and if so what, purposes, not decided.

2. The amendment not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and invested Congress with power, by appropriate legislation, to enforce its provisions.

3. The words of the amendment, although prohibitory, contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from discriminations, imposed by public authority, implying legal inferiority in civil society, lessening the security of their rights, and which are steps towards reducing them to the condition of a subject race.

4. The Statute of West Virginia, which, in effect, singles out and denies to colored citizens the right and privilege of participating in the administration of the law, as jurors, because of their color, though qualified in all other respects, is, practically, a brand upon them affixed by the law, and is a discrimination against that race, forbidden by the amendment. It is a denial of the equal protection of the laws to the race thus excluded, since the constitution of juries is a very essential part of the protection which the trial by jury is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of persons having the same legal status in society as that which he holds.

5. Where, as here, the state statute secures to every white man the right of trial by jury selected from and without discrimination against his race, and at the same time permits or requires such discrimination against the colored man because of his race, the latter is not equally protected by law with the former.

6. Section 641 of the Revised Statutes, which declares that "When any civil suit or criminal prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil

rights of citizens of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said State Court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending," considered, and held not to be in conflict with the Federal Constitution.

[No. 753.]

Argued Oct. 21, 1879. Decided Mar. 1, 1880.

IN ERROR to the Supreme Court of Appeals of the State of West Virginia.

The case is stated by the court.

Messrs. W. Willoughby, Geo. O. Davenport and Chas. Devens, for plaintiff in error.

Messrs. Robert White and Jas. W. Green, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State Court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that "By virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States; and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man." This petition was denied by the State Court, and the cause was forced to trial.

Motions to quash the *venire*, "Because the law under which it was issued was unconstitutional, null and void," and successive motions to challenge the array of the panel, for a new trial and in arrest of judgment, were then made, all of which were overruled and made by exceptions parts of the record.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872-73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are state officials.

*Head notes by *Mr. Justice Strong*.

In this court, several errors have been assigned, and the controlling questions underlying them all are: first, whether by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color; but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

The questions are important, for they demand a construction of the recent amendments of the Constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those amendments and the legislation of Congress under them. The 14th Amendment ordains that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This is one of a series of constitutional provisions having a common purpose, namely: securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the Amendments, as we said in the *Slaughter-House Cases*, 16 Wall., 36 [38 U. S., XXI., 394], cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that, in some States, laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially

needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the 14th Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases*, "No one can fail to be impressed with the one pervading purpose found in all the Amendments, lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them." So again; "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it [the 14th Amendment] such laws were forbidden. If, however, the States did not conform their laws to its requirements, then, by the 5th section of the article of amendment, Congress was authorized to enforce it by suitable legislation." And it was added, "We doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision."

If this is the spirit and meaning of the Amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia Statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal *status* in society as that which he holds. Blackstone, in his Commentaries, says: "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional Amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was, doubtless, a motive that led to the Amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that, through prejudice, they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the National Government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the Amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the Statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offense against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional Amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall., [*supra*]: "In giving construction to any of these articles [Amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.

Concluding, therefore, that the Statute of West Virginia, discriminating in the selection of jurors, as it does against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the 14th Amendment by appropriate legislation is sufficient to justify the enactment of section 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. *Prigg v. Com.*, 16 Pet., 539. So in *U. S. v. Reese*, 92 U. S., 214 [XXIII., 563], it was said by the Chief Justice of this court: "Rights and immunities created by or dependent upon the Constitution of the

United States can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected." But there is express authority to protect the rights and immunities referred to in the 14th Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State Court, in which the right is denied by the state law, into a Federal Court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Section 641 is such a provision. It enacts that "When any civil suit or criminal prosecution is commenced in any State Court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said State Court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next Circuit Court of the United States to be held in the district where it is pending."

This Act plainly has reference to sections 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guaranteed by the Constitution, the first of which declares that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens; and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." This Act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Section 641 was an advanced step, fully warranted, we think, by the 5th section of the 14th Amendment.

We have heretofore considered and affirmed the constitutional power of Congress to authorize the removal from State Courts into the Circuit Courts of the United States, before trial, of criminal prosecutions for alleged offenses against the laws of the State, when the defense presents a federal question, or when a right under the Federal Constitution or laws is involved. *Tennessee v. Davis* [ante, 648]. It is unnecessary now to repeat what we there said.

That the petition of the plaintiff in error, filed by him in the State Court before the trial of his case, made a case for removal into the Federal Circuit Court, under section 641, is very plain, if, by the constitutional Amendment and section 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, See 10 OTTO.

as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in overruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia is reversed and the case is remitted, with instructions to reverse the judgment of the Circuit Court of Ohio County.

Dissenting, *Mr. Justice Clifford* and *Mr. Justice Field*.

Cited—100 U. S., 321, 345; 103 U. S., 385, 551; 107 U. S., 120; 109 U. S., 34-38, 44, 49, 50; 112 U. S., 101; 93 N. Y., 446, 455, 458, 460; 50 Conn., 133; 47 Am. Rep., 627; 31 Minn., 248; 45 Am. Rep., 236, 244; 16 Nev., 58; 40 Am. Rep., 491.

Ex Parte; IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, *Petitioner*.

(See S. C., "*Virginia v. Rives*," 10 OTTO, 313-338.)

Removal of suit—colored race—Fourteenth Amendment—equal protection of laws—denial of rights—Virginia law—mixed jury—mandamus.

*1. Section 641 of the Revised Statutes, which provides for the removal into the Federal Court of any civil suit or prosecution "Commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," etc., examined in connection with sections 1977 and 1978. *Held*, that the object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect to civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

2. The prohibitions of the 14th Amendment have reference to state action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws and, consequently, the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against state infringement of those rights. Section 641 was also intended for their protection against state action, and against that alone.

3. A State may act through different agencies, either by its legislative, its executive or its judicial authorities, and prohibitions of the Amendment extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the 5th section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court, in which it is denied, into a Federal Court, where it will be acknowledged.

4. But the 14th Amendment is broader than the statute which authorizes the removal. Section 641 does not apply to all cases in which equal protection of the laws may be denied to a defendant. The removal authorized by the statute is a removal before trial or final hearing. But the violation of the constitutional provision, when made by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing the defendant is

*Head notes by *Mr. Justice Strong*.

denied equality of legal protection, and not until then. Nor can he know till then that the equal protection of the laws will not be extended to him. Certainly not until then can he affirm that it is denied. To such a case, that is, to judicial infractions of the constitutional Amendment after the trial has commenced, section 641 has no applicability. It was not intended to reach such cases. They were left to the revisory power of this court.

5. Therefore, the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons, citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. By express requirement of the statute, the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. But, in the absence of constitutional or legislative impediment, he cannot swear before his case comes to trial, that his enjoyment of his civil rights is denied to him.

6. The Constitution and laws of Virginia do not exclude colored citizens from service on juries. The petition for removal did not present a case for removal under the first section.

7. The defendant moved in the State Court that the *venire* be so modified that one third or some portion of the jury should be composed of his own race. The denial of that motion was not a denial of a right secured to him by any law providing for the equal civil rights of citizens of the United States, or by any statute, or by the 14th Amendment. A mixed jury in a particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them, because of his color. But that is a different thing from that which was claimed, as of right, and denied in the State Court, viz.: a right to have the jury composed in part of colored men.

8. A *mandamus* does not lie, to control judicial discretion, except when that discretion has been abused. But it may be used as a remedy where the case is outside of that discretion, and outside of the jurisdiction of the court, or officer to which or to whom the writ is directed. One of its peculiar and more common uses is to restrain inferior courts, and keep them within their lawful bounds.

[No. 3, Orig.]

Argued Oct. 16, 1879. Decided Mar. 1, 1880.

PETITION for *mandamus*.

The case is stated by the court.

Messrs. Jas. G. Field and W. J. Robertson, for petitioner.

Messrs. Chas. Devens, Atty-Gen., and W. Willoughby, *contra*.

Mr. Justice Strong delivered the opinion of the court:

The questions presented in this case arise out of the following facts:

Burwell Reynolds and Lee Reynolds, two colored men, were jointly indicted for murder in the County Court of Patrick County, Virginia, at its January Term, 1878. The case having been removed into the Circuit Court of the State, and brought on for trial, the defendants moved the court that the *venire*, which was composed entirely of the white race, be modified so as to allow one third thereof to be composed of colored men. This motion was overruled on the ground that the court "had no authority to change the *venire*, it appearing (as the record stated) to the satisfaction of the court that the *venire* had been regularly drawn from the jury-box according to law." Thereupon the defendants, before the trial, filed their petition, duly verified, praying for a removal of the case into

the Circuit Court of the United States for the Western District of Virginia. This petition represented that the petitioners were negroes, aged respectively 17 and 19 years, and that the man whom they were charged with having murdered was a white man. It further alleged that the right secured to the petitioners by the law providing for the equal civil rights of all the citizens of the United States was denied to them in the judicial tribunals of the County of Patrick, of which county they are natives and citizens; that by the laws of Virginia all male citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are made liable to serve as jurors; that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors; yet that the grand jury who found the indictment against them, as well as the jurors summoned to try them, were composed entirely of the white race. The petitioners further represented that they had applied to the Judge of the court, to the prosecuting attorney and to his assistant counsel, that a portion of the jury by which they were to be tried should be composed in part of competent jurors of their own race and color, but that this right had been refused them. The petition further alleged that a strong prejudice existed in the community of the county against them, independent of the merits of the case, and based solely upon the fact that they are negroes, and that the man they were accused of having murdered was a white man. From that fact alone they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race. The petitioners further represented that their race had never been allowed the right to serve as jurors, either in civil or criminal cases, in the County of Patrick, in any case, civil or criminal, in which their race had been in any way interested. They, therefore, prayed that the prosecution might be removed into the Circuit Court of the United States. The State Court denied this prayer, and proceeded with the trial, when each of the defendants was convicted. The verdicts and judgments were, however, set aside, and a motion for a removal of the case was renewed on the same petition, and again denied. The defendants were then tried again separately. One was convicted and sentenced, and a bill of exceptions was duly signed and made part of the record. In the other case the jury disagreed.

In this stage of the proceedings, a copy of the record was obtained, the cases were, upon petition, ordered to be docketed in the Circuit Court of the United States, Nov. 18, 1878, which was at its next succeeding Term after the first application for removal, and a writ of *habeas corpus cum causa* was issued, by virtue of which the defendants were taken from the jail of Patrick County into the custody of the United States Marshal, and they are now held in jail subject to the control of that court.

No motion has been made in the Circuit Court to remand the prosecutions to the State Court, but the Commonwealth of Virginia has applied to this court for a rule to show cause why a *mandamus* should not issue commanding the Judge of the District Court of the Western District of Virginia, the Hon. Alexander Rives, to cause to be redelivered by the marshal of said

district to the jailer of Patrick County the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said Commonwealth. The rule has been granted, and Judge Rives has returned an answer setting forth substantially the facts hereinbefore stated, and averring that the indictments were removed into the Circuit Court of the United States by virtue of section 641 of the Revised Statutes.

If the petition filed in the State Court before trial, and duly verified by the oath of the defendants, exhibited a sufficient ground for a removal of the prosecutions into the Circuit Court of the United States, they were, in legal effect, thus removed, and the writ of *habeas corpus* was properly issued. All proceedings in the State Court subsequent to the removals were *coram non jure* and absolutely void. This, by virtue of the express declaration of section 641 of the Revised Statutes, which enacts that, "Upon the filing of such petition, all further proceedings in the State Court shall cease, and shall not be resumed except as hereinafter provided." In *Gordon v. Longest*, 16 Pet., 97, it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, "It is the duty of the State Court to 'proceed no further in the cause,' and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the Court of Appeals is *coram non jure*." To the same effect is *Ins. Co. v. Dunn*, 19 Wall., 214 [86 U.S., XXII., 68].

It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the State Court and transferred it to the Federal Court. Section 641 of the Revised Statutes provides for a removal "When any civil suit or prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States," etc. It declares that such a case may be removed before trial or final hearing.

Was the case of *Lee and Burwell Reynolds* such an one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this Act of Congress. It rests upon the 14th Amendment of the Constitution and the legislation to enforce its provisions. That Amendment declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. Secs. 1977, 1978, R. S. They enact that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject

to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. Section 1978 enacts that all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property. The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws and, consequently, the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the Amendment, are intended for protection against state infringement of those rights. Section 641 was also intended for their protection against state action, and against that alone.

It is, doubtless, true, that a State may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the 5th section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State Court in which it is denied, into a Federal Court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from State Courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. But it is still a question whether the remedy of removal of cases from State Courts into the courts of the United States, given by section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not. The constitutional Amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. But the violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly, until then he cannot affirm that it is

denied, or that he cannot enforce it, in the judicial tribunals.

It is obvious, therefore, that to such a case, that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced, section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the State and ultimately to the review of this court. We do not say that Congress could not have authorized the removal of such a case into the Federal Courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm anything. It is sufficient to say now that section 641 does not.

It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments, he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to move his case. By the express requirement of the statute, his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.

The petition of the two colored men for the removal of their case into the Federal Court does not appear to have made any case for removal, if we are correct in our reading of the Act of Congress. It did not assert, nor is it claimed now, that the Constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is, that there were no colored men in the jury that indicted them, nor in the petit jury summoned to try them. The petition expressly admitted

that by the laws of the State all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws thereof, are made liable to serve as jurors. And it affirms (what is undoubtedly true) that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

Now, conceding as we do, and as we endeavored to maintain in the case of *Strander v. West Va.*, just decided [*ante*, 664], that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a State, the laws of Virginia make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the Statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of the Act of Congress of March 1, 1875, 18 Stat. at L. 335, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the State and under the laws of the United States. In one sense, indeed, his act was the act of the State, and was prohibited by the constitutional Amendment. But, inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a "denial or disability to enforce in the judicial tribunals of the State" the rights of colored men, as is contemplated by the removal Act. Section 641. It is to be observed that Act gives the right of removal only to a person "who is denied, or cannot enforce, in the judicial tribunals of the State his equal civil rights." And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of section 641. But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the State" the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fails to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the

same reason, it can with no propriety be said the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court.

The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the County of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.

Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the *venire*, by which one third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person, by the law of the State, or by any Act of Congress, or by the 14th Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz.: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any federal statute. It is not, therefore, guarantied by the 14th Amendment, or within the purview of section 641.

It follows that the petition for a removal stated no facts that brought the case within the provisions of this section and, consequently, no jurisdiction of the case was acquired by the Circuit Court of the United States. In the absence of such jurisdiction, the writ of *habeas corpus*, by which the petitioners were taken from the custody of the state authorities, should not have been issued. The Circuit Court has now no authority to hold them, and they should be remanded.

Upon the question whether a writ of *mandamus* is a proper proceeding to enforce the return of the men indicted to the custody of the state authorities, little need be said, in view of former decisions of this court. Section 688 of the Revised Statutes enacts that the Supreme Court shall have power to issue * * * writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of

the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul, is a party. In what cases such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds. Bacon, Abr., *Mand.*, Letter D; Tapping, *Mand.*, 105; 3 Bl. Com., 110. This subject was discussed at length in *Ex parte Bradley*, 7 Wall., 364 [74 U. S., XIX., 214], and what was there said renders unnecessary any discussion of it now. To that discussion we refer. In our judgment, it vindicates the use of a writ of *mandamus* in such a case as the present.

The writ will, therefore, be awarded.

Separate opinion of Mr. Justice Field:

I concur in the judgment of the court that the prisoners, Lee and Burwell Reynolds, must be returned to the officers of Virginia, from whose custody they were taken; that the prosecution against them must be remanded to the state court from which it was removed; and that a *mandamus* to the District Judge of the Western District of Virginia is the appropriate remedy to effect these ends. But, as I do not agree with all the views expressed in the opinion of the court, and there are other reasons equally cogent with those given for the decision rendered, I deem it proper to state at length the grounds of my concurrence.

The prisoners were jointly indicted in a county court for the crime of murder. They are colored men, and the person alleged to have been murdered was a white man. On being arraigned they pleaded: not guilty, and on their demand were remanded to the Circuit Court of the county for trial. When brought before that court, at the April Term of 1878, they moved that the *venire* of jurors, then composed entirely of persons of the white race, should be modified so as to allow one third of the *venire* to be composed of persons of their own race. This motion was denied, on the ground that the court had no authority to change the *venire*, and that it satisfactorily appeared that the jurors had been regularly drawn from the jury-box according to law. The accused then presented a petition for the removal of the prosecution to the Circuit Court of the United States for the Western District of Virginia, setting forth the pendency of the criminal prosecution against them, and alleging, in substance, that rights, secured by the law providing for the equal civil rights of all citizens of the United States, were denied to them by the judicial tribunals of the county, inasmuch as their application for a mixed jury had been refused. It further alleged that a strong prejudice existed in the community of the county against them, independent of the merits

of their case, on the ground that they were colored persons, and the one whom they were charged to have murdered was a white man; and that, from this fact alone, they were satisfied they could not obtain an impartial trial before a jury composed exclusively of persons of the white race.

The prayer of this petition was denied and the prisoners were tried separately and convicted of murder, one in the first and the other in the second degree. Both obtained new trials, one by the action of the court of original jurisdiction, and the other by that of the Court of Appeals on a writ of error.

At the October Term of 1878 they were a second time brought up for trial, and before the jury were impaneled again moved the court to remove the prosecution to the Circuit Court of the United States, upon the petition presented at the April Term; but the motion, as before, was denied. They were then tried separately. In one case the jury disagreed, and the prisoner was remanded to jail to await another trial. In the other case, the prisoner was convicted of murder in the second degree, and his punishment was fixed by the jury at eighteen years' confinement in the penitentiary.

While the prisoners were held in jail, one of them to be again tried, and the other until he could be removed to the penitentiary under his sentence, they procured from the clerk of the court a copy of the record of the proceedings against them, which they presented to the Circuit Court of the United States for the Western District of Virginia, then held by Alexander Rives, the District Judge, with the petition for removal presented to the state court, and prayed that the prosecutions should be there docketed and proceeded with. That court granted the petition, directed the cases to be placed on its docket, and authorized the clerk to issue a writ of *habeas corpus cum causa* to the marshal of the district, requiring him to take the petitioners into his custody, and summon for their trial twenty-five jurors to attend at the next Term of the court. A writ of *habeas corpus cum causa* was accordingly issued. Pursuant to its command, the prisoners were removed from the custody of the jailer and taken into the custody of the marshal. Thereupon the Commonwealth of Virginia presented a petition to this court praying for a writ of *mandamus* to be directed to the District Judge, commanding him to order the marshal to redeliver the prisoners to her authorities, upon the ground that the Judge in his proceedings had transcended the jurisdiction of his court, and undertaken the exercise of powers not vested by any law of the United States in him or the court held by him. Upon its presentation at the last Term an order was issued to the Judge to show cause why the writ should not issue as prayed. His return admits the facts as stated, and justifies his action on the ground that the refusal of the state court to set aside the *venire* summoned for the trial of the prisoners, and to give them a jury composed in part of their own race and color, was a denial to them of "the equal protection of the laws," and brought their cases within the provisions of the Revised Statutes for the removal of criminal prosecutions from the state to the Federal Courts. The Attorney-General of the Commonwealth, contending that the return is

insufficient to justify his action, now moves that the writ be issued as prayed.

The application of Virginia is resisted by a denial of the jurisdiction of this court to issue a writ to the District Judge in the case; a denial made not only by the counsel for the prisoners, who has been permitted to appear in their behalf, though the proceeding is one directly between the Commonwealth and the District Judge, but by the Attorney-General, who has appeared, though not officially, for that officer. The ground of the denial is that the writ can be issued by this court only in the exercise or in aid of its appellate jurisdiction, and that the writ is here prayed in a proceeding which is not appellate but original, because it has its commencement in the presentation of the petition of the Commonwealth.

It is undoubtedly true that, except in cases where, under the Constitution, this court has original jurisdiction, the writ can be issued only in the exercise or in aid of its appellate authority. This was held as long ago as the case of *Marbury v. Madison*, decided in 1803 [1 Cranch, 137], and the doctrine has been adhered to ever since; for the obvious reason that, the jurisdiction of the court being original in only a few enumerated cases, all exercise of power in other cases must be in virtue of its appellate jurisdiction. That jurisdiction may, however, be called into exercise in various ways. The term "appellate" in the Constitution is not used in a restricted sense, but in the broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals brought before it for examination in the modes provided by law. Congress has prescribed the mode or process by which such proceedings shall be brought before the court. In equity cases, it is by a simple notice that an appeal is taken from the decree or proceeding sought to be reviewed; in common law cases, it is generally by writ of error; in some cases it is by a writ of prohibition, and in some by that of *certiorari* or of *mandamus*. The mode is one resting entirely in the discretion of Congress. The Judiciary Act of 1789, 1 Stat. at L., 73, passed at the first session of Congress after the adoption of the Constitution, declared that the Supreme Court should have appellate jurisdiction from the circuit courts and from courts of the several States in certain cases, and should "Have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States."

In *Marbury v. Madison* it was held that the authority given by the Act to issue the writ of *mandamus* to public officers was not warranted by the Constitution, the court observing that it was an essential criterion of appellate jurisdiction that it revises and corrects proceedings in a cause already instituted, and does not create the cause; and that although the writ might be directed to courts, yet to issue it to an officer for the delivery of a paper was in effect the same as to sustain an original action for that paper; and, therefore, seemed to belong not to appellate, but to original jurisdiction. The case in which this language was used was an application to the court to compel Mr. Madison, then

Secretary of State, to deliver to Mr. Marbury, as justice of the peace, a commission which had been signed by President Adams and transmitted to the predecessor in office of the Secretary, to be delivered to the appointee. There was, therefore, no action of an inferior tribunal brought up for review, the proceeding being merely to compel an executive officer to perform a ministerial act in which a citizen was interested. The language must, therefore, be limited by the facts of the case. It was not intended to deny the authority of this court to issue the writ to public officers, when the case is one in which it can exercise original jurisdiction; and probably, to avoid such an inference, the addition was made to the clause we have cited which now appears in the Revised Statutes, so as to allow the writ to issue to public officers only "Where a State or an ambassador or other public minister or a consul or vice-consul is a party;" that is, in cases where the court has original jurisdiction. Indeed, it is only by such writ that the original jurisdiction of this court can in many cases be exercised. *Com. v. Dennison*, 24 How., 66 [65 U. S., XVI., 717]. Nor was the language intended to deny that this court can issue the writ to judicial officers where the object is to revise and correct their action in legal proceedings pending in the courts held by them. Though the writ to a subordinate or inferior court may be addressed to the court as such, it is usually directed to the judge thereof, or, if the court is composed of several judges, to such one or more of them as may be authorized to hold its sessions or participate in holding them. The reason assigned is that, in case of disobedience to the writ, the authority to enforce it is exercised over the judges personally who are vested with the power of exercising the functions of the court. *High, Extraordinary Legal Remedies*, sec. 275. In the present case, the writ is asked against the District Judge who, whilst holding the Circuit Court of the Western District of Virginia, made the order which is the subject of complaint, and who, if the writ be granted, will be able to hold that court and carry out its command. There is no sound objection to its issue in this form.

The writ being one of the modes provided by Congress for the exercise of our appellate jurisdiction, the question whether it should be issued in this case is not difficult of solution if, as contended by the Commonwealth of Virginia, the Circuit Court, in taking the prisoners from the custody of her authorities, transcended its jurisdiction. To review that action and set aside what was done under it, the writ is sought. The jurisdiction invoked is, in its nature, appellate; and there is no other mode provided for its exercise in the case at bar than by the writ prayed. Though the petition is the first step taken by the Commonwealth against the Judge, the proceeding is not on that account an original suit. The petition is merely the process by which our appellate jurisdiction is invoked.

It is well settled that the writ of *mandamus* will issue to correct the action of subordinate or inferior courts or judicial officers, where they have exceeded their jurisdiction, and there is no other adequate remedy. "It issues," says Blackstone, "to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is de-

layed. For it is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or the Legislature have invested them; and this is not only by restraining their excesses, but also by quickening their negligence and obviating the denial of justice." 3 Bl. Com., 110.

It is in accordance, therefore, with the principles and usages of law that this court should issue a *mandamus* in the cases here enumerated, and thus supervise the proceedings of inferior courts where there is a legal right and there is no other existing legal remedy. "It is upon this ground," says *Mr. Justice Nelson*, "that the remedy has been applied from an early day; indeed, since the organization of courts and the admission of attorneys to practice therein, down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counselors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress." *Ex parte Bradley*, 7 Wall., 364 [74 U. S., XIX., 214]; see, also, *Ex parte Robinson*, 19 Wall., 505 [86 U. S., XXII., 205].

And so in the case at bar, without the use of this writ the greatest possible injury would be inflicted upon the Commonwealth of Virginia, without any redress, if the Circuit Court, as contended, transcended its jurisdiction. In no case, therefore, could the writ be more properly issued in the interests of justice, order and good government. Nor was there any necessity for a previous demand upon that court, in the way of a motion to remand the prisoners. While the authorities, says *Mr. High*, in his valuable treatise on the law of *Mandamus*, are not altogether reconcilable as to the necessity of a previous demand and refusal to perform the act which it is sought to coerce, a distinction is made between the cases where the duties to be enforced are of a public nature, affecting the public at large, and those where the duties are of a private nature, affecting only the rights of individuals. "And while," continues the author, "in the latter class of cases, where the person aggrieved claims the immediate and personal benefit of the act or duty whose performance is sought, demand and refusal are held to be necessary as a condition precedent to relief by *mandamus*; in the former class, the duty being strictly of a public nature, not affecting individual interests, and there being no one specially empowered to demand its performance, there is no necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and the omission to perform the required duty in place of a refusal." *High, Ex. Rem.*, sec. 13.

In this case not only was the duty required of the Circuit Court one of a public nature, in which the Commonwealth of Virginia is interested, but it would have been a useless ceremony to move for an order remanding the prisoners to her authorities, in the face of its direc-

tion to the marshal to take them into custody, and its order to docket and proceed with the prosecution against them in the Circuit Court of the United States, and the justification of this action contained in the return of the Judge.

The preliminary objections to the exercise of our jurisdiction being disposed of, we are brought to the important inquiry, whether the action of the Circuit Court, in taking the prisoners from the custody of the authorities of Virginia, was authorized under the laws of the United States. The *mandamus* prayed is to compel the return of the prisoners, as already stated; but the validity of the order directing the marshal to take them into his custody depends upon the legality of the removal of the prosecution from the State to the Federal Court. The order to the marshal was the necessary sequence of assuming jurisdiction of the prosecution. The legality of the removal is, therefore, the question for determination. Its legality is denied by Virginia on two grounds: 1. That the Act of Congress, R. S., sec. 641, upon the provisions of which the respondent relies, does not authorize the removal; and, 2, that the Act, in authorizing a criminal prosecution for an offense against a law of the State to be, before trial, removed from a State Court to a Federal Court, is unconstitutional and void. In my opinion, both of these grounds are well taken.

Section 641 of the Revised Statutes, re-enacting provisions of previous statutes, in terms provides in certain cases for the removal to the Circuit Courts of the United States of criminal prosecutions commenced in a State Court. It declares that "When any civil suit or criminal prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in any part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespass, or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant filed in said State Court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State Courts shall cease." The section also provides for furnishing the Circuit Court with copies of the process, pleadings and proceedings of the State Court. A subsequent section provides for the issue in such cases of a writ of *habeas corpus cum causa* to remove the accused, when in actual custody upon process of the State Court, to the custody of the Marshal of the United States.

By this enactment it appears that, in order to obtain a removal of a prosecution from a State to a Federal Court—except where it is against a public officer or other person for certain trespasses or conduct not material to consider in this connection—the petition of the accused must

show a denial of or an inability to enforce in the tribunals of the State, or of that part of the State where the prosecution is pending, some right secured to him by the law providing for the equal rights of citizens or persons within the jurisdiction of the United States. But how must the denial of a right under such a law, or the accused's inability to enforce it in the judicial tribunals of the State, be made to appear? So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions would be retained in a state court for insufficient allegations when the accused imagined he would gain by the removal. *Texas v. Gaines*, 2 Woods, 344. There must be such a presentation of facts as to lead the court to the conclusion that the averments of the accused are well founded. There are many ways in which a person may be denied his rights, or be unable to enforce them in the tribunals of a State. The denial or inability may arise from direct legislation, depriving him of their enjoyment or the means of their enforcement, or discriminating against him or the class, sect or race to which he belongs. And it may arise from popular prejudices, passions or excitement, biasing the minds of jurors and judges. Religious animosities, political controversies, antagonisms of race and a multitude of other causes will always operate, in a greater or less degree, as impediments to the full enjoyment and enforcement of civil rights. We cannot think that the Act of Congress contemplated a denial of or an inability to enforce ones rights from these latter and similar causes, and intended to authorize a removal of a prosecution by reason of them from a State to a Federal Court. Some of these causes have always existed in some localities in every State, and the remedy for them has been found in a change of the place of trial to other localities where like impediments to impartial action of the tribunals did not exist. The Civil Rights Act, to which reference is made in the section in question, was only intended to secure to the colored race the same rights and privileges as are enjoyed by white persons; it was not designed to relieve them from those obstacles in the enjoyment of their rights to which all other persons are subject, and which grow out of popular prejudices and passions.

The denial of rights or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the State, as, for example, an Act excluding colored persons from being witnesses, making contracts, acquiring property, and the like. With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community.

This conclusion is strengthened by the provisions of the 14th Amendment to the Constitution. The original Civil Rights Act was passed, it is true, before the adoption of that Amendment; but great doubt was expressed as to its validity, and to obtain authority for similar legislation, and thus obviate the objections which had been raised to its 1st section, was

one of the objects of the Amendment. After its adoption the Civil Rights Act was re-enacted, and upon the 1st section of that Amendment it rests. That section is directed against the State. Its language is that "*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*" As the State, in the administration of its government, acts through its Executive, Legislative and Judicial Departments, the inhibition applies to them. But the Executive and Judicial Departments only construe and enforce the laws of the State; the inhibition, therefore, is, in effect, against passing and enforcing any laws which are designed to accomplish the ends forbidden. If an executive or judicial officer exercises power with which he is not invested by law, and does unauthorized acts, the State is not responsible for them. The action of the judicial officer in such a case, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court; it cannot be imputed to the State, so as to make it evidence that she, in her sovereign or legislative capacity, denies the rights invaded, or refuses to allow their enforcement. It is merely the ordinary case of an erroneous ruling of an inferior tribunal. Nor can the unauthorized action of an executive officer, impinging upon the rights of the citizen, be taken as evidence of her intention or policy so as to charge upon her a denial of such rights.

If these views are correct, no cause is shown in the petition of the prisoners that justified a removal of the prosecutions against them to the Federal Court. No law of Virginia makes any discrimination against persons of the colored race, or excludes them from the jury. The law respecting jurors provides that "All male citizens, twenty-one years of age and not over sixty, who are entitled to vote and hold office under the Constitution and laws of the State," with certain exemptions not material to the question presented, may be jurors; and it authorizes an annual selection in each county, by the County Judge, from the citizens at large, of from one to three hundred persons, whose names are to be placed in a box, and from them the jurors, grand and petit, of the county are to be drawn. There is no restriction placed upon the County Judge in selecting them, except that they shall be such as he shall think "well qualified to serve as jurors, being persons of sound judgment and free from legal exception." The mode thus provided, properly carried out, cannot fail to secure competent jurors. Certain it is that no rights of the prisoners are denied by this legislation. The application to the state court, upon the refusal of which the petition was presented, was for a *venue* composed of one third of their race—a proceeding wholly inadmissible in any jury system which obtains in the several States.

From the return of the District Judge, it would seem that in his judgment the presence of persons of the colored race on the jury is essential to secure to them the "equal protection of the laws"; but how this conclusion is reached

is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws? Foreigners resident in the country are not permitted to act as jurors, yet they are protected in their rights equally with citizens. Persons over sixty years of age in Virginia are disqualified as jurors, yet no one will pretend that they do not enjoy the equal protection of the laws. If, when a colored person is indicted for a criminal offense, it is essential, to secure to him the equal protection of the laws, that persons of his race should be on the jury by which he is tried, it would seem that the presence of such persons on the Bench should be equally essential where the court consists of more than one judge; and that if it should consist of only a single judge, such protection would be impossible. To such an absurd result does the doctrine lead, which the Circuit Court announced as controlling its action.

The equality of protection assured by the 14th Amendment to all persons in the State, does not imply that they shall be allowed to participate in the administration of its laws, or to hold any of its offices, or to discharge any duties of a public trust. The universality of the protection intended excludes any such inference. Were this not so, aliens resident in the country, or temporarily here, of whom there are many thousands in each State, would be without that equal protection which the Amendment declares that no State shall deny to any person within its jurisdiction.

It follows from these views as to the meaning and purpose of the Act of Congress, that the removal of the prosecution in this case from the state to the Federal Court is unauthorized by it; and that the order of the Circuit Court to the marshal to take the prisoners from the custody of the state authorities is illegal and void.

The second objection of the Commonwealth to the legality of the removal is equally conclusive. The prosecution is for the crime of murder, committed within her limits, by persons and at a place subject to her jurisdiction. The offense charged is against her authority and laws, and she alone has the right to inquire into its commission, and to punish the offender. Murder is not an offense against the United States, except when committed on an American vessel on the high seas, or in some port or haven without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the National Government has exclusive jurisdiction. The offense within the limits of a State, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent. The prosecution of the offense in such a case does not, therefore, arise under the Constitution and laws of the United States; and the Act of Congress which attempts to give the Federal Courts jurisdiction of it is, to my mind, a clear infraction of the Constitution. That instrument defines and limits the judicial power of the United States.

It declares among other things, that the judicial power shall extend to cases in law and equity arising under the Constitution, laws and treaties of the United States, and to various controversies to which a State is a party; but it does not include in its enumeration controversies between a State and its own citizens. There can be no ground, therefore, for the assumption by a Federal Court of jurisdiction of offenses against the laws of a State. The judicial power granted by the Constitution does not cover any such case or controversy. And whilst it is well settled that the exercise of the power granted may be extended to new cases as they arise under the Constitution and laws, the power itself cannot be enlarged by Congress. The Constitution creating a government of limited powers puts a bound upon those which are judicial as well as those which are legislative, which cannot be lawfully passed.

This view would seem to be conclusive against the validity of the attempted removal of the prosecution in this case from the State Court. The Federal Court could not, in the first instance, have taken jurisdiction of the offense charged, and summoned a grand jury to present an indictment against the accused; and if it could not have taken jurisdiction at first, it cannot do so upon a removal of the prosecution to it. The jurisdiction exercised upon the removal is original and not appellate, as is sometimes erroneously asserted; for, as stated by Chief Justice Marshall in *Marbury v. Madison*, already cited, it is of the essence of appellate jurisdiction that it revises and corrects proceedings already had. The removal is only an indirect mode by which the Federal Court acquires original jurisdiction. *R. Co. v. Whitton*, 13 Wall., 270 [80 U. S., XX., 571.]

The Constitution, it is to be observed, in the distribution of the judicial power declares that in the cases enumerated in which a State is a party, the Supreme Court shall have original jurisdiction. Its framers seemed to have entertained great respect for the dignity of a State which was to remain sovereign, at least in its reserved powers, notwithstanding the new government and, therefore, provided that when a State should have occasion to seek the aid of the judicial power of the new government, or should be brought under its subjection, that power should be invoked only in its highest tribunal. It is difficult to believe that the wise men who sat in the Convention which framed the Constitution and advocated its adoption ever contemplated the possibility of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the States, and so calculated to humiliate and degrade them, lurked in any of the provisions of the Constitution, that instrument would never have been adopted.

There are many other difficulties in maintaining the position of the Circuit Court, which the counsel of the accused and the Attorney-General have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal Court, what officer is to prosecute the case? Is the at-

torney of the Commonwealth to follow the case from his county, or will the United States District Attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency, who is to exercise it—the Governor of the State or the President of the United States? Can the President pardon for an offense against the State? Can the Governor release from the judgment of a Federal Court? These and other questions which might be asked, show, as justly observed by the counsel of Virginia, the incongruity and absurdity of the attempted proceeding.

Undoubtedly, if in the progress of a criminal prosecution, as well as in the progress of a civil action, a question arise as to any matter under the Constitution and laws of the United States, upon which the defendant may claim protection, or any benefit in the case, the decision thereon may be reviewed by the federal judiciary, which can examine the case so far and so far only, as to determine the correctness of the ruling. If the decision be erroneous in that respect, it may be reversed and a new trial had. Provision for such revision was made in the 25th section of the Judiciary Act of 1789, 1 Stat. at L., 73, and is retained in the Revised Statutes. That great Act was penned by Oliver Ellsworth, a member of the Convention which framed the Constitution, and one of the early Chief Justices of this court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the Federal and state courts. It gives to the Federal Courts the ultimate decision of federal questions, without infringing upon the dignity and independence of the state courts. By its harmony between them is secured, the rights of both Federal and State Governments maintained, and every privilege and immunity which the accused could assert under either can be enforced.

I am authorized to say that *Mr. Justice Clifford* concurs with me in these views.

Cited—103 U. S., 385, 398, 402, 493; 106 U., 639; 107 U. S., 117; 109 U. S., 12; 6 Sawy., 456; 93 N. Y., 458; 16 Nev., 58; 40 Am. Rep., 491.

Ex Parte IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA AND J. D. COLES, *Petitioners*.

(See S. C., 10 Otto, 339-370.)

Habeas corpus, when granted—exclusion of juror on account of color—Fourteenth Amendment—power of Congress—selection of jurors.

*C. being a Judge of a County Court in Virginia, charged by the law of that State with the selection of jurors to serve in the Circuit and County Courts of his county, in the year 1878, was indicted in the Federal Court for the Western District of Virginia, charged with excluding and failing to select as grand jurors and petit jurors certain citizens of his county, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him, the said C., excluded from the jury lists made out by him as such officer,

* Head notes by *Mr. Justice Strong*.

on account of their race, color and previous condition of servitude, and for no other reason, against the peace, etc., of the United States, and against the form of the statute in such case made and provided. Being in custody under that indictment, he presented to this court his petition for a writ of *habeas corpus* and a writ of *certiorari*, to bring up the record of the inferior court, that he might be discharged, averring that the finding of the indictment, and his arrest and imprisonment thereunder, were unwarranted by the Constitution of the United States, in violation of his rights and the rights of Virginia, whose judicial officer he is, and that the inferior court had no jurisdiction to proceed against him. A similar petition was presented by the State of Virginia. *Held*: 1. That while a writ of *habeas corpus* cannot generally be made to subvert the purposes of a writ of error; yet when a prisoner is held without any lawful authority and by an order beyond the jurisdiction of an inferior Federal Court to take, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.

2. The section of the Act of March 1, 1875, 18 Stat. at L., 336, which enacts that "No citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person, charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen, for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined not more than \$5,000," examined, and held to be authorized by the 13th and 14th Amendments of the Constitution, which Congress is given power to enforce by appropriate legislation.

3. The inhibition contained in the 14th Amendment means that no agency of the State, nor of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. Otherwise the constitutional inhibition has no meaning and the State has clothed one of its agents with power to annul or evade it.

4. The constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and to insure to all persons the enjoyment of such rights. Power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons; not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the Act of March 1, 1875, and is fully authorized by the Constitution.

5. The act of the defendant, in selecting jurors, was a ministerial, not a judicial act; and being charged with the performance of that duty, although he derived his authority from the State, he was bound, in the discharge of his duties, to obey the Federal Constitution and the laws passed in pursuance thereof.

[No. 4, Orig.]

Argued Oct. 16, 17, 1879. Decided Mar. 1, 1880.

PETITION for a writ of *habeas corpus*.

The case is stated by the court.

Messrs. James G. Field and W. J. Robertson, for petitioners.

Messrs. Charles Devens, Atty-Gen. and E. B. Smith, Asst. Atty-Gen., opposed.

Mr. Justice Strong delivered the opinion of the court:

The petitioner, J. D. Coles, was arrested, and he is now held in custody under an indictment found against him in the District Court of the United States for the Western District of Virginia. The indictment charged that the said See 10 OTTO.

Coles, being a Judge of the County Court of Pittsylvania County of that State, and an officer charged by law with the selection of jurors to serve in the Circuit and County Courts of said county in the year 1878, did then and there exclude and fail to select as grand and petit jurors certain citizens of said County of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him the said J. D. Coles, excluded from the jury lists made out by him as such Judge, on account of their race, color and previous condition of servitude, and for no other reason, against the peace and dignity of the United States, and against the form of the Statute of the United States in such case made and provided.

Being thus in custody, he has presented to us his petition for a writ of *habeas corpus* and a writ of *certiorari*, to bring up the record of the district court, in order that he may be discharged; and he avers that the District Court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offense punishable in said district court; and that the finding of said indictment, and his consequent arrest and imprisonment, are unwarranted by the Constitution of the United States, or by any law made in pursuance thereof, and are in violation of his rights and of the rights of the State of Virginia, whose judicial officer he is.

A similar petition has been presented by the State of Virginia, praying for a *habeas corpus* and for the discharge of the said Coles. Accompanying both these petitions are exhibited copies of the indictment, the bench-warrant, and the return of the marshal, showing the arrest of the said Coles and his detention in custody.

Both these petitions have been considered as one case, and the first question they present is, whether this court has jurisdiction to award the writ asked for by the petitioners. The question is not free from difficulty, in view of the Constitution and the several Acts of Congress relating to writs of *habeas corpus*, and in view of our decisions heretofore made. If granting the writ would be an exercise of original jurisdiction, it would seem that it could not be granted, unless the fact, that one of the petitioners for the writ is the State of Virginia, makes the cases to differ. This is established by the rulings in *Marbury v. Madison*, 1 Cranch, 137; and in numerous subsequent decisions. And it is not readily perceived how the fact that a State applies for the writ to be directed to one of her own citizens can make a case for our original jurisdiction.

But the appellate power of this court is broader than its original and, generally, that is in most cases, it may be said that the issue of a writ of *habeas corpus* by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the Constitution to any particular form or mode. It is not alone by appeal or by writ of error that it may be invoked. In *Matter of Metzger*, 5 How., 176, it was indeed ruled that an order of commitment made by a District Judge *at chambers*, cannot be revised here by

habeas corpus. But such an order was reviewable in no form; and, besides, the authority of that case has been much shaken. *In re Kaine*, 14 How., 103; *Ex parte Yerger*, 8 Wall., 85 [75 U.S., XIX., 332]. In the latter of these cases, it was said by Chief Justice Chase, in delivering the opinion of the court: "We regard as established, upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress."

In the present case, the petitioner Coles is in custody under a bench-warrant directed by the District Court, and the averment is that the court had no jurisdiction of the indictment on which the warrant is founded.

The District Court is an inferior court and, in such a case as that exhibited by the indictment, its judgments are reviewable here. The indictment has been found for a violation of section 4 of the Act of Congress of March 1, 1875, entitled "An Act to Protect all Citizens in their Civil and Legal Rights." 18 Stat. at L., 335. The 3d section gives to the District Courts, as well as the Circuit, judicial cognizance of all offenses against the provisions of the Act; and the 5th section enacts that all cases arising under the provisions of the Act shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other cases in said court. If this section applies to criminal cases as well as civil, our appellate power extends directly to the District Court, and the Act of March 3, 1879, 20 Stat. at L., 354, which allows writs of error to the Circuit Court in such cases, has not deprived us of appellate jurisdiction.

We have, then, an application to our appellate power over the action of a District Court, in a case where it is alleged that court has acted outside of its jurisdiction. It is said there is nothing to appeal from; that no decision or judgment has been given in the inferior court, and that the appeal, if any, is taken from the finding of a grand jury. This is a mistake. The bench-warrant was an order of the court, and the validity of the bench-warrant is the matter in question. It is true there has been no final judgment or decision of the whole case; but an appeal may lie, and in many courts often does lie, from a merely interlocutory order. It is said no *habeas corpus* was sued out either in the District or Circuit Court, and that we are not called upon to review the action of a lower court upon such a writ. This is true, and such a writ from the lower court would have been a more regular proceeding. We cannot say, however, it was indispensable, especially in view of the fact that a State is seeking release of one of her officers, and in view of former action in this court. In *U. S. v. Hamilton*, 3 Dall., 17, this court awarded a writ of *habeas corpus*, to review a commitment under a warrant of a District Judge. In *Ex parte Burford*, 3 Cranch, 448, such a writ was awarded to review a commitment by the Circuit Court of the District of Columbia, not to review a decision of an inferior court upon a *habeas corpus* issued by it. So, in *Ex parte Jackson*, 96 U. S., 727 [XXIV., 877], in which the question of our

power to issue the writ was raised, and the petition only averred that the Circuit Court had exceeded its jurisdiction, this court considered the merits of the case, without regard to the fact that there had been no *habeas corpus* in the court below. And in *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872], it was ruled, after an examination of authorities, that when a prisoner shows that he is held under a judgment of a Federal Court, given without authority of law, this court, by writs of *habeas corpus* and *certiorari*, will look into the record, so far as to ascertain whether that is the fact, and, if it is found to be so, will discharge him. Mr. Justice Miller said, in delivering the opinion: "The authority of the court in such a case, under the Constitution of the United States, and the 14th section of the Judiciary Act of 1789, 1 Stat. at L., 73, to issue this writ and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer an open question."

While, therefore, it is true that a writ of *habeas corpus* cannot generally be made to subvert the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal Court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.

Our conclusion, then, is, that we are empowered to grant the writ in such a case as is presented in these petitions. We come now to the merits of the case.

The indictment and bench-warrant, in virtue of which the petitioner Coles has been arrested and is held in custody, have their justification if any they have, in the Act of Congress of March 1, 1875, sec. 4, 18 Stat. at L., 336. That section enacts that "No citizen, possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000." The defendant has been indicted for the misdemeanor described in this Act, and it is not denied that he is now properly held in custody to answer the indictment, if the Act of Congress was warranted by the Constitution. The whole merits of the case are involved in the question, whether the Act was thus warranted.

The provisions of the Constitution that relate to this subject are found in the 13th and 14th Amendments. The 13th ordains that "Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction," and it declares that Congress shall have power to enforce the article by appropriate legislation. This has been followed by the 14th Amendment, which ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are cit-

izens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws." This Amendment also declares that "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are, to some extent, declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. We had occasion in the *Slaughter-House Cases*, 16 Wall., 36 [83 U. S., XXI., 394], to express our opinion of their spirit and purpose, and to some extent of their meaning. We have again been called to consider them in the cases of *Tenn. v. Davis* [ante, 648] and *Strauder v. West Va.*, just decided [ante, 664]. In this latter case we held that the 14th Amendment secures, among other civil rights, to colored men, when charged with criminal offenses against a State, an impartial jury trial by jurors indifferently selected or chosen without discrimination against such jurors because of their color. We held that immunity from any such discrimination is one of the equal rights of all persons, and that any withholding it by a State is a denial of the equal protection of the laws, within the meaning of the Amendment. We held that such an equal right to an impartial jury trial, and such an immunity from unfriendly discrimination, are placed by the Amendment under the protection of the General Government and guaranteed by it. We held, further, that this protection and this guaranty, as the 5th section of the Amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

All of the Amendments derive much of their force from this latter provision. It is not said that the *judicial power* of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the Amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such See 10 OTTO.

legislation is restrictive of what the State might have done before the constitutional Amendment was adopted. The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the General Government is overlooked, when it is said, as it has been in this case, that the Act of March 1, 1875, interferes with state rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the General Government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

We have said the prohibitions of the 14th Amendment are addressed to the States. They are: "No States shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

But the constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the Act of March 1, 1875, 18 Stat. at L., 336, and we think it was fully authorized by the Constitution.

The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the 14th Amendment. Were it not for the 5th section of that Amendment, there might be room for argument that the 1st section is only declaratory of the moral duty of the State, as was said in *Ky. v. Dennison*, 24 How., 66 [65 U. S., XVI., 717]. The Act under consideration in that case provided no means to compel the execution of the duty required by it, and the Constitution gave none. It was of such an Act *Chief Justice* Taney said, that a power vested in the United States to inflict any punishment for neglect or refusal to perform the duty required by the Act of Congress "Would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights." But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the 14th Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. The remarks made in *Ky. v. Dennison* and in *Collector v. Day*, 11 Wall., 113 [78 U. S., XX., 122], though entirely just as applied to the cases in which they were made, are inapplicable to the case we have now in hand.

We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State Judge for his official acts; and it was assumed that *Judge* Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?

But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a Circuit Court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that

the Act of Congress is unconstitutional because it inflicts penalties upon state judges for their judicial action. It does no such thing.

Upon the whole, as we are of opinion that the Act of Congress upon which the indictment against the petitioner was founded is constitutional, and that he is correctly held to answer it, and as, therefore, no object would be secured by issuing a writ of *habeas corpus*, the petitions are denied.

Mr. Justice Field, dissenting:

I dissent from the judgment of the court in this case, and from the reasons by which it is supported; and I will state the grounds of my dissent.

In Virginia all male citizens between the ages of twenty-one and sixty, who are entitled to vote and hold office under the Constitution and laws of the State, are liable, with certain exceptions not material to be here mentioned, to serve as jurors. The judge of each county or corporation court is required to prepare annually a list of such inhabitants of the county or corporation, not less than one hundred, nor exceeding three hundred in number, "as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception." The name of each person on the list thus prepared is to be written on a separate ballot, and placed in a box to be kept by the clerk of the court. From this box, the names of persons to be summoned as grand and petit jurors of the county are to be drawn.

The law, in thus providing for the preparation of the list of persons from whom the jurors are to be taken, makes no discrimination against persons of the colored race. The judge of the county or corporation court is restricted in his action only by the condition that the persons selected shall, in his opinion, be "well qualified to serve as jurors," be "of sound judgment," and "free from legal exception." Whether they possess these qualifications is left to his determination; and, as I shall attempt hereafter to show, for the manner in which he discharges this duty he is responsible only to the State whose officer he is and whose law he is bound to enforce.

The petitioner, J. D. Coles, is the Judge of the County Court of the County of Pittsylvania, in Virginia, and has held that office for some years. It is not pretended that, in the discharge of his judicial duties, he has ever selected as jurors persons who were not qualified to serve in that character, or who were not of sound judgment, or who were not free from legal exception. It is not even suggested in argument that he has not at all times faithfully obeyed the law of the State; yet he has been indicted in the District Court of the United States for the Western District of Virginia for having, on some undesignated day in the year 1873, excluded and failed to select as grand and petit jurors citizens of the county, on account of race, color and previous condition of servitude. The indictment does not state who those citizens were, or set forth any particulars of the offense, but charges it in the general words of a definition. The district court, nevertheless, issued a bench-warrant, upon which the Judge was arrested; and, refusing to give bail, he is held in custody

to answer the indictment. He, therefore, petitions for a *certiorari* to that court to send up the record of its proceedings for our examination, and for a writ of *habeas corpus*, alleging that its action was without jurisdiction, and that his imprisonment thereunder is unlawful; and he prays to be released therefrom.

The Commonwealth of Virginia has also presented a similar petition, declaring that she is injured by being deprived of the services of her judicial officer, by his unlawful arrest and imprisonment.

If the District Court had no jurisdiction, as alleged, of the matters charged against the County Judge, if they constitute no public offense for which he could be held, his arrest and imprisonment upon process issued upon the indictment were unlawful, and his petition should be granted.

It has been settled by this court, upon full examination and after some conflict of opinion among its members, that the writ of *habeas corpus* is a mode provided for the exercise of its appellate jurisdiction, whenever by any unauthorized action of an inferior tribunal, whether it be by its order, decree or process, a citizen is restrained of his personal liberty; and that a *certiorari* will issue in connection with the writ, to bring up the record of the inferior tribunal for examination. In such cases this court will look into the record, to determine not whether the inferior tribunal has erred in its action, but whether it has exceeded its jurisdiction in the imprisonment of the petitioner. *Ex parte Yeager*, 8 Wall., 85 [75 U. S., XIX., 332]; *Ex parte Lange*, 18 Wall., 166 [85 U. S., XXI., 875].

The indictment is founded upon the 4th section of the Act of Congress of March 1, 1875, "To Protect all Citizens in their Civil and Legal Rights," which declares, "That no citizen possessing all other qualifications, which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than \$5,000."

In what I have to say, I shall endeavor to show that the District Court, in issuing its process for the arrest of the defendant and in imprisoning him, exceeded its jurisdiction: 1, because, assuming that the Act of 1875 is constitutional and valid legislation, the indictment describes no offense under it, but is void on its face; and, 2, because that Act in the section cited, so far as it relates to jurors in the State Courts, is unconstitutional and void.

The indictment merely repeats the general language of the statute. It avers that the defendant, being Judge of Pittsylvania County, and an officer charged by law with the selection of jurors to serve in the Circuit and County Courts of the county, excluded and failed to select as jurors, on account of race, color and previous condition of servitude, certain citizens of the county possessing all other qualifications prescribed by law; but it names no citizens who were thus excluded and, of course, designates no specific traversable offense. It is essential

to a valid indictment that it should set forth the offense, with such particulars of time, place and person, that the accused may know the nature of the charge, and be able to prepare to meet it. It is not enough to repeat the definition of the offense in the general language of the statute, and then aver that the defendant has been guilty of the offense thus defined, without other specification. It is not sufficient, for example, to charge in an indictment that the defendant has been guilty of murder, without stating the time and place of the offense, and the name of the person murdered; or, if his name be unknown, giving such a description as to identify him. An indictment without such specification would be merely a collection of pointless words. This doctrine is only common learning; it is found in the hornbooks of the law; it is on the pages thumbed by the student in his first lessons in criminal procedure.

The Constitution, in its 6th Amendment, strikes with nullity all such vague accusations as are embraced in this indictment. It declares, repeating in this respect the doctrine of the common law, that, in all criminal prosecutions, the accused shall "be informed of the nature and cause of the accusation" against him; and this means that all the essential ingredients of the offense charged must be stated, embracing, with reasonable certainty, the particulars of time, place and person or property. It is only by such information that the accused will be enabled to prepare his defense, and avail himself of his acquittal or conviction against any further prosecution for the same cause. "This principle," says Bishop in his treatise, "that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted, pervades the entire system of the adjudged law of criminal procedure. It is not made apparent to our understandings by a single case only, but by all the cases. Wherever we move in this department of our jurisprudence, we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us." Sec. 81. To the same effect is the language of Archbold, in his treatise on Criminal Practice and Pleading. "The indictment," he says, "must state all the facts and circumstances comprised in the definition of the offense, by the rule of the common law or statute on which the indictment is founded. And these must be stated with clearness and certainty, otherwise the indictment will be bad." And he states that the principal rule as to the certainty required in an indictment may be laid down thus: "That where the definition of an offense, whether by a rule of the common law or by statute, includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species; it must descend to particulars." P. 88. This doctrine is fully stated and illustrated in *U. S. v. Cruikshank*, both in the prevailing and dissenting opinion, 92 U. S., 558, 568 [XXIII., 593, 597]. Tested by it, the indictment here is but a string of words, presenting no specific offense and, therefore, not justifying the issue of any process for the arrest and imprisonment of the petitioner.

It is difficult to understand how an indictment so defective could have been drawn by

the public prosecutor, unless we accept, as an explanation of it, the extraordinary statement of counsel, that the District Judge instructed the grand jury to the effect, that, whenever it appeared that a State Judge, in discharging the duty imposed on him by the law of the State to prepare annually a list of such inhabitants of his county as he should "think well qualified to serve as jurors, being persons of sound judgment and free from legal exception," had never put colored persons on the jury lists, it was to be presumed that his failure to do so was because of their race, color or previous condition of servitude, and that it was the duty of the grand jury to indict him for that offense. In the face of this ruling, no defense could be made by the accused, although he may have exercised at all times his best judgment in the selection of qualified persons, unless he could prove, what in most cases would be impossible, that in a county of many thousand inhabitants there was not a colored person qualified to serve as a juror. With this ruling there could be no necessity of alleging in the indictment anything beyond the general failure to put colored persons on the jury list, a fact which could not be disputed; and it would sufficiently inform the accused that he must be prepared, in order to rebut the presumption of guilt, to prove that there were no persons of the colored race in the county qualified to act as jurors. It is difficult to speak of this ruling in the language of moderation.

My second position is, that the 4th section of the Act of 1875, so far as it applies to the selection of jurors in the State Courts, is unconstitutional and void. Previous to the late Amendments, it would not have been contended, by any one familiar with the Constitution, that Congress was vested with any power to exercise supervision over the conduct of state officers in the discharge of their duties under the laws of the State, and prescribe a punishment for disregarding its directions. It would have been conceded that the selection of jurors was a subject exclusively for regulation by the States; that it was for them to determine who should act as jurors in their courts, from what class they should be taken, and what qualifications they should possess; and that their officers in carrying out the laws in this respect were responsible only to them. The States could have abolished jury trials altogether, and required all controversies to be submitted to the courts without their intervention. The 6th and 7th Amendments, in which jury trials are mentioned, apply only to the Federal Courts, as has been repeatedly adjudged.

The government created by the Constitution was not designed for the regulation of matters of purely local concern. The States required no aid from any external authority to manage their domestic affairs. They were fully competent to provide for the due administration of justice between their own citizens in their own courts; and they needed no directions in that matter from any other government, any more than they needed directions as to their highways and schools, their hospitals and charitable institutions, their public libraries, or the magistrates they should appoint for their towns and counties. It was only for matters which concerned all the States, and which could not

be managed by them in their independent capacity, or managed only with great difficulty and embarrassment, that a general and common government was desired. Whilst they retained control of local matters, it was felt necessary that matters of general and common interest, which they could not wisely and efficiently manage, should be intrusted to a central authority. And so to the common government which grew out of this prevailing necessity was granted exclusive jurisdiction over external affairs, including the great powers of declaring war, making peace, and concluding treaties; but only such powers of internal regulation were conferred as were essential to the successful and efficient working of the government established, to facilitate intercourse and commerce between the people of the different States, and secure to them equality of protection in the several States.

That the central government was created chiefly for matters of a general character, which concerned all the States and their people, and not for matters of interior regulation, is shown as much by the history of its formation as by the express language of the Constitution. The Union preceded the Constitution. As happily expressed by the late *Chief Justice*: "It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation." *Texas v. White*, 7 Wall., 725 [74 U. S., XIX., 237]. Those articles were prepared by the Continental Congress, which was called to provide measures for the common defense of the Colonies against the encroachments of the British Crown, and which, failing to secure redress, declared their independence. Its members foresaw that, when the independence of the Colonies was established and acknowledged, their condition as separate and independent States would be beset with dangers threatening their peace and safety; that disputes arising from conflicting interests and rivalries, always incident to neighboring Nations, would lead to armed collisions, and expose them to reconquest by the mother country. To provide against the possibility of evils of this kind, the Articles of Confederation were prepared and submitted to the Legislatures of the several States, and finally, in 1781, were adopted. They declared that the States entered into a firm league of friendship with each other for their common defense; the security of their liberties and their mutual and general welfare; and they bound themselves to assist each other against attacks on account of religion, sovereignty, trade, or any other pretense. They clothed the new government created by them with powers supposed to be ample to secure these ends, and declared that there should be freedom of intercourse and commerce between the inhabitants of the several States. They provided for a general Congress, and, among other things, invested it with the exclusive power of determining on peace and war, except in case of invasion of a State by enemies, or imminent danger of such invasion by Indians; of sending and receiving ambassadors, entering into treaties and alliances; of regulating the alloy and value of coin

struck by the authority of the States or of the United States; of fixing the standard of weights and measures; of regulating the trade and managing all affairs with the Indians; and of establishing and regulating postoffices from one State to another; and they placed numerous restraints upon the States. But by none of the articles was any interference authorized with the purely internal affairs of the States, or with any of the instrumentalities by which the States administered their governments and dispensed justice among their people; and they declared in terms that each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right which was not by the articles expressly delegated to the United States in Congress assembled.

When the government of the Confederation failed, chiefly through the want of all coercive authority to carry into effect its measures, its power being only that of recommendation to the States, and the present Constitution was adopted, the same general ends were sought to be attained, namely: the creation of a central government, which would take exclusive charge of all our foreign relations, representing the people of all the States in that respect as one Nation, and would at the same time secure at home freedom of intercourse between the States, equality of protection to citizens of each State in the several States, uniformity of commercial regulations, a common currency, a standard of weights and measures, one postal system, and such other matters as concerned all the States and their people.

Accordingly, the new government was invested with powers adequate to the accomplishment of these purposes, with which it could act directly upon the people, and not by recommendation to the States, and enforce its measures through tribunals and officers of its own creation. There were also restraints placed upon the action of the States to prevent interference with the authority of the new government, and to secure to all persons protection against punishment by legislative decree, and insure the fulfillment of contract obligations. But the control of matters of purely local concern, not coming within the scope of the powers granted or the restraints mentioned, was left, where it had always existed, with the States. The new government being one of granted powers, its authority was limited by them and such as were necessarily implied for their execution. But lest, from a misconception of their extent, these powers might be abused, the 10th Amendment was at an early day adopted, declaring that "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."

Now, if we look into the Constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the Amendments in force before the close of the civil war, nor, as I shall hereafter endeavor to show, in those subsequently adopted, which authorizes any interference by Congress with the States in the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The design of its framers was not to destroy the States, but to

form a more perfect union between them, and, whilst creating a central government for certain great purposes, to leave to the States in all matters the jurisdiction of which was not surrendered the functions essential to separate and independent existence. And so the late *Chief Justice*, speaking for the court in 1869, said: "Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government;" and then he adds, in that striking language which gives to an old truth new force and significance, that "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White* [*supra*.]

And *Mr. Justice Nelson*, also speaking for the court, in 1871, used this language: "The General Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the 10th Amendment, 'reserved,' are as independent of the General Government as that government within its spheres is independent of the States." And again: "We have said that one of the reserved powers was that to establish a Judicial Department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a Judicial Department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the General Government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the General Government as that government is independent of the States." *Collector v. Day*, 11 Wall., 124-126 [78 U. S., XX., 126].

The cases of *Texas v. White*, and *Collector v. Day* were decided after the 13th and 14th Amendments, upon which it is sought to maintain the legislation in question, were adopted; and with their provisions the *Chief Justice* and *Mr. Justice Nelson*, and the court for which they spoke, were familiar. Yet neither they, nor any other Judge of the court, suggested that the doctrines announced in the opinions, from which I have quoted, were in any respect modified or affected by the Amendments.

Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States; reduce them to a humiliating and degrading dependence upon the central government; engender constant irritation and destroy that domestic tranquillity which it was one of the objects of the Constitution to insure, than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the States in the discharge of their duties under state laws. It

will be only another step in the same direction towards consolidation, when it assumes to exercise similar coercive authority over Governors and legislators of the States.

The Constitution declares that "A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." And yet in the case of *Com. v. Dennison*, where a fugitive from justice from Kentucky was demanded from the Governor of Ohio, and on his refusal application was made to this court for a *mandamus* to compel him to perform his duty in this respect it was held that there was no clause or provision in the Constitution which armed the Government of the United States with authority to compel the Executive of a State to perform his duty, nor to inflict any punishment for his neglect or refusal. "Indeed, such a power," said *Mr. Chief Justice Taney*, speaking for the whole court, "would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights." 24 How., 107 [65 U. S., XVI., 729]. And *Mr. Justice Nelson*, in the case of *Collector v. Day*, where it was held that it was not competent for Congress to impose a tax upon the salary of a judicial officer of a State, said, that "Any government whose means employed in conducting its operations are made subject to the control of another and distinct government, can exist only at the mercy of that government." I could add to these authorities, if anything more were required, that all the recorded utterances of the statesmen who participated in framing the Constitution and urging its adoption, and of the publicists and jurists who have since studied its language and aided in the enforcement of its provisions, are inconsistent with the pretension advanced in this case by the counsel of the government.

The duties of the County Judge in the selection of jurors were judicial in their nature. They involved the exercise of discretion and judgment. He was to determine who were qualified to serve in that character, and for that purpose whether they possessed sound judgment, and were free from legal exceptions. The law under which he acted had been in force for many years, and had been always considered by the judicial authorities of Virginia to be in conformity with its Constitution, which inhibits the Legislature from requiring of its judges any other than judicial duties. A test as to the character of an act is found in the power of a writ of *mandamus* to enforce its performance in a particular way. If the act be a judicial one, the writ can only require the judge to proceed in the discharge of his duty with reference to it; the manner of performance cannot be dictated. Here the writ could not command the County Judge to select as jurors any particular persons, black or white, but only to proceed and select such as are qualified; its command in that respect being subject to the limitation incident to all commands of such writs upon judicial officers.

The 13th and 14th Amendments are relied upon, as already stated, to support the legislation in question. The 13th Amendment declares

"That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The 14th Amendment, in its 1st section, which is the only one having any bearing upon the questions involved in this case, declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The 15th Amendment, which declares that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color or previous condition of servitude," is not material to the question before us, except as showing that it was only with respect to the suffrage that an interdict was in terms placed against legislation on account of race, color or previous condition of servitude. Equality in their civil rights was, in other ways, secured to persons of the colored race; and the ballot being assured to them, an effectual means against unjust legislation was placed in their hands. To each of these amendments a clause is added, authorizing Congress to enforce its provisions by "appropriate legislation."

The history of the Amendments is fresh in the recollection of all of us. They grew out of the late civil war and the events which followed it. They were primarily designed to give freedom to persons of the African race, prevent their future enslavement, make them citizens, prevent discriminating state legislation against their rights as freemen, and secure to them the ballot. The generality of the language used necessarily extends some of their provisions to all persons of every race and color; but in construing the Amendments and giving effect to them, the occasion of their adoption and the purposes they were designed to attain should be always borne in mind. Nor should it be forgotten that they are additions to the previous amendments, and are to be construed in connection with them and the original Constitution as one instrument. They do not, in terms, contravene or repeal anything which previously existed in the Constitution and those Amendments. Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States; and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States. The provision authorizing Congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a bill of attainder or an *ex post facto* law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory

as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers. If the States were destroyed, there could, of course, be no United States. In the language of this court, in *Collector v. Day*, "Without them the General Government itself would disappear from the family of nations." Legislation could not, therefore, be appropriate which, under pretense of prohibiting a State from doing certain things, should tend to destroy it, or any of its essential attributes. To every State, as understood in the American sense, there must be, with reference to the subjects over which it has jurisdiction, absolute freedom from all external interference in the exercise of its legislative, judicial and executive authority. Congress could not undertake to prescribe the duties of a State Legislature and the rules it should follow, and the motives by which it should be governed, and authorize criminal prosecutions against the members if its directions were disregarded; for the independence of the Legislature is essential to the independence and autonomy of the State. Congress could not lay down rules for the guidance of the state judiciary, and prescribe to it the law and the motives by which it should be controlled, and if these were disregarded, direct criminal proceedings against its members; because a judiciary independent of external authority is essential to the independence of the State, and also, I may add, to a just and efficient administration of justice in her courts. Congress could not dictate to the Executive of a State the bills he might approve, the pardons and reprieves he might grant, or the manner in which he might discharge the functions of his office, and assume to punish him if its dictates were disregarded, because his independence, within the reserved powers, is essential to that of the State. Indeed, the independence of a State consists in the independence of its legislative, executive and judicial officers, through whom alone it acts. If this were not so, a State would cease to be a self-existing and an indestructible member of the Union, and would be brought to the level of a dependent municipal corporation, existing only with such powers as Congress might prescribe.

I cannot think I am mistaken in saying that a change so radical in the relation between the federal and state authorities, as would justify legislation interfering with the independent action of the different departments of the state governments, in all matters over which the States retain jurisdiction, was never contemplated by the recent Amendments. The People, in adopting them, did not suppose they were altering the fundamental theory of their dual system of governments. The discussions attending their consideration in Congress, and before the People, when presented to the Legislatures of the States for adoption, can be successfully appealed to in support of this assertion. The Union was preserved at a fearful cost of life and property. The institution of slavery in a portion of the country was the cause of constant irritation and crimination between the People of the States where it existed and those of the free States, which finally led to a rupture between them and to the civil war. As the war progressed, its sacrifices and burdens filled the People of the loyal States with a determination

that not only should the Union be preserved, but that the institution which, in their judgment, had threatened its dissolution should be abolished. The Emancipation Proclamation of President Lincoln expressed this determination, though placed on the ground of military necessity. The 13th Amendment carried it into the organic law. That Amendment prohibits slavery and involuntary servitude, except for crime, within the United States, or any place subject to their jurisdiction. Its language is not restricted to the slavery of any particular class. It applies to all men; and embraces in its comprehensive language not merely that form of slavery which consists in the denial of personal rights to the slave, and subjects him to the condition of a chattel, but also serfage, vassalage, peonage, villeinage and every other form of compulsory service for the benefit, pleasure or caprice of others. It was intended to render everyone within the domain of the Republic a freeman, with the right to follow the ordinary pursuits of life without other restraints than such as are applied to all others, and to enjoy equally with them the earnings of his labor. But it confers no political rights; it leaves the States free, as before its adoption, to determine who shall hold their offices and participate in the administration of their laws. A similar prohibition of slavery and involuntary servitude was in the Constitution of several States previous to its adoption by the United States; and it was never held to confer any political rights.

On the 18th of December, 1865, this Amendment was ratified; that is, the official Proclamation of its ratification was then made; and in April of the following year the Civil Rights Act was passed. Its 1st section declares that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are "citizens of the United States," and that "Such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, of which the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white persons." This legislation was intended to secure to all persons in the United States practical freedom. But its validity was questioned in many quarters entitled to consideration, and some of its provisions not long afterwards were declared by state courts to be beyond the constitutional authority of Congress. *Bowlin v. Com.*, 2 Bush, 15. There were also complaints made that, notwithstanding the amendment abolishing slavery and involuntary servitude, except for crime, the freedmen were, by legislation in some of the Southern States, subjected to such burdensome disabilities in the acquisition and enjoyment of property, and the pursuit of happiness, as to render their freedom of little value. *Slaughter-House Cases*, 16 Wall., 36 [83 U. S., XXI., 394]. There were, besides, complaints of the existence, in those sections, of a feeling of dislike towards citizens of the North seeking residence there, and towards

such of their own citizens as had adhered to the National Government during the war, which could not fail to find expression in hostile and discriminating legislation. It is immaterial whether these complaints were justified or not; they were believed by many persons to be well founded. To remove the cause of them; to obviate objections to the validity of legislation similar to that contained in the 1st section of the Civil Rights Act; to prevent the possibility of hostile and discriminating legislation in future by a State against any citizen of the United States, and the enforcement of any such legislation already had; and to secure to all persons within the jurisdiction of the States the equal protection of the laws, the 1st section of the 14th Amendment was adopted. Its first clause declared who are citizens of the United States and of the States. It thus removed from discussion the question, which had previously been debated, and though decided, not settled, by the judgment in the *Dred Scott Case*, 19 How., 393 [60 U. S., XV., 691], whether descendants of persons brought to this country and sold as slaves were citizens, within the meaning of the Constitution. It also recognized, if it did not create, a national citizenship, as contradistinguished from that of the States. But the privilege or the duty, whichever it may be called, of acting as a juror in the courts of the country, is not an incident of citizenship. Women are citizens; so are the aged above sixty, and children in their minority; yet they are not allowed in Virginia to act as jurors. Though some of these are, in all respects, qualified for such service, no one will pretend that their exclusion by law from the jury list impairs their rights as citizens.

The second clause of the 1st section of the Amendment declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In the *Slaughter-House Cases*, it was held by a majority of the court that this clause had reference only to privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States and, therefore, did not apply to those fundamental civil rights which belong to citizens of all free governments, such as the right to acquire and enjoy property and pursue happiness, subject only to such just restraints as might be prescribed for the general good. If this construction be correct, there can be no pretense that the privilege or duty of acting as a juror in a State Court is within the inhibition of the clause. Nor could it be within that inhibition if a broader construction were given to the clause, and it should be held, as contended by the minority of the court in *Slaughter-House Cases*, that it prohibits the denial or abridgment by any State of those fundamental privileges and immunities which of right belong to citizens of all free governments; and with which the Declaration of Independence proclaimed that all men were endowed by their Creator, and to secure which governments were instituted among men. These fundamental rights were secured, previous to the Amendment, to citizens of each State in the other States, by the 2d section of the 4th article of the Constitution, which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Among those privileges and immunities it was

never contended that jury duty or jury service was included.

The 3d clause in the 1st section of the Amendment declares that no State "Shall deprive any person of life, liberty or property without due process of law." It will not be contended that this clause confers upon the citizen any right to serve as a juror in the State Courts. It exists in the Constitution of nearly all the States, and is only an additional security against arbitrary deprivation of life and liberty, and arbitrary spoliation of property. It means that neither can be taken, or the enjoyment thereof impaired, except in the course of the regular administration of the law in the established tribunals. The existence of this clause in the Amendment is to me a persuasive argument that those who framed it, and the Legislatures of the States which adopted it never contemplated that the prohibition was to be enforced in any other way than through the judicial tribunals, as previous prohibitions upon the States had always been enforced. If Congress could, as an appropriate means to enforce the prohibition, prescribe criminal prosecutions for its infraction against legislators, judges, and other officers of the States, it would be authorized to frame a vast portion of their laws; for there are few subjects upon which legislation can be had, besides life, liberty and property. In determining what constitutes a deprivation of property, it might prescribe the conditions upon which property shall be acquired and held, and declare as to what subjects property rights shall exist. In determining what constitutes deprivation of liberty, it might prescribe in what way and by what means the liberty of the citizen shall be deemed protected. In prescribing punishment for deprivation of life, it might prescribe a code of criminal procedure. All this and much more might be done if it once be admitted, as the court asserts in this case, that Congress can authorize a criminal prosecution for the infraction of the prohibitions. It cannot prescribe punishment without defining crime and, therefore, must give expression to its own views as to what constitutes protection to life, liberty and property.

The 4th clause in the 1st section of the Amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Upon this clause the counsel of the District Judge chiefly rely to sustain the validity of the legislation in question. But the universality of the protection secured necessarily renders their position untenable. All persons within the jurisdiction of the State, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected. Yet no one will contend that equal protection to women, to children, to the aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests. The equality of protection intended does not require that all persons shall be permitted to participate in the government of the State and the administration of its laws, to hold its offices, or be clothed with any public trusts. As already said, the universality of the protection assured repels any such conclusion.

The equality of the protection secured extends only to civil rights as distinguished from

those which are political, or arise from the form of the government and its mode of administration. And yet the reach and influence of the Amendment are immense. It opens the courts of the country to everyone, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to everyone the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offenses. It secures to all persons their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration, as they stood previous to its adoption. It has no more reference to them than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals. In the consideration of questions growing out of these Amendments much confusion has arisen from a failure to distinguish between the civil and the political rights of citizens. Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the People acting through the ballot, or one of the departments of their government. The civil rights of the individual are never to be withheld, and may be always judicially enforced. The political rights which he may enjoy, such as holding office and discharging a public trust, are qualified because their possession depends on his fitness, to be adjudged by those whom society has clothed with the elective authority. The 13th and 14th Amendments were designed to secure the civil rights of all persons, of every race, color and condition; but they left to the States to determine to whom the possession of political powers should be intrusted. This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color or previous condition of servitude, a new amendment was required.

The doctrine of the District Judge, for which the counsel contend, would lead to some singular results. If, when a colored person is accused of a criminal offense, the presence of persons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the Bench would be equally essential, if the court should consist of more than one judge, as in many cases it may; and if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of any appellate court to which the case, after verdict, might be carried.

The position that, in cases where the rights of colored persons are concerned, justice will not be done to them unless they have a mixed jury,

is founded upon the notion that in such cases white persons will not be fair and honest jurors. If this position be correct, there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest or fair one, of which any of its members should be governed in his judgment by other considerations than the law and the evidence, and that decision would hardly be considered just, which should be reached by a sort of compromise, in which the prejudices of one race were set off against the prejudices of the other. To be consistent, those who hold this notion should contend that, in cases affecting members of the colored race only, the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race. To this result the doctrine asserted by the District Court logically leads. The jury *de medietate lingue*, anciently allowed in England for the trial of an alien, was expressly authorized by statute, probably as much because of the difference of language and customs between him and Englishmen, and the greater probability of his defense being more fully understood, as because it would be heard in a more friendly spirit by jurors of his own country and language.

If these views as to the purport and meaning of the 13th and 14th Amendments to the Constitution be correct, there is no warrant for the Act of Congress under which the indictment in this case was found, and the arrest and imprisonment of the petitioner was unlawful, and his release should be ordered.

The case is one which should not be delayed for the slow process of a trial in the court below, and a subsequent appeal, in case of conviction, to this court, to be heard years hence. The Commonwealth of Virginia has represented to us that the services of her judicial officer are needed in her courts for the administration of justice between her citizens, and she asks that the highest tribunal of the Union will release him from his unlawful arrest, in order that he may perform the duties of his office. Those who regard the independence of the States in all their reserved powers—and this includes the independence of their Legislative, Judicial and Executive Departments—as essential to the successful maintenance of our form of government, cannot fail to view, with the gravest apprehension for the future, the indictment, in a court of the United States, of a judicial officer of a State for the manner in which he has discharged his duties under her laws, and of which she makes no complaint. The proceeding is a gross offense to the State; it is an attack upon her sovereignty, in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a mere local municipal corporation; for if Congress can render an officer of a State criminally liable for the manner in which he discharges his duties under her laws, it can prescribe the nature and extent of the penalty to which he shall be subjected on conviction; it may imprison him for life, or punish him by removal from office. And if it can make the exclusion of persons from jury service on account of race or color a criminal offense, it can

make their exclusion from office on that account also criminal; and, adopting the doctrine of the District Judge in this case, the failure to appoint them to office will be presumptive evidence of their exclusion on that ground. To such a result are we logically led. The legislation of Congress is founded, and is sustained by this court, as it seems to me, upon a theory as to what constitutes the equal protection of the laws, which is purely speculative, not warranted by any experience of the country, and not in accordance with the understanding of the people as to the meaning of those terms since the organization of the government.

I am authorized to say that *Mr. Justice Clifford* concurs with me in this opinion.

Cited—103 U. S., 385, 408; 104 U. S., 612; 107 U. S., 123; 108 U. S., 553; 109 U. S., 12, 15, 44, 49, 57, 58, 59; 12 U. S., 180; 6 Sawy., 413; 19 N. W. Rep., 431; 93 N. Y., 446, 458, 460; 45 Am. Rep., 236; 16 Nev., 58; 40 Am. Rep., 491.

NORTHWESTERN UNION PACKET COMPANY, *Plff. in Err.*,

v.

CITY OF ST. LOUIS.

(See S. C., 10 Otto, 423-430.)

Wharfage fees—power of corporation.

*1. A municipal corporation, owning improved wharves and other artificial means, which it has provided and maintains at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the National Constitution from charging and collecting from those using its wharves and facilities, such reasonable fees as will fairly remunerate it for the use of the property.

2. *Packet Co. v. Keokuk* [XXIV.], affirmed.

[No. 110.]

Argued Dec. 16, 1879. Decided Mar. 1, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Messrs. James H. Davidson and *D. D. Duncan* for plaintiff in error.

Mr. Leverett Bell, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

The plaintiff in error is a Corporation of the State of Iowa and, during the years 1870, 1871, and up to March 28, 1872, was engaged with steamboats and barges of which it was the owner, in the business of commerce and navigation on the Mississippi River, between ports and places in different States. Its steamboats and barges, in the course of such business, landed at St. Louis and, during the period named, it paid to that City, upon the demand of its constituted authorities, large sums of money, amounting in the aggregate to \$6,571.35. These

*Head notes by *Mr. Justice Harlan*.

NOTE.—*Wharfs; right to construct; right to charge wharfage; lien for.* See note to *Ex parte Easton*, 95 U. S., XXIV., 373.

sums were exacted as wharfage dues, in virtue of certain ordinances of the City, one of which was entitled "An Ordinance Establishing and Regulating the Harbor Department," and the other, "An Ordinance to Reduce the Rate of Wharfage in the City of St. Louis."

The authority of the City to collect these fees is referred to section 30 of the ordinance first named, which is as follows:

"There shall be collected from each and every boat, of whatever kind or description, * * * for each and every time the same shall come within the harbor of said City, and land at any wharf or landing, or be made fast thereto, or to any boat thereto fastened, or shall receive or discharge any freight or passengers in this City, or shall tow coal or any other article in the harbor, seven and one half cents for each ton of said boat's burden, by custom-house measurement, as wharfage dues. If the boat have no custom-house measurement, or if the harbor-master be not satisfied as to the correctness of said boat's custom-house measurement, he is hereby empowered and directed to ascertain the tonnage of said boat by measurement, according to the rules and regulations of the United States in the measurement of boats, and wharfage shall be collected according to such measurement: *Provided*, That any boat making regular daily, semi-weekly, tri-weekly or weekly trips, or is engaged in the business of towing, and ferry-boats, may pay wharfage dues at a different or special rate, as may be provided by this ordinance."

The payments in question were made by the Company whenever demanded, but always under protest, and without waiving any right it had to recover the same from the City by an action at law.

This action was instituted to compel the repayment of the sums thus collected, upon the ground that the ordinances in question, and particularly the section above quoted, was in conflict: 1, with the clause prohibiting any State, without the consent of Congress, from laying any duty of tonnage; 2, with the clause which declares that "No tax or duty shall be laid on articles exported from any State; no preference shall be given any regulation of commerce or revenue to the ports of any one State over those of another; nor shall any vessels bound to or from one State be obliged to enter, clear, or pay duties in another;" 3, with the clause conferring upon Congress the right to regulate commerce with foreign nations, among the several States, and with the Indian Tribes; 4, with the "Treaty of Paris, 1783, 8 Stat. at L., 80," which declares that "The navigation of the River Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States;" 5, with the Treaty of Spain, concluded October 27, 1795, 8 Stat. at L., 138, which declares: " * * * And His Catholic Majesty has likewise agreed that the navigation of the said river, in its whole breadth, from its source to the ocean, shall be free only to his subjects and the citizens of the United States;" 6, with the Ordinance of 1787, 1 Stat. at L., 51, N, which, among other things, provides "That the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever

free, as well to the inhabitants of the said territory as to the citizens of the United States, that may be admitted into the Confederacy, without any tax, impost or duty therefor."

The court below, the Circuit and District Judges concurring, was of opinion that the plaintiff in error was legally bound to pay the sums so exacted and paid as wharfage fees, under the ordinances to which we have referred. Judgment was, accordingly, given for the City. Whether the facts set forth in the special finding are sufficient to sustain the judgment, is the controlling question arising upon this writ of error.

The elaborate argument of counsel for the Company is directed to the support of the first, second and third of the foregoing propositions. He withholds any suggestion or argument in support of the remaining propositions, for the obvious reason, as we suppose, that the case must fail altogether unless the plaintiff in error can successfully maintain the invalidity of the ordinances, under some one or more of the constitutional provisions by him cited. If the particular section of the ordinance, by virtue of which these collections were made, is not in conflict with the Federal Constitution, there would be no ground whatever for holding that it was inconsistent with either of the Treaties referred to, or with the Ordinance of 1787. We will, therefore, only consider whether the City of St. Louis was inhibited by any provision of the Federal Constitution from charging and collecting the fees, to enforce the repayment of which is the object of this action.

By the charter of the City, its Mayor and Council were invested with authority to regulate the stationing, anchoring and mooring of vessels, within the City, and to charge and collect wharfage on firewood, lumber, logs, etc., brought to the Port of St. Louis. The Council was also required, from time to time, to provide, by ordinance, for the levy and collection of taxes, licenses, wharfage, and other dues, under penalty for neglect or refusal to pay the same; also, for maintaining the permanency of and improving the wharf and harbor, and for opening and extending the wharf, applying, in its discretion, all the net receipts from wharfage to the credit of the wharf funds.

Under the authority thus conferred, the City passed the ordinance regulating and establishing its harbor department and prescribing the duties of the harbor-master.

By that ordinance it is declared that the harbor of the City comprises the bed of the Mississippi River, its channels, sloughs, bayous, bars and islands, from the mouth of the Missouri River to the southern boundary of the City. The jurisdiction of the harbor-master is made to extend over all the lands, river bank, and beach dedicated, condemned, occupied or used for wharf purposes, within the City, and over so much of the Mississippi River, and to the middle of the main channel thereof as lies immediately in front of the City, over which the City has control.

It is made his duty to direct the landing and stationing of all water-craft arriving at any point within the limits of the City, and to direct the discharge and removal of their cargoes, so as to prevent interference between different vessels and their cargoes; to superintend the arrange-

ment of freight, merchandise and materials for repairs in the river bank, so that the same shall occupy as little space as possible; to see that all combustible materials on the landing are sufficiently protected from fire; to keep the wharf and the river along the shore free from improper obstructions; to keep in repair the ring-bolts provided for fastening vessels; to regulate and control by proper rules to be established and published, all vehicles traversing the wharf or landing, and to remove thence such as unnecessarily obstruct free passage upon said wharf or landing, and generally to exercise complete supervision and control over the wharf, river bank, landing and Front Street.

It is also made his duty, under the direction of the Mayor, to provide, at the expense of the City, whenever the same shall be deemed necessary, suitable posts and ring-bolts for boats and rafts to make fast to and keep the same in repair; also to extend the steamboat landing, north and south, as soon as the wharf was made suitable for the landing of merchandise and the depth of the water shall justify, so as to give room required by boats for the handling, receiving and discharging of freight, and for the free passage of drays and other vehicles, and to designate the boundary of each class of boats, according to the wants of different trades at the time of such extension.

The duties thus imposed upon the harbor-master, if faithfully discharged, must, it will be conceded, materially advance and not obstruct or burden trade and business on the Mississippi River, especially at the Port of St. Louis. Services rendered by him in the execution of those duties would be in aid, and not a hindrance, of commerce and navigation. Besides, as the special finding discloses, the City acquired, at its own expense, and owns the property within its limits along the west bank of the Mississippi River, and for the purposes of a wharf has improved, paved and maintains in repair, at its own cost, one and a half miles of the same at an enormous expense. That wharf was used by the plaintiff in error in conducting its business, at all stages of water, for the purpose of receiving and discharging freight, and for the convenience of passengers in getting on and off its boats. Its boats landed at and used only the improved wharf. And it is found as a fact in the case that the fees demanded from and paid by the Company, under the city ordinances, "Were reasonable in amount, and a reasonable compensation for the use of defendant's wharf, if defendant (the City) was entitled to collect any sums whatever under said ordinance."

From this analysis of the special finding and the ordinance establishing and regulating the Harbor Department of St. Louis, it is not difficult to apprehend the nature and scope of the question before us. Briefly stated, it is, whether a municipal corporation, owning improved wharves and other artificial means which it has provided and maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is prohibited by the National Constitution from charging and collecting from those using its wharves and facilities, such reasonable fees as will fairly remunerate it for the use of its property.

This precise question has heretofore received

careful consideration by this court, and we recognize nothing in this case which has not been concluded by former adjudications, or which requires extended discussion.

In *Cannon v. New Orleans*, 20 Wall., 577 [87 U. S., XXII., 417], upon writ of error to the Supreme Court of Louisiana, we had occasion to consider the constitutional validity of an ordinance of the City of New Orleans, whereby "levee and wharfage dues" were imposed upon steamboats mooring or landing "in any part of the port" of that City, the amount of such duties to be determined, at a fixed rate, by the tonnage of such vessels. That case is relied upon here as sustaining the ground upon which the plaintiff in error assails the validity of the ordinance passed by the municipal authorities of St. Louis. We do not, however, assent to any such construction of our opinion in that case. It was in evidence there, that not more than one tenth of the twenty miles and more of the levee and banks of the Mississippi, within the corporate limits of New Orleans, had any wharf, and that vessels often landed at various places, within the City, where no wharfage facilities existed. It does not appear from the opinion of the court, or from the reporter's statement of that case, where the landings of Cannon's steamer were actually made, whether at the improved wharf of the City, or at points where no wharf accommodations were furnished for the use of vessels. We, therefore, held, that the ordinance, interpreted in the light of the admitted condition of the river and its banks within the City, imposed a duty of tonnage for the mere privilege of stopping, mooring or landing at the Port of New Orleans, and that the charges exacted could not, in view of the special circumstances disclosed by the evidence, be regarded or supported, as compensation simply for the use of the City's wharves. But we there expressly recognized, as essential to the interests of commerce and navigation, and as entirely consistent with the provisions of the National Constitution, the right of a municipal corporation, thereunto authorized by the State which created it, to demand from those engaged in commerce just compensation for the use of wharves, or other artificial facilities, provided and maintained at its expense.

That such was the import of our decision in *Cannon v. New Orleans* is shown in the recent case of *Packet Co. v. Keokuk*, 95 U. S., 80 [XXIV., 377], where the question under consideration was again and very fully examined in connection with an ordinance of Keokuk, which, in its main features, is like the St. Louis now under examination. By the Keokuk ordinance wharfage fees were charged whenever a steamboat should make fast to any part of the wharf of that city, or to any vessel, or other thing at or upon said wharf, or should receive or discharge any passengers or freight thereon, or should use any part of the wharf for the purpose of discharging, receiving, or landing any freight or passenger; the fees, in such cases, to be measured by the tonnage of the boat using the wharf. The unanimous judgment of the court was that the Keokuk ordinance was not repugnant to the Constitution of the United States; that the wharfage fees collectible thereunder were by way of compensation to the city for the use of its property, and were not duties,

taxes or burdens for the mere privilege of entering the Port of Keokuk or remaining in it or departing from it.

We need not repeat the reasons there given for the distinction between tonnage duties, which the States are prohibited from levying without the consent of Congress, and wharfage dues, properly so called, imposed in good faith, and to the extent only of fair remuneration for wharf accommodations furnished for the convenience of trade and commerce. We adhere to the doctrines announced in that case. They are decisive of the present one. The sums paid by the plaintiff in error were exacted and paid as compensation for the use of an improved wharf and not for the mere privilege of entering or stopping at the Port of St. Louis, or for landing at the shore, in its natural condition, where there were no conveniences which could be called a wharf. The amount paid is conceded to have been just and reasonable compensation for vessels and barges such as those owned by the plaintiff in error. It was not out of proportion to the advantages and benefits enjoyed in the use of the improved wharf. The one was a fair equivalent for the other. Nor is there any ground whatever to suppose that these wharfage fees were exacted for the purpose of increasing the general revenue of the City beyond what was necessary to meet its outlay, from time to time, in maintaining its wharves in such condition as the immense business and trade of that locality required. We are not at liberty, from anything disclosed by the record, to suppose that the City intended its ordinance as a mere cover for laying duties of tonnage within the meaning of the Federal Constitution.

What has been said renders it unnecessary to consider any other question presented in argument.

To avoid misapprehension, it is, perhaps, well to say that we express no opinion as to the validity of any of the provisions of the city charter or ordinances except such as have direct reference to the case before us. We restrict our decision to the single point that the City was not prohibited by the Federal Constitution from collecting the wharfage fees in question as reasonable compensation for the use of its wharves by the plaintiff in error.

The judgment is affirmed.

Cited—100 U. S., 432, 443; 105 U. S., 562; 107 U. S., 698, 708; 112 U. S., 596.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, *Plffs. in Err.*,

v.

JOHN W. TOBIN ET AL.

(See S. C., 10 Otto, 430-433.)

Rates of wharfage—valid ordinance.

1. The ordinance of the City of Vicksburg, passed July 12, 1865, entitled "An ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft, landing and lying at the City of Vicksburg," is constitutional and valid.

NOTE.—*Wharfs; right to construct; right to charge wharfage; lien for.* See note to *Ex parte Easton*, 95 U. S., XXIV., 373.

2. Such ordinance does not intrench upon the power of Congress to regulate commerce among the States, nor does it lay a duty of tonnage, in the sense of the Constitution.

[No. 148.]

Argued Jan. 15, 1880. Decided Mar. 1, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. W. L. Nugent, and P. Phillips, for plaintiffs in error.

Messrs. W. B. Pittman and A. B. Pittman, for defendants in error.

Mr. Justice Harlan delivered the opinion of the court:

This writ of error involves the constitutional validity of an ordinance of the City of Vicksburg, passed July 12, 1865, entitled "An ordinance establishing the rate of wharfage to be collected from steamboats and other water-craft, landing and lying at the City of Vicksburg."

The ordinance declares that all steamboats "landing at this (that) City" shall pay wharfage at the following rates: all packets terminating their trips at the City, per week, \$10; all steamboats under 1,000 tons burthen, passing and re-passing, for each landing, \$10; and, for each one exceeding 1,000 tons, \$1 for every 100 tons excess; circus or exhibition boats, \$5 per day.

The ordinance further provides that, if the captain or officer in command of any steamboat or water-craft shall refuse to comply with its provisions, on conviction thereof he shall be charged \$100 for each landing thereafter, until the settlement of the litigated claim.

Within the six years immediately preceding the commencement of this action, the City of Vicksburg collected from the defendants in error (without protest or objection on their part, although they knew the rates established by the city) the sum of \$5,400, "for and on account," as the special verdict of the jury recites, "of wharfage for the landing of plaintiffs' (defendants in error) boats at the city landing of Vicksburg on the Mississippi, plaintiffs' boats being at the time engaged in the coasting trade on said river, between New Orleans and Vicksburg, and other ports above Vicksburg."

This action was instituted to recover from the City the sums thus exacted from the defendants in error. Judgment upon the special verdict of the jury was rendered against the City, to reverse which this writ of error is prosecuted.

It appeared, upon the trial in the circuit court, that the Corporation of Vicksburg has been the riparian owner of the city landing, on account of which these charges were made, since 1851; that the former owner uniformly collected wharfage from steamboats stopping at said landing up to 1851, and that the City had done the same ever since that date, but at higher rates; that the landing is comprised in a river front in the City, covering a length of about 1800 feet between high and low water-mark; that the landing is worth \$50,000, in the repair and improvement of which the City had expended, within the six years preceding the trial \$40,000; that the only improvement made by

the City at the landing was the grading and piling of the bank to prevent caving; that, although the landing was not paved or covered with plank, it was a good landing in dry weather, but too muddy in wet weather to use as a place of deposit for freight; that the annual net receipts by the City from the use of the landing did not exceed \$11,500; that the wharf and harbor-master demanded and received from each boat stopping at the city landing \$10, and no more, without reference to the tonnage of the boat or the time it lay at the landing.

It was also in evidence that, during the whole period for which collections were made from defendants in error, the Merchants' Wharf-Boat Association had a wharf-boat lying at the city landing, and, for the privilege of occupying the space necessary therefor, had paid the City \$2,000 per annum; that, during that period, the boats of the defendants in error had touched the city landing only about twenty times, upon all other occasions landing against or fastening to the boat of the Merchant's Association.

The record discloses other facts; but they do not seem to be material in the determination of the case.

The judgment rests mainly upon the ground that the ordinance by virtue of which the money sued for was demanded and collected was in conflict, as well with the clause of the Constitution of the United States conferring upon Congress the power to regulate commerce among the States, as with the clause inhibiting the States from laying duties of tonnage.

This question is disposed of by the opinion just rendered in the case of *Packet Co. v. St. Louis* [ante, 688]. It is, in substance, the same question as that decided in *Packet Co. v. Keokuk*, 95 U. S., 80 [XXIV., 377]. The latter case had not been determined in this court, when the judgment now complained of was rendered. Here, as in the cases concerning the ordinances of Keokuk and St. Louis, the sums sued for were exacted and received as wharfage fees, by way of compensation for the use of an improved wharf, purchased and maintained by a municipal corporation at its own cost, for the benefit of commerce and navigation. They were not exacted for the mere privilege of entering or remaining in or departing from the Port of Vicksburg. The ordinance in question does not, therefore, intrench upon the power of Congress to regulate commerce among the States, nor does it lay a duty of tonnage in the sense of the Constitution.

It is contended that this ordinance, in explicit language, imposes a tax for merely landing at the City, and at points on the shore where there may have been, in fact, no wharf. If the ordinance was susceptible of that construction, a question would be presented for our determination altogether different from the one before us. Clearly, the City could not collect wharfage for the use of the unimproved shore of the river, or for that which was not, in any fair business sense, a wharf. Here there was an improved wharf and, as such, it was used by the boats of the defendants in error. The sums demanded were paid as and for wharfage dues, collectible under an ordinance which, rightly construed, only authorized the imposition of dues, by way of reasonable compensation, for the use, not of the river shore in its natural condition, but

of the wharves of the City, erected and maintained at public expense.

One other point deserves notice. The circumstance that the defendants in error paid the Merchant's Wharf-Boat Association its regular charges for landing at or against its boat does not affect the right of the City to demand from vessels the wharfage dues prescribed by the ordinance in question. It does not appear that the City, by granting the privilege which it did to that association, waived or intended to surrender its claim for wharfage from vessels landing against the association wharf-boat. All freight received by or discharged from such vessels necessarily passed over the City's wharf to its destination. It is not to be presumed that the City intended, by the special privileges granted to the Merchants' Wharf-boat Association, to waive its claim for wharfage dues from vessels landing against that boat, and using the City's wharf.

In view of what has been said touching the validity of the city ordinance, it is unnecessary to inquire whether, had such ordinance been held to be unconstitutional, the defendants in error, under the evidence in this action, could recover back what they had paid without protest or objection, and with a full knowledge of all the facts.

The judgment of the Circuit Court is reversed, with directions to render judgment for the City upon the special verdict of the jury.

Cited—107 U. S., 708.

RICHARD MONTGOMERY and JOHN S. LENG and JONATHAN OGDEN, as
LENG & OGDEN, *Appts.*,

v.

SILAS W. SAWYER.

(See S. C., 10 Otto, 571-578.)

Death of party—Louisiana law.

*In Louisiana, if a person die pending suit against him, and the proceedings are continued by the heir becoming party, the judgment should be against his heir or his succession; if it be entered only against the deceased *eo nomine*, and not against his heirs or his succession, and without reference to the revival of the suit against them and be so recorded, it is void as a judicial mortgage as against third persons.

[No. 1016.]

Submitted Jan. 15, 1880. Decided Mar. 1, 1880.

APPPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. Henry B. Kelly, Henry L. Lazarus and B. F. Jonas, for appellants.

Messrs. Joseph P. Hornor and W. S. Benedict, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

The controversy in this case relates to a certain plantation in the Parish of Plaquemines, called the New Hope or Cedar Grove Plantation. The appellee, Sawyer, claims it as purchaser at sheriff's sale under a judgment rendered in February, 1872, by the Fifth District Court of Orleans, at the suit of one James E. Zunts

*Head note by *Mr. Justice BRADLEY*.

against William and Haywood Stackhouse. The appellant claims under a mortgage executed in 1873, by Sarah F. Brooks, widow of Haywood Stackhouse, and tutrix of his minor heirs. It is conceded that the plantation belonged to William and Haywood Stackhouse at the time of the latter's death in December, 1869; and that after that it belonged to the said William and the succession of Haywood up to and after the time of Zunts's judgment. It is contended by the appellants that this judgment was void as against the undivided half of Haywood Stackhouse, because he was dead when the judgment was rendered, and the suit, as they contend, had never been revived against the succession of his estate.

The circumstances of the case are briefly as follows:

William and Haywood Stackhouse were partners owning several plantations, and in January, 1865, to secure to Zunts the payment of certain notes amounting to \$50,000, executed to him a mortgage on a plantation called the Bellechasse Plantation. The notes not being paid, Zunts, in January, 1867, attempted to collect the same by executory process against the Bellechasse plantation. The Stackhouses set up a defense, filed a counter petition, and obtained an injunction. The decision being against them, they appealed to the Supreme Court of Louisiana, and pending this appeal, in December, 1869, as before stated, Haywood Stackhouse died. His widow, Sarah F. Brooks, in her own right and as tutrix of their minor children, was made a party in the cause, and the suit proceeded to judgment, the papers being entitled, as before, in the name of *William and Haywood Stackhouse v. James E. Zunts*. In May, 1871, the Supreme Court annulled the judgment of the district court, and remanded the cause for a new trial. On the 20th of February, 1872, the district court rendered the judgment in question, which was entered and signed in these words.

"FIFTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

W. & H. STACKHOUSE

v.

JAMES E. ZUNTS.

No. 18850.

In this case, for the reasons assigned in the written opinion of the court, this day delivered and on file, it is ordered, adjudged and decreed that there be judgment in favor of defendant; that the injunction herein be dissolved with costs, and that the said defendant, James E. Zunts, do have and recover of plaintiffs, William and Haywood Stackhouse, and their surety in the injunction bond, *in solido*, twenty per cent damages on the amount of the judgment herein enjoined, together with eight per cent interest as allowed in the order of seizure and sale.

It is further ordered that the claim for attorney's fees herein be dismissed.

Judgment rendered February 20, 1872.

Judgment signed March 3, 1872.

(Signed) CHAS. LEAUMONT.

Judge 5th District Court, Parish of Orleans."

A certified copy of this judgment, in the above words, was recorded in the recorder's office of Plaquemines on the 17th of April, 1872.

Meanwhile, the plaintiffs moved for a new trial, and that being refused, on the 18th of

March, 1872, they moved for and obtained a suspensive appeal. The order allowing the appeal was as follows, the appeal bond being signed by all the appellants:

"W. & H. STACKHOUSE
v.
No. 18850.

JAMES E. ZUNTS *et al.*

On motion of Roselius & Philips and Horner & Benedict, of counsel for Wm. Stackhouse, Sarah F. Brooks, widow in community of Haywood Stackhouse, deceased and natural tutrix of her minor children, Herbert, Maude, Blanche and Mabel Stackhouse, and Lilla Stackhouse, wife of J. W. Bryant, duly authorized and assisted by her husband, and the legal heirs of James P. Waters, dec'd, to wit: Henrietta A. Waters, wife of William Stackhouse, and by her husband duly assisted and authorized Mrs. Widow Mary Upton, widow of Wheelock S. Upton, dec'd, and William H. Waters, and on suggesting to the court that said appearers and movers have been informed and believe that there is error to their prejudice in the final judgment rendered in the above entitled case by this hon. court, on the 20th February, 1872, and that they are desirous of appealing suspensively from the same to the Supreme Court of the State of Louisiana, and on showing that the clerk requires time till the third Monday of April next to make the transcript of appeal, it is ordered that a suspensive appeal be accorded to said appearers and movers from said final judgment to the Supreme Court of Louisiana, the same to be therein returnable on the third Monday of April, 1872, upon said appearers giving bond and security conditioned according to law in the sum of \$30,000."

The cause then proceeded in the Supreme Court, entitled as before. On the 31st of May, 1873, the court affirmed the judgment below. A petition for a rehearing was presented in the names of all the appellants; and, amongst other things, stated, that pending the first appeal Haywood Stackhouse died, and that the petitioners were made parties to the appeal by means of an order which they recite; but that when the cause went back to the court below for retrial, Zunts omitted to make the petitioners parties to the proceedings in that court, and that they never made themselves parties by voluntary appearance by counsel or personally; that, on the contrary, the case was proceeded with by Zunts and his counsel, and by the former counsel of William and Haywood Stackhouse, as if the latter were alive; and the petition, in a labored argument, contended that the making of the petitioners parties to the first appeal did not make them parties to the subsequent proceedings. All the points taken in this suit on the subject of want of parties were taken in the said petition for a rehearing.

On the 15th of December, 1873, the petition for rehearing was refused, and the judgment of the district court stood affirmed. No notice was taken by the court of the point referred to. Whether it was regarded as untenable, or whether the judgment was left to stand at Zunt's own risk, good, at all events, as against William Stackhouse, does not appear.

After the recording of the judgment of the district court, to wit: on the 7th of May, 1872, a partition was made between William Stackhouse and the succession of Haywood Stack-

house, of the various pieces of property belonging to the firm of W. & H. Stackhouse, by which the Bellechasse plantation was set off to William, subject to Zunts' claim; and the New Hope plantation was set off to the succession of Haywood.

On the 6th of February, 1873, Sarah F. Brooks, as widow and tutrix as aforesaid, mortgaged the New Hope plantation to Ernst & Co., to secure the payment of certain notes specified in the mortgage.

On the 20th of January, 1875, Zunts filed a petition in the District Court of Plaquemines for executory process against the New Hope plantation and other property, to obtain satisfaction of the amount of damages recovered by the judgment of February 20, 1872, being \$10,833.66, claiming that the same was a judicial mortgage against all the property in the parish belonging to William Stackhouse and the succession of Haywood Stackhouse. A writ was issued accordingly, and the said New Hope plantation, together with certain shares of bank stock, secured by mortgage thereon, were sold by the sheriff to the appellee, Silas W. Sawyer, and an act of sale, dated 28th April, 1875, was duly passed and recorded.

The appellants, Montgomery and Leng and Ogden, having become the owners of the notes secured by the mortgage given by Sarah F. Brooks to Ernst & Co., on the 15th of December, 1876, filed a bill in the Circuit Court of the United States against her as widow and tutrix, and against one of the heirs who had become of age and married, praying for the issue of executory process for the sale of the undivided half of the New Hope plantation belonging to the succession of Haywood Stackhouse, conceding that Zunts' judgment was a valid judicial mortgage as against the other undivided half belonging to William Stackhouse; and a writ of seizure and sale was issued pursuant to the prayer of the bill.

It was to enjoin proceedings under the last named writ, and to establish his own title, that the appellee, Sawyer, filed the bill in this case.

All the material facts appear from the documents submitted by the parties, and the question is one of law alone.

From this statement it would seem to be very clear that the widow and heirs of Haywood Stackhouse were parties to the proceedings in which the judgment was rendered, which, therefore, might have been, though it was not, rendered against the succession of Haywood Stackhouse jointly with William Stackhouse. But even if valid to bind said succession in any way, the question remains as to its effect against third persons. It is in form a judgment against William Stackhouse and another person not in being, but who had died more than two years before it was rendered. And in this form it was recorded. By the law of Louisiana a judgment, at least as to third persons, has no effect as a judicial mortgage until it is recorded. When recorded it has that effect against all the immovables of the debtor situated in the parish. Civil Code, arts. 3922, 3346. Here one of the nominal debtors against whom the judgment was rendered was dead, and of course had no immovables to be affected thereby. Without the existence of some very artificial rule of procedure, it is difficult to see how such a

judgment, *quoad* the deceased person, or his estate in succession, can have any binding effect without being amended.

By the common law, if a defendant died after the commencement of a term, a judgment entered against him during the term had relation back to the first day of the term, and was deemed valid. This fiction was allowed to subserve the ends of justice. But no such rule can be invoked in the present case. Here the judgment could have no effect against the general immovable property of the debtor until it was recorded. The record is all that third persons have to look to for their protection; and in this case it only showed a judgment against a person not in existence, and did not show a judgment against his succession; and did not show that his representatives had been made parties to the cause.

In a case somewhat similar, differing in the fact that the heir accepted the succession purely and simply, and did not appear in the proceedings until after the judgment in question was entered, the Supreme Court of Louisiana said: "If defendant die after issue joined, his heir should be cited; until this is done, judgment cannot be given against the succession. *McMicken v. Smith*, 5 Mart. (N. S.), 431. A judgment against one, who, though cited, dies before issue joined, is null. *R. R. Co. v. Bossworth*, 8 La. Ann., 80. When H. R. W. Hill died, it was necessary to make the legal representative a party, otherwise the judgment was inoperative as to either, and the recording of it created no judicial mortgage on the property left by H. R. W. Hill. The fiction of law or its express enactment, by which he was a party to the proceedings, did not make his heirs or legal representatives parties in his person, and the insertion of the word 'heirs' in the decree gave no force to the judgment against his heir and legatee, any more than a judgment against any person, *eo nomine*, who is not cited. The subsequent appearance of J. D. Hill as a party to the proceedings, in order to appeal from the circuit court to the Supreme Court, may have made him personally liable under the judgment rendered on appeal, but it could not retroact so as to give force to the inscription of the judgment of the district court. Inscriptions of mortgages are *stricti juris*, and must, of themselves, be complete and give all the information which the law intends is necessary for third parties. *Douglass v. Curtis*, 5 Mart. (N. S.), 112; *Ford v. Tilden*, 7 La. Ann., 533. The judgment recorded was against H. R. W. Hill; but plaintiff alleges that H. R. W. Hill died before the judgment was rendered. * * * The inscription does not contain the name of J. D. Hill (heir of H. R. W. Hill). At the time of the rendering and recording of the judgment against H. R. W. Hill, the property did not belong to him, and no judgment against J. D. Hill, was recorded at the date of his sale to defendant. Consequently, no judicial mortgage attached to the property sold by J. D. Hill to the defendant by recording the judgment in question against H. R. W. Hill, rendered after his death." *Norton v. Jamison*, 23 La. Ann., 102.

It seems to us that the views here expressed are conclusive so far as relates to the validity of the judgment as a judicial mortgage operating against the appellants. Whether the judgment

may not in some manner, or to some extent, be binding against the succession of Haywood Stackhouse, it is not necessary to inquire. The difficulty consists in the fact that no judgment has been rendered or recorded against said succession. The mere entitling of the suit against William and Haywood Stackhouse might not have prejudiced the effect of the judgment, had it been rendered against the proper parties. The title of the suit is employed only for the purpose of identification of the cause. But here the judgment itself is defective. It is conceded to be good as against the interest of William Stackhouse; but as to third persons, at least, it is void as a judicial mortgage against the property of Haywood Stackhouse or his estate in succession.

It follows from this that the appellee, Sawyer, by his purchase at sheriff's sale, acquired only the undivided half interest of William Stackhouse, and that his bill should have been dismissed.

The decree of the Circuit Court is reversed and the cause remanded, with directions to dismiss the bill of complaint.

KNICKERBOCKER LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

JULES E. SCHNEIDER, Admr. of C.
SCHNEIDER ET AL.

Life insurance policy.

In an action on a policy of life insurance, where the pleadings admit the death of the insured, and place the defense on the ground that, on the facts of the case, his death was not covered by the policy, it is not necessary for the plaintiff, in order to recover, to show that he had notified the company of such death, and made the necessary preliminary proofs required by the policy.

[No. 163.]

Submitted Jan. 22, 1880. Decided Mar. 2, 1880.

[N ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Mr. Thos. J. Semmes, for plaintiff in error.

Messrs. Joseph P. Hornor and **W. S. Benedict**, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit on a policy of insurance for \$20,000, issued by the plaintiff in error on the life of Gustav Osterman in favor of Schneider & Zuberbier, his creditors. The policy provided for payment within three months after due and satisfactory proof of the death of Osterman. The petition set forth his death on the 15th of September, 1876, and averred that the Company was immediately notified thereof and that due proof of the death, "Made under the forms and directions of said Insurance Company, were duly forwarded and their receipt acknowledged by said Company." The Company answered the petition, denying "All and singular the facts and allegations therein contained, so far as the same may have a tendency to give said plaintiff any right or cause of action against said respondent," and then averring that Osterman, at

the date of application for insurance and of the policy, "Was, and continued up to the time of his death to be, so far intemperate as to impair his health and shatter his constitution; * * * that he was addicted to gambling, a duelist, a debaucher of women, * * * and an idle and roaming character; leading such a dissolute, profligate and wandering life, as not only materially affected his health, but also considerably shortened the period of his life." There were other averments sufficient to make this a good defense to the action, if the allegations were true. It was also averred that the debt of Osterman to the plaintiffs was barred by the Statute of Limitations; that certain warranties contained in the application for the policy had been broken, and that false answers were made to certain interrogatories propounded by the Company's medical examiner. The issues being made up by the pleadings, a trial was had before a jury. On the trial, the plaintiffs, after proving the policy and the death of Osterman, rested. The Company then offered evidence tending to prove that the habits of Osterman at the time of making the application were so far intemperate as to impair his health and shorten his life. Evidence in rebuttal was given, and both parties rested. The Company then asked the court to charge the jury, "That plaintiffs, having failed to produce any evidence to show that previous to the institution of this suit they had given notice of the death of said Osterman, in conformity with the provisions printed on the back of the policy, and in fact as the plaintiffs had failed to adduce any evidence tending to show that plaintiffs had furnished, prior to the institution of this suit, any proof whatever of the death of Osterman, said plaintiffs could not recover." This request was refused and the jury, in substance, told that if they found for the plaintiffs on the other issues, their verdict must be in favor of the plaintiffs for the full amount of the policy and interest from the commencement of the suit, because the pleadings, in effect, admitted the death of Osterman and placed the defense on the ground that, under the facts of the case, his death was not covered by the policy. A judgment having been rendered against the Company, this writ of error was brought.

The only question presented by the assignment of errors is, whether, under the issues made by the pleadings, it was necessary for the plaintiffs, before they could recover, to show by evidence that they had notified the Company of the death of Osterman, and made the necessary preliminary proofs required by the policy before the suit was begun. We think it was not. It is directly averred in the petition that such notice was given and proof made. The answer is to be construed as a whole. There has been no attempt to set up separate defenses, such as is allowed in common law pleadings. No direct issue is made upon the fact of notice and proof, but the whole effort is to show that, notwithstanding such notice and proof, the plaintiffs can not recover. It is true there is a general denial of all and singular the allegations of the petition, "So far as the same may have a tendency to give said plaintiffs any right or cause of action against the respondent;" but this we understand to be no more than a denial of such averments as are inconsistent with See 10 Orto.

the specific defenses set out in the other parts of the answer. Taken as a whole, the answer in legal effect admits that the plaintiffs must recover unless the specific defenses relied on are sustained. This evidently was the understanding of all parties at the time of the trial, for the objection now insisted upon was not made until the case on both sides had been closed and the court was about to charge the jury.

The judgment is affirmed, and as it is apparent to our minds that this writ was sued out for delay, damages to the amount of \$1,000 are awarded in addition to interest.

FRANK F. CASE, RECEIVER OF THE CRESCENT CITY NATIONAL BANK, *Plff. in Err.*,

v.

CITIZENS' BANK OF LOUISIANA.

(See S. C., 10 Otto, 446-456.)

Cashier of bank—transfer of stock—action for refusal—limitation—order to receiver.

1. A cashier, unless the charter or by-laws of the bank forbid it, may properly make or superintend the transfer of shares of the capital stock.
2. The acts of a cashier in refusing to allow such transfer, are binding on the bank.
3. A special action on the case will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal.
4. Such an action is not barred by the Louisiana prescription of one year.
5. An order given by the circuit court, that the receiver of the bank provide for the payment of the amount recovered, was proper and correct.

[No. 499.]

Submitted Jan. 21, 1880. Decided Mar. 2, 1880.

ERROR to the Circuit Court of the United States for the District of Louisiana.

This was an action brought in the court below by the Citizens' Bank of Louisiana, now defendant in error, against the plaintiff in error, to recover damages for an alleged refusal on the part of the officers of the Crescent City National Bank to permit a transfer of certain shares of its capital stock.

The case is stated by the court.

Messrs. J. D. Rouse and Wm. Grant, for plaintiff in error.

Messrs. A. Pitot, M. M. Cohen and Ed. Janin, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Associations formed under the Act to Provide a National Currency are required to enter into articles of agreement, specifying the object of the association; and the articles may contain other regulations, not inconsistent with the Act which the association may see fit to adopt for the conduct of their business and affairs. Such an association may make contracts, sue and be sued, and complain and defend in any court of law or equity as fully as natural persons. They may also elect directors; and the Board of Directors may appoint a president, vice-president, cashier and other officers, and define their duties. 13 Stat. at L., 101; R. S., sec. 5136; *Knight v. Bk.*, 3 Cliff., 429, 431.

Sufficient appears, to show that the plaintiff

Bank discounted for the firm named in the transcript their promissory note, in the sum of \$20,000, payable to the order of the Bank in thirty days; and that the promisors, to insure the payment of the note, pledged to the holders two hundred and twenty shares of the capital stock of the Bank of which the defendant is the receiver, part standing in the name of the debtor firm, and part in the name of their senior partner. Authority was given to the pledgees, at the time the stock was pledged, in case the note was not paid at maturity, to sell the shares pledged at public or private sale, the pledgers agreeing to sign all required transfers of the same necessary in the premises.

Payment of the note, when it fell due, was refused; and the pledgees of the stock, having found purchasers for the same at the rate specified in the declaration, requested the Bank of which the defendant is the receiver for permission to transfer the stock to the purchasers of the same; and the charge is that the Bank peremptorily refused the request, on the ground that the promisors of the note were indebted to the Bank, and that their stock could not be transferred before payment of their indebtedness.

Nothing appears to show when the indebtedness of the pledgers of the stock was contracted to the defendant Bank; but it is not alleged that it preceded the pledge of the stock, nor is it claimed that the defendant Bank had any lien on the stock for the payment of the alleged indebtedness.

Process was served, and the defendant Bank appeared and filed a peremptory exception to the declaration: (1) Because the supposed cause of action did not accrue within one year next before the commencement of the suit. (2) Because the petition or declaration does not disclose any cause of action against the defendant.

Hearing was had, and the court overruled the exception. Proceedings now unimportant followed, when defendant again appeared and filed an answer, denying all the material allegations of the petition. Issue being joined, the parties went to trial, and the verdict and judgment were in favor of the plaintiff; and the defendant excepted, and sued out the present writ of error.

Since the cause was entered here, errors have been assigned to the effect following: (1) That the circuit court erred in holding and instructing the jury that the action arose *ex contractu*, and that it was not prescribed by one year. (2) That the circuit court erred in instructing the jury that the defendant was liable for the refusal of the cashier to permit the stock to be transferred. (3) That the circuit court erred in refusing the two prayers for instruction presented by the defendant. (4) That the circuit court erred in ordering the receiver to pay the amount of the judgment or to certify the same to the Comptroller.

By-laws were adopted by the defendant Bank, which provide that the stock of the Bank shall be assignable only on the books of the Bank, subject to the provisions and restrictions of the Act of Congress, and that a transfer book shall be kept, in which all the assignments of stock shall be made. Certificates of stock signed by the president and cashier may, as the by-laws provide, be issued to stockholders; but the re-

quirement is, that the certificate shall state upon the face thereof that the stock is transferable only upon the books of the Bank, the further requirement being that, when stock is transferred, the existing certificates shall be canceled and returned, and that new ones shall be issued.

Provision is made by the Code of the State that persons are responsible for the damage they occasion, not merely by their acts but by their negligence, their imprudence, and their want of skill, which is not different in its application to this case from the rule which prevails at common law. Rev. Code La., arts. 2315, 2316.

Whenever an agent violates his duties or obligation to his principal, and loss ensues to the principal, he is responsible therefor, says *Judge Story*, and is bound to make a full indemnity. *Story*, Ag., 6th ed., sec. 217 a.

Actions for injurious words, whether verbal or written, and those for damages caused by animals, or resulting from offenses, or *quasi* offenses, are prescribed by one year in the jurisprudence of the State. Rev. Code, La., sec. 3536. And the first proposition of the defendant is that the circuit court erred in holding that the action in this case was not barred by that article of the Code.

Causes of action resulting from offenses or *quasi* offenses are barred by the lapse of one year, and the defendant Bank contends that the cause of action set forth in the petition in this case falls within the one or the other of those designations. Argument to show that it was not an offense is certainly unnecessary, as the proposition if made would be wholly without merit, from which it follows that the theory must be wholly rejected, unless the act for which the damages are claimed in this case can properly be regarded as a *quasi* offense within the meaning of that provision.

Even suppose the terms of the provision apply to such a cause of action, it is by no means certain that the admission, if made, would benefit the defendant, as the Supreme Court of the State has decided that prescription in respect to a promissory note is interrupted so long as the holder is in possession of collaterals pledged by the maker to secure its payment. *Blanc v. Herteog*, 23 La. Ann., 199.

Stocks pledged as security for a loan, the same court holds, constitute a standing acknowledgment of the debt which interrupts prescription during the time the securities pledged remain in the possession of the creditor. *Police Jury v. Duralde*, 22 La. Ann., 107; *Bk. v. Knapp*, 22 La. Ann., 117.

Suppose, however, the claim for damages resulting from the refusal of the Bank to transfer the stock must be considered as a cause of action wholly distinct from the note and the collaterals, then it becomes necessary to examine the objections taken by the plaintiff Bank to the validity of the defense of prescription. Coming to that defense, the plaintiff Bank contends that the cause of action does not fall within the rule of prescription by the lapse of a year, because the act which gives rise to the claim was neither an offense nor a *quasi* offense within the meaning of that article of the Revised Code. Precisely the same question was presented to the Supreme Court of the State, and was decided by that court adversely to the views of the defendant. *Campbell v. Miltenberger*, 26 La. Ann., 73.

Compensation was claimed by the plaintiff in that case for damages occasioned by the defective and improper construction of a fence around his dwelling and premises by the defendant. The prescription of one year was pleaded, setting up the same article of the Code, but the court decided that the rule of prescription of one year only applied to cases arising from damages caused by the commission of an offense, or *quasi* offense, and overruled the defense as inapplicable to the case.

Actions arising under the article referred to survive, in case of the death of the injured party, for the space of one year in favor of the minor children and widow of the deceased. Rev. Code, art. 2315.

Personal actions are not, in general, prescribed in that State short of ten years, even when the creditor is present, nor short of twenty years if he be absent. Rev. Code, art. 3544.

Many decisions have been made in the State upon the subject, but a few of each of the classes in question will be sufficient to show that the act which gave rise to the cause of action in this case cannot be regarded either as an offense or *quasi* offense within the rules of decision adopted in that State.

Willful trespass in cutting wood upon another man's land and refusing to account for the same when accused of the act was held to be prescribed by that provision. *Whitehead v. Dugan*, 25 La. Ann., 409.

Where damages were claimed for the illegal and wrongful seizure of the defendant's property by virtue of an execution against another party, whereby much of the property was lost or destroyed, it was held that the claim for damages fell within the category of that rule. *De Lizardi v. Canal and Bkg. Co.*, 25 La. Ann., 414.

Claim for injuries occasioned by a railroad to individuals, or for the destruction of domestic animals, are held to fall within the same category as charges of *quasi* offenses. But the right to recover of a banker for failure to protest a note, whereby the indorser is charged, is only prescribed by ten years. *Eichelberger v. Pike*, 22 La. Ann., 142; Rev. Code, 3544.

So an action against a telegraph company for loss on goods by a mistake in the message may be maintained unless prescribed by ten years. *La Grange v. Tel. Co.*, 25 La. Ann., 383.

Cases in great number of a like character might be cited, but it must suffice to refer to one other, which seems to be decisive of the point. *Percy v. White*, 7 Rob. (La.), 513. It was an action by the stockholders against the directors to recover damages for losses sustained through their negligence, fraud and mismanagement, and the court held that it was not prescribed short of ten years from the acts which were the subject of complaint. Such a case, everyone must admit, is much stronger than the case at bar, as the directors were directly charged as wrongdoers, and as guilty of negligence, fraud and mismanagement in the performance of their official duties.

Opposed to that the defendant refers to the case of *Taylor v. Graham*, as being inconsistent with the prior case; but the court is not inclined to adopt that view, as the notary is a public officer and the charge against him was See 10 OTTO.

that of gross negligence in the performance of his official duty. 15 La. Ann., 418.

Promptitude and fidelity are expected of notaries in giving notice of protest in all jurisdictions where that duty is required of those officers, and it cannot be doubted that the court regarded the charge as imputing a *quasi* offense. In the case at bar the demand of transfer was made by the plaintiff Bank in behalf of the purchaser of the stock, and the cashier answered that by order of the directors he could not allow the transfer, as the holder of the certificates was indebted to the Bank. Instructions from the directors were obligatory upon the cashier, who, in point of fact, assumed no responsibility. He acted by order of the directors, who for that purpose constituted the Bank, it appearing that he merely obeyed their instructions not to transfer any stock whose owner had discounted notes in the Bank unpaid.

2. Evidence was introduced by the plaintiffs tending to show that the cashier of the defendant Bank was the officer intrusted by the directors with the transfer of stock, and they also gave in evidence the note secured by the pledge of the stock, but they gave no other evidence to show that the note was due and unpaid, or that any effort had been made to collect the same of the maker, or that the maker was insolvent; nor was any evidence introduced to show that anything had occurred to interrupt or suspend prescription.

Both parties having closed, the defendant Bank requested the court to instruct the jury that the defendant is not liable for the refusal of its cashier or other officer to transfer the stock, unless he acted in the premises under the authority of the charter or by-laws of the Bank or pursuant to some general or special authority derived from the Corporation through its Board of Directors; but the court refused to give the requested instruction, and instructed the jury that if they found that a person representing the plaintiff, having in his possession the certificates of the stock, sent to the defendant Bank during the ordinary hours of business and found there the cashier, and that he was the officer customarily intrusted by the directors to make such transfer of stock; and that he, the person having the certificates, demanded the transfer of the cashier, at the same time offering to deliver up the old certificates; and that the cashier refused to allow the transfer, upon the ground that the owner was indebted to the defendant Bank, that such a refusal was a refusal of the Bank.

Compare the instruction given with that requested, and it will be seen that the introductory part of the request is fully given in the instruction given to the jury. They were told that if they found that a person representing the plaintiff, having the certificates of the shares in his possession, went to defendant Bank and there found the cashier, and that he was the officer customarily intrusted by the directors to make the transfers, which was fully equivalent to the request, though stated in the affirmative and not in the negative form. Unless the jury found all those facts to be true, they were not authorized to find a verdict for the plaintiff; and, inasmuch as the verdict returned was in favor of the plaintiff, it must be assumed by

the appellate court that the entire theory of fact involved in the instruction is proved.

Suppose that is so; then it is plain that the whole instruction is correct, as it is not controverted that the demand was regularly made, nor that the cashier refused to allow the transfer.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by such institutions; and their acts, within the scope of such usage, practice and course of business, will, in general, bind the Bank in favor of third persons "possessing no other knowledge." *Minor v. Bk.*, 1 Pet., 46.

Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice and course of business; and it would be the height of injustice to hold that the Bank as the principal to the cashier may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. Story, Ag. 6th ed., sec. 127.

Such an officer is *virtute officii* intrusted with the notes, securities and other funds of the Bank, and is held out to the world by the Bank as its general agent for the transaction of its affairs, within the scope of authority, evidenced by such usage, practice and course of business.

Where the by-laws of a bank require that the transfer of the shares of the capital stock shall be entered in the books of the bank, the entry is usually made by the cashier, and the evidence introduced by the plaintiff tended to show that the practice of the defendant Bank was in accordance with the general usage. Evidence to that effect having been introduced, it was certainly competent for the court to submit it to the jury, and the Judge might have instructed them that, in view of that evidence, they would be warranted, if they believed the testimony, in finding that the cashier had the authority to make the transfer. *Wild v. Bk.*, 3 Mas., 505.

Official acts may be performed by a cashier which constitute the ordinary and customary functions of such an officer, and persons dealing with the bank are warranted in believing that the cashier is duly authorized to perform any customary duty falling within the scope of that category, and may to that extent hold the bank responsible, as if he was so authorized, however the fact may be, save only in cases where his want of authority is affirmatively proved, and actual knowledge of that fact is brought home to the third party.

Concede that, and it follows that the cashier, unless the charter or by-laws of the bank forbid it, may properly make or superintend the transfer of shares of the capital stock, and that a person showing a *prima facie* legal right to claim such a transfer to himself may demand it from that officer or any other principal officer left in general charge and superintendence of the bank, during the regular hours appointed by the bank for the transaction of banking business. *Smith v. Bk.*, 4 Cush., 1, 11; *Morse, Bkg.*, 3d ed., pp. 155, 177.

Authorities to show that the acts of a cash-

ier or other officer of a bank, within the scope of the general usage, practice and course of business of banking institutions, are binding on the corporation in favor of third persons transacting business with it, are quite numerous, provided it appears that the persons dealing with the officer did not know at the time that he was transacting his authority. *Lloyd v. Bk.*, 15 Pa., 172; *Bk. v. Warren*, 7 Hill, 91; *Bk. v. Steward*, 37 Me., 519, 522.

It may be fairly presumed, says Chancellor Walworth, that the principal officer or clerk in attendance at the bank during the usual hours of business is authorized to permit the transfer of shares when the case presented is one proper to be allowed. *Bk. v. Kortright*, 22 Wend., 348, 350.

Assumpsit in the form of a special action on the case will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal. *Kortright v. Bk.*, 20 Wend., 91; Ang. & A. Corp., 9th ed., sec. 381.

Enough has already been remarked to show that it is immaterial whether the declaration or petition is regarded as an action *ex contractu* or *ex delicto*, as it is clear that it is not barred by the prescription of one year, so that the point in any view cannot avail the defendant Bank. *R. R. Co. v. Heirne*, 2 La. Ann., 129; *Ware v. Barataria Co.*, 15 La., 169; *Elting v. Bk.*, 7 Rob. (La.), 459.

No further remarks are required to show that the refusal of the court to grant the first prayer of the defendant was not error, in view of the instruction given, as that given was quite as favorable to the defendant as the law would allow. Nor is there any just ground of complaint on the part of the defendant that the court refused to give the third request. Instead of giving that, the court instructed the jury that in order to enable the plaintiff to recover, they, the jury, must be satisfied from the evidence that the debt of the owners of the stock was still due and unpaid, and that if that has not been established the jury must find for the defendant.

Comment upon these instructions is needless, as it is clear that the verdict finds that the note is still unpaid.

Exceptions not assigned for error will be passed over without remark as not necessarily re-examinable in this court.

Nothing appears in the case to show that the defendant Bank ever adopted any by-law providing for a lien on the shares of a stockholder in case of his indebtedness to the Bank, nor is it even shown in this case that the debt, if any, of the owner of the shares to the Bank was contracted before the stock was pledged to the plaintiff, nor is there anything given in evidence by the defendant to show that it was inequitable for the plaintiff to claim the benefit of the collaterals which the Bank held to secure the payment of the note they discounted for the owners of the stock.

Beyond all doubt, the validity of their debt is established by the verdict and judgment; and, if so, it requires neither argument nor authorities to show that the order given by the circuit court to provide for the payment of the amount recovered was proper and correct.

Judgment affirmed.

Cited—105 U. S., 221.

TOWN OF MOUNT PLEASANT AND
TOWN OF CALEDONIA, *Appts.*,

v.

CHARLES BECKWITH.

TOWN OF MOUNT PLEASANT AND
TOWN OF CALEDONIA, *Appts.*,

v.

WILLIAM W. CORNELL AND LATHAM C.
STRONG, as Exrs. of the last Will and Testa-
ment of LATHAM CORNELL, Deceased.

(See S. C., 10 Otto, 514-535.)

*Division of a town—debts of old corporation—
town merged in others.*

1. Where a new town is formed from portions of an old one, the old corporation owns all the public property within its new limits, and is responsible for all the debts of the corporation contracted before the Act of separation was passed, unless the Legislature otherwise provide.

2. Debts previously contracted must be paid entirely by the old corporation. The new municipality owns the public property, which falls within its boundaries.

3. Where one town is merged in two others by a legislative Act, unless the Legislature regulate the rights and duties of the two latter, they succeed to all the public property and immunities of the extinguished municipality, and they become liable for all the debts previously contracted by it.

[Nos. 39, 283.]

Argued Apr. 23, 24, 1879. Decided Mar. 2, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is stated by the court.

Messrs. L. S. Dixon and John T. Fish, for appellants:

The circuit court, in effect, held that the Legislature of Wisconsin, by merely abolishing the Town of Racine or Orwell, and by merely attaching the territory formerly within the Town, to the appellants, imposed upon them, without their consent, liability to pay the debt of Racine or Orwell, incurred in the purchase of railroad stocks.

The court so held under an Act, the language of which evinced no such purpose or intent on the part of the Legislature, even if the Legislature had the power, which is denied. The power, if it existed, could not be said to have been exercised by a statute which was silent upon the subject.

To hold that the Legislature possessed any such power, even if attempt had been made to exercise it, would be to hold that the Legislature could do, by indirect means, that which it could not do by direct means. Had the Legislature, by express Act, attempted to impose liability upon the Towns of Mt. Pleasant and Caledonia, without their consent, it would have been void upon fundamental principles of our law.

Hampshire Co. v. Franklin Co., 16 Mass., 76; *Barclay v. Levee Comrs.*, 1 Woods, 254; *Girard v. Philadelphia*, 7 Wall., 1-14 (74 U. S., XIX., 53-56).

The case presented is far different from a case of the division of the territory of an existing corporation, and the creation of one or more

new corporations within its former territorial limits. In such case it has been held that the Legislature, by the Act so dividing and creating new corporations, may apportion the debt of the old corporation between them. In such case, the new corporations, carved out of the territory of the old, are regarded as in some sense identical with it; as being the original debtors already subject to the burden of an obligation to which they have given their assent. The burden is not imposed by the Act of the Legislature in such case, but is only divided or apportioned, which may be lawfully done. No consent of the newly created corporation or corporations is required, because such consent has already been given, and the Legislature merely apportions the common burden. Cases of that nature, therefore, differ very widely from the case at bar, and the principle upon which they proceed furnishes no ground for the decision of the court below. The principle is in entire harmony with the rule for which we contend, and sustains that rule instead of militating against it.

Atkins v. Randolph, 31 Vt., 226; *Laramie Co. v. Albany Co.*, 92 U. S., 307 (XXIII., 552); *Depere v. Bellevue*, 31 Wis., 120; *Town of Milwaukee v. Milwaukee*, 12 Wis., 102; *St. Louis v. Russell*, 9 Mo., 503; 1 Dill. Mun. Corp., ch. 4, sec. 43.

The Legislature of Wisconsin never imposed or attempted to impose this indebtedness upon the Towns of Mount Pleasant and Caledonia. If the Legislature had done so, the Act would have been nugatory and void.

Hasbruck v. Milwaukee, 13 Wis., 37; *Mills v. Charleton*, 29 Wis., 413; *People v. Batchellor*, 53 N. Y., 128; *Horton v. Town of Thompson*, 71 N. Y., 513; *People v. Mayor*, 51 Ill., 17; *Cooley, Const. Lim. (marg.)*, 231, 4th ed., 284; 1 Dill. Mun. Corp., ch. 4, sec. 43; *State v. Tappan*, *Town Clerk*, 29 Wis., 664.

Mr. William P. Lynde, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

Explicit authority from the Legislature was given to the Supervisors of the Town of Racine to subscribe for the stock of the railroad company mentioned in the Act conferring the power, to an amount not exceeding \$50,000, provided a majority of the legal voters of the municipality, at a meeting of the town duly called and held for the purpose, shall vote in favor of making the proposed subscription. Sess. L. Wis., 1853, p. 11.

Pursuant to that authority, the proper officers of the Town, on the 6th of December, 1853, subscribed for the capital stock of the railroad company to the amount of \$50,000, and issued one hundred bonds of the Corporation, each in the sum of \$500, in payment of the subscription for the stock, the bonds being made payable in twenty years from date, with coupons attached for annual interest at the rate of seven per cent. Twenty of those bonds with their coupons are now held by the complainant, numbered from seventy to eighty-nine, inclusive, and of which he became the lawful holder within one month subsequent to their date, all of which, as he alleges, remain wholly unpaid, principal and interest.

Various facts and circumstances are alleged in the bill of complaint of an equitable nature,

and which the complainant insists are of a character to show that he has no remedy at law, and which tend strongly to show that he is entitled to relief in equity. Appended to those several allegations is the prayer of the complainant, that the three respondents may answer the matters charged, and that the court will ascertain the respective liabilities of the respondents to the complainant, and decree the amount due to him from each of the respondent municipalities, and for general relief.

Service was made, and the respective respondents appeared and separately demurred to the bill of complaint. Hearing was had, and the court overruled the several demurrers and directed that the respondents should answer the matters charged in the bill of complaint by a given day. Separate answers were accordingly filed by the respective respondents, no objection being made that they were not filed in time.

Sufficient appears to show that on the 2d of January, 1838, the Town of Racine and the Town of Mount Pleasant were, by the same Act, created municipal corporations, with boundaries as set forth in the bill of complaint. Private L. Wis., 1838, 168.

Four years later, the Town of Caledonia was incorporated, her territory being taken from the two Towns before mentioned, without any provision being made that the new Town should bear any portion of the indebtedness of either of the old Towns. Private L., Wis., 1842, 10.

Both parties concur in these propositions, and it appears that the City of Racine, which is a distinct municipality from the Town by the same name, was incorporated by the Act of the 8th of August, 1848, with boundaries as correctly set forth in the transcript. Private L., Wis., 1848, 80.

Subsequent changes, if any, made in the boundaries of these municipalities, not herein made the subject of comment, are regarded as immaterial in the present investigation.

Additional territory was subsequently taken from the Town of Racine and was annexed to the City of Racine, and by a still later Act another fraction of her territory was annexed to the Town of Mount Pleasant, neither Act containing any regulations as to existing indebtedness. Private L. Wis., 1856, 148-416.

Prior to that, to wit: on the 6th of March in the same year, the Legislature of the State, by an Act of that date, annexed a much larger tract, taken from the Towns of Racine and Mount Pleasant, to the City of Racine, as described in the record; but the Supreme Court of the State decided that a certain feature of the Act was unconstitutional and void. *Stawson v. Racine*, 13 Wis., 398.

In consequence of that decision, the Towns from which the territory annexed was taken continued to exercise jurisdiction over it for the period of fifteen years longer, until a portion of the same territory then constituting a part of the Town of Mount Pleasant was again annexed to the City of Racine, on the condition that the City "Shall assume and pay so much of the municipal indebtedness of the Town as the lands described in the 1st section of that Act may be or become legally chargeable with and liable to pay." Private L. Wis., 1871, 723.

Throughout these several changes, except the last, the annexation in every instance was made

without any regulation that the Town to which the territory was annexed should pay any portion of the indebtedness of the Town from which the territory annexed was taken. Still not satisfied, the Legislature, by the Act of the 23d of February, 1857, re-arranged the boundaries of each of the three Towns, as therein is fully set forth and described. Private L. Wis., 1857, 103.

Two years later, the county supervisors changed the name of the Town of Racine to Orwell; but the prior name will be used throughout in this opinion, as less likely to produce confusion in the statement of facts. From the time the Legislature re-arranged the boundaries of the three Towns they remained without alteration until the Legislature, March 30, 1860, by a public Act, vacated and extinguished the Corporation and body politic known as the Town of Racine, then called Orwell, and enacted that thereafter it should have no existence as a body politic and corporate. Sess. L. Wis., 1860, p. 218.

Section 2 of the Act also provided that all that part of the territory of the Town lying north of the described line should be annexed to and hereafter form a part of the Town of Caledonia, and that all that part of the territory lying south of that line should become and continue to be a part of Mount Pleasant.

Each of the respondent Towns refer in their answer to the legislation of the State in respect to their incorporation and boundaries, which need not be reproduced, as they are accurately set forth in the preceding statement.

Two of the respondents, to wit: the Town of Mount Pleasant and the Town of Caledonia, deny in their answers that any statute of the State has ever been passed which would authorize the municipal authorities of those Towns to levy and collect a tax to pay either the principal or interest of the bonds described in the bill of complaint, and allege that the corporate authorities of those Towns have never assumed or undertaken any trust or duty in the premises, or have ever, in any way, recognized the acts of the Towns which issued the bonds or the validity of the same. Nor does the answer of the other respondent, to wit: the City of Racine, differ very materially from those filed by the two Towns first named, except that the pleader avers that the City was only made liable for such portion of the indebtedness of the old Town as is described in the Act enlarging the limits of the respondent City, and pleads as a separate defense that the complainant has an adequate remedy at law.

Replications were filed by the complainant, and the parties entered into a stipulation that the proofs should be taken by the master, and that they might be read and used at the final hearing as the evidence in the case, subject to legal objection. Proofs were accordingly taken by the master, and he reported the depositions of the witnesses examined, with an agreed statement of facts. Arguments of counsel followed, and the circuit court entered a decree in favor of the complainant against each respondent.

Two of the Towns, to wit: Mount Pleasant and Caledonia, appealed to this court, and assign for error the following causes: (1) That the circuit court erred in holding that the appellants are liable to pay the debt of the Town of Racine incurred in the purchase of stock in the

aforesaid railroad company, or that the debt of that Town became the debt of the appellants, to be enforced against them in any form of proceeding. (2) That the circuit court erred in holding that the property of the individuals within the jurisdiction of that Town constituted the primary fund to which the complainant had the right to look for the payment of his debt, and that the transfer of their property to the jurisdiction of the appellants rendered them liable to pay the debts due to the creditors of the Town whose powers and jurisdiction terminated by the transfer. (3) That the circuit court erred in holding that the power of taxation previously vested in the Town which issued the bonds in question was, by the Act annexing its territory to the appellant Towns, transferred to the appellants to be severally exercised by them upon all the taxable property within their respective jurisdictions. (4) That the circuit court erred in holding that it had jurisdiction in equity of the case, or that the appellants are in equity and good conscience liable to pay the claim of the complainant against the Town whose territory was annexed to the appellant Corporations.

Counties, cities and towns are municipal corporations created by the authority of the Legislature, and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the State.

Corporations of the kind are composed of all the inhabitants of the territory included within the political organization, each individual being entitled to participate in its proceedings; but the powers of the organization may be modified or taken away at the mere will of the Legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic. Corporate rights and privileges are usually possessed by such municipalities; and it is equally true that they are subject to certain legal obligations and duties, which may be increased or diminished at the pleasure of the Legislature, from which all their powers are derived.

Institutions of the kind, whether called cities, towns or counties, are the auxiliaries of the State in the important business of municipal rule; but they cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the Legislature of the State, because there is not and cannot be any reciprocity of stipulation between the parties, and for the further reason that their objects and duties are utterly incompatible with everything partaking of the nature of compact.

Instead of that, the constant practice is to divide large municipalities and to consolidate small ones, or set off portions of territory from one and annex it to another, to meet the wishes of the residents or to promote the public interests as understood by the Legislature; it being everywhere understood that the Legislature possesses the power to make such alterations and to apportion the common property and bur-

dens as to them may seem just and equitable.

Alterations of the kind are often required to promote the public interests or the convenience and necessities of the inhabitants; and the public history shows that it has been the constant usage in the States to enlarge or diminish the power of towns, to divide their territory by set-off and annexation, and to make new towns whenever the Legislature deems it just and proper that such a change should be made. Old towns may be divided and new ones incorporated out of parts of the territory of those previously organized; and in enacting such regulations the Legislature may apportion the common property and the common burdens, and may, as between the parties in interest, settle all the terms and conditions of the division of their territory, or the alteration of the boundaries, as fixed by any prior law.

State legislation may regulate the subject; but if the Legislature omits to do so, the presumption, as between the parties, is that they did not consider that any regulation was necessary. Where none is made, in case of division the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the Act of separation was passed. Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property, except what falls within her boundaries, and to that the old corporation has no claim whatever. *Laramie Co. v. Albany Co.*, 92 U. S., 307 [XXIII., 552]; *Bristol v. New Chester*, 3 N. H., 524.

Apply these principles to the admitted facts of the case, and it is clear that everyone of the described changes made in the limits and boundaries of the respondent municipalities become wholly immaterial in this investigation, except the last two, as hereafter more fully explained.

Before the passage of those two Acts, the claim of the complainant against the Town of Racine was, beyond all question, valid and collectible. Nobody controverts that proposition, and it is clear that no defense to the action could have been sustained for a moment. By the Act of March 30, 1860, the Legislature of the State vacated and extinguished the corporation and body politic formerly known as Racine, then called Orwell, and annexed the whole area of the territory included in the municipality to the two adjacent Towns of Mount Pleasant and Caledonia, in the proportions and by the boundary lines described in the 2d section of the legislative Act. Had legislation stopped there, it is clear that the City of Racine would not have been liable for any portion of the debt of the extinguished municipal corporation; but it did not stop there, as appears by what follows.

Prior to the passage of that Act, the old Town of Racine was the sole obligor in the bonds held by the complainant; and there certainly is nothing in the provisions of that Act which tends in the least degree to create any liability on the part of any other municipality for the indebtedness of that Town, except the Towns of Mount Pleasant and Caledonia. Nothing had previously occurred to create any liability on the part of the City of Racine to pay any proportion of the debts of the old Town of

Racine, which issued the bonds described in the bill of complaint.

Until the passage of the Act of the 17th of March, 1871, the rights of all parties remained unchanged. By that Act, a portion of the territory formerly belonging to the old Town of Racine was set off from the Town of Mount Pleasant and was annexed to the City of Racine. Appended to that Act, and a part of it, was the provision that the City to which the described territory was annexed "Shall assume and pay so much of the indebtedness of the Town of Racine as the lands described in the 1st section of the Act may be or become legally chargeable with and liable to pay." *Private L. Wis.*, 1871, 723.

Enough appears in that provision of direct legislation to show that the City of Racine was thereby made liable for the debts of the extinguished Town of Racine in the proportion therein described, and the clear inference from the provision is that the Town of Mount Pleasant, prior to the passage of that Act, was liable for the debts of that old municipality in proportion to the whole extent of the territory annexed to her by the prior Act which extinguished the old municipal corporation. None, it is presumed, will deny the liability of the City of Racine for those debts in the proportion described in the Act creating the liability, and hence it is that the corporate authorities of the City acquiesced in the decree of the circuit court without appeal.

Parties who do not appeal from the final decree of the circuit court cannot be heard in opposition to the same when the case is regularly brought here by other proper parties. They may be heard in support of the decree and in opposition to every assignment of error, but they cannot be heard to show that the decree below was erroneous. *The Stephen Morgan*, 94 U. S., 599 [XXIV., 266].

Concede that, and it follows that the only question open in the case for examination is, whether the other two respondent municipal Corporations are liable to any extent for the debts of the extinguished municipality, portions of whose territory were transferred by the Legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. *Gordon v. Lewis*, 2 Sum., 143; *McMicken v. Perin*, 18 How., 507 [59 U. S., XV., 504]. Nor do either of the assignments of error allege that the master committed any error in that regard. *Brockett v. Brockett*, 3 How., 691.

Viewed in that light, as the case should be, it is clear that if the appellants are liable at all, they are liable for the respective amounts specified in the decree. *Harding v. Handy*, 11 Wheat., 103; *Storry v. Livingston*, 13 Pet., 359.

Where one town is by a legislative Act merged in two others, it would, doubtless, be competent for the Legislature to regulate the rights, duties and obligations of the two towns whose limits are thus enlarged; but if that is not done, then it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan v. Beloit*, 7 Wall., 613, 617 [74 U. S., XIX., 203, 204].

It is not the case where the Legislature creates

a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the Act of separation was passed. *Depere v. Bellevue*, 31 Wis., 120, 125.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her, prior to the time when the annexation is carried into operation.

Speaking to the same point, the Supreme Court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. *Thompson v. Abbott*, 61 Mo., 176, 177.

Grant that; and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same *cum onere*, and that the successor town is thereby stopped to deny that she is liable to respond for the attendant burdens. *Swain v. Seamens*, 9 Wall., 254, 274 [76 U. S., XIX., 554, 560]; *Pickard v. Sears*, 6 Ad. & El., 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the Legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. *Cooley*, Const. Lim., 4th ed., 232.

Municipal corporations, says *Mr. Justice Field*, so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are, to that extent, to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. *Broughton v. Pensacola*, 93 U. S., 266, 269 [XXIII., 896, 897].

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or it may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the ex-

tinguished municipality owes outstanding debts, it will be presumed in every such case that the Legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colchester v. Seaber*, 3 Burr., 1866.

Neither argument nor authority is necessary to prove that a State Legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the Constitution are as sacred as the Constitution that protects them from infraction, and yet the defense in this case, if sustained, will establish the proposition that the effect of state legislation may be such as to deprive a party of all means of sustaining an action of any kind for its enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able, by some proper action, to reduce his contract to judgment.

Suppose it be admitted that the Act of the State Legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very Act which annulled that charter annexed all the territory and property of the municipality to the two appellant Towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes when the Act passed annulling her charter terminated, and from the moment the annexation of her territory was made to the appellant Towns, the power to tax the property transferred, and the inhabitants residing on it became vested in the proper authorities of the Towns to which the territory and jurisdiction were by that Act transferred; from which it follows that, for all practical purposes, the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant Towns accepted the annexation, their authorities knew or ought to have known that the extinguished municipality owed debts, and that the Act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old Town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the Legislature and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the Act annulling the charter of the debtor municipality for annexing its territory to the appellant Towns; and, when the annexation became complete, the power of taxation previously vested in the in-

See 10 OTTO.

habitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose—the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant Towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the Constitution forbids, that the appellant Towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over everything belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special Acts or pursuant to some general state law; and it is clear that their powers and duties differ in some important particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the Crown, and acquired many of their privileges by prescription, without any aid from Parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities and counties. Power exists here in the Legislature, not only to fix the boundaries of such a municipality when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the Constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the Legislature, and, if no provision is made, every one must submit to the will of the State, as expressed through the Legislative Department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power, that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the Constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the Legislature to determine. Courts everywhere in this country hold that, in the division of towns, the Legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. *Sill v. Corning*, 15 N.Y., 297; *Mayor v. State*, 15 Md., 376; *Olney v. Harvey*, 50 Ill., 458; *Borough of Dunmore's App.*, 52 Pa., 374.

Public property and the subordinate rights of a municipal corporation are within the control of the Legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corpora-

tion which falls within its limits. *N. Hempstead v. Hempstead*, 2 Wend., 109; *Hartford Br. Co. v. E. Hartford*, 16 Conn., 149, 171.

Extensive powers in that regard are, doubtless, possessed by the Legislature; but the Constitution provides that no State shall pass any "law impairing the obligation of contracts," from which it follows that the Legislature, in the exercise of any such power, cannot pass any valid law impairing the right of existing creditors of the old municipality. 1 Dill. Mun. Corp., 2d ed., sec. 41; *Van Hoffman v. Quincy*, 4 Wall., 535, 554 [71 U. S., XVIII., 403, 409]; *Lee Co. v. Rogers*, 7 Wall., 181, 184 [74 U. S., XIX., 160, 161]; *Butz v. Muscatine*, 8 Wall., 575, 583 [75 U. S., XIX., 490, 493]; *Furman v. Nichol*, 8 Wall., 44, 62 [75 U. S., XIX., 370, 377].

Where a municipal corporation has the power to contract a debt, it has, says Dixon, *C. J.*, by necessary implication, authority to resort to the usual mode of raising money to pay it, which, undoubtedly, is taxation. *Hasbrouck v. Milwaukee*, 25 Wis., 122, 133.

Whenever the charter of a city, at the time of the issue of bonds, made it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, the same court held that a subsequent Act of the Legislature prohibiting the city from levying such a tax would be repugnant to the Constitution. *Soutter v. Madison*, 15 Wis., 30.

State control over the division of the territory of the State into cities, towns and districts, unless restricted by some constitutional limitation, is supreme, but the same court admits that it cannot be exercised to annul another regulation of the Constitution. *Chandler v. Boston*, 112 Mass., 200; *Ops. of Justices, etc.*, 6 Cush., 580.

Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the Legislature to authorize them to violate their contracts. *Saving Soc. v. Philadelphia*, 31 Pa., 175, 185.

Text writers concede almost unlimited power to the State Legislatures in respect to the division of towns and the alteration of their boundaries, but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. 1 Dill. Mun. Corp., sec. 128; *Blanchard v. Bissell*, 11 Ohio, 96; *Lansing v. Co. Treas.*, 1 Dill. (C. C.), 522, 528.

Concessions of power to municipal corporations are of high importance; but they are not contracts, and, consequently, are subject to legislative control without limitation, unless the Legislature oversteps the limits of the Constitution. *Layton v. New Orleans*, 12 La. Ann., 515.

Bonds having been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds, held, that a subsequent Act of the Legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original Act, was in violation of the Federal Constitution, as impairing the obligation of contracts. *Brooklyn Park Com. v. Armstrong*, 45 N. Y., 234, 247.

Laws passed by a State impairing the obli-

gation of a contract are void, and if a State cannot pass such a law, it follows that no agency can do so which acts under the State with delegated authority. Cooley, Const. Lim., 4th ed., 241; Ang. & A., Corp., 9th ed., secs. 332, 333.

Municipal debts cannot be paid by an Act of the Legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place. Without officers, or the power of electing such agents, a municipal corporation, if it can be so called, would be an entity very difficult to be subjected to judicial process or to legal responsibility; but when the entity itself is extinguished, and the inhabitants with its territory and other property are transferred to other municipalities, the suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery. Public property, with the inhabitants and their estates, and the power of taxation, having been transferred by the authority of the Legislature to the appellants, the principles of equity and good conscience require that, inasmuch as they are and have been for nearly twenty years in the enjoyment of the benefits resulting from the annexation, they shall in due proportions also bear the burdens. *New Orleans v. Clark*, 95 U. S., 644, 654 [XXIV., 521, 522].

Equitable rules of decision are sufficiently comprehensive in their reach to do justice between parties litigant, and to overcome every difficulty which can be suggested in this case. States are divided and subdivided into such municipalities, called counties, cities, towns and school districts, and the Legislature of every State is required every year to pass laws modifying their charters and enlarging or diminishing their boundaries. Nor are the questions presented in this case either new in principle or difficult of application. New forms are given to such charters in every day's experience, when the limits of an old corporation are changed by annexation of new territory, or portions of the territory of the old municipality are set off and annexed to another town. Both corporations, in such a case, continue, though it may be that the charters are much changed, and that the inhabitants of the territory annexed or set off fall under different officers and new and very diverse regulations. *Beckwith v. Racine*, 7 Biss., 142, 149.

Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that in this case, the charter of the old town was vacated and annulled; from which it follows that the same principles of justice require that the appellant Towns, to which the territory, property and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness.

Hearing was had in this case during the last Term of this court and the case now numbered 283 was heard at the same time. Both cases, it is agreed by the parties, depend upon substantially the same facts, and, of course, they must be decided in the same way.

Decree in each case is affirmed.

Mr. Justice Miller, dissenting:
Mr. Justice Field, *Mr. Justice Bradley*
 and myself are of opinion that it requires legislation to make a legal obligation against the new Town, and make the apportionment of the debt; and we dissent, on that ground, from the judgment and from the opinion of the court in this case.

Cited—94 N. Y., 267; 3 McCrary, 224; 16 N. W. Rep., 903; 18 N. W. Rep., 501.

PEOPLE OF THE STATE OF NEW
 YORK, *ex rel.* CHAUNCEY P. WILLIAMS,
Plff. in Err.,

v.

WILLIAM J. WEAVER ET AL., Constituting
 the BOARD OF ASSESSORS OF THE CITY OF
 ALBANY.

(See S. C., 10 Otto, 539-547.)

State taxation of national banks—assessment of
—New York law.

*1. The provision of the national bank law, that state taxation on the shares of the banks shall not be at a greater rate than is assessed on other moneyed capital in the hands of citizens of the State, has reference to the entire process of assessment and includes the valuation of the shares as well as the ratio of percentage charged on such valuation.

2. A statute of a State, therefore, which establishes a mode of assessment by which the shares of the national banks are valued higher, in proportion to their real value, than other moneyed capital, is in conflict with the Act of Congress, though no greater percentage is levied on that valuation than on the valuation of other moneyed capital.

3. The Statute of New York of 1866, which permits a debtor to deduct the amount of his debts from the valuation of all his personal property including moneyed capital, except his bank shares, taxes those shares at a greater rate than other moneyed capital and is, therefore, void as to the shares of national banks.

[No. 19.]

Argued Mar. 28, 1879. Decided Mar. 2, 1880.

IN ERROR to the Court of Appeals of the State of New York.

The case is stated by the court.

Messrs. Geo. F. Edmunds and *Matthew Hale*, for plaintiff in error.

Messrs. R. W. Peckham and *Lyman Tremaine*, for defendants in error.

(See briefs of argument and authorities in No. 693, next preceding case.)

Mr. Justice Miller delivered the opinion of the court:

The law of the State of New York for taxation in the County of Albany, enacted in the year 1850, contained the following section:

"Section 9. If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deduct-

ing his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the Board of Assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit, and no more."

In the year 1866, the Legislature of that State enacted on this subject another law, the 1st section of which reads as follows:

"Section 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town or ward or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And, in making such assessment, there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided further, That nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal and other taxation to the same extent and rate and in the same manner as other real estate is taxed."

The defendants in error constituted the Board of Assessors of the City of Albany for the year 1875 and assessed the plaintiff for taxation the sum of \$38,250, on account of shares owned by him in the National Albany Exchange Bank, organized under the general Banking Act of Congress. He appeared before this Board in due time, and demanded the reduction of this sum to the amount of \$1, and accompanied the demand with this affidavit:

"CITY AND COUNTY OF ALBANY, ss.:

I, Chauncey P. Williams, being duly sworn, do depose and say that the value of personal estate owned by me, including my bank stock, after deducting my just debts and my property invested in the stock of corporations or associations liable to be taxed therefor, and my investments in the obligations of the United States, does not exceed the sum of one dollar.

C. P. WILLIAMS.

Subscribed and sworn before me, this 28th day of September, 1875.

JAMES MAHER, *Notary Public.*"

The defendants refused to make this deduction; and, under the procedure in the courts of New York, which allows of an amicable suit on an agreed statement of facts, the case finally came to the Court of Appeals of that State. The judgment there being in favor of defendants, the plaintiffs bring the record to this court by writ of error. Three questions were raised

*Head notes by *Mr. Justice MILLER*.

See 10 OTTO.

and decided in the Supreme Court, and its judgment affirmed in the Court of Appeals. They are thus stated in the record:

"The case coming on for argument on the submission thereof, after hearing Mr. Hale, of counsel for relator, and Mr. Peckham, of counsel for defendants, the court decides:

1. That it was not the duty of the defendants, as Assessors of the City of Albany, to comply with the demand made by said relator, and reduce his assessments to the sum of one dollar, and answer the first question submitted in the negative.

2. That, under the law of the State of New York, referred to in the second question, and passed April 23, 1866, the defendants, as such assessors, were justified in refusing to reduce the relator's assessment on his shares of bank stock mentioned in said submission to the sum of one dollar, and answers the second question in the affirmative.

3. That the said law of the State of New York, passed April 23, 1866, is not in violation of any law of the United States relating to the amount of taxes on shares of national banking associations, and answers the third question submitted in the negative.

Judgment is, therefore, ordered for the defendants against the relator, with costs."

Of the second of these propositions this court has no jurisdiction, but must accept the decision of the highest court of the State, that the Act of 1866 took the money invested in bank shares out of the general provision of the Law of 1850, which allowed a deduction of the debts owing by the shareholder from the value of the personal property as a basis for laying the tax. In that respect, we are bound by the decision of the Court of Appeals as the true construction of the state statute. The first proposition is but the necessary result of the case, if the other two are decided in favor of defendants by that court. We have thus left for our consideration the third proposition, which, being decided against a right asserted by plaintiff under the Act of Congress establishing the national banking system, presents a question reviewable by this court. We proceed to consider it.

The Court of Appeals delivered no formal opinion in the present case; but, in the entry of their judgment, which is part of the record, they say: "This judgment is upon the authority of the former decision of this court, rendered in the case of *People v. Dolan*, 36 N. Y., 59."

The opinion in that case is before us, and it decides directly the question now presented, and, if sound, it justifies the judgment of the court in this case. We have given it the careful consideration which the high character of the court demands at our hands. The question arises on the provision of the National Bank Law concerning taxation of the shares of the banks, which is thus expressed in section 5219 of the Revised Statutes, in force at the time of this assessment:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located, * * * subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon

other money capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It cannot be disputed—it is not disputed here—nor is it denied in the opinion of the state court, that the effect of the state law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. Nor can it be denied that, inasmuch as nearly all the banks in that State and in all others are national banks, that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress, in passing the Act which subjected these shares to taxation by the State, intended, by the very clause which was designed to prevent discrimination between national bank shares and other moneyed capital, to authorize such a result.

That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares, is abundantly established by the cases of *McCulloch v. Md.*, 4 Wheat., 316; *Osborn v. Bk.*, 9 Wheat., 738; *Weston v. Charleston*, 2 Pet., 449.

As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the State to tax these shares, it was foreseen—the cases we have cited from our former decisions showed too clearly—that the state authorities might be disposed to tax the capital invested in these banks oppressively.

This might have been prevented by fixing a precise limit in amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said: you may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may, by a narrow interpretation of the Act of Congress and by skillfully framed statutes of their own, exercise the power thus granted so as not only to reap its

full benefit, but at the same time cause the burden of supporting the State Government to fall with unequal weight on the subject of taxation thus surrendered to it by the National Government?

The argument by which this view is supported is founded on the assumption that while Congress limited the state authorities in reference to the ratio or percentage levied on the value of these shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of state regulation. The State can, therefore, adopt any arbitrary or conventional system of valuation as a basis of taxation, however unequally or unjustly it may operate and however it may discriminate against bank shares, provided the percentage of the tax levied in this valuation is the same in all cases. If, for instance, the tax is two per cent. on all personal property, the argument is, that the Act of Congress is not violated if the valuation on the money of the citizen invested in state bonds is, by statute, one half its real value, and that on bank shares is its full value, or, as in the Statute of the State now under consideration, the tax payer is allowed an exemption from taxation in whole or in part, as regards his state bonds, while none is allowed in reference to bank shares.

"Taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Seizing upon the word *rate* in this sentence as if disconnected from the word *assessment*, and construing it to mean percentage on any valuation that might be made, the Court of Appeals arrive at the conclusion that, since that percentage is the same in all cases, the Act of Congress is not infringed. If this philological criticism were perfectly just, we still think the manifest purpose of Congress in passing this law should prevail. We have already shown what that was. But the criticism is not sound. The section to be construed begins by declaring that these shares may be "Included in the valuation of the personal property of the owner, in assessing taxes imposed by authority of the State within which the association is located." This *valuation*, then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the Act, shall not be at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is, taxation. In what respect shall it be not greater than the rate assessed upon other capital? We see that Congress had in its mind an *assessment*, a *rate* of assessment, and a *valuation*; and, taking all these together, the taxation on these shares was not to be greater than on other moneyed capital.

"When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge, against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business." "An assessment, strictly speaking, is an official estimate of the sums which are to See 10 Orto.

constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes *listing* the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation cannot be apportioned without it." Cooley, Tax., 258, 259; Burroughs, Tax., p. 198, sec. 94. So, also, Judge Bouvier defines assessment to be determining the value of a man's property or occupation for the purpose of levying a tax. *Determining the share of a tax to be paid by each individual*. Levying a tax. 1 Bouvier, 154. These definitions show that, in the best use of the language employed by Congress, we are justified in looking to the rule of valuation adopted by the State in assessing taxes on these shares, as well as to the uniformity of percentage to ascertain whether the congressional restriction has been violated.

It is said, however, that the judgment of the state court is supported by the decision of this court in the case of the *People v. Comrs.*, 4 Wall., 244 [71 U. S., XVIII., 344]. The specific question now before us was not involved in that case. The only matter before the court was, whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in the negative, and it is all that was decided, or could be decided. The sentence in *Mr. Justice Nelson's* opinion, on which the argument is founded, reads thus: "The answer is, that, upon a true construction of this clause of the Act, the meaning and intent of the law-makers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

If we give to the phrase "rate of taxation" in this sentence no more than its proper force, and if we observe that the learned Judge speaks of the proportion or percentage *in* the valuation, not *on* it as it is misquoted, we have the idea which we have already supposed to be the true one in the minds of the law-makers. However this may be, we feel quite sure that the question of limiting the effect of the Act of Congress to a discrimination in the percentage levied as a tax, without regard to equality in the valuation on which that tax was levied, was not before the court, and was not intended to be decided. And in our view such a proposition is untenable.

We are, therefore, of opinion that the Statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the Act of Congress, and the judgment of that court is reversed, and the case remanded for further proceedings in conformity to this opinion.

10 Biss., 272, 505; 19 Blatchf., 177; 9 N. W. Rep., 839, 840; 10 N. W. Rep., 565.

CHAUNCEY P. WILLIAMS, *Plff. in Err.*,

v.

WILLIAM J. WEAVER ET AL.

(See S. C., 10 Otto, 547, 548.)

Federal question—liability of judicial officer.

1. Where the New York Court of Appeals decided that, in the absence of fraud or intentional wrong, the assessors of a city were not personally liable in damages for any error in an assessment of national bank stock, held: that whether that court decided that question correctly or not, is not a federal question which this court is authorized to review.

2. An officer whose duty personally, is mainly judicial, is no more liable for a mistaken construction of an Act of Congress than he would be for mistaking the common law or a state statute.

[No. 693.]

Argued Mar. 27, 28, 1879. Decided Mar. 2, 1880.

IN ERROR to the Court of Appeals of the State of New York.

The case is stated by the court.

Messrs. Geo. F. Edmunds and Matthew Hale, for plaintiff in error:

It is conceded by the court below and must be regarded as settled, as well by this court as by the courts of New York, that the defendants as assessors, violated the law in the mode adopted by them for assessing bank shares in the City of Albany, viz.: by assessing them at their par value, without reference to their actual value.

Hepburn v. School Directors, 23 Wall., 480 (90 U. S., XXIII., 112); *People v. Comrs.*, 67 N. Y., 516; *People v. Assessors*, 2 Hun (N. Y.), 583.

But it is found by the referee and held by the courts of New York, that the defendants, as such assessors, in making the assessments complained of, had jurisdiction of the property, and persons and corporations assessed, and acted in good faith and without malice, and that their proceedings were regular and, therefore, that they are not liable in this action.

This raises the important question in this case: had the defendants, as assessors of the City of Albany, jurisdiction to make such assessments? If they acted without jurisdiction, either of the person or of the property owned, their action was void and they are liable.

Mygatt v. Washburn, 15 N. Y., 316; *Dorwin v. Strickland*, 57 N. Y., 492; *Bk. v. Elmira*, 53 N. Y., 49.

It is insisted on the part of the plaintiff in error, that the defendants, in making the assessment in question, acted without jurisdiction, and are liable for the damages resulting from such assessment.

1. The capital of the National Exchange Bank or its equivalent was all invested in bonds of the United States.

2. It is well established by a long series of decisions of this court, that a tax imposed by any State, without the permission of Congress, directly or indirectly, upon any bonds or other securities issued by the United States Government, is unconstitutional and void.

McCulloch v. Md., 4 Wheat., 426; *Osborn v. Bk.*, 9 Wheat., 738; *Weston v. Charleston*, 2 Pet., 449; *Bk. v. N. Y.*, 2 Black, 628 (67 U. S., XVII.,

454); *Bank Tax Case*, 2 Wall., 200 (69 U. S., XVII., 793); *Van Allen v. Assessors*, 3 Wall., 573 (70 U. S., XVIII., 229).

The National Banking Act, ch. 106 of 1864, permitted such shares to be included in the valuation of the personal property of the owner in the assessment of taxes imposed under state authority, subject to the limitations that the amount should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State, and that the tax imposed should not exceed the rate imposed upon the shares of any state bank.

See 13 Stat. at L., 112, sec. 41.

4. This court, in *Van Allen v. Assessors* (*supra*), held unanimously that a state tax upon shares of a national bank not imposed in conformity with these limitations was void.

See, *Mr. Justice Nelson's* opinion (*supra*, 233), *Chief Justice Chase's* opinion (*supra*, 235); R. S. of U. S., p. 1015, sec. 5219.

The defendants, then, had no jurisdiction to assess the shares of the National Exchange Bank, unless they observed the restriction, "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State." Disregarding it, their action was void. The observance of this restriction was necessary to give them jurisdiction. This was expressly decided in the case of *Van Allen v. Assessors* (*supra*).

The defendants, in fact, utterly disregarded this restriction. They did not inquire or endeavor to ascertain the actual or market value, either of the national or the state bank shares; although the National Exchange Bank and the Mechanics' & Farmers' Bank published reports in the public newspapers of the City of Albany, showing that one share of the state bank was of more than double the value of a share of the national bank, the defendants assessed both at their par value, excluding real estate, making the assessment upon a share of the national bank actually greater than that upon a share of the state bank, worth twice as much. In other words, the rate assessed by defendants upon plaintiff's moneyed capital, invested in the National Exchange Bank, was double that imposed by them upon the other moneyed capital in the hands of the individual citizens of the State, invested in the Mechanics' & Farmers' Bank, a state institution.

The defendants did not act judicially in making these assessments. If they had endeavored in good faith to conform to the restrictions imposed by the law of Congress, perhaps this might have been said. It is not necessary to contend that a mistake in judgment as to actual value would make them liable. But they made no inquiry, no effort.

There can be no question, upon the facts found by the referee, that the national bank shares of plaintiff and his assignors, were assessed at a higher rate than other moneyed capital in the hands of individual citizens of the State. Moneyed capital certainly includes investments in stocks, bonds or other securities.

Waite, C. J., 23 Wall., 484 (90 U. S., XXIII., 112).

The acts of the defendants being illegal, unauthorized, in violation of the laws of the United States, and without jurisdiction, the right of

the plaintiff to recover the damages sustained by reason of such unlawful act cannot be questioned.

Ad. Torts, 1; 1 Hill. Torts, 94; *Mygatt v. Washburn* (supra); *Dorwin v. Strickland* (supra); *Rigby v. Hewitt*, 5 Exch., 240.

Mr. R. W. Peckham, for defendants in error:

The assessment of the shares of stock belonging to plaintiff was valid.

The taxation was not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.

People v. Comrs., 4 Wall., 244 (71 U. S., XVIII., 344); *People v. Dolan*, 36 N. Y., 59; *Adams v. Nashville*, 95 U. S., 19 (XXIV., 369).

The claim to deduct the personal indebtedness from the total value of the personal property, and for that purpose to include the valuation of the bank shares in the valuation of the balance of the personal property of the owner, is not valid.

The act of the assessors was judicial in its character, and, even if erroneous, no liability attaches to them on that account. If this court determines to examine this question, I would say:

(I.) In this case, the finding is that the defendants acted in good faith in their assessment; that there had been no judicial opinion expressed, at the time of the assessment, as to how it should be made; that there was no malice on defendants' part and that they acted in good faith. The leading case on the subject of the irresponsibility of assessors for a judicial act, in the State of New York, is *Weaver v. Devendorf*, 3 Den., 117, and this same principle is decided, or assumed to exist, in all the following cases:

Barhyte v. Shepherd, 35 N. Y., 238; *Swift v. Poughkeepsie*, 37 N. Y., 511; *R. R. Co. v. Supervisors of Erie Co.*, 48 N. Y., 93; *Clark v. Norton*, 49 N. Y., 243; *Bk. v. Elmira*, 53 N. Y., 49; *Dorwin v. Strickland*, 57 N. Y., 493; *Yountans v. Simmons*, 7 Hun, 466.

(II.) Of course, if there be a lack of jurisdiction in the assessors to make the assessment, then they are liable. Such are the cases in 53 N. Y., 49, and 57 N. Y., 492 (supra), and *Overing v. Foote*, 65 N. Y., 263.

(III.) There is claimed to have been a lack of jurisdiction here, because, as plaintiff alleges, the defendants have taxed him at a greater rate than is assessed upon other moneyed capital, which, as plaintiff alleges, they had no right to do; and doing it, their action is without jurisdiction. It would seem that the fallacy of that argument is plain.

1. It is not claimed that the defendants did not have: (a) Jurisdiction of the person of the plaintiff; or (b) Jurisdiction to make some assessment of value, to be determined by the judgment of the assessors upon the shares of the plaintiff. The two statutes give them such jurisdiction in terms. (c) The question, then, as to the amount of the assessment is one, of all others, judicial in its nature.

2. It is entirely different from jurisdiction to assess an individual, provided he is a resident, and no jurisdiction to assess in case he is a non-resident. In such case, the fact of residence must exist, or there is no jurisdiction, and the fact of residence or non-residence is not altered

See 10 OTTO,

by a decision of the assessors upon the subject. So as to the time in which an assessment may be made; if made outside of it, there is no jurisdiction, because a fact upon which jurisdiction depends does not exist when the assessment is made.

3. Here, the case is wholly different. The assessors have jurisdiction of the person of the plaintiff, and jurisdiction to make an assessment upon the property. The only question for the assessors to determine is the amount of such assessment.

(IV.) Having jurisdiction to decide upon such amount, it would seem clear that their decision upon such question was judicial in its nature, and if erroneous, liable to be corrected by a proceeding taken for that purpose, but such error not rendering them personally liable therefor.

Mr. Justice Miller delivered the opinion of the court:

This, though a suit between the same parties, and coming here by writ of error to the same court as the preceding case, is of a very different character. In the action as brought in the Supreme Court, the plaintiff seeks to hold these parties individually liable for the sum which he and many others have been compelled to pay as taxes on their shares of national bank stock, by reason of the wrongful assessment for the year 1874, made by the defendants in their official character as the Board of Assessors for the City of Albany.

The errors in assessments complained of are numerous and of a varied character, most of them having relation to improper discrimination to the prejudice of the rights of the plaintiff and his assignors, as holders of shares in national banks.

The Court of Appeals, in its opinion, conceding that the assessment was in many respects erroneous to the prejudice of plaintiff, held that, in the absence of fraud or intentional wrong, the defendants were not personally liable in damages for any error in their assessment. Whether that court decided that question correctly or not, it is not a federal question, but one of general municipal law, to be governed either by the common law or by the statute law of the State. In either case it presents no question on which this court is authorized to review a judgment of the state court.

That decision is also conclusive of the whole case. For if assessors in the exercise of their function of assessing property for taxation are not personally liable for any error they may commit, it can make no difference that the error consisted in a misconstruction of an Act of Congress. An officer whose duty, as the Court of Appeals of New York holds, is mainly judicial, is no more liable in damages personally for a mistaken construction of an Act of Congress than he would be for mistaking the common law or a state statute.

We may observe, also, that the federal right mainly relied on here as having been violated, namely: the right to have plaintiff's indebtedness deducted from the valuation of his bank shares, was not raised, because the plaintiff did not make the necessary affidavit and demand, as he did in the previous case.

On the whole, there is no error in the judg-

ment of the Court of Appeals which this court can review, and its judgment is affirmed.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—9 N. W. Rep., 840.

EBEN NEWTON ET AL., *Pliffs. in Err.*,

v.

BOARD OF COUNTY COMMISSIONERS
OF MAHONING COUNTY, OHIO.

(See S. C., 10 Otto, 548-563.)

County seat of Ohio County—interpretation of statute.

* In the year 1846 the Legislature of Ohio passed an Act whereby it was provided that the county seat of Mahoning County should be permanently established at Canfield, upon the fulfilment of certain prescribed terms and conditions, which were fully complied with. The county seat was established accordingly and remained at Canfield for about thirty years. In 1874 the Legislature passed another Act, providing for its removal to Youngstown.

This bill was filed, setting forth that the Act of 1846, and what was done under it, constituted an executed contract within the meaning and protection of the contract clause of the Constitution of the United States and praying for a perpetual injunction against the removal contemplated by the later Act. *Held:*

I. That the contract clause of the Constitution had no application.

II. That the Act of 1846 was a public law, relating to a public subject, with respect to which a prior had no power to bind a subsequent Legislature.

III. Conceding there was a contract as claimed, it was satisfied, on the part of the State, by establishing the county seat at Canfield, with the intent that it should remain there.

IV. There was no stipulation that the county seat should be kept or remain there in perpetuity.

V. The rule of interpretation in cases like this, as against the State, is, that nothing is to be taken as conceded but what is given in express and explicit terms or by an implication equally clear. Silence is negation and doubt is fatal to the claim.

[No. 170.]

Argued Jan. 22, 1880. Decided Mar. 2, 1880.

IN ERROR to the Supreme Court of the State of Ohio.

This action was brought in the Court of Common Pleas for the County of Mahoning, in the State of Ohio, by the plaintiffs in error, in behalf of themselves and others citizens of the County of Mahoning, for the purpose of obtaining an injunction against the Board of County Commissioners, now defendants in error, to prevent the removal of the county seat of said County from Canfield to the City of Youngstown.

The Court of Common Pleas dismissed the petition, and the plaintiffs appealed to the District Court. That court ordered that the case be reserved for decision in the Supreme Court of the State. That court rendered a decree dismissing the plaintiff's petition, and the plaintiffs sued out the present writ of error.

Messrs. Luther Day and J. A. Garfield, for plaintiffs in error.

Mr. T. W. Sanderson, for defendant in error.

*Head notes by Mr. Justice SWAYNE.

Mr. Justice Swayne delivered the opinion of the court:

It is claimed in behalf of the plaintiffs in error that the Act of the 16th February, 1846, and what was done under it, constituted an executed contract which is binding on the State; and that the Act of April 9, 1874, and the steps taken pursuant to its provisions, impair the obligation of that contract, and bring the case within the contract clause of the Constitution of the United States. Art. 1, sec. 10.

These allegations are the ground of our jurisdiction. They present the only question argued before us, and our remarks will be confined to that subject.

The case may be properly considered under two aspects:

Was it competent for the State to enter into such a contract as is claimed to have been made?

And if such a contract were made, what is its meaning and effect?

Undoubtedly, there are cases in which a State may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly. *Curran v. Arkansas*, 15 How., 304; *Davis v. Gray*, 16 Wall., 203 [83 U. S., XXI., 447].

The cases in which such contracts have been sustained and enforced are very numerous. Many of them are cases in which the question was presented whether a private Act of incorporation, or one or more of its clauses, is a contract within the meaning of the National Constitution. There is no such restraint upon the British Parliament. Hence the adjudications of that country throw but little light upon the subject.

The *Dartmouth Coll. Case* [4 Wheat., 518], was the pioneer in this field of our jurisprudence.

The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the State, and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the *Dart. Coll. Case*. *Mr. Chief Justice Marshall* said:

"That, anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, the State Legislatures were forbidden 'to pass any law impairing the obligation of contracts;' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the

States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces. * * * If the Act of incorporation be a grant of political power; if it create a civil institution to be employed in the administration of the government; or if the funds of the college be public property; or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."

The judgment of the court in that case proceeded upon the ground that the college was "A private eleemosynary institution, endowed with a capacity to take property for purposes *unconnected with the government*, whose funds are bestowed by individuals on the faith of the charter."

In the later case of *E. Hartford v. Br. Co.*, [10 How., 511], this court further said: "But it is not found necessary for us to decide finally on this first and most doubtful question, as our opinion is clearly in favor of the defendant in error on the other question, namely: that the parties to this grant did not, by their charter, stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and so could not be modified by subsequent legislation. The Legislature was acting here on the one part, and public municipal corporations on the other. They were acting, too, in relation to a *public object*, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the *subject-matter* of their action, we think that the doings of the Legislature as to this ferry must be considered rather as *public laws* than as *contracts*. They related to *public interests*. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for *public purposes*, were liable to have their public powers, rights and duties *modified or abolished* at any moment by the Legislature. * * *

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as *supervision over its subordinate public bodies*."

The legislative power of a State, except so far as restrained by its own Constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Butler v. Pennsylvania*, 10 How., 402.

The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the See 10 OTTO.

same absolute character. *Cooley, Const. Lim.*, pp. 232, 342; *The Regents v. Williams*, 9 Gill. & J., 365.

In all these cases, there can be no contract and no irrevocable law, because they are "governmental subjects," and hence within the category before stated.

They involve *public interests*, and legislative Acts concerning them are, necessarily, *public laws*. Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them must, necessarily, be of the same character.

If one may be bargained about, so may the other. In this respect there is no difference in principle between them.

The same reasoning, pushed a step further in the same direction, would involve the same result with respect to the seat of government of a State.

If a State Capital were sought to be removed, under the circumstances of this case with respect to the county seat, whatever the public exigencies or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual injunction.

It is true a State cannot be sued without its consent, but this would be a small obstacle in the way of the assertion of so potent a right. Though the State cannot be sued, its officers, whose acts were illegal and void, may be. *Osborne v. Bk.*, 9 Wheat., 738; *Davis v. Gray* [*supra*].

A proposition leading to such consequences must be unsound. The parent and the offspring are alike. *Armstrong v. Comrs.*, 4 Blackf., 208, was, in some of its features, not unlike the case before us. The Act declared that "So soon as the public buildings are completed in the manner aforesaid, at the place designated, the same shall be forever thereafter the permanent seat of justice of said County of Dearborn." Certain private individuals there, as here, had stipulated to build a court-house, and their compliance was a condition precedent. The condition had been performed. It was held that "the Act did not create a contract." The subject was fully considered. It was held further, that a subsequent Legislature might competently pass an Act for the removal of the county seat so established. In that case, both had been done and both were sustained. The reasoning of the court was substantially the same with ours touching the 8th section of the Act of 1846 here in question. *Elwell v. Tucker*, 1 Blackf., 285, was also a case arising out of the removal of a

county seat. The court said: "The establishment of the time and place of holding courts is a matter of general legislation, respecting which the Act of one session of the General Assembly cannot be binding on another." See, also, *Adams v. Logan Co.*, 11 Ill., 336, and *Bass v. Pontleroy*, 11 Tex., 698. They are to the same effect.

Second. But conceding, for the purposes of this opinion, that there is here a contract, as claimed by the plaintiffs in error, then the question arises: what is the contract? or, in other words, to what does it bind the State?

The rules of interpretation touching such contracts are well settled in this court. In *Tucker v. Ferguson*, 22 Wall., 527 [89 U. S., XXII., 805], we said: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend *either in scope or duration* beyond what the terms of the concession clearly require." There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language. *Bk. v. Billings*, 4 Pet., 514; *Gilman v. Sheboygan*, 2 Black, 510 [67 U. S., XVII., 305.]

It must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure. *Christ Ch. v. Philadelphia*, 24 How., 300 [65 U. S., XVI., 602]. No grant can be raised by mere inference or presumption, and the right granted must be clearly defined. *Charles R. Br. v. Warren Br.*, 11 Pet., 420.

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. *Silence is negation, and doubt is fatal to the claim.*" This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court." *Fertilizing Co. v. Hyde Park*, 97 U. S., 659 [XXIV., 1036].

The 8th section of the Act of 1846 declares, "That before the seat of justice shall be considered permanently established at the Town of Canfield, the proprietors or citizens thereof shall" do certain things, all of which, it is admitted, were done in due time. This is the whole case of the plaintiffs in error. It will be observed that there is nothing said about the county seat *remaining*, or being *kept*, at Canfield *forever*, or for any specified time, or "permanently." At most, the stipulation is that it shall be considered as *permanently established there* when the conditions specified are fulfilled. If the Legislature had intended to assume an obligation that it should be *kept there* in perpetuity, it is to be presumed it would have said so. We cannot—certainly not in this case—interpolate into the statute a thing so important, which it does not contain. The most that can be claimed to have been intended by the State is, that when the conditions prescribed were complied with, the county seat should be then and thereupon "permanently established" at the designated place. We are, therefore, to

consider what is the meaning of the phrase "permanently established." Domicil is acquired by residence and the *animus manendi*, the intent to remain. A *permanent residence* is acquired in the same way. In neither case is the idea involved that a change of domicil or of residence may not thereafter be made. But this in nowise affects the pre-existing legal *status* of the individual in either case while it continues. So the county seat was permanently established at Canfield when it was placed there with the *intention* that it should remain there. This fact, thus complete, was in nowise affected by the further fact that thirty years later the State changed its mind and determined to remove, and did remove, the same county seat to another locality. It fulfilled at the outset the entire obligation it had assumed. It did not stipulate to *keep* the county seat at Canfield perpetually, and the plaintiffs in error have no right to complain that it was not done. *Keeping it there* is another and a distinct thing, in regard to which the 8th section of the Act is wholly silent. In *Mead v. Ballard*, 7 Wall., 290 [74 U. S., XIX., 190]; land was conveyed on the 9th of August, 1848, "Upon the express understanding and condition" that a certain institution of learning then incorporated "shall be permanently located on said land," between the date of the deed and the same day in the succeeding year. The trustees passed a resolution, within the year, locating the institution on the premises, and at once contracted for the erection of the necessary buildings. The buildings were completed, and the institution was in full operation by November, 1849.

In the year 1857 the buildings were destroyed by fire and were not rebuilt. A part of the land was sold by the grantee. The heir of the grantor sued in ejectment to recover the premises. This court, speaking by *Mr. Justice Miller*, said: "It is clear to us * * * that when the trustees passed their resolution locating the buildings on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had *permanently located* the institution, within the true construction of the contract. Counsel for the plaintiff attach to the word 'permanent' a meaning inconsistent with the obvious intent of the parties—that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This could not have been the intention of the parties."

In *Harris v. Shaw*, 13 Ill., 463, land was conveyed on condition that the county seat should be "permanently located" upon it. The location was made accordingly with that intent, but some years later the county seat was removed. The grantor sued to recover the land. The court said it was no part of the contract that the country seat should *remain forever* on the premises; that the grantor must be presumed to have known that the Legislature had the power to remove it at pleasure, and that he must be held to have had in view at least the probability of such a change when he made the deed.

There is no point arising under either the former or the present Constitution of Ohio which, in our judgment, requires any remark.

The results of the elaborate research of one of the counsel for the defendants in error show that the phrase "permanently established" is a formula in long and frequent use in Ohio, with respect to county seats established otherwise than temporarily. Yet it is believed this is the first instance in the juridical history of the State in which such a claim as is here made has been set up.

This practical interpretation of the meaning of the phrase, though by no means conclusive, is entitled to grave and respectful consideration.

The judgment of the Supreme Court of Ohio is affirmed.

Cited—103 U. S., 10; 18 N. W. Rep., 501.

NATIONAL SAVINGS BANK OF THE
DISTRICT OF COLUMBIA ET AL., *Appts.*,

v.

JOHN A. J. CRESWELL ET AL., COMMIS-
SIONERS OF THE FREEDMAN'S SAVINGS AND
TRUST COMPANY.

(See S. C., 10 Otto, 630-643.)

*Order of sale in foreclosure—inverse order of
alienation.*

*1. The doctrine that real estate subject to a judgment or mortgage lien, different parcels of which have been alienated to several persons at different times, shall be subjected to its payment in the inverse order of alienation, is in this case considered and sustained as the prevailing doctrine in courts of equity.

2. As it is the first time this court has been called to consider it, except as an established rule of property in a State, the subject is fully considered, and the authorities, English and American, are reviewed.

[No. 161.]

Argued Jan. 16, 19, 1880. Decided Mar. 2, 1880.

APPEAL from the Supreme Court of the
District of Columbia.

The case is stated by the court.

*Messrs. W. S. Cox, Jas. M. Johnson, and
John F. Hanna, for appellants.*

Mr. Enoch Totten, for appellees.

Mr. Justice Miller delivered the opinion of the court:

Samuel P. Brown, being seised in fee of a large number of lots constituting the subdivision of a tract of land into the Town of Mount Pleasant, had a judgment rendered against him, March 3, 1870, in favor of one Jolly, for the sum of \$4,694.05, in the Supreme Court of the District of Columbia, and the lots being within the District, the judgment became from that day a lien on them. On the 20th day of June of that year, Mr. Brown borrowed of the Freedman's Savings and Trust Company the sum of \$10,000, and executed to Daniel L. Eaton a deed of trust conveying a part of the lots owned by him in Mount Pleasant, as security for the

repayment of the loan. Under this deed of trust the lots were sold and bought in for the Freedman's Bank, and they have resold several of them and guaranteed the title to the purchasers.

A few months after the execution of the deed of trust above mentioned by Brown, he began to borrow money from the National Savings Bank, the appellant in this case, and gave deeds of trust on other lots in the same subdivision to secure the payment of these loans. In July, 1874, the National Savings Bank, fearing the loss of their security by the judgment against Brown of March 3, 1870, purchased that judgment, and ordered an execution to be issued on it, which was levied on the lots conveyed to Eaton for the benefit of the Freedman's Bank. That Bank having passed into the control of Creswell and others, as commissioners appointed to wind up its affairs, they brought the present bill in chancery to release those lots from sale under that execution.

The court granted such relief as is authorized by the principle, that where real estate is subjected to a lien in the hands of its owner, and he sells or mortgages separate parcels of that property subsequently to different persons and at different times, these parcels shall be subjected to payment of the lien in the inverse order of their alienation.

The facts show that the conveyances to secure the Savings Bank were made subsequently to that made to secure the Freedman's Bank, and if the rule we have mentioned be a sound one, and there be no special reason to exempt this case from its operation, the Freedman's Bank was entitled to have the lots conveyed to the Savings Bank applied to the extent of their value in payment of the judgment, before their lots could be subjected to that payment.

There are one or two matters relied on by appellant to take this case out of the rule.

1. It is said that appellants had no actual notice of the deed of trust to Eaton when it took its mortgages, and a large part of the argument of counsel is devoted to this subject. But it does not appear that the Bank in its answer set up the defense of a *bona fide* purchaser without notice, nor that any such question was raised in the court below. The main foundation of the suggestion, however, namely: that there is no evidence that the deed to Eaton was recorded, which appeared to be so by the transcript, is removed by the production of the original deed, having on it the certificate of the register of deeds, that it was properly recorded. This removes the foundation of the argument, and it must fail.

Another objection is, that the defendant sets out in its answer that other persons had bought lots of Brown, after the rendition of the judgment, and were proper parties to this suit, and that as plaintiff failed to bring them before the court, the decree in favor of the Freedman's Bank is erroneous, and must be reversed for that reason.

But while the answer says that, as the defendant is informed and believes, there was a considerable amount of other property than that described in the bill, owned by said Brown, and subject to the lien of the judgment, which was sold and conveyed by him after his conveyance to secure the debt of the defendant, it

NOTE.—*Order of sale of mortgaged premises.* See note to *Orvis v. Powell*, ante, 373.

See 10 OTTO.

U. S., Book 25.

45

713

does not describe the property or name the purchasers or fix the date of their purchases.

As the purchases are said to be subsequent to the creation of defendant's lien, it was the interest of defendant to set out the facts necessary to enable the plaintiff to bring them before the court. Nothing in the decree as rendered prevents defendant from selling these lots under his execution. The plaintiff, therefore, was not bound to hunt up the parties and the transactions to which defendant merely alludes in such vague and indefinite language.

Lastly, the appellants argue that the subjection of the property covered by the lien of the judgment to its satisfaction, in the inverse order of its alienation, is not the prevailing rule in courts of equity, nor the rule of property in the District of Columbia.

Though the attention of counsel was directed during the argument to the production of any authoritative decision of the courts of the District or of Maryland which would be conclusive of the question, none could be found, after several days' opportunity for examination, and the decree of the district court must rest on the general equity doctrine, if it be sustained at all.

The question is, also, a new one in this court, for the case of *Oreis v. Powell* [ante, 239] was decided on the ground that the principle had become a rule of property in Illinois, and this court would follow it in reference to lands in that State. And the case of *Hughes v. Edwards*, 9 Wheat., 490, does not raise the question before us now, much less decide it. That was merely a question whether improvements constructed on the land after the execution of the mortgage became subject to its operation.

The proposition we are called on to consider is one on which the authorities, though numerous, are by no means in harmony. *Mr. Justice Story*, in his work on Equity, Vol. II., sec. 1233 b, approves the rule, so far as any of the property subject to the lien remains in the hands of the party against whom the lien was first established, but he says there is great reason to doubt whether it can be applied as between subsequent purchasers from that party, when it has been alienated at different times and to several persons. "On the contrary," he says, in such case "there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates. And so the doctrine has been asserted in the ancient as well as the modern English cases on the subject."

The older cases cited for this proposition scarcely sustain it. In *Sir William Harbert's Case*, reported 3 Coke, 11, it was resolved that "If A be seised of three acres, and acknowledge a recognizance or statute, and enfeof B of one acre and C of another acre, and the third descends to his heir, and if execution be sued out against the heir he shall not have contribution against the purchasers, for the heir sits in the seat of his ancestor." Among them is, also, the case of *Lanoy v. Duke of Athol*, 2 Atk., 444, in which Lord Hardwicke says: "Suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage

to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons." This seems to be a pretty clear statement of the rule adopted in many of the States of the Union at the present day, though based rather upon the principle applicable to marshaling assets, that he who has a right to resort to two funds, in one of which alone another party has a subsidiary lien, shall be compelled to exhaust the one to which the other cannot resort before coming upon the one in which they both have an interest, than on the ground now relied on in the courts of this country.

That ground is, that the first purchaser has a right to suppose that the part of the mortgaged property which he leaves with the mortgagor, will, in his hands, be first subjected to the payment of the mortgage he has made. To this *Judge Story* assents. But the principle goes further, and holds that when a second purchaser from the mortgagor buys either all or a part of the incumbered property which remains, he cannot place himself in a better position than his grantor, and revive the burden on the first purchaser's land, from which it had been wholly or partially relieved by its primary pressure on the land left by him in the hands of the mortgagor.

No very clear decision of the question seems to have been rendered in the English courts on the subject, though occasionally alluded to, until the case of *Averall v. Wade*, decided in the Irish Chancery by Lord Chancellor Sugden in 1835 [L. & G., 252; 10 Cond. Ch., 498], whose great authority in all that concerned titles to real estate will not be disputed. Looking to the question as governed by the doctrine of marshaling assets, he appears to decide against its application in cases like the one now before us, and refers to an opinion of Lord Eldon in [*Adrick v. Cooper*] 8 Vesey, 382, in which, while this point was not directly in issue, the argument of that eminent Chancellor leaned that way.

But while these latter are authorities of great weight, it is to be remembered that they were made long after the time to which this court has looked to the English chancery practice as governing ours, while the case of *Sir William Harbert* and Lord Hardwicke's decision were before; and that the English courts have not considered, as far as we know, the principle on which the rule is based in this country.

That principle was stated by Chancellor Kent, with his usual force and clearness, in 1821, in the case of *Clowes v. Dickenson*, which has become the leading case on the subject in this country. 5 Johns. Ch., 235.

After referring to the case of *Sir William Harbert*, he says: "This case settles the question as between the vendor and purchaser, or the heirs of the vendor and the purchaser; and if there be several purchasers in succession, at different times, I apprehend in that case, also, there is no equality and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to A, the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land

be in the hands of the debtor himself or of his heirs. If he sells another acre to B, the remaining acre is then chargeable in the first instance with the debt as against B, as well as against A; and if it should prove insufficient, then the acre sold to B ought to supply the deficiency in preference to the acre sold to A; because, when B purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect we may say of him as it is said of the heir, *he sits in the seat of his grantor*, and must take it with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment or a ratable part of it back upon A." The doctrine and the reason upon which it is founded cannot be better stated than in this extract from the opinion.

We may, as an additional reason, suggest a principle often called into action in recent times in the courts, namely: that where one of two innocent persons must suffer a loss, it should fall on him who, by reasonable diligence or care, could have protected himself, rather than on him who could not. In the case supposed, the second purchaser, at the time of his purchase, knowing that the land which he buys is subject to the incumbrance before that already sold, can exact of the vendor security or protection against the incumbrance, which it is out of the power of the first vendor to do at the time his risk is increased by the very act of the second purchaser.

Since the decision in the case of *Clowes v. Dickenson*, the doctrine there announced has been followed by much the larger number of courts of the different States, though there are a few of very high authority which have held that as between vendees of land subject to a prior incumbrance, equality is justice, and the debt shall bear equally upon all the parcels originally subject to it, in proportion to their values.

The cases are collected in the briefs of counsel on both sides in this case, to which reference is here made as they will be given by the reporter, and in *Aldrich v. Cooper*, L. Cas., in Eq., Vol. II., pt. 1, p. 291, ed. of 1877.

We are of opinion that the preponderance of authority as shown by judicial decisions, as well as the weight of sound argument, is in favor of the rule laid down by *Chancellor Kent*, and the decree in this case is, accordingly, affirmed.

HABEAS CORPUS CASES.

EX PARTE IN THE MATTER OF AUGUSTUS F. CLARKE, Petitioner.

(See S. C., 10 Otto, 399-404.)

Election law of Congress—offense under—habeas corpus—jurisdiction.

* An officer of election, at an election for a representative to Congress in the City of Cincinnati, was convicted of a misdemeanor in the Circuit Court of the United States, under section 5515 of the Revised Statutes, for a violation of the law of Ohio, in not conveying the ballot-box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open. *Held*, according to the decision in *Ex*

parte Siebold [post], that Congress had power to pass the law under which the conviction was had, and that the Circuit Court had jurisdiction of the offense.

In such a case, a *habeas corpus* for discharge from imprisonment under the conviction was rightfully issued by a Justice of this court, returnable before himself; and said Justice had the right, if it could be done without injury to the prisoner, to refer the matter to this court for its determination, it being a case which involved the exercise of appellate jurisdiction.

Had the case been one involving original jurisdiction only, this court could not have taken jurisdiction of it.

[No. 6. Orig.]

Argued Oct. 23, 24, 1879. Decided Mar. 8, 1880.

PETITION for writ of *habeas corpus*.

The case is stated by the court.

Messrs. **Headly, Johnson & Colston** and **R. T. Merrick**, for petitioner.

Messrs. **Charles Devens**, *Atty-Gen.*, and **Edwin B. Smith**, *Asst. Atty-Gen.*, opposed.

Mr. Justice Bradley delivered the opinion of the court:

This case comes before us on the return to a writ of *habeas corpus*, issued by order of one of the Justices of this court. The petition for a *habeas corpus* was addressed to the Judges of the Supreme Court of the United States, by Augustus F. Clarke, who states therein that he is a member of the City Council of Cincinnati and, as such, one of the Judges of Election of Precinct A in said City; in which capacity he acted at the state, congressional, county and municipal elections held in said City in October, 1878; that, on the 24th of October, 1878, he was indicted in the Circuit Court of the United States for the Southern District of Ohio for unlawfully neglecting to perform the duty required of him, as such judge of election, by the laws of the State of Ohio in regard to said election in this: that, having accepted one of the poll-books of said election, sealed and directed according to law, for the purpose of conveying the same to the clerk of the Court of Common Pleas of Hamilton County, in said State, at his office, he neglected to do so; and, in another count, that he permitted the said poll-book, sealed and directed for the purpose aforesaid, to be broken open before he conveyed the same to said clerk; that a motion to quash said indictment and a demurrer thereto having been successively overruled, he pleaded not guilty, and at the February Term, 1879, was tried and found guilty; and having unsuccessfully moved for a new trial, and in arrest of judgment, he was sentenced by said court to be imprisoned in the jail of Hamilton County for twelve months, and to pay a fine of \$200 and the cost of prosecution; that, in pursuance of said sentence, he had been arrested and imprisoned, and is now imprisoned and restrained from his liberty by the Marshal of the United States for said district. The petition then asserts that the said Circuit Court had no jurisdiction in the premises, and that its acts were wholly void and his imprisonment unlawful. He, therefore, prays a *habeas corpus* to the said Marshal, and a *certiorari* to the clerk of said court, if necessary; and that he may be discharged from custody. A certified copy of the indictment, proceedings and judgment in the Circuit Court is annexed to the petition, from which it appears that the first count charged

*Head notes by *Mr. Justice BRADLEY*.

See 10 OTTO.

that the petitioner on the 9th of October, 1878, in the County of Hamilton, in the State of Ohio, being an officer of election at which a representative in Congress was voted for, to wit: a judge of said election at precinct A of the eighth ward of Cincinnati, and being duly appointed such judge of election under the laws of Ohio, did unlawfully neglect to perform a duty required of him by the laws of said State in regard to said election, specifying said neglect, to wit: that he neglected to convey the poll-book to the county clerk, which had been sealed up by the judges and delivered to him for that purpose; contrary to the form of the statute and against the peace and dignity of the United States. The second count charged that the petitioner, as such judge of election, violated a duty required of him by the laws of said State in regard to said election, specifying the violation, namely: that having received the poll-book in the manner and for the purpose aforesaid, he permitted it to be broken open before he conveyed it to the county clerk, contrary to the form of the statute, etc.

It is conceded that this indictment was found under section 5515 of the Revised Statutes of the United States, which is in the following words: (This section is set forth in the previous [following] case of *Ex parte Siebold*) [post, 717].

The law of Ohio which the petitioner is charged with violating is as follows:

"(32.) Section XIX. That, after canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book, thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise) to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election; and the other poll-book, where the same is not otherwise disposed of by this Act, shall be deposited with the township clerk, or clerk of the election district (as the case may be), within three days from the day of election, there to remain for the use of the persons who may choose to inspect the same."

On the 31st day of July, 1879, the said petition was presented to *Mr. Justice Strong*, and a writ of *habeas corpus* was allowed by him, returnable forthwith before himself, at the Catskill Mountain House, in the State of New York. On the 11th of August, 1879, return being made, of the body of the petitioner, according to the command of the writ, with a copy of the judgment of the Circuit Court, and the warrant of commitment issued thereon, *Justice Strong* made an order postponing the hearing of the cause into this court, to be heard upon the second Tuesday of October, 1879 (being the first day of the present Term), and admitted the petitioner to bail in the sum of \$5,000 to abide the rule of the Supreme Court in the premises.

The case was argued at the same time with the previous [following] case of *Ex parte Siebold* [supra]; and most of the questions involved have been considered in that case.

One question, however, has been raised by the counsel for the government which it is necessary to consider. It is objected that this court

cannot proceed upon a writ of *habeas corpus* which was originally presented to a Justice of this court, and was postponed and referred by him to the court for its determination.

We have considered this point with some care, inasmuch as in *Kaine's Case*, reported in 14 How., 103, the court held that it could not act upon a writ thus referred to it by *Mr. Justice Nelson*. But the ground taken there was, that the writ had been issued by him in virtue of his original jurisdiction; though the court was of opinion that it could issue a new writ upon the papers before it, in virtue of its own appellate jurisdiction, and would do so if the case required it; but being of opinion that there was no case on the merits the application was discharged. But in this case, however it may have been in that, it is clear that the writ, whether acted upon by the Justice who issued it, or by this court, would in fact require a revision of the action of the Circuit Court by which the petitioner was committed, and such revision would necessarily be appellate in its character. This appellate character of the proceeding attaches to a large portion of cases on *habeas corpus*, whether issued by a single judge or by a court. The presence of this feature in the case was no objection to the issue of the writ by the associate Justice, and is essential to the jurisdiction of this court. The Justice who issued it could undoubtedly have disposed of the case himself, though not, at the time, within his own circuit. A Justice of this court can exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be. But as the case is one of which this court also has jurisdiction, if the Justice who issued the writ found the questions involved to be of great moment and difficulty, and could postpone the case here for the consideration of the whole court without injury to the petitioner, we see no good reason why he should not have taken this course, as he did. It had merely the effect of making the application for a discharge one addressed to the court, instead of one addressed to a single justice. This has always been the practice of English judges in cases of great consequence and difficulty, and we do not see why it may not be done here. Under the *Habeas Corpus* Act, indeed, it was the regular course to take bail and recognize the party to appear in the King's Bench or Assizes; though the judge would discharge absolutely if the case was clearly one of illegal imprisonment. *Hab. Corp. Act*, sec. 3; *Com. Dig. Hab. Corp.*, F; *Bac Abr. Hab. Corp.*, B, 13; 1 *Chit. Gen. Pr.*, 685-688. Of course, under our system, no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner. No injury can be complained of in this case, since the petitioner was allowed to go at large on reasonable bail.

As to the merits of the case, there can be no serious question that the indictment charges an offense specified in the Act of Congress. R. S., sec. 5515. Any defect of form in making the charge would be at most an error, of which this court could not take cognizance on *habeas corpus*. The principal question is, whether Congress had constitutional power to enact a law

for punishing a state officer of election for the violation of his duty under a state statute in reference to an election of a representative to Congress. As this question has been fully considered in the previous [following] case, it is unnecessary to add any thing further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient.

The petitioner, therefore, must be remanded to the custody of the Marshal for the Southern District of Ohio; and it is so ordered.

Dissenting, **Mr. Justice Field**, and **Mr. Justice Clifford**.

[See opinion, *post*, 727.]

Cited—109 U. S., 66; 57 Cal., 609; 40 Am Rep., 130.

HABEAS CORPUS CASES.

Ex Parte ALBERT SIEBOLD ET AL.

(See S. C., 10 Otto, 371-399; 404-422.)

Habeas Corpus—jurisdiction as to—erroneous decision—personal liberty—constitutionality of law—power of Congress—Enforcement Act—election law—officers of election—collision of jurisdiction—paramount national authority—marshals—exclusive power—state officers—supervisors of election.

*1. The appellate jurisdiction of this court, exercisable by *habeas corpus*, extends to a case of imprisonment upon conviction and sentence in an inferior court of the United States, under and by virtue of an unconstitutional Act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not.

2. The jurisdiction of this court by *habeas corpus*, when not restrained by some special law, extends, generally, to imprisonment by inferior tribunals of the United States which have no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional Act.

3. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error.

4. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ.

5. Certain Judges of Election in the City of Baltimore, appointed under state laws, were convicted in the Circuit Court of the United States, under sections 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the Supervisors of Election and Deputy-Marshals of the United States in the performance of their duty at an election of Representatives to Congress, under sections 2016, 2017, 2021, 2022, title XXVI, of the Revised Statutes. *Held*, that the question of the constitutionality of said laws is good ground for this court to issue a writ of *habeas corpus* to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged.

6. Congress had power by the Constitution to pass the sections referred to, viz.: section 5515 of the Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for a Representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such

law, with intent to affect such election, or to make a fraudulent certificate of the result, etc.; and section 5522, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, bribe or interfere with a Supervisor of Election or Marshal or Deputy-Marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, etc.; also, sections 2011, 2012, 2016, 2017, 2021, 2022, title XXVI, of the Revised Statutes, which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such Supervisors and Deputy-Marshals, these being the laws provided by Congress in the Enforcement Act of May 31, 1870, and the supplement thereto of February 28, 1871, for supervising the elections of Representatives, and for preventing frauds therein.

7. The circuit courts have jurisdiction of indictments under these laws, and a conviction and sentence in pursuance thereof is lawful cause of imprisonment, from which this court has no power to relieve on *habeas corpus*.

8. In making regulations for the election of Representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators," Congress has a supervisory power over the subject, and may either make entirely new regulations, or add to, alter or modify the regulations made by the State.

9. In the exercise of such supervisory power, Congress may impose new duties on the officers of election, or additional penalties for breach of duty or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted.

10. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter."

11. There is nothing in the relation of the state and the national sovereignties to preclude the co-operation of both in the matter of elections of Representatives. If both were equal in authority over the subject, collisions of jurisdiction might ensue; but the authority of the National Government being paramount, collisions can only occur from unfounded jealousy of such authority.

12. Congress had power by the Constitution to vest in the circuit courts the appointment of Supervisors of Election. It is expressly declared that "Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is, nevertheless, left to the discretion of Congress.

13. The provision which authorizes the Deputy-Marshals to keep the peace at the elections is not unconstitutional. The National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

14. The concurrent jurisdiction of the National Government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, etc.

15. The provisions adopted for compelling the state officers of election to observe the state laws regulating elections of Representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offense against the United States which Congress may rightfully inhibit and punish. This, necessarily, follows from the direct interest which the National

*Head notes by **Mr. Justice BRADLEY**.

See 10 OTTO.

Government has in the due election of its Representatives and from the power which the Constitution gives to Congress over this particular subject.

[No. 7 Orig.]

Argued Oct. 24, 1879. Decided Mar. 8, 1880.

PETITION for writ of *habeas corpus* to John M. McClintock, the Marshal of the United States for the District of Maryland, and to James H. Irvin, Warden of the Jail of the City of Baltimore, and for *certiorari* to the Circuit Court of the United States for said District.

The case is further stated by the court.

Messrs. **Hoadly, Johnson and Colston** and **Chas. J. M. Gwinn**, for petitioners.

Mr. Chas. Devens, Atty. Gen., contra.

Mr. Justice Bradley delivered the opinion of the court:

The petitioners in this case were Judges of Election at different voting precincts in the City of Baltimore, at the election held in that city, and in the State of Maryland, on the 5th day of November, 1878, at which Representatives to the 46th Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offenses alleged to have been committed by them respectively at their respective precincts whilst being such Judges of Election; upon which indictments they were severally tried, convicted and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of *habeas corpus* to be relieved from imprisonment.

Before making this application, each petitioner, in the month of September last, presented a separate petition to the *Chief Justice* of this court (within whose circuit Baltimore is situated), at Lynn, in the State of Connecticut, where he then was, praying for a like *habeas corpus* to be relieved from the same imprisonment. The *Chief Justice* thereupon made an order that the said Marshal and Warden should show cause, before him, on the second Tuesday of October, in the City of Washington, why such writs should not issue. That being the first day of the present Term of this court, at the instance of the *Chief Justice* the present application was made to the court by a new petition addressed thereto, and the petitions and papers which had been presented to the *Chief Justice* were, by consent, made a part of the case. The records of the several indictments and proceedings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under section 5515 and partly under section 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the circuit court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

The jurisdiction of this court to hear the case is the first point to be examined. The question

is, whether a party imprisoned under a sentence of a United States Court, upon conviction of a crime created by and indictable under an unconstitutional Act of Congress, may be discharged from imprisonment by this court on *habeas corpus*, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 100, 101; *Ex parte Yerger*, 8 Wall., 98 [75 U. S., XIX., 336].

That this court is authorized to exercise appellate jurisdiction by *habeas corpus* directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a State is a party; but has appellate jurisdiction in all other cases of federal cognizance, "With such exceptions and under such regulations as Congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. *Ex parte Bollman* [*supra*]; *Ex parte Watkins*, 3 Pet., 202; *Ex parte Watkins*, 7 Pet., 568; *Ex parte Wells*, 18 How., 307, 328 [59 U. S., XV., 421, 431]; *Ableman v. Booth*, 21 How., 506 [62 U. S., XVI., 169]; *Ex parte Yerger*, 8 Wall., 85 [75 U. S., XIX., 332].

There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus*, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on *habeas corpus*, and thus save the party the delay and expense of a writ of error. *Bac. Abr. Hab. Corp.*, B, 13; *Bethell's Case*, Salk., 348; 5 Mod., 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*.

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over

the person or the cause, or some other matter rendering its proceedings void.

This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872], and *Ex parte Parks*, 93 U. S., 18 [XXIII., 787]. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.

Chief Justice Abbott, in *Rev v. Suddis*, 1 East, 306, said: "It is a general rule that, where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court (the King's Bench) cannot review the sentence upon a return to a *habeas corpus*. In such cases, this court is not a court of appeal."

It is stated, however, in Bacon's *Abridgment*, probably in the words of *Chief Baron Gilbert*, that, "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." *Bac. Abr. Hab. Corp.*, B, 10. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void. The authority usually cited under this head is *Bushel's Case*, decided in 1670. There, twelve jurymen had been convicted in the Oyer and Terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the Court of Common Pleas for a *habeas corpus*; and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of *Chief Justice Vaughan* in the case has rarely been excelled for judicial eloquence. *Bushel's Case*, T. Jones, 13; S. C., Vaughan, 135; S. C., 6 Howell, St. Tr., 999.

Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on *habeas corpus*. The validity of the judgment is assailed on the ground that the Acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be re-

viewed on *habeas corpus* by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

We proceed, therefore, to examine the cases on their merits.

The indictments commence with an introductory statement that, on the 5th of November, 1878, at the Fourth [or other] Congressional District of the State of Maryland, a lawful election was held, whereat a Representative for that congressional district in the 46th Congress of the United States was voted for; that a certain person [naming him] was then and there a supervisor of election of the United States, duly appointed by the circuit court aforesaid, pursuant to the section 2012th of the Revised Statutes, for the third [or other] voting precinct of the fifteenth [or other] ward of the City of Baltimore, in the said congressional district, for and in respect of the election aforesaid, thereat; that a certain person [naming him] was then and there a special Deputy-Marshall of the United States, duly appointed by the United States Marshal for the Maryland district, pursuant to section 2021 of the Revised Statutes, and assigned for such duty as is provided by that and the following section, to the said precinct of said ward of said city, at the congressional election aforesaid, thereat. Then come the various counts.

The petitioner, Bowers, was convicted on the second count of the indictment against him, which was as follows:

"That the said Henry Bowers, afterwards, to wit: on the day and year aforesaid, at the said voting precinct within the district aforesaid, unlawfully did obstruct, hinder and, by the use of his power and authority as such Judge as aforesaid (which Judge he then and there was), interfere with and prevent the said supervisor of election in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to perform by the law of the United States, in such case made and provided, to wit: that of personally inspecting and scrutinizing, at the beginning of said day of election, and of the said election, the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first voted at said poll of election was put and placed in a ballot-box containing no ballots whatever, contrary to the 5522nd section of said statutes, and against the peace, government and dignity of the United States."

Tucker, who was indicted jointly with one Gude, was convicted upon the second and fifth counts of the indictment against them, which were as follows:

"(2.) That the said Justus J. Gude and the said Walter Tucker afterwards, to wit: on the day and year aforesaid, at the said voting precinct of said ward of said city, unlawfully and by exercise of their power and authority as such Judges as aforesaid, did prevent and hinder the free attendance and presence of the said James N. Schofield (who was then and there such

Deputy-Marshall as aforesaid, in the due execution of his said office), at the poll of said election of and for the said voting precinct, and the full and free access of the same *Deputy-Marshall* to the same poll of election, contrary to the said last mentioned section of said statutes (sec. 5522), and against the peace, government and dignity of the United States.

(5.) That the said *Justus J. Gude* and the said *Walter Tucker*, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid (they being then and there such officers of said election as aforesaid), knowingly and unlawfully at the said election did a certain act, not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of section 5514 of said statutes), which had not been voted at said election in said precinct before the ballots, then and there lawfully deposited in the same ballot-box, had been counted, with intent thereby to affect said election and the result thereof, contrary to section 5515 of said statutes, and against the peace, government and dignity of the United States."

This charge, it will be observed, is for the offense commonly known as "stuffing the ballot-box."

The counts on which the petitioners, *Burns* and *Coleman*, were convicted were similar to those above specified. *Burns* was charged with refusing to allow the supervisor of elections to inspect the ballot-box, or even to enter the room where the polls were held, and with violently resisting the *Deputy-Marshall* who attempted to arrest him, as required by section 2022 of the Revised Statutes. The charges against *Coleman* were similar to those against *Burns*, with the addition of a charge for stuffing the ballot-box. *Siebold* was only convicted on one count of the indictment against him, which was likewise a charge of stuffing the ballot-box.

The sections of the law on which these indictments are founded, and the validity of which is sought to be impeached for unconstitutionality, are summed up by the counsel of the petitioners in their brief as follows (omitting the comments thereon):

The counsel say:

"These cases involve the question of the constitutionality of certain sections of title XXVI., of the Revised Statutes, entitled 'The Elective Franchise.'

Section 2011. The Judge of the Circuit Court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof, prior to any registration of voters for, or any election at which a representative or delegate in Congress is to be voted for, that it is their desire to have such registration or election guarded and scrutinized, shall open the circuit court at the most convenient point in the circuit.

Section 2012. The judge shall appoint two supervisors of election for every election district in such city or town.

Section 2016. The supervisors are authorized and required to attend all times and places

fixed for registration of voters; to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked; to inspect and scrutinize such register of voters; and for purposes of identification to affix their signatures to each page of the original list.

Section 2017. The supervisors are required to attend the times and places for holding elections of representatives or delegates in Congress, and of counting the votes cast; to challenge any vote, the legality of which they may doubt; to be present continually where the ballot-boxes are kept, until every vote cast has been counted, and the proper returns made, required under any law of the United States, or any state, territorial or municipal law; and to personally inspect and scrutinize at any and all times, on the day of election, the manner in which the poll books, registry lists and tallies are kept; whether the same are required by any law of the United States, or any state, territorial or municipal laws.

Section 2021 requires the *Marshal*, whenever any election at which representatives or delegates in Congress are to be chosen, upon application by two citizens in cities or towns of more than twenty thousand inhabitants, to appoint special deputy-marshals, whose duty it shall be to aid and assist the supervisors in the discharge of their duties, and attend with them at all registrations of voters or election at which representatives to Congress may be voted for.

Section 2022 requires the *Marshal*, and his general and special deputies, to keep the peace and protect the supervisors in the discharge of their duties; preserve order at such place of registration and at such polls; prevent fraudulent registration and voting, or fraudulent conduct on the part of any officer of election, and immediately to arrest any person who commits, or attempts to commit, any of the offenses prohibited herein, or any offense against the laws of the United States."

The counsel then refer to and summarize sections 5514, 5515 and 5522 of the Revised Statutes. Section 5514 merely relates to a question of evidence, and need not be copied. Sections 5515 and 5522, being those upon which the indictments are directly framed, are proper to be set out in full. They are as follows:

"Section 5515. Every officer of an election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election, required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures or advises any voter, person or

officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section 5511.

Section 5522. Every person, whether with or without any authority, power or process, or pretended authority, power or process, of any State, Territory or municipality, who obstructs, hinders, assaults, or by bribery, solicitation or otherwise interferes with or prevents the supervisors of election, or either of them, or the Marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at such places of registration; or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election; or in going to and from any such place of registration or poll of election, or to and from any room, where any such registration or election or canvass of votes or of making any returns or certificates thereof, may be had; or who molests, interferes with, removes or ejects from any such place of registration or poll of election, or of canvassing votes cast thereat; or of making returns or certificates thereof, any supervisor of election, the Marshal or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any supervisor of election, or the Marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than \$3,000, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

These portions of the Revised Statutes are taken from the Act commonly known as the Enforcement Act, approved May 31, 1870, 16 Stat. at L., 140, and entitled "An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes;" and from the supplement of that Act, approved February 28, 1871, 16 Stat. at L., 433. They relate to elections of members of the House of Representatives, and were an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history and of the violence, fraud, corruption and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.

The counsel for the petitioners, however, do not deny that Congress may, if it chooses, assume the entire regulation of the elections of

See 10 OTTO.

Representatives; but they contend that it has no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States.

The general positions contended for by the counsel of the petitioners are thus stated in their brief:

"We shall attempt to establish these propositions:

1. That the power to make regulations as to the times, places and manner of holding elections for Representatives in Congress, granted to Congress by the Constitution, is an exclusive power when exercised by Congress.

2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as not to interfere with or come in collision with regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

3. That, when put in operation by Congress, it must take the place of all state regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress."

We are unable to see why it necessarily follows that, if Congress makes *any* regulations on the subject, it must assume exclusive control of the *whole* subject. The Constitution does not say so.

The clause of the Constitution under which the power of Congress, as well as that of the State Legislatures, to regulate the election of Senators and Representatives arises, is as follows: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. After first authorizing the States to prescribe the regulations, it is added: "The Congress may at *any time*, by law, *make or alter* such regulations." "*Make or alter*." What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and National Governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the State Legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it

extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to "make or alter."

Suppose the Constitution of a State should say: "The first Legislature elected under this Constitution may, by law, regulate the election of members of the two Houses; but any subsequent Legislature may make or alter such regulations," could not a subsequent Legislature modify the regulations made by the first Legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not; it could alter or modify, add or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would, so far and so far only, take its place. If consistent with it, both would stand. The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the State Legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same Legislature.

Congress has partially regulated the subject heretofore. In 1842 it passed a law for the election of Representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.

The peculiarity of the case consists in the concurrent authority of the two sovereignties, state and national, over the same subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and interstate commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that state regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding. This subject was largely discussed in the case of *Cooley v. Port Wardens*, 12 How., 299. That was a case of pilotage. In 1789, 1 Stat. at L., 53, Congress had passed a law declaring that all pilots should continue to be regulated in conformity with the laws of the States respectively wherein they should be. Hence, each State continued to administer its own laws, or passed new laws for the regulation of pilots in its harbors. Pennsylvania passed the law then in question in 1803. Yet the Supreme Court held that this was clearly a regulation of commerce; and that the state laws could not be upheld without supposing that, in cases like

that of pilotage, not requiring a national and uniform regulation, the power of the States to make regulations of commerce, in the absence of congressional regulation, still remained. The court held that the power did so remain, subject to those qualifications; and the state law was sustained under that view.

Here, then, is a case of concurrent authority of the State and National Governments, in which that of the latter is paramount. In 1837, Congress interfered with the state regulations on the subject of pilotage, so far as to authorize the pilots of adjoining States, separated only by navigable waters, to pilot ships and vessels into the ports of either State located on such waters. It has since made various regulations respecting pilots taking charge of steam vessels, imposing upon them peculiar duties and requiring of them peculiar qualifications. It seems to us that there can be no doubt of the power of Congress to impose any regulations it sees fit upon pilots, and to subject them to such penalties for breach of duty as it may deem expedient. The States continue, in the exercise of the power, to regulate pilotage subject to the paramount right of the National Government. If dissatisfied with congressional interference, should such interference at any time be imposed, any State might, if it chose, withdraw its regulations altogether, and leave the whole subject to be regulated by Congress. But so long as it continues its pilotage system, it must acquiesce in such additional regulations as Congress may see fit to make.

So in the case of laws for regulating the elections of Representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and National Governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are *pro tanto* superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of

them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the General Government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail; let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the National and State Governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the state officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, state or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce state laws or to punish state officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition this is, undoubtedly, true; but when, in the performance of their functions, state officers are called upon to fulfill duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfillment? Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State Government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, state and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Con-

See 10 OTTO.

gress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a Representative owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are state laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done, if the officers were amenable only to the supervision of the State Government which appointed them.

Another objection made, is, that if Congress can impose penalties for violation of state laws, the officer will be made liable to double punishment for delinquency, at the suit of the State and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided, although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a state law for passing counterfeit coin, which was sought

to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offense, *Mr. Justice Daniel*, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions, both of the state and federal systems, are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other, for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." *Fox v. Ohio*, 5 How., 410. The same Judge, delivering the opinion of the court in the case of *U. S. v. Marigold*, 9 How., 569, where a conviction was had under an Act of Congress for bringing counterfeit coin into the country, said, in reference to *Fox's Case*: "With the view of avoiding conflict between the state and federal jurisdictions, this court, in the case of *Fox v. Ohio*, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal Governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of *Moore v. People of Ill.*, 14 How., 13, in which the plaintiff in error had been convicted, under a state law, for harboring and secreting a negro slave, which was contended to be properly an offense against the United States under the Fugitive Slave Law of 1793, 1 Stat. at L., 302, and not an offense against the State. The objection of double punishment was again raised. *Mr. Justice Grier*, for the court, said: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." Substantially the same views are expressed in *U. S. v. Cruikshank*, 92 U. S., 542 [XXIII., 588], referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State Judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the Act of Congress providing penalties for that offense, even though he might also, under the state laws, be indictable for forgery as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the

office of sealer under a state law, be amenable to the United States as well as to the State?

If the officers of election, in elections for Representatives, owe a duty to the United States, and are amenable to that government as well as to the State, as we think they are, then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of *Ky. v. Dennison*, 24 How., 66 [65 U. S., XVI., 717], is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution, requiring the delivery of fugitives from service, was held to belong to the Government of the United States, to be effected by its own agents; and Congress had no authority to require the Governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend, namely: that in the regulation of elections for representatives the National and State Governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit: that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the National and State Governments in the election of Representatives. It is at most an argument *ab inconvenienti*. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State Government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and, so far as it is exercised and no further, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and National Governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Con-

stitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the State Governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated; that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of Representatives to Congress. If for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with state laws and regulations, with the duties of state officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and National Governments. It seems to be often overlooked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon
 See 10 OTTO.

persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State Government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State Governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State Governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State Governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered, is the objection that the deputy-marshals authorized by the Act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States. Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This, necessarily, involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land."

This concurrent jurisdiction which the National Government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Consti-

tution, it is authorized to exercise over the District of Columbia, and over those places within a State which are purchased by consent of the Legislature thereof, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the National Government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the National Government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation.

The argument is based on a strained and impracticable view of the nature and powers of the National Government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons. And, to do this, it must, necessarily, have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of Representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and if the power exists in the one case, it exists in the other.

The next point raised is, that the Act of Con-

gress proposes to operate on officers or persons authorized by state laws to perform certain duties under them, and to require them to disobey and disregard state laws when they come in conflict with the Act of Congress; that it thereby of necessity produces collision and is, therefore, void. This point has been already fully considered. We have shown, as we think, that, where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject cease to have effect as laws.

Finally; it is objected that the Act of Congress imposes upon the circuit court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the Courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

The Constitution declares that "The Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The Marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of *Hennen*, to which reference is made, *Ex parte Hennen*, 13 Pet., 258, that the appointing power in the clause referred to "Was, no doubt, intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The Law of 1792, 1 Stat. at L., 243, which required the circuit courts to examine claims to revolutionary

pensions, and the Law of 1849, 9 Stat. at L., 414, authorizing the District Judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American Army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depository of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts.

The doctrine laid down at the close of counsels' brief, that the State and National Governments are co ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for the writ of *habeas corpus* must be denied.

The application is denied accordingly.

Mr. Justice Field, dissenting:

I cannot assent to the decision of the majority of the court in these cases [Nos. 6 and 7 Orig.], and I will state the reasons of my dissent. One of the six petitioners is a citizen of Ohio, and the other five are citizens of Maryland. They all seek a discharge from imprisonment imposed by judgments of Federal Courts for alleged official misconduct as Judges of Election in their respective States.

At an election held in the First Congressional District of Ohio, in October, 1878, at which a Representative in Congress was voted for, the petitioner from that State was appointed under its laws, and acted as a Judge of Election at a precinct in one of the wards of the City of Cincinnati. At an election held in the Fourth and Fifth Congressional Districts of Maryland, in November, 1878, at which a Representative in Congress was voted for, the petitioners from that State were appointed under its laws, and

acted as Judges of Election at different precincts in the wards of the City of Baltimore. For alleged misconduct as such officers of election the petitioners were indicted in the Circuit Courts of the United States for their respective Districts, tried, convicted and sentenced to imprisonment for twelve months and, in some of the cases, also to pay a fine.

In what I have to say I shall confine myself principally to the case of the petitioner from Ohio; the other cases will be incidentally considered. In that case, the petitioner is charged with having violated a law of the State. In the cases from Maryland, the petitioners are charged with having prevented federal officers from interfering with them and supervising their action in the execution of the laws of the State. The principle which governs one will dispose of all of them; for if Congress cannot punish an officer of a State for the manner in which he discharges his duties under her laws, it cannot subject him to the supervision and control of others in the performance of such duties, and punish him for resisting their interference. In the cases from Maryland, it appears that the laws of the State, under which the petitioners were appointed Judges of Election, and the registration of voters for the election of 1878 was made, were not in existence when the Act of Congress was passed providing for the appointment of supervisors to examine the registration and scrutinize the lists, and of special deputy-marshals to aid and protect them. The Act of Congress was passed in 1871, 16 Stat. at L., 433, and republished in the Revised Statutes, which are declaratory of the law in force, December 1, 1873, p. 1. The law of Maryland, under which the registration of voters was had, was enacted in 1874, and the law under which the Judges of Election were appointed was enacted in 1876, and these Judges were required to possess different qualifications from those required of Judges of Election in 1871 and 1873.

In all the cases the petitioners are imprisoned under the judgments against them; and each one insisting that the circuit court, in his case, acted without jurisdiction, and that his imprisonment is, therefore, unlawful and subversive of his rights as a citizen, has petitioned this court for a writ of *habeas corpus*, annexing to his petition a transcript of the record of the proceedings against him; and prays that he may be released from restraint.

It has been settled by this court that the writ of *habeas corpus* is one of the modes by which its appellate jurisdiction will be exercised, in cases where it is alleged that by the action of an inferior tribunal a citizen of the United States has been unlawfully deprived of his personal liberty; and, if necessary, that a *certiorari* will be issued with the writ to bring up for examination the record of the proceedings of the inferior tribunal. In such cases, we look into that record to see, not whether the court erred in its rulings, but whether it had jurisdiction to impose the imprisonment complained of. If it had jurisdiction, our examination ends, and the case must await determination in the ordinary course of procedure on writ of error or appeal, should the case be one which can thus be brought under our review. But if the court below was without jurisdiction of the matter upon which the judgment of imprisonment was

rendered, or if it exceeded its jurisdiction in the extent of the imprisonment imposed, this court will interfere and discharge the petitioner. If, therefore, the Act of Congress, in seeking to impose a punishment upon a state officer in one of these cases for disobeying a law of the State, and in the other cases for resisting the interference of federal officials with the discharge of his duties under such law, is unconstitutional and void, the judgments of the circuit courts are unlawful and the petitioners should be released.

I do not regard the presentation by the petitioner from Ohio of his petition to one of the Justices of the court in the first instance as a fact at all affecting his case. His petition is addressed to this court, and though the Justice, who allowed the writ, directed that it should be returnable before himself, he afterwards ordered the hearing upon it to be had before this court. The petition may, therefore, with propriety, be treated as if presented to us in the first instance. Irregularities in that regard should not be allowed to defeat its purpose, the writ being designed for the security of the personal liberty of the citizen.

The Act of Congress, upon which the indictment of the petitioner from Ohio was founded, is contained in section 5515 of the Revised Statutes, which declares that "Every officer of an election, at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized with intent to affect any such election or the result thereof, * * * shall be punished as prescribed" in a previous section; that is, by a fine not exceeding \$1,000, or imprisonment not more than one year, or by both.

The indictment contains three counts, the third of which was abandoned. The first count charges unlawful neglect on the part of the accused to perform a duty required of him by the laws of the State, in not carrying to the clerk of the Court of Common Pleas one of the poll-books of the election, covered and sealed by the Judges of Election, with which he was intrusted by them for that purpose. The second count charges the violation of a duty required of him by the laws of the State in permitting one of the poll-books, covered and sealed, intrusted to him by the Judges of Election to carry to the clerk of the Court of Common Pleas, to be broken open before he conveyed it to that officer.

The law of Ohio, to which reference is had in the indictment, provides that after the votes at an election are canvassed "The judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise), to the clerk of the Court of Common Pleas of

the county, at his office, within two days from the day of the election."

The provisions of the Act of Congress relating to the appointment of supervisors of election, the powers with which they are intrusted, and the aid to be rendered them by marshals and special deputy-marshals, for resisting and interfering with whom the petitioners from Maryland have been condemned and are imprisoned, are stated in the opinion of the court. It is sufficient to observe that they authorize the supervisors to supervise the action of the state officers from the registration of voters down to the close of the polls on the day of election; require the marshals to aid and protect them, and provide for the appointment of special deputy-marshals in towns and cities of over twenty thousand inhabitants; and they invest those federal officers with a power, to arrest and take into custody persons without process, more extended than has ever before in our country in time of peace been intrusted to anyone.

In what I have to say I shall endeavor to show: 1. That it is not competent for Congress to punish a state officer for the manner in which he discharges duties imposed upon him by the laws of the State, or to subject him in the performance of such duties to the supervision and control of others, and punish him for resisting their interference; and, 2. That it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States.

There is no doubt that Congress may adopt a law of a State, but in that case the adopted law must be enforced as a law of the United States. Here there is no pretense of such adoption. In the case from Ohio it is for the violation of a state law, not a law of the United States that the indictment was found. The judicial power of the United States does not extend to a case of that kind. The Constitution defines and limits that power. It declares that it shall extend to cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; to cases affecting ambassadors, other public ministers and consuls; to cases of admiralty and maritime jurisdiction, and to various controversies to which the United States or a State is a party; or between citizens of different States or citizens of the same State claiming lands under grants of different States; or between citizens of a State and any foreign State, citizens or subjects. The term "controversies," as here used, refers to such only as are of a civil as distinguished from those of a criminal nature. The judicial power thus defined may be applied to new cases as they arise under the Constitution and laws of the United States, but it cannot be enlarged by Congress so as to embrace cases not enumerated in the Constitution. It has been so held by this court from the earliest period. It was so adjudged in 1803 in *Marbury v. Madison* [1 Cranch, 137], and the adjudication has been affirmed in numerous instances since. This limitation upon Congress would seem to be conclusive of the case from Ohio. To authorize a criminal prosecution in the Federal Courts for an offense against a law of a State is to extend the judicial power of the United States to a case not arising under the Constitution or laws of the United States.

But there is another view of this subject which is equally conclusive against the jurisdiction of the Federal Court. The Act of Congress asserts a power inconsistent with and destructive of the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence. If the Federal Government can punish a violation of the laws of the State, it may punish obedience to them, and graduate the punishment according to its own judgment of their propriety and wisdom. It may thus exercise a control over the legislation of the States subversive of all their reserved rights. However large the powers conferred upon the government formed by the Constitution, and however numerous its restraints, the right to enforce their own laws by such sanctions as they may deem appropriate is left, where it was originally, with the States. It is a right which has never been surrendered. Indeed, a State could not be considered as independent in any matter, with respect to which its officers, in the discharge of their duties, could be subjected to punishment by any external authority; nor in which its officers, in the execution of its laws, could be subject to the supervision and interference of others.

The invalidity of coercive measures by the United States, to compel an officer of a State to perform a duty imposed upon him by a law of Congress, is asserted, in explicit terms, in the case of *Ky. v. Dennison*, 24 How., 66 [65 U. S., XVI., 717]. The Constitution declares that "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." And the Act of Congress of 1793, 1 Stat. at L., 302, to give effect to this clause, made it the duty of the executive authority of the State, upon the demand mentioned, and the production of a properly authenticated copy of the indictment or affidavit charging the person demanded with the commission of treason, felony or other crime, to surrender the fugitive. The Governor of Ohio having refused, upon a proper demand, to surrender a fugitive from justice from Kentucky, the Governor of the latter State applied to this court for a *mandamus* to compel the performance of that duty. But the court, after observing that, though the words, "It shall be the duty," in ordinary legislation implied the assertion of the power to command and to cause obedience, said, that, looking to the subject-matter of the law and "The relations which the United States and the several States bear to each other," it was of opinion that the words were not used as mandatory and compulsory, but as declaratory of the moral duty created, when Congress had provided the mode of carrying the provision into execution. "The Act does not provide," the court added, "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power.

Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State. It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that, in using this word 'duty,' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over state officers not warranted by the Constitution." And again; "If the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him."

If it be incompetent for the Federal Government to enforce by coercive measures the performance of a plain duty, imposed by a law of Congress upon the executive officer of a State, it would seem to be equally incompetent for it to enforce by similar measures the performance of a duty imposed upon him by a law of a State. If Congress cannot impose upon a state officer, as such, the performance of any duty, it would seem logically to follow that it cannot subject him to punishment for the neglect of such duties as the State may impose. It cannot punish for the non-performance of a duty which it cannot prescribe. It is a contradiction in terms to say that it can inflict punishment for disobedience to an Act the performance of which it has no constitutional power to command.

I am not aware that the doctrine of this case, which is so essential to the harmonious working of the State and Federal Governments, has ever been qualified or departed from by this court, until the recent decisions in the *Virginia* cases, of which I shall presently speak. It is true that, at an early period in the history of the government, laws were passed by Congress, authorizing State Courts to entertain jurisdiction of proceedings by the United States, to enforce penalties and forfeitures under the revenue laws, and to hear allegations and take proofs, if application were made for their remission. To these laws reference is made in the *Kentucky* case; and the court observes that the powers which they conferred were for some years exercised by the state tribunals, without objection, until, in some of the States, their exercise was declined because it interfered with and retarded the performance of duties which properly belonged to them as State Courts; and in other States because doubts arose as to the power of State Courts to inflict penalties and forfeitures for offenses against the General Government, unless specially authorized to do so by the States; and that the cooperation of the States in those cases was a matter of comity which the several sovereignties

extended to one another for their mutual benefit, and was not regarded by either party as an obligation imposed by the Constitution.

It is to be observed that, by the Constitution, the demand for the surrender of a fugitive is to be made by the executive authority of the State from which he has fled; but it is not declared upon whom the demand shall be made. That was left to be determined by Congress; and it provided that the demand should be made upon the Executive of the State where the fugitive was found. It might have employed its own agents, as in the enforcement of the Fugitive Slave Law, and compelled them to act. But, in both cases, if it employed the officers of the State, it could not restrain nor coerce them.

Whenever, therefore, the Federal Government, instead of acting through its own officers, seeks to accomplish its purposes through the agency of officers of the States, it must accept the agency with the conditions upon which the officers are permitted to act. For example, the Constitution invests Congress with the "Power to establish a uniform rule of naturalization;" and this power, from its nature, is exclusive. A concurrent power in the States would prevent the uniformity of regulations required on the subject. *Chirac v. Chirac*, 2 Wheat., 259; The Federalist, No. 42. Yet Congress, in legislating under this power, has authorized courts of record of the States to receive declarations under oath, by aliens, of their intention to become citizens, and to admit them to citizenship, after a limited period of residence, upon satisfactory proof as to character and attachment to the Constitution. But, when Congress prescribed the conditions and proof upon which aliens might, by the action of the state courts, become citizens, its power ended. It could not coerce the State Courts to hold sessions for such applications, nor fix the time when they should hear the applicants, nor the manner in which they should administer the required oaths, nor regulate in any way their procedure. It could not compel them to act by *mandamus* from its own tribunals, nor subject their judges to criminal prosecution for their non-action. It could accept the agency of those courts only upon such terms as the States should prescribe. The same thing is true in all cases where the agency of state officers is used; and this doctrine applies with special force to Judges of Elections, at which numerous state officers are chosen at the same time with Representatives to Congress. So far as the election of state officers and the registration of voters for their election are concerned, the Federal Government has confessedly no authority to interfere. And yet the supervision of and interference with the state regulations, sanctioned by the Act of Congress, when Representatives to Congress are voted for, amount, practically, to a supervision of and an interference with the election of state officers, and constitute a plain encroachment upon the rights of the States, which is well calculated to create irritation towards the Federal Government, and disturb the harmony that all good and patriotic men should desire to exist between it and the State Governments.

It was the purpose of the framers of the Constitution to create a government which could enforce its own laws, through its own officers

and tribunals, without reliance upon those of the States, and thus avoid the principal defect of the Government of the Confederation; and they fully accomplished their purpose, for, as said by Chief Justice Marshall, in the *McCulloch Case*, "No trace is to be found in the Constitution of an intention to create a dependence of the Federal Government on the governments of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends." When, therefore, the Federal Government desires to compel, by coercive measures and punitive sanctions, the performance of any duties devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted. If it sees fit to intrust the performance of such duties to officers of a State, it must take their agency, as already stated, upon the conditions which the State may impose. The co-operative scheme to which the majority of the court give their sanction, by which the General Government may create one condition and the States another, and each make up for and supplement the omissions or defects in the legislation of the other, touching the same subject, with its separate penalties for the same offense, and thus produce a harmonious mosaic of statutory regulation, does not appear to have struck the great jurist as a feature in our system of government or one that had been sanctioned by its founders.

It is true that, since the recent Amendments of the Constitution, there has been legislation by Congress asserting, as in the instance before us, a direct control over state officers, which previously was never supposed to be compatible with the independent existence of the States in their reserved powers. Much of that legislation has yet to be brought to the test of judicial examination; and, until the recent decisions in the *Virginia* cases, I could not have believed that the former carefully considered and repeated judgments of this court upon provisions of the Constitution, and upon the general character and purposes of that instrument, would have been disregarded and overruled. These decisions do, indeed, in my judgment, constitute a new departure. They give to the Federal Government the power to strip the States of the right to vindicate their authority in their own courts against a violator of their laws, when the transgressor happens to be an officer of the United States, or alleges that he is denied or cannot enforce some right under their laws. And they assert, for the Federal Government, a power to subject a judicial officer of a State to punishment for the manner in which he discharges his duties under her laws. The power to punish at all existing, the nature and extent of the punishment must depend upon the will of Congress, and may be carried to a removal from office. In my judgment, and I say it without intending any disrespect to my associates, no such advance has ever before been made toward the conversion of our federal system into a consolidated and centralized government. I cannot think that those who framed and advocated, and the States which adopted the Amendments, contemplated any such fundamental change in our theory of government as those decisions indicate. Prohibitions against legislation on

particular subjects previously existed, as, for instance, against passing a bill of attainder and an *ex post facto* law, or a law impairing the obligation of contracts; and, in enforcing those prohibitions, it was never supposed that criminal prosecutions could be authorized against members of the State Legislature for passing the prohibited laws, or against members of the state judiciary for sustaining them, or against executive officers for enforcing the judicial determinations. Enactments prescribing such prosecutions would have given a fatal blow to the independence and autonomy of the States. So, of all or nearly all the prohibitions of the recent amendments, the same doctrine may be asserted. In few instances could legislation by Congress be deemed appropriate for their enforcement, which should provide for the annulment of prohibited laws in any other way than through the instrumentality of an appeal to the judiciary, when they impinged upon the rights of parties. If in any instance there could be such legislation authorizing a criminal prosecution for disregarding a prohibition, that legislation should define the offense and declare the punishment, and not invade the independent action of the different departments of the State Governments within their appropriate spheres. Legislation by Congress can neither be necessary nor appropriate which would subject to criminal prosecution state officers, for the performance of duties prescribed by state laws, not having for their object the forcible subversion of the government.

The clause of the Constitution, upon which reliance was placed by counsel on the argument, for the legislation in question, does not, as it seems to me, give the slightest support to it. That clause declares that "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators." The power of Congress thus conferred is either to alter the regulations prescribed by the State or to make new ones; the alteration or new creation embracing every particular of time, place and manner, except the place of choosing Senators. But in neither mode nor in any respect has Congress interfered with the regulations prescribed by the Legislature of Ohio, or with those prescribed by the Legislature of Maryland. It has not altered them nor made new ones. It has simply provided for the appointment of officers to supervise the execution of the state laws, and of marshals to aid and protect them in such supervision, and has added a new penalty for disobeying those laws. This is not enforcing an altered or a new regulation. Whatever Congress may properly do touching the regulations, one of two things must follow: either the altered or the new regulation remains a state law, or it becomes a law of Congress. If it remain a state law, it must, like other laws of the State, be enforced, through its instrumentalities and agencies, and with the penalties which it may see fit to prescribe, and without the supervision or interference of federal officials. If, on the other hand, it become a law of Congress, it must be carried into execution by such officers and with such sanctions as Congress may desire. See 10 OTTO.

ignite. But as Congress has not altered the regulations for the election of Representatives prescribed by the Legislature of Ohio or of Maryland, either as to time, place or manner, nor adopted any regulations of its own, there is nothing for the Federal Government to enforce on the subject. The general authority of Congress to pass all laws necessary to carry into execution its granted powers, supposes some attempt to exercise those powers. There must, therefore, be some regulations made by Congress, either by altering those prescribed by the State or by adopting entirely new ones, as to the times, places and manner of holding elections for Representatives, before any incidental powers can be invoked to compel obedience to them. In other words, the implied power cannot be invoked until some exercise of the express power is attempted, and then only to aid its execution. There is no express power in Congress to enforce state laws by imposing penalties for disobedience to them; its punitive power is only implied as a necessary or proper means of enforcing its own laws; nor is there any power delegated to it to supervise the execution, by state officers, of state laws.

If this view be correct, there is no power in Congress, independently of all other considerations, to authorize the appointment of supervisors and other officers to superintend and interfere with the election of Representatives under the laws of Ohio and Maryland, or to annex a penalty to the violation of those laws, and the action of the circuit courts was without jurisdiction and void. The Act of Congress in question was passed, as it seems to me, in disregard of the object of the constitutional provision. That was designed simply to give to the general government the means of its own preservation against a possible dissolution, from the hostility of the States to the election of Representatives or from their neglect to provide suitable means for holding such elections. This is evident from the language of its advocates, some of them members of the Convention, when the Constitution was presented to the country for adoption. In commenting upon it in his report of the debates, Mr. Madison said that it was meant "To give the National Legislature a power not only to alter the provisions of the States, but to make regulations, *in case the States should fail or refuse altogether.*" Elliott, Deb., 402. And in the Virginia Convention, called to consider the Constitution, he observed that "It was found impossible to fix the time, place and manner of the election of Representatives in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the State Governments, as being best acquainted with the situation of the people, subject to the control of the General Government, in order to enable it to *produce uniformity and prevent its own dissolution.*" 3 Elliott, Deb., 367. And in the Federalist, Hamilton said that the propriety of the clause in question rested "Upon the evidence of the plain proposition that every government should contain in itself the means of its own preservation."

Similar language is found in the debates in the conventions of the other States and in the writings of jurists and statesmen of the period. The conduct of Rhode Island was referred to as illustrative of the evils to be

avoided. That State was not represented by delegates in Congress for years, owing to the character and views of the prevailing party; and Congress was often embarrassed by their absence. The same evil, it was urged, might result from a similar cause, and Congress should, therefore, possess the power to give the People an opportunity of electing Representatives if the States should neglect or refuse to make the necessary regulations.

In the conventions of several States which ratified the Constitution, an amendment was proposed to limit in express terms the action of Congress to cases of neglect or refusal of a State to make proper provisions for congressional elections, and was supported by a majority of the thirteen States; but it was finally abandoned upon the ground of the great improbability of congressional interference, so long as the States performed their duty. When Congress does interfere and provide regulations, the duty of rendering them effectual, so far as they may require affirmative action, will devolve solely upon the Federal Government. It will then be federal power which is to be exercised, and its enforcement, if promoted by punitive sanctions, must be through federal officers and agents; for, as said by *Mr. Justice Story* in *Prigg v. Pa.*, 16 Pet., 539, "The National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, Legislative, Judicial or Executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution." If state officers and state agents are employed, they must be taken, as already said, with the conditions upon which the States may permit them to act, and without responsibility to the federal authorities. The power vested in Congress is to alter the regulations prescribed by the Legislatures of the States, or to make new ones, as to the times, places and manner of holding the elections. Those which relate to the times and places will seldom require any affirmative action beyond their designation. And regulations as to the manner of holding them cannot extend beyond the designation of the mode in which the will of the voters shall be expressed and ascertained. The power does not authorize Congress to determine who shall participate in the election, or what shall be the qualification of voters. These are matters not pertaining to or involved in the manner of holding the election, and their regulation rests exclusively with the States. The only restriction upon them with respect to these matters is found in the provision that the electors of Representatives in Congress shall have the qualifications required for electors of the most numerous branch of the State Legislature, and the provision relating to the suffrage of the colored race. And whatever regulations Congress may prescribe as to the manner of holding the election for Representatives must be so framed as to leave the election of state officers free, otherwise they cannot be maintained. In one of the numbers of the *Federalist*, *Mr. Hamilton*, in defending the adoption of the clause in the Constitution, uses this language: "Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to

condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State Governments? The violation of principle in this case would have required no comment." By the Act of Congress sustained by the court, an interference with state elections is authorized, almost as destructive of their control by the States as the direct regulation which he thought no man would hesitate to condemn.

The views expressed derive further support from the fact that the constitutional provision applies equally to the election of Senators, except as to the place of choosing them, as it does to the election of Representatives. It will not be pretended that Congress could authorize the appointment of supervisors to examine the roll of members of State Legislatures and pass upon the validity of their titles, or to scrutinize the balloting for Senators; or could delegate to special deputy marshals the power to arrest any member resisting and repelling the interference of the supervisors. But if Congress can authorize such officers to interfere with the Judges of Election appointed under state laws in the discharge of their duties when Representatives are voted for, it can authorize such officers to interfere with members of the State Legislatures when Senators are voted for. The language of the Constitution conferring power upon Congress to alter the regulations of the States or to make new regulations on the subject, is as applicable in the one case as in the other. The objection to such legislation in both cases is that state officers are not responsible to the Federal Government for the manner in which they perform their duties, nor subject to its control. Penal sanctions and coercive measures by federal law cannot be enforced against them. Whenever, as in some instances is the case, a state officer is required by the Constitution to perform a duty, the manner of which may be prescribed by Congress, as in the election of Senators by members of State Legislatures, those officers are responsible only to their States for their official conduct. The Federal Government cannot touch them. There are remedies for their disregard of its regulations, which can be applied without interfering with their official character as state officers. Thus if its regulations for the election of Senators should not be followed, the election had in disregard of them might be invalidated; but no one, however extreme in his views, would contend that in such a case the members of the Legislature could be subjected to criminal prosecution for their action. With respect to the election of Representatives, so long as Congress does not adopt regulations of its own and enforce them through federal officers, but permits the regulations of the States to remain, it must depend for a compliance with them upon the fidelity of the state officers and their responsibility to their own government. All the provisions of the law, therefore, authorizing supervisors and marshals to interfere with those officers in the discharge of their duties, and providing for criminal prosecutions against them in the Federal Courts, are, in my judgment, clearly in conflict with the Constitution. The law was adopted, no doubt, with the object of preventing frauds at elections for members of Congress, but it does not seem to have occurred to its authors that the States are as

much interested as the General Government in guarding against frauds at those elections and in maintaining their purity, and, if possible, more so, as their principal officers are elected at the same time. If fraud be successfully perpetrated in any case, they will be the first and the greatest sufferers. They are invested with the sole power to regulate domestic affairs of the highest moment to the prosperity and happiness of their people, affecting the acquisition, enjoyment, transfer and descent of property; the marriage relation, and the education of children; and if such momentous and vital concerns may be wisely and safely intrusted to them, I do not think that any apprehension need be felt if the supervision of all elections in their respective States should also be left to them.

Much has been said in argument of the power of the General Government to enforce its own laws, and in so doing to preserve the peace, though it is not very apparent what pertinency the observations have to the questions involved in the cases before us. No one will deny that in the powers granted to, it the General Government is supreme, and that, upon all subjects within their scope, it can make its authority respected and obeyed throughout the limits of the Republic; and that it can repress all disorders and disturbance which interfere with the enforcement of its laws. But I am unable to perceive in this fact, which all sensible men acknowledge, any cause for the exercise of ungranted power. The greater its lawful power, the greater the reason for not usurping more. Unrest, disquiet and disturbance will always arise among a People, jealous of their rights, from the exercise by the General Government of powers which they have reserved to themselves or to the States.

My second proposition is, that it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States. The Act, upon which the indictment of the petitioner from Ohio is founded, makes the neglect or violation of a duty prescribed by a law of the State, in regard to an election at which a Representative in Congress is voted for, a criminal offense. It does not say that the neglect or disregard of a duty prescribed by any *existing* law shall constitute such an offense. It is the neglect or disregard of *any duty* prescribed by *any law* of the State *present or future*. The Act of Congress is not changed in terms with the changing laws of the State; but its penalty is to be shifted with the shifting humors of the State Legislatures. I cannot think that such punitive legislation is valid, which varies, not by direction of the federal legislators, upon new knowledge or larger experience, but by the direction of some external authority which makes the same act lawful in one State and criminal in another, not according to the views of Congress as to its propriety, but to those of another body. The Constitution vests all the legislative power of the Federal Government in Congress; and from its nature this power cannot be delegated to others, except as its delegation may be involved by the creation of an inferior local government or department. Congress can endow territorial governments and municipal corporations with legislative powers, as the possession of such powers for certain purposes of local administration is indispensable to their

See 10 OTTO.

existence. So, also, it can invest the heads of departments and of the army and navy with power to prescribe regulations to enforce discipline, order and efficiency. Its possession is implied in their creation; but legislative power over subjects which come under the immediate control of Congress, such as defining offenses against the United States, and prescribing punishment for them cannot be delegated to any other government or authority. Congress cannot, for example, leave to the States the enactment of laws and restrict the United States to their enforcement. There are many citizens of the United States in foreign countries, in Japan, China, India and Africa. Could Congress enact that a crime against one of those States should be punished as a crime against the United States? Can Congress abdicate its functions and depute foreign countries to act for it? If Congress cannot do this with respect to offenses against those States, how can it enforce penalties for offenses against any other States, though they be of our own Union? If Congress could depute its authority in this way; if it could say that it will punish as an offense what another power enacts as such, it might do the same thing with respect to the commands of any other authority, as, for example, of the President or the head of a department. It could enact that what the President proclaims shall be law; that what he declares to be offenses shall be punished as such. Surely no one will go so far as this, and yet I am unable to see the distinction in principle between the existing law and the one I suppose, which seems so extravagant and absurd.

I will not pursue the subject further, but those who deem this question at all doubtful or difficult, may find something worthy of thought in the opinions of the Court of Appeals of New York and of the Supreme Courts of several other States, where this subject is treated with a fullness and learning which leaves nothing to be improved and nothing to be added.

I am of opinion that the Act of Congress was unauthorized and invalid; that the indictment of the petitioner from Ohio, and also the indictments of the petitioners from Maryland and their imprisonment are illegal, and that, therefore, they should all be set at liberty; and I am authorized to say that *Mr. Justice Clifford* concurs with me.

Cited—100 U. S., 401; 104 U. S., 612; 108 U. S., 553; 109 U. S., 66; 110 U. S., 662; 112 U. S., 186; 26 Minn., 518; 57 Cal., 609; 40 Am. Rep., 130.

UNITED STATES, *ex rel.* ALLEN C. PHILLIPS ET AL., *Plffs.*,

v.

JAMES L. GAINES, COMPTROLLER OF THE STATE OF TENNESSEE.

Costs in criminal proceedings—Tennessee law—mandamus.

1. Costs in criminal proceedings are a creature of statute and a court has no power to award them unless some statute has conferred it. By the common law the State pays no costs.

2. In Tennessee, by statute, defendant's costs in criminal cases, where the defendant is discharged, are payable out of the Treasury of the State.

3. A *mandamus* will not be issued to compel the State Comptroller to issue his warrant to the State Treasurer for the payment of the costs in such a case until the costs have been taxed and certified as required by law, nor if the bill contains costs for which the State is not liable.

[No. 109.]

Submitted Dec. 16, 1879. Decided Mar. 15, 1880.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Middle District of Tennessee.

The case is stated by the court.

Messrs. John P. Murray and Benton McMillin, for plaintiffs.

No counsel appeared for defendant.

Mr. Justice Strong delivered the opinion of the court:

This case comes before us by writ of error, in a case where there was a certificate of division between the Judges of the Circuit Court for the Middle District of Tennessee.

It is a petition for a *mandamus* to the Comptroller of the State, commanding him to issue his warrant to the State Treasurer for the payment of a bill of costs of an indictment against Phillips, one of the relators, and others not named.

The petition represents that, on the 10th of October, 1870, the petitioner, Phillips, and others were indicted in the County of Putnam for the murder of one Stephen Ford; that, after his arrest, the said Phillips presented his petition to the state court, praying for a removal of the indictment into the Circuit Court of the United States, under and by virtue of the Acts of Congress of March 3, 1863, May 11, 1866, and February 5, 1867; that the state court ordered and adjudged that the cause should be thus transferred, and that copies of the record and all proceedings in that court were made and duly filed in the said United States Circuit Court. The petition further represents that the circuit court took cognizance of the case until 1874, when the State of Tennessee, by her attorney, appeared and dismissed the case, agreeing that the costs should be adjudged against the State; that the court accordingly rendered such a judgment, and that a warrant for the payment of the costs had been demanded from the Comptroller and refused.

A portion of the record of the indictment and of the proceedings thereon, including what purports to be a bill of costs and the judgment of the court, certified by the clerk and made an exhibit, is appended to the petition. It is evidently incomplete. It does not contain the petition filed in the state court for the removal of the cause. The brief of the plaintiff in error, however, states that the killing, for which Phillips was indicted, was an act of war and in battle; that the petitioner adhered to the cause of the Government, and that Ford, the person killed, was a belligerent and soldier in the army of the rebellion. These averments are not denied, and if they were made in the petition it may be assumed that the indictment was removable and properly removed under the Act of Congress, and that the circuit court obtained jurisdiction of it.

The record, made, as we have stated, an exhibit, of the petition for a *mandamus*, shows that in the circuit court the State of Tennessee en-

tered a *nolle prosequi* to the indictment, and that thereupon the court considered that the defendant, Phillips, be dismissed and go without day; that the State pay the costs of prosecution, and that the same be certified to the Comptroller for payment. It also shows that a bill of costs, including not merely the costs of prosecution but the defendant's costs, was presented to the Comptroller, and that a warrant upon the Treasurer therefor was demanded, but was refused.

To this petition for a *mandamus*, the defense set up by the Comptroller was twofold: first, that the Circuit Court of the United States had no power to render the judgment for costs against the State of Tennessee; second, that the court had no power to enforce the collection of the judgment for costs by *mandamus*, by reason of the facts averred in the petition, the defendant being an officer of the State, and the court having no power to control his action. For these reasons the court refused to grant the writ, and that refusal is now assigned for error. We are not, however, called upon to consider them, in view of the facts of the case as they are made to appear.

Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it. By the common law, the public pays no costs. In England, the King does not, and the State stands in place of the King. This is the rule in the State of Tennessee. *Mooney v. State*, 2 Yerg., 578. But in that State, statutes have changed the rule. The Act of 1827, ch. 36, Hay & Cobb, 54, enacted as follows: "In all criminal cases, above the grade of petit larceny, originating in the circuit courts, where the defendant may be acquitted, and in all cases where the defendant may be convicted and shall prove insolvent and unable to pay the costs, the same shall be paid out of the Treasury of the State." Before that Act, in cases of acquittal by the verdict of a jury, costs were to be adjudged against the county. Act, 1813, ch. 136, sec. 3.

The Act of 1827 had no application to costs in cases ended by a *nolle prosequi*. But an Act passed in 1832, chapter 8, section 2, enacted that in all prosecutions for offenses subjecting the offender to confinement in the jail and penitentiary house of the State, in which a *nolle prosequi* shall be entered, or the defendant or defendants in such prosecution shall be otherwise discharged, the costs of such prosecution shall be paid by the State in the same manner and under the same provisions as in cases where the defendant or defendants may be acquitted by the verdict of a jury. The indictment against Phillips was such a case. Conceding, then, that the costs of the prosecution in that case were chargeable to the State, was the Comptroller bound to issue his warrant for the bill presented to him? It is made his duty, by the law of the State, to examine and adjust all accounts and claims against the State, which are, by law, to be paid out of the Treasury, and to draw warrants upon the Treasury for the sums which, upon such examination and adjustment, may be found due from the State. Civil Code, sec. 207. But the statutes of the State make some special provisions respecting costs. Before the Comptroller can issue a warrant for their payment, a bill of fees and costs

must be presented to him in legal form, and it must be shown that all the preliminary requisites of the law have been complied with. *State v. Delap*, Peck, 91. An examination of the state statutes will reveal what these preliminary requisites are. Section 5569, Thompson and Steger's Compilation, declares that the costs chargeable upon the State or county in criminal cases shall be made out so as to show the specific items, and be examined and entered of record and certified to be correct, by the court or judge before whom the cause was tried or disposed of, and also by the district attorney. Section 5579 directs that a copy of the judgment and bill of costs, certified by the clerk of the court and by the Attorney-General and judge, shall be presented to the Comptroller, etc., * * * by the clerk or some person authorized by him, in writing, to receive the same, whereupon a warrant shall issue for the amount. Provisions somewhat similar are found in sections 5571 and 5572.

In the present case it does not appear that these prerequisites to a comptroller's warrant had been complied with. The bill of costs had not been taxed, nor had it been examined and certified by the circuit court, nor by the Attorney-General or district attorney, and it contained the costs of the defendant, for which the State is not liable.

Though, therefore, the costs of the prosecution are undoubtedly a debt of the State, for which the Comptroller may be compelled to draw a warrant upon the State Treasurer, the demand made upon him by the relators was unauthorized by law; and, consequently, the *mandamus* was properly refused.

The judgment of the Circuit Court is affirmed.

ABEL H. PIERCE ET AL., *Plffs. in Err.*,

v.

SPENCER P. WADE.

(See S. C., 10 Otto, 444, 445.)

Jurisdiction as to value.

Where the plaintiff in a replevin suit recovered all the property sued for, except a portion which was found to be of the value of \$1,400, for the return or value of which defendants had judgment, and the plaintiffs brought the case by writ of error to this court, the matter in dispute is only of the value of \$1,400, and this court has no jurisdiction.

[No. 187.]

Submitted Mar. 9, 1880. Decided Mar. 15, 1880.

IN ERROR to the Circuit Court of the United States for the District of Kansas.

The case is sufficiently stated by the court.

Messrs. L. C. Slavens, Wallace Pratt and Nelson Cobb, for plaintiffs in error.

No counsel appeared for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit in replevin, brought by the plaintiffs in error to recover a large number of cattle, branded in a particular way. In executing the writ, the marshal, by mistake, took from the defendant sixty-two head of Texas steers, not having the proper brand, and delivered them with the other cattle to the plaintiff,

See 10 OTTO.

on receiving the requisite bond. On the trial, it was found that the plaintiffs were the owners, and entitled to the immediate possession of all thus delivered over to them, except the Texas steers, taken by mistake. It was thereupon adjudged that they "Have and recover from the said defendant the possession of all the cattle, * * * except sixty-two head of Texas steers;" and, as to these, it was adjudged that they be returned by the plaintiffs to the defendant, or if that could not be done, "That the defendant have and recover from the plaintiffs the said sum of \$1,400, the value thereof." From that judgment the plaintiffs below have taken this writ of error.

Upon this state of facts it is clear we have no jurisdiction. The matter in dispute is the sixty-two head of Texas steers, the value of which is only \$1,400. The plaintiffs recovered everything else which they claimed, and the judgment against them is less than \$5,000. We have always held that when a case is brought here by the defendant below, the amount of the recovery against him is the measure of our jurisdiction, except when he has asked affirmative relief, and that has been denied. The same rule is applicable to plaintiffs in replevin suits, where the defendant gets judgment for a return of property taken and delivered under the writ, or its value.

Writ dismissed.

Note.—*Abel H. Pierce et al., v. William S. Tough et al.*, No. 188.

This case is, in all material respects, like that of *Pierce v. Wade*, just decided. The judgment was for \$2,600 only. For the reasons stated in the other case, this writ is also dismissed.

Cited—108 U. S., 173.

WILLIAM NEWTON MEEKS, *Plff. in Err.*,

v.

ROBERT OLPHERTS ET AL.

(See S. C., 10 Otto, 564-571.)

California Statute of Limitations—suit by administrator.

*1. The Statute of California which requires an action for real estate sold by order of a probate court, which action is adverse to the sale, to be brought within three years after such sale, applies to an administrator who made the sale, as well as to the heirs, because the right of action is in the administrator and is not in the heirs.

2. When the action is barred by lapse of time against the administrator, it is also barred against the heirs, because the right of possession is, by the law of California, in the former, and when the bar is complete against him it is also perfect against the heir whose interest is represented by the administrator.

[No. 70.]

Argued Jan. 14, 15, 1880. Decided Mar. 15, 1880.

IN ERROR to the Circuit Court of the United States for the District of California.

The case is stated by the court.

Mr. Montgomery Blair, for plaintiff in error.

Mr. S. M. Wilson, for defendants in error.

* Head notes by *Mr. Justice MILLER*.

Mr. Justice Miller delivered the opinion of the court:

The action in this case was brought in the Circuit Court for the District of California by plaintiff in error to recover possession of a hundred *vara* lot in the City of San Francisco.

The case was submitted to the court on a stipulation waiving a jury, and on the findings of fact by the court now in this record. It further found, as a conclusion of law, that plaintiff was barred by section 190 of the Probate Act of the State, and gave judgment for defendants.

The material facts in the case are few and easily understood.

George Harlan, who died intestate July 8, 1850 was then seized of the title to the lot in question, except as that may have been nominally in the United States, and by the Act of Congress of 1864 the title so held by Harlan was confirmed, and inured to the benefit of anyone rightfully holding under him.

On the 19th of August, 1850, Henry C. Smith was duly appointed administrator of Harlan's estate, and having afterwards resigned, Benjamin Aspinall was appointed in his place, June 15, 1855.

On the 7th day of January, 1856, Aspinall, by an order of the probate court, sold the lot in question, with many others, and under this sale defendants, or those from whom they claim, entered into possession, which they have held uninterruptedly to the present time. Aspinall remained administrator until May 12, 1864, when he settled up his accounts and was discharged. And Joel Harlan and Lucien B. Huff were appointed in his place, and are now administrators.

On the 6th of November, 1869, an order of distribution of the estate was made in the probate court, by which the lot in question was distributed to plaintiff. To this proceeding, no objection is made as to its regularity. He brought the present action in 1872.

It will thus be seen that the defendants had purchased the lot in controversy at a sale ordered by the probate court, and had paid their money for it, and been in the peaceable adverse possession of it since 1856, a period of sixteen years; and the court held that, whether the probate sale was valid so as to confer title or not, the Statute of Limitations applicable to such cases was a bar to plaintiff's right of recovery.

As the only question in the case is the one thus stated by the circuit court, and as the Supreme Court of California had decided that the probate sale was invalid and conferred no title, we proceed to examine the defense of the Statute.

The special Statute of Limitations, of three years, contained in the Probate Act of California, is as follows:

"Sec. 190. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale.

Sec. 191. The preceding section shall not apply to minors or others, under any legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability."

As the plaintiff in this case claims title as heir

and by purchase from other heirs of the decedent, and brings his suit sixteen years after a sale by an administrator, sanctioned by a probate court, it would seem at first blush that the case came within the provision of the 1st section.

Counsel for plaintiff, however, has argued with much earnestness and force:

1. That no suit could be brought by the heirs, or anyone claiming through them, until the order of distribution was made, because, until that time or until administration was closed, the right of possession was in the administrator.

2. That, until then the heirs were under a disability, which by section 191 protected their right of action from the operation of section 190.

The first proposition and, indeed, the argument of the learned counsel, concedes that, by virtue of the Statutes of California, the real estate of a person dying intestate comes to the possession and control of his administrator as personal property does, and that while the administrator can only sell real estate upon an order of the probate court, the possession and control, the reception of the rents and profits, and the right to sue to recover possession of it when held adversely, belongs solely to the administrator. Indeed, a section or two of the Probate Act, which we copy, makes this very plain.

"Sec. 114. The executor or administrator shall have the right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents and profits of the real estate, until the estate shall be settled, or until delivered over by the order of the probate court to the heirs or devisees, and shall keep in good tenable repairs all houses, buildings and fixtures thereon which are under his control."

"Sec. 195. *Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.*"

And by section 194 of the Probate Act of California the administrator is again required to "Take into his possession all the estate of the deceased, real and personal."

While it must be conceded that no right of action existed in the heirs of Harlan until the order of distribution, the reason of this is that the right of action to recover possession of the lots wrongfully held under the invalid probate sale was in the administrator. He was the representative of the rights of the heirs and of the creditors of the estate, and as such had the same power to sue for and recover the lot as if he had been the intestate himself. Not only was it his right, but it was his exclusive right and his duty. For any failure to perform this duty he laid himself liable to the heirs, or anyone else injured by that failure.

Nor can it be said that either this right or this duty to sue for and recover possession of the lot was lost or abridged by his sale as administrator to the defendants. Instances are numerous, of persons making sales that are invalid, avoiding them by the very act of bringing an action of ejectment. Such are the cases of infants and married women who have made conveyances and received the consideration, whose acts are void or voidable by reason of infancy or of defective acknowledgments of the deeds.

There was, then, up to the date of the order of distribution, or until it was barred by the Statute, a right in the administrator of the estate of Harlan to sue for and recover the possession sought in the present action.

This being so, it is not easy to perceive why that right of action was not barred in three years from January 7, 1856, the day on which defendants purchased and took possession. This would make the bar complete January 7, 1859. During all that time Aspinall was administrator and for five years afterwards, and nothing obstructed his legal right to sue for and recover the possession. Nor is the case otherwise if the right of action began with the relinquishment of title by the Act of Congress of 1864, 13 Stat. at L., 332.

It is argued, however, that section 190 does not apply to suits brought by the administrator and, therefore, the Statute does not run against the right of action while it remains in him.

The argument is that the language used, namely: "No such action shall be maintained by any heir, or other person claiming under the deceased testator or intestate," means by an heir or one holding under the heir, and that the words "other person" do not include the administrator.

But no sufficient reason is to be found why it should not. If the administrator can by such an action avoid his own irregular or void sale, the reason for limiting the time within which it should be done by him is as strong, or, perhaps, stronger than it is against another.

It is as important to the purchaser for whose benefit the Statute was enacted, that he should be protected against the administrator as against the heirs. The words "other person" mean some one other than the heirs, and instead of meaning some one like the heirs or claiming under the heirs, the words expressly refer to some one "claiming under the deceased testator or intestate." These last words are unnecessary in reference to heirs, for they can claim in no other way but under the intestate. The words "other person," therefore, almost of necessity refer to the administrator, for they can refer to no one but the heirs or some one claiming under them, or to the administrator.

He is, therefore, within the spirit and the literal meaning of that section, and the bar is good against him. This was decided in the case of *Harlan v. Peck*, in the Supreme Court of California, 33 Cal., 515. Harlan and Peck, as we have already seen, were the successors of Smith and of Aspinall as administrators of Geo. Harlan's estate. They brought suit to recover one of the lots sold by Aspinall at the same time with the sale in question in this case. The defendants relied on the sale and the limitation of section 190 of the Probate Act. The court below gave judgment for plaintiffs; but the Supreme Court, while it held the sale void, reversed the judgment, on the ground that this Statute of Limitations barred the administrator. This is a construction of the Statute by the highest court of the State.

The legal disability mentioned in section 191 manifestly has reference to a well known class of persons in whom a right to redress exists, but who, for special reasons, are incapable of acting for themselves; such as infancy, coverture and the like. Whatever is a disability under

the general Statute of Limitations is a disability under this statute. Section 352 of the Code of Civil Procedure of California describes this class, among which are minors, *femes covert*, insane persons and persons imprisoned, and it describes them as persons *entitled* to bring an action. The disability cannot have reference to a person in whom no right of action exists. Such use of the term "disability" is without support in reason or precedent.

The right of action on the title which the plaintiff now asserts was in the administrator, and the statute, therefore, ran against him and against all whose rights he represented. "In all suits for the benefit of the estate he represents both the creditors and the heirs," said the Supreme Court in *Beckett v. Selover*, 7 Cal., 215.

Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the Statute of Limitations, the right of *cestui que trust* thus represented is also barred. This doctrine is clearly stated in Hill on Trustees, side paging, 267, 403, 504, and the authorities there cited fully sustain the text, both English and American.

Among those specially applicable to this case are *Smilie v. Biffle*, 2 Pa. St., 52; *Couch v. Couch*, 9 B. Mon., 160; *Rosson v. Anderson*, 9 B. Mon., 423; *Darnall v. Adams*, 13 B. Mon., 273.

In the first of these cases, land was devised to executors, with a power of sale, which was imperfectly executed by one of the executors alone. The legatee brought suit against the purchaser, and was held to be barred by the Statute of Limitations. After referring to the old opinion, and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in *Lewellen v. Mackworth*, 2 Eq. Cas. Abr., 579, the court says: "Therefore, where *cestui que trust* and trustees are both out of possession, for the time limited, the party in possession has a good title against both. By the terms of the will, the trustee had the right to enter on the land, to take the rents, issues and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee simple and appropriate the interest of the purchase money to her use, and after her death to be paid to certain legatees, of whom the present plaintiff was one. The property was sold in the lifetime of Jane Craig; but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect, the title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He, therefore, held adversely to both *cestui que trust* and trustee, and consequently obtained by the Statute of Limitations an indefeasible title, which cannot now be disturbed or gainsaid."

In the case of *Rosson v. Anderson* [supra], the question related to the title of slaves conveyed by a father to a trustee for his daughters. The trustee did not accept the trust, nor were the slaves ever delivered by the donor.

One of the granddaughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a

plea of the Statute of Limitations, to which she replied her infancy. The court held that the right of action, on the death of her father, vested in his executors and, as more than five years had elapsed after they had qualified as such, the Statute was a bar against them, and as they would have been barred by the Statute, so was the heir, though a minor when the cause of action accrued.

In *Darnall v. Adams* [*supra*], which concerned a devise of slaves, the same court held that the disability of coverture in the devisee could not prevent the running of the Statute of Limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the devisee is, under such circumstances, barred by the lapse of time which bars the executor. *Coleman v. Walker*, 3 Met. (Ky.), 65, and *Edwards v. Woolfolk*, 17 B. Mon., 376, are cases which assert the same doctrine, and in the latter the principle is fully and ably discussed and its soundness well maintained.

A very strong case of the same character is that of *Croxall v. Shererd*, decided in this court, 5 Wall., 268 [72 U. S., XVIII., 572], where a remainder-man was held barred by the Statute of Limitations of New Jersey, on account of the number of years of possession of defendant, under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, though the remainder-man brought suit immediately on the death of his ancestor. This was, however, based on the peculiar wording of that statute.

In *Cunningham v. Ashley*, 45 Cal., 485, it was held that an administrator, who is a party to a suit which involves the title of his intestate to real estate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate. And such judgment is an estoppel as to the title set up in the action.

On the whole, we are of opinion, both upon sound principles of construction, as well as upon the decisions of the Supreme Court of California upon the Statute of the State, that the circuit court was justified in holding that the plaintiff was barred by the adverse possession of defendants, and the judgment of that court is affirmed.

Cited—102 U. S., 649.

PATRICK BURNS ET AL., *Appts.*,

v.

JACOB MEYER ET AL.

(See S. C., 10 Otto, 671, 672.)

Patents for saddle-trees—construction of patent.

1. Saddle-trees, made according to a patent granted to Flora, have not the advantages of separate construction attained under the patent to Grimsley and Shelly for an improved saddle-tree, and do not infringe the latter patent.

2. Courts should not enlarge, by construction the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms.

[No. 154.]

Argued Jan. 16, 1880. Decided Mar. 15, 1880.

738

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is fully stated by the court.

Mr. **Samuel S. Boyd**, for appellants, cited *Sewall v. Jones*, 91 U. S., 183 (XXIII., 277); *Winans v. Denmead*, 15 How., 342; *Machine Co. v. Murphy*, 97 U. S., 125 (XXIV., 936).

Mr. **Jefferson Chandler**, for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

The only question in this case is, whether the defendants infringe certain letters patent, No. 97236, granted 23d of November, 1869, to John J. Grimsley and John Shelly, for an improved side-saddle tree alleged to have been invented by Shelly; which letters were afterwards assigned to the complainants.

The infringement alleged consists in making and using side-saddle trees according to a plan described in another patent granted to Orlando V. Flora, on the 9th of May, 1876, numbered 177233. According to the plaintiff's patent, this tree composed of side-bars, cantle behind, and crook before, is first made, and the seat is constructed separately on a properly shaped rim, and is then fastened to the tree by screws, resting on the crook in front, and on supports attached to the side-bars in the middle and at the rear. This construction is claimed to simplify and cheapen the manufacture, and leave a space for air under the seat. The claim of the patent is as follows:

"What I claim as my invention, and desire to secure by letters patent is:

As a new article of manufacture, a side-saddle tree, having the side-bars and seat made separate and then united, substantially as and for the purpose shown and specified."

The defendants' side-saddle tree, constructed according to Flora's patent, which is alleged to be an infringement, does not have "the side-bars and seat made separate and then united." On the contrary, tough strips of wood, steamed and bent to a proper shape, are attached to the tree, as a part thereof, forming side-rails for the seat; that on the right or off side extending from the cantle to the crook, and that on the left or near side extending from the cantle to a point on the near side bar some distance back of the crook. The seat is stretched over these strips or side-rails. It is obvious that the seat, in this case, cannot possibly be constructed separately from the side-bars. They must be united in one construction, forming a complete tree. The advantage of separate construction which the plaintiffs claim for their patented tree is not attained by that of Flora. It is true that room is left for the admission of air under the seat; but that by itself is not claimed as the invention of Shelly.

It is well known that the terms of the claim in letters patent are carefully scrutinized in the Patent Office. Over this part of the specification the chief contest generally arises. It defines what the office, after a full examination of previous inventions and the state of the art, determines the applicant is entitled to. The courts, therefore, should be careful not to enlarge, by construction, the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms.

100 U. S.

We think there was no infringement, and that the decree of the circuit court must be affirmed.

The decree is affirmed, accordingly.

Cited—104 U. S., 118; 107 U. S., 639.

MERRITT COX ET AL., *Pliffs. in Err.*,

v.

NATIONAL BANK OF THE STATE OF
NEW YORK.

MERRITT COX ET AL., *Pliffs. in Err.*,

v.

SAME.

(See S. C., "*Clardy v. National Bank*," 10 Otto, 704-718.)

Bill of exchange, where payable—presentment—diligent inquiry.

1. Where a bill of exchange is addressed to "Messrs. C. & C., New York, N. Y.," as drawees, and is by them accepted without explanation or condition, the legal construction of the instrument is that it became payable when it fell due at the place designated by the address as the place of acceptance.

2. Presentment at the specified place, as against the acceptor of a bill, is not necessary.

3. Where the notary public made diligent inquiry in New York City for the acceptors, and could not find them, and on the day of maturity demanded payment at the places frequented by them when in said city, which was refused, and mailed notices of protest to the drawers and indorser at their post-office address; held, that all necessary steps were taken to bind them.

[Nos. 183, 184.]

Argued Mar. 5, 1880. Decided Mar. 15, 1880.

ERROR to the Circuit Court of the United States for the District of Kentucky.

Each of the above cases was commenced in the court below, by the National Bank of the State of New York, now defendant in error, against the respective plaintiffs in error, upon a bill of exchange.

The following is a copy of the bill of exchange upon which the first action was based: \$5,000.

HOPKINSVILLE, KY., August 3, 1875.

Eighty days after date, pay to the order of J. C. Whitlock, Five Thousand Dollars, value received, and charge to account, renewing a bill for same amount and names due August 3, 1875.

MERRITT COX,

To Messrs. Cox & Cowan, New York, N. Y.

The drawees wrote across the face of the bill "Accepted. Cox & Cowan."

The payee, Whitlock, indorsed the bill to E. M. Wright & Co. of New York, who in turn indorsed it to the Bank, the plaintiff below.

The facts in the other case are precisely the same, except that the payee was one J. D. Clardy.

The court below having rendered judgment for the plaintiff in each case, the present writs of error were sued out.

The facts further appear in the opinion of the court.

Mr. Walter Evans, for plaintiffs in error:

The bill of exchange, being addressed to Cox & Cowan, New York, N. Y., is not, therefore, See 10 Otto.

and at all events, payable there.

Rowe v. Young, 2 Brod. & B., 276; *Fenton v. Goundry*, 13 East, 468; *Chit. Bills* (star), 172; *Lightner v. Will*, 2 Watts & S., 140; *Fisher v. Evans*, 5 Binn., 541.

The acceptors never had a residence or place of business in New York. On the contrary, they lived in Hopkinsville, Ky., and did business there, and there the bill was executed and delivered. They at no time changed their residence or place of business. All these facts were known to the Bank at and before the date of the bill and when it matured. Hence, in the exercise of the diligence necessary to bind the drawer and indorser, it was absolutely essential that presentment for payment should, at maturity, have been made in Kentucky.

Taylor v. Snyder, 3 Den., 145; *Spies v. Gilmore*, 1 N. Y., 321; *Bk. v. Whittemore*, 12 Gray, 469; 1 Pars. Bills & N., 453; *In re Glyn*, 15 Bk. Reg., 502; *Fisher v. Evans*, 5 Binn., 542.

The bills here in suit, having mentioned on them no place of payment, were, whether they be foreign or inland bills, in legal contemplation, payable at the residence or place of business of the acceptors, and demand of payment should have been made there at the maturity of the bills.

Musson v. Lake, 4 How., 274; *Whitesides v. Bk.*, 10 Bush, 502; *Barnes v. Vaughan*, 6 R. I., 259; *Story, Bills*, last clause, sec. 325; 1 Pars. Bills & N., 421.

The address of the drawee on a bill of exchange is nothing more than an intimation of where he is, or where he resides or does business. It is perhaps, *prima facie*, his residence.

Rowe v. Young, 2 Brod. & B., 276; *Fenton v. Goundry*, 13 East, 468; *Chit. Bills* (star) 172, 9th ed.; *Lowery v. Scott*, 24 Wend., 358.

It was a lack of due diligence for the holder to wait until the very day of maturity or the next day, to make inquiry as to the postoffice address of the drawer or indorser. The holder should have been prepared with this information in advance, and especially should inquiry have been made as to the indorsements.

Hill v. Varrell, 3 Me., 235; 2 Dan. Neg. Inst., 74; 1 Pars. Bills & N., 493, *n.*; *Lowery v. Scott*, 24 Wend., 358; *Spencer v. Bk.*, 3 Hill, 520.

It would seem clear, from the facts stated in the bill of exceptions, that the Bank delivered the original bills to E. M. Wright & Co., in New York, for the purpose of renewal, and that the Bank then knew the other parties were all in Kentucky.

We maintain, therefore:

1. That it was never contemplated that E. M. Wright & Co. should do otherwise than transmit the bills to some person in Kentucky, as they did to J. V. Thompson.

2. That E. M. Wright & Co. were authorized to do this by the necessities of the case.

3. That Thompson was, therefore, in legal contemplation, the agent of the Bank, whether the Bank ever heard of him or not.

4. That if Thompson had failed in his duty, the Bank alone could have sued for default.

5. Thompson's individual knowledge of the postoffice address of the plaintiffs in error is clearly imputable to the Bank.

6. As the notices were not addressed to the proper postoffice, and were never in fact received, they were not good.

The instructions of the court, contrary to these views, were erroneous.

The jury should have been instructed as prayed by the plaintiffs in error.

Story, Ag., secs. 14, 201, 217, *a*; *Bk. v. Triplett*, 1 Pet., 30; *Dorch & Milt. Bk. v. N. E. Bk.*, 1 Cush., 177

Messrs. William D. Shipman and W. W. Macfarland, for defendant in error:

The bills were addressed to the drawees at the City of New York and not elsewhere. They were accepted generally. They were, therefore, payable at the City of New York.

No matter in what part of the world the acceptors may, in fact, have dwelt, when they accepted a bill addressed to them at New York they elected their residence there for the purpose of presentation and payment of the bill.

Smith v. Little, 10 N. H., 526; 1 *Am. Lead. Cas.*, 5th ed., 454; Story, Bills, sec. 353; *Chit. Bills*, 397.

The duty of the holder is performed when he has made diligent effort to find the acceptor at the place where he has undertaken to pay the bill.

It follows that the charge on this point was right.

Story, Bills, sec. 351 and *n.*; 3 *Kent, Com.*, 12th ed., 96 and *notes*; *Pars. Bills & N.*, 440, and *notes*.

It is not claimed by the plaintiffs in error that notice was not given in time. Indeed, it is proved to have been given on the very day or the day after the protest. But it is said that the notice was sent to the wrong postoffice.

In answer to this, it is enough to say that the holder did not know the address of the drawer and indorsers and that, on making inquiry in the only available quarter, the notary was informed that the proper address was Hopkinstown, and, accordingly, sent the notices to that place.

The charge on this point was clearly within the rule laid down in *Lambert v. Ghiselin*, 9 How., 256; see, also, *Hunt v. Maybee*, 7 N. Y., 266; Story, Bills, secs. 299, 308, 351, 387; *Parsons, Bills & N.*, 490.

Mr. Justice Clifford delivered the opinion of the court:

Bills of exchange are written orders or requests from one party to another for the payment of money to a third person or his order, on account of the drawer, and, if payable at sight or at a date subsequent to the acceptance by the drawee, the instrument must be duly presented for payment, else the parties to the same conditionally liable for the payment of the amount will be discharged. Different rules prevail as to the place where the presentment for payment must be made, dependent upon the form of the instrument and the place where and the terms in which it was accepted.

Such an instrument must first be accepted; and if, when presented for that purpose, the drawee refuses to accept the same, it must, if it is a foreign bill, be protested for non-acceptance; the rule being that the place of protest is the place where the same is required to be presented for acceptance, unless it is in terms payable at some other place. Due presentment for payment must also be made; the general rule being that the place of payment is the place

where the acceptor resides, or where on the face of the bill it is addressed to him, unless some other place is specifically designated in the instrument. Story, Bills, secs. 48, 282.

Sufficient appears, to show that the subject-matter of the present controversy is a bill of exchange drawn by the defendant first named, the address to the drawees being "Messrs. Cox & Cowan, New York, N. Y.," for the sum of \$5,000, payable eighty days from date, value received, and the indorsement on the face of the bill is as follows: Accepted. Cox & Cowan.

That the bill was duly presented for acceptance, and that it was accepted by the drawees in the manner described, is admitted; nor is it denied that it was duly indorsed by the payee, nor that the plaintiff Bank became the *bona fide* holder of the bill by virtue of the second indorsement exhibited in the record.

Payment of the bill at maturity being refused, the plaintiff Bank, as the lawful holder of the same, caused it to be protested, and instituted the present action against the drawer, the acceptors and the payee as the first indorser, to recover the amount. Process was served, and the drawer and indorser appeared and filed separate answers.

Though the answers are separate, yet the material defenses in each are the same, and may be considered together. They are as follows: (1) That the bill was not duly presented to the acceptors for payment. (2) That it was not duly protested for non-payment. (3) That due notice was never given to the drawer of the dishonor of the bill or of the failure of the acceptors to pay the same at maturity.

Amended answers having subsequently been filed by the same parties, they went to trial, and the verdict and judgment were in favor of the plaintiff Bank against the drawer, acceptors and indorser for the amount specified in the transcript. Exceptions were filed by the defendants, and they sued out the present writ of error.

Since the cause was entered here, the defendants have assigned for error the following causes: (1). That the circuit court erred in instructing the jury that the bill, being addressed to the drawees, "New York, N. Y.," is in law payable in New York City. (2) That the circuit court erred in refusing to instruct the jury that the acceptance of the bill, as shown in the transcript, was a general acceptance, which made the bill payable at no particular place. (3) That the circuit court erred in refusing to instruct the jury that, in order to charge the defendants, the officers of the plaintiff Bank, if they knew at the maturity of the bill where the residence and place of business of the acceptors were, as stated in the answers, must show that the bill was presented and that payment was demanded at their residence or place of business. (4) That the circuit court erred in instructing the jury that if the notary made reasonable and diligent inquiry for the acceptors and their place of business in the City of New York, and could not find either their residence or place of business, and that he then demanded payment during business hours at the place or places frequented by them when in said city, that such a demand was a sufficient presentment to maintain the action.

Evidence was introduced by the defendants tending to show that, throughout the transaction

they were all residents of the State of Kentucky, and that the bill in question was drawn and indorsed in the State; that it was sent by one Thompson to the firm of Wright & Co., who delivered the same to the plaintiff Bank or their officers, who were informed where the bill was executed by the drawer and indorser. They also introduced testimony showing that the officers of the Bank, when they took the bill, knew where the drawer resided when it was forwarded, and afterwards when it was accepted by the drawees. Explanatory evidence was also given by the plaintiff Bank showing that no sort of agency existed between the person by whom the bill was forwarded and the firm by whom it was delivered and the plaintiff Bank, and that the former never had any communication with the Bank, and never informed either the Bank or the said firm of the postoffice address of any one of the defendants.

Commercial rules everywhere require that, to fix the liability of the drawer of a bill of exchange or the indorser of a bill or note, there must be a legal presentment of the instrument to the acceptor or maker, or payment must be demanded of such a party on the day the instrument becomes payable. That payment must be demanded from the maker of a note and notice of its non-payment forwarded to the indorser in due time, in order to render him liable, is so firmly settled, says Marshall, *Ch. J.*, that no authority need be cited to support the proposition. *Magruder v. Bk.*, 3 Pet., 87, 90; *Bk. v. Hale*, 16 Serg. & R., 157.

Nobody doubts the correctness of that rule, and it is equally well settled that when a note or bill is expressed to be payable at a particular place, a demand there is always sufficient to charge the indorser. Story, *Bills*, 4th ed., sec. 357; *Chit. Bills*, 13th Am. ed., 407; *Rowe v. Young*, 2 Brod. & B., 165; *Piequet v. Curtis*, 1 Sumn., 478.

Text writers of undoubted authority state that an acceptance is an engagement to pay the bill according to the tenor of the acceptance, and that a general acceptance is an engagement to pay according to the tenor of the bill. Bayley, *Bills*, 5th ed., 154; *Chit. Bills*, 13th Am. ed., 342.

Cases arise where the drawer of a bill of exchange designates in the instrument the place of payment, and the decisions are that, in such a case, both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity; but the same decisions hold otherwise as to the maker of a note and the acceptor of a bill, the rule being that, unless the restrictive words "only and not elsewhere," are added, no presentment there at maturity or afterwards is necessary to charge such a party. *Foden v. Sharp*, 4 Johns., 183; *Wolcott v. Van Santvoord*, 17 Johns., 248.

Where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstances fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business. Circumstances, however, may control the usual inference arising from the want of any such expression in the instrument which may warrant a very different conclusion. Thus, if a bill were drawn upon a merchant when abroad,

and should be addressed to him at Paris or at London, the place of payment would be the place where the drawer accepted the instrument, whether Paris or London, and not the place of his residence when the bill was drawn or at its maturity. 1 Dan. Neg. Secur., 2d ed., sec. 90.

Provided no place is designated or agreed or indicated in the form of the address or the terms of the acceptance, the rule then is, that the presentment for payment must be made at the home or domicile of the acceptor or maker, or at their usual place of business during business hours. *Id.*, sec. 635.

Parol testimony to show such an agreement is admissible, it being settled law that the introduction of such testimony is not inconsistent with the rule that a written instrument cannot be varied by parol evidence. *Brent v. Bk.*, 1 Pet., 89, 92.

Unlike the indorser, the maker of a promissory note is liable without any demand of payment. His undertaking is unconditional, but the indorser only undertakes to pay if the maker does not, which makes it necessary for the holder to take proper steps to obtain payment from the maker, from which it follows that his contract is that due diligence shall be used to that end; and when the parties agree what shall constitute due diligence in the particular case, says Marshall, *Ch. J.*, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes as such when they are silent.

Acceptors of a bill of exchange stand in the same relation to the drawee of the bill as the maker of a note does to the payee, the acceptor being the principal debtor in a bill precisely as the maker is of a promissory note; the rule being that the liability of the acceptor is governed by the terms of his acceptance, just as the liability of the maker of a note is defined and governed by the terms of a note; nor can the place of payment be of any more importance in the one case than in the other.

When a note or bill is made payable at a particular bank, as is frequently the case, it is well known that, according to the usual course of business, the note or bill is usually lodged in the bank for collection; and if the maker or acceptor calls to take it up when it falls due, and it is delivered to him, and he pays the amount, the business is closed; but if he does not find the note or bill at the bank, he can deposit the money to meet the same when it shall be presented, and the proof of such tender and deposit, in case of a subsequent suit, will exonerate him from all costs and damages. Or should the note or bill be made payable at some other place than a bank, and no deposit should be made, or he should choose to retain the money in his own possession, an offer to pay at the time and place would protect him against interest and costs on bringing the money into court.

Rules of a different character have sometimes prevailed in other jurisdictions, but the principles to be applied in such a case are settled in this court; nor is it necessary, where the note or bill is payable at a specified time and place, to aver in the declaration or prove at the trial that a demand was made at that place in order to maintain the action; the established rule being that if the maker or acceptor was at the

place at the time designated, and was ready and offered to pay the money, it is matter of defense to be pleaded and proved. *Wallace v. McConnell*, 13 Pet., 136, 150; 1 Dan. Neg. Secur., 2d ed., sec. 643; *Edw. Bills*, 2d ed., 150; *Rowe v. Young*, 2 Bligh, 391, 395.

Beyond doubt, these principles are applicable, as determined by this court, where the suit is against the maker of the note or the acceptor of the bill; but when recourse is had to the indorser of the note or the drawer of the bill, very different considerations arise, as they are not the principal debtors to the holder of the instrument. Their undertaking is not absolute, like that of the maker of the note or the acceptor of the bill, but conditional, that if the maker in the one case or the acceptor in the other refuses to make good the undertaking they will pay the amount. Hence, the holder is bound to use due diligence to obtain payment from the maker or acceptor, as a condition precedent to his right to recover of the parties only conditionally liable. Consequently, when a place of payment is designated in the body of the note or bill, the drawer or indorser has a right to presume that the maker or acceptor has provided funds at such place to pay the note or bill, and to require the holder to apply for payment at such place, unless when the place designated is a bank, and the bank is the holder of the instrument, when the rule does not apply. In all other cases the obligation is absolute, that the holder must aver and prove a presentment at the designated place, unless the necessity is obviated by agreement, or something appearing in the instrument to indicate a different intention. *Bk. v. Smith*, 11 Wheat., 171, 175.

Suppose that is so; then there never need be any difficulty in determining the rights of the parties in such a case, where the place of payment is specifically designated in the bill, or where the terms of the instrument contain no such designation whatever, as the rule of procedure in each case, though different, is equally plain and unmistakable. Nor do the parties here differ in respect to those rules, but the plaintiff Bank contends that the bill in question brings the case within the category of the first case, but the defendants insist that it falls within the second, where no place of payment is designated.

Looking at the terms of the bill, independent of the address to the drawees and the acceptance written across the face of the bill, it would seem that the theory of the defendants is correct; but the bill is addressed to "Messrs. Cox & Cowan, New York, N. Y.," as drawees, and is by them accepted without explanation or condition, from which it follows as a reasonable inference that they accepted the bill as if they were at the time in the City of New York; and having so accepted it without explanation or condition, the legal construction of the instrument is that it became payable when it fell due at the place designated by the address as the place where the acceptance took place. *Haltstead v. Skelton*, 5 Q. B., 86; 1 and 2 Geo. IV., ch. 78; 38 British Stats., 291.

Bills of exchange, like other written instruments, are subject to legal construction in order to ascertain the intent and meaning of the parties, unless the language employed to express

such intent and meaning is clear and unambiguous.

Enough has already been remarked to show that when a bill or note is expressed to be payable at a particular place on demand, it is always sufficient to prove that it was presented there to charge the acceptor or the indorser. *Evans v. St. John*, 9 Port., 186, 193; *McClane v. Fitch*, 4 B. Mon., 599. Where a bill is drawn on a firm, as *W. M. & Co.*, at a particular number and street, as at 263 Washington Street, New York, the presentment should be made at their place of business, as presumable from such address, or at the residence of either of the firm. *Bk. v. Warren*, 18 Barb., 291, 293.

If the instrument is payable in a particular town, and the residence of the maker or acceptor is elsewhere, the holder is not bound to make demand anywhere except in that town. *Smith v. Little*, 10 N. H., 526, 530; *Smith v. Little*, 1 Am. Lead. Cas., 5th ed., 454.

Views equally explicit are expressed by *Judge Story*, who says that if the bill is drawn upon the drawee domiciled in one place and is payable in another place, and is accepted by him, *meaning without qualification*, the presentment should be made at the latter place. Thus, if a bill is drawn on the drawees at Liverpool, payable in London, and is accepted, without explanation, the presentment for payment must be in London, if any particular place is there pointed out where demand may be made; and if none, and no one can be found to pay the bill, it may be protested there for non-payment for that very cause. *Story, Bills*, 4th ed., sec. 353; *Boot v. Franklin*, 3 Johns., 208; 2 and 3 William IV., 50 British Stats., ch. 98, p. 587; *Chit. Bills*, 13th Am. ed., 390.

So where a bill is directed to the drawee at a particular house, and is by him accepted without condition, the going to that house with the bill on the day of payment and finding it closed is a sufficient presentment. *Bayley, Bills*, 5th ed., 200; *Hine v. Alley*, 1 Nev. & M., 433; *Chit. Bills*, 13th Am. ed., 330.

American authorities almost universally hold that in such a case no presentment is necessary to charge the acceptor of the bill or the maker of the note; the only effect of the neglect as to such a party being that it relieves him from cost and damages if he was ready at the time and place named to pay the amount and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact and payment of the money into court will be a bar to the recovery of interest and cost. *Hills v. Place*, 48 N. Y., 520; *Caldwell v. Cassidy*, 8 Cow., 271.

Want of due diligence cannot be successfully set up in this case, as the protest was given in evidence, and shows to a demonstration that everything the law requires was done, to find the acceptors or their place of business, without success, and that the protest was finally made at the only place in the City of New York where they were accustomed to transact any business.

Diligence is, doubtless, required of the holder to ascertain the proper place to present the bill for payment; but it is not necessary to give that issue much consideration in this case, as it is not controverted that every needful effort in that

regard was made, if the true theory of the bill is that it was payable in the City of New York, which is asserted by the plaintiff Bank and denied by the defendants.

Nothing need be added to what has already been remarked to explain the views of the court upon that subject, which are, that the bill having been addressed to the drawees at the City of New York, and they having accepted the same without qualification, explanation or condition, the bill became payable in that city, even though no mention was made of any dwelling, store or place of business where the bill should be presented. *Freese v. Brownell*, 35 N. J. L., 285; 1 Bell, Com., 5th ed., 412.

Nor is it necessary to repeat the views heretofore expressed, that the acceptor of the bill, like the maker of a note, is the promissory debtor in such a case; and that, in respect to such a party to a bill, no presentment or demand of payment need be made at the specified place in order to render him liable to an action on the instrument. Story, Notes, 7th ed., sec. 228; 1 Pars. Bills and N., 425-429; Thomp. Bills, 2d ed., 294.

Our decisions are decisive to that effect, and it is equally clear in this case that every step necessary to bind the drawer and the indorser was also taken by the holder of the bill described in the declaration. Story, Notes, 7th ed., 236; *Carter v. Smith*, 9 Cush., 321.

Presentment at the specified place as against the acceptor of a bill is not necessary, the rule being that, if he was ready at the time and place to pay, he may prove that as a defense; but the rule is otherwise as against the drawer and indorsers. 3 Kent, Com., 12th ed., 100, 104.

Five other assignments of error are set forth in the brief of the defendants; but it is unnecessary to pursue the discussion, as the remarks already made are sufficient to show that there is no error in the record, and that the judgment should be affirmed.

Exactly the same questions are also involved in No. 184 on the calendar, which was argued and submitted at the same time with the case just decided. Both cases presenting the same questions, the latter must be decided in the same way as the former and for the same reasons.

Judgment in each case is affirmed.

Cited—104 U. S., 39.

EDWARD T. GUY, *Plff. in Err.*,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE.

(See S. C., 10 Otto, 434-444.)

Taxation—power of State—products of other States—unconstitutional law—power of government over commerce.

*1. It must be regarded as settled that no State can, consistently with the National Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because

*Head notes by Mr. Justice HARLAN.

See 10 OTTO.

engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

2. An ordinance of the City of Baltimore, authorized by a statute of Maryland and in pursuance of which vessels landing at the public wharves of the City, laden with the products of other States, were required to pay wharfage fees which were not exacted from vessels landing therewith with the products of Maryland, declared to be in conflict with the National Constitution.

3. Wharfage fees, so exacted, cannot be regarded, in the sense of former decisions, as compensation for the use of the City's property, but a mere expedient or device to build up the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States.

4. The power of the National Government over commerce with foreign nations and among the several States, reaches the interior of every State of the Union so far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin.

[No. 136.]

Argued Dec. 24, 1879. Decided Mar. 22, 1880.

IN ERROR to the Baltimore City Court, State of Maryland.

The case is stated in the opinion.

Messrs. **Frederick J. Brown** and **Arthur Geo. Brown**, for plaintiff in error:

As to the conflict which exists between the Constitution and the legislation of Maryland and the City of Baltimore, now in question, it is so clearly shown by the decisions of this court that it will be enough to cite the leading cases, without entering upon any analysis or discussion of them. The following cases are relied upon as conclusive of the points now in issue:

Brown v. Md., 12 Wheat., 419; *Steamship Co. v. Port Wardens*, 6 Wall., 31 (73 U. S., XVIII., 749); *State Tonnage Tax Case*, 12 Wall., 204 (79 U. S., XX., 370); *State Freight Tax Case*, 15 Wall., 232 (82 U. S., XXI., 146); *Peete v. Morgan*, 19 Wall., 581 (86 U. S., XXII., 201); *Cannon v. New Orleans*, 20 Wall., 577 (87 U. S., XXII., 417); *R. R. Co. v. Md.*, 21 Wall., 456 (88 U. S., XXII., 678); *Welton v. Mo.*, 91 U. S., 275 (XXIII., 347); *Henderson v. Mayor*, etc., 92 U. S., 259 (XXIII., 543); *Cooke v. Pa.*, 97 U. S., 566 (XXIV., 1015); see, also, *Packet Co. v. Keokuk*, 95 U. S., 80 (XXIV., 377); *Wharf Case*, 3 Bland, 361.

Mr. **James L. McLane**, for defendants in error:

No attempt is made to force vessels to receive or discharge cargoes at wharves owned by the municipal Corporation. All are left free to resort to any of the numerous private wharves in the harbor; and when they do so, the City has no claim for wharfage. In the one case as in the other, it is the use of the wharf as property that fixes the liability for wharf charges. The rates of wharfage established by the city ordinance were intended to be and, in point of fact, are nothing more than compensation for the use of property. They are simply regulations of property by its owner, and in no sense regulations of commerce. The right to exact them is an attribute of ownership.

Dugan v. Mayor, etc., 5 Gill & J., 357; *State*

NOTE.—*Power of States to tax.* See note to *Providence Bk. v. Billings*, 29 U. S. (4 Pet.), 514; and note to *Dobbins v. Erie Co.*, 41 U. S. (16 Pet.), 435.

Wharfs; right to construct; right to charge wharfage; lien for. See note to *Ex parte Easton*, 95 U. S., XXIV., 373.

Freight Tax Case, 15 Wall., 277 (82 U. S., XXI., 162); *Marshall v. Vicksburg*, 15 Wall., 146 (82 U. S., XXI., 121); *Steamship Co. v. Port Wardens*, 6 Wall., 31 (73 U. S., XVIII., 749); *Passenger Cases*, 7 How., 402; *Cooley, Tax.*, 62; *Packet Co. v. Keokuk*, 95 U. S., 84 (XXIV., 379).

Upon no possible theory of this case can the wharf charges complained of be regarded as imposts or duties upon imports, within the meaning of section 10, of article 1 of the Constitution.

If they were in fact, taxes or duties imposed or levied directly upon the appellant's cargo of Virginia produce, they would not be in violation of this provision of the Federal Constitution, the operation of which is confined to "goods imported from foreign States," and confers no immunity from state taxation upon goods brought from a sister State.

Woodruff v. Parham, 8 Wall., 136 (75 U. S., XIX., 386).

The State has the undoubted right to reserve for its own citizens the exclusive use of the property which it holds for their common benefit, and whatever right its citizens might have in such case, would be a "property right, and not a mere privilege or immunity of citizenship."

McCready v. Va., 94 U. S., 391 (XXIV., 248); *Conner v. Elliott*, 18 How., 594 (59 U. S., XV., 498); *Downham v. Alexandria*, 10 Wall., 175 (77 U. S., XIX., 930).

Mr. Justice Harlan delivered the opinion of the court:

In *Woodruff v. Parham*, 8 Wall., 123 [75 U. S., XIX., 382], we had occasion to consider the constitutional validity of an ordinance of the City of Mobile under the provisions of which had been assessed, for municipal purposes, a tax upon sales in that City of certain goods and merchandise, the product of States other than Alabama. The ordinance, in its application to articles carried into Alabama from other States, was assailed as being inconsistent with the constitutional inhibition upon the States levying imposts or duties on imports or exports; with the power of Congress to regulate commerce with foreign nations and among the several States; and with that clause which declares that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States.

Touching the first of these propositions it was ruled that the term "import," as used in section 10, article 1, of the Constitution, had reference to articles imported from foreign countries, and not to such as were brought from one of the States of the Union into another. In the argument, *Brown v. Md.*, 12 Wheat., 419, was cited in support of the proposition that the whole ordinance, in its application to articles brought from other States to Mobile for sale, was an unauthorized regulation of interstate commerce. Upon that branch of the case, we said: "If the court there (in *Brown v. Md.*) meant to say that a tax levied on goods from a sister State, which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right to regulate commerce among the States, as much as the tax on foreign goods, then under consideration, was in conflict with

the authority to regulate commerce with foreign nations, we agree to the proposition."

In a subsequent portion of our opinion in *Woodruff v. Parham*, it was said: "But we may be asked, is there no limit to the power of the States to tax the produce of other States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory? The case before us is a simple tax on sales of merchandise imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the products of that State or of some other. There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects and, therefore, void."

In *Hinson v. Lott*, 8 Wall., 148 [75 U. S., XIX., 387], we upheld a Statute of Alabama, imposing taxes upon the sale of spirituous liquors within its limits, upon the ground that it did not discriminate against the products of other States, and only subjected them to the same taxation imposed upon similar articles manufactured in that State. Had the statute been susceptible of a different construction, it would have been held to be repugnant to the Constitution.

In *Ward v. Md.* 12 Wall., 418 [79 U. S. XX., 449], we examined the provisions of a Statute of Maryland which, among other things, required of persons, not permanent residents of that State, before selling or offering for sale within the limits of the City of Baltimore any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in that State, to obtain a license therefor. The amount exacted for such license was larger than the statute required of resident traders engaged in like business. In declaring the statute to be repugnant to the Federal Constitution, we said that, "Inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell or offer or expose to sale, within the district described in the indictment, any goods which the permanent residents of the State might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

Upon the same ground, in the more recent case of *Weldon v. Mo.*, 91 U. S., 275 [XXIII., 347], we held void a Statute of Missouri imposing a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares or merchandise, except books, charts, maps and stationery, not the growth, product or manufacture of that State, and which did not impose a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri.

In view of these and other decisions of this

court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

If this were not so it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired. "Over whatever other interests of the country," said Mr. Webster, "this government may diffuse its benefits and blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system." But state legislation, such as that indicated in the cases which have been cited, if maintained by this court, would ultimately bring our commerce to that "oppressed and degraded state," existing at the adoption of the present Constitution, when the helpless Confederation was abandoned and a National Government instituted, with full power over the entire subject of commerce, except that wholly internal to the States composing the Union.

How far the principles enunciated in the foregoing cases control the determination of the one before us, we now proceed to inquire.

By an Act of the General Assembly of Maryland, passed in 1827, authority was given to the Mayor and City Council of Baltimore to regulate, establish, charge and collect to their use such rate of wharfage as they might think reasonable, of and from all vessels resorting to or lying at, landing, depositing or transporting goods or articles, *other than the products of that State*, on any wharf or wharves belonging to that municipal corporation, or any public wharf in the City other than the wharves belonging to or rented by the State, and that part of Pratt Street wharf, theretofore reserved for the use of the citizens of that State. Md. Code of Pub. Local L., art. 4, sec. 945.

In pursuance of that Act, the City, by its constituted authorities, in the year 1858, passed an Act regulating the public wharves. By its 33d section it is declared that all goods, wares or merchandise landed on the public wharves from on board any vessels lying at said wharves, or placed thereon for the purpose of shipment or exposure for sale, *other than the product of the State of Maryland*, shall pay wharfage according to certain rates therein prescribed. The 35th section declares that "All vessels belonging to or lying at, landing, depositing or transporting goods or articles *other than the production of this State*, on or from any wharf or wharves belonging to the Mayor and City Council, or any public wharf in the said City, other than the wharves belonging to or rented by the State, shall be chargeable with the wharfage as fixed by this ordinance, upon all goods or articles landed or deposited on any wharf or wharves belonging to the said Mayor and City Council;

See 10 Otto.

U. S., Book 25.

and the master or owner of the vessel so depositing, landing or transporting said goods or articles, shall be responsible for the same." The ordinance contained other sections providing for its enforcement.

The appellant, Guy, a resident citizen of Accomack, County, Virginia, was engaged in the year 1876 in sailing a schooner, of which he was master and part owner, from that county to Baltimore, laden with potatoes raised in Virginia. In June of that year, he landed his vessel at one of the public wharves belonging to the City, not that part of the Pratt Street wharf reserved, and discharged therefrom two hundred and twenty barrels of potatoes. Under the authority of the foregoing statute and ordinance, the city harbor-master demanded of him the payment of \$4.40 as wharfage. He refused to comply with that demand and, being sued by the City, judgment was rendered against him in the court of a justice of the peace, which was affirmed by the City Court of Baltimore, the highest court of Maryland in which a decision of the case could have been had.

It is admitted that such wharfage dues are not and never have been assessed against parties or vessels bringing to that port potatoes or other articles grown in the State of Maryland.

The argument in support of the statute and ordinance upon which the judgment below rests, is that the City, by virtue of its ownership of the wharves in question, has the right, in its discretion, to permit their use to all vessels landing thereat with the products of Maryland; and that those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the City's property.

This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal Corporation of Baltimore was created by the State of Maryland to promote the public interests and the public convenience. The wharf at which appellant landed his vessel was long ago dedicated to public use. The public for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the Port of Baltimore of the products of Maryland. It embraces, necessarily, all engaged in trade and commerce upon the public navigable waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or state authority; and the National Constitution secures to all, so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the Port of Baltimore with any cargo whatever, not excluded therefrom by, or under the authority of, some statute in Maryland enacted in the exertion of its police powers. The State, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other States. The concession of such a power to the States would render wholly nugatory all national control of commerce among the States, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and

products of particular States. But it is claimed that a State may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting, from those transporting to its wharves the products of other States, wharfage fees, which it does not exact from those bringing to the same wharves the products of Maryland. The City can no more do this than it or the State could discriminate against the citizens and products of other States in the use of the public streets or other public highways. The City of Baltimore, if it chooses, can permit the public wharves which it owns to be used without charge. Under the authority of the State, it may also exact wharfage fees, equally, from all who use its improved wharves, provided such charges do not exceed what is fair remuneration for the use of its property. *Packet Co. v. St. Louis* [ante, 688]; *Viicksburg v. Tobin* [ante, 690]; *Packet Co. v. Keokuk*, 95 U. S., 80 [XXIV., 377]. But it cannot employ the property it thus holds for public use so as to hinder, obstruct or burden interstate commerce in the interest of commerce wholly internal to that State. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the City's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz.: build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.

Such exactions, in the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted, by discriminations of that character, to impede commercial intercourse and traffic among the several States and with foreign nations.

In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States.

The power of the National Government over commerce with foreign nations and among the several States is broad and comprehensive. It reaches the interior of every State of the Union, so far as it may be necessary to protect the products of other States and countries from discrimination, by reason of their foreign origin. *Brown v. Md.*, 12 Wheat., 419.

Nothing can be clearer than that the Statute of Maryland and the Ordinance of the City of Baltimore, in the respects adverted to, are in conflict with the power of Congress over the subject of commerce.

The judgment is reversed, with directions to dis-

miss the action against the appellant, with his costs against the City.

Mr. Chief Justice Waite, dissenting:

I cannot concur in this judgment. We have decided that a municipal corporation may collect reasonable compensation for the use of its improved public wharves and landing places. Such a charge is in no just sense a tax or burden. The State of Maryland has seen fit to prohibit the City of Baltimore from making any such charge for landing and depositing the products of the State. That was all the State undertook to do. I am unable to bring my mind to the conclusion that the Constitution of the United States makes this the equivalent of a provision that all wharfage at the public wharves belonging to the City shall be free so long as the law as it now stands is in force.

Cited—100 U. S., 679; 105 U. S., 562; 107 U. S., 698; 18 N. W. Rep., 810.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,

v.

MARY L. GRIDLEY.

(See S. C., 10 Otto, 614-617.)

Falsity of statement in insurance application.

Where, in an application for life insurance, the statement of the insured was, "No hereditary taint on either side of the house, to my knowledge," in order to show the falsity of the statement in an action on the policy, it was necessary for the insurance company to prove that the hereditary taint alleged was known to the applicant when the statement was made.

[No. 197.]

Argued Mar. 12, 1880. Decided Mar. 22, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York.

The case is stated by the court.

Mr. Edward Salomon, for plaintiff in error.

Mr. Robert Sewell, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

This is an action upon a policy of insurance, insuring the life of Fayette R. Gridley in the sum of \$10,000, for the benefit of his wife, the defendant in error.

The policy sets forth that it was issued "In consideration of the representations made in the application therefor and of the premium, etc." It sets forth, further, that "If any of the statements or declarations in the application for this policy, and upon the faith of which it is issued, shall be found in any material respect untrue, then * * * this policy shall be null and void."

The application was signed by the assured in behalf of himself and his wife. The first clause is as follows: "An answer to each of the following questions is required from persons proposing to effect insurance in this Company, which answers form the basis of this contract."

It concluded with the declaration "That the above are the applicant's own fair and true answers to the foregoing questions. * * *. And it is hereby agreed that these statements with this declaration shall form the basis of the contract for assurance, and that any untrue or fraudulent answers—any suppression of facts in regard to the person's health, habits or circumstances—*material to the risk*, * * * shall vitiate the policy and forfeit all payments made thereon."

The application contained, among others, the following question: "Have the person's (whose life is to be assured) parents, uncles, aunts, brothers or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease." The applicant answered: "No; except one brother temporarily insane six months since. Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hereditary taint of any kind in family on either side of house, to my knowledge."

It was proved, on behalf of the Company, that Abraham Gridley, an uncle of the assured, was insane for more than a year preceding his death, and that he died in the Bloomingdale Insane Asylum upwards of twenty years before the application for the insurance here in question was made.

The testimony being closed, the counsel for the Company asked the court to instruct the jury to find a verdict for the defendant. This was refused, and defendant excepted. The court thereupon instructed the jury to return a verdict for the plaintiff, and the defendant again excepted. The jury found as directed.

The only question argued before us is, whether the court erred in instructing the jury to find for the plaintiff. The solution of that question depends upon the construction and effect to be given to the interrogatory and the answer to which our attention was called by the counsel for the plaintiff in error.

It is a recognized rule in the construction of statutes, that "A thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers." *People v. Ins. Co.*, 15 Johns., 258.

This proposition is equally applicable to other written instruments. The object of all symbols is to convey the meaning of those who use them, and when that can be ascertained it is conclusive. The intent of the law-makers is the law, and here the intent of the parties is the contract.

It was material to the risk and hence important to the insurers, to know whether either of the maladies named or any serious malady not named was *hereditary* in the family of the applicant. If the question were answered in the affirmative, it might be a reason for declining to issue the policy. On the other hand, if either of such maladies existed in a member of the family other than the applicant, but was not *hereditary* and, on the contrary, existed, according to the family history, for the first time in the person affected, and in that case was the effect of known contemporaneous causes, then it was not material to the risk, was of no inter-

See 10 OTTO.

est to insurers, and it is fairly to be presumed they did not care to be advised upon the subject.

This may be illustrated by the case of insanity mentioned in the answer of the applicant. He says his brother was afflicted in that way. "Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine." He adds: "Recovery followed reformed habits." This explanation took the subject wholly out of the scope and purpose of the inquiry by the Company, and made it, as it were, *res inter alios acta*.

The last sentence of the answer is: "No hereditary taint on either side of the house, to my knowledge."

The affirmation was restricted and narrowed down to what the applicant himself personally knew touching the subject. It has this extent; no more.

The Company might have refused to insure unless the qualification were withdrawn. Having failed to do this, such is the contract of the parties.

To make out the defense sought to be established by the insurers, three things were, therefore, necessary to be shown: that the alleged insanity of the uncle had existed; that it was hereditary; and that it was known to the applicant when he answered the question.

The first point was clearly proved. In relation to the second and third, there was no proof whatever. What was proved, without what was not proved, was of no account. The defense, therefore, wholly failed. It follows that the instruction complained of was properly given.

The subject of questions and answers in cases like this was fully considered by this court in *Bk. v. Ins. Co.*, 95 U. S., 673 [XXIV., 563].

It is unnecessary to go over the same ground again, or to add anything to what is there said.

The judgment of the Circuit Court is affirmed.

Cited—104 U. S., 203; 40 Ohio St., 217; 48 Am. Rep. 680.

UNITED STATES, *Appt.*,

v.

FRANCIS J. LIPPITT.

(See S. C., 10 Otto, 663-670.)

Court of Claims—limitation in—commutation.

*The limitation prescribed by the 10th section of the Act of March 3, 1863, amendatory of the Act of February 24, 1855, is not pleadable in the Court of Claims, against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim is presented for settlement at the proper department within six years after it first accrued.

[No. 879.]

Argued Mar. 9, 10, 1880. Decided Mar. 22, 1880.

APPEAL from the Court of Claims.

Between July, 2, 1863, and Aug. 1, 1864, the petitioner, defendant in error, was Colonel of the Second California Volunteers, in the service of the United States. July 2, 1863, he was in command of the District of Humboldt, California,

*Head note by Mr. Justice HARLAN.

and on that day he was ordered by the Commanding General of the Department of the Pacific to report, in person, at the headquarters of the department, in San Francisco, and to await further orders. About July 25 he left his post, and from about that day to Aug. 1, 1864, was in San Francisco awaiting orders. He was not furnished fuel and quarters during this time. There is no direct evidence whether they could or could not have been furnished. Most of the officers stationed at San Francisco during this time received commutation.

Petitioner was not ordered to perform, nor did he perform, any military duty during this time, nor did he again report himself at headquarters after his first report on his arrival. He made no demand on the proper officer that fuel and quarters be furnished him, nor did he receive any military order after his arrival until July 19, 1864, when he was ordered to repair to his regiment.

In 1865, he presented to the War Department a claim for commutation for fuel and quarters while so awaiting orders, which, with the papers, was referred by the Secretary of war to the Court of Claims Jan. 9, 1878, in pursuance of section 1063 of the Revised Statutes.

Subsequently, Feb. 1, 1878, the petitioner filed his petition in the Court of Claims to recover said commutation; to which, among other things, a plea was interposed, under the statute, that the action was barred, in that the petition was not filed within six years after the claim first accrued. On the trial, judgment was rendered in favor of the claimant.

Messrs. Chas. Devens, Atty. Gen., Thos. Simons, Asst. Atty. Gen., and Albert D. Robinson, for appellant.

Messrs. Jas. Lowndes, John J. Weed and Thomas Wilson, for appellee.

Mr. Justice Harlan delivered the opinion of the court:

The correctness of the judgment below depends, in part, upon the construction of the 10th section of the Act of March 3, 1863, 12 Stat. at L., 765, amendatory of the Act of Feb. 24, 1855, 10 Stat. at L., 612, establishing the Court of Claims. That section declares "That every claim against the United States, cognizable by the Court of Claims, shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this (that) Act, within six years after the claim first accrues," etc.

The claims against the Government, of which the Court of Claims could, at that date, take cognizance, were those founded upon some law of Congress, or upon some regulation of an Executive Department, or upon some contract, express or implied, with the Government of the United States, which might be suggested to that court by a petition filed therein; and also, all claims which might be referred to the court by either House of Congress. The limitation of six years applied, therefore, to every demand asserted against the Government in the Court of Claims, which it had, when the Act of 1863 was passed, jurisdiction to hear and determine. Within the meaning of the Act all such claims were cognizable by that court.

By a subsequent statute, approved June 25,

1868, authority was given to the head of any Executive Department, whenever any claim was made upon that department involving disputed facts or controverted questions of law, where the amount in controversy exceeded \$3,000, or where the decision would affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case; or where any authority, right, privilege or exemption was claimed or denied under the Constitution of the United States, to cause such claim, with all documents pertaining thereto, to be transmitted to the Court of Claims, to be there *proceeded in* as if originally commenced by the voluntary action of the claimant.

The court was also empowered to try, and adjudicate, any claim of like character, amount or class transmitted to it by the Secretary of the Treasury, upon the certificate of an Auditor or Comptroller of the Treasury.

But the Act accompanied this enlargement of the jurisdiction of the Court of Claims with the restriction that no case should be referred to it by the head of a department, unless it belonged to one of the several classes of cases to which, by reason of the subject-matter and character, the court could, under the then existing laws, take jurisdiction on the voluntary action of the claimant.

The claim of appellee first accrued in 1864. It was presented to the War Department in the year 1865, and its settlement pressed, so the finding declares, until Jan. 9, 1878. On that day, it was transmitted by the Secretary of War to the Court of Claims for its determination. It was transmitted, not, so far as the record shows, at the instance or with the consent of the appellant, but because it involved controverted questions of law, the decision whereof would affect a class of cases.

It is conceded by the Government that the claim was presented at the proper department and, when presented, was not barred by the limitation of six years. But the contention of the Attorney-General is that the Court of Claims is prohibited, by the express words of the statute, from giving judgment against the Government upon *any* claim which is not asserted by petition filed therein within six years after the claim first accrued, or which is not within that period transmitted to the court from one of the Houses of Congress or by the head of an Executive Department.

We are unable to concur in this construction of the Statute of March 3, 1863. Such a construction would work an injustice which we cannot suppose Congress intended should be done to the citizen having a demand against the Government. The claim in question, although cognizable, in the first instance, by the Court of Claims, was yet properly presented at the department which had authority to pass finally upon it. It should have been there allowed or disallowed long before the expiration of six years from the time it first accrued. The claimant steadily pressed its settlement without, so far as the finding shows, any intimation that it was defectively prepared, or that it would be ultimately rejected. The department held it undisposed of until 1878, and then sent the claimant to the Court of Claims, where he was

met at the very threshold of his case by a plea of limitation upon the part of the Government. That plea, if sustained, would defeat the only object of the reference. It would prevent the department from obtaining for its future guidance the judgment of the court upon controverted questions of law affecting a large class of cases. It should not be sustained, unless we are required to do so by some absolute, unbending rule of construction.

When this claim was presented at the War Department for settlement, there was no statute allowing the heads of Executive Departments to refer claims to the Court of Claims for adjudication. But when the Act of June 25, 1868, 15 Stat. at L., 75, was passed, its provisions necessarily applied to all claims then before the Executive Departments which belonged to one of the several classes, of which, by reason of their subject-matter and character, the Court of Claims could take cognizance upon the voluntary petition of the claimant. The claim of appellee certainly belonged to one of those classes. It was not, as we have seen, barred by limitation when that Act was passed. It could, then, in 1868, have been referred by the War Department to the Court of Claims for its determination. But, instead of adopting that course, at a time when no question of limitation could be raised, its reference was postponed or delayed for nearly ten years after the passage of the Act of 1868. We are satisfied that the delay was accidental, certainly not with any intention to defraud or injure the claimant. If the plea had, upon its face, admitted, or if the fact was established by competent evidence, that the delay in deciding, or in referring the claim to the Court of Claims, was intentional, or with a purpose to defeat the claimant, by limitation, the court would certainly not permit the Government to profit by such a course. Why should a different conclusion be reached when the delay is unexplained, and is inconsistent with proper diligence in the transaction of the public business? It seems to the court that, looking at the purpose which Congress had in the establishment of the Court of Claims, and in enlarging its powers, as indicated in the Acts of 1863 and 1868, the just and reasonable construction of the 10th section of the first named Act requires us to hold that limitation is not pleadable, in the Court of Claims, against a claim cognizable therein, and which has been referred by the head of an Executive Department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued; that is, within six years after suit could be commenced thereon against the Government. Where the claim is of such a character that it may be allowed and settled by an Executive Department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department, for allowance and settlement. In such cases, the statement of the facts, upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously, and in due time, been presented at the proper department for settlement. These views find support in the

See 10 OTTO.

fact that the Act of 1868 describes claims presented at an Executive Department for settlement, and which belong to the classes specified in its 7th section, as *cases* which may be transmitted to the Court of Claims. "And all the *cases* mentioned in this section, which shall be transmitted by the head of an Executive Department, or upon the certificate of any Auditor or Comptroller, shall be *proceeded in* as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations," with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the Act, commenced against the Government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the Court of Claims they are to be "*proceeded in* as other cases pending in said court."

Whether, if a claim be presented at the proper department when six years have elapsed after it first accrued, the Government is at liberty, upon its transfer therefrom to the Court of Claims, to plead the limitation of six years, or whether the court, in such cases, must itself interpose the statute for the protection of the Government, are questions not necessary to be decided in this case.

Touching the merits of the case, it appears that the appellee was required, by competent military authority, to leave his regiment, then on duty in the District of Humboldt, California, to the command of which he had been previously assigned, and report in person at the headquarters of the Department of the Pacific, in San Francisco, *there to await further orders*. He remained in that City, absent from his regiment, from about July 25, 1863, until August 1, 1864, awaiting orders. It is immaterial that he performed no active duty while thus awaiting orders. He was subject to assignment for such duty while in San Francisco and, as said by the court below, the responsibility for his non-employment rested with his superior officer. What was said in *U. S. v. Williamson*, 23 Wall., 411 [90 U. S., XXIII., 89], has some application here. That case arose under the Act of March 3, 1863, relating to the government of the army, by which it was enacted that any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half the pay and allowances prescribed by law, and no more. Williamson claimed full pay while absent, upon his own request, from his command. He was, however, required to remain at a particular place, and to await orders. Among other things we there said: "The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place, and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience, than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time."

Nor is there anything in *U. S. v. Phisterer*, 94 U. S., 219 [XXIV., 116], in conflict with the conclusion we have reached. We there held that an army officer, at his own home awaiting orders and having no public duty to perform, was not entitled to commutation for quarters

or fuel. No such case is presented by the special finding.

Some stress is laid upon the fact that appellee has failed to show affirmatively that he made a demand on the proper officer at San Francisco for quarters and fuel in kind. There is some force in this suggestion, but, under the circumstances of this case, we do not think it should control our judgment. There is no evidence that quarters and fuel could have been furnished in kind. On the contrary, the records of the War Department show that most, if not all, the officers stationed in San Francisco during this period received commutation of quarters and fuel. In the light of all the facts found by the court below, and since it does not appear that the claim was objected to in the War Department upon any such ground, during the thirteen years it lay there, undisposed of, despite the fact that its settlement was steadily pressed by the claimant, we are disinclined to reverse the judgment, because it does not appear affirmatively that appellee, upon his arrival in San Francisco, made a formal requisition for quarters and fuel.

Our conclusion is that, under the law as it stood when appellee's claim accrued, he was entitled to the commuted value of quarters and fuel while in San Francisco awaiting orders.

Judgment affirmed.

FIRST NATIONAL BANK OF CARLISLE,
PENNSYLVANIA, WILBER F. SADLER,
Receiver, *Plff. in Err.*,

v.

FANNY L. GRAHAM.

(See S. C., 10 Otto, 699-704.)

Gross negligence—of corporations—special bank deposit—national bank—U. S. bonds.

1. Gross negligence on the part of a gratuitous bailee is a tort, and an action on the case is the appropriate remedy for such wrong.

2. Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

3. Where a bank is accustomed to take deposits of United States bonds, and this is known and acquiesced in by the directors, and the bonds are lost by the gross carelessness of the bailee, a liability ensues, in like manner as if the deposit had been authorized by the terms of the charter.

4. The 46th section of the Banking Act of 1864, which authorizes a national bank to deliver special deposits, implies clearly that a national bank, as a part of its legitimate business, may receive such special deposits.

5. The phrase "special deposits," thus used, embraces deposits of bonds of the United States.

NOTE.—*Special deposits, responsibility of banks for.*

In case of a special deposit, the bank merely becomes the bailee of the depositor. The title to the thing deposited remains with the depositor. *Boyd v. Bank of Cape Fear*, 65 N. C., 13; *Foster v. Essex Bank*, 17 Mass., 479; S. C., 9 Am. Dec. 168; *Albany Com. Bank v. Hughes*, 17 Wend., 94; *Oddie v. Nat. City Bank*, 45 N. Y., 735; S. C., 6 Am. Rep., 160. Where money is deposited in a sealed packet, the presumption is that it was intended as a special deposit. *Dawson v. Real Est. Bank*, 5 Ark., 283.

It would be a breach of trust in the bank or its officers to open such a packet or inspect its contents. *Foster v. Essex Bank*, 17 Mass., 479; S. C., 9 Am. Dec., 168.

Where funds are deposited in a bank for a special purpose, with notice thereof, the bank cannot withhold it from that purpose for a debt due it. *Bk. of U. S. v. Macalester*, 9 Pa. St., 475.

[No. 166.]

Argued Mar. 4, 1880. Decided Mar. 22, 1880.

IN ERROR to the Supreme Court of the Commonwealth of Pennsylvania.

This action was brought in the Court of Common Pleas of Cumberland Co., Pa., by the defendant in error, against the plaintiff in error, to recover the value of certain bonds, the property of the plaintiff, which had been stolen from the vault of the defendant Bank.

Judgment was rendered in the Court of Common Pleas for the plaintiff, and this judgment having been affirmed by the Supreme Court of the State, the defendant sued out this writ of error.

The facts appear in the opinion.

Mr. Geo. H. Williams, for the plaintiff in error.

Messrs. John Hays and **Jas. H. Graham & Son**, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The capital stock of the Bank was \$500,000, divided into 500 shares of \$1,000 each. From November 9, 1869, Samuel Hepburn, the president, owned 460 shares. His son, C. H. Hepburn, was the cashier, and he and Hopewell Hepburn, another son and a director, owned ten shares each. From October 19, 1871, H. M. Hepburn, also a son and director, owned ten shares. John G. Orr, the teller and a director, owned the remaining ten shares. With one exception, these persons were directors from the year 1870. In 1867, the defendant in error had \$4,000 of 7-30 bonds of the United States deposited in the Bank for safe keeping. They were called in by the government, and at her request the cashier had them converted into the same amount of 5-20 bonds. These also were left in the Bank for safe-keeping. The cashier gave her a receipt, dated October 22d, 1868, setting forth this fact and that the bonds were to be returned on the return of the receipt. The cashier cut off the coupons and collected them and placed the proceeds to her credit on the books of the Bank, and paid her the amount as it was demanded. She kept an account with the Bank. Before and after the times mentioned, the officers of the Bank were accustomed to receive such deposits from others in the same way and for the same purpose. They were entered in a book kept by the Bank. The fact of there being such deposits was frequently spoken of by the directors at meetings of the Board. Some of the directors and quite a number of other persons

Banker is bound for slight care only, and is only responsible for gross negligence. He is bound to take the care of such deposits which an ordinarily prudent man takes of his own property of the same kind. *Hale v. Rawallie*, 8 Kan., 137; *Foster v. Essex Bank*, 17 Mass., 479; S. C., 9 Am. Dec., 168; *Giblin v. McMullen*, 38 L. J. P. C., 25; 17 W. R., 445; 2 L. R. P. C., 317; 21 L. T. N. S., 214; *Ray v. Bk. of Ky.*, 10 Bush., 344; *Scott v. Nat. Bk. of Chester Valley*, 72 Pa. St., 471; *Scott v. Crevor*, 2 S. C., 522; *Boyd v. Bank of Cape Fear*, 65 N. C., 13; *First Nat. Bk. of Lyons v. Ocean Nat. Bk.*, 60 N. Y., 278; S. C., 19 Am. Rep., 181.

Special deposit in a bank is at the risk of the depositor, but if converted to purposes of the bank by its officers or agents, they are personally liable. In matter of *Franklin Bk.*, 1 Paige Ch., 249; S. C., 19 Am. Dec., 413.

had such deposits in the Bank. No compensation was expected or received by the institution. It was a bailee without reward. The Bank alleged that, on the 5th of August, 1871, the bonds of the defendant in error were stolen from its vault. She did not learn the fact until some two or three weeks afterwards. She heard that some other securities belonging to her and so deposited had been stolen and, upon inquiry at the Bank, was told that those securities had been found upon a neighboring highway and had been returned, but that her government bonds had been stolen also and had not been recovered. She was requested to say nothing about their loss, and was assured that the interest should be regularly paid to her, and that the value of the bonds should also be made good, so that she should not be a loser. The interest was accordingly paid up to the 1st of July, 1873, inclusive. This suit was brought to recover the value of the bonds.

The defendant in the court below asked the court to instruct the jury that the Bank, being a corporation chartered under the national banking laws, "Was not authorized to receive bonds and valuables for safe-keeping;" that "The act of the cashier in taking the bonds of the plaintiff was not within the scope of his powers and duties as cashier and, therefore, did not bind the Bank; and that the plaintiff could not recover." This instruction the court refused to give, and the defendant excepted.

The jury was instructed that, "To justify a recovery against the defendant in this case, they must be satisfied from the evidence that the plaintiff's bonds were received for safe-keeping with the knowledge and acquiescence of the officers and directors of the Bank, and that if the bonds were lost by the gross negligence of the Bank or its officers, the Bank was liable." The defendant again excepted. A verdict was rendered for the plaintiff. The jury thus found and affirmed the facts of knowledge and gross negligence by the Bank. These points are, therefore, conclusively established, and are not open to inquiry.

Conceding for the moment that the contract was illegal and void, for the reason alleged in behalf of the Bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side; certainly none on the part of the depositor. She was entitled, at any time, to reclaim the securities. The Bank was bound in good faith and in law to return them or to keep them, without gross negligence, until they were called for. If, when applied for, they were refused, it cannot be doubted that they or their value, according to the form of action adopted, might have been recovered. *White v. Bk.*, 22 Pick., 181. If the Bank had destroyed them or had thrown them into the street, whereby they were lost to the plaintiff, the liability of the Bank would have been the same. To have kept them with gross negligence, whereby the same consequence to the plaintiff was incurred, involved necessarily the same result to the depositary. The only way of escape from liability, open to the latter, would have been to return the property to the owner, or to get rid of its possession otherwise in some lawful way. Gross negligence on the part of a gratuitous bailee, though not a fraud, is, in legal effect, the same thing. *Foster v. Bk.*, 17

Mass., 479. It is a tort, and an action on the case is the appropriate remedy for such a wrong. In many cases where there is a valid contract it may be regarded only as inducement and as raising a duty, for the breach of which an action may be brought *ex contractu* or *ex delicto*, at the option of the injured party. 1 Chit. Pl., 151.

Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merch. Bk. v. St. Bk.*, 10 Wall., 604 [77 U. S., XIX., 1008]. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence. *R. R. Co. v. Quigley*, 21 How., 209 [62 U. S., XVI., 75]; 2 Wait, Act. and Def., pp. 337-339; *Ang. & A., Corp.*, secs. 186, 385; *Cooley, Torts*, pp. 119, 120.

Recurring to the case in hand, it is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. *Foster v. Bk.* [supra]; *Bk. v. Smith*, 62 Pa., 47; *Scott v. Bk.*, 72 Pa., 471; *Bk. v. Graham*, 79 Pa., 106; *Turner v. Bk.*, 26 Iowa, 562; *Smith v. Bk.*, 99 Mass., 605; *Bk. v. Schley*, 58 Ga., 369. The only authorities in direct conflict with these adjudications, to which our attention has been called, are *Willey v. Bk.*, 47 Vt., 546, and *Whitney v. Bk.*, 50 Vt., 389.

The case first cited, *Foster v. Bk.*, was argued exhaustively by the most eminent counsel of the time, and decided by a court of great judicial learning and ability. Their opinion is marked by careful elaboration.

The special deposit there was a cask containing gold coin. While it was maintained that the Bank would have been liable for its loss by gross negligence, it was held that such negligence in that case had not been shown.

Here, gross negligence is conclusively established. The depositor kept an account in the Bank. The cashier cut off and collected the coupons, and placed the proceeds to her credit. The bonds, therefore, entered into the legitimate and proper business of the institution. But it is unnecessary to pursue this view of the subject further, because we think there is another ground, free from doubt, upon which our judgment may be rested.

The 46th section of the Banking Act of 1864, 13 Stat. at L., 99, re-enacted in the Revised Statutes of the United States, section 5228, declares that, after the failure of a national bank to pay its circulating notes, etc., "It shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills,

or otherwise prosecute the business of banking, except to receive and safely keep moneys belonging to it, *and to deliver special deposits.*" This implies clearly that a national bank, as a part of its legitimate business, may receive such "*special deposits*," and this implication is as effectual as an express declaration of the same thing would have been. *U.S.v. Babbitt*, 1 Black, 55 [66 U. S., XVII., 94].

The phrase "*special deposits*" thus used, embraces deposits such as that here in question. *Patterson v. Bk.*, Court of Appeals of New York, recently decided and not yet reported, [80 N. Y., 82]. In that case it was said "A reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done."

It would, undoubtedly, be competent for a national bank to receive a special deposit of such securities as those here in question, either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly.

We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us, and which in this opinion it is unnecessary to consider.

The judgment of the Supreme Court of the Commonwealth of Pennsylvania is affirmed.

Cited—102 U. S., 420; 55 Vt., 161; 45 Am. Rep., 601; 75 Mo., 324; 42 Am. Rep., 416.

LAURA ELLEN JONES, Widow and Exrx.,
and Tutrix of Minor Heirs of SIDNEY A.
STOCKDALE, Deceased, Late Collector of Internal Revenue, *Plff. in Err.*,

v.

W. T. BLACKWELL.

(See S. C., 10 Otto, 599-605.)

Tax on tobacco.

* Manufactured tobacco, shipped in bond from the manufactory and stored in an export bonded warehouse on the 14th June, 1872, was subject to the tax of thirty-two cents per pound, as prescribed in the Internal Revenue Act of July 20, 1868. It was not entitled to the benefit of the reduced tax of twenty cents per pound prescribed by the Act of June 6, 1872, amendatory of the Act of July 20, 1868.

[No. 189.]

Submitted Mar. 10, 1880. Decided Mar. 29, 1880.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

This action was brought in one of the District Courts of Louisiana by Blackwell, the defendant in error, against S. A. Stockdale, to re-

* Head note by Mr. Justice HARLAN.

cover damages sustained upon certain packages of tobacco which, he alleged, were illegally detained in a warehouse, in bond, by the defendant, in his capacity of Collector of United States Internal Revenue. The case was removed to the court below, and upon the first trial verdict was for the defendant. This verdict was set aside and upon a new trial verdict was rendered for the plaintiff, upon which judgment was entered. The defendant having died *pendente lite*, the suit was revived against his representative, who has brought the case to this court by writ of error.

The case further appears in the opinion.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for plaintiff in error.

Messrs. J. D. Rouse, W. A. Maury and William Grant, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court:

The tobacco described in the petition was shipped by the defendant in error, in bond, from the manufactory in Virginia to the Port of New Orleans, and was there entered in bond in an export bonded warehouse on the 13th June, 1872. On the first of July next thereafter, he, by his agents, applied to the Collector of Internal Revenue for the First Collection District of Louisiana, including the City of New Orleans, to withdraw the tobacco for sale or consumption, offering to pay a tax on the same at the rate of twenty cents per pound, as prescribed in the Act of June 6, 1872. 17 Stat. at L., 249. The Collector refused to permit its withdrawal, unless a tax at the rate of thirty-two cents per pound was first paid, as prescribed by the Act of July 20, 1868. 15 Stat. at L., 152.

Upon the trial in the court below the jury were instructed, among other things, that, on and after July 1, 1872, and prior to March 3, 1873, the only tax imposed by law upon manufactured tobacco was twenty cents per pound. The principal question before us is as to the correctness of that instruction.

By the 1st section of the Act of July 20, 1868, a tax of thirty-two cents per pound was imposed upon all manufactured tobacco. The same Act provided for a system of export bonded warehouses, to be designated and established by the Commissioner of Internal Revenue, at any port of entry in the United States, "For the storage of manufactured tobacco and snuff in bond intended for exportation." Manufactured tobacco, after being removed in bond from the manufactory to an export bonded warehouse, could, however, be withdrawn, upon payment of tax, for sale or consumption.

Up to November 21, 1871, on which day the commissioner submitted his annual report of the operations of the internal revenue system for the fiscal year ended June 30, 1871, there had been established and were in operation, sixteen of such export bonded warehouses. They were located in Massachusetts, New York, Pennsylvania, Maryland, Virginia, Louisiana, California and Oregon. From the report of the commissioner, of which we may take judicial notice, it appears that the quantity withdrawn for exportation from the several export bonded warehouses during that fiscal year, was 10,621,183 pounds, while the quantity withdrawn for

consumption from the several bonded warehouses during the same period was 11,499,659 pounds, showing that less than one half of the tobacco and snuff received in bond from the manufactory was actually exported. The commissioner stated that from the eight bonded warehouses, established at the several Ports of Philadelphia, Baltimore, New Orleans, San Francisco and Portland, Oregon, in which were stored during the fiscal year ended June 30, 1871, 9,437,257 pounds of manufactured tobacco, only 437,495 pounds during that period were withdrawn for exportation, while 8,480,656 pounds were withdrawn for consumption. "The practical operation," said he, "of this system of bonded warehouses hitherto has been to give to a few individuals and firms, more particularly the proprietors of the warehouses, the same facilities for storing tobacco, *without the prepayment of tax*, as were given by the former system of class B, bonded warehouses, abolished by the Act of July 20, 1868." He, therefore, recommended the abolition of the system of export bonded warehouses, as required by the best interests both of the government and of the manufacturer. The benefits to result from such abolition were that "A large portion of the expenses now (then) incurred by the manufacturers in exporting their goods would be saved, the government would receive the taxes on all goods *when removed from the place of manufacture*, all jobbers and dealers in manufactured tobacco would be placed on the same footing with regard to the traffic in tax-paid goods, and the special privileges and advantages enjoyed by a few individuals and firms would be removed."

It was, doubtless, because of these official recommendations from the head of the internal revenue system that Congress made the numerous amendments of the Act of July 20, 1868, which appear in the Act of June 6, 1872.

The contention of the defendant in error is, that while all manufactured tobacco stored in export bonded warehouses and withdrawn for sale or consumption *before* the first day of July, 1872, was subject to the tax prescribed by the Act of July 20, 1868, all found stored in such warehouses on the first of July, 1872, without regard to the date of its deposit therein in bond was subject, upon withdrawal *on and after* that date, for sale or consumption, to the reduced tax prescribed by the Act of June 6, 1872. To this construction of the statute we cannot yield our assent.

It is true that the Act of June 6, 1872, which took effect on the first of August, 1872, "except where otherwise provided," declares "That on and after the first day of July next," that is, July 1, 1872, there shall be assessed and collected on manufactured tobacco a tax of twenty cents per pound. But the section (sec. 31) which so declares must be interpreted in connection with other provisions of the Act, and with reference to the reasons which caused the radical changes made by that Act in the internal revenue system as previously established. We have already seen that the attention of Congress was called to the evils which had grown up under the system of export bonded warehouses, and to the necessity of its abolition. The Act of June 6, 1872, gave effect to the recommendations of the commissioner, and made such provisions as would enable him to dispense with such ware-

houses altogether. But a specific provision was made as to tobacco which had been previously placed in export bonded warehouses under the Act of June 20, 1868. It was declared, "All tobacco and snuff *now* stored in any export bonded warehouse shall, on and after July 1, 1872, be subject to the same tax as is provided by this Act, and shall, within six months after the passage of this Act, be withdrawn from such warehouse upon payment of the tax, or for export, under the regulations of the Commissioner of Internal Revenue now in force concerning withdrawals of tobacco or snuff from bonded warehouses. And any tobacco or snuff remaining in any export bonded warehouse for a period of more than six months after the passage of this Act shall be forfeited to the United States, and shall be sold or disposed of for the benefit of the same in such manner as shall be prescribed by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury." We entertain no doubt as to the object of this provision. It evidently refers only to tobacco stored in export bonded warehouses *at the date of the passage of the Act*, and not, also, as claimed by the defendant in error, to that stored in such warehouses, after that date, and before the first of July, 1872. If Congress intended that *all* manufactured tobacco, whether at the manufactory or in an export bonded warehouse, should, on the first of July, 1872, have the benefit of the reduced tax of twenty cents, there would have been no necessity for a special declaration that tobacco "now," that is, at the passage of the Act, stored in export bonded warehouses should, *on and after* first July, 1872, be subject to the tax prescribed by the Act of June 6, 1872. The necessity for such declaration lay in the fact that unless tobacco, deposited in export bonded warehouses prior to that Act, was, in express terms, given the benefit of the reduced tax, it would be liable to the tax of thirty-two cents imposed by the Act of July 20, 1868. This will become perfectly clear when attention is given to the regulations which the Commissioner of Internal Revenue had prescribed, and which were then in force, in reference to the shipment of tobacco in bond from the manufactory to an export bonded warehouse. Before any shipment could take place, it was necessary that an inspector should inspect, weigh and mark each package of tobacco proposed to be shipped to an export bonded warehouse. His report of inspection indicated the marks and numbers of each package, the number of packages and their contents, the number of pounds, *the rate and amount of tax*. All these items were carried into the transportation bond which the shipper was required to execute. They appeared also in the report of inspection when the tobacco reached its destination; and, finally, when the tobacco was received by the storekeeper at the export bonded warehouse, the shipper was required to execute a bond, with surety, binding him to pay "the amount of taxes due and owing" on the tobacco, the rate and amount of tax due thereon being described *on the face of the bond*, and being the same as that shown in the certificate of the inspector. So that, as to all tobacco in export bonded warehouses on 6th June, 1872, the government then held bonds obligating the parties thereto to pay the tax, as

to rate and amount, which appeared on all the official documents connected with the transportation from the manufactory to the bonded warehouse. Hence the specific provision giving the owners of tobacco, stored in export bonded warehouses on 6th June, 1872, the benefit, on and after the first of July, 1872, of the reduced tax, as well as the privilege of keeping it there for six months without removal or payment of tax.

But when Congress declared that tobacco stored in such warehouses, at the date of the passage of the Act of June 6, 1872, should be subject to the tax provided by that Act, it does not at all follow that tobacco stored in export bonded warehouses after the passage of that Act, and before July 1, 1872, when the reduced tax took effect, was entitled to the benefit of the reduction. Such a construction of the Act would be inconsistent with the policy which dictated the abolition of the system of export warehouses, as well as with the necessary implications arising from the specific provision as to tobacco stored in such warehouses at the date of the Act. It deprives the word "now," in the clause we have quoted, of all meaning. If the tobacco in question had remained in the manufactory until July 1, 1872, it would have been subject to a tax of only twenty cents; but it could not on that day, and under the Act of June 6, 1872, have been removed therefrom for sale or consumption except upon payment of the tax. If, however, the defendant in error chose not to wait until that date, when the reduction would take effect as to all tobacco in the manufactory, but preferred to ship it in bond to an export bonded warehouse between June 6, 1872, and July 1, 1872, he must abide by the terms of the bond given at the time his tobacco was deposited in such warehouse. His bond, upon its face, recites, if the statute was complied with, the rate and amount of tax prescribed by the law in force when the bond was executed. He could not satisfy its terms except by paying the amount it called for. That Congress gave the owners of tobacco stored in bonded warehouses on 6th June, 1872, the benefit of the reduced tax, constitutes no reason why such reduction should be applied to tobacco stored in such warehouses after that date, when the owner had, prior to July 1, 1872, given bond covering the tax due under the then existing law. If the Act of June 6, 1872, had prescribed an increase of tax to take effect on the first day of July thereafter no one would contend that such increase would have applied to tobacco stored in an export bonded warehouse between June 6, 1872, and July 1, 1872. That Congress reduced rather than increased the tax, to be assessed and collected on and after July 1, 1872, does not authorize the court to relieve the defendant in error from the obligations of his bond, given prior to that date, to pay the tax as ascertained and fixed by the law in force when it was executed; especially since the Act of June 6, 1872, did not go into effect before July 1, 1872, as to the reduced tax, except as to tobacco stored in export bonded warehouses on 6th June, 1872.

It results from what has been said, that the Collector rightly demanded a payment of thirty-two cents per pound on defendant in error's

tobacco, when, on July 1, 1872, he applied to withdraw it for sale or consumption.

Nor was the Collector responsible for any damage to the tobacco resulting from the delay in obtaining the necessary stamps after Blackwell's demand in August, 1872. The Collector was then, it is true, without the necessary stamps, but he made requisition for them upon the proper authorities at Washington. In view of the refusal of the appellee to pay the tax upon the first application for withdrawal on 1st July, 1872, the Collector was justified in believing that defendant in error would not pay the required tax, and he was, therefore, under no obligation to keep stamps constantly in readiness for him.

We perceive in the evidence no just ground upon which to rest a verdict against the plaintiff in error. The jury should have been instructed to find in her behalf.

The judgment is reversed, with directions for further proceedings in conformity with this opinion.

HOWE MACHINE COMPANY, *Plff. in Err.*
v.

JESSE GAGE, CLERK OF THE COUNTY COURT
OF SUMNER COUNTY.

(See S. C., 10 Otto, 676-679.)

Tax on peddlers, when valid.

A state tax on peddlers of sewing-machines, which applies alike to sewing-machines manufactured in the State and out of it, is valid, and not repugnant to the U. S. Constitution.

[No. 198.]

Submitted Mar. 12, 1880. Decided Mar. 29, 1880.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is stated by the court.

Messrs. R. McP. Smith and Morton B. Howell, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The Howe Machine Company is a Corporation of the State of Connecticut. It manufactured sewing-machines at Bridgeport, in that State, and had an agency at Nashville, in the State of Tennessee. From the latter place, an agent was sent into Sumner County to sell machines there. A tax was demanded from him for a peddlers' license to make such sales. He denied the validity of the law under which the tax was claimed, but, according to a law of the State, paid the amount demanded, and brought this suit to recover it back. He was defeated in the lower court, and the judgment was affirmed by the Supreme Court of the State.

The Constitution of Tennessee, art. 11, sec. 30, declares that "No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

"Sales by peddlers, of articles manufactured

NOTE.—*Power of States to tax.* See note to *Providence Bank v. Billings*, 29 U. S. (4 Pet.), 514; and note to *Dobbins v. Erie Co.*, 41 U. S. (16 Pet.), 435.

or made up in this State, and scientific or religious books, are exempt from taxation." Code of Tenn., sec. 546.

"All articles manufactured of the produce of the State" are exempt from assessment or taxation. Acts of 1875, ch. 98, sec. 10.

"All peddlers of sewing-machines and selling by sample" shall pay a tax of ten dollars. Code, sec. 553 *a*, subsec. 43.

By a subsequent Act of the Legislature, this tax was increased to \$15.

The sewing-machines here in question were made in Connecticut. The Supreme Court of the State held, in this case, "That the law taxing the peddlers of such machines, levied the tax upon all peddlers of sewing-machines, without regard to the place of growth or produce of material or of manufacture."

We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute. *Leffingwell v. Warren*, 2 Black, 599 [67 U. S., XVII., 261].

The question presented for our consideration is not difficult of solution. A brief reference, however, to some of the adjudications of this court, bearing with more or less directness upon the subject, may not be without interest.

A State cannot require a license to be taken out to sell foreign goods while remaining in the packages in which they were imported. Such a law is contrary to the provision of the Constitution of the United States touching the laying of *imposts by a State*, and to the commerce clause of that instrument. *Brown v. Md.*, 12 Wheat, 419.

A State cannot give to the master and wardens of a port, in addition to other fees, the sum of \$5, whether they are called on to perform any service or not, for every vessel arriving in the port. This would be a regulation of commerce and a tonnage duty, both involving the exercise of a power which is withheld from the States. *Steamship Co. v. Portwardens*, 6 Wall., 31 [73 U. S., XVIII., 749].

A purchaser of goods coming from abroad, the goods to be at his risk until delivered to him, is not an importer, and the goods may be taxed while in the original packages. *Waring v. Mayor*, 8 Wall., 110 [75 U. S., XIX., 342].

The provision in the National Constitution that "No State shall levy imposts or duties on imports or exports," does not refer to articles brought from one State into another, but exclusively to articles imported from foreign countries. Hence, a tax imposed by a State upon all auction sales, whether by citizens of such State or of another State, and whether the articles are the products of such State or of another State, without any discrimination, is valid. *Woodruff v. Parham*, 8 Wall., 123 [75 U. S., XIX., 382].

Where a State imposes the same rate of taxation upon like articles, whether brought from another State or the products of the State imposing the tax, the tax may be enforced. *Hinson v. Lott*, 8 Wall., 148 [75 U. S., XIX., 387].

A State cannot impose a higher tax upon peddlers from another State, than is imposed upon her own citizens under like circumstances. Any discrimination in favor of the latter is fatal to the statute. *Ward v. Md.*, 12 Wall., 163, 418 [79 U. S., XX., 260, 449].

A State cannot impose a tonnage tax upon

vessels belonging to her own citizens, and engaged exclusively in commerce between places within her own limits. *State Tonnage Tax Cases*, 12 Wall., 204 [79 U. S., XX., 370].

A state law, imposing a tax upon freight brought into, taken from or carried through the State, is a regulation of commerce, and contrary to the provision of the Constitution which declares that "Congress shall have power to regulate commerce with foreign nations, between the several States, and with the Indian Tribes," *Case of the State Freight Tax*, 15 Wall., 232 [82 U. S., XXI., 146].

A State cannot impose a tonnage tax upon vessels owned in foreign ports, to defray the expenses of administering her quarantine regulations. *Peete v. Morgan*, 19 Wall., 581 [86 U. S., XXII., 201].

A tax for a license to sell goods is, in effect, a tax on the goods authorized to be sold.

A law which requires a license to be taken out by peddlers who sell articles not produced in the State, and requires no such license with respect to those who sell in the same way articles which are produced in the State, is in conflict with the power of Congress to regulate commerce with foreign Nations and among the several States. This power applies to articles taken from one State into another, until they become mingled with and a part of the property of the latter, and thereafter protects such articles from any burden imposed by reason of their foreign origin.

The non-exercise, by Congress, of the power to regulate interstate commerce is equivalent to a declaration that it shall be free from any restrictions. *Welton v. Mo.*, 91 U. S., 275 [XXIII., 347].

A State may demand from a vessel a list of passengers, with their ages, places of birth, occupations, last place of legal settlement, etc. Such a requirement is a police regulation. [*N. Y. City v. Miln.*], 11 Pet., 102.

But it cannot require a sum to be paid for each passenger landed. [*Passenger Cases*], 7 How., 283.

A statute which imposes a heavily burdensome condition upon a shipmaster, as a prerequisite to landing his passengers, and allows him the alternative of paying a small sum for each one landed, is a regulation of commerce and, therefore, void.

What may be done by a State to protect itself from the influx of paupers and convicted criminals, in the absence of legislation on the subject by Congress, is left undecided. *Henderson v. Mayor of N. Y.*, 92 U. S., 259 [XXIII., 543].

A tax by a State on the amount of goods sold at auction is a tax upon the goods so sold. A law which requires every auctioneer to pay into the state treasury a tax on his sales is, when applied to goods imported and sold in the original packages, in conflict with sections 8 and 10, article 1, of the Constitution of the United States and, therefore, invalid. *Cook v. Pa.*, 97 U. S., 566 [XXIV., 1015].

A State cannot, by law, authorize a municipal corporation to exact such wharfage as it may deem reasonable from vessels using certain designated wharves, and laden with articles not the products of the State, while vessels laden with such products of the State are exempted

from any charge whatever. Such a statute, and an ordinance enacted by the corporation to carry it out, are void. They are a regulation of commerce. *Guy v. Baltimore*, not yet reported [*ante*, 743].

In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the State or of the citizens of the State which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result.

In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing-machines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff v. Parham* [*supra*]; *Hinson v. Lott* [*supra*]; *Ward v. Md.* [*supra*]; *Welton v. Missouri* [*supra*].

The judgment is affirmed.

Cited—18 N. W. Rep., 810.

UNITED STATES, *Appt.*,

v.

THOMAS J. MURRAY.

[(See S. C., 10 Otto, 536-538.)]

Furlough—extra pay.

1. The Secretary may put an *employé* of a department on furlough without pay, at any time, if the exigencies of the service require it.

2. The Joint Resolution of Congress of June 23, 1874, contemplated the extra pay only when discharges occurred in consequence of a reduction of clerical force made necessary by the legislation of that Session of Congress.

[No. 215.]

Argued Mar. 23, 1880. Decided Apr. 5, 1880.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellant.

Mr. John N. Oliver, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 3d of May, 1873, Murray, the claimant, was appointed to a clerkship of class 1, in the Treasury Department, for a probationary term of three months. At the end of that period, the Board of Examiners having reported favorably on his fitness for a clerkship of that class, he was, on the 5th of November, re-appointed, and assigned to duty in the office of the Commissioner of Internal Revenue from the 3d of that month.

Owing to the abolition by law of the offices of Assessor and Assistant Assessor of Internal Revenue, in May, 1873, a large additional amount of labor was thrown on the office of the Commissioner, to meet which more clerical force became necessary, and was employed during the summer, fall and winter following. This unusual demand upon the appropriation for clerical service in that office for the year ending

June 30, 1874, caused an early partial exhaustion of that appropriation, and created a necessity to dispense with the services of a number of the clerks employed in that office from different dates in January and February, 1874, till the close of the official year. In consequence of that necessity, leave of absence without pay was given some of the clerks until the end of the year. Murray was included among the rest, and his leave dated on the first of February. Leave of absence was granted instead of an absolute dismissal from office, as a favor to the clerks, and to give them an opportunity of getting a transfer to some other bureau, if opportunity offered. The order of leave was accompanied by a notice that, if a transfer should not be effected, dismissal would occur at the end of the year.

On the 23d of June, 1874, 18 Stat. at L., 289, Congress passed the following Joint Resolution:

"That the Secretary of the Treasury be, and he is hereby authorized to pay, when discharged, two months' pay to such clerks and *employés* of the Executive Departments in Washington, D. C., as shall be discharged at the close of the present fiscal year without fault on their part, but by reason of the reductions made necessary by the legislation of the present session of Congress: *Provided*, That the amount paid under this Resolution shall be deducted from the salary of any person receiving the same who shall be re-appointed within six months from the date of such discharge."

Murray performed no service after the date of his furlough, and at the end of the fiscal year was dismissed, with a note from the Secretary of the Treasury as follows:

"SIR, The necessity for your services in the office of the Commissioner of Internal Revenue no longer existing, they terminated January 31, 1874, on which date you ceased to serve."

This suit was brought to recover pay for the time included in the furlough, and also for the two months allowed by the Joint Resolution of Congress. The Court of Claims being divided in opinion, gave a *pro forma* judgment for the full amount of the claim, and from that judgment the United States appealed.

To our minds it is clear the judgment below was wrong. While under the regulations of the department an *employé* is not entitled to a leave of absence with pay for more than thirty days in any one year, there is nothing to prevent the Secretary from putting him on furlough without pay at any time, if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is, in effect, a partial dismissal. If he desires to be free from all obligations to serve in the future he may resign; but if he permits his name to continue on the rolls, it must be on such terms as are imposed by the department. In this case, an extraordinary demand for clerical service caused an early partial exhaustion of the appropriation for the year, and it became necessary to dispense with a part of the force, so as to reduce the expenses of the office. Absolute dismissals were not made; but, as a favor to the clerks, their names were kept on the rolls without pay. Murray remonstrated against what was done, but seems to have preferred the furlough to an absolute discharge. Under these

circumstances, having rendered no service, he cannot claim compensation.

Neither do we think the case comes within the provision of the Joint Resolution of Congress. That Resolution contemplated the extra pay only when discharges occurred in consequence of a reduction of clerical force made necessary by the legislation of that session of Congress. It nowhere appears that Murray was discharged on any such account. On the contrary, the fair inference from the findings below is, that he was appointed originally on account of the necessary temporary increase of force brought about by the abolition of the offices of Assessor and Assistant Assessor, under a law of the previous session, and that he was discharged because the additional labor was no longer required. He was kept on furlough in order that he might, if possible, effect a transfer to some other branch of the service. This clearly implies that the special work to which he had been assigned was finished. At any rate, it does not appear affirmatively or by any fair implication that his discharge was made necessary on account of any legislation which was had at the session of Congress at which the Resolution was adopted.

The judgment of the Court of Claims is reversed and the cause remanded, with instructions to dismiss the petition.

FRANK SHAW ET AL., *Appts.*,

v.

LITTLE ROCK AND FORT SMITH RAILWAY CO. ET AL.

SAME

v.

LITTLE ROCK AND FORT SMITH RAILWAY CO. ET AL.

(See S. C., 10 Otto, 605-613.)

Trustee of railroad mortgage—bill of review—money to complete unfinished railroad—foreclosure—interested trustee.

1. The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them.

2. If a bondholder, not a party to the suit, can, under any circumstances, bring a bill of review, he can have only such relief as the trustee would be entitled to in the same proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by bill of review.

3. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances.

4. The bare fact that some of the trustees were holders of bonds secured by their trust, is not sufficient to make them incompetent to consent to a decree of foreclosure embodying a plan for reorganization.

5. When everything is honestly done by the trustee, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts.

[Nos. 159, 160.]

Submitted Jan. 16, 1880. Decided Apr. 5, 1880. See 10 OTTO.

A PPEALS from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is stated by the court.

Mr. B. C. Brown, for appellants.

Mr. C. W. Huntington, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

These cases present the following facts:

On the 9th of February, 1853, 10 Stat. at L., 155, Congress granted lands to the State of Arkansas to aid in building a railroad. Power was given the State to sell the lands only as the road was completed in sections of twenty miles each. If the road was not finished in a time which was named, all lands not sold were to revert to the United States. A part of the lands thus donated by Congress were granted by the State to the Little Rock and Fort Smith Railroad Company.

On the 22d of December, 1869, the Railroad Company executed a mortgage on its railroad, completed and to be completed, to Henry W. Paine and Samuel T. Dana, as trustees, to secure an issue of bonds amounting in the aggregate to \$3,500,000, payable January 1, 1890, with interest semi-annually at six per cent per annum, and on the 20th of June, 1870, it executed another mortgage on its land grant, earned and to be earned, to Paine, Dana and William B. Stevens, to secure another issue of bonds for \$5,000,000, payable April 1, 1900, with interest semi-annually at seven per cent per annum. Each of the mortgages contained this clause:

"In case default shall be made in the payment of any half-year's interest on any of the said bonds, at the time and in the manner in the coupon issued therewith provided, the said coupons having been presented and the payment of the interest therein specified having been demanded, and such default shall continue for the period of three months after said coupons shall have become due, and been demanded as aforesaid, then and thereupon the principal of all the said bonds shall, at the election of the trustees become immediately due and payable."

On the 12th of May, 1874, all the bonds provided for in both these mortgages had been put out and one hundred miles of the road built. About sixty miles remained to be completed, and the Company was without funds or credit. All interest on the bonds falling due January 1, 1871, and thereafter, was in arrear and unpaid. Thereupon, Paine, a citizen of Massachusetts, at that time the only trustee of the mortgage of the railroad, and Paine, Stevens and Charles W. Huntington, all citizens of Massachusetts, then the trustees of the land-grant mortgage, commenced suits in the Circuit Court of the United States for the Eastern District of Arkansas to foreclose their respective mortgages. In each of the bills the necessary averments of fact were made to entitle the parties to a decree of sale, and the trustees elected to treat the principal of the bonds as due. All the necessary defendants, including certain judgment creditors, were made, and there was nothing at that time in the citizenship of the parties to interfere with the jurisdiction of the court. No. 159 is the suit upon the railroad mortgage, and No. 160 that on the land-grant.

Afterwards, changes in the trustees were made, so that Charles W. Huntington and Samuel H. Gookin represented the railroad mortgage, and Huntington, Gookin and Samuel Atkins the land-grant. The proper substitutions were made on the record, the new trustees all being citizens of Massachusetts.

Subsequently, on the 3d of October, 1874, an amendment was made to the bill for the foreclosure of the railroad mortgage, by which Atkins, one of the trustees of the land-grant mortgage, and other persons, citizens of Massachusetts, were brought in as defendants to that suit. The object of this amendment was to obtain the appointment of a receiver of the property with a view to raising money on receivers' certificates to complete the road and save the unearned land-grant. No such appointment was made however, and nothing was done under the amendment. On the 6th of November, a decree was entered in each of the cases, finding that the mortgage sued on was a valid and subsisting lien on the mortgaged property; that the whole amount of the bonds in each case had been issued and, with the interest thereon, was due and unpaid; and ordering the mortgaged property to be sold unless the debt, principal and interest, was paid on or before the 10th of December then next. Provision was also made in each case for a distribution of the proceeds of the sales among the bondholders.

After this decree was rendered, a public meeting of the holders of both classes of bonds was called in Boston on full notice and, as the result of that meeting, George O. Shattuck, Francis M. Weld and George Ripley were appointed by parties representing in the aggregate \$6,097,000 of the bonds, to purchase the mortgaged property for the benefit of the bondholders. They, accordingly, appeared at the sale and became the purchasers of the railroad for \$50,000, and the land-grant for the same amount. The sale was duly reported to the court on the 19th of December, when the purchasers appeared and declared in open court, and desired to have it recorded, that it was their intention to organize a corporation under the laws of Arkansas, to own, hold and manage the property bought at the sales, and that the holder of any of the bonds secured by either mortgage might, within sixty days from the time of the organization of the corporation, transfer to it his bonds and his right to the proceeds of the sale, and become entitled to his proportionate interest in the stock of the new Corporation, upon the same terms and stipulations as any other holder of the bonds; but this was not to prevent the new Corporation from requiring from any and all bondholders the payment of his proportion of the expenses attending the sales and purchases, and such other sums not exceeding five per cent of the principal of the bonds as it might deem for its interests to require, as a condition on which the stock should be delivered; provided that the same requirement should be made of all the other holders of bonds, and provided, further, that this stipulation should not limit the power of the purchasers to organize the Corporation without notice, or of the Corporation so organized to mortgage its property, or to reserve for its own use an amount of its capital stock, not exceeding ten per cent thereof. At the same time the several

trustees appeared in court and consented to a confirmation of the sales upon the agreement that the stipulations of the purchasers thus given be embodied in the decrees approving and confirming the sales. Thereupon, appropriate orders of confirmation containing the required stipulations were entered, and the proper conveyances made. In the order confirming the sale under the land-grant mortgage, it was provided that the new Corporation should, as part of the consideration for the conveyance, compromise or pay such claims against the old Company as Huntington, Ripley and Henry A. Whitney might within one year approve, and upon such terms and in such manner as they should prescribe.

On the 22d of February, 1875, Charles H. Richardson, Frank Shaw and David S. Greenough, of Boston, representing themselves to be holders of a large amount of the bonds, filed their petition in court, asking that the decree of confirmation might be modified by striking out the clause requiring payment of the claims against the Railroad Company, and that the provisions of the decrees relating to the exchange of bonds for stock in the new Corporation might be extended until the question of modification should be decided. As one of the grounds of this application, it was alleged that Weld and Atkins were creditors of the Railroad Company. This petition was answered by the several trustees explaining the facts. On the 13th of April, the time for exchanging bonds for stock in the new Corporation was extended for sixty days, and the order for the payment of claims against the Railroad Company so modified as to make the approval of a claim by the court necessary before it could be paid, and providing for notice to Richardson, Greenough and Shaw whenever a claim was presented for allowance.

On the 6th of July, 1875, Greenough, as owner of \$58,000 of the bonds, and Shaw, as owner of \$11,000, filed in the circuit court, in each of the cases, what is denominated a bill of review, in which they ask that the decrees be reviewed and reversed, and they placed in the same situation they would have been if the decrees had not been rendered. The errors complained of relate to the sufficiency of the allegations in the original bills; the confirmation of the sales, by the consent of the trustees, upon the terms stipulated for; a want of jurisdiction in the court, as the complainants and many of the defendants were citizens of the same State; and the rendition of a decree against the Railroad Company, without service of subpoena, after filing the amended bill. It was also alleged that Gookin and Atkins, trustees of the mortgages, were holders of bonds secured by the respective trusts. Demurrers to both bills were filed, which the court below sustained, and dismissed the suits. Shaw and Greenough thereupon appealed.

We think it clear that the appellants are not entitled to the relief they ask. They were not parties to the original suits, except through their trustees, against whom they make no charges. Indeed, their counsel says in his brief: "It is probable that they (the trustees) believed that they were doing the best possible for their beneficiaries." The trustee of a railroad mortgage represents the bondholders in all legal proceed-

ings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can, under any circumstances, bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding. To avoid what the trustee has done in his behalf, he must proceed in some other way than by bill of review. All the errors complained of in these bills of review, as occurring before the confirmation of the sale, are such as affect only the Railroad Company injuriously. If, in fact, they are errors at all, they were in favor of the trustees and those they represent, and not against them. Of these the trustees could not complain. As no relief was granted, under the amendment to the bill in the foreclosure of the railroad mortgage, the court clearly had jurisdiction of that case for the purposes of the decree as rendered.

But if the bills, as filed, are original in their character, to set aside the decrees complained of and not for review only, the appellants are in no better condition. The trustees had an undoubted right to commence these suits when they did, and it is apparent from the whole record, that all their proceedings, both before and after the sale, were in the interest of their beneficiaries generally, since one hundred and eighty in number, representing, in the aggregate, \$8,000,000 out of the \$8,500,000 of bonds outstanding, accepted the result and exchanged their bonds for stock in the new Corporation. To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders, secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. This Company and these trustees were peculiarly situated. The road was unfinished, and the land-grant, to a large extent, unearned. While the mortgages, as they stood, were first liens, there was great danger that their value would be seriously impaired unless more money could be raised. The attention of both the trustees and bondholders was called to that fact and, at first, it seems to have been thought that the end might be accomplished through the instrumentality of a receiver and receiver's certificates. This, necessarily, contemplated the creation of a lien on the mortgaged property superior to that which then existed. Although the mortgages were separate and on separate properties, the value of each depended, to a large extent, on the ability of the Railroad Company to finish its road.

For some reason the idea of a receiver and receiver's certificates seems to have been abandoned, and what, to our minds, was a much more desirable plan adopted. The power of the See 10 OTTO.

courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required without asking the courts to engage in the business of railroad building. The result, so far as encumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution.

The bare fact that some of the trustees were holders of bonds secured by their trust, is not sufficient of itself to make them incompetent to consent to such a decree as was rendered. From the whole case it is apparent that from the beginning their conduct was governed by the wishes of a very large majority of bondholders. If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees, when personally interested, should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done. But when everything is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts.

Here the name of Gookin, one of the trustees, appears in the list of bondholders appointing the committee to make the purchase at the sale as the holder of \$200,000 of the bonds. Associated with him in the list were others representing near \$6,000,000. His name openly appeared on the paper when the court was asked to confirm the sale on the conditions agreed to. Certainly, this is not sufficient to defeat the plan to which he and his associates gave their consent. Atkins, another trustee, was a creditor of the Company, whose debt came within the provision made in the decree for payment by the new Corporation. All this was fully explained to the court when the modification of the decree in this particular was asked for, and since no claim can now be paid except with the approval of the court after notice to the appellants, we see no reason why what has already been done is not sufficient for the protection of all concerned.

On the whole, we see no reason for interfering with the decrees below, and they are each, therefore, affirmed.

THOMAS BRANCH AND THOMAS

BRANCH, Admr. of JAMES R. BRANCH,

Deceased, ET AL., App'ts.,

v.

UNITED STATES.

(See S. C., 10 Otto, 673, 674.)

Confiscation.

Where cotton was seized under the Confiscation Act by order of the district court, and that court

ordered the cotton to be sold and the proceeds to be deposited in a bank to the credit of its clerk, and the bank failed, the United States is not liable to the owner of the cotton for such proceeds, after the condemnation proceedings against him were dismissed, although the bank was a designated depository of public money.

[No. 252.]

Argued Mar. 23, 1880. Decided Apr. 5, 1880.

APPEAL from the Court of Claims.

The opinion of the court below is reported in 12 Ct. of Claims, 281.

The case is stated by the court.

Messrs. Theo. H. N. McPherson and Thomas Wilson, for appellants:

The proceeds arising from the sale of the appellants' property was placed in the Selma depository, by an officer of the District Court, upon instructions from the Secretary of the Interior, that the First National Bank of Selma had been designated by the Secretary of the Treasury as a depository for the public moneys; and the Clerk of the Court was required, under the law, to deposit the money in the said Selma depository (sec. 5492 R. S., Acts March 3, 1857, and August 6, 1846); therefore the responsibility of this act must rest with the appellee.

Ex parte Morris, 9 Wall., 605 (76 U. S., XIX., 799); secs. 310, 3644, 5489, R. S.

Again; if any loss accrued to the appellee by the failure of the Selma depository, it must have been produced by neglect to enforce the law, as the Act of June 3, 1864, sec. 5153 R. S., provides that the Secretary of the Treasury shall require the associations thus designated, as depositaries of public moneys, to give satisfactory security by the deposit of United States bonds and otherwise for the safe-keeping and prompt payment of the public money deposited with them, and for the further performance of their duties as financial agents of the Government.

It appears, by the act of the appellee, that it regarded the money as public money; after seizing, condemning and converting said property into money, the U. S. directed it to be placed in a bank which had been designated as a depository of public moneys, where it could not have been deposited if it had not been public money; but, being placed in said depository, it was subject to transfer, by the order of the Secretary of the Treasury, to the credit of the Treasurer, as other public money (sec. 3640, R. S. Act Aug. 6, 1846), which made it subject to the draft of the Treasurer of the U. S. (Secs. 3644, 3593, Act, Aug., 6, 1846).

This, then, is an action for money had and received.

No priority of contract between the parties is required in order to support this claim, except that which results from the fact of one man's having the money of another which he cannot conscientiously retain.

Mason v. Waite, 17 Mass., 563; *Hall v. Mars-ton*, 17 Mass., 579; *Bk. v. Smith*, 5 Conn., 71; *Rapalje v. Emory*, 2 Dall., 54.

When money has been received by the defendant in consequence of some tortious act to the plaintiff's property, the plaintiff may waive the tort and sue *in assumpsit* for money had and received.

Jones v. Hoar, 5 Pick. (Mass.), 285; *Beardsley v. Root*, 11 Johns., 464; *Pritchard v. Ford*, 1 J. J. Marsh., 543; *Tutt v. Ide*, 3 Blatchf., 249;

Wright v. Butler, 6 Wend., 290; *Eddy v. Smith*, 13 Wend., 488; *Hall v. Schultz*, 4 Johns., 249; *Moses v. MacFerlan*, 2 Burr., 1012; *Feltham v. Terry*, Loftt., 208.

Blackstone says: "This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex æquo et bono* he ought to refund. It lies for money paid by mistake * * or through imposition, extortion or oppression, or where any undue advantage is taken of the plaintiff's situation."

3 Bl., 163.

The appellee cannot refuse to refund the money of the appellants, because the Selma depository failed; that was their concern; and, furthermore, the Selma depository was part of the Treasury of the United States, as designated depository banks are so regarded by law.

U. S. Revised Statutes, secs. 310, 3527, 3593, 3642, 3644, 3646, 3649, 3655, 5153, 5489, 5492.

Messrs. Charles Devens, Atty-Gen. and Thomas Simons, Asst. Atty-Gen., for appellee:

It appears that from the time the cotton and its proceeds in this case came into the custody of the court until the loss by failure of the depository bank, the relations of all concerned, as to moneys in the registry, were regulated by statute (Act, March 3, 1817, 3 Stat. at L., 395), which so far as relates to this case left the disposition of the fund to the discretion of the court.

It follows that the funds so received by the court in its custody, and so deposited by it under the discretion inherently belonging to it, (*The Bark Laurens*, 1 Abb. Adm., 513), and which is recognized also by the statutes, was in no sense public money, but a mere private credit as between the court and the Bank, as to which the defendant had no knowledge or concern, as the opinion very clearly shows.

In fact, the only attempt to establish the liability claimed is rested on the fact stated in the third finding, that the clerk of the court was notified by the Interior Department that the Bank had been designated as a depository of public money, which is quite immaterial.

The notice was proper, as the court, in revenue and other cases, might have funds in its custody which might be found to be public money, as in the case of a recovery of taxes, or fines and penalties, the disposition of which might be lawfully directed or suggested; but the Secretary had no right to interfere with the authority of the court to control such a fund as that in question, and it is evident that he did not attempt to.

Mr. Chief Justice Waite delivered the opinion of the court:

This case presents the following state of facts: in June, 1865, the Marshal of the United States for the Middle District of Alabama seized certain cotton belonging to the appellants, by order of the district court of that district, upon the information of the district attorney, under the Confiscation Act. Pursuant to an order of the court made in the progress of the suit for condemnation, the property was sold, and the proceeds paid over, under the direction of the court, to the clerk. The clerk, having been notified by the Interior Department that the First National Bank of Selma, Alabama, had

been designated by the Secretary of the Treasury as a depository of public money, deposited in July, 1866, to his own credit as clerk in that bank the money received by him from the marshal. This deposit was made pending the condemnation suit and to await the further orders of the court. In January, 1871, the suit was dismissed and judgment entered in favor of the defendants for costs. In the meantime, the Bank of Selma had failed and, in the proceedings for winding up its affairs under the National Banking Act, a dividend amounting to \$641.32 upon this deposit was paid to the court, and then by order of the court paid over to the claimants, less a small amount allowed by the judge to an auditor appointed by him to ascertain the facts. This suit was brought against the United States to recover the balance of the original deposit, upon the ground that, as the bank was at the time when the deposit was made a designated depository of public money, it was part of the Treasury of the United States, and that, consequently, the deposit made by the clerk was equivalent to a payment of the money into the Treasury, binding the United States to the claimants for its return in case the court should determine, in the condemnation suit, that the cotton when seized was not liable to confiscation.

The position assumed by the appellants is, to our minds, wholly untenable. The designated depositories are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the Government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depository. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depository, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whomsoever in the end it should be found to belong.

The whole subject is elaborately considered in the opinion of the Court of Claims, and we deem it unnecessary to attempt to add to what has there been said.

The judgment is affirmed.

WILLIAM S. MANNING, *Plff. in Err.*,

v.

JOHN HANCOCK MUTUAL LIFE INS.
CO.

(See S. C., 10 Otto, 693-699.)

Commissions of insurance agent—jury—circumstantial evidence.

1. Where the contract between an insurance agent and the company is, that the commissions should accrue only as the premiums are paid to the company, in order to recover such commissions from

NOTE.—When a verdict may be directed by the court. See note to *Grand Chute v. Winegar*, 82 U. S., XXI., 174.

See 10 OTTO.

U. S., Book 25.

the company, the agent must prove not only that the premiums were due, but that they were actually paid to the company.

2. It is error to submit to a jury to find a fact of which there is no competent evidence.

3. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and cannot themselves be presumed.

[No. 57.]

Argued Mar. 10, 1880. Decided Apr. 5, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. Wm. Henry Arnoux, Henry H. Anderson and James Emott, for plaintiff in error:

Law presumes that a fact, continuous in its character, still continues to exist.

1 Phil. Ev., Cow. & H., note 177, and cases cited in subd. 7.

Where a given state of things is shown to exist, the law presumes that it continues and the burden of proof is upon the opposite party to show that it has changed.

Watrod v. Ball, 9 Barb., 271; *Smith v. R. R. Co.*, 43 Barb., 225; *Fry v. Bennett*, 28 N. Y., 324; *Covert v. Gray*, 34 How. Pr., 450.

A policy of insurance is presumed to continue to the end of the term, and if it is to fail, on failure to pay a premium note when due, the burden is on the insurers to show it.

Bliss, Life Ins., 628; *Hodsdon v. Ins. Co.*, 97 Mass., 144.

Messrs. James C. Carter and Henry J. Seudder, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

The plaintiff below, now defendant in error, on the 2d day of December, 1868, employed the defendant and one Hall, as its general agents for New York and other States, to secure applications for life insurance, and to collect and pay over premiums on insurances effected. It was stipulated that the agreement should continue in force three years from Sep. 1, 1867, and that it might thereafter be terminated by either party on giving six months' notice. By the contract, the compensation allowed to Hall and Manning was twenty per cent on the ordinary premiums upon all policies, excepting those paid for by single payments, for the first year, and seven and one half per cent for the second and subsequent years of assurance. An additional allowance was also made for traveling and incidental expenses. It was further stipulated that these allowances should continue to be paid for twenty-five years from the date of each policy, should any continue so long in force; and, further, that the agents should remit monthly all moneys collected by them, and return all uncollected policies and receipts sent to them for collection by the Company. The contract declared that commissions should accrue only as the premiums were paid to the Company.

On the 13th of May, 1870, Hall assigned his interest in the contract to Manning, with the approval of the plaintiff.

On the 17th day of September, 1870, a new arrangement in lieu of the former was made between the parties, by which it was agreed that Manning should thenceforward receive for

his compensation \$5,000 per annum, the commission to sub-agents to be twenty-five and seven and one half per cent; that Manning should collect the renewals of the old business of Hall, and Hall and Manning, and receive the renewal commissions which said renewals were entitled to under the former contract. This contract was terminable at the option of the Company at any time within three years.

About the 1st of June, 1871, the plaintiff discharged the defendant from the service, for reasons which the verdict in the case establishes to have been lawful and sufficient, and this suit was brought to recover money in his hands belonging to the Company.

Among other defenses set up against the claim of the plaintiff, the defendant offered to show that a set-off existed in his favor for commissions collected and received by the plaintiff from May 1, 1871, to Dec. 23, 1871, and interest thereon to the time of the trial. To sustain this (after having made proof of notice to the plaintiff to produce the books and papers necessary to show the amount of renewal premiums received by it from policies obtained through his agency during the period mentioned, and the books and papers not being produced), he gave evidence to prove that, on the 2d of June, 1871, there were policies in force upon which the annual premiums would be \$87,000, as it appeared in his accounts with his subagencies: that his annual commissions upon the premiums would amount to \$8,391.14; and that, computing the amount which would be due to him, accruing between June 2, 1871, when he was discharged, and Dec. 23, 1871, when the suit was commenced, they amounted to about \$4,754.97.

But no direct proof whatever was given that any of the policies in force on the first of May, 1871, or on the 2d of June, 1871, had been renewed or extended, or that any of the annual premiums becoming payable after those dates had been paid to the plaintiff or received by it.

Upon this evidence the circuit court instructed the jury, in effect, that if the defendant had been removed from his agency without justifiable cause, they might find from it what amount the plaintiff should have received of renewal premiums; but if they found he was justifiably removed, there was no proof for their consideration of the amount of renewal premiums received or collected in the hands of the Company upon which he was entitled to commissions.

In another part of the charge the same instruction was given, though in different order. It was, that, if by his own conduct the defendant rendered the action of the plaintiff in removing him necessary, before he could recover from the plaintiff his portion of the renewals, it would be incumbent upon him to show, not only how many policies had been taken by his agency, and the premiums due upon them, but also that the premiums had been paid to the plaintiffs. On the other hand, if, by its wrongful act of removing him, the plaintiff deprived him of the means of collecting the premiums, then when he had shown that renewal premiums to a certain amount were due and payable upon life policies at the time when he was removed, which because of its own act the plaintiff was bound to collect, if collectible, he was entitled to the presumption that they were

collected as they became due and, therefore, the burden would rest upon the Company to show that policies had lapsed, or that without its fault it had been unable to collect the renewal premiums. To so much of these instructions as ruled, in effect, that, if the defendant was rightfully dismissed from the employment of the plaintiff there was no evidence for the consideration of the jury as to the amount of the renewals and of course, of the amount of commissions thereon, exception was taken, and it is now assigned for error.

We think, however, the defendant has no reason to complain. The charge was, at least, quite as favorable to him as he had any right to ask. By his contract with the plaintiff it was expressly stipulated that the "commissions should accrue only as the premiums are paid to the Company." It was incumbent upon him, therefore, to prove, not merely that they were due, which might possibly have been paid, but that they had been actually paid, and paid not merely to his subagents, but paid to the plaintiff. If they had been thus paid, the plaintiff held the money, to the extent of the commissions, for his use. If they had not been paid to the plaintiff, it had nothing in hand which belonged to him. His set-off was in the nature of an action for money had and received to his use. The plaintiff owed him nothing until it received the money. Now, it is very plain that proof of the existence of outstanding premiums which became payable before his set-off was pleaded fell short of any proof that those premiums had been actually paid, or that they were in the hands of the plaintiff.

It is argued, however, that, because the plaintiff failed to produce its books and papers necessary to prove the amount of renewal premiums received by it, the defendant was at liberty to prove the amount by what he calls "secondary evidence;" or, in other words, "by the best evidence the case afforded." This may be admitted; but the receipt of the renewal premiums by the plaintiff was still a fact to be proved, either by direct or circumstantial evidence.

No direct proof of such receipt was offered, as we have said. None was attempted. The defendant might have resorted to a *subpoena duces tecum*, or to an order of the court to produce papers and books; or, perhaps, to a bill of discovery. He did neither. He simply proved, as a fact, that there were life policies in existence, secured through his agency, renewal premiums upon which fell due before the suit was brought. His evidence stopped there, and he now complains that the jury was not allowed to presume from that fact that the renewal premiums had been paid to the plaintiff, and to presume it against a party who was not in the wrong, a party who had rightfully dismissed him from his agency, and who was under no obligation to collect the premiums at all. But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence. It does not follow as a necessary or even reasonable sequence from the fact that a debt existed, that it has been paid. Nor is there any presumption of its payment upon which a jury can act. Certainly, none until after the lapse of twenty years. Much less can such a presumption

arise in regard to the payment of renewal premiums upon policies of insurance such premiums not being debts due to the insurers, and not being collectible as debts. We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remark upon this subject in *U. S. v. Ross*, 92 U. S., 281, 284 [XXIII., 707, 709], we said: "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed." Referring to the rule laid down in *Starkie on Evidence*, page 80, we added: "It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass v. Mitchell*, 35 Pa. St., 440.

If these principles be applied to the present case, the inadmissibility of the presumption which the defendant contends the court should have permitted the jury to draw becomes apparent. That renewal premiums to a certain amount, upon which he was entitled to commission, had been paid to the Company, was the ultimate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2d of June 1871, the annual premiums upon which were \$87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the Company, and that these premiums were to be collected by his subagents and paid over by them. These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely: that the renewal premiums were paid to the agents; and upon this a further presumption, that the premiums had been paid over by the agents to the Company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidences of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury.

What we have said renders it unnecessary to notice at length the several assignments of error. If there was no evidence of the receipt of renewal premiums by the Company, what would have been the interest upon them, had they been received, was quite immaterial. So, See 10 OTTO.

also, was it immaterial to show what would have been the probable duration of the policies. *The judgment of the Circuit Court is affirmed.*

JOSEPH W. PARISH ET AL., *Appts.*,

v.

UNITED STATES.

(See S. C., 10 Otto, 500-507.)

Surgeon-General—government contract.

*1. The Acts of the Assistant Surgeon-General, appointed under the Act of Congress and located at St. Louis, are the acts of the Surgeon-General, and have the same validity until countermanded or revoked.

2. Where, in the effort to fulfill an order for a large amount of ice for the use of the Government, which claimants were bound to furnish by their contract, they purchased ice which was lost by the suspension of the order of the Assistant Surgeon-General, by his superior officer, they are entitled to recover the cost of the ice so lost, and the expense of the care and attempt to preserve it.

[No. 158.]

Argued Jan. 20, 21, 1880. Decided Apr. 12, 1880.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. John B. Sanborn, R. P. Lowe and R. G. & E. C. Ingersoll, for appellant.

Mr. S. F. Phillips, Solicitor-Gen., for appellee.

Mr. Justice Miller delivered the opinion of the court:

This action was commenced in the Court of Claims, under an Act of Congress specially authorizing it, approved May 31, 1872.

There is nothing in the Act which furnishes any rule for its decision, though some of its provisions are emphasized in the argument of counsel. The action was brought on the following contract:

"Article of agreement made this fifth day of March, 1863, between Henry Johnson, medical store-keeper, United States Army, and Acting Medical Purveyor, Washington, D. C., on the one part, and Joseph W. Parish and William L. Huse, comprising the firm of Joseph W. Parish & Co., of the City of St. Louis, State of Missouri, of the other part, witnesseth:

That the said Henry Johnson, medical store-keeper, United States Army, for and on behalf of the United States of America, and the said Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, viz.:

"First. That said J. W. Parish & Co. shall deliver at Memphis, Tennessee; Nashville, Tennessee; St. Louis, Missouri; and Cairo, Illinois, the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863. Ice to be in quality A No. 1, and delivered at two thousand (2,000) pounds to the ton.

Second. That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W.

* Head notes by *Mr. Justice MILLER*.

Parish & Co. shall receive the sum of twenty-five dollars (\$25).

Third. That for each and every ton of ice delivered at St. Louis, Missouri, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of sixteen dollars (\$16).

Fourth. That for each and every ton of ice delivered at Cairo, Illinois, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars (\$20).

Fifth. That for each and every ton of ice delivered at Memphis, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars (\$20).

Sixth. All the ice delivered under this contract to be subjected to the inspection and approval of the medical officer in charge of the post where it is delivered, and such as does not conform to the specifications, set forth in this contract shall be rejected.

Seventh. That payments shall be made from time to time on receipted bills of lading and duplicate accounts certified to by the medical officer in charge of the post where it is delivered.

Eighth. No member of Congress shall be admitted to any share herein or any benefit to arise therefrom.

Ninth. It is further agreed that the said J. W. Parish & Co. will allow three (3) working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to be allowed by the said Henry Johnson, medical store-keeper, United States Army, as per charter-party or bill of lading of the vessel.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date above written.

[SEAL.] HENRY JOHNSON,
Med. Store-keeper, U.S.A., Acting Med. Purveyor.
J. W. PARISH & Co."

Under this contract, there was delivered and paid for by the Government, at the stipulated prices, 12,768 tons of ice, about which there is no dispute.

The controversy grows out of the following correspondence and the acts of parties under it.

"ASSISTANT SURGEON-GENERAL'S OFFICE,
ST. LOUIS, MISSOURI, March 25, 1863.
Messrs. J. W. PARISH & Co.:

GENTLEMEN—I am instructed by the Assistant Surgeon-General to direct that the ice, which you have agreed to deliver at the points designated in your contract, shall be distributed in the following quantities, viz.:

At St. Louis	- - - -	5,000 tons,
At Cairo	- - - -	5,000 tons,
At Memphis	- - - -	10,000 tons,
At Nashville	- - - -	10,000 tons,

making the total of 30,000 which you have contracted to deliver. The ice to be delivered at Nashville and Memphis is for the use of the sick of the armies in the field, and should be furnished without delay.

Very respectfully, your ob't servant,
By order of the Assistant Surgeon-General:
(Sig.) JOSEPH B. BROWN,
Surgeon United States Army."

A copy of this order being received at the Surgeon-General's office, the following telegram

and letter were sent to Assistant Surgeon-General Wood:

"SURGEON-GENERAL'S OFFICE,
March 31, 1863.

Parish & Co. have not contracted for 30,000 tons of ice. Suspend the order you gave him.
(Sig.) W. A. HAMMOND, *Surgeon-General.*
Col. R. C. Wood,
Asst. Surgeon-General U. S. Army, St. Louis."

"SURGEON GENERAL'S OFFICE,
WASHINGTON, D. C., March 31, 1863.
SIR—Your communication of the 25th instant to J. W. Parish & Co., in regard to the quantities of ice to be delivered at the different points for which they contract, forwarded to this office for the information of the Surgeon-General, has been received.

I am instructed to inform you that the contract with Parish & Co. was made for such quantities as might be needed; and that the ice should be ordered from them, from time to time, to different points, in lots of a few hundred tons, as needed.

Very respectfully, your obedient servant,
C. H. ALDEN, *Assistant-Surgeon, U.S.A.*
Col. R. C. WOOD,
Assistant Surgeon-General, St. Louis, Mo."

"ASSISTANT SURGEON-GENERAL'S OFFICE,
ST. LOUIS, MISSOURI, March 31, 1863.
To J. W. PARISH & Co. (Care C. H. WICKER & Co.), Chicago, Ill.:

I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

(Sig.) R. C. WOOD, *Asst. Surgeon-General."*

In the finding of facts by the Court of Claims, it is said that it does not appear that this last dispatch was received by the claimants, though they had knowledge of the notice by oral information from the Assistant Surgeon-General at St. Louis, on the 2d day of April.

The sixth finding of fact by the Court of Claims, which is also important, is thus stated: "Prior to the delivery to the said Parish, of Joseph B. Brown's letter of March 25, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and after the delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2d day of April, 1863, apprised of the aforesaid order of Surgeon-General Hammond, of March 31, he had purchased or contracted for the purchase of 23,000 tons of ice."

If we add to this that 10,000 tons of this latter purchase was made at Lake Pepin, on the upper Mississippi River, which was stored there at the time and which became a total loss, and that the order of the Surgeon-General *suspending* the order of the Assistant Surgeon-General remained in that condition and has never been revoked or modified, we have the main elements on which the case was decided in the court below by dismissing the claimants' petition.

The petitioners claim to recover the contract price of the entire 30,000 tons, after deducting what they have been paid and the reasonable costs of delivering the ice not received by the Government.

The opinion of the Court of Claims, found in the record, bases the dismissal of the petition on

the ground that the Assistant Surgeon-General, in making the order on claimants for the 30,000 tons of ice, was acting so wholly without authority; that Parish & Co. had no right to treat it as of any validity or as one which they were bound to regard. In the argument of the case before us, the counsel for Government abandons this view of the matter and, we think, very properly. We apprehend if the case were reversed, and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General.

The office of Surgeon-General is one of the distinct or separate Bureaus of the administrative service of the War Department. It has been found, in regard to many of these Bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence, statutes have been made creating the office of assistant secretaries for all the heads of departments.

It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department. It was to relieve the overburdened principal of some part of those duties that the office of assistant was created. In the immense increase of business in the office of Surgeon-General during the war, similar relief was found necessary, and the office of Assistant Surgeon-General was created.

For the very reason that the prompt exercise of the powers of the Bureau was essential in the field of operations of the army, the assistant in this case was located at St. Louis, over a thousand miles from the City of Washington. He was appointed for the purpose of exercising, at that place, the functions of the office of Surgeon-General. He was, by law, the Assistant Surgeon-General. If no virtue attached to his acts until approved by the Surgeon-General in Washington, any inferior clerk would have answered the purpose as well. It is not intended to deny that he was subordinate to the chief of his Bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. But until so revoked or disapproved it was valid, and parties required to act under it had a right to rely on it.

The order of the 25th of March, made within twenty days after the contract was signed, was an unequivocal demand, under that instrument, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. No one familiar with the climate and the sources of supply could doubt that, to enable him to fulfill this demand, made at that season, required promptitude and diligence in securing the ice. If claimants had failed to have the amount thus demanded ready for use when required, the officers of the Government would have procured it at any price in the market, a price which would have been enormously enhanced by this very demand, and the claimants would have been liable for the

See 10 Otto.

difference between what the Government paid under these circumstances and the price fixed in the agreement. They were, therefore, under an imperative necessity to prepare to fulfill this requirement.

Impelled by this necessity, the Court of Claims finds that, between the time they received the order and the 2d day of April, when they first learned of its suspension by the Surgeon-General, they purchased over 23,000 tons of ice. They were then informed, not that the order was revoked, but that it was suspended. It never was revoked. It remained suspended, until the time during which the entire delivery was to be made was passed; and during that time 10,000 tons of the ice melted away at Lake Pepin, and was a total loss. As we have already stated, 12,768 tons were delivered and paid for; 10,000 tons perished by melting. What became of the 7,232 tons, neither received by the Government nor lost at Lake Pepin is not disclosed by the record, nor whether claimants made by selling it to others, or lost by it in that or any other way.

What are the rights of the parties under these circumstances?

If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price for all those amounts, they should have delivered or tendered or offered to deliver, and demanded payment.

If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or, rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

In point of fact, the order was never revoked but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require, accept and pay for part of it. The balance was never delivered or tendered.

Without elaborating the matter, we are of opinion that, as the claimants neither delivered or offered to deliver the remainder, they cannot recover either the contract price or the profits they might have made if they had done so. And as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost. So, if they lost anything on the other ice not purchased at Lake Pepin, but purchased before they learned of the order of suspension, they should recover that.

The case of *Bulkley v. U. S.*, 19 Wall., 37 [86 U. S., XXII., 62], is an analogous case. In that case Bulkley had contracted to do all the transportation of supplies, from Fort Leavenworth to army posts further west, which might be required of him by the Government. He was notified that 1,700,000 pounds would be needed, and made large preparations to meet this requirement. The United States did not need half this amount, and the freight was not delivered to him. He claimed the profits which he would have made by the terms of the contract if the freight had been delivered and carried. This court said he could not recover profits, but that, "In making ready to meet the requirements of the notice, he was subjected to the loss of time, to trouble and expense. He is entitled to be paid accordingly."

We think the case before us comes within that principle. Claimants are entitled to the expenses and losses incident to the preparation to meet the demand of the notice served on them. The cost of the ice purchased at Lake Pepin and lost, the expense bestowed upon its care, and the time and expense of making that purchase, and any sum actually lost in regard to the other 7,232 tons of ice purchased to enable them to meet that requirement, must form the measure of plaintiffs' recovery. *Because these are not found by the Court of Claims, the judgment of that court is reversed and the case remanded, that their damages may be ascertained and judgment rendered accordingly.*

Cited—110 U. S., 343.

FIRST NATIONAL BANK OF CINCINNATI, *Plff. in Err.*,
v.

FREDERICK BURKHARDT.

(See S. C., 10 Otto, 636-693.)

Charge to jury—division of time—bank deposit—usage.

1. Where the charge to the jury was full and correct and covered the entire case, the court is not bound to give any further instructions.

2. For most purposes the law regards the entire day as an indivisible unit. But when the priority of one legal right over another is involved, depending upon the order of events occurring on the same day, this rule is necessarily departed from.

3. Whether or not a check presented at a bank and left with the teller, was received by the bank on deposit, was a question of fact for the jury.

4. Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law.

[No. 234.]

Argued Apr. 1, 2, 1880. Decided Apr. 12, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought in the court below, by the plaintiff in error against the defendant in error, to recover a loan alleged to have been made to one John Cinnamon, upon the credit of a written guaranty by Burkhardt.

The case is stated by the court.

NOTE.—Computation of time; days "after the expiration," "before," Sundays, "within." Fractions of a day, when regarded and when not. See note to *Griffith v. Bogert*, 59 U. S., XV., 307.

Mr. T. D. Lincoln, for plaintiff in error:

1. A check of one depositor of a bank drawn upon the bank in favor of another depositor, and left by the latter as a deposit with the bank, in the ordinary course of business, nothing being said at the time, is subject to examination during the same day and to return within reasonable time during the day to the depositor, and he is not entitled to a credit of the same, simply because the receiving teller received it without any conditions expressed relating to such examination.

Boyd v. Emmerson, 2 Ad. & Ell., 201; *Kilsby v. Williams*, 5 B. & Ald., 818; *Bk. v. McDonald*, 51 Cal., 67; *Bk. v. Kenan*, 76 N. C., 345; *Levy v. Bk.*, 1 Binn., 37; *Oddie v. Bk.*, 45 N. Y., 741; *Morse, Bkg.*, 320, 321; *Dan. Neg. Inst.*, secs. 16, 21.

2. There is no definite rule of law which makes a check when received at a bank from a depositor, without condition expressed at the time, a credit to the depositor if the account of the drawer of the check is not good when left, nor during the day afterwards.

Above authorities.

3. If there were any rule of law, such as was laid down by the circuit court, it was subject to a usage among the bankers, by which the check could be returned the same day, if upon an examination of the account early after banking hours, the check was found not good.

Renner v. Bk., 9 Wheat., 587; *Mills v. Bk.*, 11 Wheat., 438; *Swift v. Gifford*, 2 Low., 113; *Clark v. Baker*, 11 Met., 189; *Wigglesworth v. Dallison*, Doug., 201; *Bk. v. McDonald*, 51 Cal., 66; *Bk. v. Dyer*, 19 Conn., 136; *Oddie v. Bk.*, (*supra*); *Levy v. Bk.*, (*supra*); *Form. & Mech. Bank v. Cham. Tr. Co.*, 18 Vt., 139; *S. C.*, 23 Vt., 208; *McMasters v. R. R. Co.*, 69 Pa., 378; *Van Santvoord v. St. John*, 6 Hill, 157; *Hutch. Carr.*, sec. 366; *Gibson v. Culver*, 17 Wend., 305.

The question upon which Judge Swing made the case below turn did not arise, as Burkhardt was not the depositor of Evans, Lippincott & Cunningham.

The usage of the First National Bank of Cincinnati, to the same effect, of long standing and notorious among the customers of the Bank, was binding upon the depositors of the Bank, whether he knew of such usage or not.

Mills v. Bk. (*supra*); *Bk. v. Triplett*, 1 Pet., 32; *Dor. & Mil. Bk. v. N. E. Bk.*, 1 Cush., 188; 1 Duer, Ins., sec. 58, p. 264; *Morse, Bank.*, 336; *Form. & Mech. Bk. v. Champ. Tr. Co.* (*supra*).

5. It is not necessary that the usage should embrace all the banks of Cincinnati, or the very small banks, if it be general among the banks of the class of the First National.

Vallance v. Dewar, 1 Camp., 508, *Ongier v. Jennings*, 1 Camp., 506 note; 1 Duer, Ins. sec. 58, p. 264.

Messrs. Stallo & Kittredge and Sage & Hinkle, for defendant in error:

1. If the Bank, the plaintiff in error, before the execution of the guaranty sued upon, accepted and received on deposit, checks drawn upon it by John Cinnamon, it thereupon became indebted to the depositor, and creditor of John Cinnamon, to the amount of such checks, and the guaranty does not include such transaction.

Thompson v. Riggs, 5 Wall., 663, 679 (72 U. S., XVIII., 704, 707); *Oddie v. Bk.*, 45 N. Y., 735;

Pratt v. Foote, 9 N. Y., 463; *Bk. of U. S. v. Bk. of Ga.*, 10 Wheat., 333; *Levy v. Bk.*, 1 Binn., 27; *Morse, Banks and Bkg.*, 26, 27 (effect of deposit).

II. The defendant, as guarantor, could only be held by the strict terms of the obligation into which he had entered. This is the law of Ohio, where the guaranty was entered into and to be performed. There is no reason nor authority for giving it an expanded signification beyond the fair import of the terms.

Palmer v. Yarrington, 1 Ohio St., 258; *Bk. v. Heard*, 5 Cush., 461; *Russell v. Clark*, 7 Cranch, 69; *Mauran v. Bullus*, 16 Pet., 528; *Bell v. Bruen*, 1 How., 169; *Curtis v. Dennis*, 7 Met., 516; *Lawrence v. McCalmont*, 2 How., 426; *Lee v. Dick*, 10 Pet., 482.

III. As to usage or custom:

1. It must be ancient, reasonable, generally known and certain.

U. S. v. Buchanan, 8 How., 83.

2. It must be general as to place, and notorious; not confined to a particular bank. It must be the rule of all the banks of the place.

Adams v. Otterback, 15 How., 539.

3. It is not allowed to operate unless contract made with reference to it, and known to the other contracting party.

Bliven v. Screw Co., 23 How., 420 (64 U. S., XVI., 510); *Barnard v. Kellogg*, 10 Wall., 383 (77 U. S., XIX., 987).

4. The office of it is to ascertain and explain the meaning and intention of parties to a contract. It must not be inconsistent with the contract nor contradict it. "It may be admissible to explain what is doubtful; it is never admissible to contradict what is plain."

Barnard v. Kellogg (*supra*).

5. Even if it can be applied to the mode of dealing, of a particular house, a party cannot be bound thereby unless he be shown to have had notice of it.

Chit. Cont., 11th Am. ed., 84; *Moore v. Voughton*, 1 Stark., 487.

IV. A guaranty, entered into after the contract, to which it relates, must have valuable consideration to support it.

Bickford v. Gibbs, 7 Cush., 154.

Mr. Justice Swayne delivered the opinion of the court:

On the 23d of February, 1875, Burkhardt, the defendant in error, executed, for the benefit of John Cinnamon, an instrument to the Bank whereby he stipulated "To guaranty and make good to said Bank any sum or sums which may hereafter be held against the said John Cinnamon, to an amount not exceeding \$50,000," and notice "from time to time of the amount and extent of such indebtedness" was waived.

As originally drawn, the guaranty included Cinnamon's existing as well as his future liabilities. Burkhardt refused to sign it, unless what related to the former was stricken out.

This was done by the vice-president of the Bank, and Burkhardt thereupon signed and delivered the instrument. This was in the afternoon of the day above named.

The only controversy between the parties, as the case is presented here, relates to a check for \$10,997, drawn by Cinnamon upon the Bank, in favor of Evans, Lippincott & Co.

It appears by the bill of exceptions that the See 10 OTTO.

check was presented to the Bank by the payees on the day of its date, the 23d of February, 1875, and that the Bank "Gave evidence tending to show that when the check was so handed in, it was without the pass-book, and was placed aside by the receiving teller for examination after the close of banking hours before it should be credited; that the receiving teller had been instructed by the cashier not to credit Cinnamon's account with checks left until after the close of bank hours, when the account was examined and found good; that when the checks of Cinnamon were left on that day, the depositors were informed that they would not be passed to their credit unless found good after the close of bank hours; that there was at the time, and for a long time had been, a notorious usage in Cincinnati in receiving checks from depositors on them, and that this usage peculiarly applied to large banks, like the First National, by which checks left in the Bank in the morning by depositors were held until after close of the Bank, subject to be returned in the afternoon if found, upon balancing the accounts, not to be good; that such had been the usage in the First National Bank since its organization in 1861, and that it was a Bank of \$1,500,000 capital; and that such usage was general and notorious among the customers of the Bank." And that the "Defendant thereupon gave evidence tending to show that no such usage existed, and to contradict all the evidence of plaintiff in relation thereto, and in reference to any notice to the depositors in regard to Cinnamon's check as testified to by the plaintiffs, and tending to show that Evans, Lippincott & Co. had no knowledge or understanding in regard to said check, except that it was received on deposit and as a deposit when it was left with the Bank."

If the check were to be considered as received on deposit when it was left with the teller, and Cinnamon was the debtor of the Bank and the Bank his creditor from that time, then the transaction was not within the guaranty, and Burkhardt was not liable. If, on the other hand, the Bank had the right to hold the check until after bank hours, and then to make its election, and to credit the depositor and charge Cinnamon with the amount, as was done, the check was covered by the guaranty, and the Bank was entitled to recover.

These alternatives were the hinges of the controversy upon the trial.

The question presented was decisive of the case. Its solution was for the jury under instructions from the court. It is insisted by the plaintiff in error that the court erred in the instructions given.

The general charge embraced topics not brought before us, doubtless for the reason that, with respect to them, both parties acquiesced in the findings of the jury. The charge was full and able. In our judgment, it was correct in everything it touched upon, and it covered the entire case.

Having given such a charge, the court was not bound to give any further instructions, and it would have been as well if the Judge had declined to give those submitted by the plaintiff in error.

It appears that they were seven in number. Only the last four are in the record. They

affirm or deny, with only a change of phraseology, what had been said in the charge already given.

The jury was properly cautioned not to be misled or confused by them. There is danger of both in such cases.

The first of these special charges, as we find them in the record, was given as asked for without qualification. Nothing need, therefore, be said in relation to it.

The second one, with the addition made to it by the court, is as follows: "That if checks of John Cinnamon on the Bank were left at the Bank on the 28d of February, 1875, but were not passed upon by the receiving teller, or received as a deposit, nor entered in any pass-book or other book of the Bank to the credit of the parties leaving them, but were laid aside for examination until after bank hours, when an examination could be made to see whether Cinnamon's account was good, then they did not become a debt of Cinnamon to the Bank until they were so passed upon and entered."

This charge the court gave, adding: "If it was handed in as a deposit, it became a deposit at the time it was received. Taking the surrounding circumstances into consideration, if it was received by the teller as a deposit, it became a deposit. That I give you, for it has these words in it, 'or received as a deposit.'"

For most purposes the law regards the entire day as an indivisible unit. But when the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from. Thus, where a mortgage took effect from the time it was deposited for record on a particular day, and a judgment became a lien upon the premises on the same day proof was received to show that the mortgage was deposited before the court sat, and it was held that the mortgage must be first satisfied. *Follett v. Hall*, 16 Ohio, 111. A like inquiry is involved in this case.

In *Morse's* well considered work on Banking, p. 321, it is said: "But if at the time the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit, as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the Bank's indebtedness to him for the amount will be equally fixed and irrevocable."

We regard this as a sound and accurate exposition of the law upon the subject, and it rests upon a solid basis of reason. The authority referred to sustains the text.

When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration and the

requisite concurrence and assent of the minds of those concerned. It was well said by an eminent *Chief Justice*: "If there has ever been a doubt on this point, there should be none hereafter." *Oddie v. Bk.*, 45 N. Y., 735.

We see no objection to the amendment, made by the court, to the instruction under consideration. It was correct in point of law, and it was proper to prevent any misunderstanding by the jury. It told them, tersely and clearly, as the principal charge had done, that if the check was offered and received as a deposit it was a deposit, and it followed as matter of law that the Bank was bound accordingly. Whether there had or had not been a consummated deposit was the ultimate fact to be found by the jury. The evidence is not, and should not have been, set forth in the bill of exceptions. All on the subject to be found there is that the parties gave evidence tending to prove what they respectively claimed. What that evidence was we do not know, and it is in nowise necessary that we should be advised upon the subject. The facts and circumstances, whatever they were, and the probative force and weight of each one, were exclusively for the consideration of the jury. The evidence may have been more or less cogent on either side, and more or less characterized in parts or in its entirety by internal conflicts and contradictions, or by other neutralizing qualifications. With all this we have nothing to do. The subject is beyond the sphere of our power and duties. We sit here to correct the errors committed by the court, if there were any, as disclosed in the record. The verdict, as the case is before us, is as if it were not. If it was wrong, the remedy was with the court below by a new trial. It cannot be administered here.

The third instruction involves substantially the same point as the second. It was given with a like addition, and an exception was taken. What we have said with respect to the second exception applies here.

The fourth and last instruction was, that if, at the Bank, there had been for a long time a usage "That the receiving teller entered checks in the pass-book, as they came in, subject to a return of the checks to the depositors if in the afternoon of the day, when the accounts were examined, the checks were found not to be good, and to return the same to the party depositing them, and such were then made good by the depositor, * * * such usage would be a valid and legal usage as between the depositors and the Bank."

The court refused to give this charge as asked, but gave it as thus qualified:

"Nothing in this case shows that Mr. Evans knew anything about this usage. As to the question of general usage, I have said that it was not competent to change the law in the case, when the deposit was made without anything said about the deposit by the persons receiving the deposit, the law made that a debt against the Bank in favor of the depositor; but if the depositor knows the usage in cases of that kind, why, as a matter of course, it will change it."

The plaintiff in error excepted.

The proposition submitted was fatally defective in not including as one of its terms that the depositors knew of the special and particular

usage mentioned. Without such knowledge it was entirely ineffectual. The objection of the Judge was conclusive. *Moore v. Voughton*, 1 Stark., 487; 1 Chit. Cont., 84.

The principal charge was full and clear in regard to the general usage or custom insisted upon by the plaintiff in error. Upon that subject the Judge, among other things to the like effect, remarked: "It is said by the plaintiff, by way of proof, that although there was no express agreement between Evans, Lippincott & Co., the depositors of this check, and the Bank, that it should be returned in case it should not be found good at three o'clock, or shortly thereafter, yet that there was a general usage among bankers of the City of Cincinnati of that character, which extended to all their customers and, therefore, it had become a law. The question of usage, as presented here, is, undoubtedly, a very important question, and as a general proposition of law every commercial contract is entered into with the understanding that the usage in regard to the particular matter of the contract becomes a part and parcel of the contract itself."

A large part of the able and elaborate argument of the counsel for the plaintiff in error was addressed to this point. In our view, conceding the usage to have been established, it was in nowise material as a factor in the case.

The verdict of the jury, by rejecting the claim of the Bank touching the check, established the fact that the deposit became complete by the agreement of the parties when the check was handed in. As a necessary consequence, it was not within the undertaking of Burkhardt. Usage, therefore, could have had no effect upon the rights of the parties, and was immaterial. The result of the case must have been the same as if that subject had not been drawn in question.

A general usage may be proved in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing.

Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law. *Barnard v. Kellogg*, 10 Wall., 390 [77 U. S., XIX., 989]; *Bliven v. Screw Co.*, 23 How., 433 [64 U. S., XVI., 514]; *Collender v. Dinsmore*, 55 N. Y., 200; *Adams v. Goddard* [48 Me., 212]; *Thompson v. Riggs*, 5 Wall., 674 [72 U. S., XVIII., 706]; *Dykens v. Allen*, 7 Hill, 497.

These considerations apply to the posture of the case as it was found to be by the verdict of the jury, under instructions, properly given, by the court. According to those tests, the contract was clear, complete and irrevocable when the check was delivered by one party and received by the other. After that there was nothing left for usage to do. Its aid, when the controversy arose, was invoked too late. If the Bank proposed to hold the check on conditions, it was but fair and just to the other party to have said so when it was received, and thus have given him the option, after such notice, to do with it as he might think proper. The saving or loss of the amount to the payees might have depended on the promptitude and energy of their conduct. Delay until after bank hours

See 10 OTTO.

might have determined the result inevitably against them. It would be contrary to plainest principles of reason and justice to permit a bank, under such circumstances, to shift the burden of the loss from itself to the shoulders of an innocent depositor.

It does not appear by the record that any evidence offered by the Bank, touching the general usage, was excluded and, we think, what was said by the court in that connection, as well as with respect to the special usage of the institution, was unexceptionable, and was quite as favorable to the Bank, as it had a right to claim.

If either side had ground for complaint, it was not the plaintiff in error.

The judgment of the Circuit Court is affirmed.

Cited—102 U. S., 200; 109 U. S., 283; 68 Ala., 275; 44 Am. Rep., 142.

GEORGE W. KIDD, *Appt.*,

v.

WILLIAM W. JOHNSON ET AL.

(See S. C., 10 Otto, 617-620.)

Trade-mark—transfer of.

1. When a trade-mark is affixed to articles manufactured at a particular establishment, and that establishment is transferred to others, the right to the use of the trade-mark may be lawfully transferred with it.

2. Its subsequent use, by the person to whom the establishment is transferred, only indicates that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer.

[No. 247.]

Argued Apr. 7, 1880. Decided Apr. 19, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This action was commenced in the court below by the appellees.

The case is stated in the opinion.

Messrs. R. T. Merrick and M. F. Morris, for appellant:

Sebastian on Trade-Marks, the latest English authority on this subject, lays down the law as follows: "A trade-mark is assignable and transmissible, but only in connection with the goodwill of the business concerned with the goods or classes of goods to which it relates." A trade-mark cannot exist in gross and unattached to specific articles; for if that could be so, the mark might come to be an instrument of deception, instead of a guaranty of genuineness. In an assignment of the business and goodwill, the trade-mark passes as a matter of course, or if specially excepted, must cease to be available by the vendor."

Sebastian, Trade-Marks, secs. 6, 55, 60; *Hall v. Barrows*, 33 L. J. Ch., 204; *Shipwright v. Clements*, 19 Weekly Rep., 599; *Leather Cloth Co's. Case*, 33 L. J. Ch., 199; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst., 321; *Congress Spring Co. v. High Rock, etc., Co.*, 57 Barb., 526; *S. C.*, 45 N. Y., 291; *Banks v. Gibson*, 34 Beav., 566; *Bradbury v. Dickens*, 27 Beav., 53; *Upton, Trade-Marks*, 52; *Coddington Trade-Marks*, secs. 22, 23, 125, 148, 149.

There can be no doubt, therefore, that in

1864, S. N. Pike ceased to be the individual owner of the trade-mark in question, and the firm of S. N. Pike and Company became the owners of it. It follows as a necessary consequence, that in 1868, during the continuance of the partnership, Pike individually had no right to dispose of the trade-mark, and could give no title to Mills, Johnson and Company, nor to anyone else.

Neither could he as a partner of the firm of S. N. Pike & Co. convey the right to anyone to use the trade-mark, without the concurrence of his copartner.

Messrs. Hoadly, Johnson & Colston and Thos. Allen Clarke, for appellees.

Mr. Justice Field delivered the opinion of the court:

The question presented in this case relates to the ownership of a trade-mark used by the complainants on packages and barrels containing whisky manufactured and sold by them in Cincinnati, and arises out of the following facts:

In 1849, one S. N. Pike, doing business in that city as a wholesale dealer in whisky, adopted as a trade-mark for his manufacture the words, "S. N. Pike's Magnolia Whiskey, Cincinnati, Ohio," inclosed in a circle, which he placed on packages and barrels containing the liquor. Between that date and 1863 he was in partnership with different persons doing business there under the name of S. N. Pike & Co. In 1863, having dissolved his connection with others, he took as partners two of his former clerks, Tilney and Kidd, continuing the original firm name and soon afterwards opened a branch house in New York City. The same trade-mark was used by the new firm, as it had been by the preceding firm, without any change. At this time, and subsequently until its sale in 1868, the real property in Cincinnati, upon which the business was conducted, and the distillery, with its fixtures and appurtenances, belonged to Pike individually. In 1868, the firm removed its entire business to New York City, and Pike sold the real property in Cincinnati, and the stills, tubs, engines, boilers, tubing and all apparatus in his distillery, for the consideration of \$125,000, to the firm of Mills, Johnson & Co., who were also engaged in the manufacture and sale of whisky at that place. At the same time, Pike executed and delivered to the purchasers a separate instrument, stating that, having sold his premises to them, he extended to them and their successors the use of all his brands formerly used by him in his Cincinnati house.

Mills, Johnson & Co. continued for some years the manufacture and sale of whisky on the premises thus purchased, using, without objection from anyone, the brands previously used by S. N. Pike & Co. They were succeeded in business by the complainants, who, it is admitted, are entitled to all the rights which they possessed in the trade-mark in question. S. N. Pike died in 1872, and his surviving partners formed a new partnership, under the name of George W. Kidd & Co., which was subsequently dissolved, and to its business Kidd, the appellant in this case, succeeded.

The complainants finding that whisky bearing this trade-mark, manufactured by the firm of Tyra, Hill & Co., of St. Louis, was sold in

large quantities by dealers in New Orleans, filed the present bill to enjoin the dealers from selling or trafficking in whisky contained in packages thus marked. By an amendment to the bill, the defendant Kidd was made a party. He filed an answer and cross-bill, asserting title to the trade mark as surviving partner of the firm of S. N. Pike & Co., and setting forth that Tyra, Hill & Co were acting under a license from him.

The principal question for determination is, whether the complainants, claiming under the sale of Pike to their predecessors, or the defendant, Kidd, claiming as survivor of S. N. Pike & Co., have the exclusive right to the trade-mark mentioned. The court below decided that the complainants possessed the exclusive right, and our judgment approves of the decision.

It is admitted that Pike was the owner of the trade-mark when he took two of his clerks into partnership and formed the firm of S. N. Pike & Co. He did not place his interest in the trade-mark in the concern as a part of its capital stock. He allowed the use of it on packages containing the whisky manufactured by them; but it no more became partnership property from that fact than did the realty itself, which he also owned and on which their business was conducted. He was engaged in the same business before the partnership as afterwards, and taking his clerks into partnership changed in no respect, beyond its terms, their relation to his individual property. Their subsequent conduct, moreover, plainly shows that they claimed no interest in the trade-mark. They knew of his conveyance of its use to Mills, Johnson & Co. on the first of October, 1868, when they removed their own business to New York, and made no objection to the transfer. Their subsequent correspondence discloses, beyond question, their knowledge of the transfer and recognition of his power to make it. That transfer was plainly designed to confer whatever right Pike possessed. It, in terms, extends the use of the trade-mark to Mills, Johnson & Co. and their successors. Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trade-mark would be of no service in distinguishing the whisky of the manufacture in Cincinnati; and thus the Company would lose all the benefit arising from the reputation the whisky there manufactured had acquired in the market. The right to use the trade-mark is not limited to any place, city or State and, therefore, must be deemed to extend everywhere. Such is the uniform construction of licenses to use patented inventions. If the owner imposes no limitation of place or time, the right to use is deemed perpetual and co-extensive with the whole country.

The claim of Kidd to the trade-mark, as survivor of the partners in the firm of S. N. Pike & Co. is without any merit. Pike, in his lifetime, repudiated any ownership in the trade-mark after his sale, and Kidd knew that fact, and never even pretended that the firm had any such right until after Pike's death.

As to the right of Pike to dispose of his trade-mark in connection with the establishment where the liquor was manufactured, we do not think there can be any reasonable doubt. It is true, the primary object of a trade-mark is to

indicate by its meaning or association the origin of the article to which it is affixed. As distinct property, separate from the article created by the original producer or manufacturer, it may not be the subject of sale. But when the trade-mark is affixed to articles manufactured at a particular establishment and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place and are of the same character as those to which the mark was attached by its original designer. Such is the purport of the language of *Lord Cranworth* in the case of *Leather Cloth Co. v. Am. Leather Cloth Co.*, reported in 11th Jur. (N. S.), 513. See, also, *Ainsworth v. Walmesley*, 35 L. J. Eq. (N. S.), 352-5, and *Hall v. Barrows*, 10 Jur. (N. S.), 55.

The present case falls within this rule.

Decree affirmed.

THE STEAMBOAT LOUISVILLE, ETC.,

DAVID GIBSON ET AL., Claimants, *Appts.*,

v.

WILLIAM P. HALLIDAY, OWNER OF THE
BARGE, SWALLOW.

Appeal to circuit court in admiralty case—findings of fact.

1. An appeal in admiralty from the district court to the circuit court vacates the decree appealed from. The cause is heard *de novo* in the circuit court, and an entire new decree entered, which the latter court carries into execution. The cause is not remanded to the district court.

2. The finding of facts by the circuit court is conclusive on this court. Where no exceptions are taken to the rulings of the court, in the progress of the trial, the decree will be confirmed.

[No. 278.]

Argued Apr. 23, 1880. Decided Apr. 26, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

This was a libel *in rem*, filed by the present appellee, in the District Court of the United States for the Southern District of Illinois. That court rendered a decree in favor of the libellant, and the claimants appealed to the circuit court, where the following decree was entered.

"And now, on this day, come again the parties in this cause, by their respective proctors, and the court having fully considered the proofs and arguments of counsel, and being now sufficiently advised in the premises, doth, upon the proofs aforesaid, find as follows, to wit:

First. That, as matter of fact, the libellant made and entered into a contract of charter with respondent, in manner and form substantially as set forth in the libel, and under and by virtue of the terms of which the respondent received libellant's Barge, Swallow in good order and condition, agreeing to pay libellant charter therefor at the rate of \$10 for each and every

day until returned, and to return said barge in as good condition as when received, ordinary wear and tear excepted.

Second. That, as matter of fact, the said barge, while in custody of the respondent, under the terms of charter aforesaid, was sunk and wholly lost to the libellant through the want of care and negligence of respondent in and about the management, loading and fastening of said barge, the barge at the time of such loss being of the value of \$4,000.

Third. That, according to the terms of the contract of bailment for hire, it became the duty of the respondent, as a matter of law, to return and deliver the barge, Swallow, to the libellant, in as good condition as when received, ordinary wear and tear excepted; and the fact being that the barge was not so returned or delivered according to the contract, and no sufficient reason or excuse in law being shown therefor, the respondent is in law liable for the damage sustained by the libellant.

Wherefore, in consideration of the premises and findings, of fact and law aforesaid, and inasmuch as the court is of opinion that respondent is liable upon both the law and the facts, it is ordered, adjudged and decreed by the court that the decree rendered by the district court be, and the same is, hereby, affirmed, with interest and costs, and that the libellant, William P. Halliday, recover of and from the claimants, David Gibson and Godfrey Holterhoff, the said steamboat having been heretofore released on bond according to law, the sum of \$5,700.65, as decreed by the district court, with interest from the rendition of such decree (November 10, 1864), amounting to the sum total of \$6,494.90, and costs taxed in the district and circuit courts.

And it is, accordingly, ordered that a summary judgment be rendered against Jacob Bunn and Robert J. Roberts, the obligees in the appeal bond filed in this case for the sum of \$7,000 and that an execution issue therefor, to be satisfied and discharged on the payment of the decree herein and the costs.

Messrs. Lincoln, Smith & Stephens, for appellants.

Mr. William B. Gilbert, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

It is conceded that, upon the facts found by the circuit court, the decree appealed from was right. That finding is conclusive upon us. *The Abbotsford*, 98 U. S., 440 [*ante*, 168]. No exceptions were taken to the rulings of the court in the progress of the trial.

An appeal in admiralty from the district court to the circuit court vacates the decree appealed from. The case is heard *de novo* in the circuit court, without any regard to what was done below. An entire new decree was entered, which the circuit court carries into execution. The cause is not remanded to the district court. After the suit once gets into the circuit court, it is proceeded with substantially as it would have been if originally begun in that court.

The Lucille, 19 Wall., 74 [86 U. S., XXII., 64]; *Montgomery v. Anderson*, 21 How., 388 [62 U. S., XVI., 161]; *Yeaton v. U. S.*, 5 Cranch, 283.

Affirmed.

ERASMUS NAGLE, *Plff. in Err.*,

v.

THOMAS W. RUTLEDGE.

(See S. C., 10 Otto, 675.)

Jurisdiction as to amount.

To give this court jurisdiction in cases coming from the Supreme Court of the Territory of Wyoming, the value of the matter in dispute must exceed \$1,000.

[No. 275.]

Submitted Apr. 22, 1880. Decided Apr. 26, 1880.

IN ERROR to the Supreme Court of the Territory of Wyoming.

Motion to dismiss.

The case is sufficiently stated by the court.

Messrs. Edward P. Johnson and W. R. Steele, for defendant in error.

Mr. W. W. Corlett, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

To give us jurisdiction in cases coming from the Supreme Court of the Territory of Wyoming, the value of the matter in dispute must exceed \$1,000. This writ of error was sued out by the defendant below on a judgment against him for only \$969.63. It is claimed we have jurisdiction, however, because the defendant in his answer set up a counter claim for \$1,340. The only question presented here on that branch of the case is whether the plaintiff below was liable for interest on a note of \$210, at the rate of three per cent. a month from the 24th day of June, 1872, until the date of the judgment, July 26, 1876, or for some shorter period. In no event could the amount thus put in controversy reach \$1,000; and since if error should be found in the charge of the court on this claim, it would only result in a reduction of the judgment as it now stands, and not in an actual money recovery in favor of the defendant below, it follows that our jurisdiction is not shown by the record, and that the *suit must be dismissed. It is, consequently, so ordered.*

SIDNEY W. SEA, *Plff. in Err.*,

v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

Amendment to writ of error—dismissal of case.

1. A writ of error will be dismissed, for the omission to state with certainty its return day.

2. Although amendable, yet where no application is made by the plaintiff in error for leave to amend, and no citation has been served, this court will not, on its own motion, make any order in that behalf.

[No. 1066.]

Submitted Apr. 29, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss.

The case is stated by the court.

NOTE.—Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reverivable without regard to sum in controversy. See note to *Gordon v. Ogden*, 28 U. S. (3 Pet.), 33.

Messrs. E. S. Isham and Robert T. Lincoln, in support of motion.

Mr. H. O. McDaid, for plaintiff in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This motion is granted on the authority of *Carroll v. Dorsey*, 20 How., 207 [61 U. S., XV., 804], because of the omission to state with certainty the return day of the writ of error. The defect is one that is amendable under section 1005, R. S., but as no application is made by the plaintiff in error for leave to amend, and no citation has ever been served, we are not inclined, on our motion, to make any order in that behalf.

BOWLING EMBRY, *Appt.*,

v.

UNITED STATES.

(See S. C., 10 Otto, 680-685.)

Salary of suspended postmaster.

1. A postmaster suspended from office is not entitled to salary during such suspension, although subsequently restored.

2. Congress has full control of salaries, except those of the President and the Judges of the Courts of the United States.

[No. 253.]

Argued Apr. 9, 1880. Decided May 10, 1880.

APPPEAL from the Court of Claims.

The case is stated by the court.

Messrs. M. H. Carpenter and James H. Embry, for appellant.

Messrs. Charles Devens, Atty-Gen., and Thomas Simons, Asst. Atty-Gen., for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

By the Tenure of Office Act, passed March 2, 1867, 14 Stat. at L., 430, it was enacted that every person appointed to a civil office, by and with the advice and consent of the Senate, should hold his office until his successor should be in like manner appointed and duly qualified, except as therein otherwise provided; but the President was authorized during the recess of the Senate to suspend an officer for misconduct, crime or incapacity. In case of suspension, the President could designate some suitable person to perform temporarily the duties of the office until the matter should be acted on by the Senate when in session. If the Senate concurred in the suspension, and advised and consented to the removal, the President might remove and by and with the advice and consent of the Senate appoint another person to the office. If, however, the Senate refused to concur, the officer suspended might resume the functions of his office, but his salary and emoluments during the suspension went to the person who performed his duties, and not to him.

On the 20th of April, 1867, while this law was in force, Embry, the appellant, was, by and with the advice and consent of the Senate, appointed and commissioned Postmaster at Nashville, Tennessee, the salary being at the rate of \$4,000 a year. By his commission he was to hold his office for four years, "subject to the conditions prescribed by law."

On the 5th of April, 1869, the original Tenure of Office Act was amended, 16 Stat. at L., 6, so as to authorize the President in the recess of the Senate to suspend an officer at his discretion until the end of the then next session of the Senate, and to designate some person to perform the duties of the office in the meantime, who should be entitled to the salary and emoluments while he served, instead of the officer suspended.

Under the authority of this Act, Embry was suspended from office on the 5th of May, 1869, during a recess of the Senate, and Enos Hopkins designated to perform his duties. Embry, however, remained in the office until May 27. The Senate did not advise or consent to the appointment of anyone to fill the place of Embry during its next session, which terminated July 15, 1870, and he was, on the 21st of July, notified to resume the charge of his office, which he did on the 25th of that month. The salary from May 27, 1869, to July 25, 1870, was paid to Hopkins. This suit was brought by Embry to recover for the same time. The Court of Claims decided against him, and he appealed.

We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitutional question which has at times occupied the attention of the Political Department of the Government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved. The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that Congress has full control of salaries, except those of the President and the Judges of the Courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the President or a Judge of a Court of the United States can claim

See 10 OTTO.

a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign.

When Embry was appointed, the President had power to suspend him for cause. The law also provided that if suspended he should draw no salary so long as another person was performing his duties. While he was in office, further power of suspension was given the President, with a like provision as to pay. He was suspended. The Senate did not see fit to advise or consent to the appointment of another person in his place and, consequently, on the 15th of July, 1870, when the next session of the Senate ended, he became entitled to enter again on the performance of the duties which pertained to his office. This he did on the 27th of July, but not before. His present claim rests not on any contract with the Government, either express or implied, but upon the Acts of Congress which provide for his salary. We so held in *U. S. v. McLean*, 95 U. S., 750 [XXIV., 579]. To adjudge in his favor would be to make a new law, not to enforce an old one. Although he was lawfully in office, he was not entitled to pay or emolument while not performing its duties because of his suspension.

It is true his lawful suspension ended on the 15th of July, but he did not resume possession until ten days afterwards. In the meantime, the person designated for that purpose performed his duties. Under these circumstances, the law gave the salary to the actual incumbent and not to him. The delay was an incident to the suspension, and does not seem to have been unreasonable. No more time elapsed than was necessary to give the proper notices and transfer the possession.

Affirmed.

NOTE.

The Extra Annotation here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

ABBREVIATIONS.

F. C. appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

Fed. Cas. is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

Fed. or **Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

L. R. A. will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

Am. Dec., Am. Rep. and **Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

Atl. Atlantic Reporter,	So. Southern Reporter,
Pac. Pacific Reporter,	S. E. Southeastern Reporter,
N. E. Northeastern Reporter,	S. W. Southwestern Reporter,
N. W. Northwestern Reporter,	S. Ct. Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.

C UNITED STATES.

100 U. S. 1-5, 25 L. 529, EX PARTE FRENCH.

Appeal and error.—Although judgment is separate, so that each defendant is entitled to a stay independently of the others, it is not necessary that each sue out separate writ of error, p. 5.

Cited in *Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 162, 34 Pac. 537, holding supersedeas and writ of error two different writs; *Richardson v. Richardson*, 82 Mich. 307, 46 N. W. 671, generally; *Kountze v. Omaha Hotel Co.*, 107 U. S. 390, 27 L. 614, 2 S. Ct. 922, *arguendo*.

Appeal and error.—Where writ of error is informal, remedy is by motion to vacate writ, not by mandamus to compel execution of the judgment, p. 5.

100 U. S. 6, 25 L. 530, TINTSMAN v. NATIONAL BANK.

Appeal and error.—Where, on agreed statement of facts, defendant admitted plaintiff's claim, except as to \$3,000, that sum was amount actually in dispute, and Supreme Court had no appellate jurisdiction, p. 6.

Followed in *Elgin v. Marshall*, 106 U. S. 582, 27 L. 250, 1 S. Ct. 488, holding rule limiting jurisdiction to amount actually in dispute to be strictly followed; *Hilton v. Dickinson*, 108 U. S. 174, 27 L. 691, 2 S. Ct. 430, holding sum demanded does not give jurisdiction where not real amount demanded; *Jenness v. Citizens' Nat. Bank*, 110 U. S. 53, 28 L. 67, 3 S. Ct. 426, holding jurisdiction limited to amount contested, irrespective of amount of judgment below; *Wabash, etc., Ry. v. Knox*, 110 U. S. 304, 28 L. 156, 3 S. Ct. 638, on all fours with principal case; *Webster v. Buffalo Ins. Co.*, 110 U. S. 388, 28 L. 173, 4 S. Ct. 80, holding jurisdiction governed by disputed amount as shown in pleadings, although parties stipulate for judgment in greater amount; *Gorman v. Havird*, 141 U. S. 208, 35 L. 718, 11 S. Ct. 944, holding jurisdiction governed by disputed sum as shown by whole record; *Bowman v. Chicago, etc., Ry.*, 115 U. S. 613, 29 L. 503, 6 S. Ct. 193, holding jurisdiction governed by value of actual matter disputed, irrespective of prayer for judgment; *Carne v. Russ*, 152 U. S. 252, 38 L. 429, 14 S. Ct. 579, holding no appeal lies in action to redeem land, where only controversy is as to incumbrances worth less than \$5,000; *Edwards v. Bates*, 55 Fed. 439, and *Cabot v. McMaster*, 61 Fed. 131, hold-

ing question of jurisdiction governed by value of actual matter in dispute, not damages claimed; *Johnson v. Board of Commrs.*, 140 Ind. 154, 39 N. E. 311, holding difference between claim and amount recovered is amount in controversy on appeal by plaintiff; *Batchelder v. Richardson*, 75 Va. 837, where difference between claim and amount decreed was less than jurisdictional amount. Cited generally in *New England Mortgage Co. v. Gay*, 145 U. S. 128, 36 L. 647, 12 S. Ct. 816.

Distinguished in *McCrowell v. Burson*, 79 Va. 296, 297, 300, holding sum admitted in agreed statement did not determine appellate jurisdiction where special verdict was for less than jurisdictional amount.

100 U. S. 7-8, 25 L. 536, *GARNEAU v. DOZIER*.

Appeal and error.—Transcript is sufficiently authenticated for purposes of appeal or writ of error, if signed by deputy clerk below. In name of clerk, and sealed with seal of lower court, p. 8.

Not cited.

100 U. S. 8-12, 25 L. 536, *SOULE v. UNITED STATES*.

Internal revenue.—Fifth auditor is proper officer to audit accounts of internal revenue collector, p. 10.

Internal revenue.—In suit against delinquent collector, transcripts from treasury books are prima facie evidence of correctness of balance certified, but it is competent for accounting officers to correct mistakes therein, p. 11.

Approved in *United States v. Dumas*, 149 U. S. 285, 37 L. 737, 13 S. Ct. 874, and *Jædicke v. United States*, 85 Fed. 376, 56 U. S. App. 416, holding postmaster-general's order, withholding commissions, merely prima facie evidence of amount of government's loss; *Moses v. United States*, 166 U. S. 594, 41 L. 1127, 17 S. Ct. 690, holding transcripts from treasury books admissible to show state of account with government.

Internal revenue.—Where bond given by revenue collector is deficient in form, direction of commissioner of internal revenue to execute new bond is considered direction of secretary of treasury, p. 12.

Approved in dissenting opinion in *Renfroe v. Colquitt*, 74 Ga. 633, *arguendo*.

100 U. S. 13-23, 25 L. 538, *EX PARTE REED*.

Army and navy.—Paymaster's clerk in navy is a person in naval service of United States, within article 14, section 1624, revised statutes, providing for trials by naval court-martial, p. 22.

Followed in *United States v. Hendee*, 124 U. S. 314, 31 L. 466, 8 S. Ct. 508, holding naval paymaster's clerk officer of navy, within act of 1883, respecting longevity pay; *Johnson v. Sayre*, 158 U. S. 115, 117, 39 L. 917, 15 S. Ct. 776, a similar case; *In re Zimmerman*, 12 Sawy. 263, 30 Fed. 180, holding court may, on habeas corpus, inquire whether one convicted of desertion, by court-martial, was a soldier.

Army and navy.—"Regulations for administration of law and justice" in navy have the force of law, p. 22.

Approved in *Smith v. Whitney*, 116 U. S. 181, 29 L. 605, 6 S. Ct. 575, holding "Articles for Government of Navy" have force of law; *In re Kollock*, 165 U. S. 536, 41 L. 816, 17 S. Ct. 448, holding act of 1886, authorizing commissioner of internal revenue to make regulations as to brands on oleomargarine not an unconstitutional delegation of power; *In re Huttman*, 70 Fed. 702, and *In re Comin-gore*, 96 Fed. 562, holding treasury regulation prohibiting collectors from disclosing records, State court cannot compel production; *Low v. Hanson*, 72 Me. 105, holding treasury department rules, governing payments of arrears to deceased officers, judicially noticeable; *Peters v. United States*, 2 Okl. 123, 33 Pac. 1033, holding prosecution for perjury maintainable for false swearing in land office; *Wilkins v. United States*, 96 Fed. 840, arguendo.

Distinguished in *United States v. Symonds*, 120 U. S. 50, 30 L. 558, 7 S. Ct. 412, holding order of navy department, in conflict with act of Congress, void; *Meads v. United States*, 81 Fed. 694, 54 U. S. App. 167, holding department regulations can neither enlarge nor restrict liability of officer on his bond.

Army and navy.—Officer clothed with revising authority may, before dissolution of general court-martial, direct it to reconsider its sentence, p. 22.

Followed in *Smith v. Whitney*, 116 U. S. 186, 29 L. 607, 6 S. Ct. 575, holding naval court-martial may be reconvened by secretary to reconsider its proceedings. Cited, arguendo, in *Eyer mann v. Provenchere*, 15 Mo. App. 264, holding sewer commissioner may correct erroneous decision of acceptance, made through clerical error.

Army and navy.—Judgment of court-martial having jurisdiction over person and case is not open to collateral impeachment for mere error or irregularity, p. 23.

Followed in *Keyes v. United States*, 109 U. S. 340, 27 L. 956, 3 S. Ct. 204, holding sentence of court-martial having jurisdiction valid when collaterally questioned, notwithstanding errors; *Swaim v. United States*, 165 U. S. 561, 41 L. 826, 17 S. Ct. 451, holding questions of procedure of court-martial not reviewable collaterally; *In re Zimmerman*, 12 Sawy. 260, 30 Fed. 178, holding civil courts have no jurisdiction to review action of military courts acting within

jurisdiction; *Johnson v. Sayre*, 158 U. S. 118, 39 L. 917, 15 S. Ct. 776, and *In re Davison*, 22 Blatchf. 476, 21 Fed. 621, holding proceedings of court-martial having jurisdiction, not reviewable collaterally on habeas corpus; *In re Spencer*, 40 Fed. 150, holding findings of court-martial, on trial of minor for desertion, not reviewable by civil courts; *Cooper v. People*, 13 Colo. 353, 22 Pac. 795, 6 L. R. A. 436, holding contempt proceedings only reviewable as to jurisdiction; *In re Foley's Estate*, — Nev. —, 51 Pac. 836, defining jurisdiction of Probate Court; *Crew v. Pratt*, 119 Cal. 148, 51 Pac. 42, defining jurisdiction over distribution of estate.

Distinguished in *Hovey v. Elliott*, 145 N. Y. 143, 39 N. E. 845, 39 L. R. A. 463, and *n.*, holding judgment striking out answer for contempt attackable collaterally.

Habeas corpus cannot be made to perform the functions of a writ of error, p. 23.

Approved in *Smith v. Whitney*, 116 U. S. 177, 29 L. 604, 6 S. Ct. 577, holding writ of prohibition does not lie to court-martial to correct its errors of law; *Stevens v. Fuller*, 136 U. S. 478, 34 L. 463, 10 S. Ct. 913, holding mere irregularities in proceedings not reviewable on habeas corpus; *In re Wo Lee*, 11 Sawy. 436, 26 Fed. 476, holding habeas corpus cannot perform functions of writ of error to review action of State court; *In re Jordan*, 49 Fed. 242, holding Federal courts lack power, on habeas corpus to State court, to inquire as to sufficiency of evidence; *Cooper v. People*, 13 Colo. 371, 22 Pac. 801, 6 L. R. A. 442, denying authority to release by habeas corpus, one committed for contempt by court of co-ordinate jurisdiction; *State v. Glenn*, 54 Md. 608, holding sentence of competent tribunal not reviewable for error on habeas corpus; *In re Thompson*, 9 Mont. 389, 23 Pac. 934, refusing, on habeas corpus, to consider objection that verdict was void because contrary to instructions; *Una v. Dodd*, 39 N. J. Eq. 180, holding judgment of court having power to pronounce same cannot be examined in contempt proceedings; *Ex parte Degener*, 30 Tex. App. 573, 17 S. W. 1113, holding only questions of jurisdiction and form of commitment examinable on habeas corpus; *State v. Knight*, 3 S. Dak. 516, 44 Am. St. Rep. 814, 54 N. W. 414, holding contempt orders may be set aside for want of jurisdiction. See 22 Am. St. Rep. 422, note.

Distinguished in *In re Wong Yung Quy*, 6 Sawy. 241, 47 Fed. 719, holding constitutionality of State statute may be inquired into on habeas corpus.

Courts.—Proceedings of court beyond its jurisdiction are void, p. 23.

Cited in *Ex parte Buskirk*, 72 Fed. 22, 25 U. S. App. 613, holding commitment for contempt in committing act not forbidden when committed, but made so by order *nunc pro tunc*, void.

100 U. S. 24-32, 25 L. 531, RAILROAD v. FRALOFF.

Appeal and error.—If, in respect to the controlling propositions of the case, no error is committed, judgment should be affirmed without reference to minor and technical points not involving merits, p. 26.

Trial.—Where there is no serious controversy as to facts, and the law, upon undisputed evidence, precludes recovery, peremptory instruction for verdict for defendant is proper, p. 27.

The following citing cases apply the rule: *Oscanyan v. Arms Co.*, 103 U. S. 265, 26 L. 542, where opening statement of plaintiff showed reliance on illegal contract; *Stewart v. Lansing*, 104 U. S. 512, 26 L. 869, upholding instruction to find for plaintiff; *City Nat. Bank v. Hickox*, 4 N. Mex. 215, 5 N. Mex. 33, 16 Pac. 915, holding direction of verdict proper, where evidence, if true, would not warrant contrary verdict; *Longley v. Daly*, 1 S. Dak. 261, 46 N. W. 248, holding court may direct verdict where facts are undisputed.

Carriers.—In absence of regulation limiting value of baggage for which railroad will be liable, failure to disclose extraordinary value of articles contained therein is not fraud on company, p. 27.

Cited in *Jacobs v. Tutt*, 33 Fed. 414, holding company liable for loss of jewelry checked as baggage, with knowledge of agent. See 23 Am. St. Rep. 597, monographic note on power of carrier to limit liability; 71 Am. Dec. 160, extended note on baggage.

Carriers of passengers, by specific regulations, distinctly brought to notice of passengers, reasonable in character and consistent with duties to public, may protect themselves from liability as insurers for baggage exceeding certain value, except upon additional compensation, p. 27.

Approved in *The Majestic*, 60 Fed. 630, 20 U. S. App. 503, 23 L. R. A. 752, and n., modifying S. C., 56 Fed. 247, holding condition on back of ticket binding, where passenger receives ticket in time for examination thereof before embarking; *Calderon v. Atlas S. S. Co.*, 64 Fed. 878, and *Calderon v. Atlas S. S. Co.*, 69 Fed. 575, 35 U. S. App. 587, both upholding stipulations in bills of lading, limiting liability; *The Majestic*, 166 U. S. 384, 41 L. 1043, 17 S. Ct. 601, reversing S. C., 60 Fed. 630, holding conditions on back of ticket, not brought to passenger's notice, not binding; *Calderon v. Atlas S. S. Co.*, 170 U. S. 278, 42 L. 1035, 18 S. Ct. 591, reversing S. C., 69 Fed. 575, holding marine regulation declaring non-liability to any amount for goods exceeding \$100 per package, invalid; *Hart v. Pennsylvania R. R.*, 112 U. S. 340, 28 L. 721, 5 S. Ct. 155, holding limitation of liability in bill of lading binding; *New York, etc., R. R. v. Estill*, 147 U. S. 618, 37 L. 305, 13 S. Ct. 455, *arguendo*. See 5 Am. St. Rep. 724, monograph note on carriers' liability.

Qualified in Kansas City, etc., *R. R. v. Rodebaugh*, 38 Kan. 49, 5 Am. St. Rep. 719, 15 Pac. 902, holding limitation not binding on purchaser of ticket unless, with knowledge thereof, he agrees thereto. Distinguished in *Western Union Tel. Co. v. Beals*, 56 Neb. 418, holding telegraph company liable for incorrect transmission, notwithstanding agreement on blanks.

Carriers.—Where carrier has, by regulation, limited its liability for baggage to certain amount, it may require passenger to disclose value of baggage as condition precedent to contract for transportation thereof, and on his failure to do so may be discharged from liability for excessive amount, p. 28.

Followed in *The Bermuda*, 23 Blatchf. 555, 29 Fed. 399, holding concealment of excessive value destroys claim for indemnity; *Railway v. Berry*, 60 Ark. 436, 46 Am. St. Rep. 214, 30 S. W. 765, 28 L. R. A. 502, holding duty on passenger to disclose extraordinary value of baggage; *Graves v. Lake Shore, etc., R. R.*, 137 Mass. 35, 50 Am. Rep. 284, holding shipper bound by his own valuation; *Houston, etc., R. R. v. Burke*, 55 Tex. 333, holding carrier discharged from liability by shipper's fraudulent concealment of value of shipment.

Carriers.—Contract to carry the person only, implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers of like station, pursuing like journeys, p. 29.

Cited and rule applied in *Humphreys v. Perry*, 148 U. S. 647, 37 L. 595, 13 S. Ct. 719, holding company not liable for loss of trunk containing jeweller's samples; *Metz v. California, etc., R. R.*, 85 Cal. 332, 20 Am. St. Rep. 230, 24 Pac. 611, 9 L. R. A. 432, holding man travelling alone cannot recover for loss of lady's jewelry carried in his trunk; *Spooner v. Hannibal, etc., R. R.*, 23 Mo. App. 411, holding articles carried for sale not baggage; *Hampton v. Pullman Palace-Car Co.*, 42 Mo. App. 145, holding sleeping-car company liable for loss of baggage ordinarily carried by persons in like station; *Runyan v. Central R. R.*, 61 N. J. L. 541, 68 Am. St. Rep. 713, 41 Atl. 369, holding mere merchandise cannot be taken as baggage; *Coward v. East Tennessee, etc., R. R.*, 16 Lea, 233, 57 Am. Rep. 231, holding jewelry worth \$1,400 proper baggage.

Distinguished in *Railway v. Berry*, 60 Ark. 437, 46 Am. St. Rep. 215, 30 S. W. 765, 28 L. R. A. 502, holding company liable for loss of money shipped as baggage, by consent of agent.

Carriers.—To extent to which articles carried by passenger for personal use exceed in quantity and value such as are ordinarily carried by passengers of like station and pursuing like journeys, they are not baggage for which carrier is liable as insurer, p. 30.

Cited in *Root v. Sleeping-Car Co.*, 28 Mo. App. 206, applying rule to sleeping-car companies. See citations under last syllabus.

Carriers.—Whether articles carried by passenger for personal use are such as persons of like station and under like circumstances ordinarily carry is a question for jury, p. 30.

Followed in *Oakes v. Northern Pacific R. R.*, 20 Or. 397, 23 Am. St. Rep. 128, 26 Pac. 232, 12 L. R. A. 319, holding question rightly submitted to jury. See 71 Am. Dec. 159, extended note on baggage.

Distinguished in *Carlson v. Oceanic Steam Nav. Co.*, 109 N. Y. 361, 16 N. E. 547, holding evidence as to value of baggage usually carried by emigrants inadmissible.

Appeal and error.—No error of law appearing on record, appellate court cannot reverse judgment because, upon examination of the evidence, it is of opinion that jury should have returned smaller verdict, p. 31.

Followed in *Terre Haute, etc., Ry. v. Struble*, 109 U. S. 385, 27 L. 971, 3 S. Ct. 272, *Wabash Ry. v. McDaniels*, 107 U. S. 456, 27 L. 606, 2 S. Ct. 934, *Delaware, etc., R. R. v. Converse*, 139 U. S. 476, 35 L. 216, 11 S. Ct. 572, and *Peirce v. Van Dusen*, 78 Fed. 706, 47 U. S. App. 339, all refusing to reverse on account of excessive damages, instructions being correct; *Arkansas Cattle Co. v. Mann*, 130 U. S. 75, 32 L. 856, 9 S. Ct. 460, *New York, etc., S. S. Co. v. Anderson*, 50 Fed. 465, 1 U. S. App. 176, *Northern Pac. R. Co. v. Charles*, 51 Fed. 579, 7 U. S. App. 359, and *Richmond Ry., etc. v. Dick*, 52 Fed. 380, 8 U. S. App. 99, all holding granting or denying new trial wholly in discretion of lower court; *Lincoln v. Power*, 151 U. S. 438, 38 L. 225, 14 S. Ct. 388, refusing to consider assignment of error that damages were excessive and given under influence of passion; *Shauer v. Alterton*, 151 U. S. 626, 38 L. 292, 14 S. Ct. 448, and *Texas, etc., Ry. v. Patton*, 61 Fed. 270, 271, 23 U. S. App. 219, both holding court of error lacks authority to set aside verdict, although same appears unjustified by evidence; *Blitz v. United States*, 153 U. S. 312, 38 L. 727, 14 S. Ct. 926, holding refusal of trial court to grant new trial not reviewable by writ of error; *Grayson v. Lynch*, 163 U. S. 475, 41 L. 233, 16 S. Ct. 1067, and *Chicago, etc., R. R. v. Chicago*, 166 U. S. 246, 41 L. 988, 17 S. Ct. 588, holding judgment of highest State court not re-examinable as to questions of fact; *Capital Traction Co. v. Hof*, 174 U. S. 9, 19 S. Ct. 584, holding case once tried by jury cannot be tried anew in any other Federal court; *Singer Mfg. Co. v. Brill*, 54 Fed. 382, 7 U. S. App. 601, and *Harper, etc., Co. v. Wilgus*, 56 Fed. 588, 15 U. S. App. 143, both holding appellate court not concerned with weight of properly-admitted evidence; *Homestake Min. Co. v. Fullerton*, 69 Fed. 931, 36 U. S. App. 32, holding appellate court limited to inquiry as to correctness of instructions; *Sigafus v. Porter*, 84 Fed. 431, holding orders denying motions for new trials not reviewable in Federal courts; *Bogges v. Metropolitan, etc., Ry.*, 118 Mo. 340, 24 S. W. 210, denying right of Supreme Court to review findings as to amount of damages; dissenting opinion in *Burdick v. Missouri, etc., Ry.*, 123 Mo.

249, 45 Am. St. Rep. 543, and n., 27 S. W. 460, 26 L. R. A. 400, and n., majority requiring plaintiff to remit excessive damages; *Smith v. Times Pub. Co.*, 178 Pa. St. 525, 36 Atl. 303, 35 L. R. A. 828, majority upholding act permitting Supreme Court to amend verdict.

Distinguished in *Colburn v. Groton*, 66 N. H. 154, 28 Atl. 96, 22 L. R. A. 765, holding decision on question of fact may be set aside when against evidence.

Carriers.—Section 4281, revised statutes, providing that shippers of certain articles shall disclose their value to carrier, has no reference to carriers by land, p. 32.

100 U. S. 33-36, 25 L. 539, *UNITED STATES v. HIRSCH*.

Customs duties.—Party who did not join in previous conspiracy to defraud United States of customs duties cannot, under section 5445, be convicted on the overt act, p. 34.

Cited in *Pettibone v. United States*, 148 U. S. 202, 37 L. 422, 13 S. Ct. 545, holding combination of minds for unlawful purpose, and overt act, must appear charged in indictment for conspiracy. Cited generally in *Berkowitz v. United States*, 93 Fed. 460, holding joinder of two conspiracy charges in same indictment allowable. See 3 Am. St. Rep. 481, extended note on conspiracy.

Statutes.—In construing any part of revised statutes, it is admissible to recur to its connection in act of which it was originally part, p. 35.

Approved in *United States v. Lacher*, 134 U. S. 627, 33 L. 1080, 10 S. Ct. 626, construing section 5467, revised statutes, relating to embezzlement of letters, etc.; *Barrett v. United States*, 169 U. S. 227, 42 L. 726, 18 S. Ct. 331, construing section 546, revised statutes, respecting judicial districts of North Carolina; *In re Dana*, 68 Fed. 399, arguing, revision of statutes did not alter laws.

Customs duties.—Conspiracy to defraud government of customs duties is not a crime against the revenue laws, and prosecution therefor is barred after three years, p. 36.

Cited generally in *Hamilton v. Rathbone*, 175 U. S. 419.

Customs duties.—Prosecution for effecting entry of goods at custom-house by means of false classification as to value and quantity, under section 5445, revised statutes, is not barred until lapse of five years, p. 36.

100 U. S. 37-42, 25 L. 541, *MINING CO. v. TAYLOR*.

Mines and minerals.—In ejectment for undivided interest in mining claim, both parties deriving title from original locator, validity and regularity of location are not in question, p. 40.

Mines and minerals.— Parties being tenants in common of mining claim, defendant's possession thereof was plaintiff's possession until he was ousted, p. 40.

Approved in *Crowder v. McDonnell*, 21 Mont. 370, 54 Pac. 44, holding purchaser from co-owner becomes tenant in common with other owners; *Moss v. Rose*, 27 Or. 599, 50 Am. St. Rep. 745, 41 Pac. 668, holding plaintiffs, as co-tenants in common, held possession for defendant.

Mines and minerals.— Ejectment against co-tenant for undivided interest in mining claim is not barred by Nevada statute of limitations, unless ouster took place more than two years before commencement of action, p. 40.

Trial.— Special findings of court should set forth ultimate, not evidentiary, facts, p. 42.

Cited in *Smith v. Gale*, 144 U. S. 525, 36 L. 527, 12 S. Ct. 679, holding finding of plaintiff's continued possession in suit to quiet title, finding of ultimate fact; *Tombstone, etc., Co. v. Way-Up Min. Co.*, 1 Ariz. 463, 25 Pac. 797, holding finding of probative facts unnecessary.

Mines and minerals.— Written conveyance is not necessary to transfer of mining claim, p. 42.

Followed in *Doe v. Waterloo Min. Co.*, 70 Fed. 459, 44 U. S. App. 204, holding interest in California claim transferable by parol; *Omar v. Soper*, 11 Colo. 389, 7 Am. St. Rep. 253, 18 Pac. 448, holding written conveyance unnecessary in exchanging interests in claims; *Lockhart v. Rollins*, 2 Idaho, 508, 21 Pac. 414, holding verbal transfer valid if followed by change of possession.

Departed from in *Hopkins v. Noyes*, 4 Mont. 558, 2 Pac. 283, holding deed necessary to transfer of claim.

Appeal and error.— Admission of immaterial or irrelevant evidence does not warrant reversal, where it is apparent that it cannot have affected verdict injuriously to appellant, p. 42.

Approved in *Runkle v. Burnham*, 153 U. S. 224, 38 L. 697, 14 S. Ct. 840, and *Reed v. Stapp*, 52 Fed. 645, 9 U. S. App. 34, both holding admission of immaterial evidence not affecting findings not ground for reversal; *Miller v. Houston, etc., Ry.*, 55 Fed. 370, 371, 13 U. S. App. 57, holding admission of immaterial evidence not ground for reversal, where sufficient legal evidence appeared to justify court's conclusions; *Lancaster v. Collins*, 115 U. S. 227, 29 L. 375, 6 S. Ct. 36, *United States v. Shapleigh*, 54 Fed. 137, 12 U. S. App. 26, *Pacific Postal Tel., etc., Co. v. Fleischner*, 66 Fed. 905, 29 U. S. App. 227, and *Sipes v. Seymour*, 76 Fed. 118, 40 U. S. App. 185, holding error without prejudice no ground for reversal; *Groth v. Kersting*, 4 Colo. App. 399, 36 Pac. 157, holding reception of immaterial evidence on trial before referee, not of itself reversible

error; *Fisher v. State*, 1 Pennewill (Del.), 391, 41 Atl. 185, collecting authorities, refusing reversal for erroneous admission of testimony that could not have affected verdict adversely to prisoner; *Tracewell v. Farnsley*, 104 Ind. 497, 4 N. E. 163, holding, where record shows judgment to rest on good paragraph of complaint, overruling demurrer to bad paragraph, harmless error.

100 U. S. 43, 25 L. 547, *NATIONAL BANK v. INSURANCE CO.*

Courts.—Supreme Court will not decide motions to dismiss appeals before record is printed, when there is any question about facts on which motion rests. p. 43.

Followed in *Waterville v. Van Slyke*, 115 U. S. 290, 29 L. 406, 6 S. Ct. 39, a like case.

100 U. S. 43-47, 25 L. 543, *TILLSON v. UNITED STATES.*

Courts.—Where claim of contractor against government for damages for breach of contract is referred by special act to Court of Claims, the determination must be made according to the fixed rules governing said court in adjudication of causes, p. 46.

Cited in *McClure v. United States*, 116 U. S. 149, 150, 29 L. 573, 6 S. Ct. 323, holding reference to Court of Claims to pass on claims confers no equity jurisdiction; *United States v. Cumming*, 130 U. S. 455, 32 L. 1031, 9 S. Ct. 584, holding reference to Court of Claims by special act constitutes no waiver of defenses by government.

United States.—Interest on claims against United States cannot be allowed unless specially provided for in contract or by special statute, p. 46.

Approved in *Harvey v. United States*, 113 U. S. 249, 28 L. 989, 5 S. Ct. 468, *Angarica v. Bayard*, 127 U. S. 260, 32 L. 163, 8 S. Ct. 1161, *White v. Arthur*, 20 Blatchf. 243, 10 Fed. 84, *Commissioners v. Buckner*, 48 Fed. 538, and *Baxter v. United States*, 51 Fed. 675, 10 U. S. App. 243, all holding interest not recoverable against United States on unpaid accounts, in absence of contract or statute allowing same; *Marvin v. United States*, 44 Fed. 410, and *United States v. Barber*, 74 Fed. 485, 41 U. S. App. 424, both holding interest not recoverable on judgment of Court of Claims; *Carr v. State*, 127 Ind. 220, 22 Am. St. Rep. 637, 26 N. E. 783, 11 L. R. A. 376, and n., holding interest not payable on unpaid interest of State bonds; *Boott Cotton Mills v. Lowell*, 159 Mass. 387, 34 N. E. 368, holding interest can be recovered on abated taxes, repayable by city, only from date of demand. See 22 Am. St. Rep. 648, note on obligation of State to pay interest.

Distinguished in *United States v. Old Settlers*, 148 U. S. 478, 37 L. 528, 13 S. Ct. 671, allowing interest on claim of Indians under treaty.

Damages.—In actions for breach of contract by withholding payment, allowance cannot be made for loss of profits consequent on advance in price of materials while payments were withheld, p. 47.

100 U. S. 47-55, 25 L. 544, *FAIRFIELD v. COUNTY OF GALLATIN*.

Courts.—Construction of highest State court, of State Constitution and laws, will be followed by Supreme Court, although it has previously construed same differently, p. 52.

Cited and rule followed in *Ridings v. Johnson*, 128 U. S. 224, 32 L. 405, 9 S. Ct. 76, holding final decisions of State courts upon questions of law of real estate binding in cases arising in said State; *Wade v. Travis*, 174 U. S. 509, 19 S. Ct. 718, holding latest construction of State court should be followed; *Hartford Ins. Co. v. Chicago, etc., Ry.*, 175 U. S. 108, holding questions of public policy, as affecting liability for acts within State, ordinarily governed by law of State as construed in its courts; *McCall v. Town of Hancock*, 20 Blatchf. 346, 10 Fed. 9, holding Federal court will reverse its own ruling on State statute to conform to later construction of State court; *Allen v. Fairbanks*, 45 Fed. 447, holding laws of State where corporation is organized, as construed by its courts, rules of property as to rights between corporation and stockholders; *Moore v. National Bank*, 104 U. S. 629, 26 L. 872, *Louisiana v. Pilsbury*, 105 U. S. 295, 26 L. 1096, *Reclamation Dist. v. Hagar*, 6 Sawy. 570, 4 Fed. 369, *Partee v. Thomas*, 11 Fed. 777, *Moulton v. Chafee*, 22 Fed. 28, *New Orleans Water-Works Co. v. Southern Brewing Co.*, 36 Fed. 834, *Powder River, etc., Co. v. Board of Comrs.*, 45 Fed. 325, *Jersey City Gas-Light Co. v. United Gas, etc., Co.*, 46 Fed. 268, *Evansville v. Woodbury*, 60 Fed. 720, 18 U. S. App. 514, *Rhodes v. United States Nat. Bank*, 66 Fed. 518, 24 U. S. App. 607, 34 L. R. A. 747, and *Hearfield v. Bridges*, 75 Fed. 51, 44 U. S. App. 574, all holding Federal courts bound by State court's construction of State statutes; *Western Union Tel. Co. v. Poe*, 64 Fed. 14, holding Federal court, on construction of State statute by courts thereof, will reverse its own previous contrary ruling thereon; *Sanford v. Poe*, 69 Fed. 549, 37 U. S. App. 378, holding Federal court bound to follow State court's construction of State statute, irrespective of its own previous construction; *Johnson v. State*, 91 Ala. 75, 9 So. 73, holding latest construction placed by courts of another State on statute thereof binding, unless affecting vested rights acquired under former construction; *Farrior v. New England, etc., Co.*, 92 Ala. 180, 9 So. 533, 12 L. R. A. 853, and n., holding rights acquired under construction of statutes not affected by subsequent different construction; *Winona, etc., R. R. v. Deuel*, 3 Dak. 26, 12 N. W. 569, holding construction of Constitution of other State by courts thereof conclusive; *Fowler v. Lamson*, 146 Ill. 478, 37 Am. St. Rep. 166, 34 N.

E. 933, adopting Kansas court's construction of Kansas Constitution regarding stockholder's liability; dissenting opinion in Tuttle v. Nat. Bank, 161 Ill. 510, 44 N. E. 988, 34 L. R. A. 757, majority holding statutes of another State to be construed as home statutes, in absence of construction by courts of said State.

Distinguished in *Douglass v. County of Pike*, 101 U. S. 686, 25 L. 971, holding rights of parties to municipal lands to be determined according to construction of State statutes then adopted by State courts, irrespective of subsequent decisions; *Burgess v. Seligman*, 107 U. S. 35, 27 L. 365, 2 S. Ct. 22, holding Federal courts should exercise independent judgment in cases not foreclosed by previous State adjudications; *Jessup v. Carnegie*, 80 N. Y. 447, 36 Am. Rep. 647, holding construction of statutes of another State by courts thereof conclusive; *Faulkner v. Hart*, 82 N. Y. 421, 37 Am. Rep. 580, holding Massachusetts decisions not binding in construing New York contract to be performed in Massachusetts.

Railroads.—Supreme Court accepts as binding the decision of Illinois State court, that donation to railroad voted by county before adoption of Constitution prohibiting such donation, may be completed thereafter by issuance of bonds, p. 55.

Followed in *Louisville v. Savings Bank*, 104 U. S. 471, 26 L. 776, *Moultrie v. Fairfield*, 105 U. S. 375, 26 L. 948, and *Enfield v. Jordan*, 119 U. S. 691, 30 L. 528, 7 S. Ct. 364, similar cases under same provisions; *Wade v. Walnut*, 105 U. S. 3, 26 L. 1028, holding provisions of Illinois Constitution, relating to municipal subscriptions to railroads, took effect July 2, 1870. Cited generally in *Northern Pac. R. Co. v. Roberts*, 42 Fed. 749, collecting cases, on right to levy tax to aid railroads; *Williams v. People*, 132 Ill. 588, 24 N. E. 651, *arguendo*. See 98 Am. Dec. 669, 670, note on municipal bonds and defenses thereto.

Distinguished in *Concord v. Robinson*, 121 U. S. 169, 30 L. 887, 7 S. Ct. 938, holding power given by former act of Illinois to towns to aid railroads withdrawn, if not exercised prior to adoption of Constitution of 1870; *Commissioners v. Call*, 123 N. C. 320, 31 S. E. 485, 44 L. R. A. 256, holding railroad bond issue invalid.

Miscellaneous.—*Fort Scott v. Hickman*, 112 U. S. 165, 28 L. 641, 5 S. Ct. 64, as to practice where lower court reaches wrong conclusions from findings.

100 U. S. 55-61, 25 L. 547, COWELL v. SPRINGS CO.

Deeds.—Condition in deed that intoxicating liquors shall never be sold or manufactured on premises, and that on breach title shall revert to grantor, is valid, p. 58.

Followed in *Smith v. Barrie*, 56 Mich. 320, 22 N. W. 819, and *Sioux City, etc., R. R. v. Singer*, 49 Minn. 305, 32 Am. St. Rep. 556, 51 N. W. 906, 15 L. R. A. 753, upholding like conditions. Cited

and principle applied in *Tobey v. Moore*, 130 Mass. 450, upholding restriction in deed against erection of buildings for certain trades; *Foster v. Foster*, 62 N. H. 55, upholding condition that but one house shall be erected on land within next twenty-five years; *Improvement Co. v. Dawson*, 5 Tex. Civ. App. 490, 24 S. W. 577, holding like condition enforceable by forfeiture against subsequent purchasers, although not in terms including heirs and assigns.

Cited in *Hopkins v. Grimshaw*, 165 U. S. 356, 41 L. 744, 17 S. Ct. 406, arguendo, gift upon condition subsequent, requiring entry to re-vest estate in grantor, unaffected by rule against perpetuities; *Conger v. Lowe*, 124 Ind. 371, 24 N. E. 890, 9 L. R. A. 168, and n., arguendo; *Commercial Nat. Bank v. First Nat. Bank*, 118 N. C. 788, 54 Am. St. Rep. 756, 24 S. E. 525, 32 L. R. A. 714, stipulation on check against payment to certain company, binding on holder; dissenting opinion in *Tardy v. Creasy*, 81 Va. 567, 59 Am. Rep. 686, note, majority holding grantor's covenant to abstain from business on adjoining tract, invalid. See 90 Am. Dec. 104, note, and 49 Am. St. Rep. 136, monographic note on perpetuities.

Distinguished in *Duncan v. Central, etc., Ry.*, 85 Ky. 530, 4 S. W. 229, holding condition restricting property to particular use waived by grantor's subsequent conduct.

Deeds.—On breach of condition in deed, that intoxicating liquor shall not be sold or made on premises, grantor may, in Colorado, bring ejectment without previous entry or demand, p. 58.

Approved in *Atlantic Pacific R. v. Mingus*, 165 U. S. 431, 41 L. 777, 17 S. Ct. 352, holding United States have right of re-entry upon breach of condition, exercisable by legislation; *Ellis v. Kyger*, 90 Mo. 606, 3 S. W. 24, holding ejectment maintainable by grantor for condition broken, without entry or demand.

Corporations.—By interstate comity, corporations created in one State may carry on any lawful business in another, acquiring and transferring property there equally as individuals, p. 59.

Approved in *Black v. Caldwell*, 83 Fed. 883, holding denial of right of foreign corporation mortgagee to purchase at foreclosure, a violation of fourteenth amendment; *Female Academy v. Sullivan*, 116 Ill. 382, 56 Am. Rep. 777, 6 N. E. 185, holding corporation created in one State may exercise in another, general powers conferred by its charter; *Elston v. Piggott*, 94 Ind. 18, holding foreign corporation may purchase at judicial sale; *Atchison, etc., R. R. v. Fletcher*, 35 Kan. 243, 10 Pac. 601, holding corporation clothed everywhere with powers given by charter; *Enterprise Brewing Co. v. Grime*, 173 Mass. 257, 53 N. E. 858, holding foreign corporation organized to sell liquor in another State, may do so in Massachusetts.

Corporations.—Policy of State not to permit business of a foreign corporation in its limits, or their acquisition of real property, must

be expressed affirmatively, and is not enforceable from fact that legislature has made no provision for similar corporations, p. 60.

Approved in *Christian Union v. Yount*, 101 U. S. 356, 25 L. 890, holding it presumption that corporation may exercise charter powers in other States; *Wells, Fargo & Co. v. Northern Pac. Ry.*, 10 Sawy. 449, 23 Fed. 474, holding prohibition of territory from passing special acts of incorporation, does not preclude corporation so incorporated elsewhere from doing business therein; *Reorganized Church, etc. v. Church*, 60 Fed. 942, holding specific enumeration of religious corporations charterable in State, does not restrict foreign corporations; *American Water-Works Co. v. Farmers' Loan, etc., Co.*, 73 Fed. 963, 36 U. S. App. 563, holding foreign corporation privileged to exercise charter powers in State, unless prohibited by law; *Stevens v. Pratt*, 101 Ill. 224 (see dissenting opinion, 101 Ill. 232), holding failure to provide for other domestic corporations than those named in general law, not exclusion of foreign corporation of like character; *Female Academy v. Sullivan*, 116 Ill. 384, 56 Am. Rep. 780, 6 N. E. 186, holding implied permission to foreign corporation to hold land, exists until contrary is shown; *People v. Fidelity Casualty Co.*, 153 Ill. 33, 38 N. E. 755, 26 L. R. A. 298, holding absence of authority under Illinois statute to organize multiform insurance companies, not implied prohibition of such insurance by foreign companies; *Tarpey v. Salt Co.*, 5 Utah, 503, 17 Pac. 635, holding policy of State against acquisition of land by foreign corporation must be affirmatively expressed.

Distinguished in *Williams v. Gold Hill Min. Co.*, 96 Fed. 462, holding foreign corporation governed in its conveyances by statute of State.

Corporations.—Whether land held by corporation is necessary for conduct of its business, is a matter between State and corporation, in which strangers have no concern, p. 60.

Cited and principle applied in *Fritts v. Palmer*, 132 U. S. 293, 33 L. 321, 10 S. Ct. 96, Oregon, etc., *R. Co. v. United States*, 67 Fed. 658, 29 U. S. App. 497, and *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 195, 8 N. W. 390, all holding conveyance to corporation incompetent to take land, voidable only on objection of State; *Hughes v. Northern Pac. Ry.*, 9 Sawy. 330, 18 Fed. 118, holding failure of corporation to keep charter condition can be taken advantage of by State alone; *Reorganized Church, etc. v. Church*, 60 Fed. 943, holding question as to whether land held by corporation was necessary to its purpose, belongs to State; *Rogers v. Nashville, etc., Ry.*, 91 Fed. 317, 62 U. S. App. 82, holding authority to acquire under executed purchases can only be raised by State; *Long v. Georgia Pacific Ry.*, 91 Ala. 522, 24 Am. St. Rep. 933, 8 So. 706, holding equity will not rescind executed ultra vires contract; *Water-Supply, etc., Co. v. Tenney*, 24 Colo. 355, 51 Pac. 509, holding power

of water company to purchase water rights questionable only by State; *Quitman County v. Stritze*, 70 Miss. 323, 13 So. 36, holding grantor of land to county cannot question county's right to acquire same; *Union Trust Co. v. Atchison, etc., R. Co.*, 8 N. Mex. 339, 43 Pac. 705, holding stranger cannot object to foreign corporation doing business in territory, on ground of non-compliance with statute; *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 586, 35 N. E. 967, 24 L. R. A. 331, and n., holding purchaser from corporation having power to sell land for any purpose, may not question vendor's authority; *Gas & Fuel Co. v. Dairy Co.*, 60 Ohio St. 107, 53 N. E. 713, holding doctrine of ultra vires less strictly applied in suits between corporation and individual than when State is a party; *Gilbert v. Hole*, 2 S. Dak. 168, 170, 49 N. W. 2, holding ultra vires deed passes title as between parties subject to proceedings by State; *Russell v. Railway*, 68 Tex. 652, 5 S. W. 690, holding corporation's right to acquire land, questionable by State alone. Cited generally in *Potter v. Rio Arriba, etc., Co.*, 4 N. Mex. 327, 17 Pac. 614, holding act of 1887, providing for forfeiture of lands acquired by aliens, not retroactive.

Distinguished in *In re McGraw*, 111 N. Y. 103, 19 N. E. 237, 2 L. R. A. 395, and n., holding, under charter providing that college could hold property not exceeding certain value, heirs might question devise thereto.

Estoppel.—Defendant going into possession under deed, with condition that if intoxicating liquors should be sold or made on premises, title should revert to grantor, is estopped, when sued by grantor for premises, after breach of condition, from denying corporate existence of grantor, or validity of title conveyed, p. 61.

Cited and principle applied in *Oregonian Ry. v. Oregon Ry., etc., Co.*, 10 Sawy. 471, 22 Fed. 249, holding legal disability of corporation may be set up thereby, not by other party to contract; *Oregonian Ry. v. Oregon Ry., etc., Co.*, 10 Sawy. 478, 23 Fed. 236, and *School Dist. v. Alderson*, 6 Dak. 149, 41 N. W. 467, holding one having contracted with corporation as such may not question corporate existence in action on contract; *Eastern Building, etc., Assn. v. Bedford*, 88 Fed. 18, holding one having received benefit of contract with corporation cannot raise question of ultra vires; *Bank of Shasta v. Boyd*, 99 Cal. 605, 34 Pac. 337, holding one having received from corporation consideration of mortgage note, estopped from denying corporate capacity, in action to foreclose; *Kelso v. Stigar*, 75 Md. 402, 24 Atl. 24, holding grantee cannot enter and hold under deed, and repudiate title thereby conveyed; *Jacobs v. Miller*, 50 Mich. 127, 15 N. W. 45, holding claimant under deed cannot establish claim by adopting provisions favorable to him, and repudiating others; *Jefferson County v. Grafton*, 74 Miss. 441, 60 Am. St. Rep. 518, 21 So. 248, 36 L. R. A. 799, holding purchaser from county cannot, on latter's suit to cancel deed, deny its power

to acquire property; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 327, 17 Am. St. Rep. 160, 42 N. W. 264, holding persons who were active agents in forming corporation, estopped from contesting regularity thereof; *Southern Pacific R. R. v. Orton*, 6 Sawy. 182, 32 Fed. 471, note, trespasser cannot question corporation's right to hold land.

100 U. S. 61-71, 25 L. 563, *EMIGRANT CO. v. COUNTY OF ADAMS*.

Public lands.—Although act of September 28, 1850, granting swamp lands to States, declared that said grants were made exclusively to enable States with proceeds therefrom, to drain and reclaim said lands, it is questionable whether security for such application does not rest upon good faith of the States, p. 69.

Cited and applied in *McNee v. Donahue*, 76 Cal. 507, 18 Pac. 442, doubting whether agricultural land grant of 1866 fastened trust on State; *Kiefer v. German-American Seminary*, 46 Mich. 638, 10 N. W. 51, holding donor has no redress, where fund created by absolute conveyance is not applied as directed; *A. P. Cook Co. v. Aptham*, 79 Mich. 105, 44 N. W. 421, holding drainage taxes a lien on swamp lands; *Sturgeon v. Hampton*, 88 Mo. 210 (see dissenting opinion in 88 Mo. 216), holding trust in swamp lands granted to State, a personal trust reposed in State, and not following land. Cited, *arguendo*, in *Koehler v. Hill*, 60 Iowa, 627, 15 N. W. 621.

Public lands.—Where grant of swamp lands to State is for certain purposes exclusively, Congress alone has power to enforce the conditions of the grant, by revocation, or other suitable action, p. 69.

Approved in *McNee v. Donahue*, 142 U. S. 602, 35 L. 1128, 12 S. Ct. 216, holding no disposition of proceeds of sale of agricultural grant of 1866, to California, could affect titles acquired thereunder; *Chandler v. Calumet, etc., Min. Co.*, 36 Fed. 667, holding swamp land grants of 1850, conferred upon States absolute dominion, as far as third parties were concerned; *Kings v. Tulare*, 119 Cal. 512, 51 Pac. 867, holding only United States can question disposal made of swamp lands by States; *United States v. Louisiana*, 127 U. S. 187, 32 L. 68, 8 S. Ct. 1050, affirming rule; *United States v. Louisiana*, 127 U. S. 189, 32 L. 69, 8 S. Ct. 1051, *arguendo*.

Public lands.—Grant by State of swamp lands, subject to conditions of swamp land grant of 1850, to county for general county purposes, is valid, and county cannot rescind its contracts for disposal thereof, on ground that State grant was in violation of said act, p. 69.

Followed in *Mills Co. v. Railroad Cos.*, 107 U. S. 564, 27 L. 581, 2 S. Ct. 660, and *Acker v. Walker*, 53 Iowa, 457, 5 N. W. 586, similar cases.

Public lands.—County cannot maintain bill to set aside its contract for sale of State swamp lands, because same includes sale of county's claims against United States for indemnity for lands sold contrary to law, p. 70.

Contracts.—Where covenants are mutual and dependent, failure of one party to perform absolves the other, and authorizes him to rescind, p. 70.

Vendor and purchaser.—Remedy for breach of agreement not made a condition of sale, is in action on covenant, not bill to rescind contract, p. 71.

Cited in *Adams Co. v. Graves*, 75 Iowa, 645, 36 N. W. 890, *arguendo*.

100 U. S. 72-74, 25 L. 567, *HOLDEN v. TRUST CO.*

Interest.—Where note specifies interest at rate different from legal rate, it is presumed, in absence of contrary stipulation, that agreement to pay same extends only to maturity, after which legal rate is chargeable, p. 74.

Cited and applied in *Nashua, etc., Corp. v. Boston, etc., Corp.*, 61 Fed. 249, 21 U. S. App. 50, holding court below, on cause being remanded for taking of account, should allow interest from filing of bill; *Hovey v. Edmison*, 3 Dak. 471, 22 N. W. 604, holding contract to pay compound interest at specified rate, valid; *O'Brien v. Young*, 95 N. Y. 430, 47 Am. Rep. 65, holding reduction of legal rate affected judgment rendered prior thereto. See 47 Am. Rep. 74, note. The following cases follow the above rule: *Sherwood v. Moore*, 35 Fed. 109, and *Farmers' Loan, etc., Co. v. Northern Pac. R. Co.*, 94 Fed. 455, both holding legal rate governs after maturity of bonds, in absence of contrary stipulation; *Hicks v. Coody*, 49 Ark. 428, 5 S. W. 714, holding legal rate governs after maturity, in absence of agreement for specified rate, "until paid;" *Burns v. Anderson*, 68 Ind. 205, 34 Am. Rep. 253, and *Smith v. Tatman*, 71 Ind. 176, both holding interest after maturity computable at legal rate; *Gray v. State*, 72 Ind. 581, holding interest on State bonds after maturity, determined by legal rate, where payable; *Brown v. Hardcastle*, 63 Md. 491, holding mortgage bears legal rate after it becomes due.

The following cases adopt the contrary rule: *Shaw v. Rigby*, 84 Ind. 378, 43 Am. Rep. 99, holding interest after maturity recoverable as damages, and measurable at contract rate; *Union Inst., etc. v. Boston*, 129 Mass. 94, 37 Am. Rep. 313, holding interest on contract to be computed until paid, at rate stated therein; *Borders v. Barber*, 81 Mo. 645, holding contract rate governs after maturity, where stipulation is for interest "from date"; *Hydraulic Co. v. Chatfield*, 38 Ohio St. 577, holding bonds bear interest at contract rate until paid; judgment thereon bearing same interest.

Distinguished in *New Orleans v. Warner*, 175 U. S. 147, holding contract rate governs where warrants bear interest "until paid;" *Sanford v. Savings, etc., Soc.*, 80 Fed. 61, specific agreement as to interest existing.

Courts.—Question as to whether contract rate of interest on commercial paper governs after maturity, is one of local law, p. 74.

Approved in *Ohio v. Frank*, 103 U. S. 698, 26 L. 531, holding contract rate governs after maturity of note, in Illinois; *United States v. North Carolina*, 136 U. S. 218, 34 L. 339, 10 S. Ct. 923, holding interest not payable on North Carolina bond coupons after maturity of bonds; *Massachusetts Ben. Assn. v. Miles*, 137 U. S. 691, 34 L. 835, 11 S. Ct. 235, holding question of interest always one of local law; *Bolles v. Amboy*, 45 Fed. 169, holding, under Illinois decisions, interest on overdue coupons of railroad-aid bonds, not recoverable. See 69 Am. Dec. 348, and 47 Am. Rep. 71, notes on subject.

100 U. S. 75-78, 25 L. 568, *ARTHUR v. HEROLD*.

Customs duties.—In action against collector to recover alleged excessive duties, charge that ground and burnt chicory are the same, and that whether prepared chicory differed from ground chicory is a question of fact, is not erroneous, p. 77.

Not cited.

100 U. S. 78-81, 25 L. 550, *RAILWAY CO v. TWOMBLY*.

Appeal and error.—Trial court's ruling on motion for new trial, is not reviewable on error, p. 81.

Followed in *Boogher v. Insurance Co.*, 103 U. S. 98, 26 L. 312, and *M'Clellan v. Pyeatt*, 50 Fed. 688, 4 U. S. App. 319.

Appeal and error.—Rulings in regard to instructions, not objected to when made, cannot be reviewed by appellate court on error to order refusing new trial, although incorporated in bill of exceptions, p. 81.

Cited in *Danks v. Rodeheaver*, 26 W. Va. 290, holding errors in rulings during jury trial, reviewable only when objected to, exception taken and new trial asked and refused.

Statutes.—Repeal of statute authorizing action after judgment, and during pendency of writ of error, does not authorize Supreme Court to remand same with instructions to enter non-suit, p. 81.

Cited generally in *Anderson v. Hygeia, etc., Co.*, 92 Va. 695, 24 S. E. 272, holding appellate court may reverse erroneous judgment and order entry of proper judgment.

Appeal and error.—Writ of error to Supreme Court does not vacate judgment below, p. 81.

Approved in *Sharon v. Hill*, 11 Sawy. 303, 26 Fed. 345, holding writ of error merely prevents execution of judgment; *Hughes v. Dundee Mortgage, etc., Co.*, 11 Sawy. 557, 28 Fed. 42, and *Oregonian Ry. v. Oregon Ry., etc., Co.*, 11 Sawy. 574, 27 Fed. 284, holding writ of error to Circuit Court does not suspend operation of judgment as an estoppel; *In re Kirby*, 84 Fed. 608, holding attorney convicted of crime may be disbarred therefor pending his appeal; *Goodrich v. Wilson*, 135 Mass. 33, holding judgment remains in force until actually reversed; *Hughes v. Green*, 84 Fed. 835, 56 U. S. App. 60, doubting whether order of dismissal in State court is not operative because of appeal by defendants.

Distinguished in dissenting opinion in *Day v. Holland*, 15 Or. 471, 15 Pac. 859, majority holding appeal from decree in equity does not annul same.

100 U. S. 82-99, 25 L. 550, TRADEMARK CASES.

Trademarks and tradenames.—Property rights in trademarks are recognized at common law, and were not created by acts of Congress, p. 92.

Approved in *La Croix v. May*, 15 Fed. 237, holding property in trademarks does not derive its existence from rights of Congress; *Stachelberg v. Ponce*, 23 Fed. 431, holding assignee of trademark must, in use thereof, indicate that he is assignee in order to be protected therein; *Coats v. Merrick Thread Co.*, 36 Fed. 325, 1 L. R. A. 617, upholding general right of protection to reputation acquired by commodity; *Price, etc., Powder Co. v. Fyfe*, 45 Fed. 800, protecting use of word "cream," where not descriptive of an ingredient; *L. H. Harris Drug Co. v. Stucky*, 46 Fed. 627, holding trademark rights not dependent on congressional regulations; *Battle v. Finlay*, 50 Fed. 107, holding Federal courts may administer equitable remedies in trademark controversies; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 575, 17 U. S. App. 352, holding different trademark may be registered for domestic trade, from that registered for interstate trade; *Hennessy v. Braunschweiler & Co.*, 89 Fed. 668, holding rights and remedies relating to trademarks exist independently of Federal statute; *Sarrazin v. W. R. Irby, etc., Co.*, 93 Fed. 627, holding suits regarding trademarks registered under act of 1881, involve no Federal question, unless same are used in interstate commerce; *Luyties v. Hollender*, 22 Blatchf. 413, 21 Fed. 281, refusing to enjoin use of trademark registered under act of 1881, but used in State only; *United States v. Roche*, 1 McCrary, 386, F. C. 16,180, holding decision in principal case does not affect injunction based on common law; *Small v. Sanders*, 118 Ind. 106, 20 N. E. 297, upholding jurisdiction of State courts to enjoin infringement of trademark; *Handy v. Commander*, 49 La. Ann. 1128, 22 So. 235, awarding injunction and damages for infringement of trademark; *Lord v. Steamship Co.*, 102 U. S. 544, 26 L. 226, *arguendo*;

Covington, etc., *Bridge Co. v. Kentucky*, 154 U. S. 211, 38 L. 966, 14 S. Ct. 1089, States may prescribe form of commercial contracts for internal trade; *Warren v. Warren Thread Co.*, 134 Mass. 248, holding right to trademarks designating place of manufacture passes to assignee in insolvency; *Gessler v. Grieb*, 80 Wis. 27, 27 Am. St. Rep. 24, 48 N. W. 1100, denying right to exclusive use of words "Magic Headache Wafers." Cited, arguendo, in *Higgins v. Keuffel*, 24 Blatchf. 353, 30 Fed. 628.

Trademarks and tradenames.—Power conferred on Congress by Constitution to protect writings and inventions, refers to fruits of intellectual labor, and does not extend to protection of trademarks, p. 94.

Approved in *Higgins v. Keuffel*, 140 U. S. 431, 35 L. 471, 11 S. Ct. 732, holding label on bottle not subject of copyright; *Schumacher v. Schwencke*, 26 Fed. 818, 819, denying Federal jurisdiction over suit for trademark infringement between citizens of same State; *Levy v. Waitt*, 61 Fed. 1011, 21 U. S. App. 394, 25 L. R. A. 192, and *Coffman v. Castner*, 87 Fed. 466, 59 U. S. App. 49, both holding exclusive right to use geographical name cannot be acquired; *J. L. Mott Iron Works v. Clow*, 82 Fed. 317, 53 U. S. App. 466, holding catalogue confined to statement of dimensions and price, not subject of copyright.

Commerce.—When Congress enacts a law which can only be valid as a regulation of commerce, it must appear from the face thereof, or from its essential nature, that it is a regulation of commerce with foreign nations, among the States, or with Indian tribes, p. 96.

Cited in *The Katie*, 40 Fed. 482, 7 L. R. A. 58, and n., upholding shipping act of 1886; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch, etc., Co.*, 66 Fed. 649, 35 U. S. App. 16, holding combination affecting trade between dealer in one State selling to customer in another, affects interstate commerce; *The E. A. Shores, Jr.*, 73 Fed. 347, upholding Harter shipping act. See 27 Am. St. Rep. 568, extended note on interstate commerce.

Statutes containing valid provisions so connected with invalid provisions that the two cannot be separated, must be held wholly void, p. 98.

Approved in *Virginia Coupon Cases*, 114 U. S. 305, 29 L. 198, 5 S. Ct. 922, holding valid parts of act, to be upheld, must be distinctly separable from invalid; *Baldwin v. Franks*, 120 U. S. 686, 688, 30 L. 769, 7 S. Ct. 660, holding limitation of statute by construction, not separation; *Manhattan Trust Co. v. Dayton*, 59 Fed. 333, 16 U. S. App. 588, holding contract depending on partially invalid ordinance must fall therewith; *State v. Indiana, etc., Min. Co.*, 120 Ind. 579, 22 N. E. 779, 6 L. R. A. 582, and n., holding act of

1889, prohibiting exportation of gas, unconstitutional; *Logan v. Stogsdale*, 123 Ind. 375, 24 N. E. 136, 8 L. R. A. 60, and *n.*, holding act of 1889, providing for branch roads, unconstitutional. Cited, but not applied, in *Western Union Tel. Co. v. Powell*, 94 Va. 272, 26 S. E. 828, holding statute wholly constitutional.

Distinguished in *Supervisors v. Stanley*, 105 U. S. 312, 26 L. 1050, holding separable, unconstitutional provisions do not necessarily vitiate whole act; *Presser v. Illinois*, 116 U. S. 263, 29 L. 618, 6 S. Ct. 583, upholding portions of military code of Illinois, separable from invalid; *Supervisors v. Stanley*, 12 Fed. 88, upholding valid portions of section 5219, revised statutes, regarding taxation of national bank shares; *Chicago, etc., R. R. v. Jones*, 149 Ill. 386, 41 Am. St. Rep. 293, 37 N. E. 254, 24 L. R. A. 148, upholding act of 1873, relating to rate discrimination, as far as relating to unreasonable rates within State; *Chamberlain v. Cranbury*, 57 N. J. L. 614, 31 Atl. 1036, holding statute conferring right to vote at school meetings upon females, partly constitutional.

Trademarks and tradenames.—Acts of 1870 and 1876, protecting trademarks, are not within constitutional power of Congress to regulate commerce, but are applicable generally to all commerce, and so unconstitutional, p. 99.

Approved in *South Carolina v. Seymour*, 153 U. S. 354, 38 L. 743, 14 S. Ct. 871, refusing to compel, by mandamus, registration of State's trademark on liquors; *United States v. Braun*, 39 Fed. 777, sustaining demurrer to indictment, under act of 1876; *United States v. Koch*, 40 Fed. 250, 5 L. R. A. 131, holding trademark act of 1881 did not revive penal clause of former act; *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, 94 Fed. 669, doubting constitutionality of act of 1881, protecting trademarks used in interstate commerce; *Levy v. Waitt*, 56 Fed. 1017, and *Hennessy v. Braunschweiger & Co.*, 89 Fed. 666, *arguendo*.

Distinguished in *United States v. Loeb*, 49 Fed. 637, holding section 3449, revised statutes, prohibiting shipment of liquors under fictitious brands not unconstitutional because incidentally protecting trademarks; *La Croix v. Escobal*, 37 La. Ann. 536, 538, holding treaty of 1869 with France, respecting trademarks, valid. See also 8 Biss. 334, F. C. 8,219, note.

100 U. S. 100-104, 25 L. 569, *HURT v. HOLLINGSWORTH*.

Courts.—Rule that blending of equitable and legal causes of action in one suit is not permissible in Federal courts, applies to case removed there from court of State whose procedure permits such blending, p. 103.

Cited and rule applied in *Hayward v. Andrews*, 106 U. S. 678, 27 L. 273, 1 S. Ct. 549, holding assignee of chose in action cannot enforce, in equity, assignor's legal rights; *Mansfield, etc., Ry. v.*

Swan, 111 U. S. 386, 28 L. 465, 4 S. Ct. 513, holding agreement of parties cannot confer jurisdiction; *Ridings v. Johnson*, 128 U. S. 217, 32 L. 403, 9 S. Ct. 74, holding equitable defense cannot be set up in Federal action at law; *Cherokee Nation v. Kansas Ry.*, 135 U. S. 651, 34 L. 300, 10 S. Ct. 969, affirming S. C., 33 Fed. 914, 915, on this point, holding prayer for damages if injunction prohibiting taking land be denied, improper; *Gudger v. Western, etc., R. Co.*, 21 Fed. 84, holding legal and equitable causes of action joinable in North Carolina, must be separated in Federal court; *Springfield Fire, etc., Ins. Co. v. Richmond, etc., R. R.*, 48 Fed. 363, holding tort-feasor cannot be joined with principal sufferer in Federal law action; *Bigelow v. Chatterton*, 51 Fed. 616, 10 U. S. App. 267, holding suit to determine adverse claim to unoccupied lands, must be in equity; *United States v. Swan*, 65 Fed. 652, 31 U. S. App. 112, holding Federal court in Michigan cannot issue writ of garnishment in equity case, although State practice permits same; *Coit v. Sullivan-Kelly Co.*, 84 Fed. 725, holding recovery against corporation for goods sold, and against individual interested in its business, cannot be sought in same action; *Berkey v. Cornell*, 90 Fed. 717, holding declaration in assumpsit cannot join special count on contract requiring adjustment of accounts.

Distinguished in *Phelps v. Elliott*, 23 Blatchf. 473, 26 Fed. 883, where complaint was substantially a bill in equity; *Fisher v. Knight*, 61 Fed. 493, 17 U. S. App. 502, holding, on stipulation to submit action in assumpsit on agreed facts, judgment may be entered for party having equitable right; *Waite v. O'Neil*, 72 Fed. 355, holding equity, having jurisdiction, may decree legal relief.

100 U. S. 104-110, 25 L. 527, *RICKER v. POWELL*.

Equity.—Bill of review on ground of newly-discovered matter, can only be filed on special leave, which rests in sound discretion of court to which application is made, p. 107.

Approved in *Pacific R. R. v. Missouri, etc., Ry.*, 2 McCrary, 229, 12 Fed. 641, *M'Donald v. Whitney*, 39 Fed. 467, and *Reed v. Stanley*, 89 Fed. 433, all holding bill of review must be brought within time allowed for appeal; *Taylor v. Charter Oak Ins. Co.*, 3 McCrary, 486, 17 Fed. 567, holding bill of review for errors on face of record, will not lie after time within which error can be brought; S. C., 3 McCrary, 489, 17 Fed. 568, holding leave to file bill must be first obtained; *Schæfer v. Wunderle*, 154 Ill. 581, 582, 39 N. E. 623, holding such bill of review cannot be filed without leave of trial court. See 20 Am. Dec. 172, extended note on bills of review.

Distinguished in *Kimberly v. Arms*, 40 Fed. 554, holding Circuit Court cannot entertain bill to review decree entered in pursuance of Supreme Court's mandate; *In re Gamewell, etc., Tel. Co.*, 73 Fed.

911, 33 U. S. App. 452, holding trial court may not entertain bill of review after decision by appellate court.

Equity.—Leave to file bill of review on ground of newly-discovered matter may be refused, although the facts, if admitted, would change the decree, if court deems it productive of mischief to innocent parties, or otherwise inadmissible, p. 107.

Equity.—Before bill of review can be filed, decree must first be performed, and costs paid, p. 108.

Followed in *Kimberly v. Arms*, 40 Fed. 555, holding bill of review must aver performance of decree; *Hoffman v. Knox*, 50 Fed. 492, 8 U. S. App. 19, holding money must be paid as directed in decree before bill of review is filed; *Gregory v. Pike*, 67 Fed. 852, 21 U. S. App. 658, holding relief on ground of newly-discovered evidence, cannot delay appeal or execution of judgment. See 20 Am. Dec. 174, extended note on bills of review.

Courts.—Where bill of review rests partly on grounds requiring leave to file, and partly on error of law, the whole is still discretionary, and latter must stand or fall with former, p. 109.

Cited in *Kimberly v. Arms*, 40 Fed. 558, reaffirming rule. See 20 Am. Dec. 173, extended note on bills of review.

100 U. S. 110-112, 25 L. 547, *ELASTIC FABRICS CO. v. SMITH*.

Appeal and error.—Where patent expires during pendency of infringement suit, and decree sustaining same awards only costs, without damages, case is within rule that no appeal lies from decree respecting costs, and decree must be affirmed; without examining merits, p. 112.

Approved in *Russell v. Farley*, 105 U. S. 437, 26 L. 1061, holding decision as to whether damages should be awarded, discretionary; *Paper-Bag Cases*, 105 U. S. 772, 26 L. 961, refusing to consider appeal where controversy was merely as to costs; *United States v. Waters*, 133 U. S. 212, 33 L. 595, 10 S. Ct. 250, holding amount of counsel fees allowed by court under section 824, revised statutes, discretionary with trial court; *Du Bois v. Kirk*, 158 U. S. 67, 39 L. 899, 15 S. Ct. 733, holding decree affirmed on merits cannot be reversed as to costs; *Gamewell, etc., Tel. Co. v. Municipal Signal Co.*, 77 Fed. 492, 33 U. S. App. 714, a similar case; *Tyler Min. Co. v. Sweeney*, 79 Fed. 282, 48 U. S. App. 213, holding appeal or error does not lie from judgment decreeing costs merely.

Cited, but application denied, in *Wood v. Weimar*, 104 U. S. 792, 26 L. 781, other questions being involved.

Distinguished in *Tefft v. Stern*, 73 Fed. 597, 43 U. S. App. 148, where lower court had no authority to enter costs.

100 U. S. 112-113, 25 L. 571, *RAILROAD CO. v. TROOK*.

Appeal and error.—On error to Supreme Court from judgments of affirmance in Supreme Court of District of Columbia, value of matter in dispute is determined by judgment affirmed, without adding interest or costs, and if less than \$2,500, writ must be dismissed, p. 113.

Approved in *District of Columbia v. Gannon*, 130 U. S. 228, 32 L. 922, 9 S. Ct. 509, an identical case; *Washington, etc., R. R. v. Harmon*, 147 U. S. 589, 37 L. 291, 13 S. Ct. 563, holding judgment in tort in District of Columbia, does not bear interest; *Keiser v. Cox*, 116 Ill. 28, 4 N. E. 385, holding jurisdictional amount determined by sum in controversy at commencement of action, excluding costs and interest; *Richmond v. Brummie*, 52 Kan. 248, 34 Pac. 784, refusing to entertain appeal by defendant alone from decree of less than jurisdictional amount.

Distinguished in *Keller v. Ashford*, 133 U. S. 618, 33 L. 671, 10 S. Ct. 495, holding appellate jurisdiction from judgment on note determined by amount of judgment, including interest to date thereof.

100 U. S. 113-119, 25 L. 587, *LANSDALE v. DANIELS*.

Public lands.—Declaratory statement by settler on public lands in California, under act of March 3, 1853, confers no right of pre-emption if made before return of plat of survey to land office, p. 116.

Approved in *Whitney v. Taylor*, 158 U. S. 94, 39 L. 909, 15 S. Ct. 800, holding settlement alone, without declaratory statement, confers no pre-emption rights; *Northern Pac. R. R. v. Colburn*, 164 U. S. 387, 41 L. 480, 17 S. Ct. 99, holding pre-emption, or homestead, claim does not attach to public land until entry in local land office; *Central Pac. R. R. Co. v. M'Cann*, 126 Cal. 554, 58 Pac. 1045, holding pre-emption claim, under act of 1862, does not attach until entry in local land office; *Bank v. Meagher*, 104 U. S. 285, 26 L. 738, *arguendo*.

Distinguished in *Baker v. Jamison*, 54 Minn. 28, 55 N. W. 751, holding subsequent recognition of premature applications for State lands confers validity thereon.

Public lands.—As between two locators, neither of whom has filed his notice at proper time, the superior equity of the first to enter and settle must prevail, p. 118.

Cited in *Whitney v. Taylor*, 158 U. S. 97, 39 L. 910, 15 S. Ct. 801, holding entry proceedings not vitiated by tardy filing of declaration; *Chicago, etc., R. R. v. Abbott*, 44 Kan. 178, 24 Pac. 56, holding failure to file report of commissioners on time did not invalidate condemnation proceedings.

Public lands.—Declaratory statement by settler on unsurveyed public lands in California, under act of March 3, 1853, although filed subsequent to period prescribed in act, is sufficient to give pre-emption right, unless some other person has previously commenced a settlement and given notice required, p. 117.

Cited in *Osgood v. El Dorado, etc., Co.*, 56 Cal. 578, and *Lux v. Haggin*, 69 Cal. 433, 437, 10 Pac. 779, 782, arguendo.

100 U. S. 119-124, 25 L. 571, UNITED STATES v. CURTIS.

Judgment.—Appearance of sureties after service of writ upon them, and suffering voluntary default, is a confession of indebtedness on account of breach of bond sued on, p. 123.

Interest on claim of government against sureties for money unaccounted for by principal, runs only from notice that definite sum is due United States, p. 123.

Cited and rule applied in *United States v. Denvir*, 106 U. S. 536, 27 L. 264, 1 S. Ct. 481, holding disbursing officer not chargeable with interest until failure to account is shown; *United States v. Poulson*, 30 Fed. 232, a like case; *Hagood v. Blythe*, 37 Fed. 250, 252, holding interest on claim, as against sureties, runs from filing suit; *Frink v. Southern Express Co.*, 82 Ga. 45, 46, 8 S. E. 867, 3 L. R. A. 486, and n., holding where, in absence of demand, sureties liable for interest only from service of writ; *Pennsylvania Co., etc. v. Swain*, — Pa. St. —, 42 Atl. 298, holding surety on bond of defaulting officer liable for interest on penalty only from time of demand; *Whereatt v. Ellis*, 103 Wis. 355, 74 Am. St. Rep. 870, 79 N. W. 418, holding commencement of action against sureties for unliquidated demand will not start interest. Cited, arguendo, in *Curtis v. Banker*, 136 Mass. 357, 360. See 87 Am. Dec. 750, 753, voluminous note on interest.

Distinguished in *United States v. Fitzsimmons*, 50 Fed. 384, holding, in suit against marshal's sureties, interest allowable from date when balance was stated against him by treasury.

Principal and surety.—Service of process upon sureties, in action on bond for money unaccounted for by principal, is sufficient demand, p. 124.

100 U. S. 124-138, 25 L. 554, HATCH v. OIL CO.

Sale.—Contracts for purchase and sale of chattels, if complete and unconditional, and not within statute of frauds, are sufficient, as between the parties, to vest the property in purchaser, even without delivery, p. 128.

Approved in *M'Elwee v. Metropolitan Lumber Co.*, 69 Fed. 306, 37 U. S. App. 266, holding agreement for temporary retention of designated article does not affect passage of title; *Rail v. Little Falls Lumber Co.*, 47 Minn. 424, 50 N. W. 472, holding neither pay-

ment nor delivery necessary, contract being complete and goods designated; *Abraham v. Karger*, 100 Wis. 391, 76 N. W. 332, holding vendee may maintain replevin against vendor where price has been paid and goods set apart.

Distinguished in *First Nat. Bank v. C. D. Woodworth Co.*, 7 Wyo. 18, 49 Pac. 408, where contract was conditional.

Sale.— Where property in thing sold is to remain for a time in seller, only passing to buyer at a future time or on certain conditions inconsistent with its immediate transfer, contract is deemed an executory agreement, p. 131.

Approved in *Schreyer v. Kimball Lumber Co.*, 54 Fed. 655, 13 U. S. App. 23, holding agreement to sell lumber, then in the log, an executory agreement; *Cunningham Iron Co. v. Warren Mfg. Co.*, 80 Fed. 879, holding agreement for sale of boilers, to be taken out and delivered before certain day, an executory contract; *New England, etc., Co. v. Standard Worsted Co.*, 165 Mass. 329, 52 Am. St. Rep. 518, 43 N. E. 112, holding, in sale of portion of mass, vendor retaining whole, with right of separation, no title passes until separation.

Sale.— Question whether contract is a sale or an executory agreement is one of intention of parties, p. 131.

Approved in *Merchants' Exch. Bank v. M'Graw*, 76 Fed. 937, 48 U. S. App. 68, and *Kneeland v. Renner*, 2 Kan. App. 454, 43 Pac. 96, both holding intent of parties, as to time of vesting of title, governs, irrespective of delivery; *Nash v. Brewster*, 39 Minn. 533, 41 N. W. 106, 2 L. R. A. 410, holding intention of parties and right of vendee to remove goods being shown, sale complete; *Hobart v. Littlefield*, 13 R. I. 346, holding, on sale without stipulation for credit, title may pass, although vendor is to retain goods; *Bank of Huntington v. Napier*, 41 W. Va. 487, 23 S. E. 802, holding contract one of sale, notwithstanding it contained agreement for transportation also.

Sale.— Where there is no manifestation of intention, except what arises from terms of sale, presumption, if thing to be sold is specified and ready for immediate delivery, is that contract is an actual sale, p. 131.

Approved in *Dillard v. Paton*, 19 Fed. 623, holding title to cotton passed on examination and approval by vendee; *Lucas v. Pittman*, 94 Ala. 620, 10 So. 605, holding contract for sale of wagon, to be paid in work at so much per day, passed title.

Sale.— If no place of delivery is specified in contract of sale, articles are deliverable at place where they are at time of sale, unless some other place is required by nature of articles, usage of trade or custom of parties, p. 135.

Cited in *Van Valkenburgh v. Gregg*, 45 Neb. 657, 63 N. W. 950, holding, where no place of delivery is provided, it may be inferred from circumstances or usage.

Sale.— Where place of delivery is prescribed as part of contract, tender elsewhere need not be accepted nor made, p. 135.

Sale.— Where, by terms of contract, article is to be delivered at particular place, seller, before he can recover price, is bound to prove delivery there, p. 135.

Sale.— Where plaintiff, in action for goods sold and delivered, proves delivery at place specified, and that nothing further remained for him to do, he need not show acceptance by defendant, p. 135.

Sale.— Where there has been complete delivery, in accordance with terms of sale, title passes, although something remains to be done in order to ascertain total value of goods at rate specified in contract; hence, sale of a quantity of staves, to be counted and filed from week to week, delivery to be complete upon counting, vests title in vendee before time of final delivery, as against attaching creditor of vendor, p. 135.

Approved in *Farmers' Phosphate Co. v. Gill*, 69 Md. 548, 9 Am. St. Rep. 448, 16 Atl. 217, 1 L. R. A. 770, and n., and *Barr v. Borthwick*, 19 Or. 580, 25 Pac. 361, where delivered goods were to be weighed to ascertain quantity; *Byles v. Colier*, 54 Mich. 6, 19 N. W. 567, holding necessity for inspection to determine sum payable not inconsistent with passage of title.

Distinguished in *Rosenthal v. Kahn*, 19 Or. 575, 24 Pac. 991, holding sale of wood at so much per cord not complete until measurement.

Sale.— Personal property may be purchased in an unfinished condition, buyer acquiring title to same, though possession be retained by vendor in order to fit property for delivery, if intention to that effect be fully proved, p. 136.

Sale.— Executory contract may be converted into complete sale by appropriation of specific goods to contract, p. 136.

100 U. S. 138-145, 25 L. 574, *BROWNSVILLE v. CAVAZOS*.

Public lands.— By laws of Mexico, in force in 1826, Pueblos, when recognized as such by public authority, became entitled for their use to certain lands embracing their sites and adjoining territory to extent of four square leagues, p. 139.

Approved in *Vernon Irr. Co. v. Los Angeles*, 106 Cal. 245, 39 Pac. 765, holding Pueblos' right to stream flowing through pueblo lands superior to riparian proprietor's.

Overruled in *United States v. Santa Fé*, 165 U. S. 704, 706, 41 L. 885, 17 S. Ct. 483, holding right of Pueblos to four square leagues not one of law, but of custom.

Treaties.— Rights of private property previously existing in territory east of the Rio Grande were not affected by Treaty of Guada-

inpe Hidalgo, and, if arising before independence of Texas, their validity was to be determined by laws of Mexico, p. 143.

Approved in *Lerma v. Stevenson*, 40 Fed. 356, holding Mexican grant admissible evidence, notwithstanding Texas constitutional prohibition of such admission.

Trespass to try title.—Texas law, giving dissatisfied party right, within one year, to re-litigate controversy respecting land, does not bar him from setting up his claim if, within that period, a similar suit respecting same land is commenced against him by former defendant, p. 145.

Cited generally in *Slauson v. Goodrich Transp. Co.*, 99 Wis. 26, 74 N. W. 575, 40 L. R. A. 829, and n., holding, on vacation of judgment, action stands as for original trial.

100 U. S. 145-147, 25 L. 590, *MOORE v. SIMONDS*.

Appeal and error.—Where appeal has been taken in name of firm instead of in names of individual partners, which appear in record, defect in appeal may be cured by amendment, p. 146.

Approved in *Estis v. Trabue*, 128 U. S. 229, 32 L. 438, 9 S. Ct. 59, a like case; *Walton v. Marietta Chair Co.*, 157 U. S. 347, 39 L. 727, 15 S. Ct. 628, holding writ of error amendable by substitution of new administrator's name; *United States v. Hopewell*, 51 Fed. 800, 5 U. S. App. 137, holding irregularity in addressing citation to firm curable, on objection, by new citation in proper form; *In re Woerishoffer*, 74 Fed. 916, 41 U. S. App. 411, dismissing appeal in firm name only when same could not be amended by record.

Cited, but application denied, in *Van Horn v. Natchez*, 27 Fed. 310, holding appearance of appellee in admiralty estops him from denying validity of appeal.

Shipping.—Under sections 4192 and 4193, revised statutes, unrecorded mortgage of domestic vessel is valid as between parties and persons with actual notice, p. 147.

Followed in *The W. B. Cole*, 49 Fed. 589, holding unrecorded mortgage of vessel valid as against parties with notice thereof; *Dize v. Beacham*, 81 Md. 609, 32 Atl. 245, holding unregistered transfer of interest in vessel conveys no title except as against grantor and persons with actual notice; *Read v. Horner*, 90 Mich. 157, 51 N. W. 209, holding actual notice to purchaser, of unrecorded chattel mortgage, equivalent to filing mortgage.

100 U. S. 147-148, 25 L. 591, *PAVING CO. v. MULFORD*.

Courts.—Supreme Court has no appellate jurisdiction over bill brought in court of District Columbia against several defendants, where claim against each does not exceed \$2,500, p. 147.

Appeal and error.—Neither co-defendants nor co-complainants can unite their separate interests for purpose of making up amount sufficient to confer appellate jurisdiction upon Supreme Court, p. 148.

Cited and rule applied in *Chatfield v. Boyle*, 105 U. S. 233, 26 L. 945, where several creditors attempted, by joining in suit to annul conveyance, to make up jurisdictional amount; *Russell v. Stansell*, 105 U. S. 304, 26 L. 990, holding several property-owners cannot, by joining in action to enjoin assessment, make up jurisdictional amount; *Ex parte Baltimore, etc., R. R.*, 106 U. S. 6, 27 L. 78, 1 S. Ct. 36, dismissing appeal from decree adjudging to several libellants less than \$5,000 each; *Henderson v. Wadsworth*, 115 U. S. 276, 29 L. 379, 6 S. Ct. 43, holding appeal from several judgments against heirs on one note lies only from judgments exceeding \$5,000; *Gibson v. Shufeldt*, 122 U. S. 37, 30 L. 1087, 7 S. Ct. 1071, holding, in suit by several on distinct demands, defendants can appeal only as to plaintiffs decreed over \$5,000; *Walter v. North-eastern Ry.*, 147 U. S. 373, 37 L. 208, 13 S. Ct. 350, where railroad sued to enjoin collection of taxes in different counties; *Sioux Falls Nat. Bank v. Swenson*, 48 Fed. 624, suit by national bank, for stockholders, to enjoin collection of tax; *Wheless v. St. Louis*, 96 Fed. 867, 868, where separate lotowners attempted to join to confer Federal jurisdiction in suit to enjoin assessment; *Guarantee Trust, etc., Co. v. Buddington*, 23 Fla. 518, 2 So. 887, holding parties cannot, by joining in appeal, unite separate interests to make up jurisdictional amount; *Farwell v. Becker*, 129 Ill. 269, 16 Am. St. Rep. 269, 21 N. E. 792, 6 L. R. A. 402, holding separate claims against several defendants cannot be united to confer appellate jurisdiction; *Chapman v. Banker, etc., Pub. Co.*, 128 Mass. 480, holding jurisdiction cannot be compelled by improper joining of distinct claims.

100 U. S. 149-153, 25 L. 573, *CLARK v. TRUST CO.*

Mortgages.—Trustee's public sale of land to corporation, payee of note secured by trust deed, deed being made to trustee in individual capacity, is not void because trustee was an officer of corporation and price at sale was inadequate, sale being fair, p. 152.

Approved in *Gray v. Quicksilver Min. Co.*, 68 Fed. 682, holding purchase by corporation at probate sale not invalidated because administrator was its employee; *Monroe v. Fuchtlar*, 121 N. C. 104, 28 S. E. 63, holding fact that trustee is clerk of cestui que trust does not create fiduciary relation between grantor and latter. See 19 Am. St. Rep. 293, monographic note on sales by trustees.

Distinguished in *Hunt v. Fisher*, 29 Fed. 809, where price was grossly inadequate.

100 U. S. 153-157, 25 L. 591, *HINCKLEY v. RAILROAD CO.*

Receiver appointed by State court, who, on removal to Federal, voluntarily appears therein, may be compelled by latter to account for funds, p. 156.

Approved in *Oyster v. Bank*, 107 Iowa, 43, 77 N. W. 525, holding, on transfer of jurisdiction from one court to another, latter gains jurisdiction over receiver appointed by former; *Hinckley v. Morton*, 103 U. S. 764, 26 L. 459, *arguendo*.

Receivers.—Amount of compensation of receivers of insolvent corporations is discretionary with Circuit Court, p. 157.

Cited, *arguendo*, in *In re Hinckley*, 3 Fed. 557, 558, as to compensation of same receiver; *General Trust Co. v. Wabash, etc., Ry.*, 32 Fed. 187, fixing receiver's compensation.

Trusts.—One dealing with trust fund should not mingle same with his own funds, p. 157.

Receiver is chargeable with interest on portion of funds deposited in his own name, p. 157.

Cited in *Blodgett v. Converse*, 60 Vt. 416, 15 Atl. 109, holding financial agent depositing principal's funds with his own, chargeable with interest thereon.

100 U. S. 158-195, 25 L. 632, *DOW v. JOHNSON*.

Courts.—On certificate of division of opinion, questions arising in progress of trial in Circuit Court may be brought to Supreme Court, irrespective of amount in controversy, p. 163.

Approved in *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 402, 32 L. 197, 8 S. Ct. 1201, *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 229, 34 L. 343, 10 S. Ct. 1015, and *United States v. Rider*, 163 U. S. 137, 41 L. 103, 16 S. Ct. 985, all holding only questions certified can be examined, where amount in controversy falls below jurisdictional amount; *State v. Crocker*, 5 Wyo. 398, 40 Pac. 684, upholding statute providing for reservation of important question arising during trial. See 91 Am. Dec. 193, note on writs of error.

Distinguished in *Waterville v. Van Slyke*, 116 U. S. 700, 29 L. 772, 6 S. Ct. 622, dismissing case where question certified was one of mixed law and fact.

War.—Civil courts of enemy's country have no jurisdiction over officers and soldiers of occupying hostile army; hence judgment of Louisiana court against Federal officer during Rebellion, for injuries resulting from his unauthorized orders, was void, pp. 164-169.

Cited in dissenting opinion in *Freeland v. Williams*, 131 U. S. 423, 33 L. 200, 9 S. Ct. 769, majority sustaining West Virginia Constitu-

tion of 1872, regarding non-liability for acts of warfare. See 42 Am. Dec. 56, and 87 Am. Dec. 509, notes on liability for destruction of property during war; 89 Am. Dec. 613, note on civil liability of military officer.

Distinguished in *Freeland v. Williams*, 131 U. S. 416, 417, 33 L. 197, 9 S. Ct. 766, holding inquiry whether act was done in exercise of belligerent rights, proper.

War.—Remedy for wrongful seizure of private property by members of hostile army in occupation, is by appeal to commanding officer thereof or to his government, p. 167.

Cited in *Underhill v. Hernandez*, 168 U. S. 253, 42 L. 457, 18 S. Ct. 84, holding acts of legitimate warfare cannot be made basis of individual liability. See 89 Am. Dec. 616, note on civil liability of military officer.

100 U. S. 195-208, 25 L. 621, *SAVINGS BANK v. WARD*.

Attorney and client.—Attorney employed to investigate title to real property impliedly contracts to exercise reasonable care and skill in so doing, and is responsible to client for loss arising from failure so to do, p. 195.

Approved in *Mechanics' Bldg. Assn. v. Whitacre*, 92 Ind. 551, holding recorder liable for breach of contract to certify truth as to title; *Smith v. Holmes*, 54 Mich. 111, 19 N. W. 770, holding abstracter liable for careless omission, resulting in expense to client.

Attorney acting with proper degree of skill, and with reasonable care, and to best of his knowledge, will not be held responsible for every mistake in practice or error in judgment in conduct of client's cause, p. 198.

Approved in *Ahlhauser v. Butler*, 57 Fed. 123, holding attorney not liable for insufficiency of his affidavit on attachment; *Staples v. Staples*, 85 Va. 84, applying rule to collection of debt by attorney; *Daugherty v. Herzog*, 145 Ind. 258, 57 Am. St. Rep. 206, 44 N. D. 458, 32 L. R. A. 838, holding contractor not liable to stranger for injury from negligent construction of building.

Attorney and client.—Persons acting professionally in legal formalities, negotiations or proceedings, by warrant or authority of clients, may be regarded as attorneys-at-law, p. 199.

Cited in *Moore v. Staser*, 6 Ind. App. 367, 32 N. E. 564, holding agreement in note to pay attorney's fees, covers fee for collection without suit.

Attorney and client.—Where client is injured by deficiencies of attorney, latter is liable for such want of skill, care and diligence as men of the legal profession commonly profess and exercise in such employment, p. 200.

Cited in *Western, etc., R. R. v. Kehoe*, 83 Md. 450, 35 Atl. 94, on negligence generally.

Attorney and client.—Obligation of attorney is to his client, not to third party; hence attorney is not liable to stranger for damages arising from latter's reliance on his certificate of title, made for client, pp. 200-207.

Followed in *Dundee, etc., Co. v. Hughes*, 10 Sawy. 148, 20 Fed. 41, a like case; *Talpey v. Wright*, 61 Ark. 280, 54 Am. St. Rep. 207, 32 S. W. 1074, holding one making abstract for mortgagor not liable to mortgagee; *Mallory v. Ferguson*, 50 Kan. 693, 32 Pac. 412, 22 L. R. A. 103, and *n.*, *Schade v. Gehner*, 133 Mo. 258, 34 S. W. 577, and *Zweigardt v. Birdseye*, 57 Mo. App. 466, all holding abstracter not liable to stranger acting on faith of his certificate. Cited and principle applied in *Harshman v. Winterbottom*, 123 U. S. 222, 31 L. 127, 8 S. Ct. 101, holding one not in privity cannot sue obligors on bond; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 402, 24 U. S. App. 7, 27 L. R. A. 585, holding negligence, to be actionable, must arise from breach of legal duty founded on contract or otherwise; *M'Cormick v. Western Union Tel. Co.*, 79 Fed. 452, 49 U. S. App. 121, 38 L. R. A. 686, holding company not liable to third party, who has seen and acted on erroneous telegram; *Cleveland, etc., Ry. v. Ballentine*, 84 Fed. 937, 56 U. S. App. 271, holding railroad not liable for injuries to minor voluntarily acting in extinguishing fire; *Bragdon v. Perkins-Campbell*, 87 Fed. 112, holding maker of article not inherently dangerous, not liable to stranger to sale contract injured by defects; *Buckley v. Gray*, 110 Cal. 343, 52 Am. St. Rep. 89, 42 Pac. 900, 31 L. R. A. 862, holding legatee cannot maintain action against attorney for negligence in drawing will; *State v. Harris*, 89 Ind. 365, 46 Am. Rep. 170, holding public officer liable for breach of duty only to person to whom same is owing; *Roddy v. Missouri Pac. Ry.*, 104 Mo. 245, 24 Am. St. Rep. 338, 15 S. W. 1114, 12 L. R. A. 749, holding stranger to contract cannot maintain action for damages arising from breach thereof; *Helzer v. Kingsland, etc., Mfg. Co.*, 110 Mo. 611, 33 Am. St. Rep. 485, 19 S. W. 632, 15 L. R. A. 823, holding privity must exist between defendant and injured party, in action on tort arising from breach of contract; *Gordon v. Livingston*, 12 Mo. App. 274, holding grain inspector's liability for erroneous certificate does not extend to purchasing stranger; *Drovers' Nat. Bank v. O'Hare*, 119 Ill. 652, 10 N. E. 361, as to privity of contract; *Reynolds v. Louisville, etc., Ry.*, 143 Ind. 629, 40 N. E. 426, as to necessity for privity in suit for breach of contract. See 33 Am. Rep. 760, note on this subject; 42 Am. Rep. 318, note on negligence; 24 Am. St. Rep. 617, note on abstracts of title.

Distinguished in *Stewart v. Cincinnati, etc., Ry. Co.*, 80 Mich. 170, 44 N. W. 1117, holding erector of dangerous structure on own premises liable for injuries to persons lawfully thereon; *Gate City*,

etc., *Co. v. Post*, 55 Neb. 744, 76 N. W. 471, holding abstractor employed by vendor liable to vendee under Nebraska statute; *Appelby v. State*, 45 N. J. L. 165, holding clerk of court liable for wrongful entry of satisfaction of mortgage. Departed from in *Brown v. Sims*, 22 Ind. App. 322, 323, 53 N. E. 780, 781, holding abstractor liable to mortgagee for loss arising from omission of liens in certificate prepared for mortgagor.

Customs and usages.—Evidence of usage is inadmissible to vary or contradict what is clear and unambiguous, p. 206.

Approved in *Adams v. Manufacturers, etc., Fire Ins. Co.*, 17 Fed. 633, holding usage varying terms of contract must be clearly proved known to party sought to be bound; *Heumpreus v. Fremont, etc., Co.*, 8 S. Dak. 109, 65 N. W. 468, holding usage cannot destroy effect of unambiguous contract.

Distinguished in *Adams v. Manufacturers, etc., Fire Ins. Co.*, 17 Fed. 634, admitting evidence of usage of solicitor and agent to receive notice of cancellation of policies.

Customs and usages.—Where there is no contract, proof of usage will not make one, p. 207.

Approved in *Municipal Inv. Co. v. Industrial Trust Co.*, 89 Fed. 256, holding contract liability cannot be based on mere usage alone; *Salmon v. McRae*, 9 Colo. App. 27, 47 Pac. 410, holding omitted terms essential to completed agreement not suppliable by proof of custom.

Attorney and client.—Where attorney employed to examine title gives client a certificate on which he knows others will rely, he is liable to such others for loss arising from his negligent omission of incumbrances, per Waite, Ch. J., dissenting, p. 207.

Followed in *Brown v. Sims*, 22 Ind. App. 321, 53 N. E. 780, holding abstractor employed by mortgagor liable for loss from his negligence, to mortgagee.

100 U. S. 208-213, 25 L. 603, PHILLIPS v. MOORE.

Public lands.—Sale of land to alien, under laws of Texas prior to her independence, passed title, to be held until government, on its own motion, or on denouncement of private citizen, should claim same, p. 211.

Cited and rule followed in *Hanrick v. Patrick*, 119 U. S. 169, 30 L. 404, 7 S. Ct. 153, *Hanrick v. Hanrick*, 54 Tex. 113, *Gray v. Kauffman*, 82 Tex. 67, 17 S. W. 514, and *Oregon Mortgage Co. v. Carstens*, 16 Wash. 170, 47 Pac. 423, 35 L. R. A. 843, all holding deed to alien passes title good against all except State; *Fritts v. Palmer*, 132 U. S. 293, 33 L. 321, 10 S. Ct. 96, holding deed to foreign corporation valid until office found; *Quigley v. Birdseye*, 11 Mont. 446, 28 Pac. 743, holding alien may hold valid water rights

as against all but State. Cited generally in *Hamilton v. Brown*, 161 U. S. 275, 40 L. 699, 16 S. Ct. 592, holding proceedings in rem for escheat, under Texas statute, conclusive; *Hughes v. Jones*, 116 N. Y. 75, 15 Am. St. Rep. 390, 22 N. E. 448, 5 L. R. A. 635, holding deed to one subsequently declared to have then been a lunatic, not absolutely void. Cited, arguendo, in *Kircher v. Murray*, 54 Fed. 621, collecting conflicting cases.

Pleading.—Where original petition is lost without fault of plaintiff, it is proper to allow new one to be filed in place thereof, p. 212.

Jury.—Act of March 3, 1875, section 3, regulating removals, is intended to conserve right of jury trial in causes removed from State to Circuit Courts, not to repeal revised statutes, section 649, authorizing trial without jury by stipulation, p. 213.

100 U. S. 213-226, 25 L. 612, *HOUGH v. RAILWAY CO.*

Master and servant.—Rule exempting common master from liability for injuries caused by fellow servant, is subject to obligation of master not to expose servant to perils against which he may be guarded by proper diligence of master, p. 217.

Cited and expanded in *Southern Pac. Co. v. Lafferty*, 57 Fed. 540, 541, 15 U. S. App. 193, and *McElligott v. Randolph*, 61 Conn. 162, 29 Am. St. Rep. 185, 22 Atl. 1095, both holding master's duty extends to providing competent co-laborers. Reaffirmed in *Southern Pac. Co. v. Burke*, 60 Fed. 708, 23 U. S. App. 1. Cited and principle applied in *Union Pac. Ry. v. O'Brien*, 161 U. S. 457, 40 L. 771, 16 S. Ct. 620, holding employee does not risk master's negligence; *McMahon v. Henning*, 1 McCrary, 519, 520, 3 Fed. 355, holding master liable for negligence in using defective machinery, although negligence of fellow servant contributed to injury; *Texas Trust Co. v. Texas, etc., Ry.*, 32 Fed. 450, where defective brake was proximate cause of injury; *Northern Pac. R. Co. v. Charless*, 51 Fed. 566, 7 U. S. App. 359, holding negligence of co-servant no excuse where injury was due to lack of proper machinery; *Pullman, etc., Car Co. v. Harkins*, 55 Fed. 939, 17 U. S. App. 22, where servant was pushed against unprotected machinery by negligence of fellow servant; *Clyde v. Richmond, etc., Co.*, 59 Fed. 396, holding company liable to employee for accident caused by defective rail, combined with improper speed; *Union Pac. Ry. v. Novak*, 61 Fed. 584, 15 U. S. App. 400, holding question, whether proximate cause was fellow servant's negligence or that of master, for jury; *Austin Mfg. Co. v. Johnson*, 89 Fed. 683, 60 U. S. App. 672, holding employer liable for defective construction of scaffold, though built by fellow servants; *Pullman, etc., Co. v. Laack*, 143 Ill. 256, 32 N. E. 289, 18 L. R. A. 219, holding both master and fellow servant liable where their combined negligence produced injury; *Baltimore, etc., R. R. v. Rowan*, 104 Ind. 94, 3 N. E. 630, holding company liable

for injury from low bridge; *Towns v. Pacific R. R.*, 37 La. Ann. 632, 55 Am. Rep. 510, holding negligence of fellow servant does not exonerate from liability for failure to provide proper appliances; *Railway v. Henderson*, 37 Ohio St. 553, holding company liable for injury through enforcement of unreasonable order, although negligence of fellow servant contributed; *Anderson v. Bennett*, 16 Or. 528, 8 Am. St. Rep. 324, 19 Pac. 773, holding degree of diligence to be exercised should be proportionate to dangers to be encountered; *Texas, etc., Co. v. Whitmore*, 58 Tex. 288, holding employer retaining careless servant, with knowledge of his carelessness, liable for his injury to fellow servant; *Bowers v. Union Pac. R. R.*, 4 Utah, 223, 7 Pac. 253, holding exemption rule inapplicable where defective material caused injury; *Pool v. Southern Pac. Co.*, — Utah, —, 58 Pac. 328, where employee was ordered to go beneath car to repair same; *Baltimore, etc., R. R. v. McKenzie*, 81 Va. 73, holding master, to be exempt, must himself be free from negligence; *Madden v. Railway*, 28 W. Va. 617, 57 Am. Rep. 696, holding railroad liable for injury caused by erroneous transmission of telegram; *Criswell v. Railway*, 30 W. Va. 821, 6 S. E. 43, holding company liable for injury to laborer resulting from negligent exposure to collision; dissenting opinions in *Lutz v. Atlantic, etc., R. Co.*, 6 N. Mex. 520, 30 Pac. 919, 16 L. R. A. 830, and *n.*, majority holding negligence of fellow servant proximate cause of injury; *Peschel v. Chicago, etc., Ry.*, 62 Wis. 353, 21 N. W. 276, majority applying fellow-servant rule. See 67 Am. Dec. 590, 77 Am. Dec. 219, and 53 Am. Rep. 702, notes on this subject.

Distinguished in *Baltimore, etc., R. Co. v. Andrews*, 50 Fed. 731, 6 U. S. App. 75, 17 L. R. A. 192, holding brakeman injured by negligence of engineer of another train cannot recover.

Master and servant.—Master is bound to observe all the care which prudence and the exigencies of the situation require, in providing servant with machinery adequately safe for latter's use, p. 217.

The following citing cases reaffirm the rule: *Northern Pac. R. v. Babcock*, 154 U. S. 200, 38 L. 961, 14 S. Ct. 982, *Baltimore, etc., R. R. v. Mackey*, 157 U. S. 87, 39 L. 629, 15 S. Ct. 495, *The Rheola*, 22 Blatchf. 126, 19 Fed. 927, *Alaska, etc., Min. Co. v. Whelan*, 64 Fed. 465, 29 U. S. App. 1, *Texas, etc., Ry. v. Barrett*, 67 Fed. 218, 30 U. S. App. 196, *The Pioneer*, 78 Fed. 608, *Weiss v. Bethlehem Iron Co.*, 88 Fed. 31, 59 U. S. App. 642, *Little Rock, etc., Ry. v. Leverett*, 48 Ark. 346, 3 Am. St. Rep. 238, 3 S. W. 54, *Denver, etc., R. Co. v. Simpson*, 16 Colo. 59, 25 Am. St. Rep. 244, 26 Pac. 340, *Indian Car Co. v. Parker*, 100 Ind. 187, and *Hamelin v. Malster*, 57 Md. 307.

Cited and rule applied in *Wabash Ry. v. McDaniels*, 107 U. S. 459, 27 L. 607, 2 S. Ct. 936, holding care required in selecting competent employees commensurate with that of selecting machinery;

Kings v. Ohio, etc., Ry., 11 Biss. 367, 14 Fed. 280, holding brakeman justified in assuming, without inspection, that cars are in proper repair; Bean v. Oceanic, etc., Co., 24 Fed. 125, defining ordinary care; Rillston v. Mather, 44 Fed. 744, 745, holding employer putting servant into employment attended with latent dangers, should inform him thereof; The Noddleburn, 12 Sawy. 134, 28 Fed. 858, Louisville, etc., R. Co. v. Ward, 61 Fed. 930, 18 U. S. App. 683, Hermann v. Port Blakely Mill Co., 71 Fed. 855, Pennsylvania R. Co. v. La Rue, 81 Fed. 150, 55 U. S. App. 24, Colorado Coal, etc., Co. v. Lamb, 6 Colo. App. 263, 40 Pac. 254, Wilson v. Willimantic Linen Co., 50 Conn. 460, 47 Am. Rep. 656, Lawless v. Connecticut R. R., 136 Mass. 2, Moynihan v. Hills Co., 146 Mass. 592, 4 Am. St. Rep. 350, 16 N. E. 576, Flanigan v. Guggenheim, etc., Co., — N. J. —, 44 Atl. 768, Wright v. Railway, 123 N. C. 282, 31 S. E. 652, Cunningham v. Union Pac. Ry., 4 Utah, 213, 7 Pac. 798, and Chapman v. Southern Pac. Co., 12 Utah, 40, 41 Pac. 554, all holding master responsible for the providing of safe appliances, notwithstanding he has delegated duty of providing same to another; Baltimore, etc., R. Co. v. Henthorne, 73 Fed. 638, 641, 43 U. S. App. 113, holding duty of selecting competent employees commensurate with that of providing suitable machinery; Chesapeake, etc., R. Co. v. Hennessey, 96 Fed. 716, holding railroad company obligated to exercise every reasonable precaution to exclude damaged cars from trains; Railway v. Triplett, 54 Ark. 300, 15 S. W. 834, 11 L. R. A. 777, holding degree of care required by master measured by exigencies of case; Wells v. Coe, 9 Colo. 161, 11 Pac. 51, holding master must exercise care in purchase of machinery proportionate to dangers of service; Gerrish v. New Haven Ice Co., 63 Conn. 16, 27 Atl. 237, Herbert v. Northern Pac. R. R., 3 Dak. 52, 13 N. W. 352, and Florida R. R. v. Weese, 32 Fla. 234, 13 So. 443, all holding employee does not risk master's negligence; Louisville, etc., Ry. v. Buck, 116 Ind. 573, 9 Am. St. Rep. 889, 19 N. E. 547, 2 L. R. A. 525, and n., holding employee may rest on presumption that master has supplied machinery free from latent defects; Hannibal, etc., R. R. v. Fox, 31 Kan. 599, 3 Pac. 323, and Stucke v. Railroad, 50 La. Ann. 201, 203, 23 So. 353, 354, both holding servant charged with duties of master, stands in place thereof; Powers v. Sugar Co., 48 La. Ann. 485, 19 So. 456, and Meyers v. Railroad, 49 La. Ann. 28, 21 So. 123, both holding it master's duty to warn employees of extra hazards; Wood v. Heiges, 83 Md. 268, 34 Atl. 873, holding obligation extends no further than to require use of care which ordinary prudence and exigencies of situation demand; Rice v. King Phillip Mills, 144 Mass. 237, 59 Am. Rep. 83, 11 N. E. 105, holding, where master ought to have known that machine was defective, his duty was to repair; Smith v. Peninsular Car Works, 60 Mich. 508, 1 Am. St. Rep. 547, 27 N. W. 665, holding inexperienced servant should be warned of latent risks of employment; Leigh v. Omaha, etc., Ry.,

36 Neb. 134, 54 N. W. 135, where street-car company furnished kicking horse to driver, with knowledge of its vice; *Cowels v. Railroad*, 84 N. C. 314, holding agreement to furnish suitable appliances implied by law in every contract; *Cameron v. G. N. Ry.*, 8 N. Dak. 131, 77 N. W. 1018, holding master bound to make seasonable inspection of condition of appliances; *Anderson v. Bennett*, 16 Or. 531, 8 Am. St. Rep. 326, 19 Pac. 774, where master did not guard servant against danger of drills penetrating unexploded blasts; *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 273, 44 Am. Rep. 577, holding duty to maintain in repair, commensurate with duty to provide safe appliances; *Wright v. Southern Pac. Co.*, 14 Utah, 393, 46 Pac. 376, holding railroad liable where failure to provide fireman for switch-engine caused accident; *Davis v. Railroad*, 55 Vt. 93, 45 Am. Rep. 596, where defective culvert was washed out by freshet; *Richmond, etc., R. R. v. Norment*, 84 Va. 173, 10 Am. St. Rep. 831, 4 S. E. 214, holding company must provide all appliances reasonably essential to employees' safety; *South-west Improvement Co. v. Smith*, 85 Va. 316, 17 Am. St. Rep. 65, 7 S. E. 369, where defective brakes allowed train to start suddenly, killing employee. Cited generally in *Texas, etc., Ry. v. Barrett*, 166 U. S. 620, 41 L. 1139, 17 S. Ct. 708, holding burden on plaintiff of showing that appliances were defective; *Walsh v. New York, etc., R. R.*, 160 Mass. 572, 39 Am. St. Rep. 515, 36 N. E. 584, generally; dissenting opinions in *The Serapis*, 51 Fed. 94, 8 U. S. App. 49, majority holding servant assumes risk from use of old machine; *Texas, etc., Ry. v. Smith*, 67 Fed. 528, 30 U. S. App. 176, 30 L. R. A. 325, and *n.*, majority holding railroad civil engineer assumed risk from absence of watchman on bridge; *Richmond, etc., R. R. v. Risdon*, 87 Va. 343, 344, 12 S. E. 789, majority holding employee's disobedience of orders contributory negligence; *Ballou v. Chicago, etc., Ry.*, 54 Wis. 276, 11 N. W. 568, majority holding company not liable for injuries caused by latent defects. See the following notes: 3 McCrary, 434, 77 Am. Dec. 220, 34 Am. Rep. 621, and 59 Am. Rep. 79.

Limited in *Buckley v. Gould, etc., Min. Co.*, 8 Sawy. 396, 14 Fed. 834, holding employer bound only to exercise due care in selection of employees; *Holden v. Fitchburg R. R.*, 129 Mass. 278, 37 Am. Rep. 349, holding master's liability discharged by use of reasonable care in selecting servants to maintain repairs; *Railway v. Aiken*, 89 Tenn. 251, 14 S. W. 1083, holding employer in providing safe machinery, held to exercise of only ordinary care and prudence; *Reddon v. Railway*, 5 Utah, 354, 15 Pac. 265, holding employer not required to furnish safest known appliances, but such as are reasonably safe.

Distinguished in *Johnson v. Chesapeake, etc., Ry.*, 38 W. Va. 211, 18 S. E. 574, where brakeman willfully violated precautionary rule of company; *Peschel v. Chicago, etc., Ry.*, 62 Wis. 346, 21 N. W. 273, holding injury due to negligence of fellow servant.

Master and servant.—Contract between master and servant implies that latter risks dangers ordinarily attendant to the business, including carelessness of those in same employment, p. 217.

Reaffirmed in *Dalton v. Receivers*, 4 Hughes, 188, 189, F. C. 3,550, and *Yeaton v. Boston, etc., R. R.*, 135 Mass. 418. The following citing cases apply the rule: *Michael v. Roanoke Mach. Works*, 90 Va. 496, 44 Am. St. Rep. 930, 19 S. E. 262, holding employee temporarily ordered to different work, does not risk hazards thereof; *Quinn v. New Jersey Lighterage Co.*, 23 Blatchf. 212, 23 Fed. 365, holding owner of barge not liable for injury by captain to hand; *Yager v. Receivers*, 4 Hughes, 197, 198, 199, 88 Fed. 776, 777, holding one employed as bridge builder risks falling of bridge; *The City of Alexandria*, 17 Fed. 392, holding injury by superior fellow servant no exception to rule; *The Maharajah*, 40 Fed. 786, holding workman employed at particular machine which he understands, assumes risks thereof; *Stockmeyer v. Reed*, 55 Fed. 261, holding master not liable for vice-principal's negligence in performing work properly pertaining to a servant; *Parrish v. Pensacola, etc., R. R.*, 28 Fla. 282, 9 So. 701, holding railroad not liable for injury to gravel shoveller by engineer's negligence; *Florida R. R. v. Weese*, 32 Fla. 235, 13 So. 443, holding employee who, with knowledge of danger, continues in work, waives right to recover; *Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 168, 34 Pac. 539, holding master not liable for negligence of fellow servant, unless caused by his own personal wrong; *Cherillos, etc., Co. v. Deserant*, 9 N. Mex. 59, 49 Pac. 810, holding miner assumed risk of fellow miners' carelessness.

Cited, but not applied, in *Missouri, etc., Ry. v. McCally*, 41 Kan. 650, 21 Pac. 578.

Distinguished in *Bloyd v. Railway*, 58 Ark. 78, 41 Am. St. Rep. 93, 22 S. W. 1092, holding company liable for injuries resulting from inconsistent orders of foreman.

Master and servant.—Corporation is not held as guaranteeing or warranting the absolute safety under all circumstances, or perfection in all parts, of machinery provided for employees' use, its duty being discharged when agents, having duty to supply same, exercise due care in original purchase and subsequent maintenance thereof, p. 219.

Cited and principle applied in *Southern Pac. R. R. v. Herbert*, 116 U. S. 648, 29 L. 758, 6 S. Ct. 593, and *Lawrence v. Hagemeyer*, 93 Ky. 594, 20 S. W. 705, holding agents of corporation charged with furnishing machinery, represent corporation; *Washington, etc., Ry. v. McDade*, 135 U. S. 569, 574, 34 L. 241, 242, 10 S. Ct. 1049, 1051, holding employer not a guarantor of absolute safety of machinery; *Union Pac. Ry. v. Daniels*, 152 U. S. 688, 38 L. 600, 14 S. Ct. 757, holding railroad company liable where it failed to properly inspect train; *The Maharajah*, 40 Fed. 785, holding duty does

not extend to keeping pace with new inventions; *Little Rock, etc., Co. v. Moseley*, 56 Fed. 1012, 12 U. S. App. 514, holding railway company responsible for neglect of car inspectors; *Atchison, etc., R. Co. v. Myers*, 63 Fed. 798, 24 U. S. App. 295, holding master not an insurer of employee's safety; *Lehigh Valley R. Co. v. Kiszal*, 80 Fed. 472, 51 U. S. App. 269, where plaintiff was injured by explosion of old and defective boiler; *Krueger v. Louisville, etc., Ry.*, 111 Ind. 53, 11 N. E. 958, holding acts of superior agent, charged with performance of master's duty, acts of master; *Indiana, etc., Ry. v. Snyder*, 140 Ind. 659, 39 N. E. 916, holding employee intrusted with duty of providing safe appliance, becomes vice-principal; *H. T., etc., Ry. v. Marcelles*, 59 Tex. 338, holding corporation must keep machinery in safe condition; *Darracott v. Chesapeake, etc., R. R.*, 83 Va. 294, 5 Am. St. Rep. 270, 2 S. E. 514, holding company not required to change machinery for every new improvement promising less danger; *Richmond, etc., R. R. v. Burnett*, 88 Va. 544, 14 S. E. 374, holding duty on company to keep brakes in sufficient repair; *Norfolk, etc., R. R. v. Nunnally*, 88 Va. 550, 14 S. E. 368, holding duty not discharged by original purchase of perfect appliances. See 59 Am. Rep. 77, 78, note on master's obligation to servant.

Master and servant.—To bring case within rule exempting master from liability for injuries to servant by fellow servant, both must be engaged in same department of common employment, pp. 220-224.

The following citing cases apply the rule: *King v. Ohio, etc., Ry.*, 11 Biss. 366, 14 Fed. 280, holding master's immunity does not extend to cases where servants are engaged in different departments of work; *Gravelle v. Minneapolis, etc., Ry.*, 3 McCrary, 364, 11 Fed. 573, charging jury as to who are fellow servants; *The Phoenix*, 34 Fed. 763, holding negligence of ship being immediate cause, fact that negligence of fellow servant contributed, only mitigates damages; *Bloyd v. Railway*, 58 Ark. 71, 22 S. W. 1090, holding whether relationship of fellow servant exists to be determined according to circumstances of each case; *Beeson v. Green Mountain, etc., Co.*, 57 Cal. 37, holding superintendent having entire charge of business with power to discharge employees, not a fellow servant; *Palmer v. Utah, etc., Ry.*, 2 Idaho, 296, 13 Pac. 428, holding corporation liable to employee injured through negligence of servants invested with controlling duty in management of business; *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 484, 22 Atl. 553, 13 L. R. A. 826, holding servant, of whatever rank, charged with performance of master's duties towards servants, not a fellow servant within the rule; *Willis v. Oregon, etc., Ry.*, 11 Or. 264, 4 Pac. 125, holding master liable for injury by vice-principal; *Pool v. Southern Pac. Co.*, 7 Utah, 308, 26 Pac. 655, holding exemption does not extend to injuries caused by

negligence of servant in another department; *Madden v. Railway*, 28 W. Va. 619, 57 Am. Rep. 697, holding fact that inferior servant is under control of superior, sufficient to render master liable. The following, under authority of the principal case, are held not fellow servants within the rule: *Craig v. Continental Ins. Co.*, 26 Fed. 800, marine inspector and engineer of pump on barge; *Central Trust Co. v. Wabash, etc., Ry.*, 34 Fed. 619, express and baggage-men and employees on freight train; *Pike v. Chicago, etc., Co.*, 41 Fed. 98, bridge watchman on railroad, and engineer and conductor of train; *Northern Pac. R. Co. v. Poirier*, 67 Fed. 884, 29 U. S. App. 583, train dispatcher and brakemen; *Taylor v. Evansville, etc., R. Co.*, 121 Ind. 130, 16 Am. St. Rep. 377, 22 N. E. 878, 6 L. R. A. 587, and n., machinist and master mechanic in control of shop; *St. Louis, etc., Ry. v. Weaver*, 35 Kan. 427, 57 Am. Rep. 179, 11 Pac. 416, section boss and engineer; *Bolden v. Railway*, 123 N. C. 617, 31 S. E. 852; bridge watchman and bridge repairmen; *Cameron v. G. N. Ry.*, 8 N. Dak. 131, 77 N. W. 1018, conductor and car inspector; *Railway v. Croskell*, 6 Tex. Civ. App. 164, 25 S. W. 489, employees of different railroads using joint track; *G. H. & S. A. Ry. v. Sullivan*, 2 Posey, 316, bridge carpenter and assistant foreman, and foreman in charge, with exclusive control of men engaged in work; *Reddon v. Railway*, 5 Utah, 353, 15 Pac. 265, superintendent of mine and laborer therein; *Anderson v. Ogden, etc., Co.*, 8 Utah, 133, 30 Pac. 306, foreman in charge of gang of laborers in gravel pit, and laborer; *Pool v. Southern Pac. Co.*, — Utah. —, 58 Pac. 331, laborer in car shops and foreman of switchmen; *Moons v. Richmond R. R.*, 78 Va. 751, 49 Am. Rep. 404, conductor assigning duty of trainmen, and trainmen; *Criswell v. Railway*, 30 W. Va. 819, 6 S. E. 43, railroad foreman in charge of hand car and laborer ordered to ride thereon; *Cadden v. American Steel Barge Co.*, 88 Wis. 420, 60 N. W. 803, scaffold builders and riveter working thereon; *Welty v. Lake Superior, etc., R. Co.*, 100 Wis. 143, 75 N. W. 1027, foreman and assistants by whom semaphore was constructed, and operator thereof.

The following are held fellow servants on authority of principal case: *Randall v. Baltimore, etc., R. R.*, 109 U. S. 483, 27 L. 1005, 3 S. Ct. 325, brakeman working switch on one track, and engineer of another train on adjacent track; *Armour v. Hahn*, 111 U. S. 319, 28 L. 442, 4 S. Ct. 435, foreman of carpenters working on building, and journeyman carpenter; *B. & O. R. R. v. Baugh*, 149 U. S. 388, 37 L. 781, 13 S. Ct. 916, engineer and fireman on same locomotive; *Northern Pac. R. R. v. Hambly*, 154 U. S. 357, 38 L. 1013, 14 S. Ct. 985, common laborer working on railroad, and conductor and engineer of train thereon; *Buckley v. Gould, etc., Min. Co.*, 8 Sawy. 395, 14 Fed. 834, runner of hoisting engine, and men working in shaft of mine; *Walsh v. Ship Babcock*, 12 Sawy. 415, 31 Fed. 419, employee of master stevedore, and stevedore's foreman; *Yager v.*

Receivers, 4 Hughes, 201, 88 Fed. 779, bridge builder and foreman in charge, who also works thereon as a mechanic; *The Harold*, 21 Fed. 430, ship's winchman and stevedore's laborers, unloading ship; Missouri, etc., Ry. v. Texas, etc., Co., 31 Fed. 527, brakeman and engineer of same train; *Wolcott v. Studebaker*, 34 Fed. 10, elevator boy, engineer in charge of motive power, and workman, all employed by defendant; *Dewey v. Railway*, 97 Mich. 344, 52 N. W. 943, 16 L. R. A. 343 (see dissenting opinion, 97 Mich. 338, 56 N. W. 759, 22 L. R. A. 295), freight brakeman and car inspector; *Atchison, etc., R. Co. v. Martin*, 7 N. Mex. 169, 34 Pac. 539, section hand on hand car going to repair road, and conductor of working train, also repairing road. See 2 McCrary, 244, note on fellow servants.

Master and servant.—Where servant notifies master of defects in machinery, e. g., defective locomotive, and relying on latter's promise to repair same within a reasonable time, continues to use it, his continuance in employment for such reasonable time, with knowledge of defect, is not, as a matter of law, conclusive of contributory negligence, p. 225.

The following citing cases reaffirm the rule: *Northern Pac. R. R. v. Babcock*, 154 U. S. 201, 38 L. 961, 14 S. Ct. 982, *Parody v. Chicago, etc., Ry.*, 5 McCrary, 42, 15 Fed. 208, *Young v. New Jersey, etc., Ry.*, 46 Fed. 161, *New Jersey, etc., R. Co. v. Young*, 49 Fed. 725, 1 U. S. App. 96, *Homestake Min. Co. v. Fullerton*, 69 Fed. 927, 36 U. S. App. 32, *Lehigh Valley Coal Co. v. Warrek*, 84 Fed. 868, 55 U. S. App. 442, *Eureka Co. v. Bass*, 81 Ala. 214, 60 Am. Rep. 155, 8 So. 218, *Railway v. Triplett*, 54 Ark. 301, 15 S. W. 834, 11 L. R. A. 777, *Cheaney v. Ocean Steamship Co.*, 92 Ga. 731, 44 Am. St. Rep. 117, 19 S. E. 35, *Pitts v. Florida, etc., R. R.*, 98 Ga. 661, 27 S. E. 191, *Missouri Furnace Co. v. Abend*, 107 Ill. 52, 47 Am. Rep. 429, *Indianapolis, etc., Ry. v. Ott*, 11 Ind. App. 568, 569, 38 N. E. 844, *Chicago, etc., Steel Co. v. Williams*, 17 Ind. App. 575, 47 N. E. 27, *McFarlan Carriage Co. v. Potter*, 21 Ind. App. 697, 53 N. E. 468, 51 N. E. 739, *Atchison, etc., R. Co. v. Midgett*, 1 Kan. App. 142, 40 Pac. 996, *Lyttle v. Chicago, etc., Ry.*, 84 Mich. 298, 41 N. W. 574, *Roux v. Lumber Co.*, 85 Mich. 525, 24 Am. St. Rep. 107, 48 N. W. 1093, 13 L. R. A. 731, and n., *Greene v. Minneapolis, etc., Ry.*, 31 Minn. 250, 47 Am. Rep. 787, 17 N. W. 379, *Manuf. Co. v. Morrissey*, 40 Ohio St. 154, 48 Am. Rep. 672, *Railroad v. Kenley*, 92 Tenn. 216, 21 S. W. 328, *Texas, etc., Ry. v. Kane*, 2 Tex. App. Civ. 261, *Texas, etc., Ry. v. Bingle*, 9 Tex. Civ. App. 325, 29 S. W. 675, all holding master liable for injuries received by employee within reasonable time after notice to master of defects, and latter's promise to repair. Extended in *Poirier v. Carroll*, 35 La. Ann. 704, holding master responsible for injuries by incompetent fellow servant irrespective of promise to remove same.

Cited and principle applied in *Kane v. Northern Central Ry.*, 128 U. S. 94, 95, 32 L. 341, 9 S. Ct. 17, and *Mares v. Northern Pac.*

R. R., 3 Dak. 344, 21 N. W. 8, both holding question of contributory negligence for jury, when evidence is conflicting; *Inland, etc., Coast-in, Co. v. Tolson*, 139 U. S. 558, 35 L. 272, 11 S. Ct. 655, *Wabash, etc., R. Co. v. Central Trust Co.*, 23 Fed. 740, *Amato v. Northern Pac. R. Co.*, 46 Fed. 563, *Union Pac. Ry. v. Novak*, 61 Fed. 590, 15 U. S. App. 400, *Frost v. Oregon Short Line, etc., Ry.*, 69 Fed. 939, *Berry v. Lake Erie, etc., R. Co.*, 70 Fed. 194, *Canadian Pac. Ry. v. Clark*, 74 Fed. 362, 38 U. S. App. 573, *Toledo, etc., R. Co. v. Chisholm*, 83 Fed. 657, 49 U. S. App. 708, *Chesapeake, etc., Ry. v. Steele*, 84 Fed. 98, 54 U. S. App. 561, *Little Rock, etc., Ry. v. Leverett*, 48 Ark. 348, 3 Am. St. Rep. 239, 3 S. W. 54, *Smith v. Chicago, etc., Ry.*, 4 S. Dak. 80, 55 N. W. 720, *Reddon v. Railway, 5 Utah*, 355, 15 Pac. 265, *Northern Pac. R. R. v. O'Brien*, 1 Wash. 607, 21 Pac. 35, *Spurrier v. Cable Ry.*, 3 Wash. 662, 29 Pac. 347, *Riley v. Railway*, 27 W. Va. 165, and *Hulehan v. Winona, etc., R. Co.*, 68 Wis. 527, 32 N. W. 532, all holding contributory negligence a matter of affirmative defense; *Texas, etc., Ry. v. Cox*, 145 U. S. 608, 36 L. 834, 12 S. Ct. 909, and *Gardner v. Michigan, etc., R. R.*, 150 U. S. 359, 37 L. 1109, 14 S. Ct. 143, both holding question of negligence one of law only where facts preclude recovery; *Cross Lake, etc., Co. v. Joyce*, 83 Fed. 991, 55 U. S. App. 226, where master, on complaint, had promised to discharge incompetent fellow servant; *Herbert v. Northern Pac. R. R.*, 3 Dak. 56, 57, 13 N. W. 354, and *Drop Forge, etc., Co. v. Van Dam*, 149 Ill. 342, 36 N. E. 1026, both holding whether defect is so serious that prudent person would not continue in work, question for jury; *Rogers v. Leyden*, 127 Ind. 57, 26 N. E. 212, holding question one for jury, where more than one inference may be drawn from facts; *Daugherty v. Midland Steel Co.*, — Ind. App. —, 53 N. E. 846, holding servant need not allege that unreasonable time had not elapsed since promise to repair; *Rothenberger v. Northwestern, etc., Milling Co.*, 57 Minn. 464, 59 N. W. 531, holding servant can recover within any period which would not preclude all reasonable expectation that promise would be kept; *Hyatt v. Hannibal Ry.*, 19 Mo. App. 295, 298, holding master who fails to remove known peril, guilty of negligence; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 501, 41 Pac. 276, holding promise to remove debris, justified continuance of work in mine; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 330, 38 Atl. 838, holding evidence of master's promise to adopt safer system, admissible to show his negligence; *Texas, etc., Ry. v. Bingle*, 91 Tex. 289, 42 S. W. 972, holding test is whether man of ordinary prudence would have continued in work; *Southern Pac. Co. v. Leash*, 2 Tex. Civ. App. 72, 21 S. W. 564, and *Reddon v. Railway*, 5 Utah, 356, 15 Pac. 266, both holding question of contributory negligence from continuing in employment after promise to repair, for jury; *Chapman v. Southern Pac. Co.*, 12 Utah, 43, 41 Pac. 556, a like case, holding notice to vice-principal sufficient; *Norfolk, etc., Co. v. Ampey*, 93

Va. 134, 25 S. E. 231, holding master liable where servant, in obedience to orders, incurred risk of dangerous machinery; McKelvey v. Chesapeake R. R., 35 W. Va. 513, 14 S. E. 265, holding instruction that promise to repair rendered company liable as a conclusion of law, erroneous; reviewing cases: Jensen v. Hudson Sawmill Co., 98 Wis. 83, 73 N. W. 438, holding whether one continuing in employment, in like case, is exercising due care, question for jury. Cited, arguendo, in Narramore v. Cleveland, etc., Ry., 96 Fed. 301; dissenting opinions in Romona, etc., Stone Co. v. Phillips, 11 Ind. App. 151, 39 N. E. 106, majority reaffirming rule; Lutz v. Atlantic, etc., R. Co., 6 N. Mex. 527, 30 Pac. 922, 16 L. R. A. 833, and n., majority opinion, *supra*. See 77 Am. Dec. 224, and 23 Am. St. Rep. 385, 386, 387, extended notes on this subject.

Qualified in District of Columbia v. McElligott, 117 U. S. 629, 631, 29 L. 948, 6 S. Ct. 886, holding assurances of employer do not release employee from duty of exercising care; McAndrews v. Montana Ry., 15 Mont. 298, 39 Pac. 87, holding reliance on promise to repair no justification when machinery was obviously dangerous. Distinguished in Kresanowski v. Northern Pac. Ry., 5 McCrary, 531, 532, 537, 18 Fed. 231, 232, 235, holding voluntry riding on engine pilot, contributory negligence; Gowen v. Harley, 56 Fed. 981, 12 U. S. App. 574, holding promise to furnish safer tools immaterial, where work could be done with reasonable safety without such tools; McPeck v. Central, etc., R. R., 79 Fed. 593, 596, 60 U. S. App. 33, 38, holding continuance at work for twenty days after complaint, waiver of protest; Detroit Crude-Oil Co. v. Grable, 94 Fed. 78, 79, and Davis v. Graham, 2 Colo. App. 215, 29 Pac. 1009, both holding employee by continuing in dangerous employment after lapse of reasonable time, after promise to repair, assumes risk; Woodward Iron Co. v. Jones, 80 Ala. 128, holding contributory negligence a question of law, when facts are undisputed; Indianapolis, etc., Ry. v. Watson, 114 Ind. 33, 5 Am. St. Rep. 588, 14 N. E. 727, where danger of continuance in employment was great and immediate; Valparaiso v. Ramsey, 11 Ind. App. 217, 38 N. E. 876, holding recovery may be defeated by proof of contributory negligence, notwithstanding master's promise to repair; Hayball v. Detroit, etc., R. Co., 114 Mich. 140, 141, 72 N. W. 147, where skilled mechanic used, without protest, dangerous machine; Lutz v. Atlantic, etc., R. Co., 6 N. Mex. 505, 30 Pac. 915, 16 L. R. A. 826, and n., holding negligence of fellow servant proximate cause of injury; Colorado, etc., Ry. v. Brentford, 79 Tex. 625, 23 Am. St. Rep. 382, 15 S. W. 563, holding servant, to recover, must be ignorant of continued existence of defect; Darracott v. Chesapeake, etc., R. R., 83 Va. 296, 5 Am. St. Rep. 271, 2 S. E. 514, where master had not promised to repair; McDonald v. Norfolk, etc., R. Co., 95 Va. 106, 27 S. E. 821, where servant remained in service with knowledge of defects, and failed to notify master thereof; Woodell v. West Vir-

ginia, etc., Co., 38 W. Va. 45, 17 S. E. 394, holding continued use of defective machinery, without protest, contributory negligence; *Stephenson v. Duncan*, 73 Wis. 407, 9 Am. St. Rep. 808, 41 N. W. 338, holding continuance in employment for more than reasonable time after master's promise, waiver of objection; *Erdman v. Illinois Steel Co.*, 95 Wis. 14, 60 Am. St. Rep. 72, 69 N. W. 996, holding continuance in work where danger is obvious and imminent, contributory negligence.

Courts.—On questions depending upon general principles of law, Supreme Court is not bound to follow decisions of courts of State in which action arose, p. 226.

Cited and rule applied in *Myrick v. Michigan Central R. R.*, 107 U. S. 109, 27 L. 327, 1 S. Ct. 431, holding question of what constitutes contract of carriage, one of general law; *Clark v. Bever*, 139 U. S. 117, 35 L. 97, 11 S. Ct. 475, and *Greenwood v. Westport*, 63 Conn. 602, 60 Fed. 576, both holding Federal courts not bound by State court decision on general questions of commercial law; *Lake Shore, etc., Ry. v. Prentice*, 147 U. S. 106, 37 L. 101, 13 S. Ct. 262, holding question of railroad's liability for oppressive conduct of conductor, one of general law; *B. & O. R. R. v. Baugh*, 149 U. S. 374, 37 L. 776, 13 S. Ct. 916, holding State decisions not binding on question of who are fellow servants; *Gardner v. Michigan, etc., R. R.*, 150 U. S. 358, 37 L. 1109, 14 S. Ct. 143, holding responsibility of railroad to employees, a question of general law; *Chicago, etc., Ry. v. Solan*, 169 U. S. 137, 42 L. 692, 18 S. Ct. 290, holding State construction of right of railroad to contract for exemption, not binding; *Mason v. Edison Machine Works*, 24 Blatchf. 95, 28 Fed. 229, *Willis v. Board of Commrs.*, 86 Fed. 874, holding Federal courts not bound to follow decisions of State court on questions of general law; *Johnston v. Western Union Tel. Co.*, 33 Fed. 364, holding State decisions on question of telegraph company's right to restrict its liability, not binding; *Newport News, etc., Co. v. Howe*, 52 Fed. 366, 6 U. S. App. 172, holding State construction of general contract of service does not bind Federal courts; *Griffin v. Overman, etc., Co.*, 61 Fed. 572, 21 U. S. App. 151, holding rule that contributory negligence is matter of defense, applicable in Federal court, notwithstanding contrary State decision; *Gatton v. Chicago, etc., Ry.*, 95 Iowa, 145, 63 N. W. 600, 28 L. R. A. 567, denying existence of national common law. See 42 Am. Rep. 666, note.

Contra where State has statute governing subject: *Northern Pac. R. Co. v. Hogan*, 63 Fed. 105, 27 U. S. App. 184, holding construction of State statute defining employer's liability, by State court, will be followed in Federal; *Northern Pac. R. Co. v. Mase*, 63 Fed. 115, 27 U. S. App. 238, holding State statute regulating master's liability, a rule of decision in Federal court; *Krogg v. Atlanta*,

etc., R. R., 77 Ga. 214, 4 Am. St. Rep. 82, holding construction placed by courts of another State upon its own laws, should be followed.

100 U. S. 226-234, 25 L. 577, *CRAIG v. SMITH*.

Appeal and error.— Only those original papers should be transmitted on appeal which require actual inspection as originals, in order to give them full effect, p. 232.

Cited in *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. 243, 21 U. S. App. 50, holding bringing of whole record unnecessary where appeal is on question of law alone.

Equity.— Allowing introduction of newly-discovered evidence under bill of review, to prove facts in issue on former hearing, is a matter in sound discretion of court, to be exercised sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause, p. 234.

Approved in *Society of Shakers v. Watson*, 77 Fed. 515, 516, 47 U. S. App. 170, and *Hilts v. Ladd*, — Or. —, 58 Pac. 34, where new evidence consisted in mere accumulation of witnesses to fact once litigated; *Snyder v. Botkin*, 37 W. Va. 368, 16 S. E. 595, holding bill of review alleging matters supplemental to original bill, properly dismissed.

100 U. S. 235-238, 25 L. 645, *UNITED STATES v. PERRYMAN*.

Indians.— Sections 2154 and 2155, revised statutes, providing that any white man convicted of taking property of friendly Indian shall be sentenced to repay double value thereof, and, if unable to pay, such Indian shall be reimbursed from treasury, has no application where theft was by negro, p. 238.

Not cited.

100 U. S. 239-250, 25 L. 580, *OATES v. NATIONAL BANK*.

Bills and notes.— Alabama act of April 8, 1873, amending section 1833, revised code, places bills of exchange and promissory notes, payable at designated places, on same basis as to immunity from set-offs or equities, as bills and notes payable at banks, p. 244.

Approved in *Mobile Savings Bank v. Patty*, 16 Fed. 752, holding Alabama act of 1873, regarding negotiable instruments, repealed act of 1867, where conflicting therewith; *Gwathmay v. Clisby*, 24 Blatchf. 403, 31 Fed. 223, holding bills of exchange drawn and accepted in Alabama, governed by commercial law, although not payable at designated place.

Statutes.— Courts should not defeat clearly-expressed legislative intent by adhering too rigidly to mere letter of the statute, or technical rules of construction, p. 244.

Reaffirmed in *Lee Kan v. United States*, 62 Fed. 919, 15 U. S. App. 516, and *State v. Smith*, 40 Ark. 433. Cited and principle applied in *Burgess v. Seligman*, 107 U. S. 35, 27 L. 365, 2 S. Ct. 22, holding Federal courts will follow their own interpretation of State laws, although same are subsequently differently interpreted by State courts; *Holy Trinity Church v. United States*, 143 U. S. 462, 36 L. 229, 12 S. Ct. 513, holding act prohibiting importation of alien contract labor, does not apply to contract with foreign clergyman; *Lau Ow Bew v. United States*, 144 U. S. 59, 36 L. 344, 12 S. Ct. 520, construing Chinese restriction act of 1882, as amended by act of 1885; *Swayne v. Hager*, 13 Sawy. 621, 37 Fed. 783, holding Chinese shoes not taxable as clothing under act of 1883; *Woolridge v. McKenna*, 8 Fed. 659, holding act of 1875, regarding filing of transcript of record in State court, directory only; *Brown v. Aberdeen*, 4 Dak. 408, 31 N. W. 738, transposing proviso in one section, and construing it as affecting another; *Perry v. Jefferson*, 94 Ill. 221, holding title of act examinable to aid in discovering intent; *Shellabarger v. Jackson Co.*, 50 Kan. 141, 32 Pac. 133, holding legislative intent governs, though clothed in inappropriate language; *Gray v. County Commissioners*, 83 Me. 435, 22 Atl. 377, extending meaning of remedial statute beyond plain words thereof, to accord with legislative purpose; *Wadsworth v. Marshall*, 88 Me. 268, 34 Atl. 31, 32 L. R. A. 589, construing statute regarding liability for blasting; *Chase v. Walker*, 167 Mass. 297, 45 N. E. 917, applying rule to construction of contract not to obstruct light with wall; *Sanborn v. Sanborn*, 62 N. H. 639, holding expressed intention to create life estate not defeated by addition of words "heirs," etc.; *Opinion of Justices*, 66 N. H. 657, 33 Atl. 1091, and *McGregor v. Home Ins. Co.*, 33 N. J. Eq. 187, both holding thing within intention of statute makers as much in statute as if in letter thereof. Cited generally in *Aspley v. Murphy*, 50 Fed. 377, resolving doubts as to scope of repealing act in favor of jurisdiction under prior act. Cited, *arguendo*, in *The Louis Olsen*, 52 Fed. 656; dissenting opinions in *United States v. Freight Assn.*, 166 U. S. 354, 41 L. 1032, 17 S. Ct. 564, *arguendo*; *Russel v. Ayer*, 120 N. C. 207, 27 S. E. 140, 37 L. R. A. 253, majority holding sections 2, 3, chapter 168, of State Revenue Act of 1897, unconstitutional.

Distinguished in *United States v. Huggett*, 40 Fed. 642, holding penal statutes to be strictly construed.

Courts.—Federal courts are not bound by State decisions, on questions of general commercial law, p. 246.

The following citing cases reaffirm the rule: *Railroad v. National Bank*, 102 U. S. 31, 56, 26 L. 67, 76, *Pana v. Bowler*, 107 U. S. 541, 27 L. 429, 2 S. Ct. 714, *First Nat. Bank v. Lock-Stitch Fence Co.*, 24 Fed. 226, 227, *Boston v. Crowley*, 38 Fed. 204, *Bank of Edgefield v. Farmers, etc., Mfg. Co.*, 52 Fed. 103, 2 U. S. App. 282, 18 L. R. A. 203, *Van Vleet v. Sledge*, 45 Fed. 749, and *Greenwood v.*

Westport, 63 Conn. 602, 60 Fed. 576, all holding State decisions on questions of commercial law not binding on Federal courts. Cited and applied also in *Murray v. Chicago, etc., Ry.*, 62 Fed. 29, *Hambly v. Bancroft*, 83 Fed. 447, and *Bancroft v. Hambly*, 94 Fed. 979, all holding Federal courts bound to exercise independent judgment in construing contract not dependent on construction of State law; *Faulkner v. Hart*, 82 N. Y. 418, 37 Am. Rep. 577, and *St. Nicholas Bank v. State National Bank*, 128 N. Y. 33, 27 N. E. 851, 13 L. R. A. 244, both holding decisions of courts of one State on questions of commercial law, not obligatory on courts of another; dissenting opinion in *Mutual Fire Ins. Co. v. Furniture Co.*, 108 Mich. 184, 66 N. W. 1099, majority holding Illinois judgment conclusive on Michigan policy-holders, as to assessment. Cited, arguendo, in *Smith v. Alabama*, 124 U. S. 478, 31 L. 512, 8 S. Ct. 569, and *Gatton v. Chicago, etc., Ry.*, 95 Iowa, 138, 63 N. W. 598, 28 L. R. A. 565, no national common law.

Distinguished in *Bank of Sherman v. Apperson*, 4 Fed. 31, holding State statute enlarging negotiability of bills and notes, binding on Federal courts; *New Orleans, etc., Co. v. Southern Brewing Co.*, 36 Fed. 835, following State decisions in construction of State laws; *Pipps v. Harding*, 70 Fed. 476, 34 U. S. App. 148, holding Federal courts will administer law of State which controls contract.

Bills and notes.—Creditor taking negotiable note before maturity, so indorsed that he becomes a party thereto, as collateral security for a pre-existing debt, and in consideration of extension of time to debtor, is a holder for value, unaffected by equities between antecedent parties, p. 248.

Followed in *Newman v. Aultman, etc., Co.*, — Tenn. Ch. App. —, 51 S. W. 201, a like case. Cited and principle applied in *American File Co. v. Garrett*, 110 U. S. 294, 28 L. 152, 4 S. Ct. 93, and *Mobile Savings Bank v. Board of Supervisors*, 24 Fed. 112, both holding fact that bonds were taken for pre-existing debt does not render holder any the less a bona fide holder for value; *Black v. Reno*, 59 Fed. 919, and *Greenway v. Orthwein Grain Co.*, 85 Fed. 538, 56 U. S. App. 527, both holding taker of note by way of pledge to secure repayment of simultaneous loan, acquires it for value; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 460, 3 Am. St. Rep. 244, 3 S. W. 807, and *Dearman v. Trimmer*, 26 S. C. 511, 2 S. E. 504, holding one receiving commercial paper before maturity, as security for precedent debt, a holder for value, unaffected by previous equities; *Spencer v. Sloan*, 108 Ind. 188, 58 Am. Rep. 39, 9 N. E. 152, and *Nat. Bank v. Dakin*, 54 Kan. 662, 45 Am. St. Rep. 302, 39 Pac. 181, both holding pre-existing debt sufficient consideration for transfer of collaterals as security; *Deere v. Marsden*, 88 Mo. 514, holding express agreement to delay suit on pre-existing debt until collateral matures, constitutes transferee holder for value. Cited generally

in *Winship v. Merchants' Nat. Bank*, 42 Ark. 24, holding possession by payee prima facie evidence of title to note.

Distinguished in *Loewen v. Forsee*, 137 Mo. 43, 59 Am. St. Rep. 497, 38 S. W. 715, and *Napa Valley, etc., Co. v. Rinehart*, 42 Mo. App. 178, both holding holder of note as collateral for pre-existing debt, without other consideration, holds liable to prior equities; *Conrad v. Fisher*, 37 Mo. App. 413, 8 L. R. A. 166, holding pledge as security for antecedent debt, creditor parting with no new value, does not constitute pledgee purchaser for value.

Banks and banking.—National banking act, while subjecting to penalty bank taking usurious interest, does not authorize courts to declare contracts under which it is taken void, p. 250.

Approved in *Slaughter v. First Nat. Bank*, 109 Ala. 161, 19 So. 432, holding penalties of banking act cannot be set off in action on note; *Neilsville Bank v. Tuthill*, 4 Dak. 301, 30 N. W. 155, holding, unless statute makes purchase of note by bank void, maker cannot plead ultra vires; *Hill v. National Bank of Barre*, 21 Blatchf. 259, 15 Fed. 433, and *Boerner v. Traders' Nat. Bank*, 90 Tex. 445, 39 S. W. 286, both holding one paying national bank usurious interest, can recover double whole amount paid.

Usury.—Where contract for indorsement rests upon sufficient valid consideration, presence of additional illegal consideration, such as payment in advance of usurious interest, does not destroy entire contract, p. 250.

Approved in *McBroom v. Scottish Investment Co.*, 153 U. S. 325, 38 L. 732, 14 S. Ct. 854, holding sections 1736-1738, compiled laws of New Mexico, make contract for usurious interest void only as to excess of legal rate; *Davis v. Seeley*, 71 Mich. 219, 38 N. W. 906, holding negotiable instruments enforceable in hands of bona fide holders, although unenforceable between original parties; *Scottish, etc., Investment Co. v. McBroom*, 6 N. Mex. 587, 30 Pac. 863, holding reservation of usurious interest does not avoid contract, unless statute so declares; *Memphis Bethel v. Bank*, 101 Tenn. 133, 45 S. W. 1072, holding fact that contract is usurious between parties does not affect innocent holder; *Hoots v. Williams*, 116 Ala. 374, 22 So. 498, refusing to extend contrary Alabama doctrine to purchaser at foreclosure sale, without notice that mortgage was affected by usury; *Lynchburg Nat. Bank v. Scott*, 91 Va. 656, 50 Am. St. Rep. 863, 22 S. E. 488, 29 L. R. A. 829, holding plea of usury not sustainable in action by bona fide holder for value, acquiring before maturity; dissenting opinion in *Ward v. Sugg*, 113 N. C. 501, 18 S. E. 721, 24 L. R. A. 283, majority holding note embracing usurious interest void.

Distinguished in *Ward v. Sugg*, 113 N. C. 493, 18 S. E. 717, 24 L. R. A. 281, holding note embracing usurious interest void as against maker in hands of purchaser for value, before maturity.

100 U. S. 251-257, 25 L. 626, *TRENOUTH v. SAN FRANCISCO*.

Public lands.—History and status of San Francisco pueblo lands reviewed, pp. 251-255.

Cited in *Baker v. Brickell*, 87 Cal. 334, 25 Pac. 490, holding San Francisco held pueblo lands in trust for inhabitants, subject to governmental regulations; *Galvin v. Palmer*, 113 Cal. 52, 45 Pac. 173, holding, upon conquest of California, title to pueblo lands not in private ownership, passed to United States; *San Francisco v. Le Roy*, 138 U. S. 664, 34 L. 1099, 11 S. Ct. 366, *arguendo*.

Public lands.—Title of San Francisco to municipal lands vests upon decree of Circuit Court, as entered May 18, 1865, and confirmatory act of 1866, p. 255.

Public lands.—Trespassers in possession at time of passage of act of 1866, confirming San Francisco's title to pueblo lands, in trust for parties in bona fide actual possession, are not beneficiaries thereunder, as against parties subsequently recovering possession in ejectment, p. 256.

Public lands.—Right of pre-emption cannot be acquired by intrusion and trespass upon lands in actual possession of others, p. 256.

Reaffirmed in *Davis v. Scott*, 56 Cal. 171, and *Durand v. Martin*, 120 U. S. 369, 30 L. 677, 7 S. Ct. 589, both holding California school lands not open to pre-emption while in possession of State's patentee; *North, etc., Min. Co. v. Orient Min. Co.*, 6 Sawy. 508, 11 Fed. 128, holding trespasser acquires no rights against actual possessor of claim, irrespective of latter's compliance with statute; *Field v. Gray*, 1 Ariz. 407, 25 Pac. 793, holding one working mining claim may eject intruders showing no superior title; *McBrown v. Morris*, 59 Cal. 74, where entry was made on inclosed dairy land; *Keller v. Berry*, 62 Cal. 490, where defendant, by connivance of mortgagor, attempted to enter homestead on mortgaged land; *Duggan v. Davey*, 4 Dak. 123, 26 N. W. 892, holding actual possession of mining claim sufficient evidence of title against intruder; *Nickals v. Winn*, 17 Nev. 195, 30 Pac. 436, holding pre-emption rights cannot be acquired on land occupied by one not entitled to make pre-emption; dissenting opinion in *Doolan v. Carr*, 125 U. S. 641, 31 L. 853, 8 S. Ct. 1239, *arguendo*.

Distinguished in *Haven v. Haws*, 63 Cal. 515, 516, holding claim to whole quarter-section may be vitiated by settlement on unin-closed half; *Bullock v. Rouse*, 81 Cal. 595, 22 Pac. 920, holding land by reason of dilapidated fences, and lack of improvements, not in actual possession; *Caldwell v. Bush*, 6 Wyo. 359, 45 Pac. 492, where entry was made on land merely inclosed for grazing.

Public lands.—Right of pre-emption cannot be acquired by entry on lands, claim to which, under a foreign title, is pending before United States tribunals. p. 256.

Approved in *United States v. Williams*, 12 Sawy. 147, 30 Fed. 314, holding land not open to settlement pending contest of State's right to select same; dissenting opinion in *Chapman v. Quinn*, 56 Cal. 296, *arguendo*.

Distinguished in *Lockhart v. Wills*, 9 N. Mex. 355, 54 Pac. 340, holding lands within boundaries of Mexican grant in New Mexico, and sub judice in court of private land claims, open to exploration and purchase under Federal mining laws.

100 U. S. 257-302, 25 L. 648, **TENNESSEE v. DAVIS**.

Removal of causes.—Petition representing that act for which petitioner was indicted was done by right of his office as revenue collector, makes case for removal to Federal court, p. 261.

Approved in *Omaha, etc., Ry. v. Cable, etc., Co.*, 32 Fed. 729, and *St. Paul, etc., Ry. v. Northern Pac. R. Co.*, 68 Fed. 10, 32 U. S. App. 372, both holding, where face of complaint shows Federal question, jurisdiction of court extends to whole case; *Whelan v. New York, etc., R. Co.*, 35 Fed. 864, 1 L. R. A. 74, and *n.*, holding suit *ipso facto*, removed by filing petition showing case within act on face thereof; *State v. Kirkpatrick*, 42 Fed. 694, holding it prerogative of Federal courts to determine upon habeas corpus whether homicide resulted from act done in pursuance of Federal law; *State v. Sullivan*, 50 Fed. 597, holding removal of prosecution against revenue officer, effected upon filing petition therefor in Federal court; *Eighmy v. Poucher*, 83 Fed. 856, refusing to remand action against Federal district attorney for malicious prosecution.

Distinguished in *Illinois v. Fletcher*, 22 Fed. 778, holding mere fact that petitioner held Federal commission at time of indictment, not ground for removal.

Removal of causes.—Section 643, revised statutes, providing for removal to Federal courts of prosecutions against Federal officers for acts done under color of office, includes prosecutions for alleged violation of State laws, p. 262.

Approved in *In re Neagle*, 135 U. S. 61, 34 L. 70, 10 S. Ct. 667, reprinted in 14 Sawy. 303 (see dissenting opinion in 135 U. S. 89, 93, 94, 34 L. 80, 82, 10 S. Ct. 677, 678, 679), discharging Federal marshal held for homicide, committed in defense of Supreme justice; *Georgia v. Bolton*, 11 Fed. 218, and *State v. Kirkpatrick*, 42 Fed. 690, both holding prosecution "commenced" and cause removable, when warrant is issued, irrespective of indictment. Cited generally in *Ex Parte Fagg*, 38 Tex. Cr. 589, 44 S. W. 297, 40 L. R. A. 215, holding proceeding by municipality to enforce fine for gambling, not a prosecution.

Distinguished in *State v. Grand Trunk Ry.*, 3 Fed. 889, holding criminal case not removable upon claim of alienage.

Removal of causes.—A case arises under the Constitution, or a law or treaty of the United States, either in a criminal prosecution or civil suit, whenever its correct decision depends upon the construction of either, p. 264.

Reaffirmed in *Van Allen v. Atchison, etc.*, R. R., 1 McCrary, 600, 3 Fed. 547, *Sowles v. Witters*, 46 Fed. 497, and *Nashville, etc., Ry. v. Taylor*, 86 Fed. 181. Cited and principle applied in *Bailey v. Mosher*, 63 Fed. 491, 27 U. S. App. 339, holding petition averring violation of national bank laws, discloses cause arising under Federal laws; *Wood v. Drake*, 70 Fed. 883, holding action against Federal marshal for false imprisonment, within jurisdiction of Federal court exclusively; *Arkansas v. Kansas, etc.*, *Coal Co.*, 96 Fed. 357, holding existence of Federal question to be determined from complaint itself. The following have been held to involve Federal questions: *Railroad v. Mississippi*, 102 U. S. 140, 26 L. 98, State's petition for mandamus to compel railroad chartered by Congress, to remove bridge; *Bock v. Perkins*, 139 U. S. 630, 35 L. 315, 11 S. Ct. 677, trespass against Federal marshal for improperly seizing property; *In re Lennon*, 166 U. S. 553, 41 L. 1113, 17 S. Ct. 660, bill to enforce compliance with interstate commerce act; *Jones v. Florida*, 41 Fed. 71, bill by pre-emptor for injunction restraining railroad from crossing United States lands; question being complainant's right as pre-emptor; *Sowles v. Witters*, 43 Fed. 700, suit to recover property acquired by removing defendant as receiver of national bank; *Lowry v. Chicago*, 46 Fed. 86, action against interstate carrier for damages through discrimination; *Grant v. Spokane Nat. Bank*, 47 Fed. 673, action to secure application of funds in hands of national bank receiver; *Walker v. Windsor Nat. Bank*, 56 Fed. 80, 5 U. S. App. 423, suit on bond of national bank cashier. Contra, *Kings v. Lawson*, 84 Fed. 210, bill to protect homestead entryman by enjoining interference with improvements; *Starin v. New York*, 115 U. S. 257, 29 L. 390, 6 S. Ct. 31, question whether New York city possessed exclusive right to establish certain ferries; dissenting opinion in *Fergus Falls v. Fergus Falls Water Co.*, 72 Fed. 883, 26 U. S. App. 480, majority holding allegation that city resolution impaired contract obligation, did not bring case within rule.

Distinguished in *Kansas v. Bradley*, 26 Fed. 289, holding point once decided by United States Supreme Court presents no Federal question; *Pac. Gas Imp. Co. v. Ellert*, 64 Fed. 429, holding suggestion in bill that defendant will raise constitutional question, gives no jurisdiction to Federal court.

United States.—Upon formation of national government, States surrendered many attributes of sovereignty in part, and others wholly, among them exclusive power of administering all the law, civil and criminal, within their borders, pp. 263-270.

Approved in *Ex parte Virginia*, 100 U. S. 345, 25 L. 679, discussing fourteenth amendment; *In re Debs*, 158 U. S. 579, 39 L. 1101, 15 S. Ct. 904, enjoining obstruction of business of interstate railroads by boycott; *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 517, 42 L. 1129, 18 S. Ct. 688, holding State courts may take cognizance of suit by State against non-citizen, subject to right of removal; *Ohio v. Thomas*, 173 U. S. 284, 19 S. Ct. 456, affirming S. C., 82 Fed. 310, holding State laws prescribing manner of using oleomargarine do not govern use in Federal soldiers' home; *In re Neagle*, 14 Sawy. 246, 247, 254, 255, 259, 271, 39 Fed. 843, 848, 849, 851, 860, 5 L. R. A. 84, 86, 88, 92, ordering release of Federal marshal held by State authorities; *In re Iasigi*, 79 Fed. 753, holding rule that United States cannot punish common-law offense not applicable to offenses by consuls; *United States v. Boyer*, 85 Fed. 435, holding acts of Congress authorizing inspection of slaughter-houses unconstitutional; *Webb v. Dunn*, 18 Fla. 724, holding State tonnage duty unconstitutional; *Butler v. State*, 97 Ind. 382, and *State v. Boswell*, 104 Ind. 543, 4 N. E. 676, both holding provisions of Federal Constitution do not apply to criminal prosecutions within States; *Jamieson v. Indiana, etc., Oil Co.*, 128 Ind. 580, 28 N. E. 84, 12 L. R. A. 660, holding act regulating pressure of natural gas in interstate pipes, valid.

Removal of causes.—Section 643, revised statutes, providing for removal to Federal courts, before trial, of prosecutions commenced in State courts against Federal officers, on account of acts done under color of office or authority of Federal law, is constitutional, p. 271.

Reaffirmed in *Georgia v. Port*, 4 Woods, 516, 3 Fed. 120, a like case. Cited and relied on in *Strauder v. West Virginia*, 100 U. S. 312, 25 L. 667, upholding section 641, providing for removal of prosecutions against defendants denied equal rights; *Davis v. South Carolina*, 107 U. S. 599, 27 L. 575, 2 S. Ct. 639, holding prosecution against soldier detailed to assist Federal marshal, within section 643; *Dunton v. Muth*, 45 Fed. 393, holding Federal judicial power co-extensive with Federal legislative power; *In re Waite*, 81 Fed. 364, 365, releasing, on habeas corpus, pension examiner convicted in State court, for act done under color of office. Cited generally in *State v. Sullivan*, 110 N. C. 518, 14 S. E. 798, holding State court's jurisdiction ceases only on filing of petition and issuance of writ. Cited in *Railroad Tax Case*, 8 Sawy. 303, 13 Fed. 774, *arguendo*, private corporations entitled to equal protection under fourteenth amendment.

Distinguished in *Virginia v. Paul*, 148 U. S. 114, 37 L. 389, 13 S. Ct. 538, remanding criminal prosecution irregularly removed.

Removal of causes.—No mode of procedure being prescribed for trial in Federal court of prosecution removed thereto from State court. Federal court will adopt and apply State criminal laws, p. 271.

Reaffirmed in *Georgia v. Port*, 4 Woods, 519, 3 Fed. 122. Approved in *Virginia v. Paul*, 148 U. S. 120, 37 L. 391, 13 S. Ct. 541, holding Federal court, on removal, tries case upon accusation presented by State grand jury.

Miscellaneous.—*Lavin v. Emigrant, etc., Savings Bank*, 18 Blatchf. 30, 1 Fed. 669, no application.

100 U. S. 303-312, 25 L. 664, *STRAUDER v. WEST VIRGINIA*.

Civil rights.—Fourteenth amendment is one of a series of constitutional provisions having the common purpose of securing to the negro race all civil rights enjoyed by whites, and of preventing discrimination against them by State legislation, p. 307.

Cited and relied on in *Bush v. Kentucky*, 107 U. S. 118, 27 L. 357, 1 S. Ct. 632, holding denial, because of color, of right to be juror, violative of amendment; *Claybrook v. Owensboro*, 16 Fed. 302, holding law applying taxes collected from whites and negroes, respectively, to exclusive white and colored schools, void; *Board of Education v. Tinnon*, 26 Kan. 17, holding, in absence of statute, board cannot exclude negroes from white schools; *People v. King*, 110 N. Y. 425, 6 Am. St. Rep. 394, 18 N. E. 247, 1 L. R. A. 295, upholding law prohibiting exclusion of negroes from places of amusement. Cited in the following cases, holding following acts unconstitutional: *Parrott's Chinese Case*, 6 Sawy. 380, 1 Fed. 511, California constitutional prohibition of employment of Chinese labor by corporations; *In re Ah Chong*, 6 Sawy. 456, 2 Fed. 737, California statute prohibiting Chinese from fishing in State waters; *Railroad Tax Case*, 8 Sawy. 302, 303, 13 Fed. 774, California law prescribing different methods of assessing corporations and individuals; *Smith v. Louisville, etc., R. R.*, 75 Ala. 451, act creating cause of action against corporations only; *Percey v. Powers*, 51 N. J. L. 434, 14 Am. St. Rep. 695, 17 Atl. 970, holding statutory right to testify in own behalf cannot be denied on account of religious principles; *Steed v. Harvey*, 18 Utah, 374, 54 Pac. 1012, holding non-citizens of State, within its jurisdiction, entitled to equal protection of its laws. Cited generally in *Elk v. Wilkins*, 112 U. S. 101, 28 L. 646, 5 S. Ct. 45, holding unnaturalized Indian not a citizen of United States, within amendment; *United States v. Wong Kim Ark*, 169 U. S. 676, 42 L. 900, 18 S. Ct. 467, holding Chinese born in United States, citizens thereof; *In re Rodriguez*, 81 Fed. 352, holding all native-born citizens of Mexico eligible to citizenship; dissenting opinions in *Civil Rights Cases*, 109 U. S. 36, 44, 49, 27 L. 847, 850, 852, 3 S. Ct. 38, 45, 49, majority holding civil rights act, prohibiting denial of equal accommodations in inns, etc., not authorized by amendment; *King v. Gallagher*, 93 N. Y. 458, 460, 45 Am. Rep. 247, 248, note, majority opinion below. See 25 Am. St. Rep. 875, note on fourteenth amendment.

Distinguished in *Lehew v. Brummell*, 103 Mo. 551, 23 Am. St. Rep. 898, 15 S. W. 766, 11 L. R. A. 829, upholding law providing for separate schools for colored children; *King v. Gallagher*, 93 N. Y. 446, 455, 45 Am. Rep. 236, 244, holding establishment of schools for separate and exclusive use of whites and negroes, not contrary to amendment; dissenting opinion in *Attorney-General v. Abbott*, — Mich. —, 80 N. W. 381, majority holding woman ineligible as prosecuting attorney.

Constitutional law.— West Virginia act of 1873, in effect excluding negroes from juries, is in violation of fourteenth amendment, p. 309.

Cited and followed in *Neal v. Delaware*, 103 U. S. 385, 26 L. 570, holding statute excluding negroes from juries rendered inoperative by adoption of amendment; *Bush v. Kentucky*, 107 U. S. 120, 122, 27 L. 358, 359, 1 S. Ct. 634, 636 (see dissenting opinion in 107 U. S. 123, 27 L. 359, 1 S. Ct. 636), holding indictment found by grand jury selected under like statute should be set aside; *Commonwealth v. Johnson*, 78 Ky. 509, holding like statute unconstitutional; dissenting opinion in *Plessy v. Ferguson*, 163 U. S. 556, 41 L. 262, 16 S. Ct. 1145, majority opinion below; *Holden v. Hardy*, 169 U. S. 383, 42 L. 788, 18 S. Ct. 384, majority upholding Utah law prohibiting employment of miners for more than eight hours daily. See also 25 Am. St. Rep. 878, extended note on fourteenth amendment.

Distinguished in *Virginia v. Rives*, 100 U. S. 321, 25 L. 670, holding negro cannot claim right to jury composed partly of negroes; *Gisbon v. Mississippi*, 162 U. S. 580, 40 L. 1078, 16 S. Ct. 906, holding negro cannot claim colored jury as of right; *Plessy v. Ferguson*, 163 U. S. 545, 41 L. 259, 16 S. Ct. 1141, upholding Louisiana law requiring equal separate accommodations on trains for whites and negroes; *Ex parte Murray*, 66 Fed. 298, holding failure to summon colored jurors to try negro not violative of amendment; *Green v. State*, 73 Ala. 34, and *State v. Joseph*, 45 La. Ann. 905, 12 So. 935, both holding fact that venire included only whites raises no presumption of exclusion of negroes; *Vierling v. Stifel, etc., Co.*, 15 Mo. App. 131, upholding statute allowing either party right to special venire; *Nevada v. Ah Chew*, 16 Nev. 59, 40 Am. Rep. 493, holding exclusion of Mongolians from juries not violative of amendment.

Constitutional law.— Whether fourteenth amendment had any other aim than to prevent discrimination because of race or color, is doubtful, p. 310.

Approved in *Logan v. United States*, 144 U. S. 289, 36 L. 438, 12 S. Ct. 624, and *Green v. Elbert*, 63 Fed. 309, 27 U. S. App. 325, both holding amendment confers no new rights or privileges on citizens generally; *United States v. Sanges*, 48 Fed. 84, holding right to testify before Federal grand jury not right conferred by Constitution; *Dabbs v. State*, 39 Ark. 356, 43 Am. Rep. 276, holding act pro-

hibiting sale of all but certain kinds of pistols not violative of amendment; *State v. Ah Chew*, 16 Nev. 58, 40 Am. Rep. 491, holding amendment did not confer right of citizenship upon Mongolians; *Allen v. Wyckoff*, 48 N. J. L. 93, 57 Am. Rep. 550, 2 Atl. 660, holding discrimination against non-residents in game laws not violative of amendment; *McKinney v. State*, 3 Wyo. 725, 726, 30 Pac. 295, 16 L. R. A. 713, holding exclusion of women from jury not a discrimination prohibited by amendment; *In re Hall*, 50 Conn. 133, 47 Am. Rep. 627, holding right of women to be admitted as attorneys not secured by amendment; dissenting opinion in *United States v. Wong Kim Ark*, 169 U. S. 724, 42 L. 917, 18 S. Ct. 485 majority holding Chinese born in United States a citizen thereof; *Alabama, etc., v. R. v. Christian*, 82 Ala. 311, 1 So. 123, *arguendo*.

Constitutional law.—Rights or immunities created or guaranteed by Federal Constitution may be protected by Congress without express delegation of power thereto; hence power of Congress to enforce fourteenth amendment is sufficient to justify enactment of section 641, revised statutes, providing for removal to Federal courts of prosecutions against persons denied equal civil rights of citizens, p. 312.

Reaffirmed in *California v. Chue Fan*, 14 Sawy. 578, 42 Fed. 865.

Approved in *Ex parte Virginia*, 100 U. S. 345, 25 L. 679, upholding act of 1875, prohibiting race discrimination in selection of jurors; *United States v. Lancaster*, 44 Fed. 895, upholding right of Federal court to punish citizen of another State for contempt of its decree; *Dubuclet v. Louisiana*, 103 U. S. 551, 26 L. 504, holding suit to try title to office not removable on claim that negroes were deterred from voting; dissenting opinions in *Civil Rights Cases*, 109 U. S. 34, 35, 50, 27 L. 847, 852, 3 S. Ct. 38, 39, 50, majority holding civil rights act of 1875, sections 1 and 2, unconstitutional; *In re Neagle*, 135 U. S. 88, 34 L. 80, 10 S. Ct. 676, *arguendo*.

Distinguished in *California v. Chue Fan*, 14 Sawy. 583, 42 Fed. 868, holding prosecution against Chinaman for having lottery tickets, under law applying to "any person," not removable.

Removal of causes.—Where petition sets forth case for removal on ground that petitioning prisoner is denied equal rights by State law excluding negroes from juries, it is error to proceed to trial after filing thereof, or to overrule challenge to array of jury, p. 312.

Cited in *Henen v. Baltimore, etc., R. R.*, 17 W. Va. 891, holding order of lower court removing case to Federal court reviewable by State appellate court.

100 U. S. 313-338, 25 L. 667, *VIRGINIA v. RIVES*.

Removal of causes.—Where petition filed in State court, before trial, exhibits sufficient ground for removal, under section 641,

revised statutes, protecting citizens in their civil rights, cause in legal effect is removed and all subsequent proceedings by State court are void, p. 317.

Approved in *Kern v. Huidekoper*, 103 U. S. 493, 26 L. 357, holding proceedings of State court, subsequent to entry therein of transcript, void; *Virginia v. Paul*, 148 U. S. 116, 122, 37 L. 390, 392, 13 S. Ct. 539, 542, holding Federal jurisdiction depends on statements in petition; *Wagner v. Drake*, 31 Fed. 852, holding Federal court, after removal, may enjoin further proceedings of State court; *Biglew v. Nickerson*, 70 Fed. 122, 34 U. S. App. 261, 30 L. R. A. 341, holding removal merely an indirect means by which Federal court secures original jurisdiction.

Distinguished in *In re Barnesville Ry.*, 2 McCrary, 219, 4 Fed. 12, 13, holding Federal court's jurisdiction not complete, so as to hear cause, until day prescribed by statute; *California v. Chue Fan*, 14 Sawy. 578, 42 Fed. 865, holding petition of Chinaman, held for possessing lottery ticket, alleging fear of unfair trial, stated no cause for removal; *Birdseye v. Shæffer*, 37 Fed. 826, holding removing order merely suspends State court's jurisdiction, to be resumed on remanding.

Constitutional law.—Object of fourteenth amendment and of civil rights acts (§§ 1977, 1978, R. S.) is to make civil and criminal rights and responsibilities of whites and negroes identical, p. 318.

Approved in *Neal v. Delaware*, 103 U. S. 385, 26 L. 570, holding adoption of fifteenth amendment enlarged statute rendering only electors eligible to juries, to include negroes; *Claybrook v. Owensboro*, 16 Fed. 302, holding Kentucky act, discriminating between races in distribution of school fund, unconstitutional; *Davenport v. Cloverport*, 72 Fed. 694, holding act taxing whites alone for exclusive schools, unconstitutional; *Nevada v. Ah Chew*, 16 Nev. 58, 40 Am. Rep. 491, holding right of citizenship not conferred on foreign-born Chinese by amendment; *Scott v. McNeal*, 154 U. S. 45, 38 L. 901, 14 S. Ct. 1112, holding judgment that purchaser at probate sale of land of living person is entitled thereto, contrary to amendment; *McKinney v. State*, 3 Wyo. 726, 30 Pac. 295, 16 L. R. A. 713, holding amendment does not prohibit discrimination because of sex; *Holden v. Hardy*, 169 U. S. 383, 42 L. 788, 18 S. Ct. 384, upholding Utah eight-hour law, respecting miners; dissenting opinions in *Plessy v. Ferguson*, 163 U. S. 556, 41 L. 262, 16 S. Ct. 1145, majority opinion, *infra*; *People v. Gallagher*, 93 N. Y. 458, 45 Am. Rep. 247, note, majority holding establishment of separate, exclusive schools for different races not violative of amendment.

Distinguished in *Plessy v. Ferguson*, 163 U. S. 545, 41 L. 259, 16 S. Ct. 1141, holding Louisiana act, requiring railroads to provide equal, separate, exclusive accommodations for each race, not violative of amendment.

Constitutional law.—Provisions of fourteenth amendment refer to State action exclusively, not to that of individuals, p. 318.

Reaffirmed in *Claybrook v. Owensboro*, 16 Fed. 301. Cited and principle applied in Civil Rights Cases, 109 U. S. 12, 27 L. 839, 3 S. Ct. 22, 45 Am. Rep. 252, note, holding acts of 1875, prohibiting denial of equal accommodations in inns, etc., not warranted by amendment; *United States v. Harris*, 106 U. S. 639, 27 L. 294, 1 S. Ct. 609, holding section 5519, revised statutes, punishing interference with equal rights by individuals, unconstitutional; *Le Grand v. United States*, 12 Fed. 580, holding Congress lacks power to punish individuals who invade rights protected by amendment; *Smoot v. Kentucky, etc., Ry.*, 13 Fed. 344, holding discrimination in accommodations, by railroad, not within amendment; *Pacific Gas Imp. Co. v. Ellert*, 64 Fed. 430, 431, holding prohibition of taking property without due process applies to acts of persons acting under State authority; *Nashville, etc., Ry. v. Taylor*, 86 Fed. 184, holding amendment covers State action through every department of State government; *Kiernan v. Multnomah*, 95 Fed. 849, holding amendment does not cover unlawful taking of property by individual; *Ex parte Alabama*, 71 Ala. 366, holding existence of local race prejudice not ground for removal, under section 641, revised statutes; *Clark v. Maryland*, 87 Md. 660, 41 Atl. 129, holding 'semi-public educational institution may exclude negroes.

Removal of causes.—Section 641, revised statutes, providing for removals of prosecutions against defendants denied equal rights, refers only to legislative denial of such rights; hence it only authorizes removal before commencement of trial, p. 319.

Approved in *Bush v. Kentucky*, 107 U. S. 116, 117, 118, 27 L. 357, 1 S. Ct. 631, 632, 633, holding remedy of accused, if State court refuses to set aside panel, is through highest State court to Supreme Court; *In re Wood*, 140 U. S. 285, 35 L. 508, 11 S. Ct. 741, holding objection to jury should be raised in trial court and by error, not by habeas corpus to Federal courts; *Gibson v. Mississippi*, 162 U. S. 583, 40 L. 1079, 16 S. Ct. 907, holding exclusion of negroes from grand jury will not authorize removal, under section 641; *California v. Chue Fan*, 14 Sawy. 582, 583, 42 Fed. 863, holding prosecution against Chinaman for possessing lottery ticket, not removable before trial on ground of maladministration of law; *Ex parte Murray*, 66 Fed. 298, 299, denying habeas corpus on petition alleging that commissioners had failed to summon negroes for jury; *Virginia v. Paul*, 148 U. S. 114, 37 L. 389, 13 S. Ct. 538, prosecution of crimes against States may be interfered with only where removal is expressly authorized; *Neal v. Delaware*, 103 U. S. 394, 26 L. 573, *arguendo*; *Dubuclet v. Louisiana*, 103 U. S. 551, 26 L. 504, holding suit to try title to State office, because of exclusion of negroes from voting, not removable.

Removal of causes.—Petition for removal, under section 644, revised statutes, must affirm that petitioner is actually denied equal rights, not merely apprehension of subsequent denial, p. 320.

Approved in *Carter v. State*, — Tex. Crim. App. —, 48 S. W. 510, holding motion to quash indictment for exclusion of negroes from jury, supported only by defendant's affidavit, properly overruled.

Removal of causes.—When subordinate State officer, in violation of State law, undertakes to deprive defendant of equal rights, as by exclusion of negroes from jury, such denial cannot be said to be that of the trial court, justifying removal to Federal court, p. 321.

Cited in *Green v. State*, 73 Ala. 34, 35, refusing to inquire into acts of persons empowered to select jurors.

Civil rights.—Colored defendant cannot claim, as of right, to be tried by jury composed partly of negroes, p. 323.

Cited and relied on in *Gibson v. Mississippi*, 162 U. S. 580, 40 L. 1078, 16 S. Ct. 906, *State v. Brown*, 119 Mo. 536, 24 S. W. 1029, and *Lawrence v. Commonwealth*, 81 Va. 485, cases on all fours with principal case; *Bush v. Kentucky*, 107 U. S. 117, 119, 27 L. 357, 1 S. Ct. 631, 633, holding fact that panel consisted solely of whites, not ground for setting same aside; *Cooper v. State*, 64 Md. 47, 20 Atl. 988, holding fact that jury consisted exclusively of whites, not in itself a denial of rights; *Nevada v. Ah Chew*, 16 Nev. 60, 40 Am. Rep. 493, holding Chinese not entitled to jury composed partly of Chinese; *Cavitt v. State*, 15 Tex. App. 199, holding fact that grand jury was composed exclusively of whites no denial of rights; *People v. Hampton*, 4 Utah, 261, 262, 9 Pac. 510, holding Mormon not entitled to jury composed partly of Mormons; dissenting opinion in *Neal v. Delaware*, 103 U. S. 398, 401, 402, 26 L. 574, 575, majority holding negroes unlawfully excluded from jury. See also 25 Am. St. Rep. 878, extended note on fourteenth amendment.

Mandamus does not lie to control judicial discretion, except where same has been abused, p. 323.

Cited in *State v. Barnes*, 25 Fla. 304, 23 Am. St. Rep. 521, 5 So. 725, refusing mandamus to control comptroller's discretion in rejecting bond; dissenting opinion in *State v. Ross*, 118 Mo. 77, 23 S. W. 210, majority holding order removing receiver not assailable in mandamus on account of judge's kinship with stockholders.

Mandamus lies where lower court has acted outside of the exercise of its discretion or of its jurisdiction, p. 324.

Cited and applied in *In re Washington, etc.*, R. R., 140 U. S. 95, 35 L. 341, 11 S. Ct. 674, holding mandamus proper remedy for unauthorized allowance of interest, error not lying; *Virginia v. Paul*, 148 U. S. 123, 37 L. 392, 13 S. Ct. 542, awarding mandamus to com-

pel remanding of prosecution improperly before Federal court; *Gaines v. Rugg*, 148 U. S. 243, 37 L. 437, 13 S. Ct. 617, awarding mandamus where lower court improperly entered judgment of reversal; *Grinsfelder v. Street Ry.*, 19 Wash. 524, 67 Am. St. Rep. 744, 53 Pac. 721, 41 L. R. A. 517, holding duty of street railway to continue operation enforceable by mandamus. See also 89 Am. Dec. 739, extended note on mandamus.

Mandamus.—Previous demand is unnecessary where mandamus is sought to compel performance of duty of public nature, per *Field, J.*, concurring, p. 330.

Cited in dissenting opinion in *People v. Board of Canvassers*, 129 N. Y. 385, 14 L. R. A. 655, and *n.*, majority denying writ to compel issuance of election certificate by one not entitled thereto.

100 U. S. 339-370, 25 L. 667, EX PARTE VIRGINIA.

Courts.—In general, the issuance of habeas corpus by Supreme Court, directed to an inferior Federal court, is an exercise of appellate jurisdiction, p. 341.

Reaffirmed in *Ex parte Hung Hang*, 108 U. S. 553, 27 L. 812, 2 S. Ct. 864, holding Supreme Court can only issue habeas corpus under its appellate jurisdiction.

Habeas corpus.—While habeas corpus cannot generally be made to subserve purposes of writ of error, yet where prisoner is held without lawful authority, and under order beyond jurisdiction of inferior Federal court, Supreme Court will, in favor of liberty, grant writ, not to review whole case, but to examine authority of court below to act at all, p. 343.

Cited and principle applied in *Ex parte Rowland*, 104 U. S. 612, 26 L. 864, holding proceedings for contempt of valid order not reviewable on habeas corpus; *Ex parte Crouch*, 112 U. S. 180, 28 L. 691, 5 S. Ct. 97, holding habeas corpus cannot be used to prevent possible future errors; *In re Ayers*, 123 U. S. 486, 31 L. 223, 8 S. Ct. 172, releasing prisoner committed for contempt in refusing to obey void order; *In re Mills*, 135 U. S. 270, 34 L. 110, 10 S. Ct. 764, releasing prisoner sentenced to penitentiary, for offense punishable by "imprisonment" only; *In re Mayfield*, 141 U. S. 116, 35 L. 638, 11 S. Ct. 941, releasing Cherokee Indian imprisoned for act not criminal by Cherokee law; *In re Bonner*, 151 U. S. 256, 38 L. 151, 14 S. Ct. 325, releasing prisoner illegally sentenced by Federal court to State penitentiary; *In re Peraltareavis*, 8 N. Mex. 31, 41 Pac. 539, holding sufficiency of indictment cannot be tried on habeas corpus in place of demurrer below; *In re Christian*, 82 Fed. 202, releasing prisoner not sentenced in conformity to statute as to extent of punishment; *Milliken v. City Council*, 54 Tex. 392, holding mandamus will afford relief when applicant is held under void process;

Ex parte Degener, 30 Tex. App. 576, holding only ground for release of person sentenced by another court, is want of jurisdiction over person or cause; Ex parte Mooney, 26 W. Va. 40, 53 Am. Rep. 62, holding prisoner cannot be discharged on habeas corpus, however erroneous judgment may be, if court had jurisdiction; *Miskimins v. Shaver*, — Wyo. —, 58 Pac. 417, holding appellate court, on habeas corpus, may inquire into power of lower court to commit for contempt. Cited generally in *In re Mineau*, 45 Fed. 189, holding marshal holding criminal warrant may apply for habeas corpus for release of prisoner held under civil execution; *United States v. Doherty*, 27 Fed. 733, *arguendo*; dissenting opinion in *In re Neagle*, 135 U. S. 77, 34 L. 76, 10 S. Ct. 673, majority holding one detained for act done in pursuance of Federal law may be brought before Federal court on habeas corpus; Ex parte Henshaw, 73 Cal. 509, 15 Pac. 120, majority holding judgment declaring office vacant, although founded on repealed statute, unassailable on habeas corpus. See 26 Am. Dec. 40, note, 23 Am. St. Rep. 108, extended note.

Constitutional law.—Purpose of thirteenth and fourteenth amendments was to confer upon colored race perfect equality of civil rights with whites, p. 345.

Cited and relied on in *Claybrook v. Owensboro*, 16 Fed. 302, holding law discriminating between races in distribution of school fund, unconstitutional; *People v. King*, 110 N. Y. 425, 6 Am. St. Rep. 394, 18 N. E. 247, 1 L. R. A. 295, upholding act prohibiting exclusion by reason of color, from equal accommodations in places of amusement. The following cases cite the principal case generally as to scope of protection to equal rights of citizens: *Holden v. Hardy*, 169 U. S. 383, 42 L. 788, 18 S. Ct. 384, upholding Utah eight-hour mining law; *United States v. Wong Kim Ark*, 169 U. S. 676; 42 L. 900, 18 S. Ct. 467, holding Chinese born in United States, of alien parents, a citizen; *Williams v. Mississippi*, 170 U. S. 225, 42 L. 1016, 18 S. Ct. 588, holding unequal and discriminating administration of impartial law, within prohibition; *In re Parrott*, 6 Sawy. 389, 1 Fed. 521, holding California act of 1880, prohibiting employment of Chinese, unconstitutional; *Railroad Tax Case*, 8 Sawy. 303, 13 Fed. 774, *arguendo*, California constitutional provisions discriminating between corporations and individuals in assessment, unconstitutional; *United States v. Sanges*, 48 Fed. 84, holding thirteenth and fourteenth amendments confer no new rights; *Green v. Elbert*, 63 Fed. 309, 27 U. S. App. 325, denying jurisdiction of action for damages for conspiracy to disbar in State courts; *In re Yot Sang*, 75 Fed. 984, holding law taxing hand laundries more than steam laundries, unconstitutional; *In re Grice*, 79 Fed. 645, holding Texas anti-trust law of 1889, unconstitutional; *Speer v. Mayor*, 85 Ga. 67, 11 S. E. 808, 9 L. R. A. 408, upholding act to

assess property-owners for sidewalk improvements; *Commonwealth v. Johnson*, 78 Ky. 511, holding negro not entitled to demand jury composed partly of negroes; *Nevada v. Ah Chew*, 16 Nev. 58, 40 Am. Rep. 491, holding amendment does not guarantee Chinese defendant trial by jury partly composed of Chinamen; *Ex parte Rollins*, 80 Va. 317, discharging prisoner committed under void statute, discriminating against non-resident book agents; *McKinney v. State*, 3 Wyo. 726, 30 Pac. 295, 16 L. R. A. 713, holding exclusion of women from jury on prosecution of a man, does not violate amendment. Cited in dissenting opinions in *Civil Rights Cases*, 109 U. S. 49, 27 L. 852, 3 S. Ct. 48, majority holding civil rights act of 1875, sections 1, 2, unconstitutional; *King v. Gallagher*, 93 N. Y. 458, 460, majority opinion below; *Green v. State*, 73 Ala. 34, *arguendo*. See 45 Am. Rep. 247, note, and 25 Am. St. Rep. 875, monographic note on fourteenth amendment.

Distinguished in *Neal v. Delaware*, 103 U. S. 385, 397, 26 L. 570, 574, holding exclusion of negroes from jury, in absence of discriminating State law, no ground for removal; *Blake v. McClung*, 172 U. S. 260, 19 S. Ct. 173, upholding Tennessee act of 1877, giving preference to resident creditors of foreign corporations within State; *Board of Education v. Tinnon*, 26 Kan. 17, holding separate, exclusive schools may be established for each race; *King v. Gallagher*, 93 N. Y. 446, 45 Am. Rep. 236, upholding establishment of equal, separate, exclusive schools for each race.

Constitutional law.—Whoever, by virtue of public position under State government, deprives another of property, life, or liberty, without due process of law, or takes away equal protection of law, violates inhibitions of fourteenth amendment, and his act is that of the State, p. 347.

Cited and principle applied in *Yick Wo v. Hopkins*, 118 U. S. 374, 30 L. 228, 6 S. Ct. 1073, where municipal ordinance was so administered as to discriminate against Chinese laundries; *Scott v. McNeal*, 154 U. S. 45, 38 L. 901, 14 S. Ct. 1112, where Probate Court had appointed administrator of estate of living person; *Chicago, etc., R. R. v. Chicago*, 166 U. S. 234, 41 L. 984, 17 S. Ct. 583, holding judgment authorized by statute whereby property is taken without compensation, not due process; *In re Lee Tong*, 9 Sawy. 336, 18 Fed. 255, ordering release of prisoner held on warrant issued under void law; *Nashville, etc., Ry. v. Taylor*, 86 Fed. 184, 185, holding State action within amendment not limited to legislation as enacted. Cited to proposition that acts must be those of State in order to violate amendment; *Smoot v. Kentucky Ry.*, 13 Fed. 343, holding exclusion of negro from car by rule of railroad, not violative of amendment; *In re Ziebold*, 23 Fed. 792, ordering release of person imprisoned for refusal to testify before county attorney under Kansas prohibition law; *Pacific Gas*,

etc., *Co. v. Ellert*, 64 Fed. 430, 431, where city supervisors were about to fill in basin belonging to plaintiff; *Iron Mt. R. Co. v. Memphis*, 96 Fed. 121, 122, holding passage of resolution by city, declaring forfeiture of prior contract and intention to take property, act of State; *Clark v. Maryland Inst.*, 87 Md. 661, 41 Atl. 129, holding private school, receiving State aid, may exclude negroes; dissenting opinion in *Civil Rights Cases*, 109 U. S. 57, 58, 59, 27 L. 855, 3 S. Ct. 54, 55, majority holding civil rights act of 1875, sections 1, 2, unconstitutional; *Powell v. Pennsylvania*, 127 U. S. 691, 32 L. 259, 8 S. Ct. 1259, majority upholding Pennsylvania act of 1885, prohibiting manufacture of oleomargarine. See 45 Am Rep. 248, 252, note, on fourteenth amendment.

Distinguished in *In re Ah Lee*, 6 Sawy. 413, 5 Fed. 902, holding person imprisoned under valid law, but by judge appointed under unconstitutional law, not imprisoned without due process. Criticised in *Green v. State*, 73 Ala. 36, holding violation of equal rights, by subordinate officer, not the act of the State.

Jury.—Selection of jurors, whether made by judge or not, is merely a ministerial act, p. 348.

Jury.—Section 4, act of March 1, 1875, prohibiting race discrimination in selection of jurors, is constitutional, hence habeas corpus denied State judge held under Federal indictment for violation thereof, p. 349.

Approved in *Logan v. United States*, 144 U. S. 289, 36 L. 438, 12 S. Ct. 625, holding every right guaranteed by Constitution may be protected by Congress; dissenting opinions in *Bush v. Kentucky*, 107 U. S. 123, 27 L. 359, 1 S. Ct. 636, majority opinion below; *Civil Rights Cases*, 109 U. S. 44, 27 L. 850, 3 S. Ct. 45, majority opinion below; *Plessy v. Ferguson*, 163 U. S. 556, 41 L. 262, 16 S. Ct. 1145, majority upholding Louisiana law requiring railroads to provide separate, equal accommodations for each race. See 45 Am. Rep. 254, note.

Distinguished in *Bush v. Kentucky*, 107 U. S. 118, 27 L. 357, 1 S. Ct. 632, holding, in absence of discriminatory statute, prisoner cannot allege, before trial, denial of equal rights; *Civil Rights Cases*, 109 U. S. 12, 15, 27 L. 839, 840, 3 S. Ct. 22, 24, holding civil rights act of 1875, sections 1, 2, prohibiting denial of equal accommodations in inns, etc., unconstitutional.

Constitutional law.—Scope of fourteenth amendment discussed and held to extend to equal protection of civil as distinguished from political rights, per Field, J., dissenting, p. 367.

Cited in dissenting opinions in *Strauder v. West Virginia*, 100 U. S. 312, 25 L. 667, and *Neal v. Delaware*, 103 U. S. 408, 409, 26 L. 578, holding congressional legislation interfering with selection of jurors in State courts, unwarranted. See 25 Am. St. Rep. 877, note.

Constitutional law.—United States has no constitutional authority to compel State officers to perform their duties, per Field, J., dissenting, p. 359.

Approved in *Sturtevant v. Armsby Co.*, 66 N. H. 559, 49 Am. St. Rep. 629, 23 Atl. 368, holding assignment under foreign insolvency law will not prevail against subsequent attachment of citizen or non-resident; *Percey v. Powers*, 51 N. J. L. 434, 14 Am. St. Rep. 695, 17 Atl. 970, holding right to testify in own behalf a civil right not deniable on account of religious belief; *Brown v. Stewart*, 60 Wis. 592, 50 Am. Rep. 391, 19 N. W. 431, holding right of extradition rests on comity of States; *Green v. State*, 73 Ala. 37, *arguendo*.

Trial.—Duties of county judge in selection of jurors are judicial, per Field, J., dissenting, p. 359.

Cited, *arguendo*, in *Philbrook v. Newman*, 85 Fed. 145, holding judges not liable to civil suit for disbarment of attorney.

100 U. S. 371-399, 25 L. 717, EX PARTE SIEBOLD.

Habeas corpus.—Party imprisoned under sentence of Federal court upon conviction of crime created by unconstitutional act of Congress, may be discharged by Supreme Court on habeas corpus, although latter has no jurisdiction by error over judgment, p. 374.

Cited and principle applied in *Ex parte Royall*, 117 U. S. 248, 29 L. 870, 6 S. Ct. 738, holding conviction under unconstitutional law no legal cause of imprisonment; *In re Ayers*, 123 U. S. 486, 31 L. 223, 8 S. Ct. 172, holding prisoner held for contempt of unauthorized orders of court, should be released on habeas corpus; *Hans v. Nielsen*, 131 U. S. 182, 33 L. 120, 9 S. Ct. 674, discharging prisoner sentenced under valid law, but to unconstitutional penalty; *Matter of Maguire*, 57 Cal. 609, 40 Am. Rep. 130, discharging petitioner convicted under unconstitutional ordinance; *Ex parte Rollins*, 80 Va. 317, holding act unconstitutional and discharging petitioner; *In re Wright*, 3 Wyo. 488, 31 Am. St. Rep. 104, 27 Pac. 568, 13 L. R. A. 752, holding constitutionality of statute under which petitioner was convicted examinable in habeas corpus; *Miskimins v. Shaver*, — Wyo. —, 58 Pac. 417, holding on habeas corpus from commitment for contempt, court may examine whether acts constituted contempt, collecting authorities. Cited, *arguendo*, in *Babb v. Bruere*, 23 Mo. App. 608, holding judgment irregular according to facts, may be corrected by appellate court; *Milliken v. Council*, 54 Tex. 392, issuing mandamus to restore mayor unlawfully removed.

Cited, but application refused, in *Ex parte Terry*, 128 U. S. 305, 32 L. 409, 9 S. Ct. 79, refusing to discharge one committed for contempt of Federal court; *In re Supervisors of Registration*, 53 Fed. 228, refusing to appoint election supervisors, petition being defective. Distinguished in *Ex parte Hanson*, 11 Sawy. 661, 28 Fed.

130, refusing to discharge petitioner held under State law, not unconstitutional on its face; *In re Terry*, 13 Sawy. 463, refusing to discharge party committed for forcible resistance to marshal in presence of court; *In re Taylor*, 7 S. Dak. 388, 58 Am. St. Rep. 849, 64 N. W. 256, 45 L. R. A. 148, and n., holding imposition of excessive sentence by court having jurisdiction, does not avoid legal portion of sentence.

Courts.—**Habeas corpus** proceedings to relieve prisoner sentenced by inferior court are within appellate jurisdiction of Supreme Court, p. 374.

Approved in *Ex parte Hung Hang*, 108 U. S. 553, 27 L. 812, 2 S. Ct. 864, holding Supreme Court can issue habeas corpus only under appellate jurisdiction; *State v. Neel*, 48 Ark. 287, 3 S. W. 632, holding State court may, in exercise of appellate jurisdiction, review proceedings of inferior judges at chambers on habeas corpus.

Habeas corpus cannot be used as a mere writ of error, p. 375.

Approved in *Ex parte Crouch*, 112 U. S. 180, 28 L. 691, 5 S. Ct. 97, holding habeas corpus cannot be used to prevent possible future errors; *Stevens v. Fuller*, 136 U. S. 478, 34 L. 463, 10 S. Ct. 913, holding errors or irregularities in proceedings before commissioner, not reviewable on habeas corpus; *In re Frederick*, 149 U. S. 75, 37 L. 656, 13 S. Ct. 795, holding State court's conclusions of law or fact not reviewable on habeas corpus; *In re Morris*, 40 Fed. 825, holding on habeas corpus, merits of commissioner's decision will not be examined; *In re Jordan*, 49 Fed. 244, holding evidence of facts bearing on justice of judgment cannot be heard on habeas corpus; *In re King*, 51 Fed. 435, refusing to examine, on habeas corpus, question of qualification of jurors; *In re Rowe*, 77 Fed. 166, 40 U. S. App. 516, holding technical defect in indictment will not authorize discharge on habeas corpus; *State v. Neel*, 48 Ark. 289, 3 S. W. 633, reaffirming rule; *Lowery v. Howard*, 103 Ind. 442, 3 N. E. 126, holding sentence on plea of guilty, without intervention of jury, error, and not attachable by habeas corpus; *Elsner v. Shrigley*, 80 Iowa, 36, 45 N. W. 394, holding failure of judgment to state limit of imprisonment, not reviewable on habeas corpus; *Sennott's case*, 146 Mass. 492, 4 Am. St. Rep. 345, 16 N. E. 449, holding irregularity in proceedings or sentence cannot be inquired into on habeas corpus; *In re Thompson*, 9 Mont. 389, 23 Pac. 934, holding irregularities in verdict and judgment not reviewable on habeas corpus; *In re Ream*, 54 Neb. 669, 75 N. W. 24, holding conviction not void whatever errors preceded its rendition, where court had jurisdiction of person and cause; *State v. Barnes*, 3 N. Dak. 137, 54 N. W. 543, holding rulings on trial not reviewable on habeas corpus; *In re Fitton*, 68 Vt. 300, 35 Atl. 320, holding one confined on sentence following conviction will not be released unless conviction was void; *Ex parte Marx*, 86 Va. 44, 9 S. E. 477, holding

sufficiency of evidence cannot be investigated on habeas corpus; *In re Nolan*, 21 Wash. 398, 58 Pac. 223, holding prisoner not having appealed in time, cannot attack judgment on habeas corpus; *In re McDonald*, 4 Wyo. 162, 33 Pac. 22, holding validity of judgment or imprisonment pending payment of fine not questionable, on ground of indefiniteness; dissenting opinion in *In re Neagle*, 135 U. S. 77, 34 L. 76, 10 S. Ct. 673, majority discharging petitioner, held by State for homicide in defense of Federal judge; *Miskimins v. Shaver*, — Wyo. —, 58 Pac. 415, *arguendo*. See 26 Am. Dec. 40, extended note.

Cited, but application refused, in *Hans v. Nielsen*, 131 U. S. 184, 33 L. 120, 9 S. Ct. 674, holding denial of constitutional right not mere error. Distinguished in *In re Peraltareavis*, 8 N. Mex. 31, 41 Pac. 539, refusing to review sufficiency of information.

Habeas corpus.—Only ground upon which courts, in absence of special statute, will relieve on habeas corpus prisoner under sentence of another court, is want of jurisdiction of latter, p. 375.

Approved in *Ex parte Wilson*, 114 U. S. 421, 29 L. 90, 5 S. Ct. 937, affirming S. C., 18 Fed. 36, refusing discharge because of sentence to penitentiary outside of State; *In re Frederich*, 149 U. S. 76, 37 L. 656, 13 S. Ct. 795, holding remedy by habeas corpus limited to cases where sentence is clearly rendered without jurisdiction; *Andrews v. Swartz*, 156 U. S. 276, 39 L. 423, 15 S. Ct. 391, holding repugnancy of State statute to State Constitution will not authorize habeas corpus from Federal court; *Ex parte Ulrich*, 43 Fed. 663, holding Federal court, on habeas corpus, cannot declare State judgment void, court having jurisdiction; *Delgado v. Chavez*, 5 N. Mex. 654, 25 Pac. 950, refusing to release officer imprisoned for disobeying partially irregular mandate; *In re Peraltareavis*, 8 N. Mex. 30, 41 Pac. 538 (see dissenting opinion in 8 N. Mex. 35, 41 Pac. 540), holding commitment not reviewable where court had jurisdiction of defendant and offense; *Ex parte Keeler*, 45 S. C. 542, 55 Am. St. Rep. 789, 23 S. E. 866, 31 L. R. A. 679, holding party adjudged guilty of contempt will not be released unless proceedings are void wholly or in part; *Ex parte Degener*, 30 Tex. App. 574, 17 S. W. 1113, reaffirming rule; *Ex parte Hays*, 15 Utah, 82, 47 Pac. 614, holding one convicted by court having jurisdiction, cannot be released on habeas corpus; dissenting opinion in *In re Coy*, 127 U. S. 760, 32 L. 281, 8 S. Ct. 1273, majority refusing to discharge petitioner held for offense against election laws, State and Federal; *In re Anderson*, 94 Fed. 493, refusing to discharge Federal marshal arrested for trespass while serving process outside his district. See 26 Am. Dec. 41, extended note.

Habeas corpus.—Jurisdiction of committing court, authority to render judgment, and constitutionality of law under which conviction was had, may be investigated on habeas corpus, p. 377.

Approved in *Ex parte Rowland*, 104 U. S. 612, 26 L. 864, discharging petitioner held for contempt of mandamus in excess of court's jurisdiction; *In re Coy*, 127 U. S. 758, 32 L. 281, 8 S. Ct. 1272, *Hans v. Nielsen*, 131 U. S. 183, 33 L. 120, 9 S. Ct. 674, *Swift v. Sutphin*, 39 Fed. 637, *In re Barber*, 39 Fed. 647, *In re Petition of Edward Kline*, 6 Ohio C. C. 216, *Commonwealth v. Huntley*, 156 Mass. 237, 30 N. E. 1128, 15 L. R. A. 841, and *Ex parte Smith*, 135 Mo. 228, 58 Am. St. Rep. 578, 36 S. W. 629, 33 L. R. A. 607, all holding court, on habeas corpus may review constitutionality of act under which petitioner was committed; *United States v. Dohertry*, 27 Fed. 733, holding acts of special tribunals examinable collaterally as to jurisdiction; *Ex parte Hollis*, 59 Cal. 407, holding question of authority of convicting court examinable on habeas corpus; *Ex parte Rosenblatt*, 19 Nev. 442, 3 Am. St. Rep. 902, 14 Pac. 299, holding "drummer's license" act, under which petitioner was committed, void, and releasing him; *Ex parte Mato*, 19 Tex. App. 116, overruling former Texas decisions, and holding constitutionality of law questionable, on habeas corpus, not only after indictment, but after conviction; *Ex parte Degener*, 30 Tex. App. 575, 576, 17 S. W. 1114, discharging grand jury, committed for contempt for serving judge; dissenting opinions in *Ex parte Henshaw*, 73 Cal. 509, 15 Pac. 120, majority holding erroneous findings not collaterally attackable on habeas corpus; *Ex parte Bönninghausen*, 91 Mo. 305, 1 S. W. 763, holding habeas corpus will not lie to test constitutionality of act under which petitioner was committed, where court had jurisdiction; *Ex parte Bönninghausen*, 21 Mo. App. 271, holding party convicted of violating city ordinance will not be discharged on sole ground of unconstitutionality thereof. See 26 Am. Dec. 48, extended note, and 23 Am. St. Rep. 110, monographic note on collateral attacks on judgments.

Distinguished in *People v. District Court*, — Colo. —, 58 Pac. 609, 610, and *Ex parte Bowler*, 16 Mo. App. 21, both holding constitutionality of act not reviewable on habeas corpus, jurisdiction being original.

Elections.—Under its constitutional power to regulate elections for senators and representatives, Congress, without assuming exclusive control of whole subject, may alter or add to regulations made by States, pp. 383, 385.

Cited in *Ex parte Yarbrough*, 110 U. S. 662, 28 L. 277, 4 S. Ct. 157, holding power to regulate congressional elections not annulled because of simultaneous State election.

Distinguished in *Ex parte Perkins*, 29 Fed. 905, holding fact that representative is to be elected, does not authorize regulation of election in other matters.

Constitutional law.—Where States and National government possess concurrent authority, that of latter is paramount; hence,

congressional regulations of elections for Congress supersede those of State, where inconsistent, pp. 385-392.

Approved in *United States v. Conway*, 18 Blatchf. 569, 6 Fed. 52, holding State law no excuse for interference with Federal election officer; *Ex parte Geissler*, 9 Biss. 497, 4 Fed. 191, denying right of State to interfere with Federal election supervisor; *In re Appointment of Supervisors*, 52 Fed. 262, holding Georgia registration law void, as conflicting with section 2005, revised statutes; *In re Massey*, 45 Fed. 632, holding State election laws cannot justify refusal to produce ballots before Federal grand jury; *In re Huttman*, 70 Fed. 703, holding revenue collector cannot be compelled to divulge records in State court, contrary to departmental regulations.

Elections.—Under its constitutional power to regulate elections for Congress, Congress may pass laws punishing State election officers for committing frauds at such elections, p. 388.

Approved in *In re Coy*, 127 U. S. 743, reprinting S. C., 31 Fed. 804, holding Congress may require State officers to perform duties under State laws at congressional elections; *United States v. Bader*, 4 Woods, 190, 16 Fed. 117, holding fraudulent addition to list of voters punishable under section 5515, revised statutes; *United States v. O'Connor*, 31 Fed. 452, holding Congress may impose penalties for violating State election laws at congressional election; *United States v. Kelsey*, 42 Fed. 883, reaffirming rule.

Elections.—Congress, by refraining from altering State laws respecting congressional elections, has in effect adopted them, and has power to provide additional means for their enforcement, p. 389.

Approved in *United States v. Coy*, 32 Fed. 542, 543, holding violation of State election law at congressional election, an offense against United States under section 5515, revised statutes; *Sowles v. Witters*, 46 Fed. 499, holding State law respecting enforcement of judgments, adopted by Federal court, becomes law of United States; *In re Kelly*, 71 Fed. 547, holding State criminal laws may be adopted by Federal government for land acquired within State.

Distinguished in dissenting opinion in *In re Coy*, 127 U. S. 761, 762, 32 L. 282, 8 S. Ct. 1274, majority refusing to discharge petitioner held for violation of State election laws.

Elections.—Person owing duty to two sovereigns is amenable to both for its performance, hence; State election officers are liable to United States as well as to State, for commission of fraud in congressional election, p. 391.

Approved in *Cross v. North Carolina*, 132 U. S. 139, 33 L. 290, 10 S. Ct. 49, holding same act may constitute offense equally against United States and State; *In re Green*, 134 U. S. 380, 33 L. 953, 10 S. Ct. 587, upholding concurrent jurisdiction of State over

indictment for illegal voting at presidential election; *United States v. M'Bosley*, 29 Fed. 898, holding indictment for bribery at congressional election need not allege that same was to influence vote for representative; *Mason v. State*, 55 Ark. 535, 18 S. W. 829, holding State courts have jurisdiction to punish fraud at election for presidential electors; *State v. Oleson*, 26 Minn. 518, 5 N. W. 969, holding conviction under city ordinance no bar to indictment for same act under State law; *People v. Welch*, 141 N. Y. 277, 38 Am. St. Rep. 800, 36 N. E. 331, 24 L. R. A. 121, upholding concurrent jurisdiction of State to punish crimes committed on State navigable waters.

Distinguished in *United States v. Morrissey*, 32 Fed. 150, denying jurisdiction of offense against State election laws not affecting congressional election; *In re Loney*, 134 U. S. 375, 33 L. 951, 10 S. Ct. 585, denying State jurisdiction of complaint for perjury, in falsely testifying upon contested congressional election; dissenting opinion in *In re Neagle*, 135 U. S. 93, 94, 34 L. 82, 10 S. Ct. 678, 679, majority discharging marshal held for homicide in defense of Federal judge.

United States.—Relations of National and State governments discussed, pp. 391-394.

Cited in *In re Neagle*, 135 U. S. 60, 34 L. 70, 10 S. Ct. 666, reprinted in *In re Neagle*, 14 Sawy. 301, holding assault on Federal judge, breach of peace of United States, as distinguished from peace of State; *Logan v. United States*, 144 U. S. 294, 36 L. 440, 12 S. Ct. 627, holding United States bound to protect all persons in their custody throughout country; *In re Debs*, 158 U. S. 579, 39 L. 1101, 15 S. Ct. 904, upholding Federal right to enjoin obstruction of interstate commerce by strikers; *Ohio v. Thomas*, 173 U. S. 284, 19 S. Ct. 456, affirming S. C., 82 Fed. 310, holding quartermaster of Soldiers' Home not amenable to State law regulating use of oleomargarine; *Railroad Tax Case*, 8 Sawy. 304, 13 Fed. 775, holding State cannot withdraw corporations from guaranties of Federal Constitution; *Spring Valley Water Works v. Bartlett*, 8 Sawy. 560, 16 Fed. 619, holding ordinance appearing on its face to violate Constitution, cannot cloud rights of parties; *In re Neagle*, 14 Sawy. 246, 252, 253, 260, 266, 39 Fed. 843, 847, 852, 5 L. R. A. 84, 86, 89, discharging Federal marshal held by State for homicide committed in defense of Federal judge, discussing relations of States and government; *United States v. Fullbart*, 47 Fed. 806, discharging marshal arrested for using force in executing Federal process; *United States v. Debs*, 64 Fed. 749, 751, holding Federal government may execute its powers on every foot of American soil; *Kelly v. Georgia*, 68 Fed. 654, discharging Federal marshal arrested by State authorities for killing while discharging duty; *United States v. Flournoy, etc., Co.*, 69 Fed. 893, holding power of government to enforce its laws and treaties co-extensive with soil; *Woods v. Drake*, 70 Fed.

883, holding Federal courts proper tribunals for adjudicating legality of acts of Federal officers; *United States v. Mullin*, 71 Fed. 686, holding executive department, in pursuance of duty to protect Indians in occupancy of lands, may issue necessary processes; *Jamieson v. Indiana Gas, etc., Co.*, 128 Ind. 580, 28 N. E. 84, 12 L. R. A. 660, holding regulation of pressure of natural gas in transportation, valid exercise of State police power; *Brown v. Stewart*, 60 Wis. 592, 50 Am. Rep. 391, 19 N. W. 431, discussing rights of States respecting extradition.

Constitutional law.—Congress has constitutional power to vest appointment of election supervisors in Circuit Courts, and in so doing does not impose performance of a non-judicial duty, p. 398.

Approved in *People v. Hoffman*, 116 Ill. 603, 5 N. E. 603, upholding State election law of 1885, empowering County Courts to appoint election commissioners; *Oregon v. George*, 22 Or. 158, 29 Am. St. Rep. 594, 29 Pac. 360, 16 L. R. A. 742, and n., upholding act authorizing judges to appoint bridge commissioners.

Distinguished in *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 593, 596, 37 Atl. 1085, 1086, 39 L. R. A. 799, 800, holding act conferring power to regulate location, etc., of street railways, upon superior courts, void.

Elections.—Enforcement acts of 1870, 1871 (§§ 5515, 5522, 2011, 2012, 2016, 2017, 2021, 2022, R. S.), regulating elections for Congress, and punishing interference with, and fraud in, same, are constitutional; hence, State election officer convicted thereunder, will not be discharged on habeas corpus, p. 399.

Approved in *Ex parte Clarke*, 100 U. S. 401, 402, 25 L. 716, a like case; *United States v. Gale*, 109 U. S. 66, 27 L. 858, 3 S. Ct. 2, reaffirming validity of enforcement act; *Ex parte Morrill*, 13 Sawy. 329, 35 Fed. 266, discharging Federal marshal held by State for making arrest without process, at congressional election; *People v. Hoffman*, 116 Ill. 608, 5 N. E. 606, upholding State election law of 1885.

Distinguished in *United States v. Seaman*, 23 Blatchf. 219, 23 Fed. 884, holding indictment under enforcement act, fraudulently attempting to vote, must allege attempt to vote for congressman; *United States v. Kelsey*, 42 Fed. 884, where indictment was fatally defective.

100 U. S. 399-422, 25 L. 715, EX PARTE CLARKE.

The following cases cite to the first syllabus point under *Ex parte Siebold*, ante: *Ex parte Buskirk*, 72 Fed. 22, 25 U. S. App. 613, releasing, on habeas corpus, party committed by court for act forbidden after commission thereof; *Matter of Maguire*, 57 Cal. 609, 40 Am. Rep. 130, holding there can be no valid conviction upon in-

valid ordinance. As to the fifth syllabus point under *Ex parte Siebold*, ante: *Babb v. Bruere*, 23 Mo. App. 608, arguendo, judgment, irregular according to facts, correctible by appellate court; dissenting opinion in *Ex parte Henshaw*, 73 Cal. 509, 15 Pac. 120, majority holding erroneous findings not collaterally attackable on habeas corpus. As to the eighth syllabus point under *Ex parte Siebold*, ante: *In re Coy*, 127 U. S. 743, reprinting S. C., 31 Fed. 804, holding Congress may compel State officers to perform duties under State laws at congressional elections; *United States v. Bader*, 4 Woods, 190, 16 Fed. 117, holding fraudulent addition to list of voters punishable under revised statutes, section 5515; *United States v. Kelsey*, 42 Fed. 883, reaffirming statement. As to the ninth syllabus point in *Ex parte Siebold*, ante: *In re Coy*, 127 U. S. 752, 32 L. 279, 8 S. Ct. 1269 (see dissenting opinion in 127 U. S. 761, 32 L. 282, 8 S. Ct. 1274), sustaining, on habeas corpus, jurisdiction of Federal court to punish for offense against State election laws at congressional election; *United States v. Coy*, 32 Fed. 542, 543, holding violation of State election law at congressional election, a Federal offense. Cited, but denying application of point, in twelfth syllabus, *Ex parte Siebold*, ante: *In re Supervisors, etc.*, 53 Fed. 228, refusing to appoint Federal election supervisors, petition being defective.

Habeas corpus.—Supreme Court may proceed upon habeas corpus issued by single justice, and upon return, referred by him to court, p. 403.

Followed in *In re Fitton*, 45 Fed. 472, holding application for habeas corpus may be made to single judge, and disposed of by court; *Bennett v. Barber*, 4 Wyo. 64, 32 Pac. 17, holding single justice may issue alternative mandamus in vacation.

Habeas corpus.—Mere errors, such as defects in form in making charge, are not cognizable on habeas corpus, p. 403.

Cited in *Delgado v. Chavez*, 5 N. Mex. 654, 25 Pac. 950, holding officer imprisoned for disobeying partly irregular mandamus, cannot be discharged on habeas corpus.

Elections.—Congress has constitutional power to enact law punishing State election officers for violating duty under State statute at congressional elections; hence, section 5575, revised statutes (enforcement act), is valid, and officer convicted thereunder will not be discharged on habeas corpus, p. 404.

Approved in *United States v. Gale*, 109 U. S. 66, 27 L. 858, 3 S. Ct. 2, reaffirming validity of enforcement act; *Ex parte Perkins*, 29 Fed. 912, refusing to discharge petitioner for contempt in refusing to swear before commissioner regarding election frauds.

Distinguished in *United States v. Seaman*, 23 Blatchf. 219, 23 Fed. 884, holding Federal indictment for fraudulent attempt to vote

must allege attempt to vote for congressman; *United States v. Kelsey*, 42 Fed. 884, where indictment was defective in not alleging commission of offense "knowingly."

100 U. S. 423-430, 25 L. 688, *PACKET CO. v. ST. LOUIS*.

Commerce.—Municipal ordinance charging wharfage dues, reckoned according to tonnage, for use of city wharves, is not in conflict with constitutional prohibition of State tonnage duties, p. 429.

Cited and relied on in *Vicksburg v. Tobin*, 100 U. S. 432, 25 L. 691, a case on all fours; *Packet Co. v. Catlettsburg*, 105 U. S. 562, 26 L. 1170, *Ouachita Packet Co. v. Aiken*, 121 U. S. 448, 30 L. 978, 7 S. Ct. 909, *Leathers v. Aiken*, 9 Fed. 681, *Silver v. Tobin*, 28 Fed. 547, and *People v. Roberts*, 92 Cal. 664, 28 Pac. 691, all holding municipality owning wharves may charge reasonable duty, based on tonnage, for use thereof; *Transportation Co. v. Parkersburg*, 107 U. S. 698, 27 L. 587, 2 S. Ct. 738 (see dissenting opinion in 107 U. S. 708, 27 L. 591), holding Federal courts will not inquire into secret purpose of apparently constitutional wharfage ordinance; *Morgan v. Louisiana*, 118 U. S. 462, 30 L. 241, 6 S. Ct. 1118, upholding Louisiana statute requiring payment of quarantine fee by all vessels passing quarantine stations; *Philadelphia, etc., Ss. Co. v. Pennsylvania*, 122 U. S. 346, 30 L. 1205, 7 S. Ct. 1125, holding State tax on gross receipts of domestic steamship company, derived from interstate transportation, unconstitutional, reviewing cases; *Huse v. Glover*, 11 Biss. 559, 15 Fed. 298, holding State may charge toll based on tonnage, for passage of its locks; *Spotswood v. The Dora Mathews*, 31 Fed. 619, holding owner of improved wharves may charge for use thereof; *The Oyster Police Steamers*, 31 Fed. 765, holding police vessels belonging to State, liable to Federal boiler inspection fee; *Railroad Co. v. Board of Health*, 36 La. Ann. 670, upholding State quarantine duty; *St. Louis v. St. Louis, etc., Trans. Co.*, 84 Mo. 159, reaffirming validity of ordinance; *Carroll v. Campbell*, 108 Mo. 566, 17 S. W. 888, holding prohibition of State taxation of interstate commerce does not include fair license tax on ferry; *St. Louis v. Consolidated Coal Co.*, 113 Mo. 87, 20 S. W. 699, upholding city wharfage tax on vessels, allowing deduction in favor of those owned therein. Cited generally in *United States v. Hopkins*, 82 Fed. 540, as discussing relations of State and National governments with respect to interstate commerce; *Lumberville, etc., Co. v. Assessors*, 55 N. J. L. 535, 26 Atl. 713, 25 L. R. A. 137, upholding State tax on domestic corporations, though affecting those in interstate trade. Cited, arguendo, in *Head Money Cases*, 112 U. S. 596, 28 L. 803, 5 S. Ct. 253, upholding act of Congress (1882) imposing tax on vessels bringing in immigrants, proportionate to number brought; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 211, 38 L. 966, 14 S. Ct. 1089, Kentucky act fixing tolls over interstate bridge, unconstitutional; *Hopkins v. United States*, 171 U. S.

594, 19 S. Ct. 46, agreement indirectly restraining interstate commerce may be valid; *Keator Lumber Co. v. St. Croix, etc., Co.*, 72 Wis. 92, 7 Am. St. Rep. 856, 38 N. W. 541, holding State may authorize log booms on shores of navigable rivers.

Distinguished in *Guy v. Baltimore*, 100 U. S. 443, 25 L. 746, and *Broeck v. Welch*, 2 Fed. 383, both holding imposition of higher wharfage on boats from without State than on domestic vessels, unconstitutional; *Gloucester, etc., Co. v. Pennsylvania*, 114 U. S. 217, 29 L. 167, 5 S. Ct. 835, holding transportation between States by ferry incorporated in one, not taxable by other; *Sweeney v. The Lizzie E.*, 30 Fed. 877, and *Girardeau v. Campbell*, 26 Mo. App. 15, both holding municipality cannot impose tax on vessels landing at natural bank of river; *Webb v. Dunn*, 18 Fla. 728, holding tax on all vessels entering port, irrespective of services rendered thereto, unconstitutional; *St. Louis v. Schulenburg, etc., Lumber Co.*, 13 Mo. App. 60, holding city cannot collect dues for landing beyond wharf during high water; *Harbor Commrs. v. Pashley*, 19 S. C. 321, holding harbor duty, proportioned to vessel's length, irrespective of services rendered, void.

100 U. S. 430-433, 25 L. 690, *VICKSBURG v. TOBIN*.

Commerce.—Municipal ordinance charging wharfage dues reckoned according to tonnage for use of city landing, is not in conflict with constitutional prohibition of State tonnage duties, p. 433.

Approved in *Huse v. Glover*, 11 Biss. 559, 15 Fed. 298, holding State may charge toll based on tonnage, for passage of its locks; *Leathers v. Aiken*, 9 Fed. 681, *Silver v. Tobin*, 28 Fed. 547, and *People v. Roberts*, 92 Cal. 664, 28 Pac. 691, all holding municipality owning wharves may charge reasonable duty, based on tonnage for use thereof; *The Dora Mathews*, 31 Fed. 619, holding owner of improved wharf may charge for use thereof; *Carroll v. Campbell*, 108 Mo. 566, 17 S. W. 888, holding prohibition of State taxation of interstate commerce does not include fair license tax on ferry; *Keator Lumber Co. v. St. Croix, etc., Co.*, 72 Wis. 92, 7 Am. St. Rep. 856, 38 N. W. 541, holding State may authorize log booms on shores of navigable rivers; *United States v. Hopkins*, 82 Fed. 540, as discussing respective rights of State and United States over interstate commerce; dissenting opinion in *Transportation Co. v. Parkersburg*, 107 U. S. 708, 27 L. 591, majority holding Federal courts will not inquire into secret purpose of apparently constitutional wharfage ordinance.

Distinguished in *Guy v. Baltimore*, 100 U. S. 443, 25 L. 746, and *Gloucester, etc., Co. v. Pennsylvania*, 114 U. S. 217, 29 L. 167, 5 S. Ct. 835, both holding transportation between States by ferry incorporated in one, not taxable by other; *Broeck v. Welch*, 2 Fed. 383, holding imposition of higher wharfage on vessels from without State than on domestic vessels, unconstitutional; *The Lizzie E.*,

30 Fed. 877, holding municipality cannot impose tax on vessels landing at natural bank of river; *Webb v. Dunn*, 18 Fla. 728, holding tax on all vessels entering port, irrespective of services rendered thereto, unconstitutional; *Harbor Comm. v. Pashley*, 19 S. C. 321, holding harbor duty proportionate to vessel's length, irrespective of services, unconstitutional.

100 U. S. 434-444, 25 L. 743, *GUY v. BALTIMORE*.

Commerce.—No State can impose on products of other States brought therein for sale or use, more onerous burdens than it imposes on its own like products; hence Baltimore ordinance charging higher wharfage fees to vessels laden with products of other States than to those laden with Maryland products, is unconstitutional, pp. 439, 443.

Cited and principle applied in *Walling v. Michigan*, 116 U. S. 454, 29 L. 694, 6 S. Ct. 457, reversing S. C., 53 Mich. 270, 18 N. W. 810, and holding taxation of sale of liquor from other States, unconstitutional; *Pickard v. Pullman, etc.*; *Car Co.*, 117 U. S. 49, 29 L. 790, 6 S. Ct. 642, holding taxation of foreign sleeping-cars run in State, unconstitutional, as interfering with commerce; *Philadelphia, etc., Co. v. Pennsylvania*, 122 U. S. 345, 30 L. 1205, 7 S. Ct. 1125, holding State tax on gross receipts of domestic steamship company, derived from interstate commerce, unconstitutional; *Minnesota v. Barber*, 136 U. S. 325, 34 L. 459, 10 S. Ct. 865, holding Minnesota meat-inspection law unconstitutional, as discriminating against other States; *The John M. Welch*, 18 Blatchf. 72, 2 Fed. 381, holding act discriminating in wharfage rates in favor of domestic canal-boats, unconstitutional; *Williams v. The Lizzie Henderson*, 29 Fed. Cas. 1374, holding pilotage law exempting domestic vessels from half pilotage charges, unconstitutional; *Ex parte Davis*, 21 Fed. 397, *Vines v. State*, 67 Ala. 76, and *Ames v. People*, 25 Colo. 511, 55 Pac. 726, all holding tax on peddlers of all goods not manufactured in State, unconstitutional; *Arkansas v. Marsh*, 37 Ark. 360, and *State v. Deschamp*, 53 Ark. 493, 14 S. W. 653, holding prohibition of sale of wine, exempting that made on premises, unconstitutional; *Graffty v. Rushville*, 107 Ind. 510, 57 Am. Rep. 134, 8 N. E. 612, holding ordinance requiring non-resident peddlers to pay license, unconstitutional; *People v. Hawkins*, 157 N. Y. 16, 68 Am. St. Rep. 747, 51 N. E. 261, 42 L. R. A. 497, holding law requiring convict-made goods to be so marked, unconstitutional.

Cited generally in *United States v. Hopkins*, 82 Fed. 539, holding Kansas City Stock Exchange a monopoly within act of 1898.

Cited in *J. S. Keator Lumber Co. v. St. Croix, etc., Co.*, 72 Wis. 92, 7 Am. St. Rep. 857, 38 N. W. 541, arguendo, State may authorize construction of logbooms into navigable water; dissenting opinion in *New York v. Roberts*, 171 U. S. 671, 19 S. Ct. 73, majority upholding New York tax on corporation franchises. See note, 27 Am. St. Rep. 556.

Distinguished in *Machine Co. v. Gage*, 100 U. S. 679, 25 L. 756, upholding tax on all peddlers of sewing machines, irrespective of place of manufacture; *Packet Co. v. Catlettsburg*, 105 U. S. 562, 26 L. 1170, and *Transportation Co. v. Parkersburg*, 107 U. S. 698, 27 L. 587, 2 S. Ct. 738, upholding charge, based on tonnage, for use of city wharves; *Brown v. Houston*, 114 U. S. 631, 29 L. 260, 5 S. Ct. 1096, holding coal shipped from Pennsylvania to Louisiana for sale therein, taxable in Louisiana; *Ex parte Hanson*, 11 Sawy. 659, 28 Fed. 129, upholding drummers' license law, indiscriminating on face thereof; *People v. Walling*, 53 Mich. 270, 18 N. W. 810, holding taxation of importation of liquor from other States, valid exercise of police power; *State v. Addington*, 12 Mo. App. 226, upholding prohibition of sale of imitation butter; *Waterbury v. Newton*, 50 N. J. L. 539, 541, 14 Atl. 607, 608, holding law prohibiting sale of imitation butter valid as to package from another State; *Lumberville, etc., Co. v. Assessors*, 55 N. J. L. 534, 26 Atl. 713, 25 L. R. A. 137, holding State tax on domestic corporations not invalid because incidentally affecting interstate commerce; *McGuire v. State*, 42 Ohio St. 535, upholding exemption of wine made from domestic grapes from operation of law regulating sale of liquor.

Constitutional law.—In exercise of police powers State may exclude from its territory articles prejudicial to health or property, p. 443.

Cited in *Waterbury v. Newton*, 50 N. J. L. 541, 14 Atl. 608, upholding law prohibiting sale of imitation butter.

Commerce.—Power of national government over commerce with foreign nations and among several States reaches interior of every State so far as necessary to protect products of other States and countries from discrimination by reason of foreign origin, p. 443.

100 U. S. 444-445, 25 L. 735, *PIERCE v. WADE*.

Appeal and error.—Amount actually in dispute, irrespective of amount of judgment, is the measure of Supreme Court appellate jurisdiction, p. 445.

Approved in *Pierce v. Tough*, 100 U. S. 445, note, 25 L. 735; argued and decided with principal case in *Hilton v. Dickinson*, 108 U. S. 173, 27 L. 690, 2 S. Ct. 429, holding sum actually disputed, irrespective of demand, governs jurisdiction, reviewing cases.

100 U. S. 445, 25 L. 735, *PIERCE v. TOUGH*.

Decided with preceding case.

Not cited.

100 U. S. 446-456, 25 L. 695, *CASE v. BANK*.

Limitation of actions.—Action against bank for damages arising from refusal to permit transfer of its stock, is not action on

"quasi-offense" prescribed, in Louisiana, by one-year limitation, p. 452.

Reaffirmed in *St. Romes v. Cotton Press Co.*, 127 U. S. 620, 621, 32 L. 292, 8 S. Ct. 1338, 1339. Approved in *Citizens' Bank v. Hyams*, 42 La. Ann. 733, 7 So. 701, holding prescription does not run against debt secured by pledge while pledgee retains same.

Distinguished in *Conger v. City*, 32 La. Ann. 1253, holding, when pledgor in possession for pledgee, has sold pledge, prescription not interrupted by existence thereof.

Bank cashiers are held out to public as having authority to act according to general usage and course of business conducted by banks, and their acts within scope thereof bind bank in favor of strangers ignorant of secret instructions regarding particular case, p. 454.

Approved in *Chemical Nat. Bank v. Armstrong*, 50 Fed. 804, holding vice-president of bank has authority to negotiate loan; *Birmingham, etc., Co. v. National Bank*, 99 Ala. 386, 13 So. 114, 20 L. R. A. 603, holding notice received by cashier, notice to bank; *First Nat. Bank v. First Nat. Bank*, 116 Ala. 533, 22 So. 979, holding bank cannot repudiate cashier's act in receiving note for collection; *Jennings v. Bank*, 79 Cal. 328, 12 Am. St. Rep. 149, 21 Pac. 854, 5 L. R. A. 235, holding bank officers making loans have authority to arrange for security; *McNeil v. Boston, etc., Commerce*, 154 Mass. 286, 28 N. E. 248, 13 L. R. A. 563, holding secret limitation imposed by stockholders does not control apparent authority from directors.

Corporations.—Assumpsit in form of special action on the case lies against corporation for improper refusal to make transfer of its stock; hence, in absence of by-law providing lien in favor of bank on shares of its stock belonging to shareholder indebted thereto, bank is liable for refusal to transfer such stock to purchaser from holder, on ground of latter's indebtedness to bank, pp. 455, 456.

Approved in *National Bank v. Merchants' Nat. Bank*, 37 Ohio St. 215, holding pledgee of bank stock may sue bank for refusal to transfer same; *Cattle Co. v. Burns, etc., Co.*, 82 Tex. 57, 17 S. W. 1046, holding suit for specific performance, or for market value, lies for refusal to transfer stock; *In re Klaus*, 67 Wis. 408, 29 N. W. 585, holding by-law requiring consent of all stockholders to transfer of shares, void. Cited generally in *Eastern, etc., Bank v. Vermont Nat. Bank*, 22 Blatchf. 502, 22 Fed. 189, ordering judgment against insolvent national bank certified by receiver to comptroller; *Merrill v. First Nat. Bank of Jacksonville*, 75 Fed. 153, 41 U. S. App. 529, and *Denton v. Baker*, 79 Fed. 193, 194, 48 U. S. App. 243, 244, as to form of decree against receiver of insolvent national bank; *Sowles v. Witters*, 39 Fed. 408, arguendo. Qualified in *Second Nat. Bank*

v. National Bank, 8 N. Dak. 54, 76 N. W. 506, holding pledgee suing bank for refusal to transfer, can only recover value of his interest in stock.

Banks and banking.— Unless forbidden by bank's charter or by-laws, cashier may properly make or superintend transfers of shares of its capital stock, p. 455.

Reaffirmed in *National Bank v. Watsontown Bank*, 105 U. S. 221, 26 L. 1041. Approved in *Merchants' Bank v. Citizens' Gas, etc., Co.*, 159 Mass. 507, 38 Am. St. Rep. 455, 34 N. E. 1084, holding treasurer of gas company has authority to sign note binding corporation; *Bank v. Dick*, 73 Mo. App. 356, holding cashier may take book account in payment of note due bank. Cited, *arguendo*, in *Robertson v. Buffalo, etc., Bank*, 40 Neb. 241, 58 N. W. 716, holding president has no authority to bind bank to gratuitous donation. See 77 Am. Dec. 763, note.

Distinguished in *Holden v. Upton*, 134 Mass. 180, denying authority of savings bank treasurer to transfer to purchaser, note belonging to bank.

100 U. S. 457-482, 25 L. 593, REMOVAL CASES.

Removal of causes.— Removal act of 1875, section 2, construed to mean that when controversy in State court is between citizens of one or more States on one side, and citizens of other States on other side, either party may remove suit to Federal court without regard to position occupied in pleadings as plaintiff or defendant, p. 468.

The following citing cases rely upon the principal case in construing the act: *Ayers v. Chicago*, 101 U. S. 187, 25 L. 840, and *Gage v. Carraher*, 154 U. S. 656, 25 L. 989, 14 S. Ct. 1190, reaffirming construction; *Pacific R. R. v. Ketchum*, 101 U. S. 298, 25 L. 936, and *Mutual L. Ins. Co. v. Champlin*, 22 Blatchf. 338, 340, 21 Fed. 88, 89, both holding construction applicable to both first and second sections of act; *Barney v. Latham*, 103 U. S. 211, 26 L. 517, holding removal right not affected because defendant, co-citizen of plaintiff, may be proper party plaintiff; *Blake v. McKim*, 103 U. S. 337, 26 L. 564, holding suit against two resident and one non-resident executors, not removable by latter; *Harter v. Kernochan*, 103 U. S. 567, 26 L. 412, holding non-resident sole shareholder, may remove suit against county officers and "unknown holders," to restrain tax levy; *Hyde v. Ruble*, 104 U. S. 409, 410, 26 L. 824, and *Frasher v. Jennison*, 106 U. S. 194, 27 L. 132, 1 S. Ct. 174, both holding cause, to be removable, must involve controversy wholly between citizens of different States; *Corbin v. Van Brunt*, 105 U. S. 578, 26 L. 1176, holding controversy being mere adjunct of principal dispute, not removable; *Ayers v. Wiswall*, 112 U. S. 191, 192, 28 L. 695, 5 S. Ct. 92, 93, holding filing of separate answers by sev-

eral defendants in foreclosure, raising separate issues, does not create separate controversies within act of 1875, section 2; *Hancock v. Holbrook*, 112 U. S. 231, 28 L. 715, 5 S. Ct. 116, reversing judgment in cause removed to Circuit Court and brought to Supreme Court on appeal, and ordering cause remanded, record not showing requisite citizenship; *Stone v. South Carolina*, 117 U. S. 433, 29 L. 963, 6 S. Ct. 800, *Chicago, etc., R. R. v. McComb*, 17 Blatchf. 375, F. C. 2,670, *Smith v. M'Kay*, 4 Fed. 354, *Maine v. Gilman*, 11 Fed. 215, and *Mayor, etc. v. Independent, etc., Co.*, 21 Fed. 594, all holding suit removable only on petition of all plaintiffs or defendants; *Peninsular Iron Co. v. Stone*, 121 U. S. 632, 633, 30 L. 1020, 7 S. Ct. 1010, 1011, *Mitchell v. Tillotson*, 11 Biss. 327, 12 Fed. 738, *Pollok v. Louchheim*, 19 Fed. 465, *Perrin v. Lepper*, 26 Fed. 547, *Anderson v. Bowers*, 40 Fed. 709, *Marsh v. Atlanta, etc., R. Co.*, 53 Fed. 169, *City v. Seixas*, 35 La. Ann. 41, *Broadway Nat. Bank v. Adams*, 130 Mass. 434, and *Blum v. Thomas, etc.*, 60 Tex. 161, all holding causes not removable because interests of parties were not separable; *Merchants, etc., Press Co. v. North Am. Ins. Co.*, 151 U. S. 385, 38 L. 204, 14 S. Ct. 373, *Evers v. Watson*, 156 U. S. 532, 39 L. 522, 15 S. Ct. 432, *Le Mars v. Iowa Falls, etc., R. Co.*, 4 McCrary, 219, 48 Fed. 662, *Burke v. Flood*, 6 Sawy. 221, 1 Fed. 542, *Bybee v. Hawkett*, 6 Sawy. 599, 600, 5 Fed. 6, 7, *Snow v. Texas, etc., R. R.*, 4 Woods, 398, 16 Fed. 3, *Sayer v. La Salle, etc., Gas-Light Co.*, 9 Biss. 373, 14 Fed. 70, *Campbell v. James*, 18 Blatchf. 103, 2 Fed. 349, *Adelbert College v. Toledo, etc., Ry.*, 47 Fed. 844, *Mangels v. Donau Brewing Co.*, 53 Fed. 514, *Wolcott v. Sprague*, 55 Fed. 546, *Board of Trustees v. Blair*, 70 Fed. 417, and *Goodsell v. Land Co.*, 72 Miss. 585, 18 So. 453, all holding court will disregard positions of parties in pleadings and look to real controversy in determining whether cause is removable; *Consolidated Water Co. v. Babcock*, 76 Fed. 248, and *Langdon v. Fogg*, 21 Blatchf. 398, 18 Fed. 9, classifying defendant having same interests with plaintiff for removal purposes; *Ruble v. Hyde*, 1 McCrary, 515, 3 Fed. 331, holding all persons forming party on one side of controversy, must be of different citizenship from all opposed; *Walsh v. Memphis, etc., R. R.*, 2 McCrary, 159, holding corporation necessary defendant to bill to enforce judgment against it by compelling stockholders to contribute; *Price v. Foreman*, 11 Biss. 331, 12 Fed. 803, holding executors indispensable parties to suit to set aside will; *Dormitzer v. Illinois, etc., Co.*, 6 Fed. 217, denying jurisdiction where necessary opposite parties were co-citizens; *Chester v. Chester*, 7 Fed. 5, holding interests of mortgagor and mortgagee inseparable in suit to establish trust in mortgaged land; *Smith v. Horton*, 7 Fed. 271, holding petition must allege all defendants to be of different citizenship from plaintiffs; *Karns v. Atlantic, etc., R. Co.*, 10 Fed. 310, 311, denying jurisdiction over suit between citizens of one State and those of same and other States; *Illinois v. Illinois, etc., R. Co.*,

16 Fed. 888, regarding formal defendant as a complainant for purpose of removal; *Hazard v. Robinson*, 21 Fed. 195, holding presence of merely formal complainant not ground for removal; *Capital City Bank v. Hodgkin*, 22 Fed. 210, holding cause must be separable into parts to authorize removal for diverse citizenship; *Ballin v. Leher*, 24 Fed. 193, where citizens of New York and New Jersey sued citizen of Maryland and an alien in New York; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. 531, holding Federal court cannot acquire jurisdiction unless all plaintiffs are citizens of different States from all defendants; *Covert v. Waldron*, 33 Fed. 312, holding cause not removable where real controversy was between citizens of same State, irrespective of pleadings; *Woodrum v. Clay*, 33 Fed. 899, holding action on partnership obligation not separable for purpose of removal; *May v. St. John*, 38 Fed. 771, holding joinder of nominal parties cannot affect right to removal; *Bissell v. Canada, etc., Ry.*, 39 Fed. 226, holding railroad necessary defendant in action to determine priority of liens thereon; *Arkansas Valley, etc., Co. v. Cowenhoven*, 41 Fed. 451, refusing removal where cause contained single controversy and some defendants resided in State; *Pittsburgh, etc., Ry. v. Baltimore, etc., R. Co.*, 61 Fed. 709, 22 U. S. App. 359, denying jurisdiction where proper party plaintiff had been made defendant; *Hutton v. Bancroft, etc., Co.*, 77 Fed. 482, holding no controversy between plaintiff and defendant who admits allegations; *M'Donald v. Seligman*, 81 Fed. 755, denying Federal jurisdiction where several defendants and plaintiffs reside in same State; *Clews v. Mumford*, 78 Ga. 477, 3 S. E. 267, holding either party in suit between citizen of State and non-resident, entitled to removal; *Fusg, etc. v. Trager, etc.*, 38 La. Ann. 174, denying removal where one partner of defendant firm claimed, and one opposed same; *Townsend v. Sykes*, 38 La. Ann. 411, refusing removal where case was not separable into parts; *Danvers Savings Bank v. Thompson*, 133 Mass. 184, holding cause removable by non-resident defendant, record showing release of interest by resident defendant; *Mutual Life Ins. Co. v. Allen*, 134 Mass. 390, holding bill of interpleader by non-resident, against two citizens of State, not removable; *Clarke v. Figgins*, 27 W. Va. 668, holding interests of parties not separable for purpose of removal.

Cited generally in *Myers v. Swann*, 107 U. S. 547, 27 L. 584, 2 S. Ct. 686, holding Federal jurisdiction, on ground of local prejudice, under revised statutes, section 634, subdivision 3, not dependent on diverse citizenship; *Western Union Tel. Co. v. Brown*, 32 Fed. 340, holding right of removal, in cases involving single controversy, where jurisdiction depends solely on citizenship, exercisable only by non-resident defendants; *Hammond v. Buchanan*, 68 Ga. 732, holding amendment allowable to insufficient removal petition; *Horne v. Boston, etc., R. R.*, 62 N. H. 455, holding railroad running between other States, through New Hampshire, a citizen thereof. Cited, arguendo, in *Turner v. Farmers' Loan, etc., Co.*, 106 U. S.

555, 27 L. 275, 1 S. Ct. 522, *Ouachita, etc., Co. v. Aiken*, 4 Woods, 210, 16 Fed. 892, and *Belding v. Gaines*, 37 Fed. 820. See also 9 Biss. 318, note, and 10 Biss. 320, note on removal.

Removal of causes.—Objection that petition for removal was not signed, cannot be first raised in Federal court, p. 471.

Approved in *Street R. R. v. Hart*, 114 U. S. 660, 29 L. 228, 5 S. Ct. 1131, holding absence of oath to petition mere informality, waived by opponent not objecting on motion to remand; *Cook v. Seligman*, 17 Blatchf. 457, 7 Fed. 267, holding signature of counsel to removal petition sufficient; *Deford v. Mehaffy*, 13 Fed. 487, denying motion to remand on ground of defective bond, and allowing amendment thereof; *Northern Pac., etc., Co. v. Lowenberg*, 9 Sawy. 351, 18 Fed. 341, quare, can removal petition be amended in Circuit Court; dissenting opinion in *Johnson v. Brewers, etc., Ins. Co.*, 51 Wis. 580, 9 N. W. 658, majority holding State court's judgment, after erroneous refusal to order removal, valid, unless set aside.

Removal of causes.—Requirement in section 3, removal act of 1875, for bond, with good and sufficient surety, is satisfied by presence of one surety able to respond to conditions of bond, p. 472.

Approved in *Chambers v. M'Dougal*, 42 Fed. 697, holding case will not be remanded for defects in security.

Removal of causes.—State court has no discretion to refuse acceptance of removal bond, with good and sufficient surety, p. 472.

Approved in *Noble v. Massachusetts Ben. Assn.*, 48 Fed. 333, holding removal effected, notwithstanding State court's refusal to accept sufficient bond; *La Page v. Day*, 74 Fed. 978, and *Monroe v. Williamson*, 81 Fed. 986, both holding jurisdiction of State court ceases eo instanti on filing proper petition and bond; *Dunn v. Burlington, etc., Ry.*, 35 Minn. 78, 27 N. W. 451, holding State court may retain jurisdiction, although petition be filed, if case is not within statute; *Roberts v. Chicago, etc., Ry.*, 48 Minn. 530, 51 N. W. 479, arguendo, and *Johnson v. Brewers, etc., Ins. Co.*, 51 Wis. 576, 577, 8 N. W. 298, 299 (see dissenting opinion, 51 Wis. 587, 9 N. W. 662), both holding judgment of State court, after erroneous refusal to allow removal, valid in collateral actions, until set aside.

Distinguished in *Railroad v. Rabasse*, 44 La. Ann. 180, 10 So. 709, where bond omitted condition for payment of costs in event of wrongful removal.

Removal of causes.—Applications for removal of suits pending at passage of removal act of 1875, were in time, if made during first term of court at which suit could be tried, after act became operative, p. 473.

Reaffirmed in *Kings v. Worthington*, 104 U. S. 48, 26 L. 654; dissenting opinion in *Johnson v. Brewers, etc., Ins. Co.*, 51 Wis. 579, 9 N. W. 658, arguendo.

Distinguished in *Bible Society v. Grove*, 101 U. S. 612, 25 L. 848, holding suit tried prior to passage of act, resulting in disagreement of jury, not removable; *Phoenix, etc., Ins. Co. v. Walrath*, 11 Biss. 436, 16 Fed. 164, where action had been brought in State court after passage of act; *Mauley v. Olney*, 32 Fed. 709, remanding case commenced before, but removed after repeal of act of 1875.

Removal of causes.—To bar right of removal, on ground of diverse citizenship, under act of 1875, it must appear that trial in State court had actually began, and was in progress in orderly course of proceedings when application was made, p. 473.

Approved in *Jifkins v. Sweetzer*, 102 U. S. 179, 26 L. 130, denying right to remove after reversal by State appellate court, with instructions to refer to master; *Cable v. Ellis*, 110 U. S. 397, 28 L. 189, 4 S. Ct. 89, holding removal after intervention in trial, too late; *Alley v. Nott*, 111 U. S. 476, 28 L. 492, 4 S. Ct. 496, holding hearing on demurrer, on ground that complaint fails to state cause of action, trial within act; *Pullman, etc., Car Co. v. Speck*, 113 U. S. 86, 28 L. 926, 5 S. Ct. 375, holding cause removable at any time before final hearing is begun; *Bank of Marysville v. Claypool*, 120 U. S. 269, 270, 30 L. 633, 7 S. Ct. 545, 546, holding application made after verdict, too late; *Manning v. Amy*, 140 U. S. 141, 35 L. 388, 11 S. Ct. 708, holding conditional application, made before trial, invalid, and subsequent application too late; *Miller v. Tobin*, 9 Sawy. 412, 18 Fed. 616, holding hearing on demurrer, not such trial as to bar removal; *Deford v. Mehaffy*, 13 Fed. 486, holding to bar removal, cause must be at issue and triable as to all parties; *Maloy v. Duden*, 25 Fed. 674, holding removal in time where after calling of cause and continuance at petitioner's request; *Chicago, etc., R. Co. v. Minnesota, etc., R. Co.*, 29 Fed. 339, holding application, after appearance on motion for temporary injunction and appeal therefrom, too late; *Kalamazoo Wagon Co. v. Snively*, 34 Fed. 824, holding application in time, although after setting aside of order dismissing case; *Elliott v. Stocks, etc.*, 67 Ala. 299, holding removal bond filed in time, although case has been continued by consent of petitioner; *Velie v. Manufacturers' Co.*, 40 Fed. 547, and *Mecke v. Mineral Co.*, 122 N. C. 798, 29 S. E. 782, both holding, under act of 1888, petition must be filed before expiration of statutory time to answer, irrespective of extensions by stipulation.

Removal of causes.—State court is not required to relinquish jurisdiction until case is made, which, upon its face, shows that petitioner can remove as a matter of right, p. 474.

Reaffirmed in *Stone v. South Carolina*, 117 U. S. 432, 29 L. 962, 6 S. Ct. 800, and *Hickman v. Missouri, etc., Ry.*, 151 Mo. 654, 52 S. W. 353. The following citing cases apply the principle: *Pennsylvania Co. v. Bender*, 148 U. S. 258, 37 L. 442, 13 S. Ct. 592, no Federal question arises from act of State court in proceeding after

filing of defective removal petition; *Merchants' Bank v. Brown*, 4 Woods, 265, 17 Fed. 162, holding removal rightly refused where petition did not show diverse citizenship; *Stix, etc., Co. v. Keith*, 90 Ala. 124, 7 So. 424, holding face of petition must show cause for removal; *Southern Pac. R. R. v. Superior Court*, 63 Cal. 612, refusing writ of prohibition, prohibiting lower court's proceeding after filing of removal petition; *Hayes v. Todd*, 34 Fla. 239, 15 So. 751, holding State court may refuse acceptance of petition and bond when not in compliance with statute; *Angier v. East Tenn., etc., R. R.*, 74 Ga. 637, holding petition, in connection with record, must make case for removal; *Western Union Tel. Co. v. Griffith*, 104 Ga. 57, 30 S. E. 420, holding State court should determine whether, as matter of law, cause is removable; *Bosler v. Booge*, 54 Iowa, 252, 6 N. W. 301, holding suit cannot be removed for diverse citizenship, before filing of pleading by defendant; *Bixby v. Blair*, 56 Iowa, 420, 9 N. W. 320, holding, in passing upon application for removal, decision should be based on whole record; *Stone v. Sargent*, 129 Mass. 510, holding party demanding removal must show on record that his case comes under statute; *National, etc., Ry. v. Pennsylvania R. R.*, 52 N. J. Eq. 60, 28 Atl. 72, holding State court may pass upon sufficiency of grounds for removal; *Hyatt v. McBurney*, 18 S. C. 212, holding removal properly denied, record failing to show requisite facts on face thereof; *Texas, etc., Ry. v. McAllister*, 59 Tex. 356, 361, upholding State court's power to pass upon sufficiency of petition; *White v. Holt*, 20 W. Va. 810, holding petition insufficient; dissenting opinion in *North American, etc., Co. v. Colonial, etc., Co.*, 3 S. Dak. 604, 605, 54 N. W. 665, majority holding State court's proceedings, after filing of removal petition, invalid.

Distinguished in *Carson v. Hyatt*, 118 U. S. 286, 30 L. 169, 6 S. Ct. 1054, holding petitioner not estopped by answer from showing her diverse citizenship; *Brown v. Murray, etc., Co.*, 43 Fed. 615, holding omission to ask State court to act on petition no ground for remanding; *Monroe v. Williamson*, 81 Fed. 984, holding State jurisdiction ceases eo instanti on filing petition showing cause for removal.

Removal of causes.—Party who fails in efforts to obtain removal and is forced to trial under protest, loses no rights by defending action, p. 475.

The following citing cases reaffirm and apply the rule: *Railroad Co. v. Mississippi*, 102 U. S. 141, 26 L. 98, *Kern v. Huidekoper*, 103 U. S. 492, 26 L. 357, *Railroad Co. v. Koontz*, 104 U. S. 14, 15, 26 L. 645, 646, *Powers v. Chesapeake, etc., Ry.*, 169 U. S. 103, 42 L. 677, 18 S. Ct. 268, *Richards v. Rock Rapids*, 31 Fed. 506, *Mecke v. Valley, etc., Mineral Co.*, 89 Fed. 115, *Mecke v. Valley, etc., Mineral Co.*, 89 Fed. 211, *Stix, etc., Co. v. Keith*, 90 Ala. 125, 7 So. 424, and *Howard v. Railway*, 122 N. C. 953, 29 S. E. 780. Also cited and applied

in *Edrington v. Jefferson*, 111 U. S. 774, 28 L. 595, 4 S. Ct. 685, holding party forced to hearing in Federal court by erroneous refusal to remand has right of appeal; *Baltimore, etc., R. R. v. Ford*, 135 Fed. 172, holding motion for continuance in State court, after filing petition, does not confer jurisdiction; *City v. Seixas*, 35 La. Ann. 38, holding enforced appearance in Federal court pending appeal of appellant from order of removal, not acquiescence; *Benedict v. Johnson*, 4 S. Dak. 392, 57 N. W. 68, holding appearance after denial of motion to dismiss for lack of jurisdiction, not waiver of objection; *Northern Pac. R. Co. v. McMullen*, 86 Wis. 508, 56 N. W. 632, holding right to removal not waived by answering and defending on merits after wrongful refusal to order removal; *Chesapeake, etc., R. R. v. White*, 111 U. S. 137, 28 L. 379, 4 S. Ct. 354, holding remedy for action of State court in proceeding after removal, writ of error after final judgment.

Distinguished in *Barnhart v. Davis*, 30 Kan. 524, 2 Pac. 634, holding judgment rendered by justice after erroneous refusal to change venue, not void.

Removal of causes.—Although removal act of 1875 requires that transcript be filed in Circuit Court on first day of term, latter is not deprived of jurisdiction by delay caused by accident or fault of State court, p. 475.

Followed in *Railroad Co. v. Koontz*, 104 U. S. 16, 26 L. 646, holding Federal jurisdiction attaching on presentation of petition, not lost by failure to enter record on first day of next term; *Woolridge v. McKenna*, 8 Fed. 666, holding provision of act of 1875, as to filing transcript, directory; *Lucker v. Phoenix Assur. Co.*, 66 Fed. 162, reaffirming holding; *Hamilton v. Fowler*, 83 Fed. 324, 328, holding record may be filed before next term where special procedure is necessary; *Eisenmann v. Delemar, etc., Co.*, 87 Fed. 250, refusing to remand on mere ground that record was filed seven days after commencement of term; *Torrent v. Martin Lumber Co.*, 37 Fed. 729, holding time for pleading does not begin running until entry of record.

Distinguished in *St. Paul, etc., R. Co. v. McLean*, 108 U. S. 215, 27 L. 704, 2 S. Ct. 499, holding it within discretion of Federal court to remand where record is not filed in time; *In re Barnesville, etc., Ry.*, 2 McCrary, 219, 4 Fed. 13, holding Federal court's jurisdiction not complete, to hear cause, before day prescribed by statute; *McLean v. St. Paul, etc., Ry.*, 17 Blatchf. 367, F. C. 8,893, holding cause remanded after negligent failure to perfect removal, cannot be again removed; *White v. Holt*, 20 W. Va. 812, holding filing transcript after State court's proper refusal to allow removal does not affect State jurisdiction.

Mechanics' liens.—Under laws of Iowa, mechanic's lien for work done under contract, precedes all incumbrances put on property by mortgage or otherwise after commencement of work, p. 476.

Approved in *Thomas, etc., Co. v. Mowers*, 27 Kan. 268, holding mechanic's lien dates from commencement of excavation for building, and precedes mortgage obtained thereafter, but before commencement of mechanic's work; *Haxtun, etc., Co. v. Gordon*, 2 N. Dak. 252, 33 Am. St. Rep. 780, 50 N. W. 709, holding materialman's lien precedes prior mortgage on building. See 54 Am. St. Rep. 423, 424, monographic note.

Assignment.—Agreement to pay out of particular fund is not an equitable assignment; hence, statement in contract that railroad would pay construction company from subscription of certain county is not such taking of collateral security by latter as to vitiate its lien, p. 477.

Miscellaneous.—*Pac. Ry. v. Fitzgerald*, 160 U. S. 582, 40 L. 542, 16 S. Ct. 396.

100 U. S. 483-491, 25 L. 628, *HAUENSTEIN v. LYNHAM*.

Aliens.—In absence of proof of naturalization, original citizenship of alien is presumed to have continued, p. 484.

Approved in *Green v. Salas*, 31 Fed. 107, holding naturalization provable only from record itself; *Bode v. Trimmer*, 82 Cal. 517, 23 Pac. 188, holding naturalization must be proved by record evidence; *Thayer v. Boyd*, 31 Neb. 730, 48 N. W. 753, holding fact of having voted and held office does not rebut presumption.

Aliens.—In Virginia, as at common law, aliens may take by grant or devise, but not by descent, p. 484.

Cited in *Wunderle v. Wunderle*, 144 Ill. 58, 33 N. E. 198, 19 L. R. A. 87, holding alien incapable of taking by descent at common law.

Aliens.—At common law, title of alien is liable to be divested by office found, at pleasure of sovereign, p. 484.

Cited in *Wunderle v. Wunderle*, 144 Ill. 64, 33 N. E. 200, 19 L. R. A. 88, holding aliens' title valid unless divested by office found.

International law.—Law of nations recognizes liberty of every government to give aliens only such rights, touching real property within its territory, as it sees fit to concede, p. 484.

Cited in *Geofroy v. Riggs*, 133 U. S. 267, 33 L. 645, 10 S. Ct. 297, holding treaty-making power limited only by Constitution.

Treaty of 1850, with Switzerland, article 5, secures to citizen of either country right to sell property, within the other, falling to him, and which, on account of alienage, he may not hold, and to withdraw proceeds; hence, alien heirs of alien, dying in Virginia, entitled to avails of sale of ancestor's land, sold by public escheator, p. 487.

Treaties.—Where treaty admits of two constructions, one restrictive of rights claimable thereunder, and one liberal, latter is to be preferred, p. 487.

The following citing cases apply the principle: *Geofroy v. Riggs*, 133 U. S. 272, 33 L. 646, 10 S. Ct. 298, construing French treaties of 1800 and 1853; *Schultze v. Schultze*, 144 Ill. 296, 36 Am. St. Rep. 434, 33 N. E. 203, 19 L. R. A. 91, holding word "representatives," in Bremen treaty of 1827, covers heirs; *Adams v. Akerlund*, 168 Ill. 638, 48 N. E. 457, holding provision in Swedish treaty of 1827, as to disposal of goods, refers to real and personal property; *Scharpf v. Schmidt*, 172 Ill. 262, 50 N. E. 184, construing Wurtemberg treaty of 1848, as to property rights of aliens; *Doehrel v. Hillmer*, 102 Iowa, 172, 71 N. W. 205, construing German treaty of 1829, as to property rights of aliens; dissenting opinion in *Baldwin v. Franks*, 120 U. S. 703, 30 L. 772, 7 S. Ct. 765, *arguendo*; *Kinthead v. United States*, 150 U. S. 511, 37 L. 1162, 14 S. Ct. 183, construing Russian treaty of 1867, as to ownership of public buildings; *Ward v. Race Horse*, 163 U. S. 517, 41 L. 249, 16 S. Ct. 1081, majority reversing S. C., 70 Fed. 605, 607, and holding privilege of hunting (Bannock Indian treaty of 1868), does not confer right to hunt in violation of State laws.

Treaties.—Rights secured by treaty are paramount to State legislation, p. 489.

Reaffirmed in *Succession of Rabasse*, 47 La. Ann. 1455, 49 Am. St. Rep. 435, 17 So. 867. Approved in *In re Parrott*, 6 Sawy. 370, 371, 1 Fed. 502, holding California constitutional prohibition of employment of Chinese invalid; *In re Race Horse*, 70 Fed. 607, holding treaty with Indians paramount to State laws; *Opel v. Shoup*, 100 Iowa, 424, 69 N. W. 563, 37 L. R. A. 586, holding treaty conferring property rights on aliens, contrary to State Constitution, controls. See 76 Am. Dec. 666, note, 81 Am. Dec. 538, note, and 12 Am. St. Rep. 95, extended note.

Cited, but application refused, in *Wunderle v. Wunderle*, 144 Ill. 54, 33 N. E. 197, 19 L. R. A. 85, holding disability of non-resident aliens, under Illinois law, not removed by any treaty with Germany.

Treaty-making clause of Constitution is retroactive as well as prospective, p. 489.

Escheats.—Where alien heir recovers avails of sale of ancestor's land sold by public escheator, latter is entitled to retain only percentage allowed by law for making sales of real property in ordinary cases, p. 491.

Attorney and client.—Settled rule of Supreme Court is never to allow counsel on either side to be paid from fund in dispute, p. 491.

Followed in *In re Lloyd*, 7 Fed. 460, disapproving allowance of attorney's fees to attorney of petitioning creditors from estate of bankrupt; *Riddle v. Hudgins*, 58 Fed. 494, 19 U. S. App. 144, holding court not justified in ordering payment of attorney from fund in court.

100 U. S. 491-499, 25 L. 558, *KIRTLAND v. HOTCHKISS*.

Taxation.—Supreme Court can afford citizen of State no relief from taxation thereof, however oppressive, where State laws regulating taxation neither touch upon Federal authority nor violate any constitutional right, p. 498.

The following citing cases apply the principle: *Kelly v. Pittsburgh*, 104 U. S. 80, 26 L. 660, sustaining right of State to regulate taxation; *Spencer v. Merchant*, 125 U. S. 355, 31 L. 767, 8 S. Ct. 926, holding responsibility for oppressive taxation to people, not courts; *Dundee, etc., Co. v. School District*, 10 Sawy. 63, 19 Fed. 367, holding State may tax all persons and property within its reach; *Chamberlain v. Walter*, 60 Fed. 790, holding courts can only interfere with taxation when it is unconstitutional or illegal; *Robinson v. Wilmington*, 65 Fed. 858, 25 U. S. App. 144, holding Federal courts of equity will not enjoin taxing power of States for mere irregularity or illegality; *People, etc., R. R. v. Commrs. of Taxes*, 104 N. Y. 250, 10 N. E. 442, holding courts can only interfere when tax transcends legislative power.

Distinguished in *Erie R. R. v. Pennsylvania*, 153 U. S. 641, 38 L. 851, 14 S. Ct. 956, holding Pennsylvania taxation statute of 1885, section 4, unconstitutional; *Cincinnati, etc., R. R. v. Commonwealth*, 81 Ky. 500, holding legislative discretion as to taxation does not extend to discrimination.

Taxation.—A debt may, for taxation purposes, be regarded as situated at domicile of creditor, p. 498.

The following reaffirm the rule: *Chicago, etc., Ry. v. Sturm*, 174 U. S. 714, 19 S. Ct. 799, *Hauf v. Wilson*, 31 Fed. 389, *Central Trust v. Chattanooga R. Co.*, 68 Fed. 689, and *Hawk v. Bonn*, 6 Ohio C. C. 465. Approved and applied in *Bank v. Sedgwick*, 104 U. S. 111, 112, 26 L. 704, holding capital of State bank invested in foreign countries, taxable under section 3408, revised statutes; *Taylor v. Life Assn.*, 13 Fed. 496, holding assignment of all assets to receiver passes notes of non-resident debtors; *Boyd v. Selma*, 96 Ala. 151, 158, 11 So. 396, 398, 16 L. R. A. 733, 736, and n., holding solvent credits evidenced by notes, taxable at owner's residence, although payable in another county; *Louisville, etc., Ry. v. Nash*, 118 Ala. 486, 23 So. 828, holding State court has no jurisdiction in garnishment, over debt due non-resident, and payable without State; *Holbrook v. Ford*, 153 Ill. 646, 46 Am. St. Rep. 924, 39 N. E. 1095, 27 L. R. A. 328, holding situs of debt due corporation in State creating same; *Dykes*

v. Lockwood Mortg. Co., 2 Kan. App. 228, 43 Pac. 271, holding judgment taxable only at domicile of owner; Meyer v. Pleasant, 41 La. Ann. 646, 6 So. 259, holding debts do not lose situs at creditor's domicile, because reduced to judgment at debtor's; Insurance Co. v. Board of Assessors, 44 La. Ann. 764, 11 So. 92, 16 L. R. A. 59, holding debt due non-resident creditor of State not taxable thereon; Railroad v. Commissioners, 91 N. C. 457, holding non-resident holder of stock in North Carolina corporation not taxable in North Carolina; Grant v. Jones, 39 Ohio St. 514, and Myers v. Seaberger, 45 Ohio St. 235, 12 N. E. 798, both holding credits owned by non-residents not taxable in State, although secured by mortgage; Goodsell v. Benson, 13 R. I. 244, holding money debt payable at creditor's domicile; Grundy County v. Tennessee Coal, etc., Co., 94 Tenn. 317, 29 S. W. 121, holding owner's domicile situs for taxation of intangible personal property; Bank of Virginia v. Richmond, 79 Va. 116, holding notes held by bank taxable at place of its location, irrespective of residence of makers; Bragg v. Gaynor, 85 Wis. 488, 55 N. W. 925, 21 L. R. A. 168, debts due non-resident may be applied by equity to payment of debts due another resident from him. See 56 Am. Dec. 529, extended note, and 62 Am. St. Rep. 452, monographic note on this point.

Distinguished in New Orleans v. Stemple, 175 U. S. 321, holding municipal bonds and bank bills taxable where found, irrespective of owner's domicile; Walker v. Jack, 88 Fed. 578, 60 U. S. App. 128, overruling S. C., 79 Fed. 139, 141, holding State may tax credits due non-resident, when invested and controlled by resident agent; Street R. v. Morrow, 87 Tenn. 434, 11 S. W. 354, 2 L. R. A. 861, holding situs of shares for taxation purposes may be fixed at location of corporation.

Taxation.—Federal Constitution does not prohibit State from taxing, in hands of resident citizen, bonds evidencing debts due him from citizens of another State and secured by mortgages on lands therein, p. 499.

The following citing cases apply the principle: Saving Society v. Multnomah, 169 U. S. 431, 42 L. 806, 18 S. Ct. 396, upholding Oregon statute taxing mortgages of Oregon land to mortgagees, in county where land lies; Mackay v. San Francisco, 113 Cal. 398, 400, 45 Pac. 698, 699, holding railroad bonds held in State, taxable therein, although secured by mortgage of property without State; American Coal Co. v. County Commrs., 59 Md. 194, holding assessment on stock not illegal because value was determined by including foreign land of corporation; Detroit v. Lewis, 109 Mich. 160, 66 N. W. 959, 32 L. R. A. 441, holding credits held by resident trustees for non-residents, taxable in State; Bradley v. Bauder, 36 Ohio St. 36, 38 Am. Rep. 549, holding shares of stock of foreign corporation, owned by resident of Ohio, taxable therein; Judge v. Spenser, 15 Utah,

249, 48 Pac. 1100, holding mortgages owned by residents, taxable in State irrespective of location of land; *Dwinnell v. Gaylord*, 73 Wis. 325, 41 N. W. 524, holding notes secured by mortgage of land in another State, and held for collection therein, taxable at domicile of owner. See 74 Am. Dec. 95, note, and 62 Am. St. Rep. 457, monographic note on situs for purpose of taxation.

Distinguished in *Augusta v. Kimball*, 91 Me. 609, 40 Atl. 668, 41 L. R. A. 477, holding stock held by non-resident trustees, who have qualified in Maine, not taxable therein; *Jefferson v. Smith*, 88 N. Y. 583, holding State statute did not include securities owned by resident, but held in another State.

100 U. S. 500-507, 25 L. 763, *PARISH v. UNITED STATES*.

Army and navy.—Acts of assistant surgeon-general are acts of surgeon-general and valid until revoked by latter, p. 505.

Approved in *Shillito Co. v. M'Clung*, 51 Fed. 872, 6 U. S. App. 128, upholding decision of assistant secretary on appeal to secretary of treasury; In re *Huttman*, 70 Fed. 702, holding acts of revenue commissioner presumed to be acts of secretary of treasury.

Contracts.—Where parties having contracted to furnish ice to government, purchased a quantity thereof, which, through suspension of surgeon-general's order for same, was lost, they should recover amount paid for ice and expense of keeping same until lost, p. 507.

Approved in *United States v. Behan*, 110 U. S. 343, 28 L. 170, 4 S. Ct. 83, holding outlay and expenses recoverable on breach of contract; *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 206, 35 L. 150, 11 S. Ct. 503, and *Cincinnati Gas Co. v. Western, etc., Co.*, 152 U. S. 206, 38 L. 413, 14 S. Ct. 525, both holding agreement to pay for loss of profits resulting from breach of contract, not part thereof.

100 U. S. 508-514, 25 L. 631, *UNITED STATES v. BOWEN*.

Pensions.—Under revised statutes, section 4820, only those pensioners who have not contributed to funds of soldiers' home are required to surrender their pensions thereto while receiving its benefits; hence, recovery allowed for pension withheld from inmate of home, p. 513.

Statutes.—Revised statutes are legislative declaration of statute law on subjects embraced on December 1, 1873, and original statutes can only be looked to, when necessary, to construe doubtful language therein, p. 513.

The following cases reaffirm the rule: *Arthur v. Dodge*, 101 U. S. 36, 25 L. 949, *Cambria Iron Co. v. Ashburn*, 118 U. S. 57, 30 L. 61, 6 S. Ct. 930, *United States v. Averill*, 130 U. S. 339, 32 L. 978, 9 S. Ct. 548, and *Bate, etc., Co. v. Sulzberger*, 157 U. S. 33, 39, 39 L.

610, 612, 15 S. Ct. 515, 517. Cited and principle applied in *Meyer v. Car Co.*, 102 U. S. 11, 26 L. 60, holding rule applicable to construction of Iowa code; *Vietor v. Arthur*, 104 U. S. 499, 500, 26 L. 634, *Deffebach v. Hawke*, 115 U. S. 402, 29 L. 426, 6 S. Ct. 99, *United States v. Howard*, 9 Sawy. 157, 17 Fed. 640, Sixty-five Terra Cotta Vases, etc., 21 Blatchf. 514, 18 Fed. 510, *Bent v. Hubbardston*, 138 Mass. 101, *Pugh v. Brewster*, 44 Ohio St. 252, 6 N. E. 655, *Heck v. State*, 44 Ohio St. 538, 9 N. E. 305, and *State v. Long*, 48 Ohio St. 512, 28 N. E. 1039, all holding former statute not examinable where language of revision is plain; *Viterbo v. Friedlander*, 120 U. S. 726, 30 L. 782, 7 S. Ct. 972, holding, in construing articles of Louisiana code originally enacted in French and English, French text may be examined to explain ambiguities in English; *The Conqueror*, 166 U. S. 122, 41 L. 943, 17 S. Ct. 515, *Barrett v. United States*, 169 U. S. 227, 42 L. 726, 18 S. Ct. 331, and *Pentlarge v. Kirby*, 22 Blatchf. 264, 20 Fed. 900, all holding original acts examinable where meaning of revised act is doubtful; *Hamilton v. Rathbone*, 175 U. S. 420, holding prior acts may be cited to solve, not to create, ambiguity in later; *Canan v. Pound Mfg. Co.*, 23 Blatchf. 174, 23 Fed. 186, and *Gwathmay v. Clisby*, 24 Blatchf. 400, 31 Fed. 221, both holding original statutes examinable when necessary to construe doubtful language of revision; *Ex parte Byers*, 32 Fed. 409, holding original acts examinable to obtain meaning of words in revision; *Edison, etc., Light Co. v. United States Electric-Light Co.*, 35 Fed. 138, construing revised statutes, section 4887, respecting limitation of patents on articles covered by foreign patents; *King v. McLean Asylum, etc.*, 64 Fed. 344, 21 U. S. App. 481, 26 L. R. A. 791, construing revised statutes, sections 751, 752, respecting jurisdiction to issue habeas corpus; *In re Dana*, 68 Fed. 899, holding mere change of phraseology not construable as change in law; *United States v. North American Comm. Co.*, 74 Fed. 149, affirming rule in construction of act of 1875, regulating seal fishery; *Rice v. Sharpleigh, etc., Co.*, 85 Fed. 563, holding code presumed not to change, but only to revise; old statutes; *Steadman v. Bank*, 69 Tex. 53, 6 S. W. 676, holding former law, superseded by vague new law, may be resorted to in construing latter; *Cortesy v. Territory*, 7 N. Mex. 95, 32 Pac. 506, 19 L. R. A. 355, holding revised act must be looked to as embodying law on subject at time of passage; *Gaines v. Marye*, 94 Va. 227, 26 S. E. 512, holding last expression of legislative will, if embodied in revision, must prevail in construing inconsistent parts of law as revised; *Grætz v. McKenzie*, 3 Wash. 199, 28 Pac. 333, and *Powder River, etc., Co. v. Board of County Commrs.*, 3 Wyo. 605, 29 Pac. 364, as to effect of combination of two prior statutes in revised statute. Cited generally in *United States v. Auffmordt*, 19 Fed. 896, holding subsequent acts modify revised statutes, and *Ex parte Perkins*, 29 Fed. 907.

Distinguished in *United States v. Lacher*, 134 U. S. 627, 33 L. 1082, 10 S. Ct. 626, holding, where revision is ambiguous, resort may be

had to original statute; *Bank v. Colgate*, 120 N. Y. 395, 24 N. E. 802, 8 L. R. A. 717, and n., holding prior code may be referred to in construing revision.

100 U. S. 514-535, 25 L. 699, *MOUNT PLEASANT v. BECKWITH*.

Municipal corporation's powers do not rest upon contract with State, and may be modified or taken away at will of legislature, p. 525.

The following citing cases apply this principle: *Sinton v. Carter*, 23 Fed. 537, holding legislature may authorize county to create debt without submission to popular vote; *Mayor, etc. v. Shattuck*, 19 Colo. 120, 41 Am. St. Rep. 222, 34 Pac. 952, and *True v. Davis*, 133 Ill. 532, 22 N. E. 411, 6 L. R. A. 267, and n., both holding legislature may provide for organizing, uniting, dividing or annulling municipal corporations, at discretion; *Woolverton v. Albany*, 152 Ind. 79, 52 N. E. 456, and *State v. Cincinnati*, 52 Ohio St. 457, 40 N. E. 514, 27 L. R. A. 750, and n., both holding boundaries of municipal corporations may be extended or restricted, or municipalities consolidated, at legislative discretion; *Wooster v. Plymouth*, 62 N. H. 212, holding legislature may divide town and property thereof without its consent; *Dare v. Currituck*, 95 N. C. 192, upholding power of legislature to create new counties from existing counties, and apportion debts; *Morris v. Gussett*, 62 Tex. 743, affirming rule, but holding legislative power to repeal municipal charters cannot be exercised to injury of creditors; *Barre v. School Dist.*, 67 Vt. 113, 30 Atl. 808, holding State may abolish school districts and transfer their funds to towns; *Board v. Board*, 30 W. Va. 430, 4 S. E. 643, holding municipal corporations always subject to will of legislature; *Richland v. Richland*, 59 Wis. 599, 18 N. W. 501, holding statute devoting liquor-license money to counties for pauper support, gave no vested right; *Forest v. Langlade*, 76 Wis. 610, 45 N. W. 600, holding general law providing for apportionment of debts on creation of new counties, not binding on subsequent legislatures; *State Joint School, etc. v. Sweeney*, 103 Wis. 406, 79 N. W. 421, denying existence of vested interest in school-district boundaries. See 53 Am. Dec. 471, extended note.

Qualified in *Shapleigh v. San Angelo*, 167 U. S. 653, 655, 42 L. 313, 17 S. Ct. 959, 960, holding disincorporation cannot affect subsisting contracts.

Appeal and error.—Parties not appealing from final decree below cannot be heard in opposition thereto when case is brought up by other parties, p. 527.

Followed in *Bensiek v. Thomas*, 66 Fed. 106, 27 U. S. App. 765.

Municipal corporations.—Where legislature creates new town out of portion of territory of old one, latter is liable for all debts contracted before separation, p. 528.

The following citing cases apply the principle: *Brewis v. Duluth*, 3 McCrary, 224, 13 Fed. 335, holding old corporation cannot enforce contribution from new, to which part of its property has been transferred; *Board of Supervisors v. Thompson*, 61 Fed. 921, 22 U. S. App. 418, holding liabilities of old corporation do not follow severed territory; *Perry County v. Conway County*, 52 Ark. 432, 12 S. W. 878, 6 L. R. A. 666, and n., holding remaining portion of county retains all county property and debts; *Johnson v. San Diego*, 109 Cal. 475, 42 Pac. 251, 30 L. R. A. 180, holding imposition of whole bonded debt on part of municipality exclusively benefited thereby, valid; *Washington v. Weld*, 12 Colo. 154, 20 Pac. 273, holding new county carved from old, receives none of latter's assets and assumes none of its liabilities; *Winona v. School Dist.*, 40 Minn. 19, 12 Am. St. Rep. 692, 41 N. W. 542, 3 L. R. A. 49, holding old district, not being abolished, retains debts and property in territory annexed to new; *Bloomfield v. Glen Ridge*, 55 N. J. Eq. 507, 37 Atl. 64, holding, on division of municipality, old corporation retains title to all its property; *Livingston v. School Dist.*, 9 S. Dak. 107, 68 N. W. 168, holding old school district liable for debts contracted before annexation of portion of territory to new.

Municipal corporations.—Where municipal corporation is extinguished by legislature and its territory annexed to other towns, in absence of legislation latter are entitled to public property and immunities of former and liable for its debts contracted prior to annexation, p. 528.

The following citing cases rely on the principal case: *Mobile v. Watson*, 116 U. S. 302, 29 L. 625, 6 S. Ct. 403, reaffirming rule; *Pacific Imp. Co. v. Clarksdale*, 74 Fed. 533, 41 U. S. App. 68, and *Broadfoot v. Fayetteville*, 124 N. C. 486, 70 Am. St. Rep. 614, 32 S. E. 806, both holding debts of town, on repeal of its charter, fall to city succeeding thereto; *Johnson v. San Diego*, 109 Cal. 480, 42 Pac. 252, 30 L. R. A. 181, holding legislature, on making division, may adjust burden of existing debts; *Louisville, etc., Ry. v. Boney*, 117 Ind. 505, 20 N. E. 434, 3 L. R. A. 438, and n., applying rule to consolidation of railroad companies; *Wellington v. Wellington*, 46 Kan. 221, 26 Pac. 418, holding title to land granted township passes to city on its erection thereto; *Clother v. Maher*, 15 Neb. 2, 16 N. W. 903, holding consolidated school district liable for debts of former districts; *District v. Greenfield*, 64 N. H. 86, 6 Atl. 486, holding debts of abolished school district payable by town succeeding to property, when less than value thereof; *Bloomfield v. Glen Ridge*, 54 N. J. Eq. 280, 33 Atl. 927, holding, on division of corporation, property fixed to land within new corporation becomes property of that municipality; *People v. Board of Suprs. of Ulster*, 94 N. Y. 267, holding creditors' remedy is by mandamus against officers of succeeding towns; *Coler v. Dwight, etc., Township*, 3 N. Dak. 261, 55 N. W. 592, 28 L. R. A. 654, holding school township becomes, on

organization, immediately liable for debts of former district; *Guthrie v. Territory*, 1 Okl. 203, 31 Pac. 194, 21 L. R. A. 847, holding legislature may provide for payment of provisional government's debts by succeeding village corporation; *Lawrence Co. v. Meade County*, 6 S. Dak. 534, 62 N. W. 133, holding annexing county liable for proportion of floating debt of county partially annexed; *O'Connor v. Memphis*, 6 Lea, 737 (see dissenting opinion in 6 Lea, 749), holding suit pending against city at date of repeal of charter, renewable against new corporation composed of same people; *Prescott v. Lennox*, 100 Tenn. 592, 47 S. W. 181, holding each of new towns, created out of former municipality, holds in severalty public property within its limits; *De Mattos v. Whatcom*, 4 Wash. 130, 132, 29 Pac. 934, 935, holding consolidated city may issue bonds to pay debts of former corporations; *Board v. Board*, 30 W. Va. 432, 4 S. E. 644, holding legislature, on division of old corporation and creation of new, may apportion property and liabilities; *Knight v. Ashland*, 61 Wis. 242, 21 N. W. 70, holding attorney may recover from new town for services rendered old, before its annexation; *Schriber v. Langlade*, 66 Wis. 629, 29 N. W. 552, holding, on annexation of one town to another, assets and liabilities of former pass to latter; *Comanche County v. Lewis*, 133 U. S. 205, 33 L. 607, 10 S. Ct. 289, holding county debts, contracted during valid organization, remain obligations of county, although organization is suspended. See 35 Am. St. Rep. 539, and 59 Am. St. Rep. 555, monographic notes.

Distinguished in *Morgan v. Waldwick*, 17 Fed. 288, holding, on division of town into two towns, each liable for proportion of debt assumed thereby; *Bloomfield v. Glen Ridge*, 55 N. J. Eq. 508, 37 Atl. 64, holding, on division of corporation, old corporation retains title to all its property.

Municipal corporations.—Where municipality is extinguished and territory annexed to other towns, power to tax property transferred vests in latter immediately, p. 530.

Cited in *Garrett v. Memphis*, 5 Fed. 876, holding new corporation may be compelled to levy taxes to pay debt of old.

Municipal corporations, whenever engaging in transactions not public in nature, act under same pecuniary responsibility as individuals, p. 533.

Approved in *Mobile v. Watson*, 116 U. S. 305, 29 L. 626, 6 S. Ct. 405, holding municipalities deemed private corporations to extent of fixing liability on bonds; *Mt. Hope Cemetery v. Boston*, 158 Mass. 512, 35 Am. St. Rep. 518, 33 N. E. 695, holding municipalities may possess private ownership in property not under legislative control.

Municipal corporations.—Remedy of creditor of extinguished municipal corporation is in equity, against municipalities succeeding to its property and liabilities, p. 534.

Approved in *Towle v. Brown*, 110 Ind. 68, 10 N. E. 628, holding division of funds, on creation of new township from existing one, matter of equity jurisdiction; *Swann v. Summers*, 19 W. Va. 132, applying rule to other corporations.

Distinguished in *Saving, etc., Assn. v. Alturas*, 65 Fed. 684, denying equitable relief where act providing for bond issue provided for payment upon division of county; *Livingston v. School Dist.*, 9 S. Dak. 109, 68 N. W. 169, holding old corporation retained liabilities.

Miscellaneous.—Miscited in *Compton v. Jesup*, 167 U. S. 35, 42 L. 68, 17 S. Ct. 808.

100 U. S. 535, 25 L. 699, *MOUNT PLEASANT v. CORNELL*.

Decided with preceding case.

Not cited.

100 U. S. 536-538, 25 L. 756, *UNITED STATES v. MURRAY*.

United States.—Secretary of treasury may put employee on furlough without pay whenever exigencies of service require, p. 538.

United States.—Joint resolution of Congress, approved June 23, 1874, contemplated extra pay only when discharges from treasury department were in consequence of reduction of clerical force necessitated by legislation of that session, p. 538.

Not cited.

100 U. S. 539-547, 25 L. 705, *PEOPLE v. WEAVER*.

Taxation.—Valuation is part of assessment of taxes, p. 545.

Cited in *Bank of Albia v. City Council*, 86 Iowa, 31, 33, 52 N. W. 334, 335, holding actual value of national bank stock, less proportionate value of bank's real estate, proper valuation for taxation; *State v. Railroad*, 54 S. C. 575, 32 S. E. 695, holding official valuation for taxation necessary to constitute liability to pay taxes.

Taxation.—Section 5219, revised statutes, providing that State taxation on national bank shares shall not exceed rate assessed on other capital, refers to entire process of assessment, including valuation of shares as well as rates of percentage charged thereon; hence, New York statute of 1850, permitting deduction of debts from personal property valuation, except as to exclusive property invested in such shares, establishes mode of assessment by which same are valued higher in proportion to real value than other capital, and is invalid as to them, although no greater percentage is levied on valuation, p. 546.

Approved and principle applied in *Pelton v. National Bank*, 101 U. S. 145, 25 L. 902, holding systematic valuation of all other capital at less rate than national bank stock violative of act; *Super-*

visors v. Stanley, 105 U. S. 311, 315, 26 L. 1050, 1051, affirming S. C., 12 Fed. 87, 90, 91, holding New York statute of 1866, so far as not authorizing deduction for debts of shareholder of national bank, invalid; Evansville Bank v. Britton, 105 U. S. 324, 26 L. 1054, holding Indiana taxation of national bank shares without permitting deduction of indebtedness, as in case of other moneyed capital, invalid; Boyer v. Boyer, 113 U. S. 694, 695, 28 L. 1090, 1091, 5 S. Ct. 709, holding Pennsylvania statute, exempting from local taxation various kinds of moneyed capital, discriminatory against that invested in national banks; Evansville Nat. Bank v. Britton, 10 Biss. 505, 8 Fed. 868, holding Indiana revenue law invalid; Nat. Albany, etc., Bank v. Wells, 18 Blatchf. 481, 5 Fed. 251, holding assessment, under New York act of 1866, void; Albany Nat. Bank v. Maher, 19 Blatchf. 177, 6 Fed. 419, holding restriction on State power to tax national bank shares prohibits assessment discriminating unfairly against same; Richards v. Rock Rapids, 31 Fed. 508, 512, holding national bank shareholders entitled to right of deduction given taxpayers under section 814, Iowa code; First Nat. Bank v. Richmond, 39 Fed. 314, and Nat. Bank v. Fisher, 45 Kan. 729, 26 Pac. 483, holding assessment of entire stock of national bank in solido against bank itself, invalid; Whitney Nat. Bank v. Parker, 41 Fed. 409, holding Louisiana tax on national bank shares, making no deduction for bank's non-assessable property, invalid; National Bank v. Shields, 59 Fed. 954, holding similar Ohio statute (§ 2730, R. S. Ohio) an unlawful discrimination; Railroad, etc., Co. v. Board of Equalizers, 85 Fed. 307, holding constitutional requirement of uniform taxation applies to mode of assessment as well as rate; Pollard v. State, 65 Ala. 631, 633, 634, 636, holding similar Alabama law (Code, § 358) invalid; State Bank v. Board of Revenue, 91 Ala. 219, 8 So. 853, holding shareholders in State and national banks equally entitled to deduct indebtedness from value of shares; Miller v. Heilbron, 58 Cal. 137, 140, holding provisions of section 3640, California political code, invalid as applied to national banks; McHenry v. Downer, 116 Cal. 27, 47 Pac. 781, 45 L. R. A. 743, and n., holding shares of national bank stock not assessable for purposes of taxation under California code; Wasson v. First Nat. Bank, 107 Ind. 213, 215, 217, 8 N. E. 100, 102, holding owners of national bank stock may deduct indebtedness from its assessed value, notwithstanding statute; Bank of Albia v. City Council, 86 Iowa, 31, 33, 37, 38, 52 N. W. 334, 335, 336, 337, holding national bank stock credits, within section 814, code, entitling taxpayer to deduct debts from credits; National Bank v. Hoffmann, 98 Iowa, 122, 61 N. W. 419, holding national bank stock not assessable as personal property of bank; Chicago, etc., R. R. v. Atchison, 54 Kan. 789, 39 Pac. 1040, holding railroad taxed upon higher assessment than other property, may enjoin collection of excess; Walsh v. King, 74 Mich. 353, 41 N. W. 1082, holding, where assessors col-

lusively assess certain property at less than cash value, other property-owner, whose tax is thereby increased, entitled to equitable relief; *McAden v. Commissioners*, 97 N. C. 358, 2 S. E. 672, holding owner of national bank stock may deduct therefrom amount of his indebtedness; *Bressler v. Wayne*, 32 Neb. 836, 49 N. W. 787, 13 L. R. A. 615, and n., overruling S. C., 25 Neb. 472, 41 N. W. 357, holding owner of national bank stock may not deduct indebtedness from value thereof; *National Bank v. Kreig*, 21 Nev. 407, 32 Pac. 642, holding mortgages held by national banks not taxable; *Weston v. Manchester*, 62 N. H. 574, holding national bank stock must be included in money at interest; *First Nat. Bank v. Chapman*, 9 Ohio C. C. 82, 83, holding national bank shareholder must be permitted to deduct debts, notwithstanding Ohio statute; *Newport v. Mudgett*, 18 Wash. 273, 274, 275, 51 Pac. 467, holding similar Washington statute (Bul. code, § 1657), invalid; *Ruggles v. Fond du Lac*, 53 Wis. 439, 10 N. W. 565, holding value of national bank stock must be considered part of "debts due," from which indebtedness may be deducted; *Stanley v. Supervisors of Albany*, 121 U. S. 542, 545, 30 L. 1001, 1002, 7 S. Ct. 1235, 1237, holding party failing to resort to tribunal created by State for correction of assessment errors cannot sue at law; *Talbott v. Silver Bow*, 139 U. S. 440, 35 L. 210, 11 S. Ct. 595, holding territories possess same power to tax national banks enjoyed by States; *Santa Clara R. R. Tax Case*, 9 Sawy. 189, 190, 18 Fed. 401, holding elimination of mortgages in estimating value of railroad property (Cal. Const., art. 13) invalid discrimination; *Railroad Tax Cases*, 8 Sawy. 255, 13 Fed. 736, 737, holding California statutes, providing for different modes of assessing property of railroads and persons, invalid; *First Nat. Bank v. Herbert*, 44 Fed. 159, holding national bank shares taxable by State if similar property is equally taxed; *People v. National Bank*, etc., 123 Cal. 60, 69 Am. St. Rep. 37, 55 Pac. 688, 45 L. R. A. 758, holding personal assets of national banks exempt from State taxation; *Bank v. Board of Assessments*, 41 La. Ann. 183, 5 So. 408, holding shares of banks, whose capital is invested in United States bonds, taxable; *Sprague v. Fletcher*, 69 Vt. 76, 37 Atl. 241, 37 L. R. A. 842, holding law denying non-resident, exemption allowed resident, invalid. *Arguendo*, in *Osborne v. Florida*, 164 U. S. 654, 41 L. 587, 17 S. Ct. 215, construction of State statute by State court binding; *National Bank v. King*, 57 Fed. 433, overruling *demurrer*; *First Nat. Bank v. Hungate*, 62 Fed. 549, affirming doctrine. See 69 Am. St. Rep. 49, 50, and 96 Am. Dec. 294, 295, extended notes.

Distinguished in *National Bank v. Kimball*, 103 U. S. 735, 26 L. 470, holding bill failing to allege statutory discrimination, or discriminatory rule established by assessors, demurrable; *Mercantile Bank v. New York*, 121 U. S. 151, 30 L. 900, 7 S. Ct. 833, holding moneyed capital does not necessarily embrace all corporation stock;

Palmer v. McMahon, 133 U. S. 667, 33 L. 775, 10 S. Ct. 326, upholding chapter 596, laws of New York 1880, regulating assessments on bank stock; First Nat. Bank, etc. v. Ayer, 160 U. S. 664, 40 L. 574, 16 S. Ct. 413, holding Kansas statutes, as to deduction of debts, not invalid; Aberdeen Bank v. Chehalis, 166 U. S. 452, 41 L. 1075, 17 S. Ct. 633, holding Washington act of 1891 does not impose forbidden tax on national banks; First Nat. Bank v. Farwell, 10 Biss. 272, 7 Fed. 520, holding shareholders in national bank not entitled to allowance for capital invested in government bonds; Exchange Nat. Bank v. Miller, 19 Fed. 380, sustaining Ohio statute taxing national bank shares without deducting amount of non-assessable securities; Maguire v. Mobile, 71 Ala. 414, 415, 416, 418, holding Alabama statute of 1880 not in conflict with national bank laws; Winter v. Baldwin, 89 Ala. 485, 7 So. 734, holding national banks within purview of statute securing stockholders of corporations right to inspect books thereof; Dutton v. National Bank, 53 Kan. 456, 36 Pac. 722, where statute provided that all moneyed capital should be subject to taxation without deduction; First Nat. Bank v. St. Joseph, 46 Mich. 529, 530, 9 N. W. 839, 840, upholding Michigan tax law; Stratton v. Collins, 43 N. J. L. 567, 569, holding exemption of stock in other corporations not violative of section 5219, revised statutes; Boyer's Appeal, 103 Pa. St. 393, sustaining Pennsylvania county tax of 1883, as taxing national bank shares equally with other property; Rosenberg v. Weekes, 67 Tex. 585, 4 S. W. 901, holding, under Texas law allowing deduction of debts from credits only, bank stock not included in latter.

100 U. S. 547-548, 25 L. 708, WILLIAMS v. WEAVER.

Courts.—Decision of State court that assessor is not personally liable in damages for erroneous assessment of national bank stock, presents no Federal question, p. 548.

Cited in Tyler v. Cass, 142 U. S. 291, 35 L. 1018, 12 S. Ct. 226, holding State decision presented no Federal question; Rutland R. R. v. Central Vt. R. R., 159 U. S. 641, 40 L. 289, 16 S. Ct. 116, holding decision involving Federal question, but decided against appellant on other sufficient grounds, not subject to Federal review; Leyson v. Davis, 17 Mont. 292, 42 Pac. 796, 31 L. R. A. 453, holding cases involving ownership of national bank stocks do not always present Federal questions; Boody v. Watson, 64 N. H. 165, 9 Atl. 797, holding assessors not personally liable for erroneous assessment.

Miscellaneous.—First Nat. Bank v. St. Joseph, 46 Mich. 530, 9 N. W. 840, holding taxpayer, who omits to have assessment corrected, assumes correctness thereof; Wells v. Western Paving, etc., Co., 96 Wis. 126, 70 N. W. 1074, cited erroneously.

100 U. S. 548-563, 25 L. 710, *NEWTON v. COMMISSIONERS*.

Officers.—Legislative power of a State, except as restrained by its Constitution, being at all times absolute, it may at pleasure create, or abolish, all offices within its reach, modifying duties, increase or shorten terms or alter salary thereof, p. 559.

The following citing cases apply the principle: *Crenshaw v. United States*, 134 U. S. 105, 33 L. 828, 10 S. Ct. 433, holding naval officer does not hold office by contract, but at will of government; *Collins v. Russell*, 107 Ga. 426, 33 S. E. 445, holding legislature may shorten term of incumbent; *Board, etc. v. Chapman*, 22 Ind. App. 63, 53 N. E. 188, holding county commissioners may alter assessor's salary at any time; *People v. Loeffler*, 175 Ill. 608, 51 N. E. 792, upholding State civil service act; *Lloyd v. Silver Bow*, 11 Mont. 411, 412, 28 Pac. 454, upholding act reducing salary of sheriffs in office; *Esser v. Spaulding*, 17 Nev. 305, 30 Pac. 899, holding right to be paid from particular fund not vested, as against subsequent legislation; *Richland v. Richland*, 59 Wis. 599, 18 N. W. 501, holding State may, at pleasure, charge its agencies for expenditure of its funds.

Distinguished in *Hall v. Wisconsin*, 103 U. S. 10, 26 L. 305, where State had contracted for services, at stipulated compensation; *Fisk v. Jefferson Police Jury*, 116 U. S. 134, 29 L. 588, 6 S. Ct. 330, holding perfect implied obligation exists to pay for services of officer at rate fixed.

Constitutional law.—Contracts cannot arise from public laws relating to governmental subjects; hence, act establishing permanent county seat does not create contract between State and inhabitants of town selected, p. 559.

Cited and principle applied in *Essex, etc., Board v. Skinkle*, 140 U. S. 340, 35 L. 448, 11 S. Ct. 792, holding law empowering road board to purchase land, creates no contract; *Grand Lodge v. New Orleans*, 166 U. S. 150, 41 L. 953, 17 S. Ct. 525, holding act exempting masonic hall from taxation constituted no contract; *Luce v. Fensler*, 85 Iowa, 601, 52 N. W. 519, denying jurisdiction, under statute, to enjoin action by supervisors upon petition to relocate county seat; *Edwards v. Lesueur*, 132 Mo. 440, 33 S. W. 1135, 31 L. R. A. 822, refusing to enjoin removal of State capitol; *Seminary v. County Court*, 149 Mo. 73, 50 S. W. 884, 45 L. R. A. 680, holding charter of public seminary not a contract. Cited, *arguendo*, in *Indianapolis v. Central Trust Co.*, 83 Fed. 532, 53 U. S. App. 664, holding inquiry whether amending act violates vested right, presents Federal question; *State v. Elting*, 29 Kan. 405, holding offer to donate land in case county seat is located at certain town, not bribery.

Distinguished in *Lynn v. Polk*, 8 Lea, 223, majority denying jurisdiction to invalidate license law, passage thereof was procured by

bribery; *Pepin v. Prindle*, 61 Wis. 310, 21 N. W. 257, holding private grant to county on condition of maintaining courthouse on land, subject to forfeiture on removal thereof.

Constitutional law.—In matters of public law, relating to public subjects, prior legislature cannot bind subsequent legislatures, p. 559.

Approved in *Pennsylvania R. R. v. Miller*, 132 U. S. 83, 33 L. 272, 10 S. Ct. 37, reprinted in 129 Pa. St. 199, holding railroad took charter subject to changes in law; *Illinois, etc., R. R. v. Illinois*, 146 U. S. 459, 36 L. 1045, 13 S. Ct. 120, holding grant of land beneath water to railroad, merely a license; *Mutual Life Ins. Co. v. Spratley*, 172 U. S. 621, 19 S. Ct. 315, holding legislature may alter law in regard to serving process on foreign corporations; *Lake Roland, etc., Ry. v. Mayor*, 77 Md. 372, 26 Atl. 513, 20 L. R. A. 131, holding ordinance authorizing double tracks repealable after tracks are laid; *Seminary v. County Court*, 149 Mo. 72, 50 S. W. 884, 45 L. R. A. 680, holding charter granting fines collected to seminary subject to repeal.

Distinguished in *Pingree v. Michigan, etc., Co.*, 118 Mich. 329, 76 N. W. 640, holding legislature may grant railroad irrevocable right to fix tolls.

Statutes.—In construing contracts made by State, nothing can be taken as conceded but what is given in express and explicit terms, or by clear implication, p. 561.

Approved in *Railroad Commrs. Cases*, 116 U. S. 327, 29 L. 643, 6 S. Ct. 343, holding statute granting railroad right to regulate fare does not prevent State passing upon same; *Pennsylvania R. R. v. Miller*, 132 U. S. 84, 33 L. 272, 10 S. Ct. 37, reprinted in 129 Pa. St. 200, holding exemption from future general legislation must be expressly granted; *Water Co. v. Water Co.*, 80 Me. 563, 15 Atl. 788, 1 L. R. A. 394, holding exclusive right to appropriate water cannot be inferred from charter creating water company; *Attorney-General v. Jamaica, etc.*, 133 Mass. 366, holding grant from sovereign to be construed strictly against grantee; *Springfield v. Smith*, 138 Mo. 655, 60 Am. St. Rep. 574, 40 S. W. 759, 37 L. R. A. 448, holding right of city to exact license will not be denied unless expressly surrendered in ordinance; *Seminary v. County Court*, 149 Mo. 70, 50 S. W. 883, 45 L. R. A. 680, holding only such powers exercisable under grants to corporations as clearly comprehended therein; *Dow v. Railroad*, 67 N. H. 49, 36 Atl. 534, holding exemption from taxation must be shown by clear and unmistakable language; *Esser v. Spaulding*, 17 Nev. 300, 304, 30 Pac. 897, 899, holding complainant must show existence of contract and impairment by legislation.

Constitutional law.—If act providing that county seat should be permanently established at given town can be construed as a contract, it is satisfied by establishing same there with intent that it remain, and is not broken by subsequent removal, p. 562.

Cited in *Lord v. Goldberg*, 81 Cal. 602, 15 Am. St. Rep. 87, 22 Pac. 1128, holding agreement in hiring contract, for permanent employment, merely means indefinite continuance.

Miscellaneous.—*Southern Ry. v. North Carolina R. Co.*, 81 Fed. 600.

100 U. S. 564-571, 25 L. 735, *MEEKS v. OLPHERTS*.

Limitation of actions.—Section 190, probate act of California, providing that no action for recovery of land sold by order of Probate Court shall be maintained by any heir or other person claiming under intestate, unless brought within three years after sale, applies to administrator who made sale, p. 568.

Cited in *Dennis v. Bint*, 122 Cal. 44, 45, 68 Am. St. Rep. 22, 54 Pac. 380, holding limitation begins, under section 1573, code of civil procedure, to run after lapse of reasonable time in which to obtain settlement of final account; *Chase v. Cartright*, 53 Ark. 365, 22 Am. St. Rep. 211, 14 S. W. 92, holding executor not barred by his own void conveyance from suing to recover land.

Limitation of actions.—Whenever right of action in trustee is barred by limitation, right of cestui que trust is also barred, p. 569.

Reaffirmed in *Partee v. Thomas*, 11 Fed. 778, and *Chase v. Cartright*, 53 Ark. 366, 22 Am. St. Rep. 212, 14 S. W. 92. Cited and principle applied in *Trimble v. Woodhead*, 102 U. S. 649, 26 L. 291, *McCartin v. Perry*, 39 N. J. Eq. 202, and *Mount v. Manhattan Co.*, 41 N. J. Eq. 215, 3 Atl. 729, holding assignee's failure to recover assigned property within time limited gives bankrupt and creditors no right to do so; *Walker v. Cronkite*, 40 Fed. 136, holding execution debtor cannot collaterally attack validity of sale after redemption period; *Willson v. Louisville Trust Co.*, — Ky. —, 44 S. W. 122, applying rule where beneficiaries were infants and trust constructive; *Nash v. Simpson*, 78 Me. 153, 3 Atl. 58, holding assignee's failure to recover property fraudulently conveyed confirms grantee's title.

Executors and administrators.—In California, when action is barred by limitation, against administrator, it is barred against heirs, right of possession and representation of their interests being in him, p. 569.

Approved in *Lloyd v. Ball*, 77 Fed. 368, 369, 370, holding, under California code, judgment in action by assignee, against administrator of deceased bankrupt, binds heirs; *McLeran v. Benton*, 73 Cal. 343, 2 Am. St. Rep. 822, 14 Pac. 884, holding heir barred, although a minor when action accrued to administrator; *Mathews v. Durkee*, 34 Fla. 563, 16 So. 413, holding prescriptive title barring administrator, bars heirs; *Hyde v. Heller*, 10 Wash. 602, 39 Pac. 256, holding legal title vests in administrator for purpose of conveying to purchaser under decedent's sale contract.

Distinguished in *Staples v. Connor*, 79 Cal. 15, 21 Pac. 380, holding heirs not barred where administrator had never qualified.

100 U. S. 571-578, 25 L. 692, *MONTGOMERY v. SAWYER*.

Abatement and revival.—In Louisiana, if defendant die pending suit and heir continues proceedings, judgment should be against heir or his succession, and if entered only against deceased *eo nomine* it is void as a judicial mortgage against third persons, p. 577.

Not cited.

100 U. S. 578-584, 25 L. 618, *DICKERSON v. COLGROVE*.

Estoppel.—He who, by language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted; hence, letter disavowing all intentions to claim certain land, estops writer from claiming same, p. 580.

Reaffirmed in *Baker v. Humphrey*, 101 U. S. 499, 25 L. 1067, *Kirk v. Hamilton*, 102 U. S. 78, 26 L. 82, *Foster v. Bear Valley Irr. Co.*, 65 Fed. 842, 844, *Butler v. Cockrill*, 73 Fed. 951, 36 U. S. App. 702, Illinois, etc., *Bank v. Arkansas*, 76 Fed. 293, 40 U. S. App. 257, 34 L. R. A. 531, Pacific, etc., *Co. v. Leete*, 94 Fed. 975, and *Carpy v. Dowdell*, 115 Cal. 687, 47 Pac. 697, all applying rule to various acts and transactions.

Approved and relied upon in *Miller v. Merine*, 43 Fed. 267, holding estoppels in pais bind privies; *Paxson v. Brown*, 61 Fed. 882, 27 U. S. App. 49, holding assignors estopped from claiming land assignment, purchased from assignee, on ground of non-compliance with statute; *Berry v. Seawall*, 65 Fed. 753, 754, 31 U. S. App. 30, holding married woman, tenant in common, estopped, by Ohio law, to dispute partition made by husband; *Union Pac. Ry. v. United States*, 67 Fed. 979, 32 U. S. App. 311, holding estoppel operating against rights of real party in interest, bars recovery where United States is formal complainant; *Ward v. Cochran*, 71 Fed. 131, 36 U. S. App. 307, holding vendee not in possession long enough to plead limitations to ejectment by vendor, may plead estoppel; *The Otumwa Belle*, 78 Fed. 648, holding active intent to mislead not essential to estoppel; *Mohrenstecher v. Westervelt*, 87 Fed. 165, 57 U. S. App. 632, holding bank estopped to deny statements on which cashier's sureties relied; *Lindsay v. Cooper*, 94 Ala. 177, 33 Am. St. Rep. 111, 11 So. 327, 16 L. R. A. 816, and n., where grantor, as administrator of purchaser's estate, sold land without giving notice of his lien; *Hagan v. Ellis*, 39 Fla. 473, 63 Am. St. Rep. 172, 22 So. 730, holding one permitting another to purchase land under erroneous opinion of title, estopped; *Burke v. Grant*, 116 Ill. 130, 4 N. E. 658, holding mortgagee estopped to enforce mortgage, by reason of acts induced by promise to discharge; *Quick v. Milligan*, 108

Ind. 422, 58 Am. Rep. 51, 9 N. E. 394, holding grantor estopped to deny title under deed wrongfully delivered by escrow; *Kiefer v. Klinsick*, 13 Ind. App. 254, 37 N. E. 1048, holding wife permitting husband to conduct business in his own name, estopped to deny his ownership as against mortgagee; *Snow v. Hutchins*, 160 Mass. 117, 35 N. E. 315, and *Kelly v. Hurt*, 74 Mo. 567, where mortgagor, with knowledge of irregularities in sale, stood by while purchaser improved land; *Olden v. Hendrick*, 100 Mo. 538, 539, 13 S. W. 822, holding one holding land in own name in trust for another, estopped to assert title; *Alliance Trust Co. v. O'Brien*, 32 Or. 341, 51 Pac. 642, where owner placed property in another's name and latter mortgaged same with former's knowledge; *Tolerton, etc., Co. v. Casperson*, 7 S. Dak. 213, 63 N. W. 911, holding one encouraging attachment estopped to claim it improperly sued out; *Scott v. Toomey*, 8 S. Dak. 649, 67 N. W. 841, holding pre-emptor estopped by acquiescence in construction, from denying right to maintain ditch; *Electric-Light Co. v. Gas Co.*, 99 Tenn. 382, 42 S. W. 21, holding lien claimant estopped as against purchasers of bonds issued at his suggestion; *Frame v. Tabler*, — Tenn. —, 52 S. W. 1018, holding maker inducing another to purchase note from payee, without notifying him of defenses, estopped; *Lehi Irr. Co. v. Moyle*, 4 Utah, 343, 9 Pac. 877, holding ditchowner, cognizant of improvements made by others, estopped to deny their right to use ditch; *Trust Co. v. Wagener*, 13 Utah, 241, 44 Pac. 1032, reversing S. C., 12 Utah, 11, 40 Pac. 765, and holding lessee relying upon lessor's declaration of forfeiture, not liable for rent thereafter; *Marrow v. Brinkley*, 85 Va. 62, 6 S. E. 609, holding party acquiescing in judicial sale cannot, long after, set up lack of notice; *Williamson v. Jones*, 39 W. Va. 269, 19 S. E. 446, 25 L. R. A. 236, and n., holding one who causes his land to be sold under void judicial process, retaining proceeds, estopped to set up invalidity; *St. Paul, etc., Ry. v. Sage*, 49 Fed. 320, 4 U. S. App. 160, holding laches, independent of limitations, may bar recovery; dissenting opinion in *Lake Superior, etc., Co. v. Cunningham*, 44 Fed. 843, majority holding State not estopped to claim title, through act of its agent, who was also officer of defendant company. See also 49 Am. Dec. 386, extended note on estoppel.

Limited in *Naumburg v. Hyatt*, 24 Fed. 904, holding doctrine of estoppel available only for protection, not attack. Cited, but application denied, in *Brown v. Cranberry Iron Co.*, 72 Fed. 102, 25 U. S. App. 679, and *Evans v. Belmont, etc., Co.*, 92 Tenn. 366, 21 S. W. 674, both holding facts did not justify application of doctrine of equitable estoppel. Distinguished in *Paxson v. Brown*, 61 Fed. 884, 27 U. S. App. 49, holding recital in deed that grantee derives title from certain source, does not estop one claiming under him from deraigning title from true source; *Whitney v. Nat., etc., Bank*, 84 Fed. 377, holding bank not estopped to set up agent's excess of au-

thority in bidding; *Cleveland v. Cleveland, etc., Ry.*, 93 Fed. 119, holding conduct of party sought to be estopped must be viewed in light of contemporaneous understanding of his rights; *Brickley v. Edwards*, 131 Ind. 10, 30 N. E. 710, holding third party relying on correspondence not addressed to him, cannot claim estoppel; *Stone v. Engstrom*, 19 R. I. 204, 32 Atl. 918, holding estoppel not enforceable in favor of purchaser, where price was grossly inadequate; *Edwards v. Dickson*, 66 Tex. 618, 2 S. W. 721, holding representation referring only to future state of things, not estoppel; *McLaren v. Jones*, 89 Tex. 134, 33 S. W. 850, holding defendant not estopped by declarations neither made to, nor intended for, plaintiff; *Trust Co. v. Wagener*, 12 Utah, 11, 40 Pac. 765, reversed in 13 Utah, 241, 44 Pac. 1032, holding lessees prevented by knowledge of real facts from claiming estoppel.

Estoppel in pais is a defense available in law, as well as in equity, e. g., available in ejectment, p. 582.

Approved in *Drexel v. Berney*, 122 U. S. 253, 30 L. 1222, 7 S. Ct. 1204, *Wehrman v. Conklin*, 155 U. S. 327, 39 L. 174, 15 S. Ct. 134, *Drexel v. Berney*, 21 Blatchf. 350, 16 Fed. 524, *Concord v. Norton*, 16 Fed. 479, *De Guire v. St. Joseph, etc., Co.*, 38 Fed. 66, and *Cornwall v. Davis*, 38 Fed. 882, 4 L. R. A. 565, all holding it necessary to show some ground other than estoppel, in order to justify resort to equity; *Miller v. Merine*, 43 Fed. 266, *Berry v. Seawall*, 65 Fed. 755, 31 U. S. App. 30, *Hagan v. Ellis*, 39 Fla. 472, 63 Am. St. Rep. 171, 22 So. 729, and *Tracy v. Roberts*, 88 Me. 317, 51 Am. St. Rep. 399, 34 Atl. 71, all holding equitable estoppel equally available in law and equity; *Pitman v. Mining Co.*, 78 Mo. App. 441, holding estoppel in pais an available defense before justice of the peace; *Duke v. Griffith*, 9 Utah, 476, 35 Pac. 514, holding improvements made with plaintiff's knowledge may be set up as estoppel in ejectment.

Cited, but application refused, in *Cleveland v. Cleveland, etc., Ry.*, 93 Fed. 123, holding facts insufficient to establish defense of estoppel. Distinguished in *Brown v. Cranberry Iron, etc., Co.*, 72 Fed. 103, 25 U. S. App. 679, holding issue involving only question of estoppel improperly sent by equity court to law court. Questioned in *United States v. California, etc., Land Co.*, 148 U. S. 45, 37 L. 361, 13 S. Ct. 463, holding one may become bona fide purchaser for value, although holding under quitclaim.

Ejectment can be maintained on title by estoppel, p. 583.

Affirmed in *George v. Tate*, 102 U. S. 570, 26 L. 233, holding title by estoppel effectual either for attack or defense in ejectment; *Bicknell v. Comstock*, 113 U. S. 152, 28 L. 963, 5 S. Ct. 400, *Campbell v. Holt*, 115 U. S. 623, 29 L. 485, 6 S. Ct. 211, and *Baker v. Oakwood*, 123 N. Y. 29, 25 N. E. 315, 10 L. R. A. 392, all holding continuous adverse possession for period sufficient to bar owner's recovery confers title.

Deeds.—Grantee by quitclaim deed is not bona fide purchaser, p. 584.

Reaffirmed in *Runyon v. Smith*, 18 Fed. 582, *United States v. Sliney*, 21 Fed. 895, *Dodge v. Briggs*, 27 Fed. 167, *Hastings v. Nissen*, 31 Fed. 600, *Dunn v. Barnum*, 51 Fed. 361, 10 U. S. App. 86, *Johnson v. Williams*, 37 Kan. 181, 1 Am. St. Rep. 245, 14 Pac. 538, collecting cases, and *Martin v. Morris*, 62 Wis. 428, 22 N. W. 530, all holding holder under quitclaim not a bona fide purchaser for value; *Beakley v. Robert*, — Mich. —, 79 N. W. 193, holding grantee for value, under recorded quitclaim, not entitled to priority over senior unrecorded deed; dissenting opinion in *United States v. California, etc., Co.*, 49 Fed. 504, 7 U. S. App. 128, majority holding deed granted land itself as well as interest of grantor.

Distinguished in *Griswold v. Bragg*, 19 Blatchf. 97, 6 Fed. 346, allowing ejected claimant under quitclaim to recover value of improvements under Connecticut statute; *Woodward v. Jewell*, 25 Fed. 691, intimating that rule does not apply in Georgia; dissenting opinion in *Ellison v. Torpin*, 44 W. Va. 446, 30 S. E. 195, majority reaffirming rule.

Miscellaneous.—*Western Union Tel. Co. v. Williams*, 86 Va. 715, 11 S. E. 112, 8 L. R. A. 436, and n., arguendo; *Saloy v. New Orleans*, 33 La. Ann. 84, miscited.

100 U. S. 585-594, 25 L. 585, **COUNTY OF CASS v. GILLETT**.

Municipal corporations.—Provisions of Missouri Constitution of 1865, requiring assent of two-thirds of voters of county to subscriptions to railroad stock, do not apply where subscription is pursuant to charter granted prior to adoption of Constitution, although contemplated road is a branch, and established under act passed subsequent to Constitution, p. 590.

Approved in *Louisiana v. Taylor*, 105 U. S. 458, 26 L. 1134, and *Ralls v. Douglass*, 105 U. S. 731, 26 L. 958, both holding said provisions prospective merely, and upholding bonds issued under prior granted authority; *Green Co. v. Conness*, 109 U. S. 104, 27 L. 872, 3 S. Ct. 69, holding rights of municipal bondholders to be determined by law as judicially construed when bonds were issued; *Scotland v. Hill*, 132 U. S. 112, 33 L. 263, 10 S. Ct. 27, upholding bonds issued under authority granted before Constitution went into effect; *Lowell v. Railroad*, 90 Me. 93, 37 Atl. 873, arguendo. See 98 Am. Dec. 669, extended note.

Municipal corporations.—Where branch road is organized by company, through committee thereof, county subscriptions thereto are not invalidated because partial assignment of franchises to another company was made prior to subscription, p. 591.

Cited in *Green Co. v. Conness*, 109 U. S. 104, 27 L. 872, 3 S. Ct. 69, holding consolidation of two railroads merges privileges, which

continue existence; *Croyster v. Bayfield Co.*, 99 Wis. 20, 74 N. W. 641, holding county cannot escape liability because railroad has transferred its interest in bonds to be earned on completion of certain sections.

Bills and notes.—*Bona fide purchaser of negotiable securities before maturity is not affected with constructive notice of suits concerning same*, p. 593.

Reaffirmed in *Tregea v. Modesto Irr. Dist.*, 164 U. S. 187, 41 L. 398, 17 S. Ct. 55, and *Hauf v. Wilson*, 31 Fed. 388, *arguendo*. See 98 Am. Dec. 684, and 45 Am. Rep. 187, notes.

Distinguished in *Stevens v. Railroad*, 4 Fed. 102, holding rule inapplicable to bill to enforce lien.

Corporations.—Actual manual subscription on company's books is not necessary to bind county as subscriber, where proper county authorities have ordered subscription and issued bonds in payment for stock, p. 594.

Reaffirmed in *Nelson v. Haywood Co.*, 87 Tenn. 797, 11 S. W. 889, 4 L. R. A. 656. See 98 Am. Dec. 670, note.

100 U. S. 595-599, 25 L. 647, RAILROAD CO. v. COLLECTOR.

Internal revenue.—Tax on interest paid by corporations on bonds under section 122, internal revenue law of 1866, is a tax on the earnings of the corporation, not the bondholder, p. 598.

Reaffirmed and applied in *Railroad v. United States*, 101 U. S. 550, 25 L. 1070, and *Bailey v. Railroad*, 106 U. S. 115, 27 L. 83, 1 S. Ct. 67, both reaffirming construction; *United States v. Erie Ry.*, 106 U. S. 330, 703, 27 L. 153, 1 S. Ct. 228 (but see dissenting opinion in 106 U. S. 337, 27 L. 156, 1 S. Ct. 233), decided on authority of principal case; *Memphis, etc., R. R. v. United States*, 108 U. S. 234, 236, 27 L. 713, 714, 2 S. Ct. 484, 486, holding railroad liable to pay tax on dividends earned in Confederacy and paid in Confederate notes; *United States v. Louisville, etc., R. Co.*, 33 Fed. 831, applying same construction to act of July 14, 1870.

Cited generally in *United States v. Little Miami, etc., R. R.*, 1 Fed. 701, holding taxes imposed under said act can be recovered in debt, although not previously assessed.

Arguendo, in *Little Miami R. R. v. United States*, 108 U. S. 279, 27 L. 725, 2 S. Ct. 629, holding act does not apply to earnings used in construction; *Pollock v. Farmers, etc., Trust Co.*, 157 U. S. 578, 39 L. 818, 15 S. Ct. 688, as to purpose of war revenue acts.

Internal revenue.—Congress may tax earnings of corporations after deducting interest paid on their debts, or may treat same as part of net earnings, p. 598.

Internal revenue.—Tax on interest paid by corporations on bonds, under section 122, internal revenue law of 1866, is not in-

validated by provision that amount thereof might be withheld from dividends or interest payable to stock or bondholders, p. 599.

Distinguished in *Pollock v. Farmers, etc., Trust Co.*, 157 U. S. 573, 39 L. 816, 15 S. Ct. 686, holding tax on income derived from interest on municipal bonds, unconstitutional.

100 U. S. 599-605, 25 L. 752, *JONES v. BLACKWELL*.

Internal revenue.—Manufactured tobacco, shipped in bond from factory and stored in export bonded warehouse on June 14, 1872, was subject to thirty-two cents per pound tax, under act of July 20, 1868, and not entitled to benefit of reduced tax, under act of June 6, 1872, p. 605.

Not cited.

100 U. S. 605-613, 25 L. 892, *SHAW v. RAILROAD CO.*

Railroads.—Trustee of railroad mortgage represents bondholders in all legal proceedings carried on by him affecting his trust to which they are not parties, and whatever binds him, if he acts in good faith, binds them, p. 611.

Cited and principle applied in *Richter v. Jerome*, 123 U. S. 246, 31 L. 137, 8 S. Ct. 112, holding bondholders bound by foreclosure decree obtained by trustee; *Beals v. Illinois, etc., R. R.*, 133 U. S. 295, 33 L. 611, 10 S. Ct. 316, holding decree cancelling bonds binding on bondholders, trustee being party; *Elwell v. Fosdick*, 134 U. S. 513, 33 L. 1002, 10 S. Ct. 601, holding bondholders bound by trustee's release of right to appeal; *Kent v. Lake Superior, etc., Co.*, 144 U. S. 90, 36 L. 358, 12 S. Ct. 655, holding recognition of paramount lien by trustee binding on bondholders; *Huntington v. Little Rock, etc., R. Co.*, 3 McCrary, 585, 16 Fed. 909, holding foreclosure decree, in suit where bondholders were represented by trustee, binding on them; *Credit Co. v. Arkansas, etc., R. Co.*, 5 McCrary, 31, 15 Fed. 53, holding decree binding trustee binds bondholders; *Farmers' Loan, etc., Co. v. Kansas City R. Co.*, 53 Fed. 185, refusing to permit bondholders to become parties for purpose of having decree, to which trustee assented, vacated; *Pollitz v. Farmers' Loan, etc., Co.*, 53 Fed. 211, holding bondholders bound by decree where trustee is party; *Phinizy v. Augusta, etc., R. Co.*, 56 Fed. 277, holding trustees, after default, may pray appointment of receiver without waiting for action by bondholders; *Brown v. Chesapeake, etc., Canal Co.*, 73 Md. 582, holding bondholders cannot intervene in action by trustees for appointment of receivers; *Oxley Stave Co. v. Butler Co.*, 121 Mo. 637, 26 S. W. 372, holding bondholders not necessary parties to suit to set aside deed of trust; *White v. Wood*, 129 N. Y. 536, 29 N. E. 838, refusing to hold trustees liable under narrow technical construction of agreement under which they acted; *Meyer v. Utah, etc., Ry.*, 3 Utah, 291, 3 Pac. 398, holding bondholder, not party to action, cannot move to set aside sale by trustee for fraud.

Distinguished in *Toler v. Tennessee, etc., Ry.*, 67 Fed. 171, holding majority of bondholders may appear as defendants in action by trustee to foreclose; *Ex parte Clyde*, 14 S. C. 394, holding cestui que trust may appear in Supreme Court and avail himself of trustee's appeal; *Credit Co. v. Arkansas, etc., R. Co.*, 5 McCrary, 30, 15 Fed. 52, holding beneficiaries in railway mortgages bound by acts of trustee.

Railroads.—If mortgage bondholder not party to suit can, under any circumstances, bring bill of review, he can have only such relief as trustee of mortgage would be entitled to in same form of proceeding, p. 611.

Mortgages.—Where bondholders differ as to what their interests require, trustee of mortgage should be governed by voice of majority, p. 612.

Approved in *First Nat. Bank v. Shedd*, 121 U. S. 86, 30 L. 882, 7 S. Ct. 813, holding sale should not be postponed because minority object thereto; *Gates v. Boston, etc., R. R.*, 53 Conn. 346, 5 Atl. 701, holding dissenting minority can assert no private rights against reorganization of corporation by majority; *Waldoborough v. Railroad*, 84 Me. 471, 24 Atl. 942, holding minority bondholder cannot enjoin sale voted by majority; *State v. Brown*, 73 Md. 516, 21 Atl. 378, holding minority bondholders have no right to interfere with trustee acting in good faith; *Brown v. Chesapeake, etc., Canal Co.*, 73 Md. 582, holding minority of bondholders cannot intervene to obstruct relief prayed by trustees.

Distinguished in *Toler v. Tennessee, etc., Ry.*, 67 Fed. 180, holding trustee having power to vote shares, not bound to vote according to wishes of majority.

Railroads.—Power of courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances, p. 612.

Approved in *Credit Co. v. Arkansas, etc., R. Co.*, 5 McCrary, 27, 15 Fed. 50, holding court will not, with assent of all parties interested, authorize receiver to issue lien certificates for purpose of extending road; *Insurance Trust, etc., Co. v. Roanoke Iron Co.*, 68 Fed. 624, denying jurisdiction of equity to authorize receiver to issue certificates, to be paramount lien on property of corporation, for purpose of carrying on business thereof; *Seibert v. Minneapolis, etc., Ry.*, 52 Minn. 155, 38 Am. St. Rep. 534, 53 N. W. 1136, 20 L. R. A. 540, upholding mortgage provision, that individual bondholders shall not proceed to foreclose independently of trustee; dissenting opinion in *Central Trust Co. v. Marietta, etc., Co.*, 75 Fed. 203, 41 U. S. App. 339, *arguendo*.

Railroads.—Bare fact that some of trustees were holders of bonds secured by their trusts, is not sufficient to render them in-

competent to consent to foreclosure decree embodying plan for reorganization of road, p. 613.

Cited in *Symmes v. Union Trust Co.*, 60 Fed. 871, holding reorganization by trustees, on full notice, and to interest of corporation, not fraud, although trustees profited personally thereby.

100 U. S. 614-617, 25 L. 746, *INSURANCE CO. v. GRIDLEY*.

Statutes.—Rule that thing within intention of statute is as much within statute as if it were within letter thereof, and that thing within letter is not within statute unless within intention of makers, is equally applicable to other written instruments, p. 616.

Cited in *Kelley v. Mutual Life Ins. Co.*, 75 Fed. 639, holding insured bound by warranty against suicide, sane or insane; *Murry v. Fay*, 2 Wash. 356, 26 Pac. 535, construing statute.

Insurance.—Where insured, in application, denied existence of any hereditary taint in his family, it was necessary for insurer, in action on policy, to prove not only existence of such taints, but that it was known to insured, p. 617.

Cited and principle applied in *Insurance Co. v. Trefz*, 104 U. S. 203, 26 L. 711, upholding charge that jury might consider that answer was by one unfamiliar with language; *Mechanics, etc., Trust Co. v. Guarantee Co.*, 68 Fed. 463, holding statements made on knowledge, not untrue unless shown to have been made with knowledge of falsity; *Guarantee Co. v. Mechanics, etc., Trust Co.*, 80 Fed. 783, holding, where assured is left to exercise his own judgment, same is not warranted correct; *Kumle v. Grand Lodge*, 110 Cal. 209, 42 Pac. 635, *Mutual Life Ins. Co. v. Hazelett*, 105 Ind. 220, 4 N. E. 587, and *Morotock Ins. Co. v. Fostoria, etc., Co.*, 94 Va. 364, 26 S. E. 851, all holding burden of showing breach of affirmative warranties is on insurer; *Perine v. Grand Lodge*, 51 Minn. 227, 53 N. W. 368, holding irresponsible answer to material question will not avoid contract; *Schultz v. Insurance Co.*, 40 Ohio St. 223, 48 Am. Rep. 680, holding burden of proving death to have been by suicide, on insurer; *Assurance Society v. Reutlinger*, 58 Ark. 543, 25 S. W. 840, arguendo.

Distinguished in *Johnson v. Maine, etc., Ins. Co.*, 83 Me. 187, 22 Atl. 108, statement being absolute, not based on belief as in principal case.

100 U. S. 617-620, 25 L. 769, *KIDD v. JOHNSON*.

Trademarks and tradenames.—As distinct property, separate from article created by original producer or manufacturer, trademarks are not subjects of sale, p. 620.

Trademarks and tradenames.—Right to use of trademark, which has acquired special reputation in connection with place of manu-

facture, may be transferred, together with said establishment; hence, purchasers of establishment may enjoin use of trademark by grantor, p. 620.

Cited and followed in *Brown, etc., Co. v. Meyer*, 139 U. S. 547, 35 L. 250, 11 S. Ct. 628, and *Princes, etc., Paint Co. v. Prince Mfg. Co.*, 57 Fed. 943, 17 U. S. App. 145, both holding trademark long used in connection with article made at fixed places, passes to purchaser thereof; *Richmond, etc., Co. v. Richmond*, 159 U. S. 302, 40 L. 161, 16 S. Ct. 34, holding fact that trademark bears name and portrait of adopter, does not render it unassignable; *Oakes v. Tonsmierre*, 4 Woods, 551, 49 Fed. 450, holding stipulation that right to trademark should cease on sale of business to stranger, not binding on purchaser unaware thereof; *Pepper v. Labrot*, 8 Fed. 42, holding purchaser of distillery entitled to exclusive right to trademark as against vendor; *Burton v. Stratton*, 12 Fed. 704, *The LePage Co. v. Russia Cement Co.*, 51 Fed. 943, 5 U. S. App. 112, 17 L. R. A. 355, *J. G. Mattingly Co. v. Mattingly, etc.*, 96 Ky. 437, 27 S. W. 987, *Symonds v. Jones*, 82 Me. 313, 17 Am. St. Rep. 491, 19 Atl. 822, 8 L. R. A. 573, and *Russia Cement Co. v. Le Page*, 147 Mass. 209, 9 Am. St. Rep. 687, 17 N. E. 305, holding one may be enjoined from use of his own name, where he has assigned same as trademark; *Morgan v. Rogers*, 19 Fed. 597, holding trademark passes under general conveyance of all assets and effects of firm; *Cleveland, etc., Co. v. Wallace*, 52 Fed. 436, holding trademark may be owned by several without impairing owners' claim for redress for infringement; *Sarazin v. Libby, etc., Tobacco Co.*, 93 Fed. 626, holding every trademark, not strictly personal, assignable with business in which used; *Batcheller v. Thomson*, 93 Fed. 664, holding licensed use in firm business, of trademark owned by one partner, does not make same a firm asset; *Fish Bros, etc., Co. v. Fish Bros. Mfg. Co.*, 95 Fed. 461, holding right to use device in connection with manufacture, assignable to another in different locality, together with good-will of business; *Wilmer v. Thomas*, 74 Md. 489, 22 Atl. 404, 13 L. R. A. 382, and *n.*, and *Warren v. Warren, etc., Co.*, 134 Mass. 248, both holding right to trademark, designating place of manufacture, passes to assignee in insolvency; *Hoxie v. Chaney*, 143 Mass. 594, 58 Am. Rep. 151, 10 N. E. 713, holding trademark, consisting of original maker's name, assignable with business; *Pratt's Appeal*, 117 Pa. St. 414, 2 Am. St. Rep. 680, 11 Atl. 881, upholding exclusive right of heirs continuing business to use trademark, as against strangers; *Carmichel v. Latimer*, 11 R. I. 409, 23 Am. Rep. 494, holding trademark used in connection with place of manufacture can be sold therewith; dissenting opinion in *Messer v. Faddetts*, 168 Mass. 143, 46 N. E. 407, 37 L. R. A. 723, majority refusing to enjoin use of name of orchestra by withdrawing members, after sale by organizer; *Funke, Jr. v. Dreyfus Co.*, 34 La. Ann. 84, 44 Am. Rep. 416, *arguendo*. See 17 Am. St. Rep. 497, note.

Distinguished in *Chadwick v. Covell*, 151 Mass. 194, 21 Am. St. Rep. 446, 23 N. E. 1070, 6 L. R. A. 841, holding one not having exclusive right to manufacture, cannot enjoin use of trademark; *Covell v. Chadwick*, 153 Mass. 267, 25 Am. St. Rep. 628, 26 N. E. 857, where business in which trademarks were used had been wound up before purchase thereof; *Laughman's Appeal*, 128 Pa. St. 18, 18 Atl. 416, 5 L. R. A. 600, where alleged trademark was a geographical name.

100 U. S. 621-629, 25 L. 607, *WILLS v. RUSSELL*.

Witnesses.—Except to show bias or prejudice, or to lay foundation for evidence of prior contradictory statements, a witness cannot, without leave of court, be cross-examined as to matters not connected with those stated in direct examination, p. 625.

Witnesses.—Party wishing to examine witness as to matters not stated in direct examination, must make him his own witness, p. 626.

Reaffirmed in *Seymour v. Malcolm, etc., Co.*, 58 Fed. 960, 16 U. S. App. 245.

Appeal and error.—Order and time of introducing evidence are matters largely belonging to practice of trial court; hence, refusal to enforce rule limiting cross-examination to matters opened in direct examination is not reversible error where ruling worked no injury to opposite party, p. 626.

Customs duties.—Instruction in action to recover duties paid under protest, that it was for jury to find whether or not jute rejections were of a class of non-enumerated substances similar to enumerated articles in act under which they were imported, held correct, p. 629.

Cited in *United States v. Cobb*, 11 Fed. 77, *arguendo*; *In re Smith*, 55 Fed. 478, holding whether article falls within class claimed, question for jury, and witness' opinion inadmissible.

100 U. S. 630-643, 25 L. 713, *SAVING BANK v. CRESWELL*.

Mortgages.—Property subject to judgment or mortgage lien, and alienated in separate parcels to different persons at different times, is subject to satisfaction of liens in inverse order of alienation, p. 643.

Reaffirmed in *Warden v. Raymond*, 17 S. C. 206, and *Watson v. Neal*, 38 S. C. 99, 16 S. E. 836. Applied in *Aurora Bank v. Black*, 129 Ind. 599, 29 N. E. 398, to sale of parcels of personal property incumbered by laborers' liens; generally, in *Stanton v. Catron*, 8 N. Mex. 367, 45 Pac. 887.

Distinguished in *Steinmeyer v. Steinmeyer*, 55 S. C. 30, 33 S. E. 25, holding rule inapplicable to voluntary conveyances.

100 U. S. 644-648, 25 L. 605, RAILROAD CO. v. SCHUTTE.

Appeal and error.—Approval of bond by justice, obtained by fraud and perjury, will be set aside and supersedeas vacated, p. 646.

Cited in *Draper v. Davis*, 102 U. S. 371, 26 L. 122, holding power of trial court over supersedeas, in absence of fraud, exhausted on perfection of appeal; *Railroad v. Schutte*, 103 U. S. 136, 26 L. 333, incidentally; *Dueber Watch, etc., Co. v. Fahys, etc., Co.*, 45 Fed. 698, holding appeal and supersedeas stop effect of decree; *Morrin v. Lawler*, 91 Fed. 694, holding, after perfection of appeal, motion for substitution of bond must be addressed to appellate court; *Tampa St. Ry. v. Tampa, etc., R. R.*, 30 Fla. 410, 11 So. 910, holding action of judge in accepting sureties conclusive, unless acceptance was obtained by fraud.

Appeal and error.—Where supersedeas is vacated because approval of bond was obtained by fraud, new bond will not be accepted, p. 647.

Courts.—Appellant having copied into transcript only such papers and proofs in hearing below as he considered necessary, Supreme Court ordered him to file copies of such omitted papers as appellee should deem necessary, appeal to be dismissed on default thereof, p. 648.

Procedure followed in *Gregory v. Pike*, 64 Fed. 417, 21 U. S. App. 474, holding court may require appellant to file complete transcript, on pain of dismissal.

Distinguished in *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. 245, 21 U. S. App. 50, holding appellee, deeming transcript defective, must resort to certiorari, where omitted papers do not appear necessary to hearing.

100 U. S. 648-659, 25 L. 609, IMPROVEMENT CO. v. SLACK.

Internal revenue.—Money involuntarily paid for internal revenue taxes illegally exacted may be recovered from collector in assumption, p. 654.

Railroads.—Improvement company having charter power to construct railroad, and transporting thereon passengers for hire, is a railroad within meaning of act of July 13, 1866, imposing tax on railroad coupons, p. 658.

Cited in *Railway v. Slack*, 100 U. S. 661, 25 L. 612, argued and decided with principal case; *Massachusetts, etc., Co. v. Hamilton*, 88 Fed. 592, 59 U. S. App. 410, Montana statute, making judgments against railroads liens thereon, does not include street railways.

100 U. S. 659-661, 25 L. 611, RAILWAY CO. v. SLACK.

Adjudged in accordance with *Improvement Co. v. Slack*, *supra*.
Not cited.

100 U. S. 661-662, 25 L. 587, RAILROAD CO. v. BLAIR.

Appeal and error.— Citation is unnecessary where appeal is taken and perfected in open court during term at which decree is actually entered, and taking of appeal should, in some form, appear on records of court, p. 662.

Cited in *Farmers' Loan, etc., Co. v. Chicago, etc., Co.*, 73 Fed. 317, 34 U. S. App. 626, holding citation may be waived by proof of equivalent notice.

Appeal and error.— When appeal is allowed at a term subsequent to rendition of decree, citation is necessary, although appellees were present by their solicitors, p. 662.

Cited in *Richards v. Mackall*, 113 U. S. 542, 28 L. 1133, 5 S. Ct. 536, holding allowance of appeal in session at Special Term does not avoid necessity of citation; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. 582, 6 S. Ct. 319, denying jurisdiction to issue citation in appeal docketed in Supreme Court of the term to which appeal was returnable.

Distinguished in *Peugh v. Davis*, 110 U. S. 229, 28 L. 128, 4 S. Ct. 18, holding appellate court may grant supersedeas after expiration of time allowed for filing bond.

Appeal and error.— Where appellants, by reason of allowance of appeal in presence of appellee's solicitors, although at term subsequent to decree, might well suppose citation would be waived, court will not dismiss appeal, but will order that citation be served, p. 662.

Cited in *Dodge v. Knowles*, 114 U. S. 438, 29 L. 297, 5 S. Ct. 1109, holding failure to cite appellee does not deprive Supreme Court of jurisdiction where security is not furnished until subsequent term; *Gurnee v. Blair*, 154 U. S. 659, see 25 L. 587, 14 S. Ct. 1202, argued and decided with principal case; *Henning v. Western Union Tel. Co.*, 41 Fed. 867, holding court may enlarge time for filing motion for new trial, same having expired.

100 U. S. 663-670, 25 L. 747, UNITED STATES v. LIPPITT.

Courts.— Limitation prescribed by section 10, act of March 3, 1863, is not pleadable in Court of Claims, against claim cognizable therein and referred thereto by head of an executive department, where claim was presented at proper department within six years after accrual, p. 668.

Approved in *United States v. New York*, 160 U. S. 617, 40 L. 557, 16 S. Ct. 409, holding delay of department in disposing of seasonably-presented claim cannot impair claimant's rights.

Cited generally in *Finn v. United States*, 123 U. S. 231, 31 L. 130, 8 S. Ct. 84, holding it competent for Congress to limit liability of government to specified causes of action brought within prescribed periods.

Distinguished in *United States v. Utz*, 80 Fed. 851, 39 U. S. App. 630, overruling S. C., 75 Fed. 650, and holding right of action against government, on express contract, accrues when money becomes due.

Army and navy.—Officer ordered to headquarters, there to await further orders, is, while so waiting, entitled to fuel and quarters, and, if not furnished therewith, may recover their commuted value. p. 670.

100 U. S. 671-672, 25 L. 738, *BURNS v. MEYER*.

Patent issued to Grimsley and Shelly for improved saddle-tree having side bars and seat made separately and then united, is not infringed by saddle-tree constructed in one piece, p. 672.

Approved in *Smith v. Putnam*, 45 Fed. 203, holding use of more or less than whole of ingredients of combination not infringement thereof; *Ryan v. Runyon*, 93 Fed. 972, an analogous case; *Polsdorfer v. St. Louis, etc., Works*, 37 Fed. 58, *arguendo*.

Patents.—Courts should not enlarge, by construction, claim which patent office has admitted and which patentee has acquiesced in, beyond fair interpretation of terms thereof, p. 672.

Cited and principle applied in *Railroad v. Mellon*, 104 U. S. 118, 26 L. 641, holding claim cannot be enlarged by language used elsewhere in specifications; *Duff v. Sterling Pump Co.*, 107 U. S. 639, 27 L. 518, 2 S. Ct. 490, *Boyd v. Janesville, etc., Co.*, 158 U. S. 262, 39 L. 975, 15 S. Ct. 838, and *Ney v. Ney Mfg. Co.*, 69 Fed. 408, 37 U. S. App. 371, all holding patentee limited by prior state of the article to exact forms shown; *McClain v. Ortmyer*, 141 U. S. 425, 35 L. 802, 12 S. Ct. 78, holding patentee presumed to have abandoned portion of invention not described and claimed; *Coupe v. Royer*, 155 U. S. 577, 39 L. 267, 15 S. Ct. 204, holding court should define patent to jury, as indicated by language of claims; *Untermeyer v. Jeannot*, 20 Fed. 504, holding claim, not manufactured article, essential feature in deciding upon alleged infringement; *Otis, etc., Co. v. Crane, etc., Co.*, 27 Fed. 555, holding limitations introduced into application by patent office to be strictly construed against inventor; *Brown v. Stilwell, etc., Mfg. Co.*, 57 Fed. 740, 6 U. S. App. 427, holding patentee cannot show his invention to be broader than his claim; *Gerard v. Diebold, etc., Co.*, 61 Fed. 211, 23 U. S. App. 341, holding peculiarity in locking device for jails not construable as improvement in burglar-proof safes; *Durand v. Schulze*, 61 Fed. 820, 17 U. S. App. 620, holding claim being restricted to process, patent cannot be made to include product by

reference to other portions of specifications; *Craig v. Michigan, etc., Co.*, 72 Fed. 176, holding patentee cannot obtain, by construction, what patent office has denied; *United States, etc., Co. v. Atlas, etc., Co.*, 88 Fed. 500, holding patentee bound by ordinary construction of his claim; *Thompson v. Second Ave., etc., Co.*, 89 Fed. 322, holding claim for coasting structure, with terminals at same elevation, not infringed by one with stations at different elevations; *MacColl v. Knowles, etc., Works*, 95 Fed. 987, holding patentee's right to relief should be measured by his specifications; *Reece Button-Hole Mfg. Co. v. Globe, etc., Co.*, 61 Fed. 963, 21 U. S. App. 244, *arguendo*.

100 U. S. 673-674, 25 L. 759, *BRANCH v. UNITED STATES*.

Deposits in court.—Money involved in litigation, deposited by court in national bank designated as a depository, is not money paid into Federal treasury; hence, United States not liable to owner of confiscated cotton for proceeds thereof, so deposited by order of court, where bank failed and confiscation proceedings were afterwards dismissed, p. 674.

Followed in *Coudert v. United States*, 175 U. S. 179, 180, and *United States v. Coudert*, 73 Fed. 507, 38 U. S. App. 515, similar cases, holding funds deposited in banks, awaiting further order of court, not public money recoverable from United States.

100 U. S. 675, 25 L. 772, *NAGLE v. RUTLEDGE*.

Courts.—To give Supreme Court jurisdiction to review judgments of territorial courts of Wyoming, value of matter in dispute must, as shown by record, exceed \$1,000, p. 675.

Cited in *Crosby v. Crosby*, 92 Tex. 442, 49 S. W. 360, holding, in case of cross-action, either plaintiff's demand or defendant's must, of itself, reach jurisdictional sum.

100 U. S. 676-679, 25 L. 754, *MACHINE CO. v. GAGE*.

Commerce.—State laws requiring payment of licenses by peddlers selling articles not produced in State, but not by those selling articles produced in State, are unconstitutional, p. 678.

Reaffirmed in *Standard Oil Co. v. Combs*, 96 Ind. 184, 49 Am. Rep. 160, and *Range Co. v. Carver*, 118 N. C. 335, 24 S. E. 353. Cited and applied in *Pickard v. Pullman Car Co.*, 117 U. S. 49, 29 L. 790, 6 S. Ct. 642, holding statute taxing cars run over railroads in Tennessee and not owned by such roads, void as applied to interstate transportation; *In re Sheffield*, 64 Fed. 835, holding Kentucky tax on vendors of patent rights invalid; *Vines v. State*, 67 Ala. 76, holding license law, exempting peddlers of domestic manufactures, unconstitutional; *Arkansas v. Marsh*, 37 Ark. 360, holding act discriminating in favor of home-produced wines in regulating liquor

traffic, unconstitutional. See notes in 52 Am. Dec. 333, 59 Am. Rep. 272, and 27 Am. St. Rep. 560.

Distinguished in *Rothermel v. Meyerle*, 136 Pa. St. 265, 20 Atl. 587, 9 L. R. A. 368, and *n.*, upholding act discriminating in favor of certain counties as against others within State.

Commerce.—Laws requiring payment of license tax by all peddlers, without regard to place of manufacture of articles sold, are not unconstitutional as discriminations in favor of State; hence, Tennessee law imposing tax on all sewing-machine peddlers, as construed by Tennessee courts, is constitutional, p. 679.

The following citing cases rely on and apply the principal case: *Emert v. Missouri*, 156 U. S. 311, 312, 316, 319, 39 L. 434, 436, 437, 15 S. Ct. 370, 371, 373, affirming S. C., 103 Mo. 246, 248, 23 Am. St. Rep. 877, 879, 15 S. W. 82, 83, 11 L. R. A. 220, 221, upholding Missouri statute imposing license on peddlers; *Ex parte Brown*, 48 Fed. 439, 440, 443, upholding North Carolina act, requiring merchants to pay, as license, percentage on total amount of purchases; *American Harrow Co. v. Shaffer*, 68 Fed. 755, 757, upholding Virginia act imposing license tax on persons selling goods owned by others; *Preston v. Finley*, 72 Fed. 855, 860, 861, upholding act taxing persons selling specified newspapers, "or publications of like character," and holding test is whether there is discrimination in favor of State or citizens thereof; *In re May*, 82 Fed. 425, upholding, on habeas corpus, Montana law taxing cigarette peddlers; *Ex parte Haskell*, 112 Cal. 420, 44 Pac. 726, 32 L. R. A. 530, upholding municipal license tax upon travelling salesmen; *Standard Oil Co. v. Combs*, 96 Ind. 185, 49 Am. Rep. 161, holding articles purchased by citizen of another State, remaining in State to be finished, taxable; *South Bend v. Martin*, 142 Ind. 49, 41 N. E. 321, 29 L. R. A. 537, holding license act valid as to peddler whose sales are conditional, title remaining in foreign owner; *Iowa v. Wheelock*, 95 Iowa, 583, 58 Am. St. Rep. 444, 64 N. W. 621, 30 L. R. A. 437, and *n.*, upholding act imposing license on itinerant drug venders; *Corson v. State*, 57 Md. 265, and *State v. Smithson*, 106 Mo. 154, 17 S. W. 222, both upholding acts requiring licenses of peddlers; *People v. Walling*, 53 Mich. 269, 18 N. W. 810, holding taxation of wholesale importations of liquor from other States, valid exercise of police power; *Waterbury v. Newton*, 50 N. J. Law, 539, 540, 14 Atl. 607, upholding act prohibiting sale of imitation butter; *State v. Long*, 95 N. C. 586, 59 Am. Rep. 266, upholding license tax on drummers, laws of 1885; *State v. Wessell*, 109 N. C. 736, 14 S. E. 391, an identical case; *State v. Gorham*, 115 N. C. 727, 44 Am. St. Rep. 496, 20 S. E. 181, 25 L. R. A. 812, upholding license on all itinerant venders; *Range Co. v. Carver*, 118 N. C. 336, 24 S. E. 354, upholding State revenue act of 1895; *State v. Richards*, 32 W. Va. 353, 9 S. E. 247, 3 L. R. A. 708, and *n.*, upholding like stat-

ute; *Matheson, etc., Co. v. Roberts*, 158 N. Y. 163, 52 N. E. 1103, holding franchise tax on domestic corporations computed upon dividends, not a tax on property; dissenting opinions in *Leisy v. Hardin*, 135 U. S. 151, 34 L. 147, 10 S. Ct. 699, majority holding statute prohibiting sale of liquors, invalid as to sale by importer in original package; *Laurens v. Elmore*, — N. C. —, 33 S. E. 561, 45 L. R. A. 250, majority holding city license law void as to agent selling frames to purchasers of pictures; *State v. Coop*, 52 S. C. 512, 30 S. E. 611, 41 L. R. A. 503, majority holding agent offering frame to purchaser of picture not a peddler.

Cited, but not applied, in *State v. Lee*, 113 N. C. 682, 37 Am. St. Rep. 649, 18 S. E. 714, holding one selling, by sample, goods to be thereafter delivered, not a peddler. Distinguished in *Walling v. Michigan*, 116 U. S. 461, 29 L. 696, 6 S. Ct. 460, holding State tax, necessarily discriminating against introduction of products of another State, invalid; *Robbins v. Shelby, etc., Dist.*, 120 U. S. 497, 30 L. 697, 7 S. Ct. 596, holding act taxing all drummers not having regular licensed business houses in county, unconstitutional; *Tax Collector v. Pettigrew*, 44 La. Ann. 360, 10 So. 854, holding agent of foreign manufacturer, soliciting orders and delivering goods in State, not subject to peddlers' license tax; *State v. Hoyt*, 71 Vt. 61, 42 Atl. 974, holding statute void as discriminating in favor of goods made without State; *Myer's case*, 92 Va. 815, 23 S. E. 917, 31 L. R. A. 381, holding Virginia statute void as discriminating in favor of home-produced articles; dissenting opinion in *State v. Roberts*, 171 U. S. 674, 676, 19 S. Ct. 74, majority upholding New York statute imposing franchise tax on corporations doing business in State.

100 U. S. 680-685, 25 L. 772, *EMBRY v. UNITED STATES*.

United States.—Congress has full control of salaries, except those of president and of judges of courts of United States, p. 685.

Cited in *United States v. McDonald*, 128 U. S. 473, 32 L. 507, 9 S. Ct. 117, holding claim of naval officer to travelling expenses rests upon act of Congress, not contract.

Post-office.—Postmaster, suspended under act of 1867, is not entitled to salary for period of suspension, although subsequently reinstated, p. 685.

Cited in *In re Marshalship, etc.*, 20 Fed. 383, holding powers of suspended officer not revived by refusal of senate to confirm temporary officer for permanent appointment.

100 U. S. 686-693, 25 L. 766, *NATIONAL BANK v. BURKHARDT*.

Trial.—Where court gives full and correct charge, covering entire case, it is not bound to give further instructions, p. 688.

Reaffirmed in *Becknagel v. Murphy*, 102 U. S. 200, 26 L. 131.

Banks and banking.—Checks received by bank as deposits become its property, and it is liable to depositor for money credited thereby from date of deposit, p. 689.

Approved in *Alabama, etc., Ry. v. Anniston, etc., Trust Co.*, 57 Fed. 31, 13 U. S. App. 506, holding receiver, having accepted credit, estopped to deny bank's authority to sell deposited certificates; *Riverside Bank v. First Nat. Bank*, 74 Fed. 278, 38 U. S. App. 674, holding payment of note by bank, although under misapprehension of maker's account, concludes bank against holder; *City Nat. Bank v. Burns*, 68 Ala. 275, 44 Am. Rep. 142, holding crediting holder with amount of check constitutes payment, and same cannot be withheld on discovering drawer insolvent; *National Bank v. Gregg*, 138 Ill. 601, 32 Am. St. Rep. 174, 28 N. E. 841, holding acceptance of check by bank, stamping same as paid, and entry of credit to holder, payment of check; *Wasson v. Lamb*, 120 Ind. 517, 519, 16 Am. St. Rep. 345, 346, 22 N. E. 730, 731, 6 L. R. A. 192, holding deposit of check and receipt of credit therefor equivalent to actual cash deposit; *Martin v. State Bank*, 7 S. Dak. 271, 64 N. W. 130, holding act only takes effect from moment of approval by president; ownership thereof; *First Nat. Bank v. Mt. Pleasant, etc., Co.*, 103 Iowa, 523, 72 N. W. 690, *arguendo*. See 47 Am. St. Rep. 390, monographic note on deposit.

Time.—When priority of one legal right over another, depending upon order of events occurring on same day is involved, rule that law regards entire day as an indivisible unit must be departed from, p. 689.

Approved in *Maine v. Gilman*, 11 Fed. 216, holding reduction of claim, by amendment, prevented removal, where done an hour before filing bond; *United States v. Stoddard, etc., Co.*, 89 Fed. 701, holding act only takes effect from moment of approval by president; *Hoyt v. San Francisco, etc., R. R.*, 87 Cal. 611, 25 Pac. 1066, dismissing appeal when notice of motion is given before filing transcript, although on same day; *Lockwood, etc., Co. v. Crawford*, 29 Kan. 287, holding exact minute of filing important in determining whether chattel mortgage renewal precedes attachment.

Cited, but application refused, in *Harmon v. Comstock, etc., Co.*, 9 Mont. 250, 23 Pac. 472, holding filing of papers after usual office hours, does not invalidate attachment; *Arrowsmith v. Hamering*, 39 Ohio St. 577, 578, holding ordinary presumption must prevail in absence of proof that action was pending on day act took effect, but at an earlier hour.

Banks and banking.—Whether a check presented at bank and left with teller was received as a deposit, is a question for jury, p. 690.

Cited in 47 Am. St. Rep. 389, monographic note on deposit.

Customs and usages.— Usage cannot make a contract where there is none, nor prevent effect of settled rules of law, p. 692.

Cited in *Grace v. American, etc., Ins. Co.*, 109 U. S. 283, 27 L. 934, 3 S. Ct. 210, holding parol evidence of insurance custom inadmissible to vary contract; *Dillard v. Paton*, 19 Fed. 625, holding custom cannot be pleaded where parties have habitually disregarded same.

100 U. S. 693-699, 25 L. 761, **MANNING v. INSURANCE CO.**

Insurance.— Where company contracts with agent that his commission shall accrue only as premiums are paid to company, in action to recover such commissions he must prove not only that premiums were due, but actual receipt thereof by company, p. 697.

Trial.— It is error to submit to jury a fact of which there is no competent evidence, p. 697.

Evidence.— Only presumptions of fact recognized by law are immediate inferences from facts proved, p. 698.

Approved in *Postal Tel., etc., Co. v. Zoppi*, 73 Fed. 612, 43 U. S. App. 141, holding one presumption cannot be based on another; *Ward v. Life Ins. Co.*, 66 Conn. 240, 50 Am. St. Rep. 85, 33 Atl. 905, holding presumption of relinquishment of known right cannot be rested on presumption that right was known; *Cleveland, etc., Ry. v. Wynant*, 114 Ind. 530, 5 Am. St. Rep. 648, 17 N. E. 120, holding evidence of similar accidents on other occasions inadmissible to prove place dangerous; *Medsker v. Pogue*, 1 Ind. App. 199, 27 N. E. 433, holding open and visible connection required between evidentiary facts and deductions therefrom; *The Washington, etc., Co. v. McCormick*, 19 Ind. App. 666, 49 N. E. 1085, reaffirming rule; *State v. Vaughan*, 22 Nev. 299, 39 Pac. 735, holding evidence of one fact as presumptive evidence of another inadmissible in absence of recognized connection.

100 U. S. 699-704, 25 L. 750, **NATIONAL BANK v. GRAHAM.**

Bailments.— Gross negligence on part of gratuitous bailee is, in legal effect, the same as fraud, p. 702.

Corporations cannot plead *ultra vires* to relieve themselves from liability for torts; hence, bank receiving bonds for safe-keeping, although unauthorized by charter to do so, is liable for their loss, caused by its negligence, p. 702.

Cited and principle applied in *Daniels v. Tearney*, 102 U. S. 420, 26 L. 188, holding one availing himself of ordinance estopped to deny validity thereof; *Manhattan Bank v. Walker*, 130 U. S. 276, 32 L. 963, 9 S. Ct. 522, holding bank liable for loss of proceeds of specially-deposited note, but in unsafe investment; *Whitney v. First Nat. Bank*, 154 U. S. 664, 26 L. 212, 14 S. Ct. 1215, presenting identical questions; *Taylor v. South, etc., R. R.*, 4 Woods, 579, 13 Fed. 155, holding stockholder cannot plead *ultra vires* to con-

structively-fraudulent executed contract after ten years' acquiescence; *Prather v. Kean*, 29 Fed. 501, holding retention of cashier with knowledge that he speculated, gross negligence; *Simons v. Fisher*, 55 Fed. 909, 17 U. S. App. 1, 20 L. R. A. 557, and *Fisher v. Simons*, 64 Fed. 314, 28 U. S. App. 95, both holding national bank cannot set up want of legal capacity to escape just responsibility; *Nevada Bank v. National Bank*, 59 Fed. 341, holding bank liable for fraudulent representations to another bank as to customer's financial responsibility; *Arthur v. Israel*, 15 Colo. 153, 22 Am. St. Rep. 385, 25 Pac. 83, 10 L. R. A. 695, holding one taking advantage of void divorce decree estopped to repudiate same; *Gray v. Merriam*, 148 Ill. 189, 39 Am. St. Rep. 178, 35 N. E. 813, 32 L. R. A. 773, and *n.*, a similar case; *Commonwealth v. Mechanical Assn.*, 92 Ky. 201, 17 S. W. 443, holding incorporated fair association liable for permitting gaming on fair grounds; *Nims v. Boys' School*, 160 Mass. 178, 39 Am. St. Rep. 469, 35 N. E. 777, 22 L. R. A. 366, holding corporation liable for personal injuries caused by negligence in running ferry *ultra vires*; *Hussey v. Railroad*, 98 N. C. 42, 2 Am. St. Rep. 315, 3 S. E. 926, holding action for slander maintainable against corporation; *Bank v. Zent*, 39 Ohio St. 108, a similar case; *First Nat. Bank v. Rex*, 89 Pa. St. 312, 33 Am. Rep. 768, holding national bank receiving special deposit for safe-keeping, without reward, liable only for gross negligence; *Pronger v. National Bank*, 20 Wash. 622, 56 Pac. 392, holding national bank cannot plead *ultra vires* in defense of frauds; *Walker v. Manhattan Bank*, 25 Fed. 254, collecting cases on bailee's liability, and cited generally in *Hazard v. Vermont*, etc., R. R., 17 Fed. 756, holding power to rent includes power to change security by issuing bonds; *Wilkinson v. Dodd*, 42 N. J. Eq. 248, 7 Atl. 334, *arguendo*; dissenting opinion in *Atlantic R. R. v. Mays Landing*, etc., R. R., 48 N. J. L. 586, 7 Atl. 537, majority holding plea of *ultra vires* inadmissible in action for performance of contract performed by plaintiff. See also notes in 34 Am. Rep. 497, 36 Am. Rep. 592, 26 Am. St. Rep. 131, 38 Am. St. Rep. 778, and 70 Am. St. Rep. 159.

Distinguished in *Wylie v. Northampton Bank*, 119 U. S. 370, 30 L. 458, 7 S. Ct. 272, holding, in absence of negligence, bank not liable for theft of special deposit; *Merchants' Nat. Bank v. Armstrong*, 65 Fed. 934, holding bank not liable to stranger relying on its representations made to comptroller of currency; *Merchants' Bank v. Guilmartin*, 88 Ga. 801, 15 S. E. 832, 17 L. R. A. 324, holding bank not liable for theft, by cashier, of special deposit for gratuitous custody; *Mason v. Union Stock*, etc., Co., 60 Mo. App. 98, holding gratuitous bailee liable only for gross negligence; *Greeley v. Savings Bank*, 63 N. H. 147, holding bank not estopped to plead *ultra vires* where bonds never came into its possession; *Whitney v. National Bank*, 55 Vt. 161, 45 Am. Rep. 601, holding national bank not liable in absence of gross negligence, for loss of bonds held as gratuitous bailments.

Corporations are liable for acts of servants while same are engaged in business of principal, in same manner, and to same extent that individuals are liable under like circumstances, p. 702.

Approved in *Denver, etc., Ry. v. Harris*, 122 U. S. 608, 30 L. 1148, 7 S. Ct. 1289, affirming S. C., 3 N. Mex. 115, 2 Pac. 370, holding corporation liable for bodily injuries committed by employees while forcibly seizing contested land; *Times Pub. Co. v. Carlisle*, 94 Fed. 774, holding newspaper corporation liable for exemplary damages for libel circulated by employees; *Machine Co. v. McCaffrey*, 139 Ind. 551, 47 Am. St. Rep. 295, 38 N. E. 210, holding corporation liable where president fraudulently induced plaintiff to purchase worthless stock; *Boogher v. Life Assn.*, 75 Mo. 324, 42 Am. Rep. 416, holding corporation liable for malicious prosecution; *Fitzgerald v. Fitzgerald, etc., Co.*, 41 Neb. 416, 59 N. W. 846, holding corporation civilly liable for damages from torts of officers. See 38 Am. St. Rep. 786, monographic note.

Distinguished in *Lake Shore, etc., Ry. v. Prentice*, 147 U. S. 109, 37 L. 102, 13 S. Ct. 263, holding railroad not liable to exemplary damages for unauthorized violence by conductor.

Banks and banking.—Revised Statutes, section 5228, authorizing national banks, after failure, "to deliver special deposits," etc., clearly implies that national banks, as part of their legitimate business, may receive such special deposits, and bank is liable for loss thereof, caused by its negligence, p. 703.

Approved in *Whitney v. First Nat. Bank*, 154 U. S. 664, 26 L. 212, 14 S. Ct. 1215, presenting identical question; *Eastern, etc., Bank v. Vermont Nat. Bank*, 22 Blatchf. 501, 22 Fed. 188, holding powers impliedly given national banks as valid as those expressly given; *First Nat. Bank v. Strange*, 138 Ill. 356, 27 N. E. 905, and *Bank v. Zent*, 39 Ohio St. 108, both holding bank liable for negligent loss of special deposit. Cited generally in *Leo v. Union Pac. Ry.*, 22 Blatchf. 26, 19 Fed. 286, as to existence of implied corporate powers.

Banks and banking.—Phrase "special deposits," in section 5228, revised statutes, embraces deposits of United States bonds, p. 703.

100 U. S. 704-718, 25 L. 739, *COX v. NATIONAL BANK*.

Bills and notes.—Foreign bills of exchange must be protested for non-acceptance at place where presentation therefor is to be made, p. 710.

Approved in *Brown v. Jones*, 113 Ind. 50, 3 Am. St. Rep. 625, 13 N. E. 859, holding drawer not liable where presentment was not made at place designated by acceptor; *Martin v. Cole*, 104 U. S. 39, 26 L. 651, *arguendo*. See 43 Am. Dec. 221, note.

Bills and notes.—No place of payment being expressed in a bill or note, place of presentment is where acceptor or maker resides, or at his usual place of business, p. 713.

Approved in *Skinner v. Butler Co.*, 112 Mo. 338, 20 S. W. 614. holding failure to demand does not stop interest where no funds are at place of payment at maturity; *Clough v. Holden*, 115 Mo. 344, 37 Am. St. Rep. 397, 21 S. W. 1073, holding evidence that presentment was made after maker's business hours, erroneously excluded; *Rose v. McCracken*, — Tex. Civ. App. —, 50 S. W. 153, holding no place of payment being designated in note, maker may designate one and leave deposit there.

Distinguished in *Strawberry, etc., Bank v. Lee*, 117 Mich. 124, 75 N. W. 444, holding addition of payee's place of residence in another State, to name in note made and delivered in Michigan, insufficient to render note contract of other State.

Bills and notes.— When a bill or note is made payable at particular place or on demand, proof of presentment there is sufficient to charge acceptor or indorser; hence demand at place frequented by acceptors, after diligent effort to locate them, held sufficient, p. 716.

Cited in 39 Am. Rep. 119, note.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

IN

OCTOBER TERM, 1879.

Vol. 101.



REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1879.

AND REPORTED HEREIN,

VOL. 101,

AS HAVE ALSO BEEN REPORTED IN

11 OTTO.

11 Otto.	Title.	Here in.	11 Otto.	Title.	Here in.
1-6	National Bank v. United States	979	99	Baker v. Selden,	841
7	Babbitt v. Finn,	820	99-101	" " "	842
11-13	" " "	821	101-104	" " "	843
13-15	" " "	822	104-107	" " "	844
16-18	Bowditch v. Boston,	980	107	" " "	845
18-21	" " "	981	108	Meguire v. Corwine,	899
21-22	" " "	982	108-111	" " "	900
23	Missouri v. Lewis,	989	111-112	" " "	901
29	" " "	991	112-113	Market Company v. Hoffman,	782
29-32	" " "	992	113-116	" " "	783
32-33	" " "	993	116-118	" " "	784
34	Arthur v. Dodge,	948	118-119	" " "	785
35-36	" " "	949	119	Roberts v. Bolles,	880
36-37	" " "	950	120-121	" " "	881
37	The "Florida,"	898	121-123	" " "	882
41-43	" " "	899	123-126	" " "	883
43	National Bank v. Hall,	822	126-129	" " "	884
44-45	" " "	823	129-131	National Bank v. Co. of Yankton	1046
45-48	" " "	824	131-134	" " " " "	1047
48-51	" " "	825	134-135	" " " " "	1048
51	" " "	826	135-138	Wood v. Carpenter,	807
51-52	Manufacturing Co. v. Trainer,	993	138-140	" " "	808
52-55	" " "	994	141-143	" " "	809
55-58	" " "	995	143-145	Pelton v. National Bank,	901
58-61	" " "	996	145-148	" " " " "	902
61-64	" " "	997	148	" " " " "	903
64-66	" " "	998	149	Worthington v. Mason,	848
66-67	" " "	999	149-152	" " " " "	849
68	Trust Company v. National Bank,	876	152-153	" " " " "	850
68-70	" " " " "	877	153-154	Cummings v. National Bank,	903
70-71	" " " " "	878	154-157	" " " " "	904
71-78	Thomas v. Railroad Company,	950	157-160	" " " " "	905
78-81	" " " " "	951	160-163	" " " " "	906
81-84	" " " " "	952	163-164	" " " " "	907
84-87	" " " " "	953	164-165	United States v. Lawson,	860
87	Empire v. Darlington,	878	165-167	" " " " "	861
89-92	" " " " "	879	167-169	" " " " "	862
92	" " " " "	880	170	United States v. Ellsworth,	862
93	Bast v. Bank,	794	170-173	" " " " "	863
93-94	" " " " "	795	173-174	" " " " "	864
94-97	" " " " "	796	174-176	Wright v. Blakeslee,	1048
97	" " " " "	797	176-179	" " " " "	1049
98-99	Railroad Company v. White,	860	179-181	" " " " "	1050

REFERENCE TABLE

11 Otto.	Title.	Here in.	11 Otto.	Title.	Here in.
181-183	People's Bank v. National Bank,	907	328-331	Smith v. Ayer,	959
183-184	" " " "	908	331-332	" " " "	960
184	Ayers v. Chicago,	838	332-333	Water-Metre Co. v. Desper,	1024
184-186	" " " "	839	333-336	" " " "	1025
186-187	" " " "	840	336-337	" " " "	1026
188	Steam-Engine Co. v. Hubbard	786	337-338	Railroad Co. v. Tennessee,	960
188-191	" " " "	787	339-341	" " " "	961
191-194	" " " "	788	341	Langford v. United States,	1010
194-196	" " " "	789	341-343	" " " "	1011
196-199	Pompton v. Cooper Union,	803	343-346	" " " "	1012
199-202	" " " "	804	346	" " " "	1013
202-204	" " " "	805	347-349	Creswell v. Lanahan,	853
205	Hatch v. Dana,	885	349-351	" " " "	854
210-212	" " " "	886	352	" " " "	855
212-215	" " " "	887	352	Christian Union v. Yount,	888
215	" " " "	888	353-354	" " " "	889
216-217	Terry v. Little,	864	354-357	" " " "	890
217-218	" " " "	865	357-360	" " " "	891
219-222	Gas Company v. Pittsburgh,	789	360-362	" " " "	892
222	" " " "	790	362-365	Kain v. Gibboney,	813
223	Pollard v. Railroad Company,	840	365-368	" " " "	814
224-225	" " " "	841	368-369	" " " "	815
225	Jones v. Clifton,	908	370-372	Phelps v. Harris,	855
225-228	" " " "	909	372-375	" " " "	856
228-231	" " " "	910	375-378	" " " "	857
231-233	May v. Sloan,	797	378-380	" " " "	858
233-236	" " " "	798	380-383	" " " "	859
236-239	" " " "	799	383	" " " "	860
239	" " " "	800	384-385	The "Sabine,"	982
240-241	Bank of America v. Banks,	850	385-388	" " " "	983
241-243	" " " "	851	388-391	" " " "	984
243-246	" " " "	852	391-392	Gay v. Parpart,	841
246-247	" " " "	853	392	Whitney v. Wyman,	1050
247-249	Watt v. Starke,	826	392-395	" " " "	1051
249-252	" " " "	827	395-397	" " " "	1052
252-255	" " " "	828	397-399	Aldridge v. Muirhead,	1013
255-256	" " " "	829	399-401	" " " "	1014
256-258	Leggett v. Avery,	865	401-403	" " " "	1015
258-260	" " " "	866	403-404	Bank v. Sherman,	
260	Simmons v. Wagner,	910		Hickling v. Sherman,	866
260-263	" " " "	911	404-407	" " " "	867
263	" " " "	912	407	Livingston Co. v. Darlington,	1015
263	West v. Smith,	809	407-409	" " " "	1016
264-266	" " " "	810	409-412	" " " "	1017
266-269	" " " "	811	412-414	" " " "	1018
269-272	" " " "	812	415-417	" " " "	1019
272-273	" " " "	813	417	Mohr v. Manierre,	1052
274-275	Broder v. Water Company,	790	418-420	" " " "	1053
275-277	" " " "	791	420-423	" " " "	1054
278-280	Greenleaf v. Goodrich,	845	423-426	" " " "	1055
280-283	" " " "	846	426-429	Gunton v. Carroll,	985
283-285	" " " "	847	429-432	" " " "	986
285-286	Jeffrey v. Moran,	785	432	" " " "	987
286-289	" " " "	786	433	South Carolina v. Gaillard,	937
289	Pacific Railroad v. Ketchum,	932	436-437	" " " "	938
295-296	" " " "	935	437-438	" " " "	939
296-299	" " " "	936	439	Wheeler v. Insurance Company,	1055
299-300	" " " "	937	439-441	" " " "	1056
301-304	Fleitas v. Cockrem,	954	441-443	" " " "	1057
304-306	" " " "	955	443-444	Brooks v. Railway Company	1057
306-307	Ketchum v. St. Louis,	999	444-446	" " " "	1058
307-310	" " " "	1000	446-449	" " " "	1059
310-313	" " " "	1001	449-452	" " " "	1060
313-316	" " " "	1002	452	" " " "	1061
316-319	" " " "	1003	453-454	The "City of Panama,"	1061
319	" " " "	1004	454-457	" " " "	1062
320	Smith v. Ayer,		457-459	" " " "	1063
	Smith v. National Bank,	955	460-462	" " " "	1064
321-322	" " " "	956	462-464	" " " "	1065
322-325	" " " "	957	465	Silliman v. United States,	
325-328	" " " "	958		United States v. Silliman,	987

REFERENCE TABLE.

11 Otto.	Title.	Here in.	11 Otto.	Title.	Here in.
469-470	Sillman v. United States,	988	614-617	Gates v. Goodloe,	896
470-471	" " " "	989	617-619	" " " "	897
472	School District v. Ins. Company,	868	619-621	" " " "	898
473-474	Marquez v. Frisbie,	800	622	Jones v. Guaranty & Ind. Co.,	1030
475-477	" " " "	801	625-627	" " " "	1034
477-479	" " " "	802	627-630	" " " "	1035
479-481	Planing-Machine Co. v. Keith,	939	630-633	" " " "	1036
481-483	" " " "	940	633-635	Lumber Company v. Buchtel,	1072
483-486	" " " "	941	635-637	" " " "	1073
486-489	" " " "	942	638-639	" " " "	1074
489-492	" " " "	943	639-641	Railway Company v. United	
492-494	" " " "	944		States,	1074
494-495	Baker v. Humphrey,	1065	641	" " " "	1075
495-498	" " " "	1066	641-643	Kennedy v. Creswell,	1075
498-501	" " " "	1067	643-646	" " " "	1076
501-503	" " " "	1068	647-656	Imhaeuser v. Buerk,	945
503	Hall v. Russell,	829	656-659	" " " "	946
503-506	" " " "	830	659-662	" " " "	947
506-509	" " " "	831	662-664	" " " "	948
509-511	" " " "	832	665-669	Scipio v. Wright,	1037
511-514	" " " "	833	669-672	" " " "	1038
514	Vance v. Burbank,	929	672-675	" " " "	1039
519-521	" " " "	931	675-677	" " " "	1040
522	Canal Company v. Ray,	792	677	Douglass v. County of Pike,	968
522-525	" " " "	793	679-681	" " " "	969
525-528	" " " "	794	681-684	" " " "	970
528-533	Railway Company v. Philadelphia,	912	684-687	" " " "	971
533-536	" " " "	913	687-688	" " " "	972
536-539	" " " "	914	688	Darlington v. Jackson Co., Note,	972
539-540	" " " "	915	688-690	Case v. Beauregard,	1004
541	Lovell v. Davis,	944	690-692	" " " "	1005
541-543	" " " "	945	693	Anthony v. County of Jasper	1005
543	Railroad Company v. U. S.,	1068	693-694	" " " "	1006
548-549	" " " "	1069	694-696	" " " "	1007
549-550	" " " "	1070	696-699	" " " "	1008
551-552	Nougue v. Clapp,	1026	699-700	" " " "	1009
552-555	" " " "	1027	700-701	Dauterive v. United States,	869
555	" " " "	1028	701-704	" " " "	870
555	Durant v. Essex Company,	961	704-707	" " " "	871
555-557	" " " "	963	707	" " " "	872
557	Shaw v. Railroad Company,	892	708-710	Moulou v. Insurance Company,	1077
561-563	" " " "	893	710-711	" " " "	1078
563-566	" " " "	894	711-713	Ex parte Railway Company,	872
566-567	" " " "	895	713-716	" " " "	873
567-568	National Bank v. Carpenter,	815	716-719	" " " "	874
568	" " " "	816	719-721	" " " "	875
569	United States v. Dawson,	791	721	Phillips v. Gilbert	833
569-570	" " " "	792	722-724	" " " "	834
570	Butterfield v. Smith,	868	724-726	" " " "	835
571-572	" " " "	869	726-728	United States v. Kimball,	835
572	Cowdrey v. Vandenburg,	923	728	" " " "	836
573-574	" " " "	924	728-730	Meyer v. Hornby,	1078
574-576	" " " "	925	731-735	Stewart v. Platt,	816
577	Walden v. Skinner,	963	735-738	" " " "	817
578-580	" " " "	964	738-741	" " " "	818
580-583	" " " "	965	741-744	" " " "	819
583-586	" " " "	966	744	" " " "	820
586-589	" " " "	967	745	Goddard v. Ordway,	1040
589-590	" " " "	968	745-748	" " " "	1041
591-593	Hollingsworth v. Flint,	1028	748-751	" " " "	1042
593-596	" " " "	1029	751-754	" " " "	1043
596	" " " "	1030	754	" " " "	1044
597	Bechtel v. United States,	1019	755-756	Wolsey v. Chapman,	915
597-600	" " " "	1020	756-759	" " " "	916
600-601	" " " "	1021	759-762	" " " "	917
601	Crampton v. Zabriskie,	1070	762-765	" " " "	918
607-609	" " " "	1071	765-768	" " " "	919
609	" " " "	1072	768-770	" " " "	920
610	Bible Society v. Grove,	847	770-772	" " " "	921
610-612	" " " "	848	773	Litchfield v. County of Webster,	
612-614	Gates v. Goodloe,	895		County of Webster v. Litchfield,	925

REFERENCE TABLE.

11 Otto.	Title.	Here in.	11 Otto.	Title.	Here in.
774-776	Litchfield v. County of Webster,	926	810	Duncan v. Gegan,	875
776-779	" " "	927	812-813	" " "	876
779-781	" " "	928	814-818	Stone v. Mississippi,	1079
781	Litchfield v. County of Hamilton,		818-820	" " "	1080
	Note,	928	820-821	" " "	1081
782-786	Young v. Bradley,	1044	822-827	United States v. Clamorgan,)	
786-788	" " "	1045		Clamorgan v. United States,)	836
789	" " "	1046	827-829	" " "	837
789	Powers v. Comly	805	829-831	" " "	838
790-791	" " "	806	832-835	Railroad Company v. Alabama,	973
791	" " "	807	835	" " "	974
791	Wright v. Nagle,	921	836	Railroad Company v. Turrill	1009
791-794	" " "	922	837-841	Howard v. Railway Company,	1081
794-797	" " "	923	841-844	" " "	1082
797-803	Trenier v. Stewart,	1021	844-847	" " "	1083
803-805	" " "	1022	847-849	" " "	1084
805-808	" " "	1023	849-850	" " "	1085
808-810	" " "	1024			

CASES REPORTED IN VOLUME 101.

A.		B.	
Alabama, So. & No. Ala. R. R. Co. v.	973	Banks, Bank of America v.	850
Aldridge v. Muirhead, Assignee,	1013	Bast v. First Nat. Bk. of Ashland,	794
American Bible Society v. Grove,	847	" Beaugerard, Case v."	1004
American & For. Christian Union v. Yount,	888	Bechtel v. United States,	1019
American L. Ins. Co., Moulou v.	1077	Bible Society, American, v. Grove,	847
Amoskeag Mfg. Co. v. Trainer,	983	Blakeslee, Coll., Wright v.	1048
Anthony v. County of Jasper,	1005	Bolles, Town of Roberts v.	880
Arthur, Coll., v. Dodge,	948	Boston, Bowditch, Assignee, v.	980
Avery, Leggett v.	865	Bowditch, Assignee, v. Boston,	980
Ayer, Smith, Admr., v.	955	Bowman v. Lewis,	989
Ayers, Exr., v. City of Chicago,	838	Bradley, Young v.	1044
B.		Broder v. Natoma Water & Mining Co.,	790
Babbitt, Assignee, v. Shields,	820	Brooks v. Bur. & S. W. Ry. Co.,	1057
" Babbitt v. Finn,"	820	Buchtel, Mason Lumber Co. v.	1072
Baker v. Humphrey,	1065	Buerk, Imhaeuser v.	945
Baker v. Selden,	841	Burbank, Vance v.	929
Ballard Paving Co., Follansbee v.	802	Burlington & S. W. Ry. Co., Brooks v.	1057
Bank of America v. Banks,	850	Burr v. Myers,	976
Bank of Ashland, First Nat., Bast v.	794	Butterfield v. Smith, Admr.,	868
Bank, Com. Nat., of Cleveland, Pelton,		C.	
Treas., v.	901	Canal Co., Chesapeake & Ohio, v. Ray,	792
Bank, First Nat., of Brunswick, v. Co. of		Carpenter, Mercantile Nat. Bk., v.	815
Yankton,	1046	Carpenter, Wood v.	807
Bank, First Nat., of Quincy, v. Hall,	822	Carraher, Gage v.	989
Bank, First Nat., of Westboro, Smith,		Carroll, Exrx., Gunton, Trustee, v.	985
Admr., v.	955	" Case v. Beaugerard,"	1004
Bank, First Nat., of Wyandotte, Cent.		Case, Receiver, v. N. O. & Car. R. R. Co.,	1004
Trust Co. of N. Y. v.	876	Central Trust Co. of N. Y. v. First Nat.	
Bank, International, v. Sherman, As-		Bk. of Wyandotte,	876
signee,	866	Chapman, Wolsey v.	915
Bank, Mfrs. Nat., of Chicago, People's		Chesapeake & O. Can. Co. v. Ray,	792
Bk. v.	907	Chicago, City of, Ayers, Exr., v.	838
Bank, Mercantile Nat., v. Carpenter,	815	Chicago & Alton R. R. Co. v. Turrill,	1009
Bank, Merch. Nat., of Little Rock v. U. S.	979	Chicago, B. & Q. R. R. Co. v. Turrill,	1009
Bank, Merch. Nat., of St. Louis, Shaw v.	892	City of Chicago, Ayres, Exr., v.	838
Bank, Merch. Nat., of Toledo, Cummings,		"City of Panama, The," v. Phelps,	1061
Treas., v.	901	Clamorgan v. United States,	836
Bank, People's, of Belleville, v. Mfrs. Nat.		Clapp, Nougue v.	1026
Bk.,	907	Clifton, Jones, Assignee, v.	908

C.		G.	
Cockrem, Receiver, Fleitas v.	954	Gates v. Goodloe, Exr.,	895
Collins, Admr., v. The Florida,	898	Gay v. Parpart,	841
Colorado Cent. R. R. Co. v. White, Admr.,	860	Gegan, Duncan v.	875
Comly, Coll., Powers v.	805	Gibboney, Exrx., Kain, Bishop, v.	813
Commercial Nat. Bk. of Cleveland, Pel-		Gilbert, Phillips v.	833
ton, Treas., v.	901	"Goddard v. Ordway,"	1040
Cooper Union, Inhabitants of Pompton v.	803	Goodloe, Exr., Gates v.	895
County of Hamilton, Litchfield v.	928	Goodrich, Greenleaf v.	845
County of Jackson, Darlington v.	972	Grand Trunk Ry. Co. v. Walker,	977
County of Jasper, Anthony v.	1005	Greenleaf v. Goodrich,	845
County of Livingston v. Darlington,	1015	Grove, American Bible Society v.	847
County of Pike, Foote v.	972	Guaranty & Indemnity Co., N. Y., Jones,	
County of Webster, Litchfield v.	925	Assignee, v.	1030
County of Yankton, First Nat. Bk. v.	1046	Guntton, Trustee, v. Carroll, Exrx.,	985
Corwine, Exrx., Meguire v.	899	H.	
Cowdrey v. Vandenburg,	923	Hall, First Nat. Bk. of Quincy v.	822
Crampton v. Zabriskie,	1070	Hall v. Russell,	829
Crane, Exr. v. Kansas Pacific Ry. Co.	782	Hamilton Co., Litchfield v.	928
Creswell, Comr., Kennedy, Exr., v.	1075	Harris, Phelps v.	855
Creswell, Comr., v. Lanahan,	853	Hatch v. Dana,	885
Cummings, Treas., v. Merch. Nat. Bk. of		Hickling v. Sherman, Assignee,	866
Toledo,	903	Hoffman, Washington Market Co. v.	782
D.		Hollingsworth v. Flint, Admr.,	1038
Dallas Co. v. Davol,	974	Howard v. Mil. & St. P. Ry. Co.,	1081
Dana, Hatch v.	885	Hubbard, Prov. Steam Engine Co. v.	786
Darlington v. Jackson County,	972	Humphrey, Baker v.	1065
Darlington, Livingston County v.	1015	I.	
Darlington, Township of Empire v.	878	Imhaeuser v. Buerk,	945
D'Auterieve v. United States,	869	Inhabitants of Pompton v. Cooper Union,	803
"Dauterive v. United States,"	869	Ins. Co., Am. L., Moulou v.	1077
Davis, Lovell v.	944	Ins. Co., Factors' & Traders', Wheeler v.	1005
Davol, Dallas Co. v.	974	Ins. Co., St. J. F. & M., School Dist. No.	
Dawson, United States v.	791	56 v.	868
De Liano v. Gaines,	928	International Bank v. Sherman, Assignee,	866
Denver & R. G. Ry. Co., <i>Ex Parte</i> ,	872	J.	
Desper, Union Water-Meter Co. v.	1024	Jasper County, Anthony v.	1005
Dodge, Arthur, Coll., v.	948	Jackson County, Darlington v.	972
Douglass v. Pike County,	968	Jeffrey, Admr., v. Moran, Trustee,	785
Duncan v. Gegan,	875	Jones, Assignee, v. Clifton,	908
"Durant v. Essex Co."	961	Jones, Assignee, v. N. Y. Guaranty & I.	
Durant v. Storrow,	961	Co.,	1030
E.		K.	
Eastern Kentucky Ry. Co. v. Slack, Coll.,	611	Kain, Bishop, v. Gibboney, Exrx.,	813
Edrington, O'Reilly, Assignee, v.	1009	Kansas Pacific Ry. Co., Crane, Exr., v.	782
Edwards, Trustee, Rice v.	976	Keith, Woodbury Planing-Machine Co. v.	939
Egbert, Admr., Meyer, Trustee v.	1078	Kennedy, Exr., v. Creswell, Comr.,	1075
Ellsworth, United States v.	862	Ketchum, Pacific R. R. Co. of Missouri v.	932
Empire Township v. Darlington,	878	Ketchum v. St. Louis,	999
"Essex Co., Durant v."	961	Kimball, Admr., United States v.	835
<i>Ex Parte</i> Denver & R. G. Ry. Co.,	872	L.	
<i>Ex Parte</i> Phillips,	781	Lanahan, Creswell, Comr., v.	853
F.		Langford v. United States,	1010
Factors' & Traders' Ins. Co., Wheeler v.	1055	Lawson, United States v.	860
"Finn, Babbitt v."	820	Leggett v. Avery,	865
First Nat. Bk. of Brunswick v. Co. of		Lewis, Bowman v.	989
Yankton,	1046	"Lewis, Missouri" v.	989
First Nat. Bk. of Quincy v. Hall,	822	Litchfield v. County of Hamilton,	928
First Nat. Bk. of Wyandotte, Cent. Trust		Litchfield v. Webster County,	925
Co. of N. Y. v.	876	Little, Terry v.	864
Fleitas v. Cockrem, Receiver,	954	Livingston County v. Darlington,	1015
Flint, Admr., Hollingsworth v.	1028	Lovell v. Davis,	944
"Florida, The,"	898	Lumber Co., Mason, v. Buchtel,	1072
Florida, The, Collins, Admr., v.	898	M.	
Follansbee v. Ballard Paving Co.	802	Manierre, Mohr v.	1052
Foote v. County of Pike,	972	Manufacturers' Nat. Bk. of Chicago, Peo-	
Frisbie, Marquez v.	800	ple's Bk., v.	907
G.		Manufacturing Co., Amoskeag v. Trainer,	993
Gage v. Carraher,	989	Marquez v. Frisbie,	800
Gaillard, Treas., South Carolina, <i>ex rel.</i> v.	937		
Gaines, De Liano v.	928		

M.		R.	
Mason Lumber Co. v. Buchtel,	1072	R. R. Co., West. W. v. United States,	1068
Mason, Worthington, Admr., v.	848	Ry. Co., Bur. & S. W., Brooks v.	1057
May, Exr., v. Rice, Assignee,	797	Ry. Co., Denver & R. G., <i>Ex Parte</i> ,	872
"May v. Sloan,"	797	Ry. Co., Grand Trunk, v. Walker,	977
Mayflower, The, v. The Sabine,	982	Ry. Co., Kansas Pacific, Crane, Exr., v.	782
Meguire v. Corwine, Exrx.,	899	Ry. Co., Mil. & St. P., Howard v.	1081
Memphis & Charleston R. R. Co. v. Tennessee	960	Ry. Co., Nashville & C., v. U. S.,	1074
Mercantile Nat. Bk. v. Carpenter,	815	Ry. Co., Union Passenger, v. Pa.,	912
Merch. Nat. Bk. of Little Rock v. U. S.,	979	Ray, Chesapeake & Ohio Can. Co. v.	792
Merch. Nat. Bk. of St. Louis, Shaw v.	892	Rice, Assignee, May, Exr., v.	797
Merch. Nat. Bk. of Toledo, Cummings,		Rice v. Edwards, Trustee,	976
Treas., v.	903	Roberts, Town of, v. Bolles,	880
Meyer, Trustee, v. Egbert, Admr.,	1078	Russell, Hall v.	829
Mississippi, State of, <i>ex rel.</i> , Stone v.	1079	S.	
Milwaukee & St. P. Ry. Co., Howard v.	1081	"Sabine, The," The Mayflower v.	982
Mohr v. Manierre,	1052	St. Joseph F. & M. Ins. Co., School Dist.	
"Missouri v. Lewis,"	989	No. 56 v.	868
Moran, Trustee, Jeffrey, Admr. v.	785	St. Louis, Ketchum v.	999
Moulou v. Am. L. Ins. Co.,	1077	School Dist. No. 56 v. St. J. F. & M. Ins.	
Muirhead, Assignee, Aldridge, v.	1013	Co.,	868
Myers, Burr v.	976	Scipio, Town of, v. Wright,	1087
N.		Selden, Baker v.	841
Nagle, Wright v.	921	Shaw v. Merch. Nat. Bk. of St. Louis,	892
Nashville & C. Ry. Co. v. United States,	1074	"Shaw v. R. R. Co.,"	892
National Bank, First, of Ashland, Bast v.	794	Sherman, Assignee, Hickling v.	866
Natoma Water & Mining Co., Broder v.	790	Sherman, Assignee, International Bank v.	896
New Jersey R. R. & Trans. Co., Pollard v.	840	Shields, Babbitt, Assignee, v.	820
New Orleans & Car. R. R. Co., Case, Receiver, v.	1004	Silliman v. United States,	987
Nougue v. Clapp,	1026	Simmons v. Wagner,	910
N. Y. Guaranty & In. Co., Jones, Assignee, v.	1030	Skinner, Walden, Exr., v.	963
O.		"Sloan, May v."	797
"Ordway, Goddard v."	1040	Smith, Admr., v. Ayer,	955
Ordway, Phillips, Admr., v.	1040	Smith, Admr., Butterfield v.	868
O'Reilly, Assignee, v. Edrington, Admr.,	1009	Smith, Admr., v. First Nat. Bk. of West-boro,	955
P.		Smith, West v.	809
Pacific R. R. Co. of Missouri v. Ketchum,	932	South Carolina, <i>ex rel.</i> , v. Gaillard, Treas.,	837
"Panama, The City of," Phelps v.	1061	South & N. Ala R. R. Co. v. Alabama,	973
Parpart, Gay v.	841	Starke, Watt v.	826
Paving Co., Ballard, Follansbee v.	802	Steam Engine Co., Prov., v. Hubbard,	786
Pelton, Treas., v. Com. Nat. Bk. of Cleveland,	901	Stewart v. Platt, Assignee,	816
People's Bank of Belleville v. Mfrs. Nat. Bk.	907	Stewart, Trenier, Admr., v.	1021
Phelps v. Harris,	855	Stone v. State of Miss. <i>ex rel.</i> ,	1079
Phelps, The City of Panama v.	1061	Storrow, Durant v.	961
Philadelphia, Union Passenger Ry. Co. v.	912	T.	
Phillips, <i>Ex Parte</i> ,	781	Tennessee, Memphis & Ch. R. R. Co. v.	960
Phillips v. Gilbert,	833	Terry v. Little,	864
Phillips, Admr., v. Ordway,	1040	"The Florida,"	898
Pike County, Douglass v.	968	Thomas v. West Jersey R. R. Co.,	950
Pike County, Foote v.	972	Town of Roberts v. Bolles,	880
Pittsburgh, City of, Pittsburgh Gas Co. v.	789	Town of Scipio v. Wright,	1037
Pittsburgh Gas Co. v. Pittsburgh,	789	Township of Empire v. Darlington,	873
Platt, Assignee, Stewart v.	816	Trainer, Amoskeag Mfg. Co., v.	993
Pollard v. N. J. R. R. & Trans. Co.,	840	Transportation Co., N. J. R. R., Pollard v.	840
Pompton, Inhabitants of, v. Cooper Union,	803	Trenier, Admr., v. Stewart,	1021
Powers v. Comly, Coll.,	805	Trust Co. of N. Y. Central, v. First Nat.	
Providence Steam Engine Co. v. Hubbard,	786	Bk. of Wyandotte,	876
R.		Turrill, Chicago & Alton R. R. Co. v.	1009
R. R. Co., Chicago & Alton, v. Turrill,	1009	Turrill, Chicago, B. & Q. R. R. Co. v.	1009
R. R. Co., Chicago, B. & Q., v. Turrill,	1009	U.	
R. R. Co., Col. Cent., v. White, Admr.,	860	Union Passenger Ry. Co. v. Philadelphia,	912
R. R. Co., Memphis & Ch., v. Tennessee,	960	Union Water-Meter Co. v. Desper,	1024
R. R. Co. of Missouri, Pacific, v. Ketchum,	832	United States, Bechtel v.	1019
R. R. Co., N. O. & Car., Case, Receiver, v.	1004	United States v. Clamorgan,	836
"R. R. Co., Shaw v."	892	United States, D'Auferieve v.	869
R. R. Co., South & Nor. Alabama, v. State of Alabama,	973	"United States v. Dautrive,"	869
R. R. Co., West Jersey, Thomas v.	950	United States v. Dawson,	791
		United States v. Ellsworth,	862
		United States v. Kimball, Admr.,	835
		United States, Langford v.	1010

U.		W.	
United States v. Lawson,	860	West Jersey R. R. Co., Thomas v.	950
United States, Merch. Nat. Bk. of Little Rock v.	979	West. W. R. R. Co. v. United States,	1068
United States, Nashville & C. Ry. Co. v.	1074	Wheeler v. Factors' & Traders' Ins. Co.,	1055
United States, Parish v.	763	White, Admr., Col. Cent. R. R. Co. v.	860
United States v. Silliman,	987	Whitney v. Wyman,	1050
United States, West. W. R. R. Co. v.	1068	Wolsey v. Chapman,	915
V.		Woodbury Planing-Mach. Co. v. Keith,	939
Vance v. Burbank,	929	Wood v. Carpenter,	807
Vandenburgh, Cowdrey v.	923	Worthington, Admr., v. Mason,	848
W.		Wright v. Blakeslee, Coll.,	1048
Wagner, Simmons v.	910	Wright v. Nagle,	921
Walden v. Skinner, Exr.,	963	Wright, Town of Scipio v.	1037
Walker, Grand Trunk Ry. Co. v.	977	Wyman, Whitney v.	1050
Washington Market Co. v. Hoffman,	782	Y.	
Water & Mining Co., Natoma Broder v.	790	Yankton Co., First Nat. Bk. of Yankton v.	1046
Watt v. Starke,	826	Young v. Bradley,	1044
Webster Co. v. Litchfield v.	925	Yount, Amer. & For. Christian Union v.	888
West v. Smith,	860	Z.	
		Zabriskie, Crampton v.	1070

THE DECISIONS

OF THE

Supreme Court of the United States,

AT OCTOBER TERM, 1879.

Ex Parte LEWIS W. PHILLIPS.

Power of admiralty court to sequester property—remedy in another court—judgment against sureties.

1. There is no statute or rule which confers on a court of admiralty those powers of sequestering property which appertain to a court of equity.

2. Libelants, who have recovered judgment, in an admiralty suit, against stipulators for value and on an appeal bond, can, after execution returned "Unsatisfied" thereon, resort to some other proper court to reach any property which the debtors may have.

3. Such libelants are general creditors by judgment *in personam* of the sureties. The judgments are money judgments, upon which stipulators for value cannot be required to bring the property into court.

[No. 11 Orig.]

Submitted Nov. 3, 1879. Decided Nov. 10, 1879.

PETITION for a rule to show cause.

The following is the portion of the opinion of the Judge of the Circuit Court referred to by this court:

Blatchford, J.

(1) As to so much of the motion as asks that the sureties be ordered to appear before this court for examination concerning their property according to the laws and practice of the State of New York: there is no statute of the United States which authorizes or requires such an examination in a suit in admiralty. Sections 914, 915 and 916 of the Revised Statutes apply solely to common law suits. Section 941 provides for such stipulations for value as were given in these cases, and enacts that judgment thereon, against both the principal and sureties may be recorded at the time of rendering the decree in the original cause (Rule 21, in Admiralty), provides that, "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution, in the nature of a *fieri facias* commanding the Marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators." There is no other rule as to the enforcing a decree in a suit *in rem*. That rule is one of a series of rules made by the Supreme Court, under section 6 of the Act of August 23, 1842, 5 Stat. at L., 518, now section 917 of the Revised Statutes, which provides that the Supreme Court shall have the power to prescribe the forms of process, the modes of proceeding to obtain relief, and generally to regulate the whole practice in suits in admiralty, by the

circuit and district courts. Nothing is found which authorizes what is asked for under the first branch of the motion.

(2) As to so much of the motion as asks that the sureties be ordered to disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed to convey all of their property to a sequestrator to be appointed by this court: there is no statute which confers on a Court of Admiralty of the United States those powers of sequestering property which appertain to a court of equity, nor is there any rule which does so. The libelants have judgments, and after executions have been issued and returned "Unsatisfied," they can resort to the proper court to reach any property which the debtors may have. But this court sitting in admiralty is not such court. The fact that the libelants could not recover judgments on the stipulations or bonds in any other court than the Admiralty Court, does not prevent their resorting to other courts, when they have obtained judgments in the Admiralty Court, to enforce such judgments. The judgments have then become like any other judgments *in personam* in any court. In a suit *in rem*, where the court has acquired jurisdiction of the *res*, and has not voluntarily yielded possession of it, and has a right to recall it to its custody, it may proceed to do so, as against those who have it or have taken it; but that is not the present case. Rule 38. The libelants are general creditors, by judgment *in personam* of the sureties. The stipulations and bonds are merely to pay money and the judgments are money judgments. The stipulators for value could not now perform the condition of their stipulation by bringing the vessel into court. * * *

Messrs. H. J. Scudder and F. W. Hackett, for petitioner.

Mr. Chief Justice Waite delivered the opinion of the court:

The petitioner shows that, having recovered a summary judgment in an admiralty suit against the stipulators for value and the sureties on an appeal bond, he moved the circuit court for an order on such stipulators and sureties to appear "For examination concerning their property according to the laws and practice of the State of New York;" and also for an order that they "Disclose all information concerning their property, with a view to the sequestration thereof, and that they be directed

to convey all their said property to a sequestrator to be appointed by the court," and also that they "Be punished for their contempt in not performing their stipulations and failing to comply with the provisions of the decrees." These motions were overruled by the court, and we are now asked for an order on that court to show cause why a *mandamus* should not issue commanding it to exercise the power and grant the remedy sought.

Even if we have the power to grant a *mandamus* in a case like this, the reasons assigned by the Circuit Judge in his opinion for refusing the motion are so satisfactory and show so clearly that he was right in what he did, that we think it quite unnecessary to hear an argument and, therefore, deny the application for the rule.

NIXON M. CRANE, EXR., of ELLEN HALLETT, Deceased, ET AL., Appts.,

v.

KANSAS PACIFIC RAILWAY COMPANY ET AL.

Bill to enforce contract—who may bring—heirs—personal representative.

1. A bill cannot be brought by heirs of a deceased person to enforce a contract made by him in his lifetime with a railroad company, for the construction of its railway and telegraph.

2. The contract formed part of his personal estate and belonged to his personal representative and not to his heirs; as also the profits, even if partly in lands.

3. These do not pass to the heirs by inheritance, but go to the personal representative as part of the personal estate, and through him to the heirs, only on distribution after all debts are paid.

[No. 2.]

Argued Nov. 11, 1879. Decided Nov. 17, 1879.

APPEAL from the Circuit Court of the United States for the District of Kansas.

This was an equity action, commenced in the court below by the appellants against the Kansas Pacific Ry. Co., John P. Usher and others. The bill set up a trust, and charged conspiracy and fraud, and prayed for an accounting, etc. The two defendants just named demurred, and the bill was dismissed. The facts are sufficiently stated by the court.

Messrs. Matt. H. Carpenter and Jas. B. Stewart, for appellants.

Messrs. J. P. Usher and C. E. Bretherton, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This decree is affirmed. The suit was in equity by the children and heirs of Samuel Hallett, deceased, to enforce a contract he made in his lifetime with the Railroad Company, defendant, then known by another name, for the construction of its line of railway and telegraph. By the terms of the contract, he was to be paid for his work in money, United States subsidy bonds, construction bonds, land-grant bonds, capital stock of the Company, and city and county bonds. He was not to become interested in any lands except indirectly, as a stockholder in a corporation owning lands, and a holder of bonds secured by mortgage. When he died, the

contract formed part of his personal estate, and belonged to his personal representative and not to his heirs, except upon distribution after all debts were paid. Had the personal representative performed the contract, he, like the intestate, would be entitled to money, stocks and bonds for what he did. In this way he might have added to the assets of the estate for distribution, but he would get nothing which would pass directly to the heirs by inheritance. It matters not that, since the death of Hallett, others may have taken possession of the contract, and made themselves, in law, trustees of the profits they have realized by its performance. As such trustees they must account to the personal representative of the estate and not to the heirs. If the profits for which they account are partly in lands, these lands do not pass to the heirs of Hallett by inheritance. They go to the personal representative as part of the personal estate, and through him on distribution to the heirs.

It follows that the heirs could not bring this suit and that the demurrer to their bill was properly sustained.

WASHINGTON MARKET COMPANY,

Appt.,

v.

JAMES A. HOFFMAN.

(See S. C., 11 Otto, 112-119.)

Jurisdiction as to amount—construction of statute—Washington market.

1. Where there are two hundred and six complainants suing jointly and the decree is a single one in favor of them all, and in denial of the right claimed by defendant, which is of greater value than the sum which is the limit below which an appeal to this court is not allowable, this court has jurisdiction as to amount.

2. It is a cardinal rule of statutory construction, that significance and effect shall, if possible, be accorded to every word, and that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.

3. Under the Act of May 20, 1870, chartering the Washington Market Co., one who has acquired by bid made at auction, the right to two years' occupancy of a stall, has no right to continue in possession after such time, and so long as he chooses to pay the rent therefor.

[No. 38].

Argued Oct. 31 and Nov. 3, 4, 1879. Decided Nov. 17, 1879.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. William Birney, B. F. Butler and W. E. Chandler, for appellant.

Messrs. R. T. Merrick and M. F. Morris, for appellee.

Mr. Justice Strong delivered the opinion of the court:

This was a bill originally brought by James A. Hoffman against the Washington Market Company, seeking an injunction against the Company's proceeding to sell a stall in their market, occupied by him, and seeking also a decree establishing his right to retain possession of said stall so long as he chose to oc-

cupy it for his business as a butcher. Subsequently the bill was amended by consent, and two hundred and five other occupants of other stalls in the market were made complainants with Hoffman. The relief then asked was an injunction in favor of each of the complainants together with a decree establishing the right of each to the continued occupancy of his stall so long as he might choose to occupy it for his business. After hearing, the court by a final decree enjoined the Market Company from selling or offering for sale the stands and stalls of the several complainants, or any of them, and also adjudged that the rights of the complainants in their several stalls and stands did not expire, by any valid limitations of the time for the continuance of such rights and interest, in two years from July 1, 1872. From this decree the Market Company has appealed.

The first question to be determined is, whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true, that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or by the Market Company, the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the Company, which is of far greater value than the sum which, by the Act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings, that the sale which the Company proposed to make, and the court below enjoined, would have realized to the Market Company more than \$60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction.

Dismissing this, we come directly to the merits of the case. The Market Company was chartered by an Act of Congress approved May 20, 1870, 16 Stat. at L., 124, and authorized to erect upon a lot belonging to the United States, a market-house with stalls. By the 2d section of the Act it was enacted as follows:

"And the said Company shall, whenever any part or parts of said buildings, stalls, stands and so forth, for market purposes, are ready for use or occupancy, offer the same for sale at public auction, for one or more years, to the highest bidder or bidders, subject to the payment of an annual ground-rent, the amount of which to be fixed by the Mayor and Common Council of the City of Washington and the directors of this Corporation (a prescribed public notice being given), and all subsequent sales and leases thereof shall be made on similar notice and in the same manner. * * *. The stalls, stands and privileges of all kinds, in said market, to be used for market purposes, when offered at public sale, shall be let to the highest bidder, and there shall be no bidding on the part of said Company, directly or indirectly; but said Company, with the consent of the mayor and aldermen of the City of Washington, may fix a minimum rate of bids at such sales; and the person who shall offer the highest price, at or beyond such minimum, for any such stand, stall or privilege, shall be entitled to the occupation thereof, and shall be considered as having the good-will and the right to retain the possession

thereof so long as he chooses to occupy the same for his own business and pay the rent therefor. * * * *Provided, however,* That such right to the possession of such stands or stalls may be sold and transferred by such purchaser under regulations to be fixed by the by-laws of said Company, and, in the case of the death of such purchaser during the existence of his lease, it shall be disposed of as other personal property."

By the 14th section, the Corporation was required to pay to the City of Washington the sum of \$25,000 annually, in consideration of the privileges granted; and by section 12 it was provided that, at the expiration of thirty years, the City of Washington might take possession of the property, on paying a sum equal to a fair valuation of the buildings and improvements. The property was made to revert to the United States at the end of ninety-nine years.

Such were the provisions of the Act of Congress that have any bearing on the present case. In pursuance of the authority given by the 2d section, the Company, on the 25th of May, 1872, offered to the highest bidder, at public auction, the stalls or stands in the market, for the term of two years from the 1st day of July, 1872; and Hoffman, with the other complainants, or persons under whose bids they claim, became the highest bidders for the several stalls they occupy. They now insist that they are entitled to hold the stalls thus bid off, so long as they may choose to occupy them for their own business and pay the rent, notwithstanding the said term of two years has expired, claiming that such are the rights given to the highest bidders at the auction by the Act of Congress.

We think this claim is quite unfounded. In our judgment, it has no warrant in any reasonable construction of the charter. The Market Company was authorized and required to sell the privilege of occupying a stall at public auction for a term, or, to use the language of the Act, "for one or more years;" and subsequent sales and leases were required to be made in the same manner. The Company was left at liberty to fix the length of the term. They might sell for two years, or ten, or thirty, at their option, but in all cases sales were required to be made for a definite period. No authority was given to create a tenancy at will—a tenancy to be held either at the will of the Market Company or at the will of the bidder at the sale. The prescription to sell "for one or more years" negatives this. Had it been intended that the sale should confer upon the highest bidder the right to occupy a stall at his will, and so long as he might use it for his business, those words would not have been inserted in the statute. They would be unmeaning; even more, they would have been contradictory of the intent. It would have been sufficient to declare that the stalls should be sold at public auction, and that the highest bidder should have the right to hold so long as he chose to occupy for his business and pay rent. We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, section 2, it was said that "A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or

insignificant." This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.

Keeping these admitted rules of construction in view, the clause in the charter which defines the rights of purchasers at the sale, the clause upon which the complainants rely, is easily understood. It declares in effect that the highest bidder for a stall shall be considered as having the good-will, and the right to retain possession thereof during his term, so long as he chooses to occupy the same for his own business and pay the rent therefore. The construction contended for by the complainants is obviously inconsistent with the direction that sales of rights of occupancy should be made for a term; that is, for one or more years. That construction, therefore, is not to be admitted, if another reasonable one can be given. That the clause, general as its language is, has some limitation will not be questioned. It will not be claimed that it gives to the highest bidder at a sale for two years, or to his vendee or transferee (for such bidder is authorized to assign), a perpetual right of occupancy so long as he pays the rent. If it does, the right may outlast the time when by the charter the Corporation of Washington is empowered to take possession of the market buildings and grounds, and even the time when the Company's rights and property are to revert to the United States. To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate. In *Brewer v. Blough-er*, 14 Pet., 178, it was said to be the undoubted duty of the court to ascertain the meaning of the Legislature from words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to include in it. Now, the subject upon which Congress attempted by this clause to legislate was the rights of the highest bidder for a stall, under a purchase for a term of years, and not the rights of a purchaser under a bid for an indefinite period, terminable only at his will. Nothing else was in view of the Legislature. No other sale had been spoken of. The enactment, therefore, that he should have the good-will and possession of the stall so long as he might choose to occupy it, paying rent, must have reference to possession during the term, for that was the only subject under consideration. Such a construction of the clause gives effect to it, denies effect to no other words or provisions in the statute, and is in strict harmony with every part. It is the only construction that harmonizes all the provisions of the Act. And it is a construction which, in a very important particular, is beneficial to the highest bidders at the sale. The clause not only declares that the highest bidder above a fixed minimum should by his bid become entitled to the possession, which had not been declared previously in the Act, but it impliedly relieves him from what might, without it, have proved an onerous burden. The stalls in this case were sold for two years. The Market Company might

have sold them for twenty, or even thirty. Such authority was given by the statute. Had they done so, the purchaser of a stall would have been bound to pay the stall rent during the whole period, of twenty or thirty years, whether he occupied the stall or not, were it not for this provision, and in case of his death his estate would have been liable. To guard against this, his right under his bid to retain the occupancy is declared to continue so long as he chooses to occupy for his own business, and pay the rent, clearly implying that when, during the period for which he bought, he chooses to give up the occupancy and cease to pay the rent, his liability ceases. In other words: the Company is bound to permit his occupancy during the term which was sold, but the bidder is not bound absolutely to pay rent during the whole term, nor longer than he chooses to occupy the stall for his own business.

To our minds, therefore, it appears clearly that under the true and reasonable construction of the Act of Congress, the complainants below acquired by the bids made at the auction sale in 1872 no right to more than two years' occupancy of their several stalls, and no right to continue in possession thereof after July 1, 1874. Our conclusion is supported by several other considerations. In the 2d section of the Act it is enacted that, in case of the death of any purchaser at the auction sale, "*during the continuance of his lease*," his right to the possession of his stall should be sold as other personal property. The words, "*during the continuance of his lease*," indicate strongly that Congress contemplated and intended that what was sold at the auction should be a term of years, with fixed limits of duration. Else why speak of the existence of a lease and its continuance?

We may add that the contemporaneous understanding of the parties was in harmony with the construction of the statute we now give. On the 23d day of May, 1872, the Market Company resolved to commence the sale of rights to occupy the stalls on the 25th day of that month, in pursuance of previous notice given; and resolved also that the sales should be of the right to occupy for two years from July 1, 1872. On the same day, May 23, 1872, the Company adopted market regulations, as they were authorized to do by their charter. Among these regulations were the following: Rent shall be payable quarterly in advance. No person shall be allowed to occupy a stall or stand until he has signed the market regulations, and has received a permit describing the character of his stall or stand, and the conditions of occupancy. At the end of the term of each occupant, he shall quit and deliver up his stand peaceably, in as good order and condition, except ordinary wear, as the same now is, or may be put into by the Company. With such regulations in force, the sales were made and a permit was delivered to each purchaser, declaring him entitled to occupy his stall "For the term of two years from July 1, 1872, paying therefor the quarterly rent in advance, subject to the conditions of the charter and by-laws of the Company and the regulations of the Company; the permit to be of no effect until the holder had signed the regulations." Thus the claimants, or those under whom they claimed, obtained possession, and thus they engaged to surrender possession at the expiration

of their term of two years. It does not appear to have entered into the contemplation of the Market Company, or the bidders at the sale, at that time, that by the purchase a bidder obtained a possible right of occupancy for more than two years. The construction now insisted upon by the complainants is an afterthought, a creature of recent birth.

In view of the considerations thus presented we are of opinion that the Supreme Court of the District erred in the construction it gave to the charter of the Market Company, and in sustaining the complainants' bill. Of the cross-bill it is sufficient to say that it must fall with the bill of the complainants. This is conceded by the appellants.

The decree of the Supreme Court of the District is reversed, with costs, and the record is remitted, with instructions to dismiss both the bill and the cross-bill.

Mr. Justice Bradley, dissenting;

I dissent from the judgment of the court in this case. I think that it was the intent of the statute to give to the purchasers of stalls the benefit of the "good-will" acquired during the term, so long as they chose to keep them and pay the rents originally fixed, or which might from time to time be imposed by the common council.

Also dissenting **Mr. Justice Harlan**, who concurred in the foregoing dissent.

Cited—106 U. S., 6.

FRANCIS JEFFREY, Admr. of WILLIAM ZENTMEYER, Deceased, *Appt.*,

v.

CHARLES MORAN, Trustee.

(See S. C., 11 Otto, 285-289.)

Ohio law as to lien of judgments—railroad—lien on fund—when lien accrues.

1. By the law of Ohio, a judgment is a lien upon all the lands and tenements of the debtor within the county where the judgment is entered, from the first day of the term at which judgment is rendered.

2. A judgment against a railroad company, whose roadway had been sold under a decree upon a mortgage foreclosure, and the sale confirmed more than a year before the rendition of the judgment, is no lien thereon.

3. There being no lien at law upon the road, there could be none in equity upon the fund arising from the sale.

4. It is only when a claim has ripened into a judgment where there is property to be bound by it, that a lien can subsist.

[No. 51.]

Submitted Nov. 7, 1879. Decided Nov. 17, 1879.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio. The case is stated by the court.

Messrs. S. T. Crawford and Thos. S. Young, for appellant:

In the acceptance of the Act of the Legislature by complainant, he agreed to have the lien See 11 OTTO.

of his mortgage postponed to the liens of such judgments as Jeffrey's.

Curran v. Ark., 15 How., 304; *Fox v. Seal*, 22 Wall., 425 (89 U. S., XXII., 774).

It is the business of the court, the judge, to construe the Act, suppress the mischief and advance the remedy.

Tracey v. Card, 2 Ohio St., 442; *R. R. Co. v. Cowdrey*, 11 Wall., 475 (78 U. S., XX., 204).

The sale of the road, nor any other proceedings of the court below, prior to Jeffrey becoming a party thereto, could in no way affect his rights.

R. R. Co. v. Cowdrey, *supra*; *Hook v. Payne*, 14 Wall., 252 (81 U. S., XX., 887); *Ogilvie v. Ins. Co.*, 2 Black, 539 (67 U. S., XVII., 349); *Coiron v. Millaudon*, 19 How., 113 (60 U. S., XV., 575); *Wolfe v. Lewis*, 19 How., 280 (60 U. S., XV., 643); *Beebe v. Russell*, 19 How., 283 (60 U. S., XV., 668); *Craighead v. Wilson*, 18 How., 199 (59 U. S., XV., 332).

The proceeds of sale were a substitute for the railroad sold; or, the judgment creditor could have a resale of the road.

Myers v. Hewitt, 16 Ohio, 449; *Olcott v. Bynum*, 17 Wall., 63 (84 U. S., XXI., 575); *Porter v. Barclay*, 18 Ohio St., 546; *R. R. Co. v. Cowdrey* (*supra*); *Markey v. Langley*, 92 U. S., 142 (XXIII., 701); *Moore v. Rittenhouse*, 15 Ohio St., 318; *Jefferson v. Dallas*, 20 Ohio St., 68.

At the time of the injury to Zentmeyer, his representative had a right of action and an inchoate lien paramount to complainant's lien; when he obtained his judgment, his paramount lien became absolute.

Bk. of O. v. Hinton, 21 Ohio St., 509.

Mr. M. A. Daugherty, for appellee.

Mr. Justice Swayne delivered the opinion of the court:

A corporation existed in Ohio known as the Cincinnati, Wilmington and Zanesville Railroad Company. It owned and operated a road extending from the City of Zanesville to the Village of Morrow in that State. The company became insolvent, and the road was sold on the 3d of June, 1863, under foreclosure proceedings upon a mortgage which the company had given. Charles Moran became the purchaser in trust for the creditors and stockholders. The original company was reorganized on the 11th of March, 1864, pursuant to a statute of the State of April 11, 1861, under the name of the Cincinnati and Zanesville Railroad Company. On the 12th of March, 1864, Moran conveyed to the new company, which thereupon executed to him and W. Shall a mortgage to secure the payment of the principal and interest of certain bonds therein described. This mortgage bore date on the 1st of April, 1864. Default having been made in the payment of the interest accruing on these bonds, Moran, on the 30th of April, 1869, filed a bill of foreclosure in the court below. On the 4th of May following, the road was put, by the court, into the charge of the officers of the company as receivers. On the 6th of October then next, a final decree was entered, finding the amount due, and ordering the premises to be sold unless it was paid within twenty days.

On the 2d of December following a sale was reported, and on the same day it was confirmed

by the court. The proceeds of the sale were largely less than the amount intended to be secured by the mortgage. On the 22d of June, 1866, Zentmeyer, the appellant's intestate, was killed on the road. On the 16th of July, 1867, the appellant, as his administrator, sued the company in the Court of Common Pleas of Clinton County, through which the road passes, and on the 28th of February, 1871, he recovered a judgment for \$5,000. On the 5th of November he was made a party to the proceedings in the foreclosure case. He thereupon answered and filed a cross-bill, in the nature of a creditors' bill, claiming to have the judgment paid out of the proceeds of the sale of the road in the hands of Moran. The court decreed against him, and he appealed to this court.

Several objections have been taken to the claim of the cross-bill by the counsel for the respondent, which the view we take of the case renders it unnecessary to consider.

The counsel for the appellant have pressed upon our attention certain provisions of the mortgage under which the road was sold. We think it too clear to require discussion, that they have no application to the point upon which the case must turn. We shall, therefore, pass them by without further remark.

The mortgage was executed under the Act before mentioned, of April 11, 1861, and was subject to its provisions. The 6th section of that Act is as follows:

"The lien of the mortgages and deeds of trust authorized to be made by this Act shall be subject to the lien of judgments recovered against said corporation, after its reorganization, for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts, or liability as a common carrier thereafter made or incurred."

By the law of Ohio, a judgment is a lien upon all "The lands and tenements of the debtor within the county where the judgment is entered, from the first day of the Term at which judgment is rendered * * * but judgments by confession, and judgments rendered at the same Term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered." 2 R. S. of Ohio, Swan & Cr., 1064. If execution shall not be sued out within five years from the date of the judgment, the latter becomes dormant and the lien expires. 2 R. S. of Ohio, Swan & Cr., 1067. Judgment liens are the creatures of positive law, without which they cannot exist. A State may regulate them as it deems proper. *Corwin v. Benham*, 2 Ohio St., 36. When this judgment was rendered, there was no real estate of any kind in Clinton County belonging to the railroad company. The roadway and all its appurtenances had been sold to Moran under the decree upon the mortgage, and the sale confirmed more than a year before that time. Thereafter the relation of the property to the company was in all respects as if the company had never owned it. A lien by the judgment was, therefore, impossible.

There being no such lien at law upon the road, there could be none in equity touching the fund arising from the sale. *Olcott v. By-*

num, 17 Wall., 44 [84 U. S., XXI., 570], cited by the learned counsel for the appellant, does not, therefore, affect the case.

The counsel would have us give the same construction to the terms "The lien of judgments recovered against the corporation," as if they were "valid claims against the corporation," etc. The language of the statute is clear and explicit. It has a specific meaning in the jurisprudence of Ohio, and seems to have been chosen, *ex industria*, to express exactly the category it defines. There is as much difference with respect to the property between a claim secured by a judgment lien, and one not so secured, as there is between a demand secured by mortgage, and one not secured at all. In such cases the mortgage and the judgment lien are equivalents. In both the binding effect is the same, and the law prescribes the consequences. Here, if the lien had subsisted, though junior in date, it would have had priority over the mortgage. The latter was subject to the statute, and the statute would have given to the lien that effect. No reasoning can successfully maintain that a claim merely in judgment and a judgment lien are the same thing, in legal effect, any more than in fact. To hold otherwise would be to make the law, and not simply to apply it. The former is beyond the sphere of our authority; the latter is our duty. It is only when a claim has ripened into a judgment where there is property to be bound by it, that a lien can subsist. This element is indispensable under the law to such a result. If the Legislature intended that a judgment—not a lien on the mortgaged premises—should have the same effect as one that was such lien, it would have been easy to say so, and this would, doubtless, have been done. No process of word stretching or bending can make the language employed touch the fund in dispute.

It does not appear that the foreclosure sale, from which Moran derived title, was made in the process of another reorganization under the statute. If this were so, the last clause of the 1st section would control the rights of the parties. It is there declared that "Every such agreement" for reorganization, "shall provide that the unsecured debts of the company incurred for repairs or running expenses shall be paid in money or bonds of the reorganized company, as hereinafter provided; said bonds to be of the highest class issued. A copy of the terms of said agreement shall be filed in said court before the rendition of said decree." But as the mortgages did not avail themselves of the Act, they are not bound by its requirements. This clause, nevertheless, throws light upon the subject we have been considering and, therefore, we refer to it in that connection.

The decree of the Circuit Court is affirmed.

PROVIDENCE STEAM-ENGINE COMPANY,
NY, *Plff. in Err.*,

CHARLES HUBBARD.

(See S. C., 11 Otto, 188-196.)

Penalty for failure to make annual report—officers of corporation—liability.

1. A statute imposing a liability for the debts of

a corporation upon its officers, for a failure to make an annual report, is penal and should be strictly construed.

2. Individuals elected and serving as such officers may incur the statute liability for the corporate debts of the company, even although irregularities occurred in their election.

3. Under the Connecticut Statute, such officers are, for the neglect or refusal to make such annual report, liable only for debts contracted during the period of such neglect or refusal.

[No. 65.]

Argued Nov. 11, 1879. Decided Nov. 24, 1879.

ERROR to the Circuit Court of the United States for the District of Connecticut.

The case is stated by the court.

Mr. Charles E. Perkins, for plaintiff in error.

Mr. A. P. Hyde, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Statutory regulations were enacted by the State, to enable the business public to ascertain the pecuniary standing of joint stock corporations, and for that purpose it was made the duty of the president and secretary of every such corporation annually to make a certificate showing the condition of the affairs of the corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, stating the amount of paid capital, the cash value of its credits, the amount of its debts, and the name and number of shares of each stockholder, which certificate it is required shall be deposited, on or before the 15th of February or of August, with the town clerk of the town, who shall record the same at full length. Conn. R. S., sec. 404, p. 172.

Such an officer, whether president or secretary, if he intentionally neglects or refuses to comply with that requirement and perform the duty therein specified, is declared to be liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal. Conn. R. S., p. 174, sec. 413.

Sufficient appears to show that the Odorless Rubber Company was a joint-stock corporation legally organized in 1870, at Middletown, under the laws of the State. About the time of its organization, to wit: on the 9th of September of that year, C. C. Post was elected president, and it appears that he was twice re-elected at the annual meetings of the stockholders, each held in April of the two succeeding years, and that he continued to hold the office until the 17th of June following his last election, when he resigned. During all the period he was in office there was a secretary.

Neither the president nor the secretary, during that period, deposited with the town clerk any certificate required to be so filed by the law of the State, except as follows: on the 20th of June, 1871, the president and secretary did deposit such a certificate, showing the condition and assets of the Company on the 1st day of April of that year.

Prior to the 10th of June of the next year the defendant was not even a stockholder of the company, but it appears that he on that day signed the subscription paper exhibited in the record for two hundred shares of new stock of See 11 OTTO.

the Company, and that eight days later he paid \$1,800 towards his subscription. His promise to pay was conditional, that is, he was to pay \$6.25 per share whenever cash subscriptions to the amount of \$118,000 should be obtained, and the balance in equal monthly installments of ten per cent each from the date of the subscription, * * * it being understood that none of said subscriptions shall be valid or obligatory until at least said amount of \$118,000 shall have been subscribed and thirty per cent deduction is made in the old stock. Subscriptions to the required amount were obtained, but no evidence was offered to show that the thirty per cent deduction in the old stock was ever made.

Evidence to show that the defendant was ever elected a director is entirely wanting, but it is shown that, on the day the old president resigned, the Board of Directors elected him president of the corporation in the place made vacant by the resignation of his predecessor, and that thereafter he acted as president and stockholder, and that he continued to act as such until the 2d of September in that year, when he resigned said office.

Beyond all doubt, he was, during that period, the acting president of the corporation, and the bill of exceptions shows that he never made any statement of the condition and assets of the company until the day he resigned his office. Attempt is made by the plaintiffs to show that he was culpably guilty of neglect in that regard; but the bill of exceptions also shows that on that day he, with the secretary, made out in due form and deposited a certificate of the condition and assets of the company as they existed on the first day of July, two weeks subsequent to the day of his election as president of the corporation.

More than three months before the defendant was elected president, the plaintiffs entered in to a written agreement with the rubber company, by which they contracted to furnish the company a steam-engine for \$5,700, and it appears that they constructed the engine and shipped and delivered it to the purchasers; that the manufacturers subsequently placed it in position and put it in good running order, to the satisfaction of the buyers. Due delivery of the same having been made, the buyers made a cash payment and gave a note for a part of the price, which was never paid, leaving more than \$5,000 unpaid when the rubber company was adjudged bankrupt. Payment being refused, the plaintiffs brought this suit against the defendant as president of the rubber company, claiming that the debt was contracted during the period that he was guilty of neglect in not making and depositing the before described certificate, and that, in consequence of such neglect, he is liable for all the debts of such corporation contracted during that period.

Service was made, and the defendant appeared and denied the truth of all the matters alleged in the declaration. Subsequently the parties went to trial, and the verdict and judgment were in favor of the defendant. Exceptions were filed by the plaintiffs, and they sued out a writ of error and removed the cause into this court.

When the plaintiffs rested their case, the defendant requested the court to instruct the jury

to return a verdict in his favor; and the bill of exceptions shows that the circuit court, being of the opinion that there were no disputed questions of fact, gave the instruction as requested, and that the verdict was in conformity with the instruction. Opposed to that, the plaintiffs insist that the facts proved entitled them to the verdict, and they assign for error the instruction given by the circuit court to the jury.

Three principal defenses are set up by the defendant, as follows: (1) That he was never legally elected president of the corporation. (2) That the debt was not contracted while he was acting in the capacity of president of the company. (3) That by the proper construction of the state statute he is not liable for the debt due to the plaintiffs, even if the first two points cannot be sustained.

Preliminary to those inquiries, the defendant contends that the statute upon which the action is brought is penal and should be strictly construed; in which proposition the court unhesitatingly concurs. Statutes somewhat similar in character have been passed in several of the States, in all of which States it is held that the statutes are penal, and that for that reason their provisions must receive a strict construction. Take, for example, the Statute of New York, which provides that, on failure of the company within twenty days from the first of January to make, publish and file an annual report, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made, it has repeatedly been held that the act was penal, and that it could not be extended by construction to cases not fairly within its language. Hence it was decided that the trustees could not be held liable on account of the failure to publish and file the annual report, unless the debt was contracted during the default or unless it existed at the time of a subsequent default. *Garrison v. Howe*, 17 N. Y., 458; *Boughton v. Otis*, 21 N. Y., 261.

Repeated instances have occurred where suit was brought in one State to enforce the statute liability for the debts of a corporation created by the Legislature of another State, in all which it is held that the statute is penal, and that it can only be enforced in the State where the statute was passed. *Halsey v. McLean*, 12 Allen, 438; *Derrickson v. Smith*, 3 Dutch., 166; *Sturges v. Burton*, 8 Ohio St., 215; *Bk. v. Price*, 33 Md., 487; *Irvine v. McKeon*, 23 Cal., 472.

Corresponding decisions have been made in other courts, and to such an extent as to justify the remark that the rule is universal. *Bird v. Hayden*, 1 Robt. (N. Y.), 383; *Moies v. Sprague*, 9 R. I., 541.

Suppose that is so; then it is contended by the defendant that the Act cannot be enforced against him unless it appears that he was legally elected president, and that he was under legal obligation to perform the duties of that office.

Persons acting publicly as officers of a corporation are ordinarily presumed to be rightfully in office. *Bk. v. Dandridge*, 12 Wheat., 64; *Ang. & A. Corp.*, 9th ed., sec. 139. Individuals elected and serving as such officers may incur the statute liability for the corporate debts of the company, even though irregularities occurred

in their election, if in all other respects the evidence brings them within the category of legal default. *Neucomb v. Reed*, 12 Allen, 362; *Hagnes v. Brown*, 36 N. H., 545, 563.

Stockholders elect the directors, and it is claimed by the defendant that he was not legally elected president, because he was not a stockholder, the condition of his subscription having never been fulfilled; but he paid the first installment, and the evidence reported shows that he acted as a stockholder from the time of his election as president until his resignation. His subscription to the new stock was made before he was elected president, and the bill of exceptions shows that on the following day he paid the required amount of his subscription.

Power to elect the president is vested in the directors; and the record shows that he was formally elected to the office, and that he acted in that capacity for a month and a half, when he resigned. Beyond controversy, he was the acting president, and in view of the circumstances the court is not inclined to rest the decision of the case upon the ground that the defendant was not, during the period he performed the duties devolved upon the president of the company, legally responsible for the neglect to comply with the requirement of that statute. He acted as president during that period and, therefore, is liable, if any liability exists, notwithstanding the informality of his election. *Thayer v. Lithographic Co.*, 108 Mass., 523.

Three months before he was elected president the company contracted with the plaintiffs for a steam-engine, but it was not shipped for delivery to the purchasers until four days after he was elected president and commenced to perform the duties of his office.

Certificates of the kind are required to be deposited with the town clerk on or before the 15th of February or of August, and the provision is that the persons neglecting or refusing to comply with such requirements "Shall jointly and severally be liable to an action founded on the statute for all debts of such corporation contracted during the period of such neglect or refusal." Intentional neglect and refusal create the liability, and the liability extends to the debts contracted by the company during the period of such neglect and refusal, and to no others, which of itself is sufficient to disprove the theory of the plaintiffs that the defendant can in any view be held liable for the default of his predecessor.

Officers of the kind are responsible for the consequences of their own neglect or refusal to comply with the statute requirement while they remain in office, and they continue to be liable for those consequences even after they go out of office; but they are not responsible for the consequences of subsequent defaults committed by their successors, nor are the successors in such offices in any way responsible for the consequences of such defaults committed by their predecessors in office, for the plain reason that the language of the statute is that the persons so neglecting or refusing * * * shall be liable in an action founded on the statute for all debts of the corporation contracted during the period of such neglect or refusal. *Boughton v. Otis* [*supra*].

Much aid in construing the statute in question

is not required, as the language employed by the Legislature speaks its own construction; but if more be needed, it will be found in another decision of the same tribunal as that just cited. *Quarry Co. v. Bliss*, 27 N. Y., 297.

Statutes of the kind are passed for the benefit of creditors, and their reliance always is upon the officers who are such when they give the credit, and not upon persons who had ceased to be officers, or who might subsequently become such when those in office should go out.

Three things must concur in order that it can be held that the defendant is liable: (1) That he was president of the corporation. (2) That he intentionally neglected or refused to deposit the described certificate, as required by the statute. (3) That the debt was contracted during the period of such neglect or refusal.

Where all these things concur, the president is liable, not for all the debts of the corporation, but for all such as were contracted while he was guilty of such default. If he was not the president at the time of the default, or if the debt was contracted before he was in default, then he is not liable, as the case is not brought within the letter or spirit of the statute. Liability in such a case, as imposed, is in its nature penal, and in order to render such an officer responsible it must appear that he has neglected or refused to do some act which the law made it his duty to perform. *Crane v. Easterly*, 4 Lans., 513, 521; *Bond v. Clark*, 6 Allen, 361-363; *Andrews v. Murray*, 33 Barb., 354, *Blk. v. Com.*, 26 Pa. 451.

Marked differences exist between the provisions of the New York Statute and those of the State of Connecticut, the latter being much less stringent than the former. By the New York law, the duty of making the annual return is required of the corporation itself, and the penalty for neglect is imposed upon the trustees who are intrusted with the management of its affairs. Consequently, it is a corporate duty, and being such each succeeding Board is bound to perform it if it has been neglected by their predecessors. Unlike that, the duty to deposit the certificate under the Connecticut Statute is devolved on the president and secretary in terms which show that a new president does not inherit the consequences of neglect of duty or pecuniary liability from his predecessor in office. He is made liable for his own neglect and not for that of a prior officer, as clearly appears from the closing sentence of the penal section. In New York the trustees, upon default, are made liable for all the outstanding debts of the corporation, whenever contracted, but in Connecticut the president and secretary are liable only for debts contracted during the period of such neglect or refusal.

Prior to his election, the president, as such, had no duty to perform in respect to such a certificate, which is a self-evident proposition, and it is equally clear that his duty in that regard ceased when he ceased to be president of the corporation. Certificates of the kind are required to be made and deposited with the town clerk on or before the 15th of February or of August, as explicitly provided by the statute. On the 15th of February of that year his predecessor was in office, and of course the defendant was under no obligation to deposit any such certificate on that day, nor was he in any man-

ner in default because his predecessor did not perform that duty. Argument to show that he could not make and deposit such a certificate before he was elected is unnecessary, as such a proposition would be absurd; from which it follows that he was not under any legal obligation to perform such a service until the 15th of August of the same year, it appearing that his election as president took place less than two months prior to that time.

Concede that it became his duty as president to make and deposit such a certificate with the town clerk on the 15th of August next after his election, still it by no means follows that the present action can be maintained, as it clearly appears that he was not in default before that time. Proof of default in the defendant, without more, will not maintain the action, as it is also incumbent upon the plaintiffs to prove that the debt alleged was contracted during the period of such neglect or refusal. Apply that test to the case exhibited in the record, and it is clear that the defendant is not liable and that the decision of the court below is correct.

When the agreement for the steam-engine was made, the defendant was not president of the corporation, and of course he was not in default at that time, nor was he in default when the engine was delivered and placed in position, because that took place, in any view of the evidence, one month before the 15th of August, when the default of the defendant commenced. Prior to that time, the defendant was never in default and, inasmuch as the debt of the plaintiffs was not contracted during the period of his default, he was not liable for that debt. *Garrison v. Howe*, 17 N. Y., 458, 462.

Judgment affirmed.

Cited—48 Conn., 18; 40 Am. Rep., 152; 103 Ill., 398; 42 Am. Rep., 24.

PITTSBURGH GAS COMPANY, *Plff. in*
Err.,
v.
CITY OF PITTSBURGH.

(See S. C., 11 Otto, 219-222.)

Revenue tax on gas.

Section 94 of the Internal Revenue Act of 1864, levying taxes on illuminating gas, does not make a municipal corporation liable for the tax in a case where a gas company has, for a valuable consideration, contracted to furnish the corporation with gas "free of charge."

[No. 75.]

Argued Nov. 20, 1879. Decided Nov. 24, 1879.

IN ERROR to the Supreme Court of the State of Pennsylvania.

The case is sufficiently stated by the court *Messrs. J. W. Moore, E. A. Newman, Edward Lander and Chas. A. Ray*, for plaintiff in error.

Mr. Geo. Shiras, Jr., for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

Section 94 of the Internal Revenue Act of 1864, 13 Stat. at L., 264, levying taxes on illuminating gas, to be paid by the manufacturer

thereof, as amended in 1866, 14 Stat. at L., 128, contained the following provision:

"All gas companies whose price is fixed by law are authorized to add the tax herein imposed to the price per thousand feet on gas sold; and all such companies which have heretofore contracted to furnish gas to municipal corporations are in like manner * * * authorized to add such tax to such contract price."

This, we think, does not make a municipal corporation liable for the tax in a case where a gas company has, for a valuable consideration, contracted to furnish the corporation with gas "free of charge."

Judgment affirmed.

OSWALD BRODER, *Piff. in Err.*,

v.

NATOMA WATER AND MINING COMPANY.

(See S. C., 11 Otto, 274-277.)

Miners' rights—railroad grants—Pacific Railroad.

1. It is the established doctrine of this court, that rights of miners and the rights of persons who had constructed canals and ditches, to be used in mining operations and irrigation, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the Act of 1866.

2. Congress, in making donation grants to railroad companies, cannot be supposed to have exercised its liberality at the expense of pre-existing rights which, though imperfect, were still meritorious and had just claims to legislative protection.

3. In construing the grant to the Pacific Railroad Companies, this principle is eminently applicable.

[No. 64.]

Submitted Nov. 11, 1879. Decided Nov. 24, 1879.

IN ERROR to the Supreme Court of the State of California.

This action was commenced by the plaintiff in error, in the District Court of the Sixth Judicial District of the State of California, in and for Sacramento Co. Cal., claiming title to a certain tract of land, and alleging that the defendant had unlawfully entered the same and constructed a ditch across it. Plaintiff prayed that the ditch might be adjudged to be a nuisance; that, at the expense of the defendant, it might be filled up and abated. Plaintiff also asked for damages and other relief.

The defendant answered, denying the allegations of the plaintiff and averring that eighteen years before, while these were public lands, the defendant entered thereon and constructed the ditch complained of, and has ever since continuously held exclusive possession and ownership of the land used for the purposes of the ditch, adversely to the plaintiff and all other persons, for the purpose of supplying water for miners and others; and that this entry, possession and ownership were taken, acquired and held according to the local law of California, and under the license of the United States confirmed by the Act of Congress of July 26, 1866. The answer also relied on the Statute of Limitations.

NOTE.—Title to water by appropriation; common law rule; rule of mining States. See note to *Atchison v. Peterson*, 87 U. S., XXII., 414.

Judgment was rendered in the State District Court for the defendant, which judgment was affirmed by the Supreme Court of California. 50 Cal., 621.

The case is further stated by the court,

Mr. John H. McKune, for plaintiff in error.

Messrs. S. Shellabarger, J. M. Wilson and A. P. Catlin, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The plaintiff in this case has title to several parcels of land derived from the United States through which a canal owned by defendant runs for conducting water and distributing the same for mining, agricultural and other uses. This canal, a very small part of which passes over the lands of the plaintiff, is some fifteen miles long and was completed in the year 1853, and has been in successful operation ever since, under the control and possession of defendant, and it is stated to have cost about \$200,000. It is found also as a fact, by the court of the first instance on the trial of this cause, that the canal and branches during all the time since have been uniformly acknowledged and recognized by the local customs, laws and decisions of the courts of the State of California, in which it lies and that the land covered by the canal and its branches is indispensable to its use. At the time the canal was made, and for many years after, in fact up to the passage of the Pacific Railroad Bills of 1862 and 1864, the land through which the canal ran was the public property of the United States. A part of this land is included in the grant made by that Act to what has since, by change of name and consolidation of corporate franchises, become the Central Pacific Railroad Company, and the plaintiff by proper conveyance from said Company, has become the owner of it. He brings this action in the proper court of the State of California to have the canal declared a nuisance and abated and to recover \$12,000 damages on account of the maintenance of the nuisance on his land.

The case was submitted to the court, without a jury and the facts which we have stated, and others that will be referred to, are found by the court.

The inception of the title of plaintiff to the land described in his petition, other than that derived from the railroad company, was a declaratory statement for preemption, filed August 6, 1866, by himself for one tract, and a similar statement filed September 14, 1866, by his brother, Jacob Broder, for another. But prior to either of these dates, to wit: on the 26th of July of the same year, Congress enacted a law, the purpose of which was to deal with the rights of miners who had theretofore, without objection, and with the tacit encouragement of the United States, discovered, developed and mined the public lands. 14 Stat. at L., 251. The 9th section of that Act contains this declaration: "That, wherever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall

be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid: is hereby acknowledged."

As to the canal of the defendant: so far as it ran through the land of the United States, at the date of this Act it was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right commenced subsequent to this statute, as to the lands patented to him and his brother, he took the title subject to this right of way and cannot now disturb it.

In reference to the lands of plaintiff held under conveyance from the Pacific Railroad Company, it might be a question of some difficulty whether the right was so far a vested right in that Company before the passage of this Act of 1866, that the latter would be ineffectual as regards these lands. But we do not think that defendants are under the necessity of relying on that statute.

We are of opinion that it is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866, and that the section of the Act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: *Atchison v. Peterson*, 20 Wall., 507 [87 U. S., XXII., 414]; *Basey v. Gallagher*, 20 Wall., 670 [87 U. S., XXII., 452]; *Forbes v. Gracey*, 94 U. S., 762 [XXIV., 313]; *Jennison v. Kirk* [*ante*, 240].

We turn now to the Act of 1864, 13 Stat. at L., 356, which makes the final grant to the Pacific Railroad Companies, and the acceptance of which by the companies bound them to its terms, and we find in section 4, which enlarges the grant of lands made by the Act of 1862, this clause of reservation from the general terms of the grant: "Any lands granted by this Act, or the Act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land or *other claim*, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler or any lands returned or denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist."

We have had occasion to construe a very common clause of reservation in grants to other railroad companies, and in aid of other works of internal improvements, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection. See, *Wolcott v. Des Moines Co.*, 5 See 11 OTTO.

Wall., 681 [72 U. S., XVIII., 689]; *Williams v. Baker*, 17 Wall., 144 [84 U. S., XXI., 561]; *R. R. Co. v. U. S.*, 92 U. S., 733 [XXIII., 634].

In construing the grant to the Pacific Railroad Companies this principle is eminently applicable. The grant of land was vastly larger than any previous grant. The land was surrounded by circumstances much more varied than in any previous grant, and the number and varied character of the interests which might be affected by the vast extent of the donation were beyond any with which Congress had previously dealt.

Hence, we have in the clause of reservation a much more liberal and extended protection of pre-existing rights than in reservation clause which had become a *formula* in previous grants.

Not only are prior reservations made by the government, and rights of preemption excepted, but the improvements of *bona fide* settlers, land returned or denominated mineral lands, and the timber necessary to support the miner's improvements, and *any other claim*, are unaffected by the grant. Of course this means any honest claim evidenced by improvements or other acts of possession.

We cannot doubt that the claim of the defendants, of which they had been in possession for twelve years when this Act was passed, on which they had expended \$200,000, which was of great utility, nay necessity, to a large agricultural and mining interest, was of the class which this section declared should not be defeated by the grant which Congress was then making.

As the judgment of the Supreme Court of California was based on this principle, it is affirmed.

Copy, foregoing opinion, duly authenticated by James H. McKenny, Esq., Clerk, Supreme Court, U. S.

UNITED STATES, *Plff. in Err.*,

v.

JOSEPH N. DAWSON ET AL., Survivors of
GEORGE W. DAWSON, Deceased.

(See S. C., 11 Otto, 569, 570.)

Finding on question of fact.

On a question of fact, the finding of the circuit court cannot be reversed here.

[No. 55.]

Submitted Nov. 7, 1879. Decided Nov. 24, 1879.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The case is stated by the court.

Mr. E. B. Smith, Asst. Atty-Gen., for plaintiff in error.

Mr. J. H. Bradley, for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

This was an action on the bond of a Collector of Internal Revenue. After the suit was brought, amicable continuances were granted, and then several statements of account were made by the auditing officer of the Government. The last of these stated a balance against the collector

of \$2,115.25, which was paid by his executors before final trial. The only question raised in the court below and sought to be presented here is the date from which interest should be awarded on that sum.

The counsel for the Government cite section 3624 of the Revised Statutes, which provides that where any person accountable for public money neglects or refuses to pay the sum or balance found due to the United States upon adjustment by the proper officer, he shall forfeit his commissions and pay interest at six per cent per annum from the time of receiving the money.

There is no question here of the construction of the statute, but whether the balance finally found due the Government was for money received by him or for something else. The case was submitted to the court without a jury, and the finding of facts by the court is part of the record.

From this it appears that about the time the collector went out of the office he paid a large sum of money, which he supposed to be all that he owed the Government. But he stood charged on the books of the department with a large sum for uncollected taxes. It was the adjustment of this account which occupied the three years in which the suit was pending.

The court finds that the final balance of \$2,115.25 was made up of these uncollected taxes, for which he was still responsible, and was not for any money actually received by the collector.

Counsel for the Government argue against this conclusion. But whether sound or not, it was a question of fact on which the finding of that court cannot be reversed here; and its judgment is, accordingly, affirmed.

CHESAPEAKE AND OHIO CANAL COMPANY, *Appt.*,

v.

A. ROSS RAY ET AL.

(See S. C., 11 Otto, 522-528.)

Parol agreement to vary contract.

The terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity.

[No. 67.]

Argued Nov. 13, 1879. Decided Dec. 1, 1879.

APPPEAL from the Supreme Court of the District of Columbia.

The facts of the case are stated by the court.

The bill was filed in the court below, by the present appellees, against the appellant, for the purpose of obtaining an injunction restraining the appellant from shutting off the water from the mill of the complainants, because the complainants continued to keep their gauge at the wheel, instead of complying with the requirements of the appellant.

The court below, at Special Term, rendered a decree in favor of the complainants, and this decree having been affirmed at General Term, the Canal Company appealed to this court.

Messrs. Richard T. Merrick, W. S. Cox and M. F. Morris, for appellant:

The contract of lease between the defendant and the Canal Company being under seal, it can not be changed by any instrument of a less formal character. Any conditions therein for the benefit of the Company could be waived by it in the most informal manner; but such waiver would amount to a mere license to the lessee, revocable at pleasure by the party granting it, though operating as a full protection for everything done under it while remaining unrevoked.

Prince v. Case, 2 Am. L. Cas., 540; 10 Conn., 375; notes and cases cited.

Mr. W. D. Davidge, for appellees:

It is claimed that the leases being under seal, could not be altered by even a written contract not under seal, although made upon a valuable consideration. This, it is submitted, is a mistake. Parol evidence, whether oral or written, would not be admissible to contradict or vary the words of the leases, or to show that the parties by the leases intended that the gauges should be, not at canal bank, but at the wheels. The case, however, is entirely different when it is shown that, by a subsequent agreement, upon sufficient consideration, the parties have abrogated all or any part of the original leases. In such case there can be no doubt that the subsequent agreement is valid.

Greenl. Ev., sec. 303, and cases cited; 2 Phil. Ev., 4th Am. ed., p. 92, and *Cowen & H. Notes*, 505, and cases cited, where the whole subject is discussed; *Watchman v. Crook*, 5 Gill & J., 239; *Dearborn v. Cross*, 7 Cow., 48; *Chit. Cont.*, 116, notes E and F, and cases cited; *Blaisdell v. Souther*, 6 Gray, 149; *Canal Co. v. Hill*, 15 Wall., 94 (82 U. S., XXI., 64); 3 Kent, Com., 252; *Rerick v. Kern*, 14 Serg. & R., 267; 2 Am. L. Cas., 733, and cases cited; *Le Fevre v. Le Fevre*, 4 Serg. & R., 241.

Mr. Justice Strong delivered the opinion of the court:

Assuming the facts to be such as are averred in the bill, and not denied in the answer, we have this case: in 1860 the complainants were engaged in enlarging the machinery and capacity of their flouring-mill, situate near the canal of the defendants, between it and the Potomac River, and dependent for its power upon water obtained from the canal. While thus engaged it was agreed between them and the defendants that for a stipulated rent they should have full right, permission and authority to draw from the canal, for the uses of their mill, so much water as would pass through an aperture of specified dimensions, in an iron plate not exceeding a half inch in thickness, on certain conditions. The first of these related to the form of the aperture and its capacity. The second was that the aperture should not be placed nearer the canal bottom proper than two feet. The third prohibited any attachment, contrivance or device to increase the quantity of water that could be drawn through the aperture above what could be drawn if such device were not used. The fourth required that a sliding gate or gates should be placed in front of the aperture, so that the whole water-power granted might, as occasion under the provision of the contract required, be entirely or partially stopped from passing through it. The fifth condition related to the construction of the fore-bay, the aperture, and sliding gates, requiring them, *inter alia*, to

be put down, constructed and thereafter kept in repair at the sole cost of the complainants, under the special direction and superintendence, and subject in every particular to the approval of such officer of the Company as might be charged with that duty. The sixth condition was that, in like manner, at the sole cost of the grantees or complainants, and under the special direction of the officers of the Company charged with that duty, such alterations should be made from time to time in the fore-bay or trunks, cover or bridge aperture, and sliding gate or gates as might be considered necessary by the Company or their officers, *to prevent or lessen the inconvenience to the navigation of the canal and the use of its towing-path, which might be found to arise from said use of the water, or that might be thought necessary by the Company for the greater security of the canal or of its works.* The seventh condition reserved to the Company the right of full ingress and egress, by their officers, to and from the premises of the grantees, for the purpose of examining, repairing and preserving the fixtures and works connected with drawing off the water, repairing the embankment and other parts of the canal, and also for the purpose of ascertaining whether any defects existed in the fixtures and works for drawing off water, repairing the embankment and other parts of the canal, and also for the purpose of ascertaining whether any defects existed in the fixtures and works for drawing off water, occasioning leakage from the canal, or endangering its security and that of its works, and also for ascertaining whether more water was drawn off than was granted by the contract. The remaining conditions need not be noticed. They have no possible bearing upon the matter now in controversy.

Obviously, this grant of the water privilege contemplated that the aperture, the trunk or fore-bay, and the sliding gate or gates should be constructed after the grant was made. To that extent the contract was executory. It did not expressly require that the aperture and gauge should be located at the bank of the canal, in front of an opening there made, though probably such was the understanding of the parties. But conceding that it was and that the contract in terms required such a location, it was, nevertheless, competent for the parties in the subsequent execution thereof to substitute another location in place of that first contemplated, and if such a change was made by mutual consent it amounted to a compliance with the provisions of the contract. The Company, after having accepted or acquiesced in a location of the aperture and gate at a point nearer the complainants' mill than the canal bank, could not afterwards complain that the condition respecting the location had not been performed, unless a right to require arbitrarily a change was reserved.

The bill avers that after the enlargement of the complainants' mill had been completed, the works for conducting the water from the canal to the mill, and for measuring the quantity of water granted by the contract, were constructed and located under the special direction of the engineer and superintendent of the Canal Company, the officers charged with the duty and with their approval, and that with like approval the aperture or gauge and sliding gate thereat were constructed and located at the wheel of the complainants' mill, where they have since

remained, having been repeatedly inspected and approved by the officers of the Company. This averment is, at most, only evasively denied. The answer does, indeed, deny that the gauge and sliding gate were located at the wheel of the complainants' mill with the knowledge and consent of the Company, and denies that such location was made with the approval or the direction of the officers of the Company, "*if it is meant by the averment (of the bill) to that effect that such arrangement was intended as permanent, or as other than a temporary indulgence.*" Such an equivocal denial cannot be considered as breaking the force of the complainants' allegation. Then, what is the effect of that averment? If, in executing the contract between the parties, the gauge and sliding gate were placed at the wheel of the mill with the knowledge of the Company and with their consent, and if the location was thus made under the special direction of their engineer and superintendent, the officers charged with the duty; if for years the location remained unchanged and unchallenged, having been repeatedly inspected and approved by the Company's proper officers, as averred in the bill and not denied, it would be grossly inequitable to hold that the location was not intended by both parties to be an execution of the contract, and accepted as such. Especially is this true when the location was made at the cost of the grantees of the water, and when, at the time when the works were thus constructed and located, there was also placed at the opening of the fore-bay into the canal, as part and in consideration thereof, and at the cost of the grantees, a gate to enable the Company to control the water-power granted, in accordance with the provisions of the grant. And it matters not that the Company may not have intended such location of the gauge to be permanent, unless such was the understanding of both parties, which is not averred. There can be no doubt that a party to a contract imposing mutual obligations may accept, as performance by the opposite party, some other thing than that specifically designated; and if he does, he cannot afterwards insist upon exact performance. Nothing is more common than such fulfillment of contract obligations. In equity it is certainly regarded as sufficient fulfillment. In the present case the location of the aperture and sliding gate at the mill-wheel, instead of at the canal bank, effectuated the leading purpose of the contract, which was to give the complainants a specified quantity of water; and the Company was fully protected by an additional gate at the canal, at the entrance of the fore-bay, by which they were enabled conveniently to control the flow of water to the mill.

This, however, is not all the case. On the 23d of February, 1865, some other millers having preferred requests that they might be allowed to draw, at the wheels of their mills, the quantity of water leased to them by the Canal Company, the Board of Directors of the Company adopted the following resolution:

"Resolved, That the superintendent of the Georgetown division, under the direction of W. E. Smith, C. E., be directed to place the water-gauges for the mills at Georgetown at such points as may be deemed most advisable to effect the objects of the respective water grants,

and to limit the flow of water to the quantity to which the lessees are severally entitled: *Provided*, that said lessees shall severally assent in writing that the officers of the Company may, at all times, have free access to their premises for examination or regulation of such parts as may be constructed upon them; and provided further, that the Board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of such gauge or gauges, or any of them, as contemplated by the lease, and that this resolution shall not in any manner change or impair the provisions or requirements of the respective leases granted to said parties."

On the 25th of the same month the several millers, together with the complainants in this case, gave their written consent to the resolution, and requested that the water-gauges should be placed upon their respective premises, at or near the water-wheel. This resolution (made a contract by the acceptance of its provisions) certainly cannot be construed so as to deprive the complainants of the right they had previously acquired. It was intended mainly for the benefit of the other millers whose water-gauges were not located at the wheels of their respective mills. And though the complainants assented to it, and thus subjected themselves to the obligations prescribed, they did not thereby agree that the location of the gauge at their water-wheel might be changed at the pleasure of the Company, without cause, or for any reason except such as were specified in the grants of water to them. The proviso declared that the Board of Directors might alter or change the position of the gauge, "as contemplated by the lease." That means that the Company reserved the same power to change the location which they had by the original contract. It stated expressly that the resolution should not in any manner change or impair the provisions or requirements of the respective leases granted to the parties. Now, what were the provisions of the leases, or contemplated by them, respecting changes in the position of the water-gauges? They are to be found in the sixth condition upon which the grants of water were made. They are that such alterations in the fore-bay or trunk cover of bridges, aperture and sliding gate or gates, from time to time shall be made, as the Company or their officer charged with that duty might consider necessary "To prevent or lessen the inconvenience to the navigation of the said canal, and the use of its towing path, which may be found to arise from the use of said water, or that may be thought necessary by the said Company for the greater security of the said canal or of its works." No right was reserved to require such alterations arbitrarily, or for any other cause than one of those thus specified, and none to enforce such a requirement by stopping the flow of the water. It is admitted here by stipulation that the Company has no knowledge of abuses by the complainants of the privileges conceded to them by the resolution of February, 1865, necessitating a change of their gauge to the canal bank for the purpose of navigation, or in respect of the tow-path, or for the security of the canal or of its works. The change required, therefore, is without any cause that justifies a demand that it be made; without the

existence of any circumstance that, by the conditions of the grant, authorized the Company to enforce it.

It is said, on behalf of the appellants, that the contract of lease between the Canal Company and the complainants, being a sealed instrument, could not be changed by any instrument of a less formal nature. From this it is inferred that neither the action of the Company's officers in 1860 nor the resolution of 1865 could change the provisions of the grant. It is admitted that the Company could waive any conditions therein for the benefit of the grantors such as the condition that the gauge should be at the canal bank; but is insisted that such a waiver would amount to no more than a license, revocable at will. But were it conceded that the location of the gauge at the water-wheel of the complainants' mill was in pursuance of a mere license, the license, when followed by the expenditure of the licensee's money in the construction of the works, on the faith of it, became a contract irrevocable by the grantor. The case, however, does not rest on that ground. The location of the gauge in 1860, under the direction and with the approval of the officers of the Company charged with the duty of directing and superintending its construction, was, as we have said, an execution of the contract in that regard and not an alteration of it. And if it was not an execution of the contract, the resolution of 1865, accepted by the complainants, was a contract on sufficient consideration, which the parties were competent to make. Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity. *Dearborn v. Cross*, 7 Cow., 48; *Le Fevre v. Le Fevre*, 4 Serg. & R., 241; *Fleming v. Gilbert*, 3 Johns., 527. These are cases at law. Numerous others might be cited. The rule in equity is undoubted.

The objections we have thus expressed lead directly to an affirmation of the decree rendered by the court below. In 1873, thirteen years after the gauge had been constructed at the water-wheel, the Canal Company required the complainants to place the gauge and sliding gate at the canal bank, and threatened to shut off the water from the mill if the requirement was not complied with. The Company had no right to make and had none to enforce such a requirement, except in the cases specified in the leases, and those cases have now no existence.

The decree of the Supreme Court of the District is, therefore, affirmed.

EMANUEL BAST, *Plff. in Err.*,

v.

FIRST NATIONAL BANK OF ASHLAND.

(See S. C., 11 Otto, 93-97.)

Judgment assigned as security—parol evidence.

1. Where a judgment was assigned to a bank, as collateral security for the payment of certain notes, with authority, in case said notes were not paid at maturity, to sell the judgment and apply the proceeds to their payment, the Bank was under no obligation to collect the judgment before the maturity of the notes.

2. Evidence of a parol agreement made by the Bank, contemporaneously with the written agreement that the Bank should take measures to collect the judgment assigned previous to the maturity of the notes, was inadmissible.

[No. 86.]

Argued Nov. 26, 1879. Decided Dec. 8, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. Hughes & Farquhar, for plaintiff in error:

There are two positions taken by the plaintiff in error in his affidavit and supplemental affidavit of defense, viz.:

1. That, by the assignment of the judgment against the iron and coal company as a collateral security to the Bank, the latter alone had control over it and, having failed to proceed to collect it until after another execution had swept away property, from which the amount of the notes in suit and of the judgment, could have been realized, if execution had been promptly issued, the Bank must account for the loss to Bast.

2. That the Bank having, when it received the notes in suit and the assignment of the judgment, agreed in terms that it would issue execution upon said judgment, and proceed to collect the same, whenever the money could be made thereon, and having failed and neglected to issue said execution when the money could have been made thereon, whereby said Bast was damaged to the full amount of said notes, he has a right to set off said damages in this suit against said notes.

The first proposition involves the question of the liability of the assignee of a collateral security which has been lost by his neglect.

In Pennsylvania, it is abundantly decided that where a collateral is lost by the insolvency of the debt in the collateral instrument through the supine negligence of the creditor, he must account for the loss to his own debtor.

Miller v. Bk., 8 Watts, 192; Bk. of U. S. v. Peabody, 20 Pa., 454; Ins. Co. v. Smith, 11 Pa., 120; Sellers v. Jones, 22 Pa., 423; Lishy v. O'Brien, 4 Watts, 141; Muirhead v. Kirkpatrick, 21 Pa., 237; Ins. Co. v. Murr, 46 Pa., 504; Hanna v. Holton, 78 Pa., 334; Lyon v. Bk., 12 S. & R., 68; Beale v. Bk., 5 Watts, 530.

The foregoing cases would seem to decide conclusively the principle that the holder of a collateral security must account to the assignor thereof for its value, if lost by the negligence of such holder, or by his failure to take the necessary steps to prevent it becoming worthless or lost; yet the court below entered judgment for the plaintiff below, and against the defendant, for want of a sufficient affidavit of defense, when such affidavit set forth, 1: that the defendant below had assigned to the plaintiff below collateral security sufficient to pay the debt sued for; and 2, that said collateral security had been lost by the neglect of the plaintiff below.

The second proposition is, that, in an action upon a contract, the defendant may recover damages arising out of the same transaction.

The affidavit of defense avers that it was part of the contract, that the plaintiff below would proceed by execution to collect the judgment assigned as collateral, whenever the defendant

See 11 OTTO.

in the judgment had sufficient property out of which it could be made; that the defendant in the judgment did have such property; that the plaintiff below failed and neglected to issue any execution; that, by reason of such failure and neglect the judgment became worthless and was lost, and that the defendant below was thereby damaged to the full amount claimed by the plaintiff below in this suit.

Eckel v. Murphey, 15 Pa., 488; Hunt v. Gilmore, 59 Pa., 450; Shaw v. Badger, 12 S. & R., 275; Thompson v. Clark, 56 Pa., 34; Leiber-sperger v. Bk., 30 Pa., 531; Twitchell v. McMurtree, 77 Pa., 383.

Messrs. R. M. Schick and G. R. & S. H. Kaercher, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This is an action on three notes made by Bast, the plaintiff in error, to the First National Bank of Ashland, defendant in error, dated March 1, 1876, and payable four months after date, two being for \$2,000 each, and the other for \$3,481.79. Simultaneously with the delivery of the notes the following assignment in writing was made:

"Know all men by these presents, that I, Emanuel Bast, do hereby transfer and assign to William Torrey, Cashier, of Ashland, Pennsylvania, a certain judgment of June Term, 1875, in Court of Common Pleas of Schuylkill County, No. 1292, in which the First National Bank of Ashland is plaintiff, and the Ringgold Iron and Coal Company is defendant, and the three several drafts upon which the said judgment was obtained as collateral security for the payment of two notes of \$2,000 each, and one for \$3,481.69, made by me to order of William Torrey, cashier, dated March 1, 1876, payable in four months after date, and upon failure on my part to pay said notes at maturity, or at the maturity of time for which the same may be renewed, then the said Torrey, cashier, is hereby authorized and empowered to sell the same at public sale, after ten days' notice, to me, and apply the proceeds thereof to payment of my said notes, and in case the proceeds of same shall not be sufficient to pay said notes, then I promise to pay any balance that may be due.

In witness whereof, I have hereunto set my hand and seal, this first day of March, 1876.

[Seal.]

EMANUEL BAST.

Witness: A. P. SPINNEY,
S. HENRY NORRIS."

Bast was, at the time, the owner of the judgment assigned, on which there was due the exact amount of his notes, and on each of the notes was an indorsement to the effect that the judgment assigned was held as collateral. There was no legal impediment in the way of an immediate issue of execution on the judgment, and until May 19, 1876, the Iron and Coal Company, the judgment defendant, had unincumbered personal property subject to levy and sale on execution sufficient to pay the amount that was due. No execution was issued until June 19, and before that time the property of the company had all been exhausted by the prior levy of executions issued on other judgments. Bast made no demand on the Bank to issue execution on his judgment at any time before June 19.

After the maturity of the notes the judgment was sold pursuant to the authority contained in the assignment and \$2,141 realized, which was applied towards the payment of the notes. This suit was brought to recover the balance due after this application was made.

Bast filed an affidavit of merits, which in Pennsylvania has the effect in cases of this class, of a plea, in which he alleges (1) that it was the duty of the Bank under the written assignment to have issued execution on the judgment prior to the time it did; and (2) "that simultaneously with his delivery of said notes to said Bank as aforesaid, as well as said assignment of said judgment as collateral security for the same, it was agreed between deponent (Bast) and said Bank, as part of the transaction, that said Bank would issue execution upon said judgment and proceed to collect the same whenever the money could be made thereon." He then claimed that "By reason of the supine neglect of the plaintiff in not issuing execution as aforesaid, the said judgment assigned to it as aforesaid as collateral security for the payment of the notes sought to be collected in this case was lost and became worthless, whereby deponent suffered damages to an amount equal to the full amount due upon the notes in suit."

The court below held that the defense set up in the affidavit of merits was insufficient in law, and gave judgment for the Bank for \$5,440.46, the balance remaining due on the notes.

To reverse this judgment this writ of error has been brought.

Two questions are presented by the defense in this case.

1. Was the Bank bound by the terms of the written assignment to take steps for the collection of the judgment before the maturity of the notes? and

2. Was parol evidence admissible to prove the alleged promise, made simultaneously with the assignment and as part of the transaction, to issue execution and collect the judgment whenever the money could be made thereon.

1. As to the assignment.

No obligation to collect was in terms put on the Bank by the writing. On the contrary, the only power conferred on the Bank in reference to the judgment was to sell if the notes were not paid at maturity, or at the maturity of their renewals. All parties seem to have contemplated delay in the collection, and Bast seems also to have been especially careful to retain in his own hands the power to withhold execution if he saw fit. Until a sale was made under the express power granted for that purpose he continued the actual owner of the judgment, subject only to the lien of the Bank to secure the payment of his notes. So far as anything appears on the face of the written instrument, he retained full control of the collection by legal process; but whether that be so or not, he certainly could call on the Bank at any time before a sale to take the necessary steps, or permit him to do so, to enforce its collection, or to secure and preserve such priority of lien as the judgment was entitled to over other judgments or executions thereon. If the Bank had failed to comply with his demand, and loss had ensued, other questions than such as are now presented might have arisen. But upon the face of the assignment we are clearly of the opinion

that the Bank put itself under no obligation to collect except on the demand of Bast. Any attempt to do so before the maturity of the notes, without his consent, would be a direct violation of the terms of the instrument under which it acquired all its rights.

2. As to the parol evidence.

No principle of evidence is better settled at the common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident or mistake, "Conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing." 1 Greenl. Ev., sec. 275. In Pennsylvania, the stringency of this rule has been very considerably relaxed, but we have been referred to no case where, in the absence of fraud or mistake, parol evidence has been admitted to alter the plain and unequivocal terms of a written instrument. In *Martin v. Berens*, 67 Pa., 463, the court say: "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesale one, and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative." In this case, the Pennsylvania decisions are extensively reviewed, and the exceptions to the rule of the common law which they recognize carefully stated, but the conclusion is that, "As a general rule, it (parol evidence) is inadmissible to contradict or vary the terms of a written instrument." Again; in *Barnhart v. Riddle*, 29 Pa., 96, this language is used: "Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their minds. What if parol evidence prove never so clearly, that they used such and such words in making their bargain; the writing signed, if it contain not those words, is final and conclusive evidence that they were set aside in favor of the other expressions that are found in the written instrument. And hence this rule of law is only a conclusion of reason, that that medium of proof is most trustworthy which is most precise, deliberate and unchangeable." This is the rule, it was said, which prevails in reference "to the terms in which the writing is couched," and that "Evidence to explain the subject-matter of an agreement is essentially different from that which varies the terms in which a contract is conceived." It is not always easy to determine when in Pennsylvania parol evidence is admissible to explain a written instrument, but in *Anspach v. Bast*, 52 Pa., 356, it is expressly declared that "No case goes the length of ruling that such evidence is admitted to change the promise itself, without proof or even allegation of fraud or mistake. The contrary has been repeatedly decided." To the same effect is the case of *Hacker v. Oil Refining Co.*, 73 Pa., 93, as well as many others that might be cited.

In the present case, as we have seen, the contract which the parties reduced to writing is, in effect, that the Bank should not, before the maturity of the notes, take measures to collect

the judgment assigned without the consent of Bast. The offer was to prove a contemporaneous parol agreement that it should do so. This is a clear contradiction of the terms of the written contract, in a matter where there is no pretense of ambiguity and where there has been no fraud or mistake.

We think the court below was right in giving judgment for the Bank, notwithstanding the affidavit of merits, and the judgment is, consequently, affirmed.

Cited—2 McCrary, 420.

ELLIOTT M. MAY AND SAMUEL PASCO,
EXRS., AND MARGARET M. MAY, EXRX.
of ASA MAY, Deceased, ET AL., Appts.,
v.

LEPINE C. RICE, Assignee of ANDREW M.
SLOAN.

(See S. C., "May v. Sloan," 11 Otto, 231-239.)

*Jurisdiction as to amount—specific performance
of parol agreement—pleadings—trade.*

1. The objection to the jurisdiction of this court, that it does not appear that the matter in dispute exceeds the value of \$5,000, is untenable, where it appears from the record that the appellee, who raises the objection, purchased the land in dispute for \$21,000, and claims it by that purchase, and the petition of appeal to this court, verified by the affidavit of the appellant, avers that the land is worth more than \$5,000.

2. A bill to compel the conveyance of land cannot be maintained upon a parol agreement only. The Statute of Frauds would be a complete bar.

3. Where the defendant in his answer denies that any such agreement was made, his denial is as effective for letting in the defense as if the Statute of Frauds had been pleaded.

4. The word "trade," includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally. A sale of lands, comes within the term "trade," used in the agreement set out in the opinion.

[No. 34.]

Argued Oct. 30, 31, 1879. Decided Dec. 8, 1879.

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

The case is sufficiently stated by the court. It appears that the plaintiff below became insolvent and the defendant below died before the argument.

Mr. S. F. Phillips, for appellants.

Mr. Chas. N. West, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

This case arises upon a bill in equity filed by A. M. Sloan, the appellee, against Asa May, the appellant (since deceased), in the Circuit Court for the Second Judicial Circuit of Florida, to compel May to convey to the complainant a certain tract of land situated in Jefferson County, Florida, known as the Alvin May

place, and containing about 1,100 acres; and for an injunction against May's attempting to obtain possession of the land pending the suit. The case was removed into the Circuit Court of the United States for the Northern District of Florida, and the appeal is from the decree of that court.

A preliminary point is made as to the jurisdiction of this court, on the ground that it does not appear that the matter in dispute exceeds the value of \$5,000. This objection is untenable. It does appear from the record that the appellee, who raises the objection, purchased the land for the price of \$21,000; and it is by virtue of that purchase that he claims it in this suit. Then again, the petition of appeal to this court, which is verified by the affidavit of the appellant, distinctly avers that the matter in dispute is a large body of land worth more than \$5,000 in value. No attempt is made to controvert this allegation, and we think that it sufficiently appears that the case is within our jurisdiction.

The facts, as set forth in the bill and answer and developed by the proofs, are substantially as follows:

In 1868, Asa May, the appellant, sold and conveyed to his relative and friend, Alvin May, a plantation in Jefferson County, Florida, called the Asa May place, consisting of about 1,200 acres of land, for the sum of \$14,848 in gold; and received in payment eight sealed notes, payable at intervals of one year, with interest, seven of which were for \$2,000 each, and the eighth for the balance. To secure the payment of these notes, Alvin gave to Asa May a mortgage on the property sold and on two other plantations adjoining, one called the Picolata place, containing 650 acres, and the other called the Alvin May place (being the property in question), containing about 1,100 acres. Various payments were made on this debt, amounting, as Alvin May testified, to from \$9,000 to \$11,000.

Alvin May, besides the above property, became the ostensible owner of several other plantations in the vicinity, and became indebted to A. M. Sloan & Co., commission merchants in Savannah, for money lent and advanced and supplies furnished, to an amount exceeding \$50,000. To secure this indebtedness, in January, 1872, he gave to Sloan & Co. three notes, one for \$16,881.28, one for \$18,777.14, and one for \$20,696.78, payable respectively on the first days of January, 1873, 1874 and 1875; and executed to Sloan & Co. a mortgage on the same property previously mortgaged to Asa May, and on several other tracts of land, namely: one called the Elbow tract, containing 660 acres; one called the Arendell tract, containing over 1,000 acres; one called the McCain place, containing about 1,100 acres; and a small tract of 150 acres, called the S. F. May place. Both mortgages embraced all the personal property on the lands mortgaged, or that might thereafter be thereon.

Alvin May being unable to pay this indebtedness, in May, 1873, Asa May and A. M. Sloan, who succeeded to the rights of A. M. Sloan & Co., severally brought suits against him, and recovered simultaneous judgments, upon which executions were duly issued. Asa May's judgment was for \$5,782.15; but the whole balance due to him for principal and interest on his

NOTE.—*Jurisdiction of U. S. Supreme Court depends on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable, without regard to sum in controversy.* See note to Gordon v. Ogden, 28 U. S. (3 Pet.), 33.

mortgage, including the amount of said judgment, was upwards of \$13,000. Sloan's judgment was for \$13,811.66, being only upon the note given to his firm which had first matured; the other two notes not being due. Subsequent judgments and executions were obtained by other parties.

To obviate the necessity of an actual levy on his property, and to save the expense of advertising, Alvin May, in October, 1873, agreed with the sheriff that no part of the property should be removed; that the sale might take place on the first Monday of December, 1873; and that the proceeds should be distributed according to the rights of the creditors. The sale was afterwards postponed to the first Monday of January, 1874. It was understood that the property to be sold would be the three plantations included in Asa May's mortgage and all the personal property, including mules, farming utensils and crops. It seems that Sloan had a lien for advances on the crop, independent of his execution and mortgage. The reason why the several tracts, covered by Sloan's mortgage and not covered by Asa May's, were not proposed to be sold at the same time does not clearly appear, except that the title to the McCain place had failed, and the Arendell place, as will be seen, was allowed to be retained by Alvin May free of Sloan's mortgage. The other two tracts, namely: the Elbow tract and the S. F. May place, may have been reserved for the remaining notes held by Sloan which were not yet due.

On the 13th of December, 1873, Alvin May, the debtor, and A. M. Sloan, made the following written agreement:

"State of Florida, County of Jefferson: Memorandum made and entered into this thirteenth day of December, A. D. 1873, by and between Alvin May and Andrew M. Sloan, relative to the sale of the lands and personal property hereinafter specified.

The said May, in consideration of one dollar, in hand paid, of twenty-one thousand dollars to be paid by the said Sloan, bargains and sells to the said Sloan the lands owned by him in said county, known as the Lang place, the Gamble eighth, the Harvey forty, and twenty acres belonging to the Gorman eighth, and the Murray land, comprising eleven hundred acres, more or less; also, six mules, one thousand bushels of corn, one four-horse and one two-horse wagon, the said lands comprising the home settlement, the house formerly occupied by the said Alvin May, and the other tenements and improvements thereon. The said May is to give a good title to the same, and the same is to sell in such way as to make the title perfect at sheriff's sale, if necessary, to satisfy the judgments now upon record, or mortgages now existing, and the payments are to be made upon the claims existing against the said May, and in favor of the said Sloan. The said Sloan is to have possession immediately, and the said May is to vacate the houses by the first day of January, or sooner, if possible.

Witness our hands and seals, this 13th of December, A. D. 1873.

A. M. SLOAN. [SEAL.]
ALVIN MAY. [SEAL.]

Signed, sealed, and delivered in our presence:
A. DENHAM.
M. PALMER."

It is conceded that the lands which form the subject of this agreement constituted the Alvin May place, now the subject of controversy, and were included in Asa May's mortgage.

The evidence establishes, we think, that, in pursuance of this agreement, Sloan did take possession of portions of the property on the first of January, 1874, and has ever since continued to occupy the same.

On the 5th of January, the day before the sale was to take place, Asa May, Alvin May and Sloan had a meeting at the office of Mr. Pasco, an attorney at Waukenah, in the neighborhood of the property, and entered into the following agreement:

"*Memorandum of Propositions to Alvin May by Asa May and A. M. Sloan, relative to Settlement of Indebtedness.*

The property, subject to the mortgages and execution of the said May and Sloan, is to be sold on the first Monday in January, 1874, under the executions against Alvin May. Unless there are other purchasers ready to bid the amount of Asa May's claim, he is to buy in the property for his own use.

If Asa May buys the property, he agrees that if Alvin May and wife will relinquish all right and title, including her right of dower, to the property sold, that the Arendell plantation shall be given up to Alvin May; that Asa May will pay up or guarantee the payment of the balance due to Arendell's creditors on the Arendell place, the said amount not to exceed \$3,000 at the present time; and that the said Asa May and Sloan will make no further claim to the said place, and will permit the title to rest in Alvin May or his wife.

Asa May and Sloan bind themselves to make no further personal claim upon Alvin May on account of the mortgage and judgment debts of theirs against him; Asa May agrees to let Alvin May have mules of those bought in, and bushels of corn, and pounds of fodder, to enable him to work the Arendell place, the value of the mules to be deducted from the \$3,000. Alvin May is to give peaceable possession of the property as soon as possible, so as to enable Asa May to proceed at once to make his arrangements for the coming year.

Alvin May is to bring up a memorandum of all the property subject to the mortgage and executions against him, early on the morning of the sale, and is to get in as many as possible of the mules sold by him and not paid for, or paid for only in part. The amount of \$3,000 embraces the entire amount to be paid by Asa May, whether it is paid on the land, in mules, or in any other manner. Asa May agrees not to interfere with any *bona fide* trades made by Alvin May, so far as any of the mortgaged property is concerned, provided the trades have been carried out in good faith, and completed.

Witness our hands and seals, this fifth day of January, A. D. 1874.

ASA MAY. [SEAL.]
A. M. SLOAN. [SEAL.]
ALVIN MAY. [SEAL.]

Executed in our presence:
A. DENHAM.
S. PASCO."

The last clause of this agreement constitutes.

one of the principal grounds of the present controversy.

On the 6th of January, 1874, sale took place under the executions. Asa May bid off the three tracts of land covered by his mortgage at fifty cents per acre, namely: the Asa May place, the Picolata place, and the Alvin May place; also nine mules, one pony, one mare, three two-horse wagons, one six-horse wagon, one log-cart, a sugar-mill and a buggy and harness. Sloan bid off the fodder, a four-horse wagon, a cotton-gin and two sugar-kettles. One Whitfield bid off fifteen hundred bushels of corn, which he afterwards surrendered to Sloan under the latter's plantation lien.

The proceeds of the sale of the lands, mules, plantation implements, etc., amounting to about \$3,000, were applied to Asa May's mortgage; and the proceeds of the sale of the corn and fodder, amounting to about \$1,260, were applied to Sloan's plantation lien for advances. It does not appear that any money passed; the application of the proceeds of sale was made by simply crediting the amounts. Sloan received the articles which had been sold to him by Alvin May by the agreement of December 13, 1873, though the mules and one of the wagons were bid off by Asa May, who afterwards purchased the mules and the corn and fodder from Sloan. The sheriff executed a deed to Asa May for the real estate in accordance with the sale.

The object of this suit is to compel Asa May to convey to Sloan, the complainant, the Alvin May place according to what he alleges was the agreement and understanding between the parties, and the intent and meaning of the last clause in the agreement of January 5, 1874.

If the case depended upon the parol agreement set up by the complainant, whereby he claims that Asa May bound himself to convey the land to him, no relief could be granted on this bill. The Statute of Frauds would be a complete bar. The defendant in his answer denies that any such agreement was made. Such a denial is as effective for letting in the defense as if the Statute of Frauds had been pleaded. Sugd., Vendors and Purchasers, 150, ch. IV., sec. 6, par. 5.

This renders it unnecessary to examine minutely the testimony on the question thus put in issue by the parties. Had the complainant succeeded in proving such an agreement, it could not have availed him. But the fact is, that he did not succeed in making such proof. The evidence is conflicting on the subject. The fact being denied in the answer, it would have required evidence tantamount to the testimony of two witnesses to establish it; whilst we have only that of the complainant himself, in which he is contradicted by the defendant and by Alvin May and Pasco, the attorney.

The question must stand, then, on the construction to be given to the written agreement of January 5, 1874, in view of the surrounding circumstances and the acts of the parties. Does the last clause of that agreement by its terms embrace the transaction contained in the contract made by Alvin May and Sloan on the 13th of December, 1873? Was that transaction a "trade" made by Alvin May relating to the mortgaged property, within the meaning of the terms? Was it a "trade" carried out in good faith and completed?

See 11 OTTO.

The word "trade," in its broadest significance, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally. There is nothing in the manner in which it is used in the clause in question to limit its meaning. Asa May was to buy in the property for his own use. This was the general purport of the agreement. But it was added that "Asa May agrees not to interfere with any *bona fide* trades made by Alvin May, so far as any of the mortgaged property is concerned, provided the trades have been carried out in good faith and completed." Now, certainly the agreement of December 13, between Alvin May and Sloan, was a trade, within the broad meaning of the term. It was a trade relating to a portion of the mortgaged property. It appears to have been made for full consideration and in good faith. Asa May, when put on the stand, although he denied that, by the clause in question, he intended to confirm or to agree to carry out the agreement of December 13, yet he could not deny that he knew of its existence; and Pasco, the common attorney of the parties, knew all about it, and had it in his possession when the agreement of January 5 was made in his office. It cannot be said, therefore, that it was a secret agreement, withheld from the knowledge of Asa May, or that any fraud or bad faith was practiced upon him in relation to it. It was also a completed agreement, so far as it could be completed without the execution sale itself, which was contemplated as part of the means of carrying it out. The title was to be made good in that way if necessary, and it cannot be disputed that it was necessary. The weight of evidence also is, that the sale had been carried into effect by delivery of possession by Alvin May to Sloan. It is true that as to a portion of the place there is conflicting testimony on this point. Asa May, after the sale, worked a portion of it; though it is not disputed that Sloan was in possession of the residue. In this connection the conduct of the parties, in relation to the mules and other personal property included in the agreement of December 13, cannot be overlooked. Although bid off by Asa May, by whose mortgage it was covered, yet Sloan's claim to it was respected, and Asa May soon afterwards actually purchased the mules from Sloan.

If we look to the surrounding circumstances existing at the time, it will be difficult to resist the conclusion that the sale by Alvin May to Sloan, of the property in question, was one of the trades to be respected by Asa May. At the time of the sheriff's sale he had already received some \$10,000 from Alvin May on the principal and interest of the purchase money for the place he had sold him, and there was about \$14,000 still due. By the sheriff's sale and the agreement of January 5, 1874, he not only got back the original Asa May place, which was all the property he had ever parted with, but the Picolata place adjoining, containing over 650 acres, which is stated in the bill and is not denied to be a valuable tract of land. It is true that he agreed to give Alvin May an additional \$3,000; but it must be recollected that he also got a considerable personal property, the full amount of which does not appear, and a release of dower from Alvin's wife. This was Asa May's situation, and the result of the agreement as it

affected him, if construed as we have suggested.

Now, what were the circumstances of Sloan's case? His debt was between \$50,000 and \$60,000. Besides the lands covered by Asa May's mortgage, he had a mortgage on the McCain place of eleven hundred acres; on the Arendell place of a thousand acres; on the Elbow tract containing 660 acres; and on the S. F. May place containing 150 acres. He also had a lien on the crop. The McCain place failed in the matter of the title; and in the agreement of January 5, 1874, he agreed to give up to Alvin May all claim on the Arendell tract, to release him from all personal obligation, and to allow \$21,000 (its full value) for the Alvin May place; leaving still due to him between \$30,000 and \$40,000, with only the Elbow tract and S. F. May place as security. Now, why should he have given up the Arendell tract, and all personal claim against Alvin May? And why should this be stipulated for in an agreement between him and Alvin May and Asa May? an agreement which is entitled "Memorandum of propositions to Alvin May by Asa May and A. M. Sloan, relative to settlement of indebtedness." What did he get? What came to him in the transaction? Nothing; absolutely nothing, unless the clause in question, at the end of the paper, is to be construed as embracing the agreement of December 13, by which he was to have the Alvin May place at \$21,000, on account of his claim.

In the light of all these circumstances, it is hard to resist the conclusion that the word "trade" in the agreement of January 5, 1874, was used by the parties in its broadest signification, so as to include any bargain or sale. As such a meaning of the term is admissible, we think that the circumstances and acts of the parties show that it must have been intended. This being conceded, it plainly became the duty of Asa May, after having purchased the property, to convey the land in question to the appellee.

The decree of the Circuit Court is affirmed.

Dissenting, **Mr. Justice Strong.**

NICHOLAS MARQUEZ, *Plff. in Err.*,

v.

JOHN D. FRISBIE, THE CALIFORNIA
PACIFIC RAILROAD COMPANY ET AL.

(See S. C., 11 Otto, 473-479.)

Injunction or mandamus to officers—equities in land—before patent issued—question of law and fact—Land Department.

1. The courts will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus.

2. After the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before.

3. The courts may deal with the possession of the land, prior to the issue of the patent, or enforce contracts between the parties concerning the land; but they cannot transfer a title which is yet in the United States.

4. Where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of

the tribunal to which the law has confided the matter is conclusive.

5. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute, or no reasonable doubt, the officers of the Land Department have, by a mistake of the law deprived a man of his right, it will give relief.

[No. 78.]

Argued Nov. 20, 21, 1879. Decided Dec. 8, 1879.

IN ERROR to the Supreme Court of the State of California.

The case is stated by the court.

Messrs. Geo. W. Julian, Richard T. Merrick, M. F. Morris and W. W. Morrow, for plaintiff in error.

(No counsel appeared for defendant in error.)

Mr. Justice Miller delivered the opinion of the court:

This is a writ of error to the Supreme Court of California.

The original suit was begun by a petition of the plaintiff in error in the proper court of the State, setting forth several reasons why the decision of the Department of the Interior against his claim as a preemptor, and in favor of Frisbie and others, to a certain quarter-section of land, was erroneous, and praying a decree of the court declaring him to be its true owner and his right to the legal title paramount. The case was heard in the inferior state court on a demurrer to this petition, which was sustained, and the judgment there rendered against plaintiff was affirmed by the Supreme Court.

The two grounds, principally, if not exclusively relied on by the counsel of plaintiff in this court, who so faithfully and earnestly presented his case, are: 1. That the Land Department mistook the law of the case and thereby deprived plaintiff of a vested right in the land. 2. That their decision was obtained by fraud.

The petition of the plaintiff, however, is so badly drawn and has so many defects that, sitting here to revise the judgment of two courts of the State of California, we are not able to discover in the petition that the questions argued here are so presented as to enable the court to decide them.

There are also objections besides this, fatal to the complaint and the relief asked under it.

One of them is that the principal relief sought, that without which any other would be imperfect, is, that defendants may be declared to hold the land in trust for plaintiff, and compelled to convey the same accordingly. This, undoubtedly, means the legal title to the land, for the plaintiff alleges himself to have been in actual possession when he brought the suit and that he had been so for a great many years before. But the bill does not show that defendants, or either of them, ever had the legal title. On the contrary, it is a necessary conclusion from the allegations of the bill that the legal title is in the United States. After referring to the decision of the Secretary of the Interior against his claim, the petition says that, "In pursuance of this decision, an order was issued authorizing the defendants and other purchasers of the Valjejo title to enter the lands claimed by them; and the said defendants have entered and will be enabled to receive a patent for the said quarter-section." It plainly appears from this: first, that defendants had not the legal title; second, that it was in the United States; and third, that

the matter was still *in fieri*, and under the control of the land officers.

Nothing in the record of the case before us gives evidence that any further steps in that department have been taken in the case.

We have repeatedly held that the courts will not interfere with the officers of the Government, while in the discharge of their duties in disposing of the public lands, either by injunction or *mandamus*. *Litchfield v. Register*, 9 Wall., 575 [76 U. S., XIX., 681]; *Gaines v. Thompson*, 7 Wall., 347 [74 U. S., XIX., 62]; *Secretary v. McGarrahan*, 9 Wall., 298 [76 U. S., XIX., 579].

And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the Executive Departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decrees in advance of the action of the Government, which would render its patent a nullity when issued.

After the United States has parted with its title and the individual has become vested with it, the equities on which he holds it may be enforced, but not before. *Johnson v. Townsley*, 13 Wall., 72 [80 U. S., XX., 485]; *Shepley v. Cowan*, 91 U. S. 330 [XXIII., 424].

We did not deny the right of the courts to deal with the possession of the land, prior to the issue of the patent, or to enforce contracts between the parties concerning the land. But it is impossible thus to transfer a title which is yet in the United States.

If, however, we could suppose that defendants had obtained the patent which the Secretary has decided that they are entitled to, that patent and the order on which it issued has in its favor all the presumptions which such an instrument necessarily carries, to which is to be added in this case the plaintiff's allegation that it was founded on a decision made after full contest and repeated hearings, by appeal and otherwise, by the officers to whom the law has specially confided the adjudication of that class of cases.

The rule which governs the courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction.

That principle is that "The decisions of the officers of the Land Department, made within the scope of their authority, on questions of this kind, are in general conclusive everywhere, except when considered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief." *Moore v. Robbins*, 96 U. S., 530, 535 [XXIV., 848, 850]; *Shepley v. Cowan* [*supra*]; *Johnson v. Townsley* [*supra*].

As we have already said, the argument of counsel is that the bill which was demurred to

makes a case of mistake and of fraud and imposition within the meaning of these decisions.

1. Let us inquire first into the alleged mistake of law by the Land Department.

The language of this court in *Moore v. Robbins*, cited above, is that equity will interfere "When it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another."

The meaning of this, and the sound principle, is, that where it is a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief.

Looking to the complaint in this case, no such clear statement of a mistake of law is to be found. The counsel in his argument says that the Act of March 3, 1863, 12 Stat. at L., 808, under which defendants as vendees of Vallejo entered the land, only protected such vendees to the extent of their actual possession, and that the Secretary of the Interior decided otherwise to the prejudice of plaintiff. But no such allegation is made in the complaint.

That part of the complaint which relates to this subject is, after detailing his efforts before the register and receiver, as follows:

"But the said register and receiver refused to receive said money and issue a certificate of purchase for said land, as they had previously refused to award the same to him, and had returned the proofs with their said opinion to the General Land-Office at Washington.

The plaintiff's claim, among others, was thus rejected. But the Commissioner of the General Land-Office took a different view of the law, and in certain cases, adjudicated by him, declared that the said lands were subject to preemption under the general laws, and sustained the rights of preemption settlers.

An appeal was taken in one case to the Secretary of the Interior, who, upon the opinion of Mr. Attorney-General Speed, reversed the decision of the commissioner, and declared that the Act of March 3, 1863, above cited, has the effect to deprive the preemption settler of all rights under the general laws of the land. In pursuance of this decision an order was issued authorizing the said defendants and other purchasers of the Vallejo title to enter the lands claimed by them; and the said defendants have entered and will be enabled to receive a patent for the said quarter section, although the plaintiff first reduced it to possession, and has resided continuously upon and been in the occupation of it for the last fourteen years, and justly claimed by the plaintiff under the laws of the United States."

No copy of the opinion of the Attorney-General or of the Secretary of the Interior is given, nor is any other statement than this of what principle of law was then decided to be found. That the decision had any reference whatever to the nature, character or extent of the possession of the claimants under Vallejo, is a very forced inference from facts not found in the

record, for there is no allegation in the bill, whatever, of the proofs of defendants, or what they did or did not prove in regard to possession, except that they had not resided on the land.

To reverse the decision of the Land Department, declare its action to be a violation of the law, and to reverse also the judgments of the two courts of California on that ground demands some stronger evidence than such a decision was made by these officers than is to be found in this petition.

So, also, as regards the allegations of fraud and imposition.

It is alleged in the vaguest terms that the Act of Congress for the benefit of Vallejo and his vendees was procured by the false and fraudulent representations of defendants, but as no attempt is made to invalidate this law, and the court is not asked to disregard it, nothing more need be said of this charge.

The next is, that, before the passage of that bill the Commissioner of the General Land Office, at the instigation of defendant, fraudulently and unjustly ordered that the surveys of this land should be withheld by the Surveyor-General. Unless the mere use of the word "fraudulent" makes his order a fraud, it is impossible to see any wrong in withholding these surveys while Congress was considering how far and in what manner it would relieve Vallejo and his grantees from the effect of a very hard, if technically legal, judgment in favor of the government.

It is also alleged that "Defendants will, on receiving the patent, be at liberty to sell said land to innocent purchasers, and thus wholly defeat the just claim and right of plaintiff, who will thus be fraudulently deprived of the land which he has settled and improved under the guarantee of the laws of the land, and which is evidently the intent and purpose of said defendants in prosecuting their unjust and fraudulent claim to the land aforesaid."

It is too obvious for comment that in all this the only use of the words "fraud" and "fraudulent" is to stigmatize acts which are adverse to the plaintiff's view of his own rights. But there is not a syllable which defines an act fraudulent in nature, or done or performed under the influence of corrupt motives, or by corrupt means, by the defendant or by any of the land officers who have had to deal with his claim. These officers are not even named. It is idle at this day to suppose that the expensive machinery of a court of equity is to be put in operation for the purpose of reviewing and reversing the judgment of the tribunals to whom that question is by law intrusted, on such loose, untraversable allegations of fraud in general. *U. S. v. Throckmorton* [ante, 93]; *Kerr, Fraud*, 365.

It is urged in argument that the facts stated by plaintiff in regard to his own settlement, possession and declaratory statement, show his right to receive a patent for the land, and that on demurrer these are to be taken as true.

We are hardly inclined to believe that if everything so stated is to be treated as absolute verity that it makes out his right. But it is sufficient to say that plaintiff also shows that all his proofs, together with those on the other side, which he has *not* set out in his petition, were submitted to and passed upon by the land

officers, from the register and receiver up to the Secretary of the Interior, and they decided against the validity of his claim.

All this appears from his own petition; so that we return to the proposition, that as he has not shown such a mistake of law, or such element of fraud in that decision as will justify a court of equity in setting it aside, the judgment of the Supreme Court of California refusing that relief is without error, and it is, accordingly, affirmed.

Cited—101 U. S., 519; 102 U. S., 375; 107 U. S., 464, 465; 39 Ohio St., 387.

GEORGE FOLLANSBEE, *Appt.*,

v.

BALLARD PAVING COMPANY.

What is final decree.

A decree that the plaintiff recover of defendant the highest market value of certain bonds to be ascertained by the court in Special Term, is not a final decree, where the amount has not been ascertained.

[No. 102.]

Argued Dec. 10, 11, 1879. Decided Dec. 15, 1879.

APPEAL from the Supreme Court of the District of Columbia.

On motion to dismiss.

The following is the decree appealed from.

This cause coming on to be heard in the General Term in the first instance upon the pleadings and proofs and the decrees *pro confesso* against the defendants, Michael Mandle, Edward P. Aistrop and Henry H. Dudley, and having been argued by the counsel for the complainant, and the counsel for the defendants, John C. Mulford, Peter Campbell, George Follansbee and Francis H. Morgan, upon consideration thereof, it is, this 4th day of March, 1876, adjudged, ordered and decreed as to the said defendants, John C. Mulford and Peter Campbell, that the bill be dismissed; as to the defendant, George Follansbee, that the plaintiffs are entitled to recover from him the highest market value since the 16th day of February, 1875, of three sixty five bonds of the District of Columbia, of the par value of \$5,150, with interest coupons all attached, less the sum of \$2,000, and interest thereon from the 26th day of January, 1874, to such day of highest market value; as to the defendant, Francis H. Morgan, that the plaintiffs are entitled to recover from him the highest market value at any time since the 8th day of December, 1874, of such bonds of the par value of \$1,650, with interest coupons all attached, less the sum of \$641.58, with interest thereon from the 17th day of January, 1874, to such day of highest value; and as to the defendant, The Middletown National Bank of Middletown, New York, that the plaintiff is entitled to recover from it the highest market value of such bonds at any time since the 8th day of December, 1874, of the par value of \$1,250, with interest coupons all attached, less the sum of \$481.80, and interest thereon from the 26th day of January, 1874, to such day of highest value.

And it is further ordered, adjudged and decreed that when the respective amounts due the complainants from the three last named defendants shall have been ascertained by the court in

Special Term, the complainants shall have execution as at law against them for such respective amounts, with interest thereon from such respective days of highest market value.

And it is further ordered that this case be remanded to the court in Special Term, for further proceedings in conformity to this decree.

Messrs. William A. Cook and J. H. Bradley, for appellant.

Messrs. A. S. Worthington and E. L. Stanton, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

The motion to dismiss this appeal is granted. The decree appealed from is not a final decree. The amount due from the appellant has not been ascertained.

Dismissed.

INHABITANTS OF THE TOWNSHIP OF POMPTON, IN THE COUNTY OF PASSAIC, *Plffs. in Err.,*

v.

COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART.

(See S. C., 11 Otto, 196-204.)

Bona fide holder of bonds—estoppel by recital.

1. Where a corporation has lawful power to issue bonds and does so, the *bona fide* holder has a right to presume that the power was properly exercised, and is not bound to look beyond the question of its existence.

2. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital.

[No. 84.]

Argued Nov. 25, 1879. Decided Dec. 15, 1879.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

The case is stated by the court.

Messrs. Thomas N. McCarter and Frederick T. Frelinghuysen, for plaintiffs in error.

Messrs. Barker Gummere and Edward T. Green, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

This is a controversy touching the validity of certain municipal bonds issued by the plaintiffs in error which came into the hands of the defendant in error, and which the latter is seeking to enforce. The judgment of the court below was in favor of the Cooper Union. There is no conflict as to the facts. The questions to be considered all involve the effect of the facts as matter of law upon the rights of the parties.

The Montclair Railway Company was incorporated by an Act of the Legislature of New Jersey, approved March 18, 1867. The 6th section authorized the company to construct a railway from the Village of Montclair, in the Township of Bloomfield, to the Hudson River, at one

or the other of certain designated points; and also to attach a branch to the main stem in the township named, and "To extend the said railway into the Townships of Caldwell and Wayne."

By another Act, approved April 9, 1868, section 1, it was provided that on the application in writing of twelve freeholders, residents of any township, town or city "Along the routes of the Montclair Railway Company or at the *termini* thereof," except the Township of Bloomfield, it should be the duty of the Circuit Judge of the county, within ten days after receiving the application, to appoint three freeholders, residents of such township, town or city, to be commissioners to carry into effect the provisions of the Act. They were to hold their offices five years and until their successors were appointed. The 3d and 4th sections of the Act are also necessary to be considered. Their provisions may be thus summarized and sufficiently presented for the purposes of this opinion. The commissioners were authorized to borrow money, not exceeding in amount twenty per cent of the valuation of the real estate in such township, town or city, according to the assessment rolls, at a rate of interest not exceeding seven per cent per annum, to be paid half yearly, and to execute under their hands and seals bonds therefor, in such sums and payable at such times and places as they might deem proper; but no bonds were to be issued or debt contracted until the written consent of those owning at least two thirds of the real estate of the township, town or city on the assessment roll, according to the valuation on such roll, should have been obtained. The consent was to state the amount of money to be borrowed, and that the fund was to be invested in the bonds of the railway company. The signatures of those consenting were to be proved by the oath of one or more of the commissioners. The valuation of the property owned and represented was to be proved by the affidavit of the assessor. The consent and affidavit were to be filed in the office of the clerk of the proper locality. The commissioners were authorized to sell the bonds as they might think proper, but not for less than par. The proceeds were to be invested in the bonds of the railway company issued for the purpose of building and equipping the road, and not otherwise. The commissioners were to subscribe for the purchase of bonds to the amount they were authorized to borrow. By the 1st section of the supplementary Act of March 16, 1869, the railway company was authorized to extend the road from any point upon it to any point in the Township of West Milford. By the 4th section it was provided that the operation of the last named prior Act should not be extended to any township, town or city through or to which the road was *not authorized* to be extended before the passage of this Act. On the 6th of July, 1868, the proper previous steps having been taken, the Judge appointed the commissioners for Pompton Township. On the 4th of May, 1870, the commissioners issued bonds to the amount of \$100,000, all of which subsequently came into the hands of the defendant in error. When the bonds were disposed of by the commissioners, no route of the road west of Montclair had been surveyed, but it was distinctly proved on the trial that the southeast line of Pompton was

NOTE.—*Recitals in negotiable bonds or securities; estoppel by; evidence of the facts recited.* See note to *Mercer Co. v. Hackett*, 68 U. S., XVII., 548.

See 11 Otto.

then the contemplated and intended southwestern terminus. On the 6th of April, 1870, a survey was filed which commenced at that village and extended to a point between Mead's Basin and the Pequannock River, in the southern part of Wayne Township. On the following 9th of June another survey was filed, which began at the terminus last mentioned, crossed the line between Wayne and Pequannock Townships; then proceeded to the line between Pequannock and Pompton, the latter being a parallelogram, and after traversing Pompton diagonally about two thirds of its length, crossed its west line into West Milford, and thence proceeded in that township to the boundary line between New Jersey and New York. This line was finally adopted, and the road was built accordingly. Thus, though Pompton did not get a terminus on its southeast line, as originally contemplated, it got for the same consideration the length of the road within its territory and the extension beyond its limits. The change was obviously beneficial to the Township. No ground is disclosed for the slightest imputation of bad faith against anyone, touching either the road or the sale of the bonds. It does not appear that the township authorities made the slightest complaint. Doubtless, all believed that what was done was best for all concerned.

According to the record, the defendant in error is clearly a *bona fide* holder of the bonds. Full value was paid for them, and they were taken underdue without knowledge or notice of any infirmity, if there were any, belonging to them. The learned Judge who tried the case below so instructed the jury, and properly withdrew the subject from their consideration.

It is objected to the validity of the bonds:

1. That they could not be competently issued until the route of the road had been surveyed and the *termini* thus fixed.

2. That no terminus at Pompton was ever so fixed or designated as to be effectual.

3. That, when the route of the road was changed and fixed, pursuant to the Act amending the charter of the company, the necessary consideration for the bonds became in a vital part impossible or failed, and that the bonds were thereupon void.

These several points may well be grouped and considered together.

The Act under which the bonds were issued must be regarded in the light of the circumstances. At the outset it is material to note that the power of the commissioners was hedged about by checks, limitations and safeguards, with the most careful elaboration. Yet it is nowhere said or intimated when or under what circumstances the bonds should be sold. In these respects, there was no restriction. The discretion of those who were empowered and directed to make the sale was left unfettered. The bonds were to be issued to aid the company to complete the road. Such is the language of the Act. Without such help the road might not be begun, or, if begun, might not be finished. After the work was done, assistance would not be needed. Fraud and abandonment of the enterprise were possible, as well after the survey was definitely made as before. Such results touching a work in the hands of persons of known good character were not to be anticipated and could hardly occur. The commis-

sioners being constituted the sole judges as to the points mentioned with reference to parting with the bonds, their decision was conclusive. There could be no appeal and no review. It was a matter with which a *bona fide* purchaser had nothing to do. The phrases "along the route" "or at the *termini*" have a meaning as plain and clear as that of any other terms the law-makers could have employed. It was expressly declared that the road might go "into" the Township of Wayne, which meant to any part of it, and it was intended that it should stop at the line between Wayne and Pompton. There the two territories came in contact. The boundary of one was the boundary of the other, and to stop at that line made Pompton one of the *termini* of the road. This brought the case within the category expressly defined by the statute, and justified the action of the commissioners. That the terminus was potential and contemplated was sufficient. It was not required to be fixed or unalterable. We hold, therefore, that the bonds were rightfully issued. That under the Act amending the charter, Pompton, instead of being a terminal Township, became thereafter a Township "along the route" of the road, cannot affect the previously vested rights of a *bona fide* transferee of the securities. It would be a singular result if a larger and better consideration than was contemplated when the bonds were issued should be held to destroy their validity. There was, in effect, an exchange of obligations between the company and the Township, but the motive and object of the latter was the benefit expected to accrue from the road.

There are several things which go strongly to sustain the construction and effect we have given to the Act of 1868.

The coupons for the half-yearly interest upon the township bonds, and those for the half-yearly interest upon the railroad bonds belonging to the Township, were paid to the respective holders to November 1, 1872, inclusive. Up to that time it does not appear that the validity of the township bonds was questioned by anyone. There seems to have been entire acquiescence on the part of all concerned, including the township authorities.

By the 4th section of the Act of 1869 the Legislature declared in effect that the *authorized* and not the *actual* routes were those intended by the bonding Act of 1868.

By the 1st section of the Act of 1874 the office of the Commissioners of Pompton Township was abolished, and their duties were devolved upon the township committee. One of those duties was to provide the necessary funds in the ways prescribed, and to pay the interest upon the bonds involved in this controversy.

In cases like this, legislative ratification is the equivalent of original authority, and what is clearly implied in a statute is as effectual as what is expressed. 1 Dill. Mun. Corp., sec. 46: *U. S. v. Babbitt*, 1 Black, 55 [66 U. S., XVII., 94]. Whether this statute was a ratification of the sale of the bonds as made, if such ratification were needed, is a point which the view we take of the case renders it unnecessary to consider. It was certainly a clear recognition of Pompton as one of the townships authorized to issue bonds in aid of the railroad company; a legislative construction entitled to great respect.

The bonds of the railroad company held by the commissioners are still in the hands of the Township. It does not appear that there has been any offer to return them.

In *Scotland Co. v. Thomas*, 94 U. S., 682 [XXIV., 219], the county was authorized to issue bonds in aid of the construction of a railroad authorized to be built by the Alexandria and Bloomfield Railroad Company, a Missouri corporation. Pursuant to law that company became consolidated with an Iowa corporation, bearing the name of the Iowa and Southern Railway Company, whereby an important elongation of the road originally authorized was secured. The combined corporations took the name of the Missouri, Iowa and Nebraska Railway Company. The bonds were issued to that company. This court held them to be valid. It was said, in effect, that this conclusion was the result of "a broad and general view" of the facts of the case.

In *Callaway Co. v. Foster*, 93 U. S., 567 [XXIII., 911], a statute authorized the stock of a railroad company to be subscribed for, and bonds to provide the means of paying for it to be issued and sold "By the county court of any county in which any part of said railroad *may be*." The stock was subscribed and the bonds were issued and sold before the route of the road was surveyed or located. In construing the phrase "*may be*," this court said: "*May be* what? This expression is incomplete, and is to be construed with reference to the subject-matter. If used in a statute where a road already built was the subject-matter, it would refer to the presence or existence there of the road. * * * But when used in reference to a railroad not yet built, not located or surveyed, and, indeed, not yet organized, it must have quite a different meaning." "Upon any reasonable construction it embraces Callaway, which was one of the possible sites, and a site ultimately occupied in fact." The bonds were sustained.

In *Ray Co. v. Vansycle*, 96 U. S., 675 [XXIV., 800], the facts were as follows:

In 1860, Ray County, in Missouri, under authority conferred by a statute, and the sanction of its legal voters, by its county court, subscribed for the stock of railroad company A, and agreed to issue its bonds in payment. Under an Act passed in 1864, and pursuant to a popular vote of the county, company A transferred all its rights, privileges, property and effects to company B. By an agreement between companies B and C and the county court, the subscription of the county for the stock of A was released and, in consideration of the release, the county court subscribed for the same amount of the stock of C, and issued its bonds in payment. By this arrangement the county secured increased railroad facilities, and it still held the certificates of stock. There had been no offer to return them. The county paid the interest on its bonds continuously for five years. It then repudiated. It was held by this court:

1. That B was entitled to the bonds of the county by reason of the first subscription.

2. That as against a *bona fide* holder it could not be objected that the qualified voters had not assented to the subscription to C.

3. That the tax payers were concluded by the act of the county court and by their failure to take action, if it could have availed them, to

See 11 OTTO.

prevent the transfer from one company to the other.

In *Schuyler Co. v. Thomas* [ante, 88], *Callaway Co. v. Foster*, and *Scotland Co. v. Thomas* were cited and strongly approved.

The analogies of all these cases to the one in hand are too obvious to need comment.

If any error or wrong was committed in issuing these bonds, it was the act of the agents of the plaintiffs in error.

Where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him and not upon the other party. *Hern v. Nichols*, 1 Salk., 289; *Merch. Bk. v. St. Bk.*, 10 Wall., 604 [77 U. S., XIX., 1008].

The bonds in question recite on their face that they were issued "In pursuance of an Act of the Legislature of New Jersey, approved April 9, 1868, entitled 'An Act to Authorize Certain Townships, Towns and Cities to Issue Bonds and to Take the Bonds of the Montclair Railway Company.'"

In the case of *Orleans v. Platt* decided last Term and not yet reported [ante, 404], this court said: "The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall., 110 [69 U. S., XVII., 857]. This court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer Co. v. Hackett*, 1 Wall., 83 [68 U. S., XVII., 548]; *San Antonio v. Mehaffy*, 96 U. S., 312 [XXIV., 816]; *Moultrie Co. v. Bk.*, 92 U. S., 631 [XXIII., 631]; *Moran v. Miami Co.*, 2 Black, 722 [67 U. S., XVII., 342]; *Knox Co. v. Aspinwall*, 21 How., 539 [62 U. S., XVI., 208]; *Bk. v. Turquand*, 6 El. & Bl., 327."

These rules are the settled law of this court, and they are decisive of the case in hand. The constitutional objection was not taken in the court below; but aside from this, we are of opinion that it is without validity. It would be supererogatory to discuss the minor points set forth in the assignment of errors to which we have not specifically adverted. They are all covered and concluded by what we have said.

The judgment of the Circuit Court is affirmed.

Dissenting, *Mr. Justice Field* and *Mr. Justice Bradley*.

Cited—19 Blatchf., 371.

THOMAS H. POWERS ET AL., *Plffs. in Err.*,
v.

SETH I. COMLY, Collector, etc.

(See S. C. 11 Otto, 789-791.)

Duty Act—Treaty—additional duty.

1. In section 3 of the Act of June 8, 1872, the words, "Countries east of the Cape of Good Hope" mean

countries with which, at that time, the United States ordinarily carried on commercial intercourse by passing around that cape.

2. There is nothing in the Act of Congress which is in conflict with the Treaty with Persia.

3. It is only when the products of Persia are first exported to some place west of the cape, and from there exported to the United States, that the additional duty of ten per cent is imposed.

[Nos. 97, 98, 99.]

Argued Dec. 10, 1879. Decided Dec. 15, 1879.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

These were three cases in which the jury in the court below found special verdicts, the same in all respects except as to amounts.

The material facts are as follows:

The plaintiffs imported into the Port of Philadelphia, in the year 1874, from Liverpool, England, a place west of the Cape of Good Hope, certain opium, the growth or product of Persia, in Asia, a country east of the Cape of Good Hope.

The opium was carried from Persia to England by way of the Isthmus of Suez and the Mediterranean Sea.

The defendant, as Collector of the Port of Philadelphia, declined to deliver the said opium to the plaintiffs without their first paying the additional duty of ten per cent imposed by section 2501 of the Revised Statutes, and section 8, Act, June 6, 1872.

The plaintiffs duly protested against the payment of the said duty of ten per cent, and duly appealed from the decision of the Collector, which appeal was duly referred to the Treasury Department of the United States, by which the decision of the Collector was affirmed.

The said Collector has collected from the plaintiffs, on certain opium imported by them in the manner above mentioned, the said additional duty of ten per cent, amounting to \$2,447, to recover which the plaintiffs have brought suit, within the period prescribed by law.

The section of the Act of Congress under which these duties were levied, is as follows:

"That, on and after the first day of October next, there shall be collected and paid on all goods, wares and merchandise of the growth or produce of countries east of the Cape of Good Hope, except wool, raw cotton and raw silk, as reeled from the cocoon, or not further advanced than tram, thrown, or organzine, when imported from places west of the Cape of Good Hope, a duty of ten per centum *ad valorem*, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production."

The following is a copy of articles 3 and 4 of the Treaty between the United States of America and Persia, ratified by both parties, June 13, 1857, and proclamation made thereof, August 18, 1857, 11 Stat. at L., 709:

Article III. The citizens and subjects of the two contracting parties, travelers, merchants, manufacturers and others, who may reside in the territory of either country, shall be respected and efficiently protected by the authorities of the country and their agents, and treated in all respects as the subjects and citizens of the most favored Nation are treated.

They may reciprocally bring by land or by sea into either country, and export from it, all

kinds of merchandise and products, and sell, exchange or buy, and transport them to all places in the territories of either of the high contracting parties. It being, however, understood that the merchants of either Nation who shall engage in the internal commerce of either country, shall be governed, in respect to such commerce, by the laws of the country in which such commerce is carried on, and in case either of the high contracting powers shall hereafter grant other privileges concerning such internal commerce to the citizens or subjects of other governments, the same shall be equally granted to the merchants of either Nation engaged in such internal commerce within the territory of the other.

Article IV. The merchandise imported or exported by the respective citizens or subjects of the two high contracting powers, shall not pay in either country, on their arrival or departure, other duties than those which are charged in either of the countries on the merchandise or products imported or exported by the merchants and subjects of the most favored Nation, and no exceptional tax, under any name or pretext whatever, shall be collected on them in either of the countries.

Messrs. R. J. C. Walker, Wm. Ernst and Henry Flanders, for plaintiffs in error.

Mr. S. F. Phillips, Solicitor-Gen., for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

These cases are substantially disposed of by *Hadden v. Collector*, 5 Wall., 107 [72 U. S., XVIII., 518] and *Sturges v. Collector*, 12 Wall., 19 [79 U. S., XX., 255]. Section 3 of the Act of June 6, 1872, 17 Stat. at L., 232, is, in all material respects, like the statutes under consideration in those cases where we held that countries "beyond the Cape of Good Hope" and countries "east of the Cape of Good Hope" meant countries with which, at that time, the United States ordinarily carried on commercial intercourse by passing around the Cape of Good Hope. Although the Act of 1872 was passed after the Suez Canal was in operation, we see no indication of an intention by Congress to give a new meaning to the language employed and which had already received a judicial construction. The words used are words of description, and indicate to the popular mind the same countries now that they did before the course of trade was to some extent changed by cutting through the Isthmus of Suez. The object of Congress was to encourage a direct trade with these Eastern countries. For this purpose, in legal effect, a bounty was offered to those who imported the products of that region directly from the countries themselves, instead of from places west of the Cape.

We see nothing in the Act of Congress which is in conflict with the Treaty with Persia. 11 Stat. at L., 709. If the subjects of Persia export their products directly to the United States, they are required to pay no more duties here than the "merchants and subjects of the most favored Nation." It is only when their products are first exported to some place west of the Cape, and from there exported to the United States, that the additional duty is imposed. Under such circumstances, the importation into the United

States is not, commercially speaking, from Persia, but from the last place of exportation.

The judgment in each of these cases is affirmed.

WILLIAM L. WOOD, *Plff. in Err.*,

v.

WILLARD CARPENTER.

(See S. C., 11 Otto, 135-143.)

Indiana Statute of Limitations—concealment—contrivance—delay.

1. In Indiana, actions for fraud must be commenced within six years. The Statute begins to run when the fraud is perpetrated.

2. Where there is concealment, such actions may be brought within the time limited, after the discovery of the cause of action.

3. Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

4. There must be reasonable diligence; and the means of knowledge are the same thing, in effect, as knowledge itself.

5. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

[No. 628.]

Submitted Dec. 5, 1879. Decided Dec. 22, 1879.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The case is stated by the court.

Messrs. Andrew L. Robinson and Asa Iglehart, for plaintiff in error.

Messrs. Charles Denby and J. M. Shackelford, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

This is a writ of error. The complaint or declaration makes the following case: Wood recovered judgments in the Vanderburg Circuit Court against Carpenter, upon sundry promissory notes and bills of exchange. The first judgment bore date on the 16th of May, 1860, and the last on the 22d of August in that year. In the aggregate, they amounted to the sum of \$8,557.07. At the dates of the notes and bills, the defendant was the owner of real and personal estate of the value of \$500,000. For the purpose of defrauding the plaintiff and others by depreciating the value of their claims against him, and of thereby inducing them to sell the claims to him for less than their face, the defendant, in the year 1858, entered into a fraudulent conspiracy with his brother, Alvin B. Carpenter, and others to the plaintiff unknown, to incumber his real estate and hide away the title so that the property should not be sold to pay his debts, but in the end inure to his benefit. In pursuance of this scheme, he confessed sundry fraudulent judgments for large sums, and afterwards made a fraudulent assignment of all his property to William H. Walker and William D. Allis, and thereafter procured the title to all his real and personal estate to be vested in his brother, Alvin, and others, who held the property in secret trust for the defendant. In this way the title was so concealed that the plaintiff was prevented from levying executions issued upon his judgments. On the 14th of January, 1863, the plaintiff, in order to compel the de-

See 11 OTTO.

fendant to pay his judgments, caused him to be arrested by the sheriff, in Massachusetts, upon final process. The defendant was taken before a master in chancery, and afterwards, before the master, took the insolvent debtors' oath according to the law of that State, and was thereupon discharged. Upon that occasion he falsely deposed and swore that he was not possessed of pecuniary means to the extent of \$20, and that he had, in good faith, assigned all his property for the benefit of his creditors. From that time forward the defendant falsely pretended to the plaintiff and his other creditors that he was poor and wholly unable to pay his debts, or any part of them. Having thus put his property beyond the reach of process upon the plaintiff's judgments, and procured his discharge from custody in Massachusetts, and led the plaintiff to believe he had no property out of which the judgments could be collected, the defendant afterwards, on the first of January, 1864, in further pursuance of the conspiracy, pretended and represented that his son-in-law, one D. C. Keller, would purchase the judgments with his own means, and so procured the plaintiff, who acted upon the belief of the truth of the representations and of the perjured statement of the defendant, to assign the judgments to Keller for fifty per cent of their principal and interest, amounting to \$5,104.52; whereas, in fact, the judgments were bought by Keller with money furnished by the defendant, and they were held in trust by Keller for the defendant until June 1, 1873, when Keller, at the instance of the defendant, caused satisfaction to be entered. Before and since the rendition of the judgments the defendant owned property worth exceeding \$200,000. The title was held in secret trust for him by his brother Alvin and others, and was fraudulently concealed from the plaintiff until long after the assignment of the judgments. Within twelve months past the property was all reconveyed to the defendant, and he holds it by an indefeasible title. The plaintiff had no knowledge of the ownership of the property by the defendant, nor of the secret trust, nor of the falsity of his representations, as alleged, until during the year 1872.

The defendant filed an answer consisting of three paragraphs:

1. He denied all the allegations of the petition.

2. He alleged that the causes of action set forth in the petition did not accrue within six years.

3. He averred that he was not guilty of any of the grievances set forth in the complaint at any time within six years before the commencement of the action.

The plaintiff's reply to the second and third paragraphs averred as follows:

The defendant concealed the facts: that the judgments confessed in favor of Chapman and others were fraudulent; that Alvin C. Carpenter held the said property, real and personal, in trust for the defendant; that the defendant had committed perjury before the master in Massachusetts; that Keller had bought the judgments with the defendant's money, and for the defendant's use and benefit; that the defendant was, in fact, the owner of the property, and that it was held by his brother and others in secret trust for him; and that his representations as to his insolvency were false and fraudulent.

It was averred further, that the concealment was effected by the defendant by means of fraud, perjury and the other wicked devices set forth and described in the plaintiff's complaint herein; and that the plaintiff had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the commencement of this suit.

The defendant demurred to the last two paragraphs of the reply. The demurrer was sustained. The plaintiff not asking leave to amend, the court gave judgment against him, and he thereupon sued out this writ of error.

The only question presented for our consideration is, whether the demurrer was properly sustained. The Statute of Limitations relied upon by the defendant declares:

"The following actions shall be commenced within six years after the cause of action has accrued, and not afterwards." 2 R. S. of 1876, p. 121. " * * * If any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action." 2 R. S., 128, sec. 219. Both these provisions apply to actions for fraud. *Musselman v. Kent*, 33 Ind., 453; *Cravens v. Duncan*, 55 Ind., 347. The statute begins to run when the fraud is perpetrated. *Wynne v. Cornelison*, 52 Ind., 312.

In the case in hand, the specific wrong complained of, and the *gravamen* of the action, is the transfer of the judgments against Carpenter for the consideration of fifty cents on the dollar of principal and interest, when it is averred they were good for the entire amount, and which transfer, it is alleged, was brought about by the fraud and misrepresentations of the defendant and Keller. It is averred in the complaint that they were assigned on the first of January, 1864. The cause of action then accrued, and the Statute began to run. The averments of fraud, aside from this transaction, are only matters of inducement. The bar of the statute became complete on the first of January, 1870, unless the reply brings the case within section 219, which declares that, where there is concealment such actions may be brought within the time limited, after the discovery of the cause of action.

Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

The provision in the Statute of which the plaintiff seeks to avail himself was originally established in equity, and has since been made applicable in trials at law. There is no trace of it in the English Statute of Limitations of the 21st of James I., which was adopted in most of the American Colonies before the Revolution, and has since been the foundation of nearly all of the like legislation in this country.

Having been imported from equity, the adjudications of equitable and legal tribunals up-

on the subject are alike entitled to consideration.

Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it.

It will be observed, also, that there is no averment that during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence, not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. It should be borne in mind that when the judgments were assigned to Keller the country was in the throes of the civil war. Lee had not surrendered. Gold and silver, in the currency of the time, were at a large premium. All real property was largely depreciated. The future was uncertain. A transaction which then seemed wise and fortunate, a year later might be deemed greatly otherwise. It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another.

The discovery of the cause of action, if such it may be termed, is thus set forth: "And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit." There is nothing further upon the subject.

In this class of cases the plaintiff is held to stringent rules of pleading and evidence, "And especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." *Stearns v. Page*, 7 How., 819, 829. "This is necessary to enable the defendant to meet the fraud and the time of its discovery." *Moore v. Greene*, 19 How., 69, 72 [60 U. S., XV., 533, 534]. In *Beaubien v. Beaubien*, 23 How., 190 [64 U. S., XVI., 484], and in *Badger v. Badger*, 2 Wall., 95 [69 U. S., XVII., 838], the same rules were again laid down.

A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it

was, how it was made, and why it was not made sooner. *Carr v. Hilton*, 1 Curt. (C. C.), 390.

The fraud, intended by the section, which shall arrest the running of the Statute must be one that is secret and concealed, and not one that is patent or known. *Martin v. Smith*, 1 Dill., 85, and the authorities cited.

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Kennedy v. Green*, 3 Myl. & K., 722. "The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." Ang. Lim., sec. 187 and n.

A party seeking to avoid the bar of the Statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. *Buckner v. Calcoete*, 38 Miss., 432. See, also, *Nudd v. Hamilton*, 8 Allen, 130.

In *Cole v. McGlathery*, 9 Me., 131, the plaintiff had given the defendant money to pay certain debts. The defendant falsely affirmed he had paid them and fraudulently kept the money. It was held that the plaintiff could not recover, because he had at all times the means of discovering the truth by making inquiry of those who should have received the money.

In *McKown v. Whitmore*, 31 Me., 448, the plaintiff handed the defendant money to be deposited for the plaintiff in bank. The defendant told the plaintiff that he had made the deposit. It was held that, if the statement were false and fraudulent, the plaintiff could not recover, because he might at all times have inquired at the bank. In *Rouse v. Southard*, 39 Me., 404, the defendant was sued as part owner of a vessel, for repairs, and pleaded the Statute of Limitations. The plaintiff offered evidence that the defendant, when called on for payment, had denied that he was such owner. It was held that, as the ownership might have been ascertained from other sources, the denial was not such a fraudulent concealment as would take the case out of the bar of the Statute.

Numerous other cases to the same effect might be cited. They all show the light in which courts regard the qualification here in question, of the limitation which would otherwise apply.

The subject has been several times considered in the State of Indiana, whence this case came. In *Boyd v. Boyd*, 27 Ind., 429, it was ruled that the concealment under section 219, which will avoid the Statute, must go beyond mere silence. It must be something done to prevent discovery.

Stanley v. Stanton, 36 Ind., 445, is instructive with reference to the case before us. In 1870, A sued B. The complaint alleged that in 1848 B falsely represented himself to A to be the agent of C, to whom A was indebted on a promissory note, and that A paid the money to B as such agent; and that B promised to pay it over to C, which he had not done. B pleaded the Statute of Limitations. A replied that he paid the money to B on his claim that he was

the agent of C; that B was not such agent, but concealed the fact from A, and promised A to pay the money to C, which he had not done; and that, by reason of the concealment, A did not discover the cause of action until the fall of the year 1869. It was held that, the concealment being all previous to the accruing of the cause of action, something more than the silence of B was necessary to prevent the running of the Statute, and that the action was barred. The concealment, it was said, must be the result of positive acts.

Wynne v. Cornelison [*supra*], was a case growing out of an alleged fraudulent conveyance. There, as here, there was a demurrer to a paragraph of the reply setting up concealment to countervail the defense of the Statute of Limitations. The allegations were not unlike those in the case before us. The judgment of the court below sustaining the demurrer was affirmed. The court said: "The Statute of Limitations is a statute of repose, and where its operation is sought to be avoided by the party liable to the action, the allegation and proof should bring the case clearly within the section. The allegation, that the defendants pretended and professed to the world that the transactions were *bona fide* transactions, is too general to amount to anything." A wide and careful survey of the authorities leads to these results:

The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation.

Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.

The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

The reply is clearly bad. It contains some vigorous declamation, but is wanting in the averment of facts, which are indispensable to give it sufficiency as a pleading, for the purpose intended. The complaint to which it refers does not help it. Further remarks are unnecessary. The demurrer was properly sustained by the Circuit Court, and the judgment is affirmed.

Cited—101 U. S., 567; 111 U. S., 190; 4 Hughes, 323, 444, 445.

JOSEPH J. WEST ET AL., Partners, as WEST,
BRADLEY & CARY, *Plffs. in Err.*,
v.

DARIUS B. SMITH ET AL., Composing the
Firm of D. B. SMITH & Co.

(See S. C., 11 Otto, 263-273.)

Amendments after removal of cause—parol evidence.

1. Where a cause is removed from a state court to the U. S. Circuit Court, the latter court may allow such amendments to be made to the declaration as would be allowable by the state practice.

2. Where it was doubtful what the precise intent of the writer of a letter was, the question of intention is open to explanation, and parol evidence may be given of it.

[No. 101.]

Argued Dec. 10, 1879. Decided Dec. 22, 1879.

ERROR to the Circuit Court of the United States for the District of Connecticut.

The case is stated by the court.

Mr. Charles E. Perkins, for plaintiffs in error.

Messrs. Waldo Hubbard and A. P. Hyde, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Due removal of the suit before the court was made from the state court where it was commenced, into the circuit court, in which case it is no longer usual to file new pleadings, the Act of Congress providing that the practice, pleadings and forms and modes of proceeding in common law actions shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the State within which such circuit court is held, any rule of court to the contrary notwithstanding. 17 Stat. at L., 197; R. S., sec. 914.

Sufficient appears, to show that the writ in the practice of the state courts contains the declaration, the command of the same to the sheriff being that he shall summon the defendant to appear and answer to the plaintiff in a certain plea, wherein is set forth the cause of action. Pursuant to that practice, the defendants in this case were summoned to appear in a plea of the case, the declaration containing two counts in *assumpsit*, the first being a count for goods sold and delivered, in the sum of \$8,000, in two forms; the second being a count for work and labor done and performed, in the sum of \$8,000, at the special instance and request of the defendants. Both counts are in the usual form, and the declaration concludes with the usual breach alleging non-payment, to the damage of the plaintiffs in the sum of \$10,000. Personal service was made; and the defendants having appeared and removed the cause into the circuit court, pleaded the general issue that they never did assume and promise in manner and form as the plaintiffs in their declaration have alleged, and tendered an issue to the country.

Special matter may be given in evidence under the general issue, according to the state practice, if previous notice be given by the defendant or defendants. Such notice was given by the defendants in this case, that they would give in evidence a written agreement, and the extension of the same for one year, which is fully set forth in the transcript. Profract of the instrument was made, and the defendants averred that the supposed promises were made, if ever, in consideration of work and labor done by the plaintiffs, in the pretended performance of the stipulations and agreements in said written contract contained, in respect to which the defendants allege that the plaintiffs did not keep and perform their said agreements and obligations, to the damage of the defendants in the sum of \$20,000, and greatly exceeding the amount that would be due to the plaintiffs for the alleged labor and work they had performed.

What they claim is to set off so much of said damages as may be sufficient to extinguish their indebtedness to the plaintiffs, and to recoup and recover the excess of the \$20,000 by a judgment in their favor.

In addition to the notice of such special matter, they also pleaded the Statute of Limitations, which, it seems, would not be admissible under the general issue and notice of special matter.

Leave was asked by the plaintiffs to file two additional special counts; and the court allowed them to file the one cailed in the transcript the second special count, subject to the objection of the defendants. Preliminary matters being closed, the parties went to trial, and the verdict and judgment were for the plaintiffs in the sum of \$7,978.84. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court.

Two errors are assigned in this court as follows: (I) That the circuit court erred in allowing the new count to be filed. (II) That the court erred in admitting parol evidence of the plaintiffs' intention in writing the letter set forth and described in the transcript.

1. Amendments to the declaration under the state statute may be made by the plaintiff to correct any defect, mistake or informality in the same, not changing the form or ground of the action; and he may insert new counts in his declaration for the same cause of action as that alleged in the original counts. State Stats., Revision 1875, 426.

Authority is also given by the same statute to insert counts in any form of action which might have been originally inserted in the declaration. As quoted, the word "in" before "which," as found in the published statute, is left out, it being regarded as a misprint, or, if not, that the word "declaration" should follow it, which would give the provision the same meaning as if the word "in" was omitted. Nor is it necessary in this case to construe that provision, as it is clear that the question before the court is controlled by the preceding part of the section, which authorizes the plaintiff to insert new counts in the declaration for the same cause of action as that alleged in the original counts, as well as to correct any defect, mistake or informality in the declaration, not changing the form or ground of action.

Such amendments to the declaration are allowed in the state courts with great liberality, and it appears that the practice is carried to such an extent as to justify the remark of the court in a case cited for the plaintiffs, that the decisions of other States furnish but little guidance in expounding the meaning of their statute upon the subject. *Nash v. Adams*, 24 Conn., 33-38.

Their original Statute was passed at a very early period, and has been several times amended so as to enlarge and extend the power of the court, and the course of the decisions in the courts has been in the same direction, so as to further the beneficial purpose intended by it, which was to prevent the plaintiff from being put to a new action when by accident, mistake or inadvertence he had in his declaration failed to describe his claim with legal accuracy. In a great proportion of the cases, say the court, where amendments are allowed, the ground of

action is in one sense changed, as where, for instance, the note in suit is incorrectly described; but amendments in such cases are very frequent where the court is satisfied that the error arose merely from mistake or inadvertence, and that the action was intended to be brought for the cause of action described in the amendment.

Other examples of like import are given in the opinion, and the court remarks that the phrase, "ground of action," is not used in the Statute in any technical or narrow sense, but was intended to refer rather to the real object of the plaintiff in bringing the suit than to the technical meaning of the words; and added, that such a construction had always been given to the phrase as would further that object. *Bulkeley v. Andrews*, 39 Conn., 523, 535.

Where power is given to the court to allow the amendment, the ruling of the court in that regard is a matter of discretion, and is not the subject of error. *Stuart v. Corning*, 32 Conn., 105, 108; *Merriam v. Langdon*, 10 Conn., 460, 472.

New counts setting forth more specifically the cause of action mentioned in the prior counts are not objectionable, as it cannot be held in such a case that the new counts describe a new cause of action. *Baldwin v. Walker*, 21 Conn., 168, 180; *Hollister v. Hollister*, 35 Conn., 241.

Whenever the declaration misdescribes a writing which constitutes the cause of action, the state courts will allow the plaintiff to amend and make the description accurate, and it is even held that in an action for a breach of covenant the plaintiff may add a new count setting forth a new and distinct incumbrance not previously mentioned in the declaration. *Spencer v. Howe*, 26 Conn., 200.

Cases appealed, it is held in that State, may be amended in the appellate courts; and the rule is well settled, that if the new counts are founded upon the same transaction as the old ones, they do not change the ground of action, within the meaning of the Act allowing amendments. *Howland v. Couch*, 43 Conn., 47-50.

Writs of summons or attachment in that State may be sued out in civil actions, and the defendant, as matter of argument, to show that the amendment was improperly allowed in this case, insists that its effect would be to discharge an attachment, as it would otherwise enlarge the lien which the attachment created. Two answers may be made to that suggestion in the case: (1) It is not shown that any of the property of the defendant was attached by the sheriff. (2) But if it was, the defendant will not be injured if the plaintiff sees fit to discharge his attachment.

Without more, these authorities are sufficient to show that the ruling of the circuit court in allowing the amendment was fully justified by the state decisions, and that it is correct.

2. Suppose that is so; still it is insisted by the defendants that the ruling of the court embraced in the second assignment of error was erroneous, and that the judgment for that cause must be reversed.

Articles of agreement were executed between the parties, to the effect that the defendants agreed to furnish for the plaintiffs cotton of a certain description, to keep the mill of the plaintiffs supplied for a certain time; the cotton to be manufactured by the plaintiffs into yarn, See 11 Otto.

two-threaded and of a certain described fineness, for thirty cents per pound, allowing sixteen per cent for waste. Cash payments the first day of each month were to be made by the defendants for manufacturing the yarn. Under that contract, as set forth at large in the transcript, the defendants delivered to the plaintiffs a large amount of cotton which was manufactured into yarn by the plaintiffs, and the yarn sent back and delivered to the defendants. Invoices of cotton purchased by the defendants were shipped to the plaintiffs, and when the same was manufactured into yarn by the plaintiffs, the yarn was sent back in bags, accompanied with invoices, to the defendants.

Accounts between the parties were rendered monthly and, when adjusted, the plaintiffs drew upon the defendants for the money due for manufacturing the yarn; and it appears that the drafts were uniformly paid until the last month of the contract. Payment of the last draft being refused, the plaintiffs brought *assumpsit*, and furnished the defendants with the bill of particulars exhibited in the record.

It appears that the defendants were tape manufacturers, and that they procured the yarn for the purpose of manufacturing tape; and they offered evidence tending to show that when the contract terminated they had on hand a large quantity of yarn not woven into tape, which they then tested, and for the first time discovered that it was of a coarser quality than that specified in the contract, and they alleged that if the whole was of that quality they had been seriously damaged.

Opposed to that, the plaintiffs offered evidence tending to disprove that charge, and to show that during the early part of the contract they, at the request of the defendants, manufactured a certain quantity of yarn for them of a lower grade, and that if the defendants had on hand any of a lower grade than the contract required, it must be part of that so manufactured by the plaintiffs at the request of the defendants, who accepted the same with full knowledge of its defects.

Four letters upon the subject were written by the defendants to the plaintiffs, and in the course of the trial the defendants gave those letters in evidence, together with one written to them by the plaintiffs in reply to the last of their series. In that letter the plaintiffs refer to the fact that the defendants claim a deduction of five cents per lb. on a specified quantity of the yarn, and state that they deduct that amount from the bill; adding, to the effect that it leaves a balance due of \$2,680.24, etc.

For the purpose of rebutting any alleged admission contained in that letter, the plaintiffs gave notice to the defendants to produce the letters written by the plaintiffs in reply to the other letters to them given in evidence by the defendants. Said letters not having been produced, and it appearing that no copies had been kept and that the originals were mislaid or lost, parol evidence of their contents was admitted, which showed that the plaintiffs denied the assertion of the defendants that the yarn was of a lower grade than the contract required; and they called the surviving partner of the firm, who was the writer of the letter of the plaintiffs given in evidence, and he was asked by the counsel of the plaintiffs whether he intended in and by that

letter to admit that the defendants' claim for damages was valid and that the yarn was below the contract grade, to which question the counsel of the defendants objected, and the court sustained the objection and excluded the testimony.

Failing in that, the plaintiffs then asked the witness whether his acceptance of the defendants' proposition, to deduct five cents per pound from the quantity of yarn named, was because he admitted that the yarn was not according to contract or to settle a controversy. Seasonable objection was made to the question by the defendants; but the court overruled the objection, and the witness answered that he accepted the proposition because he did not wish to be obliged to commence a lawsuit in the City of New York, and to incur the expenses of a trial in the courts of that State; and the defendants excepted to the ruling of the court, which is the foundation of the second assignment of error.

Evidence was then introduced by the plaintiffs showing that the defendants refused to pay the draft for the balance, making that deduction, and that they demanded the same reduction in price upon all the yarn previously manufactured and delivered. Certain exceptions were also taken to the charge of the court, but they are not embraced in the assignment of errors, and for that reason will not be re-examined.

Doubtless, the general rule is that it is the province of the court to construe written instruments; but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inferences of fact to be drawn from the paper must be left to the jury; or, in other words, where the effect of a written instrument, collaterally introduced in evidence, depends not merely on its construction and meaning, but also upon extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation. *Etting v. Bk.*, 11 Wheat., 59; *Barreda v. Silsbee*, 21 How., 146, 167 [62 U. S., XVI., 86, 93].

Other cases have been decided by this court, in which the same principle was applied and in which the doctrine is more fully explained and illustrated. *Iasigi v. Brown*, 17 How., 183, 196 [58 U. S., XV., 208].

Damages were claimed by the plaintiff in that case for a false representation respecting the pecuniary standing of a third person, whereby he, the plaintiff, had been induced to sell goods and had incurred loss. Letters were introduced and facts and circumstances connected with the letters proved; and this court held that it was for the jury to say, after examining the letters in connection with the facts and circumstances, whether they were calculated to inspire and did inspire a false confidence in the pecuniary responsibility of the party, to which the defendant knew he was not entitled.

Admissions by a party or by an authorized agent, either in court or out, may, in general, be given in evidence; but the circumstances surrounding the admission, the purposes for which it was made, and the conditions attached to it, may be fully shown. It may not infrequently happen that the party making the admission is

not bound by it, and will not be estopped from denying its truth, and in view of the showing on both sides, allowing each to prove the whole truth, it will be for the jury to determine how the proof stands on the facts in controversy on which the admission is claimed to bear. *Perry v. Waterproof Mfg. Co.*, 40 Conn., 313, 317.

What the defendants charged at the trial was, that the act of the plaintiffs in making the deduction proposed by the defendants was presumptive evidence that the plaintiffs admitted that they had not fulfilled their contract, which was expressly denied by the plaintiffs. On the other hand, the plaintiffs claimed that their act in making the deduction, taken in connection with the fact that they explicitly denied that they had broken their contract, was presumptive evidence, not that they admitted a breach of the contract, but that they made the deduction to avoid the expense of litigation. Neither of the presumptions was contrary to the language of the letter and, inasmuch as it was doubtful what the precise intent of the writer was, it is clear that the question of intention was open to explanation.

Parol evidence is admissible to contradict or vary the language of a valid written instrument, by which is meant that the language employed by the parties in making it, and no other, must be used in ascertaining its meaning. Argument to support that proposition is unnecessary, and yet it is universally admitted that it may be read in view of the subject-matter and the attendant circumstances, in order more perfectly to understand the meaning and intent of the parties. 1 Greenl. Ev., 12th ed., sec. 277.

Written instruments as used in the rule, says Taylor, include not only records, deeds, wills and other instruments required by statute or by the common law to be in writing, but every document which contains the terms of a contract between different parties. Text writers everywhere support that rule; but Taylor admits that the rule will not strictly apply to certain less formal documents, of which he gives several examples. 2 Taylor, Ev., 6th ed., 988.

Extrinsic evidence, it may be admitted, is not admissible in expounding written contracts to prove that other terms were agreed to, which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it; still it is competent, said Shaw, *Ch. J.*, to offer parol evidence to prove facts and circumstances respecting the relations of the parties, the nature, quality and condition of the property which constitutes the subject-matter respecting which it was made. *Knight v. Worsted Co.*, 2 Cush., 271-283.

Where a party was about to publish an advertising chart, and the defendant promised in writing to pay him \$50 for inserting his business card in two hundred copies of the chart, the Supreme Court of Massachusetts held, in an action to recover the amount, that parol testimony was admissible for the interpretation of the contract and its application to the subject-matter; that at the time of the making of the agreement the plaintiff represented and promised that his chart should be composed of a certain material and be published in a certain manner. In disposing of the case, the court advert to the rule that the obligation of a written contract cannot be abridged or modified by

parol evidence, but add that it is equally well settled that, for the purpose of applying the terms to the subject matter and removing or explaining any uncertainty or ambiguity which arises from such application, parol testimony is legitimately admissible, and for that purpose all the facts and circumstances of the transaction out of which the contract arose, including the situation and relation of the parties, may be shown. Authorities in great numbers are cited in support of the proposition; and the court further say, that the purpose of all such evidence is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. *Stoops v. Smith*, 100 Mass., 63-66.

Apply the strictest rule to the question, and it is clear that the ruling of the circuit court is correct, as the answer of the witness, which was admitted, did not tend in any view to contradict anything stated in the letter; but the ruling of the court may also be sustained upon the ground that the letter was a mere offer of compromise, which could not prejudice the rights of the plaintiffs, especially as the record shows that the defendants subsequently refused to pay the draft drawn for the balance.

Offers of compromise to pay a sum of money by the way of compromise, as a general rule are not admissible against the party making the offer; but if admitted, it is clear that the offer is open to explanation, no matter whether it was by letter or by oral communication. *Gerish v. Sweetser*, 4 Pick., 374; *Bridge Co. v. Granger*, 4 Conn., 142, 148; *Stranahan v. El. Haddam*, 11 Conn., 507, 513.

By all or nearly all the cases, the rule as established is not that an admission made during or in consequence of an effort to compromise is inadmissible, but that an offer to do something by the way of compromise, as to pay sums of money, *allow certain prices*, deliver certain property, or *make certain deductions*, and the like, shall be excluded. These cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation.

Decided cases may be found, where it is said that the evidence is admissible unless the offer made was stated to be without prejudice; but the rule, in general, both in England and the United States, is, that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise. *Lofts v. Hudson*, 2 Man. & R., 481-484; *Phil. Ev.*, 5th Am. ed., 427, n. 124; 1 Greenl. Ev., sec. 192.

Suffice it to say, that such evidence having been admitted, it was clearly competent to give evidence to explain it, especially as the evidence given did not contradict any of the terms of the letter introduced by the defendants.

Judgment affirmed.

JOHN J. KAIN, BISHOP, INCUMBENT, etc.,
Appt.,
v.

E. G. GIBBONEY, Exrx. of ROBERT GIBBONEY, Deceased, ET AL.

(See S. C., 11 Otto, 362-369.)

See 11 OTTO. U. S., Book 25.

Charitable bequests—when invalid.

1. The English Statute of Charitable Uses having been repealed in Virginia, the courts of chancery of that State have no power to enforce charities where the objects are indefinite and uncertain, and charitable bequests stand on the same footing as other bequests.

2. A bequest to the Bishop of Wheeling, or his successor in said dignity, for the benefit of an unincorporated religious community, but not declared to be for religious uses, held invalid in that State.

[No. 89.]

Submitted Dec. 1, 1879. Decided Dec. 22, 1879.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

This action was brought in the court below by Richard V. Wheelan, Bishop of Wheeling, for the purposes stated in the opinion. The plaintiff having died pending the suit, it was revived in the name of the present plaintiff in error, his successor, the case to proceed with the same effect as if it had been commenced by said Kain, saving to the defendants the benefit of any question in regard to the transmissibility of the right of action to the plaintiff in error. The complainant's bill having been dismissed upon demurrer, the present appeal was taken.

Mr. John W. Johnston, for appellant.

Messrs. John A. Campbell and J. W. Caldwell, for appellees.

Mr. Justice Strong delivered the opinion of the court:

The bequest which the plaintiff seeks to enforce by this bill was made in terms, "To Richard V. Wheelan, Bishop of Wheeling, Ohio, or his successor in said dignity," the testatrix adding "who is hereby constituted a trustee for the benefit of the community (previously described as a religious community attached to the Roman Catholic Church) of which I may die a member, the said property or money to be expended by the said trustee for the use and benefit of said community." It was an attempted testamentary disposition under the law of Virginia, and the matter now to be determined is, whether, by that law, it can be sustained. It may be conceded that, notwithstanding its uncertainty, a legacy given in the words of this will, if for a charity, would be held valid in England, and in most of the States of the Union. But we have now to inquire: What is the law of Virginia? The gift was made to "Richard V. Wheelan, Bishop of Wheeling, or to his successor in said dignity." It was, therefore, in effect, a gift to the office of the Bishop of Wheeling. Neither Bishop Wheelan, nor any Bishop succeeding him, was intended to derive any private advantage from it. Nothing was intended to vest in him but the trust, and that was required to be executed by whomsoever should fill the office of Bishop, only so long as he should fill it, and executed in his character of Bishop, not as an individual. The bequest was practically to a bishopric, and as a Bishop is not a corporation sole, it may be doubted whether, at the decease of the testatrix, there was any person capable of taking it. True it is that, generally, a trust

NOTE.—Charitable uses; what is a charity; bequests valid for charitable purposes and those not. See note to *Vidal v. Girard*, 42 U. S. (1 How.), 127.

will not be allowed to fail for want of a trustee: courts of equity will supply one. But if it could be conceded that Wheelan was, in his lifetime, capable of taking the bequest, and that Bishop Kain is capable of taking and holding after the death of his predecessor, a greater difficulty is found in the uncertainty of the beneficiaries for whose use the trust was created. In the words of the will, they are a religious community, of which the testatrix contemplated she might die a member. She died a member of a religious community attached to the Roman Catholic Church, known as the "Sisters of St. Joseph." That is an unincorporated association, and it is the association as such, and not the individual members who composed it when the testatrix died, which is declared to be the beneficiary. Nor is it the community attached to any local church which is designated, but a community attached to the Roman Catholic Church, wherever that Church may exist. Its members must be constantly changing, and it must always be uncertain who may be its members at any given time. No member can ever claim any individual benefit from the bequest, or assert that she is a *cestui que trust*; and the community having no legal existence, can never have a standing in court to call the trustees to account. This bequest is, therefore, plainly invalid, unless it can be supported as a charity. And it is far from evident that it is a gift for charitable uses. It looks more like private bounty. Charity is generally defined as a gift for a public use. Such is its legal meaning. Here the beneficial interest is given to a religious community, but not declared to be for religious uses. There is nothing in the will to show that aid to the poor, or aid to learning, or aid to religion or to any humane object was intended.

Conceding, however, that it is a charitable bequest, it is a Virginia gift, by a Virginia will, and in that State charities, in general, are not upheld to any greater extent than ordinary trusts are. This will be very manifest when the decisions of the courts of the State and of this court are reviewed. The subject was fully considered in *Baptist Asso. v. Hart*, 4 Wheat., 1, decided in 1819. There it appeared that the testator, a citizen of Virginia, had bequeathed certain military certificates to "The Baptist Association that for ordinary meets at Philadelphia annually," to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of his father's family. Before the death of the testator, the Legislature of the State had repealed all English statutes, including, of course, the 43d Elizabeth, at that time generally regarded as the origin of the jurisdiction of equity over charities. This court held: that the Baptist Association, not having been incorporated at the testator's decease, could not take the trust as a society. 2. That the individuals composing it could not take. 3. That there were no persons who could take, if it were not a charity. 4. That the bequest could not be sustained as a charity. 5. That charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot, independently of the 43d Elizabeth, be sustained by a court of equity, either in the exercise of the ordinary

jurisdiction of the court, or in enforcing the prerogative of the King as *parens patriæ*.

It is true, that the 5th Rule thus announced, as a general proposition, is now known to have been erroneously stated. Trusts for charitable uses are not dependent for their support upon the Statute of 43d Elizabeth. They had been sustained by the English Chancellors in virtue of their general equity powers before the enactment of that statute in numerous cases. *Vidal v. Girard*, 2 How., 127. And generally, in this country, it has been settled that courts of equity have an original and inherent jurisdiction over charities, though the English Statute is not in force, and independently of it. It is believed that such is the accepted doctrine in all the States of the Union, except Virginia, Maryland and North Carolina. But as we have said, the rule in Virginia is different, and it has been different ever since the case of *Vidal v. Girard* was decided.

In 1832, the case of *Gallego v. Atty-Gen.*, 3 Leigh, 450, came before the Court of Appeals of that State. A testator had directed his executors to lay by \$2,000, "to be distributed among needy poor and respectable widows;" and in case the Roman Catholic chapel should be continued at the time of his death, he directed the executors to pay \$1,000 towards its support, and if the Roman Catholic congregation should come to a determination to build a chapel at Richmond, to pay \$3,000 towards its accomplishment. He further devised a lot to four trustees, in trust, to permit all and every person belonging to the Roman Catholic Church as members thereof, or professing that religion and residing in Richmond, to build a church on the lot for the use of themselves, and of all others of their religion who might thereafter reside in Richmond. These were, undoubtedly, gifts to charitable uses. Upon an information and bill in chancery, to enforce the bequest and devise as charities, it was held that they were all uncertain as to the beneficiaries and, therefore, void. The court ruled that the English Statute of Charitable Uses having been repealed in Virginia, the courts of chancery of that State had no power to enforce charities where the objects are indefinite and uncertain, and that charitable bequests stand on the same footing as other bequests. The opinion of President Tucker is very elaborate, and fully sustains that view, approving the doctrine announced in *Baptist Asso. v. Hart* [*supra*].

This case was followed by *Wheeler v. Smith*, 9 How., 55, decided in 1850, after *Vidal's Case*. It re-asserted the doctrine of *Gallego v. Atty-Gen.*, as the law of Virginia, and declared that the courts of chancery had no jurisdiction to uphold charities when the objects are indefinite and uncertain. Therefore, a bequest for a public purpose, namely: one given to trustees "For such purposes as they might consider to be most beneficial to the town and trade of Alexandria," was declared void.

In *Seaburn v. Seaburn*, 15 Gratt., 423, the case of *Gallego v. Atty-Gen.* was again recognized as the law of the State, except so far as it had been modified by the statutes, and it was ruled that the statute did not authorize a devise of land for the use of a religious congregation, but a conveyance only. *A fortiori*, that it did not authorize a bequest of money, to be expended

in building a church at a specified place, or for the support of the pastor of such church.

So in a case not reported, a devise in these words: "I give to the Rev. W. J. Plummer, D. D., the residue of my estate, real and personal, in trust for the Board of Publication of the Presbyterian Church of the United States," was held to be void.

We do not overlook the fact that there are cases in which trusts for charitable uses have been sustained, though the description of the beneficiaries was uncertain, but in them all the decisions have been rested upon statutes of the State enacted to provide for special cases. In 1841-2, an Act was passed by which it was declared that every conveyance should be valid which should thereafter be made of land for the use or benefit of any religious congregation, as a place for public worship, or as a burial place, or a residence for a minister. This was amended in 1866-7 by adding "Or for the use or benefit of any religious society; or a residence for a Bishop, or other minister or clergyman, who, though not in special charge of a congregation, is yet an officer of such church or society, and employed under its authority and about its business." Civil Code of 1860, ch. 78, tit. 22, sec. 8; Civil Code of 1873, ch. 76, tit. 22, sec. 8. It will be observed these statutes validate only conveyances. They controlled the decision made in *Brooke v. Shacklett*, 13 Gratt., 301, decided in 1856, and *Seaburn v. Seaburn*, decided in 1859 [15 Gratt., 423]. The first of these cases—a deed conveying property in trust for the erection of a local Methodist church and the use of its members—was sustained. But *Gallego's Case* was expressly recognized as the law of the State, except so far as the statute had changed it.

On the 2d of April, 1839, the Legislature passed an Act declaring that devises and bequests for the establishment or endowment of unincorporated schools, academies or colleges should be valid, requiring, however, that reports of the devises or bequests should be made to the Legislature, and that in case it should fail to incorporate the schools, academies, etc., within a certain time, the gifts should fail. Acts of 1839, ch. 12, 11, 13.

So, also, at an early date, the State created a corporation to manage what was called the literary fund (Civil Code of 1860, chapters 78, 79, 80), and by the sections of chapter 80 it was enacted that every gift, grant, devise or bequest made since April 2, 1839, or which might be made thereafter, for literary purposes, or for the education of white persons within the State, other than for the use of a theological seminary, whether made to a body corporate or unincorporated, or to a natural person, should be as valid as if made to or for the benefit of a certain natural person, with some exceptions. Under these and similar statutes charitable gifts in favor of the literary fund or of schools, have been sustained, which, without the statutes, would have been held invalid. Such were *Literary Fund v. Dawson*, 10 Leigh, 147, and 1 Rob., 402; *Kinnaird v. Miller*, 25 Gratt., 107, and *Kelly v. Love*, 20 Gratt., 124. But in all these cases the general law of the State is recognized to be as asserted in *Gallego v. Atty-Gen.* The bequest now under consideration, therefore, cannot be sustained as a charity.

See 11 OTTO.

Equally certain is it that the complainant cannot stand upon the consent decree made by the Circuit Court of Wythe County upon the issue of *devisavit vel non*, ordered to try whether the instrument purporting to be the will of the testatrix was her will. That issue, framed to try only the validity of the instrument, not the validity of the disposition made by it, was never tried. It was dismissed. No decree was made that the will was valid. To the agreement recited in the decree, the defendant was not a party, and the arrangement made by the counsel of the parties to the record did not bind her. Moreover, if she had been bound by it, it conferred no right upon the present complainant.

The decree of the Circuit Court is affirmed.

Cited—107 U. S., 168.

MERCANTILE NATIONAL BANK OF THE CITY OF HARTFORD, Appt.,

v.

WILLARD CARPENTER ET AL.

(See S. C., 11 Otto, 567, 568.)

Statute of Limitations—demurrer—equity rule.

1. Where it appears on the face of plaintiff's bill, that the case which it makes is barred by the Statute of Limitations, the defect can be taken advantage of by demurrer.

2. Rule 29 of equity practice established by this court, applies only where leave to amend is asked before a demurrer is allowed.

3. Where it does not appear what amendment or amendments the appellant desired to make, nor that the court below, in anywise abused the discretion by refusing leave to amend, its judgment will not be set aside for such refusal.

[No. 409.]

Submitted Dec. 5, 1879. Decided Dec. 22, 1879.

APPPEAL from the Circuit Court of the United States for the District of Indiana.

The case is stated in the opinion, and in the case there referred to.

Messrs. Andrew L. Robinson, Asa Iglehart and John E. Iglehart, for appellant.

Messrs. Charles Denby, D. B. Kumler, James M. Shackelford and R. D. Richardson, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

The chief difference between this case and the case of the same *Bank [Wood] v. Carpenter* (at law, No. 628), in which our opinion has just been delivered [*ante*, 807] is, that this is a suit in equity, while that was an action at law. The bill sets out the same facts in the same way as the declaration, except that the latter alleges a fraudulent purchase by Keller of a judgment in favor of the *Bank v. Willard Carpenter*, while the bill alleges such a purchase of a judgment in favor of the Bank against Willard Carpenter and John Love. The defendants severally demurred. The demurrers were sustained, and the complainant asked leave to amend. Leave was refused and the bill was dismissed. The complainant thereupon appealed to this court.

Our reasoning in the case at law and the authorities there cited are applicable here. It appears on the face of the bill that the case which it makes is barred by the Statute of Limitations, and that the excuse of concealment of "the cause of action" by the defendants is not so alleged as to avail the complainant. This defect can be taken advantage of by demurrer. *R. I. v. Mass.*, 15 Pet., 233; *Marvrell v. Kennedy*, 8 How., 210. The objection of laches is also fatally apparent. *Brown v. Buena Vista Co.*, 95 U. S., 157 [XXIV., 422]; *Duncan v. Lyon*, 3 Johns. Ch., 351. The demurrers of the defendants were, therefore, rightly sustained, and the bill was properly dismissed.

It is insisted that the complainant was entitled of right to amend under the 29th of the Rules of equity practice established by this court, and that the learned Judge below erred in refusing the leave asked for. That Rule has no application, and does not affect the case. It applies only where leave is asked before a demurrer is allowed. Formerly, upon the allowance of a demurrer to a whole bill, the bill was out of court, and no subsequent proceeding could be taken in the cause. 1 Dan. Ch. Pr., 597; 1 Barb. Ch. Pr., 111. The rigor of this principle was subsequently relaxed. It is unnecessary to pursue the subject further, because the practice in such a state of things in the courts of the United States is regulated by the 35th Rule of equity practice, which is as follows:

"If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable."

In this case it does not appear what amendment or amendments the appellant desired to make, nor that the court below in anywise abused the discretion with which it was clothed. Error must be shown affirmatively. It cannot be presumed.

The decree of the Circuit Court is affirmed.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—111 U. S., 190.

CORNELIA M. STEWART, Individually and
as Exrx., etc., ET AL., Appts.,
v.

JOHN H. PLATT, Assignee in Bankruptcy of
SIMEON LELAND ET AL.

(See S. C., 11 Otto, 731-744.)

Chattel mortgage by firm, filing of—when valid—assignee in bankruptcy—gift to wife—exchange of securities.

1. A chattel mortgage, executed by a firm upon firm property is void, under the New York Statute, as against creditors, subsequent purchasers and mortgagees in good faith, unless filed in the city or

town where the individual members of the firm severally reside.

2. The actual residence, and not the residence as recited in the mortgage, controls.

3. Although chattel mortgages, by reason of the failure to file them in the proper place, are void as against judgment creditors, they are valid and effective as between the mortgagors and the mortgagee.

4. An assignee in bankruptcy takes property subject to such liens or incumbrances as would have affected it, had no adjudication in bankruptcy been made.

5. A gift from the husband to the wife, at a time when his right to make it cannot be disputed, is not assailable by the assignee in bankruptcy.

6. A mere exchange of securities is not forbidden by the letter or the spirit of the Bankrupt Law.

[No. 80.]

Argued Nov. 21, 24, 1879. Decided Dec. 22, 1879.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Messrs. H. E. Davies and Roscoe Conkling, for appellants.

Messrs. R. H. Dana, D. McMahon, John J. Thomson and Redfield & Hill, for appellees.

Mr. Justice Harlan delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York in a suit instituted by the assignee in bankruptcy of Simeon Leland, Warren Leland and Charles Leland, late partners under the name of Simeon Leland & Co. The latter were adjudged bankrupts upon the petition of one of their creditors filed on the 4th March, 1871.

The objects of the suit, so far as they concern the appellants, were:

1. To obtain the distribution of a fund arising from the sale of furniture and other personal property in use in the Metropolitan Hotel, in the City of New York, at the commencement of the proceedings in bankruptcy. The Lelands were lessees of that hotel under a written lease from A. T. Stewart, dated April 30, 1867, for a term of four years thereafter, at an annual rent of \$79,186, payable in equal monthly installments. Upon the property thus sold Stewart held, as security for rent reserved by the lease, several chattel mortgages executed by the Lelands, the validity of which was questioned in this suit by the assignee in bankruptcy.

2. To have a decree declaring sundry judgments against the bankrupts within four months prior to the adjudication in bankruptcy, as well as certain conveyances of real estate to Stewart, to be invalid under the provisions of the Bankrupt Law and as against the assignee.

The first question to which we will direct our attention relates to those several chattel mortgages.

The district and circuit courts concurred in opinion that they were not filed in the office designated by the statutes of New York and, upon that ground, were ineffectual to give the security and lien contemplated by the parties, and void as against the assignee.

By the laws of New York, it is provided that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery, and followed by an actual and continued

NOTE.—*Chattel mortgage allowing possession and sale of goods, whether void or not.* See note to Robinson v. Elliott, 89 U. S. XXII., 796.

Settlement or conveyance, for benefit of wife and child; when good or void as to creditors. See note to Sexton v. Wheaton, 42 U. S. (1 How.), 219.

change of possession of the things mortgaged, should be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the Act. The statute requires such mortgages to be filed in the town or city where the mortgagor, "If a resident of that State, shall *reside* at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument." In the City of New York, the mortgage is directed to be filed in the office of the register of said city; in other cities of the State, and in the several towns thereof in which a county clerk's office is kept, in such office; and, in each of the other towns of the State, in the office of the town clerk thereof. Registers and clerks are required to file such instruments, presented to them for that purpose, and indorse thereon the time of receiving the same, and keep them deposited in their offices for the inspection of the persons interested.

It is further provided that every mortgage filed in pursuance of the statute should cease to be valid against the creditors of the mortgagor, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage, a true copy thereof, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him in virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then *reside*.

The bankrupts resided, with their families, in the County of Westchester, at the respective dates of the several chattel mortgages, but the business of the firm of Simeon Leland & Co., as lessees of the Metropolitan Hotel, was carried on in the City of New York, and all the property covered by the mortgages was in use in that hotel. The mortgages were filed in the office of the register of deeds for the City and County of New York, and were not filed in the towns where the lessees respectively resided with their families. The contention of learned counsel for the appellants is that *the firm* was the mortgagor, that *its* residence or domicile was in the City of New York, and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word "*reside*" employed in the statute. It is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination. But no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside. The statute, upon its face, furnishes persuasive evidence that its framers intended to make a

sharp distinction between the place where the property might be at the time of the execution of the mortgage and the place of the mortgagor's residence. If he be a non-resident of the State of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual *situs* of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors at the time respectively reside.

Some stress is laid upon the fact that in each of the mortgages the mortgagors are described as "of the City of New York." If that is to be regarded as a representation by them that their fixed abode was in that city, it is obvious that the statute, designed for the protection of creditors, subsequent purchasers and mortgagees in good faith, cannot be thus defeated. Their rights depend not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing, otherwise the object of the statute would be frustrated by the mere act of the parties to the injury of those whose rights were intended to be protected. The recital of the residence in the mortgage "seems to be of no importance, and might for the matter of security be omitted altogether." Nelson, *Ch. J.*, in *Chandler v. Bunn*, Hill. & D. Supp. (N. Y.), 167.

A good deal was said in oral argument as to the serious inconveniences which may result from any construction of the statute that requires chattel mortgages executed by a firm upon its property to be filed elsewhere than in the town or city where the property is used, and where the firm business is conducted. On the other hand, it is quite easy to suggest reasons of a cogent character why, in view of the manifest purpose of such legislation, the actual residence of the mortgagors should determine the place of filing. But these are considerations to be addressed more properly to the Legislature of New York, with whom rests the power to make such alterations as experience may suggest to be necessary. The statute expressly declares that a chattel mortgage not filed as required by its provisions, is void as to creditors and subsequent purchasers and mortgagees in good faith; and the Circuit Justice well said that the statute had "Imposed a rigid and unbending condition, to wit: a filing in the place where the mortgagors actually reside, as a preliminary to the validity of the mortgage. Whether this condition is wise or not, whether convenient or difficult of performance, is not for the courts to say. The statute exacts it, and the courts must see that it is performed." Upon this branch of the case, therefore, we concur in opinion with the circuit court.

It follows, necessarily, from what has been said, that the circuit court rightly adjudged that creditors who obtained judgments and sued out executions against the Lelands, previous to the commencement of bankruptcy proceedings, had prior claims and liens upon the proceeds arising from the sale of the property covered by the chattel mortgages.

But the final decree in the circuit court is

erroneous in directing the residue of the proceeds of the sale of the mortgage property, after satisfying execution creditors, "To be paid to the assignee (in bankruptcy) for the purposes of the trust," and in charging that balance with the payment of the fees due counsel of the assignee.

In *Yeatman v. Sav. Inst.*, 95 U. S., 764 [XXIV., 589], we held it to be an established rule that, "Except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt." *Brown v. Heathcote*, 1 Atk., 160; *Mitchell v. Winslow*, 2 Story, 630; *Gibson v. Warden*, 14 Wall., 244 [81 U. S., XX., 797]; *Cook v. Tullis*, 18 Wall., 332 [85 U. S., XXI., 933]; *Donaldson v. Farwell*, 93 U. S., 631 [XXIII., 993]; *Jerome v. McCarter*, 94 U. S., 784 [XXIV., 136]. He takes the property in the same 'plight and condition' that the bankrupt held it. *Winsor v. McLellan*, 2 Story, 492."

The decree below is plainly in contravention of this rule. Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and the mortgagee. *Lane v. Lutz*, 1 Keyes, 213; *Wescott v. Gunn*, 4 Duer, 107; *Smith v. Acker*, 23 Wend., 653. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided. It could not be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens or incumbrances as would have effected it, had no adjudication in bankruptcy been made. While the rights of creditors, whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the Bankrupt Law.

It results that the court below erred in directing the fees of the assignee's counsel to be paid out of the residue of the fund in court remaining after the claims of execution creditors were satisfied. To that balance the appellants are entitled without diminution, to be applied in payment of the rent remaining unpaid,

after crediting thereon \$43,500, the agreed valuation of the real estate conveyed to Stewart, and to which we will presently refer in another connection. It was error to charge that balance with the payment of costs of fees of counsel, or any expense incurred by the assignee in bankruptcy in the administration of his trust.

We come now to the questions relating to the several conveyances of real estate made to Stewart in January and February, 1871; all of which were adjudged by the circuit court to be void as against the assignee in bankruptcy.

It is important to consider the circumstances under which those conveyances were made. Early in the month of January, 1871, commenced a series of interviews between the lessees and Stewart, brought about, perhaps, by the demand of the latter, through his agent, for the settlement of rent in arrear, which then amounted to about \$50,000. The lessees desired a new lease at a reduced rent, while Stewart insisted upon the payment or a satisfactory arrangement of the rent due him. The former confessed present inability to discharge the indebtedness in any other mode than by conveyances of real estate, which they urged the latter to take at fair valuation and give a new lease at reduced rent. The lessees, in those interviews, expressed the utmost confidence that such an arrangement would relieve them from all immediate financial burdens, growing out of the hotel business, and enable them to meet promptly thereafter not only installments of rent, but all other engagements. Stewart, finally, agreed, for the accommodation of his lessees, to accept certain real estate, offered to him at the aggregate price of \$43,500, in satisfaction of a like amount of back rent and, necessarily, in extinguishment, to that extent, of his mortgages upon the furniture and other property in the hotel building. He also signified his willingness to renew the lease to the same parties, at the reduced rent of \$65,000. In pursuance of this arrangement the lessees, or some of them, caused conveyances to be made to Stewart of the real estate in question, consisting of a farm in Westchester County, and several houses and lots on Crosby, Jersey and Prince Streets, in New York City.

We are all of opinion that the conveyance, dated February 1, 1871, by Mrs. Warren Leland and her husband, of the farm in Westchester County, was unassailable by the assignee upon any ground whatever. That property was a gift from the husband to the wife, at a time when his right to make it cannot be disputed. As early as 1868 it was distinctly separated from the mass of his property, and the title made to her for her benefit. There is no proof that the conveyance was with any intention to defraud his then existing or future creditors. Of those whose interests the assignee in bankruptcy here represents, or assumes to represent, none, except perhaps one, were creditors of Warren Leland at the date of that conveyance. The bill alleges that the bankrupts, or some of them, intended to give Stewart a preference over other creditors, and to that end, it is charged, Warren Leland caused the conveyance to be made to his wife of the farm in question, "Owned by the said Warren Leland, but standing in the name of his wife." But clearly it was not owned by the husband after the execu-

tion of the absolute conveyance of 1868. Her rights, by reason of anything appearing in this record, could not be disturbed by the husband's creditors who became such after the execution of the conveyance to her. She chose, in order to aid her husband, or for other reasons satisfactory to herself, to unite with him in the conveyance to Stewart, thereby surrendering her estate for the benefit of the husband's creditor. Suppose she had not so done, and that the title had remained in her name up to the time of the adjudication in bankruptcy, would it be contended, for a moment, that the assignee in bankruptcy, or that the creditors of the bankrupts, becoming such after the execution of the conveyance, could have subjected that farm to the debts of Warren Leland against the consent of his wife? This question must, in view of the evidence, receive a negative answer, which shows, conclusively, that the appropriation of the wife's property, by the joint act of herself and husband, to the payment of the debt of a particular creditor of the latter, is not a matter of which the assignee in bankruptcy, or any subsequent creditor of the husband, can rightfully complain. The decree of the circuit court declaring the conveyance of that farm to Stewart to be void, and requiring Mrs. Stewart to convey to the assignee in bankruptcy, was, for the reasons stated, clearly erroneous.

It remains to consider that part of the decree which declared the conveyances to Stewart of the houses and lots on Crosby, Jersey and Prince Streets, in New York City, to be void.

When these conveyances were agreed to be made, Stewart, as already stated, had an undisputed claim for rent in arrear amounting to over \$50,000. Under the provisions of the mortgages, a default in the payment of rent having taken place, Stewart, at the time the exchange was determined upon, could have taken actual possession of the mortgaged property and sold it for the best price he could obtain in satisfaction of his claim for rent. His right to possession for such a purpose could not have been questioned by any creditor of the lessees who had not, by previous judgment and execution, acquired a lien upon the mortgage property. [*Burdick v. McVanner*], 2 Den., 170; [*Stewart v. Slater*], 6 Duer, 83; [*Hall v. Sampson*], 35 N. Y., 274; [*Ackley v. Finch*], 7 Cow., 290; [*Langdon v. Buel*], 9 Wend., 80; [*Patchin v. Pierce*], 12 Wend., 61. Instead of exercising that right—a course which would have seriously endangered, if it had not utterly destroyed, the business and credit of the lessees—Stewart, at their earnest solicitation, and for their accommodation, accepted real estate at a fair valuation in satisfaction of rent due and unpaid, thereby surrendering and extinguishing his lien to that extent upon the property described in the chattel mortgages. Of the \$43,500 at which the real estate received by Stewart was valued, \$19,500 represented the farm in Westchester County, which, we have shown, could not have been subjected to the claim of any creditors who became such after the conveyance to Mrs. Leland. In point of fact, therefore, only \$24,000 in value of real estate, belonging to the bankrupts, was received by Stewart, while he surrendered his claim and lien for rent to the extent of \$43,500. This was, in its substance and effect, a mere exchange

of securities, not forbidden by the letter or the spirit of the Bankrupt Law. In *Cook v. Tullis*, [*supra*], we said that "A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling it or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to anyone, and does not impair the value of his estate. An insolvent is not bound in the misfortune of his insolvency to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously." Substantially, the same doctrine was announced in *Clark v. Iselin*, 21 Wall., 360 [88 U. S., XXII., 568]; *Sawyer v. Turpen*, 91 U. S., 114 [XXIII., 235].

These principles would seem to be decisive of the case under consideration. While there is some conflict in the testimony as to certain matters, we have a strong conviction, from all the facts and circumstances established by the proof, that the transaction by which the real estate, at a fair valuation, was substituted for the lien, of like amount, upon personal property, was without any fraudulent purpose. The substitution was not made to give a preference to Stewart. The belief and hope of the bankrupts, expressed in decided terms to him, were that the substitution or exchange would enable them to remove all financial obstacles of a serious nature. They induced him, by earnest representations, to share these hopes. He delayed or forebore to exercise the right, which, at the commencement of negotiations, he undoubtedly had, of taking the mortgaged property into his custody, and disposing of it in satisfaction of his claim for rent. That the arrangement in question did not substantially impair the value of the bankrupts' estate is abundantly clear. His lien, which was extinguished by the exchange, exceeded, in value, that portion of the real estate embraced in the conveyances to him, which the creditors of the bankrupts could have reached under their executions. Reference is made to the fact that the mortgaged property brought only \$43,469.31, and that circumstance is relied upon to show that the exchange did impair the estate of the bankrupts. This argument proceeds upon the assumption either that when the exchange was determined upon, he had not a lien upon the mortgaged property, as between him and the mortgagors, or that if he had one, he would not have enforced it by taking the property into his custody, upon a refusal of the lessees to make some satisfactory arrangement. But such assumption is without support in the law or in the proof. Besides, the evidence leads to the conclusion that the mortgaged property sold, at public auction, for less than its fair value. While the witness, who made the inventory and appraisal, testifies that it sold for its full value, the auctioneer, who conducted the sale, testified that with proper appliances it would have brought fifty per cent more. It is

certain that it sold for much less than either the lessees or Stewart at the time of their negotiations supposed it to be worth.

For these reasons, we are of opinion that the court below erred in adjudging the conveyances to Stewart, of the houses and lots on Crosby, Jersey and Prince Streets, in New York, to be void, requiring Mrs. Stewart to convey the same to the assignee in bankruptcy, and declaring his estate liable for the rents and profits of the same.

The decree below is reversed, with directions to enter a decree in conformity with this opinion.

Mr. Justice Field delivered the following opinion:

I concur in the decree of reversal in this case, but I go further than the majority of the court. I think that the chattel mortgages were properly filed with the register in the City of New York. The mortgagors were partners doing business there. They are described in the mortgages as of that city. The property mortgaged was furniture in a hotel situated there, and it is to the records of the city that one would naturally resort to ascertain whether there were any liens upon it. The domicile of a firm, under the law requiring chattel mortgages to be filed in the county where the mortgagors reside, is, in my judgment, the place where it is located and carries on its business. I am of opinion, therefore, that the chattel mortgages in this case held the property against the judgments of the creditors, and I am authorized to say that **Mr. Justice Swayne** and **Mr. Justice Bradley** agree with me in this view.

Cited—105 U. S., 406; 36 Ohio St., 11.

JAMES C. BABBITT, Assignee of **E. MILLER**, a Bankrupt, *Plff. in Err.*,

v.

JOHN SHIELDS AND JOHN FINN.

(See S. C., "*Babbitt v. Finn*," 11 Otto, 7-15).

Sureties in appeal bond—liability of—new appeal.

1. It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the appellate court should be issued against the principal.

2. The sureties in a bond, given in the district court to indemnify the opposite party on an appeal to the circuit court, are not liable for the costs incurred by a subsequent removal of the cause from the circuit court to the Supreme Court.

3. Such new appeal will not diminish or discharge the liability of the sureties on the bond given in the district court, unless the judgment rendered in the district court is wholly reversed.

[No. 106.]

Submitted Dec. 16, 1879. Decided Jan. 5, 1880.

ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Mr. Nathaniel Myers, for plaintiff in error:

I. The answer admitted the bond and breach. This entitled plaintiff to judgment on the pleadings, unless the special matter pleaded constituted a defense in law.

II. The omission of the names of the sureties in the body of the bond was immaterial.

Pequawket Bridge v. Mathes, 7 N. H., 230;

Martin v. Dortch, 1 Stew., 479; *Keeton v. Spradling*, 13 Mo., 321; *Johnson v. Steamboat*, 13 Mo., 539; *Cunningham v. State*, 14 Mo., 402; *Cooke v. Crawford*, 1 Tex., 9; *Brandt*, Sur., sec. 15, and authorities there cited.

III. The liability of the sureties was fixed by the affirmance of the judgment of the district court by the circuit court. That was a breach of the condition to prosecute the writ of error with effect.

Karthauss v. Owings, 6 Har. & J., 134.

IV. It was not necessary to sue out execution against the original judgment debtor.

Smith v. Ramsay, 6 Serg. & R., 573; *Anderson v. Sloan*, 1 Col., 487; *Wood v. Derrickson*, 1 Hilt., 410; *Tissot v. Darling*, 9 Cal., 285; *Brandt*, Sur., sec. 404; *Smith v. Gaines*, 93 U. S., 341 (XXIII., 901).

V. The second writ of error did not annul the original judgment of affirmance, nor discharge the sureties on the original *superseas* bond.

Dolby v. Jones, 2 Dev. (N. C.), 109; *Ashby v. Sharp*, 1 Litt. (Ky.), 156; *Jordan v. Agawam Woolen Co.*, 106 Mass., 571; *Storrs v. Engel*, 19 N. B., 90; *Hinckley v. Kretz*, 58 N. Y., 583; *Smith v. Falconer*, 11 Hun (N. Y.), 481; *Gillette v. Bullard*, 20 Wall., 571 (87 U. S., XXII., 387); *R. S. U. S.*, 187, sec. 1000; *Smith v. Crouse*, 24 Barb., 433; *Richardson v. Krapp*, 5 Daly, 885; *Gardner v. Barney*, 24 How. Pr., 467; *Robinson v. Plimpton*, 25 N. Y., 484; *Kellar v. Williams*, 10 Bush., 216; *Brandenburg v. Flynn*, 12 B. Mon., 399; *Pott v. Nathans*, 1 Watts & S., 155; *Patterson v. Pope*, 5 Dana, 241.

Mr. Given Campbell, for defendants in error:

It is insisted on behalf of defendants that the judgment was proper; that the new bond from the circuit court, the writ of error and *superseas* operated as a discharge of the sureties on the bond sued on, *i. e.*, the bond given in the district court.

First. An appeal bond is intended as a bond of indemnity to secure the payment of the debt, as evidence by the judgment of the court, if the defendant fails in the appellate court.

See Rule 29 of Supreme Court of United States; *Evans v. Hardwick*, 1 J. J. Marsh., 435; *Moore v. Gorin*, 2 Litt. (Ky.), 186; *Morriss v. Barclay*, 2 J. J. Marsh., 376; *Sumrall v. Reid*, 2 Dana, 65; *Shannon v. Spencer*, 1 Blackf., 120; *Norwood v. Martin*, 3 Har. & J., 199; *Parker v. R. R. Co.*, 44 Mo., 415.

The appeal from the circuit court to the Supreme Court, so far as the judgment of the former affected these defendants, sureties on the bond from the district to the circuit court, vacated said judgment.

See, *Paine v. Coudin*, 17 Pick., 142.

It has been held that a judgment will be vacated when an appeal therefrom has been allowed, and an action of debt cannot be maintained upon it.

Atkins v. Wyman, 45 Me., 399; *Campbell v. Howard*, 5 Mass., 376; *Keen v. Turner*, 13 Mass., 266; *Ohio v. Bk.*, 7 Ohio, 129; *Gale v. Butler*, 35 Vt., 449.

If the bond from the district to the circuit court still remained, why was it necessary to have a bond from the judgment of the circuit court? If this judgment were already secured, no new bond, except for costs, should be

required or would be necessary to carry the case up to the Supreme Court. Such is the course in admiralty in many of the circuits, in admiralty appeals, where stipulations have been taken under Rules 4 and 10.

After the bond in the circuit court is approved and *supersedeas* is allowed, the circuit court has not the judgment in its power; no further step can be taken in that court; hence the judgment cannot be enforced against the principal on the appeal bond from the district to the circuit court. The new bond, operating as a *supersedeas*, stayed all proceedings and rendered the first bondsmen powerless to fulfill the condition of the bond.

Mr. Justice Clifford delivered the opinion of the court:

Notice to the opposite party is required in every case when a writ of error is sued out or an appeal is taken to remove a cause into an appellate court, except when the appeal is allowed in open court; and the provision is that every justice or judge signing the citation, except in certain cases not material to mention, shall take good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect; and if he fail to make his plea good, that he shall answer all damages and costs where the writ is a *supersedeas*, or all costs only where it does not supersede the execution. R. S., sec. 1000.

It appears that the plaintiff, as such assignee, recovered judgment in the district court against Edward Burgess in the sum of \$4,236.28 debt, and costs of suit. Exceptions were filed by the defendant, and he sued out a writ of error and removed the cause into the circuit court for the same district to reverse the judgment. Sureties to the bond were required to perfect the removal of the cause, and the defendants in the present suit signed the bond as sureties of the principal, who is the party that sued out the writ of error.

Sufficient appears, to show that the bond was duly approved and the writ allowed, and that the cause was removed into the circuit court for trial. Due notice was given to the plaintiff, and it appears that the parties were there heard and that the circuit court affirmed the judgment of the district court, with costs. Payment of the judgment having been refused, and it appearing that the debtor had no property wherewith to satisfy the execution, the judgment creditor, as plaintiff, instituted the present suit against the defendants as the sureties of the principal, counting on the said bond as the cause of action.

None of these facts are controverted, and it appears that the plaintiff, in his declaration, assigned as a breach of the bond that the principal in the same did not prosecute his writ of error to effect nor answer all or any damages or costs on failing to make his plea good. Service was made; and certain proceedings followed that it is not important to notice, subsequent to which the defendants filed an answer, in which they set up the defense that the defendant in that suit by writ of error removed the judgment of the circuit court into the supreme court, and gave a new *supersedeas* bond, with good and sufficient sureties, to prosecute the appeal to the last named court to effect; and

the defendants here aver that, by force and effect of said last named writ of error and bond, the judgment of the circuit court was superseded, rendered inoperative and vacated, and that the defendants in that bond thereby became released and discharged from any and all liability on the bond which they signed as sureties for their principal, it appearing that the sureties on the last named bond are solvent, and that the bond is sufficient in amount to answer all damages and costs.

Responsive to those affirmative defenses, the plaintiff filed a demurrer to the affirmative defenses set up in the answer, which was overruled by the court. Failing in that, the plaintiff filed a replication denying the new matters set up in the answer, and the court, on motion of the defendants, rendered judgment in their favor. Exceptions were filed by the plaintiff, and he sued out the present writ of error.

Three errors are assigned in this court: (1) That the circuit court erred in overruling the plaintiff's demurrer to the affirmative defenses set up in the answer. (2) That the court erred in rendering judgment for the defendants. (3) That the court erred in not rendering judgment for the plaintiff.

Argument to show that the bond, given in the district court to prosecute the appeal to effect and answer all damages and costs, was sufficient in form, is unnecessary, as nothing is suggested to the contrary; nor is it necessary to enter into any discussion to prove that the omission of the names of the sureties in the introductory part of the bond does not affect its validity, inasmuch as it appears that each signed and sealed the instrument. *Pequankett Bridge v. Mathes*, 7 N. H., 230; *Martin v. Dorch*, 1 Stew., 479; *Johnson v. The Lehigh*, 13 Mo., 539; *Brandt, Sur.*, sec. 15; *Cooke v. Crawford*, 1 Tex., 9.

2. Judgment was affirmed in the circuit court, and the rule is universal that the affirmation of the judgment in the appellate court fixes the liability of the sureties, as it shows conclusively that the principal obligor did not prosecute his appeal to effect. *Karthaus v. Owings*, 6 Har. & J., 134, 139.

Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error. *Doby v. Jones*, 2 Dev. (N. C.), 109; *Ashby v. Sharp*, 1 Litt. (Ky.), 156; *Robinson v. Plimpton*, 25 N. Y., 484; *Smith v. Falconer*, 11 Hun, 481; *Gardner v. Barney*, 24 How. Pr., 467-469; *Smith v. Crouse*, 24 Barb., 433.

Sureties in a bond on an appeal from the Special Term to the General Term are fixed in their liability when the judgment rendered in the Special Term is affirmed at the General Term, but such sureties are not liable for costs in the appeal from the General Term to the Court of Appeals, as the costs of such an appeal are not within the undertaking of the sure-

ties in a bond given to prosecute the appeal from the Special Term to the General Term, from which it follows that the sureties in the bond to prosecute the appeal from the General Term to the Court of Appeals are alone responsible for such costs, without any claim for contribution from the sureties in the bond given to prosecute the appeal from the court of original jurisdiction to the General Term. *Hinckley v. Kreitz*, 58 N. Y., 583, 587.

Viewed in the light of these suggestions, it is clear that the sureties in the bond given to prosecute the removal of the cause in this case from the district court to the circuit court, became fixed when the judgment rendered in the district court was affirmed; nor did the removal of the judgment of affirmance rendered in the circuit court into the Supreme Court have any effect whatever to diminish the liability of those sureties. Certainly not, as the judgment rendered in the circuit court was affirmed in the Supreme Court.

Judgment having been rendered against the principal in the bond in the district court, and the condition of the bond being that he, the principal, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, it is difficult to see how it can be held that the sureties are discharged when it is held both in the circuit court and the Supreme Court that the judgment of the district court is correct and that the judgment should be affirmed. Neither principle nor authority will support that theory, nor do they afford it any countenance whatever. *Jordan v. Woolen Co.*, 106 Mass., 571.

Suppose that is so; still it is contended by the defendants that they are not liable in a suit on the bond because the plaintiff did not as a preliminary proceeding sue out an execution on the judgment and take proper steps to make the money. Without more, the condition of the bond is a sufficient answer to that defense, as it stipulates that if he, the principal, fails to make his plea good, the obligors, principal and sureties, shall answer all damages and costs, which is quite enough to show that it was not necessary that an execution should be sued out on the judgment before a right of action would accrue to the judgment creditors to enforce their remedy on the bond. As between the obligors and obligees, all the obligors are principal debtors, though as between each other they may have the rights and remedies resulting from the relation of principal and surety. *Anderson v. Sloan*, 1 Col., 33, 484.

It was the affirmance of the judgment that fixed the liability; and, inasmuch as the defendants bound themselves that the principal should pay the judgment if he failed to make his plea good, no such preliminary step is required. *Gillette v. Bullard*, 20 Wall., 571, 575 [87 U. S., XXII., 387, 388]; *Tissot v. Darling*, 9 Cal., 278, 281; *Smith v. Ramsay*, 6 Serg. & R., 573; *Brandt, Sur.*, 404.

It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the appellate court should be issued against the principal. When they execute the bond, they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from

which it follows that if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties, *proprio vigore* become liable to the same extent as the principal obligor. Unless the bond contains some special provisions to that effect, the sureties in such a bond given in a common law action do not become liable for the costs incurred in consequence of a new appeal to a still higher court; or, in other words, the sureties in a bond given in the district court to indemnify the opposite party on an appeal to the circuit court are not liable for the costs incurred by a subsequent removal of the cause from the circuit court to the Supreme Court, the rule being that in that court the plaintiff in error or appellant must give a new bond; but it is equally well settled that such new appeal will not diminish or discharge the liability of his sureties on the bond given in the district court, unless the judgment rendered in the district court is wholly reversed.

Apply these suggestions to the case before the court, and it is clear that the circuit court gave judgment for the wrong party.

Judgment reversed and the cause remanded, with directions to sustain the demurrer of the plaintiff to the affirmative defenses set up in the answer, and to render judgment in favor of the plaintiff, in conformity with the opinion of the court.

FIRST NATIONAL BANK OF QUINCY,
ILLINOIS, *Plff. in Err.*,

v.

S. FRANK HALL ET AL.

(See S. C., 11 Otto, 43-51.)

Agreement to accept drafts—misunderstanding—rejection of offer—contract of firm.

1. Where a firm in Chicago notified a bank in Quincy that thereafter they would accept drafts drawn on them only on actual consignments, and the cashier wrote the firm in effect that the bank would protect itself; held, that there was no contract between them, and that the firm was not liable for a draft on them, not drawn on actual consignment.

2. Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity.

3. A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer.

4. Where new members are added to a firm, the new firm will not be bound by a contract previously made with the old firm.

[No. 768.]

Submitted Dec. 19, 1879. Decided Jan. 5, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois. The case is stated by the court.

Mr. William McFadon, for plaintiff in error:

As settling the case upon its intrinsic merits in favor of the plaintiff in error, we cite the following as settled legal principles:

NOTE.—Contracts by letter or telegram; offer and acceptance, when valid. See note to *Eliason v. Henshaw*, 17 U. S. (4 Wheat.), 225.

First. That the Bank having done all that it did do entirely innocently, and the party practicing the deception being the agent of the defendants in error, they should bear the loss rather than the Bank.

Hern v. Nichols, 1 Salk., 289; *Stoner v. Millikin*, 85 Ill., 221; *Storer v. Logan*, 9 Mass., 59, 60.

Second. On the supposition that Hall, Patterson & Co. were as innocent as the Bank, and they were also deceived, the Bank in possession of the money should be allowed to retain it, for the equities of the parties are equal.

Leather v. Simpson, L. R., 11 Eq. Cas., 407; *Bk. v. Burkham*, 32 Mich., 330.

Third. Because the drafts having been paid by the drawee on presentation and, as the law presumes, in obedience to a legal obligation, without proof of fraud on the part of the payee, there can be no recovery.

Hoffman v. Bk. 12 Wall., 181 (79 U. S., XX., 366).

And the knowledge of the payee that the drawer had authority to draw only against actual consignment, does not constitute fraud. *Craig v. Sibbett*, 15 Pa., 240.

Messrs. Sleeper & Whiton, for defendants in error:

The letter written by the defendants in error, to Penfield, Cashier, dated Jan. 15, 1876, was a full revocation of any previous authority which Melson may have had to make drafts upon them, either from letters of credit or other authority from them, except upon the conditions named in such letter of Jan. 15, that is to say, upon actual consignments of stock to them, and when the stock was in transit and would, in the regular course of business, reach them the same day or the day after the draft was presented to them.

The letter of Penfield, Cashier, of Jan. 17, 1876, was an acceptance of the notice to the Bank, of the revocation of Melson's authority, and an undertaking on behalf of the Bank that it would not cash or discount or forward for collection, any drafts of Melson which were not drawn on actual consignments, and as evidence of such consignments, and that the stock was in transit; that the Bank would thereafter require the production of shipping bills in all cases; and there being no evidence that Hall, Patterson & Co. ever waived their right to have all drafts on them drawn against actual consignments in transit, as stated in the letter of Jan. 15, it became and was the duty of the cashier and officers of the Bank to know that consignments of stock were actually on hand or in transit, to meet any draft it might cash or discount, before forwarding the same for collection.

It appearing from the evidence that the drafts in controversy were prepared for the signature of Melson by the cashier, and purported on their face to be drawn in connection with consignments of stock to cover them, it was the duty of the cashier before forwarding these drafts to be paid by Hall, Patterson & Co., in ignorance of the falsity of the recitals therein, to see that Melson had shipping bills for the stock referred to in such drafts; and if, relying upon Melson's word, he omitted this duty and a loss resulted therefrom to the defendants in error, then the Bank is liable for such loss.

In this cause it appears that the fraud of Mel-

son will compel one of two innocent parties to suffer the loss of the money paid on the drafts in controversy.

It is a maxim of the law that "When one of two innocent parties must suffer a loss, that one must bear it whose acts or omissions occasioned the loss;" and because it appears from the evidence that, with proper care and observance of instructions, the Bank might have prevented any loss to either of the parties to this suit from Melson's fraud, and that the defendants in error did not have an equal opportunity, therefore this maxim applies, and the Bank should bear the loss.

Shear & Redf. Neg., secs. 156, 234, 261; *Whart. Neg.* sec. 435; 1 *Hill, Torts*, 37, 121, 123, 3d ed.; *Morse, Bkg.*, 331, 2d ed; *Mattheus v. Bk.*, 1 *Holmes* 412; *Allen v. Bk.*, 22 *Wend.* 233.

Mr. Justice Swayne delivered the opinion of the court.

This is an action of tort growing out of a contract. The bill of exceptions is well drawn, and reflects clearly the points in issue between the parties. A brief statement of the case, as it appears in the record, will be sufficient for the purposes of this opinion.

During the years 1874, 1875, and up to April 1, 1876, a firm under the name of Hall, Patterson & Co. had existed at Chicago. It consisted of S. Frank Hall, Frank D. Patterson and Augustus L. Patterson, three of the five defendants in error. Their business was selling live stock on commission at the Chicago stock-yards. William G. Melson was their agent at Quincy. To secure consignments at that point to his principals it was frequently necessary to make advances there. Hall, Patterson & Co. arranged with the plaintiff in error to cash Melson's drafts on them for this purpose. The drafts were numerous, and were all payable at sight. Penfield was the cashier of the Bank. A draft for \$125 was returned to the Bank unpaid. This gave rise to some controversy between the Bank and the drawees, but the matter was satisfactorily adjusted. Thereafter Hall, Patterson & Co. addressed a letter to the cashier, which was as follows:

"CHICAGO, January 15, 1876.

U. S. PENFIELD, Cashier, Quincy, Ill.:

DEAR SIR: Hereafter we will pay drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet dr't same day or the day after presented to us. This letter will cancel all previous arrangement of letters of credit in reference to G. W. Melson. Please acknowledge receipt of this, and oblige,

Yours respectfully,

HALL, PATTERSON & Co."

Penfield replied as follows:

"QUINCY, ILL., Jan. 17, 1876.

MESSRS. HALL, PATTERSON & Co., Chicago:

DEAR SIR: Your favor of the 15th received. I note what you say. We have never knowingly advanced any money to Melson on stock to come in. Have always supposed it was in transit. Have always taken his word. After this we shall require ship's bill.

Very truly yours,

U. S. PENFIELD, Cashr."

This letter closed the correspondence.

On the first of April, 1876, two of the defend-

ants in error, Frazee and Greer, were added as partners to the firm of Hall, Patterson & Co., as it had before existed. They had previously been employed as clerks, and knew of the writing of the letter to Penfield of the 17th of January, 1876. The new firm continued to do business under the name of Hall, Patterson & Co., until after this suit was commenced. Melson acted as the agent of the new firm as he had acted for the old one. Between the first of April, 1876, and the happening of the loss out of which this controversy has arisen, he, as such agent, drew thirty-one drafts on his principals, amounting in the aggregate to \$50,000. They were all at sight, were cashed by the Bank, and were duly accepted and paid by Hall, Patterson & Co. There was no communication personally or by letter between any officer of the Bank and any member of the firm, from the date of the cashier's letter of the 17th of January, 1876, until after the loss before mentioned. In the meantime, the Bank was wholly ignorant of the change which had been made in the firm, and the drafts were cashed without such knowledge.

On the 7th of December, 1876, Melson drew drafts as follows:

"\$2,505. QUINCY, ILL., Dec. 7, 1876.

Pay to the order of U. S. Penfield, Cas., twenty-five hundred and five dollars on account Jos. Hunnele 5 l'ds stock.

W. G. MELSON.

To HALL, PATTERSON & Co., Stock-Yards, Chicago, Ills."

"\$2,004.00. QUINCY, ILLS., Dec. 7, 1876.

Pay to the order of U. S. Penfield, Cas., two thousand and four dollars on account S. C. Fooley 4 l'ds hogs and cattle.

W. G. MELSON.

To HALL, PATTERSON & Co., Stock-Yards, Chicago, Ills."

Both these drafts were cashed by the Bank on the day of their date, and the proceeds were paid to Melson. They were taken in the usual course of business and in entire good faith. The cashier testified that by "ship'g bill," in his letter of the 17th of January, 1876, he meant bill of lading, but that no bill of lading was taken by the Bank after the date of that letter, and that all Melson's drafts—being thirty-one after the first of April, and ten or twelve between January 17 and April 1 of that year—were paid by Hall, Patterson & Co. without bills of lading being attached, and without inquiry by the Bank or its cashier concerning such securities. When the two drafts last mentioned were cashed, the cashier had no knowledge whether they were drawn against stock or not. It was a rule of the Bank, understood by all the stock agents doing business there, that no draft should be drawn unless the stock was in transit. Agents, when drawing, were, therefore, not usually questioned upon the subject. Their compliance with the rule was assumed by the Bank. The two drafts last mentioned were indorsed and transmitted by the cashier to his correspondent in Chicago for collection. They were accepted and paid by Hall, Patterson & Co., and the plaintiff in error received the money. No stock was forwarded by Melson. The transaction was a fraud on his part. Upon receiving the proceeds of the drafts he fled the country. He was diligently sought for, but could not be found. The de-

fendants in error brought this suit against the Bank to recover the amount they had paid. A verdict and judgment were rendered in their favor in the court below, and the Bank has brought the case here for review.

The bill of exceptions contains all the evidence given upon the trial. It discloses nothing which affords the slightest ground for any imputation against the Bank or its officers with respect to their good faith and fair dealing in the transaction out of which this controversy has arisen. The defendants in error claimed nothing in that respect in the court below, and they have made no such claim here.

The counsel for the Bank has assigned twenty-seven errors. Some of them are repetitions of the same objections in different forms. None of them are frivolous, and many of them, if the exigencies of the case required it, would be entitled to grave consideration by this court.

The two letters between the parties, of the 15th and 17th of January, 1876, are the heart of the controversy. The stress of the case is upon their construction and effect. Passing by the other points raised in the record, we shall first give our attention to this subject, and our remarks will be confined to that and one other of the errors assigned.

By this letter, Hall, Patterson & Co. advised the Bank: (1) That thereafter they would pay drafts only on actual consignments of stock; (2) That they would not pay money a week in advance of shipments; (3) That the stock must be in transit, so as to meet the draft the same day or the day after it was presented to them; (4) That this letter was to cancel all previous letters of credit as to W. G. Melson; (5) They asked an acknowledgment of the receipt of the letter.

These terms were clear and explicit. What was the reply of the Bank?

The cashier answered: (1) That the letter of the other party was received; (2) That its contents were noted; (3) That the Bank had never knowingly advanced money to Melson on stock to come in; (4) That the cashier had always taken Melson's word; (5) That thereafter the Bank would require a "ship'g bill," meaning a bill of lading. This letter, Hall, Patterson & Co. never answered.

What was its effect as to them? It certainly did not accept their proposition, nor accede to their terms, that "The stock must be in transit to meet the draft on the same day or the day after presented." They made this expressly the condition of their accepting. The letter made no allusion to the requirement, and was wholly silent on the subject. Upon this point the parties were as wide asunder as if the letters had not been written.

For whose benefit was the shipping bill mentioned by the cashier to be taken? *Prima facie* the point is left in uncertainty. Here, again, the cashier is silent. But the interpretation is reasonable that Hall, Patterson & Co., having in advance refused to accept, except upon the condition mentioned, the Bank notified them in reply that it would thereafter take a bill of lading, not for their protection, but for its own. This view is strengthened by the conduct of the defendants in error, and the practical construction which they seem to have thus given to the clause. They did not say in reply that they understood the shipping bill was to be

for their benefit, and that they should expect it to accompany the draft. No such bill was ever required by them or sent by the Bank. They went on accepting and paying in silence exactly as before. The large number of drafts so accepted and paid by them has been already stated. If they relied on the shipping bills their conduct is inexplicable. If the understanding of the cashier had been different from what we have suggested, it is hardly to be supposed he would, from the date of his letter, have constantly disregarded his promise. Such conduct would have been worse than negligence. It would have been a gross breach of good faith to the other party. If, on the other hand, he meant by the clause that the bill of lading, if taken, was to be solely for the security of the Bank, then it was for the Bank to determine whether it should be required or not. If the cashier had confidence in Melson, and chose to exercise it, he exposed the Bank to the hazard of the consequences; but there was certainly no responsibility to Hall, Patterson & Co.

It is a remarkable feature of the case that, when the loss occurred, the defendants in error attached no importance to their own letter, but fell back upon the letter of the cashier which they had not answered, and which they had not before in any manner recognized as concerning them, much less as constituting a contract by the Bank for their protection and benefit. To give it that effect, early and explicit notice to the Bank was necessary. The afterthought of Hall, Patterson & Co., when the loss occurred, came too late, and cannot avail them. *Adams v. Jones*, 12 Pet., 207; *McCollum v. Cushing*, 22 Ark., 540; *White v. Corlies*, 46 N. Y., 467; *Story*, Cont., sec. 1130.

The minds of the parties, as shown by these letters, moved on parallel not on concentric lines. There was not the meeting of minds and the mutuality of assent to the same thing, which are necessary to create a contract. It is not pretended that the Bank ever agreed to the proposition—if it may be considered such, and not the mere announcement of a purpose—contained in the letter of Hall, Patterson & Co., and there is no evidence that the proposition of the Bank, if the letter of the cashier can be regarded in that light, was ever accepted and acted upon by the parties to whom it was addressed. We are satisfied, however, that no proposition or promise was intended to be made by the Bank, and that this was the understanding of the defendants in error. Their letter revoked the letter of credit they had before given to Melson. The Bank announced, in reply, the manner in which it should thereafter do business with him. Thereafter, each occupied a position independent of the other. If the Bank discounted drafts for Melson, the defendants in error, like any other drawees, had the option to accept or not, and in the latter event the Bank could have had no redress against them, whether it had or had not taken a bill of lading. The destruction of the stock, after the Bank took such a bill, would not have changed the relations of the parties. In our view, it was a thing with which the defendants in error had nothing to do.

If it be said they were obliged to accept if the Bank took a shipping bill, it may be asked in reply: where is the evidence of such an un-

derstanding on their part? There is nothing in the record that gives the slightest support to such an assumption. If they were not bound, where is the consideration for the alleged promise of the Bank? The true view of the subject is that neither was in anywise bound or liable to the other.

The defendants in error notified the Bank that thereafter they would accept only on the condition specified. The cashier answered, that the Bank would protect itself. This is the sole effect of the letters. Thereupon the correspondence of the parties ceased, because there was nothing left for either to add.

Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. *Baldwin v. Mildeberger*, 2 Hall, 176; *Coles v. Bowne*, 10 Paige, 526; *Utley v. Donaldson*, 94 U. S., 29 [XXIV., 54].

Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and, therefore, neither is bound. *Appleby v. Johnson*, L. R., 9 C. P., 158.

A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer. *Baker v. Johnson Co.*, 37 Iowa, 186; see, also, *Jenness v. Iron Co.*, 53 Me., 20; *R. Co. v. Dane*, 43 N. Y., 240; and *Suydam v. Clark*, 2 Sandf., 133.

The learned Judge who tried the case below instructed the jury that the letters constituted a binding contract, and that if the Bank cashed any bills not based on actual consignments to the plaintiffs, and the plaintiffs sustained any injury by such failure, the Bank is responsible. This instruction was erroneous.

In making a contract, parties are as important an element as the terms with reference to the subject-matter. Mutual assent as to both is alike necessary. If, in fact, there were here, as claimed, a contract with reference to the latter, it was made on the 17th of January, 1876, with Hall and the two Pattersons, then constituting the firm known as Hall, Patterson & Co. The change of the firm on the first of April following, by taking in Frazee and Greer as new members, without the knowledge or consent of the Bank, put an end to the contract as to the latter. The proof is conclusive that the Bank had no knowledge of the change until after commencement of this suit. The alleged cause of action arose more than eight months after the new partnership was formed, and nearly a year after the date of the letters by which the contract is claimed to have been made. There was no privity between the Bank and the new firm. There was no binding acquiescence by the Bank. There could be none without knowledge, and it is not claimed or pretended that such knowledge existed. A new party could no more be imported into the contract and imposed upon the Bank without its consent, than a change could be made in like manner in the other pre-existing stipulations. The Bank might have been willing to contract with the firm as it was originally but not as it was subsequently. At any rate, it had the right to know and to decide for itself.

Without its assent, a thing was wanting which was indispensable to the continuity of the contract. *Barns v. Barrow*, 61 N. Y., 39; *Grant v. Naylor*, 4 Cranch, 224; *Bleeker v. Hyde*, 3

McLean, 279; *Taylor v. Wetmore*, 10 Ohio, 490, *Taylor v. McClung*, 2 Houst. (Del.), 24; *Hunt v. Smith*, 17 Wend., 179; *Cremer v. Higginson*, 1 Mas., 323; *Russell v. Perkins*, 1 Mas., 368.

The court refused an instruction asked for in accordance with this view of the subject. This, also, was an error.

The judgment is reversed and the cause will be remanded to the court below, with directions to proceed in conformity to this opinion.

Cited—10 N. W. Rep., 42.

GEORGE WATT, *Appt.*,

v.

PATRICK HENRY STARKE.

(See S. C., 11 Otto, 247-256.)

Trial of feigned issues—new trial—verdict of jury—review of case—instructions.

1. A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial. On such motion, the evidence or the substance of it should be stated and made part of the record. The court cannot decide the case upon exceptions without the evidence.

2. If the court is satisfied that if, on the trial of an issue, evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds.

3. The verdict of a jury, upon an issue out of chancery, is only advisory, and never conclusive upon the court. It may be disregarded, and a decree rendered contrary to it.

4. The verdict can only be set aside on a motion for a new trial, based, not on mere errors of the judge, but upon review of the whole case as submitted to the jury.

5. Misdirection of the judge is a circumstance to be taken into consideration, but the evidence may be so preponderating as to sustain the verdict, notwithstanding the instructions.

[No. 108.]

Argued Dec. 16, 1879. Decided Jan. 5, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

The case is sufficiently stated in the opinion of the court.

Mr. J. M. Meredith, for appellant.

Mr. Robert Ould, for appellee.

Mr. Justice Bradley delivered the opinion of the court:

This case arises on a bill in equity filed in the court below, setting forth three certain letters patent granted to the complainant, the appellant here, for improvements in the construction of plows. The principal controversy in the case arose upon the ninth claim of the third patent set out in the bill, which was dated November 26, 1867, and re-issued on the 17th day of August, 1869. The defendant filed an answer, in which, among other things, he denied that he had infringed the claim in question, and set up certain patents granted to himself in 1860 and 1868, under which he alleged his manufacture of plows had been carried on.

Afterwards, by leave of the court, he filed an amended and supplemental answer, in which, among other things, he alleged that the complainant was not the original and first inventor of the improvements specified in the claim relied on; that it was for a particular kind of

mold-board, which he alleged had been in public use and on sale in the United States for more than two years before Watt's application for his patent, specifying the names and residence of persons who had so made and used the same; and that others had known and used it before Watt's pretended invention thereof, naming various persons, and stating their residences. The defendant also, in due time, served a notice upon the complainant that he would introduce several witnesses, whose names and residences were stated, for the purpose of proving prior knowledge and use of the improvements named in the patents more than two years before the complainant's application therefor, and of proving that he was not the original and first inventor or discoverer of said improvements. The defendant also filed in the clerk's office of the circuit court, long anterior to the trial, several notices, naming other persons whom he intended to examine as witnesses, and specifying certain letters patent which he intended to introduce in evidence to show that the complainant was not the original and first inventor of the improvement claimed by him, but that the same had been patented or described in a printed publication prior to his supposed invention or discovery thereof.

After the taking of some depositions on the part of the complainant, the court, on the 7th of April, 1876, made an order for the trial of the following issues before a jury at the bar of the court (other issues being also framed, but subsequently abandoned by the complainant):

First. Whether the complainant, Watt, was the original and first inventor or discoverer of the improvement claimed in said specification nine, or of any material and substantial part thereof.

Second. Whether the improvement therein claimed had been in public use or on sale in the United States for more than two years before the said Watt's application for his patent.

Third. Whether said improvement had been patented or described in some printed publication prior to said Watt's supposed invention or discovery thereof.

The trial of these issues came on in October, 1876, and the jury rendered a verdict in favor of the defendant on each issue. The complainant thereupon moved for a new trial, but the motion was overruled. Thereupon the court, upon the pleadings, proofs and verdict of the jury, rendered a decree dismissing the bill. From this decree the complainant has appealed; and in support of his appeal produces two bills of exceptions taken by him at the trial before the jury:

First. To the admission in evidence, on the part of the defendant, of certain patents, without any notice having been served on the complainant or his attorney of an intention to produce the same; such notice only having been filed with the clerk.

Second. To certain instructions given to the jury by the court at the request of the defendant.

Although it appears by these bills, that the defendant introduced proof tending to show that plows and mold-boards, substantially the same in principle and mode of operation with the mold-board of the plaintiff, had been in common use more than two years before the date of the application of the plaintiff for his

original patent, and that the complainant introduced rebutting testimony on the subject, none of this evidence is contained in the record. The only evidence which the record discloses is the depositions taken by the complainant before the trial of the issues.

We lately held, in the case of *Johnson v. Harmon*, 94 U. S., 371 [XXIV., 271], that a bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial. We are still of that opinion, for the reasons then stated. The court below may have been abundantly satisfied, from the evidence taken at the trial, that the complainant had no case. The complainant, on his motion for a new trial, might have had the evidence, or the substance of it, stated and made part of the record, and then we could have seen whether the court below had before it sufficient grounds for being satisfied with the conclusions of the jury. This is the proper course in such cases. See, 2 Smith, Ch. Pr., ch. IX., and especially pp. 84-88. The fact that by virtue of the recent statute, passed Feb. 16, 1875, 18 Stat. at L., 316, sec. 2, the trial of a feigned issue may be had, in patent cases, at the bar of the court, makes no difference; for it is expressly declared that the verdict of the jury in such cases "Shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings." Where a court of chancery suspends proceedings in a cause, in order to allow the parties to bring an action at law to try the legal right, it does not assume to interfere with the course of proceedings in the court of law, and a motion for new trial must be made to that court; but when it directs an issue to be tried at law, a motion for a new trial must be made to the Court of Chancery; and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either by having the proceedings and evidence reported with the verdict, or by moving the Chancellor to send to the Judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The Chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken. See, *Graham, N. Tr.*, by *Waterman*, Vol. III., p. 1551. In *Boote v. Blundell*, 19 Ves., 500, Lord Eldon said: "If this court thinks proper to consider the case upon the record as fit to be governed by the result of a trial, the review or propriety of which belongs to a court of law, the opinion of the court of law is sought in such a form, that it is regarded as conclusive, whether the judgment is obtained upon a verdict or in any other shape; but, upon an issue directed, this court reserves to itself the review of all that passes at law; and one principle, on which the motion for a new trial is made here and not to the court of law, is, that this court regards the judge's report with a view to determine whether the information collected before the jury, together

See 11 OTTO.

with that which appears upon the record of this court, is sufficient to enable it to proceed satisfactorily, to which it did not consider itself competent previously." And in another case before the same Judge, *Baker v. Ray*, 2 Russ., 75, he said: "In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed, to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there, and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."

It is difficult to see how the matter could be made more clear than it is here put by Lord Eldon, whose familiarity with equity practice and pleadings has probably never been surpassed. The remarks above quoted have a direct application to this case. The evidence before the jury, on the question of prior use, may have been so overwhelming as to satisfy the court below that no new trial ought to be granted, but that the verdict should stand, whatever might be said as to the technical points raised by the bills of exceptions. That evidence is not before us. It was before the court below, because the trial was had at the bar of that court. It might have been here so as to be considered by us also, had the party who was dissatisfied with the verdict (in this case, the complainant) seen fit to have procured a statement of the evidence from the Judge's notes, or in some other proper way. This was for him to do, if he desired to question the verdict or the decree rendered by the court.

The reason of the practice is obvious: the verdict of a jury upon an issue out of chancery is only advisory, and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded, and a decree rendered contrary to it. See, in addition to the cases cited, *Basey v. Gallagher*, 20 Wall., 670 [87 U. S., XXII., 452]. If the verdict were conclusive, erroneous rulings at the time, if material, would vitiate it, of course, and render a new trial necessary. But not being conclusive, the Chancellor may be satisfied with the verdict, notwithstanding such rulings; or he may think a new trial desirable even if no erroneous rulings be made. But in all cases where the verdict is brought in question, it is necessary that he be made acquainted with what passed at the trial, including as well the evidence given as the rulings of the court, in order that he may exercise his own judgment in the matter. Exceptions to rulings are proper to be taken and noted; for upon a view of the whole case, the mind of the Chancellor may be

affected by them; just as it is proper to take and note objections to evidence taken by deposition; but a bill of exceptions, as such, has no proper place in the proceeding. The verdict can only be set aside on a motion for a new trial, based, not on mere errors of the judge, but upon review of the whole case as submitted to the jury.

What took place on the motion for new trial in this case we are not informed by the record. But as the trial was had at the bar of the court, even though no statement of the proceeding was made up, the court had the benefit of its own notes of the trial, and therefore was cognizant of all that occurred. Had we the same means of knowledge before us, we could then judge whether the court decided properly or not. But we have not these means. We have only bills of exceptions, which are taken not for use before the court that tries the cause, but for the use of a court of error or appeal; and are generally taken, as they were here, upon the specific rulings of the court of trial, and not upon the entire proceeding. To decide the case upon these bills, therefore, would be to decide it upon a different case from that upon which it was decided by the court below.

Brockett v. Brockett, 3 How., 691, was an appeal from a decree of the Circuit Court of the District of Columbia. There had been an issue directed, which was tried on the law side of that court. Exceptions were taken at that trial; and it was sought to procure a reversal of the decree upon these exceptions. But this court decided that this could not be done. The court, speaking by Justice McLean, say: "The bills of exceptions are copied into the record, but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court in chancery." This case is directly to the point, that a bill of exceptions is not the proper mode of reviewing the trial of an issue out of chancery.

Had the case been fully presented to us, as the court below had it before it on the motion for a new trial, we do not mean to say that the objections relied on by the appellant might not have been good ground of reversal of the decree. But without that, we cannot say that they are; for, even though they had been well taken, they would not necessarily have been good ground for a new trial. The usual grounds for directing a new trial of an issue, as stated in Smith's Chancery Practice, Phila. ed., Vol. II, p. 84, citing *Tatham v. Wright*, 2 Russ. & M., 1, are: "1st, the alleged improper summing up of the Judge; 2dly, because the weight of evidence is against the verdict; and, 3dly, because of an informality in the evidence." But, as we have before shown, notwithstanding erroneous rulings may have been made, the whole case as presented at the trial may have been such as to show to the Chancellor's satisfaction that no new trial was necessary. In the case cited by Smith, *Tatham v. Wright*, the Master of the Rolls, on the motion for new trial, said: "I have carefully read every word of the report of the learned Judge, but have purposely abstained from reading the shorthand writer's notes of the summing up, in order that my judgment might be formed upon the evidence alone. * * *

828

conclusion on the subject. As this opinion is formed without any reference to the summing up of the learned Judge, and as I should have considered it my duty to direct a new trial upon the evidence alone, whatever the summing up had been, if the jury had come to a different conclusion, it is not necessary to take any notice of the observations which have been made in that respect." On appeal to the Lord Chancellor, *Chief Justice Tindall* and *Chief Baron Lyndhurst*, sitting for the Chancellor (who had been counsel in the cause), took no notice of the instructions given by the judge to the jury; but carefully examined the evidence which had been laid before the jury at the trial, and sustained the verdict, as the Master of the Rolls had done.

We have examined the authorities referred to by the learned counsel of the appellant, but find nothing therein which militates against the views which we have expressed.

The case of *Salter v. Hite*, 7 Bro. P. C., 189, which is most relied on, only confirms these views. There, notes of the evidence were had, on a motion for a new trial, and the decision, both of the Lord Chancellor and the House of Lords, was based upon a consideration of the whole matter. The case in Ambler, *Cleeve v. Gascoigne*, 1 Amb., 323, came before the Chancellor on a motion for a new trial, no bill of exceptions having been taken. A new trial was granted on two grounds; first, because postponement had been refused by the judge, notwithstanding the absence of a material witness for the defendant by means of sudden illness. The materiality of the witness' testimony was shown by a statement of what it had been on a previous trial, in which a contrary verdict had been given. The other ground was a clear misdirection of the judge to the jury. Under these circumstances, the Lord Chancellor deemed the verdict unsatisfactory, and directed a new trial to be had. Misdirection of the judge is, undoubtedly, a strong circumstance to be taken into consideration, when the Chancellor has the whole case before him, and the evidence is not so preponderating as to sustain the verdict notwithstanding the instructions. Here the Chancellor had before him sufficient to show that the verdict was taken, not only under a misdirection, but in the absence of very important evidence which ought to have been before the jury. We see nothing here in conflict with what we have said above. The exclusion of material testimony which might have changed the verdict is quite as important to a just conclusion to be formed by the Chancellor, as the preponderance of testimony actually given can be to sustain a verdict open to technical objections. In both cases the question is, whether, in view of all the evidence given, as well as of what has been improperly excluded, the conscience of the Chancellor ought to be satisfied.

In the case of *Watkins v. Carlton*, 10 Leigh, 560, the Court of Appeals of Virginia held, as we do, that the whole proceedings in the court of law, upon an issue directed out of chancery for the purpose of ascertaining a particular fact, are part and parcel of the chancery cause; and that the court, if required, must certify any instructions given to the jury; inasmuch as the Chancellor has a right to see the whole proceedings. In that case a bill of exceptions was taken,

it is true; but the case was considered as upon a motion for a new trial. One of the issues, whether or not the defendant was a mulatto, had, under the instructions of the Judge, been ignored or evaded, and evidence upon it had been excluded. All this was made to appear to the Court of Appeals; and that court very properly reversed the decree. As intimated by us in *Johnson v. Harmon*, though a bill of exceptions cannot properly be taken on the trial of a feigned issue out of chancery, yet, if taken, it may be employed as one of the means of bringing before the court, on a motion for a new trial, the proceedings which took place at the trial. This is all that was done in *Watkins v. Carlton*.

The case of *Brockenbrough v. Spindle*, in 17 Gratt., 22, was a bill filed to set aside a deed of trust on account of usury in the loan intended to be secured thereby, and the proceedings were regulated by statute, which required that the question of usury should be tried by jury at the bar of the court. Apparently, the verdict of the jury was to be conclusive. In this case a bill of exceptions was taken, in which all the evidence given on the trial was set forth; and the Court of Appeals went into a full consideration both of the evidence and of the rulings of the court, and reversed the decree and ordered a new trial, with instructions that if the evidence on the new trial should be substantially the same as on the former trial, the court should instruct the jury, if they believed the evidence, that they ought to find the transaction not to be usurious. In view of the effect given to the verdict by statute in this case, we see nothing in the action of the Court of Appeals in conflict with what has been laid down in this opinion; and we find nothing material to the question in the other cases that have been cited.

The decree of the Circuit Court is affirmed.

Cited—97 N. Y., 6.

LYDIA C. HALL, Widow, and CARRIE R. HALL ET AL., Heirs at law of SAMUEL PARKER HALL, Deceased, Devisee of JAMES L. LORING, Deceased, and WM. W. CHAPMAN, Admr. of said JAMES L. LORING, Deceased, Appts.,

v.

EDWIN RUSSELL ET AL.

(See S. C., 11 Otto, 503-514.)

Oregon Donation Act—interest of settler.

1. Under section 4, of the Oregon Donation Act, there was no grant of the land to a settler until he had qualified himself to take as grantee, by completing his four years of residence and cultivation and performing such other acts in the meantime as the statute required, in order to protect his claim and keep it alive.

2. Under such Act of Congress, a settler cannot devise his interest in the land, unless the fee passed to him before his death.

[No. 63.]

Argued Nov. 10, 11, 1879. Decided Jan. 5, 1880.

APPEAL from the Circuit Court of the United States for the District of Oregon.

The case is stated by the court.

See 11 OTTO.

U. S., Book 25.

Messrs. William W. Chapman and Timothy D. Lincoln, for appellants:

1. The estate granted by the Donation Act is a present grant from the passage of the Act, made certain and definite upon the specific land by the settlement thereon.

Schulenberg v. Harriman, 21 Wall., 60 (88 U. S., XXII., 554); *Wythe v. Haskell*, 3 Sawy., 578; *Lee v. Summers*, 2 Oreg., 267; *Blakesly v. Caywood*, 4 Oreg., 284; *Dolph v. Barney*, 5 Oreg., 202; *Adams v. Burke*, 3 Sawy., 418; *Chapman v. School Dist. No. 1*, Deady, 118.

2. The fact that the land is not ascertained or defined by the statute, does not prevent the statute from operating as a present grant.

Rutherford v. Greene, 2 Wheat., 196; *U. S. v. Arredondo*, 6 Pet., 745; *Lessieur v. Price*, 12 How., 77; *Frémont v. U. S.*, 17 How., 558 (58 U. S., XV., 246).

3. It is the Donation Act that passes the title, and not the patent. The latter is but the evidence of the title and of the facts entitling the party to the specific land.

Adams v. Burke, 3 Sawy., 418; *Wythe v. Haskell*, 3 Sawy., 578; *Landeau v. Hanes*, 21 Wall., 530 (88 U. S., XXII., 609); *Barney v. Dolph*, 97 U. S., 656 (XXIV., 1064).

4. The cases show that the title conveyed by the Act is a present fee simple, subject to be defeated by the non-performance on a condition subsequent.

Stark v. Starr, 94 U. S., 486 (XXIV., 279); *Adams v. Burke*, 3 Sawy., 418; *Wythe v. Haskell*, 3 Sawy., 578; *McKay v. Freeman*, 6 Oreg., 456; *Dolph v. Barney*, 5 Oreg., 202; *Blakesly v. Caywood*, 4 Oreg., 286.

5. In the government of Oregon, the people and the courts have regarded the settler's right to the land as giving him a fee simple estate.

Dolph v. Barney, 5 Oreg., 202; *McKay v. Freeman*, *supra*; *Adams v. Burke*, *supra*; *Wythe v. Haskell*, *supra*; *Barney v. Dolph*, 97 U. S., 654 (XXIV., 1063).

6. The decisions of this court tend very strongly in the same direction.

Barney v. Dolph (*supra*); *Stark v. Starr*, 94 U. S., 486-488 (XXIV., 279); *S. C.*, 6 Wall., 417 (73 U. S., XXIII., 929); *Lamb v. Davenport*, 18 Wall., 317 (85 U. S., XXI., 762).

7. The estate was a fee simple in Loring, subject to a condition subsequent that might defeat or cut it off, if the occupancy was abandoned before the four years had run out, or if the other conditions of the statute were not complied with for the four years, or up to the time of the death of Loring.

U. S. v. Arredondo, 6 Pet., 745; *Adams v. Burke*, 3 Sawy., 418; *Wythe v. Haskell*, 3 Sawy., 578; *Stark v. Starr*, 94 U. S., 487 (XXIV., 279); *Crooks v. Burcham*, 1 Black, 356 (66 U. S., XVII., 92); *Chapman v. School Dist. No. 1*, Deady, 118.

8. Loring having fulfilled all the conditions of the statute, up to his death, and the further performance becoming impossible by the Act of God, the condition subsequent, by the 8th section of the Act and by the common law becomes fulfilled, and the estate is released from its operation and thereby becomes absolute.

U. S. v. Arredondo (*supra*); *Castillero v. U. S.*, 2 Black, 156 (67 U. S., XVII., 375); 4 Kent, 129.

9. Loring, having an estate of inheritance,

which descended to his heirs, he had a devisable estate.

Blakesly v. Caywood, 4 Oreg., 286; Jarm. Wills, 40; Redf. Wills, 390, sec. 17; Act of Oregon of 1849, relating to wills; Donation Act, sec. 4, 9 Stat. at L., 498; 4 Kent, 418; 1 Washb. Real Prop., 79; *Bond v. Swearingen*, 1 Ohio, 395; *Fields v. Squires*, Deady, 383; *Stephenson v. Hagan*, 15 B. Mon., 282.

Mr. Geo. H. Williams, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a bill in equity, filed by the heirs of the devisee of James L. Loring, deceased, and the administrator of Loring with the will annexed, to obtain the legal title to a tract of 303 acres of land near Portland, Oregon, which, as the complainants claim, the defendants hold in trust for them. The facts material to the view we take of the case are as follows:

In the month of April, 1852, Loring, a single man, settled on the land in dispute with a view to becoming its owner under the operation of the Oregon Donation Act. 9 Stat. at L., 496. He had all the qualifications necessary to enable him to take and hold under the Act, but died after a residence on the land of less than a year, leaving a will, executed in Ohio in 1849, whereby he devised all his estate remaining after the payment of some small legacies, to Samuel Parker Hall, then of Cincinnati, Ohio, but now deceased.

On the death of Loring, Joshua Delay claimed the land as a settler in behalf of himself and his wife, Sarah Delay, and after a contest with the representatives of Loring before the officers of the Land Department, the heirs of the Delays succeeded in obtaining a patent. Much litigation ensued between them and the heirs of Loring about the title, but, finally, all the estate of both these parties was transferred to the present defendants, in whom it is now vested, but with full knowledge, before the transfer, of the claim of the complainants. The theory of the present suit is, that Loring, by his settlement, acquired an estate in the lands which passed by his will, and that the heirs of the Delays took title under the patent issued to them in trust for the devisee of Loring as the real owner of the property. The court below dismissed the bill for the reason, among others, that Loring had no devisable estate in the lands when he died and, consequently, his devisee took nothing by the will.

The case, therefore, in this aspect, presents the question directly, whether the heirs of a settler under the Oregon Donation Act, who died before the expiration of the four years' residence and cultivation required, took by descent from the settler, or as donees of the United States. If by descent, it is conceded the settler had a devisable estate. If as donees, he had not.

The sections of the Act material to the determination of this question are the 4th, 5th, 6th, 7th, 8th and 12th. The 4th is as follows:

"Section 4. That there shall be, and hereby is granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen, or who shall make such

declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this Act, the quantity of one half section, or three hundred and twenty acres of land, if a single man; and if a married man or if he shall become married within one year from the first day of December, 1850, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right; and the Surveyor-General shall designate the part inuring to the husband and that to the wife, and enter the same on the records of his office; and in all cases where such married persons have complied with the provisions of this Act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon, or since, and either shall have died before patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon. *Provided*, That no alien shall be entitled to a patent to land, granted by this Act, until he shall produce, to the Surveyor-General of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of an intention to become a citizen of the United States, after the passage of this Act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this Act, shall descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue. *Provided further*, That, in all cases provided for in this section, the donation shall embrace the land actually occupied and cultivated by the settler thereon. *Provided further*, That all future contracts by any person or persons entitled to the benefit of this Act, for the sale of the land to which he or they may be entitled under this Act, before he or they may have received a patent, therefore, shall be void. *Provided further*, however, that this section shall not be so construed as to allow those claiming rights under the Treaty with Great Britain, relative to the Oregon Territory, to claim both under this grant and the Treaty, but merely to secure them the election, and confine them to a single grant of land."

The 5th provides "That to all white male citizens of the United States * * * emigrating to and settling in said Territory between the first day of December, 1850, and the first day of December, 1853, * * * who shall * * * comply with the foregoing section, and the provisions of this law, there shall be and hereby is granted the quantity of one quarter-section * * * if a single man; or if married * * * the quantity of one half section * * *."

Section 6 provides that, within three months after the survey has been made, or after the commencement of the settlement, each settler shall notify the Surveyor General of the precise tract claimed by him, and that the Surveyor-

General shall enter a description of such claims in a book to be kept by him for that purpose.

Section 7 provides that, within twelve months after the survey or settlement, each person claiming a donation right shall prove to the Surveyor-General that the settlement and cultivation have been commenced, specifying the time of the commencement; and that he shall, after the expiration of four years from the date of his settlement, prove in like manner the fact of continued residence and cultivation required by the 4th section; "And upon such proof being made, the Surveyor General, or other officer appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the Commissioner of the General Land Office, setting forth the facts in the case, and specifying the land to which the parties are entitled. And the said Surveyor-General shall return the proof so taken to the office of the Commissioner of the General Land-Office, and if the said commissioner shall find no valid objections thereto, patents shall issue for the land according to the certificates aforesaid, upon the surrender thereof."

"Section 8. That, upon the death of any settler before the expiration of the four years' continued possession required by this Act, all the rights of the deceased, under this Act, shall descend to the heirs at law of such settler, including the widow where one is left, in equal parts; and proof of compliance with the conditions of this Act up to the time of the death of such settler, shall be sufficient to entitle them to the patent."

Section 12 provides that all persons claiming by virtue of settlement and cultivation commenced subsequently to December 1, 1850, shall make affidavit that the land is for their own use and cultivation.

The rights of Loring and those who claim under him all depend on section 4. Whatever he took was by virtue of the grant there made. If that section gave him no devisable estate before the completion of the required four years' residence and cultivation, he had none. The other sections may be resorted to, if necessary, to get at the meaning of this, but this alone, when its meaning is ascertained, fixes the limit of the donation made to him.

The anomalous condition of affairs in Oregon Territory when this Act was passed has been heretofore brought to our attention. *Stark v. Starrs*, 6 Wall. 402 [73 U. S., XVIII., 925]; *Lamb v. Davenport*, 18 Wall. 307 [85 U. S., XXI., 759]; *Stark v. Starr*, 94 U. S. 477 [XXIV., 276]; *Barney v. Dolph*, 97 U. S. 652 [XXIV., 1063]. For many years the inhabitants had been without any government except that which they had themselves organized for their own protection. The ownership of the soil on which they lived was in dispute between the United States and Great Britain. Under the operation of treaty stipulations for a joint occupation of the Territory, extensive settlements had grown up, and the people, in governing themselves, had adopted land laws which made occupancy the basis of ownership as between settlers. While waiting for the contesting sovereign claimants to determine which of the two should be the acknowledged owner of the soil they contented themselves with regulating their rights of occupancy as between each other, trusting to the

See 11 OTTO.

bounty of the government under whose sole dominion they should ultimately fall, for a grant of title to the land itself. The first of these Acts was passed in 1844. Laws of Oregon, 1843 to 1849, 77. Under this, only free males, over the age of eighteen, who would be entitled to vote if of lawful age, and widows, were entitled to hold a "claim," save that a married man under eighteen was not debarred. A claim was also confined to 640 acres or less. Permanent improvements and continuous occupation and cultivation were essential to the preservation of the rights conferred. Following this was the "Land Law," contained in the organic law of the provisional government which went into operation in 1846. Ter. Stat. Oregon (1851), 32, art. III. This law relaxed somewhat the stringency of the former Act as to actual occupation, and extended the privilege of establishing claims to all residents of the Territory. By the Act of Congress creating a territorial government for Oregon, approved August 14, 1848, 9 Stat. at L., 323, all laws theretofore passed in the Territory making grants of land, or otherwise affecting or incumbering the title to lands, were declared void; but all other laws in force under the authority of the provisional government were continued in operation, so far as they were not incompatible with the Constitution, or the principles and provisions of that Act. All laws passed by the Legislative Assembly of the Territory were to be submitted to Congress, and if disapproved were to be null and void. Sec. 6.

Doubts having arisen whether, after the establishment of the territorial government, the land law of the provisional government was in force, an Act of the territorial Legislature was passed September 12, 1849, expressly declaring it to be so, and some additional provisions were made consistent with the title of the new Act, which was "An Act to Prevent Injuries to the Possession of Settlers on Public Lands." Ter. Laws (1851), 246. By section 5 of this Act it was provided that "Land claims shall descend to and be inherited by the heirs at law of the claimant, in the same manner as is provided by law for the descent of real estate." On the 26th of September, 1849, "An Act Respecting Wills" was passed by the territorial Legislature. Ter. Stat. 1851, 274. By this Act every person of twenty-one years of age and upwards, of sound mind, might, by "last will, devise all his estate, real, personal and mixed, and all interests therein, saving to the widow her dower." Before the passage of the Act of September 12, if a person died in the lawful possession of a land claim, it formed part of his personal estate, and was to be disposed of by his executors or administrators for the benefit of his legal heirs. Laws of Oregon, 1843 to 1849, 61.

It was in the midst of this condition of affairs that the Donation Act was passed. Congress had the right, on assuming undisputed dominion over the Territory, to confine its bounties to settlers within just such limits as it chose. The settlers had no title to the soil, and the legislation under the provisional government, as well as that by the territorial Legislature, had no other effect than to regulate possessory rights on the public domain in the absence of congressional interference.

The opening words of section 4 are "That there shall be, and hereby is granted." This is

appropriate language in which to express a present grant, but as was well remarked by *Mr. Justice Field* for the court in *Mo. Kan. & Tex. R. Co. v. Kan. Pacif. R. Co.*, 97 U. S., 491 XXIV., 1095], "It is always to be borne in mind, in construing a congressional grant, that the Act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress." There cannot be a grant unless there is a grantee and, consequently, there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time. Thus, in *Rutherford v. Greene*, 2 Wheat., 196, the grantee was Major-General Greene; in *Lesieur v. Price*, 12 How., 59, the State of Missouri; in *U. S. v. Arredondo*, 6 Pet., 691, Arredondo and Son; in *Frémont v. U. S.*, 17 How., 542 [58 U. S., XV., 241], Alvarado; in *Schulenberg v. Harriman*, 21 Wall., 44 [88 U. S., XXII., 551], the State of Wisconsin; in *R. R. Co. v. U. S.*, 92 U. S., 733 [XXIII., 634], the State of Kansas; and, without particularizing further, it may be said generally that in the swamp land cases and all the internal improvement grant cases, where for the most part the question has arisen of late, if a grant has been held to take effect presently, the State or some corporation, having all the qualifications specified in the Act, has been designated as grantee. In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named.

Coming, then, to the present case we find that the grantee designated was any qualified "Settler or occupant of the public lands * * * who shall have resided upon and cultivated the same for four consecutive years and shall otherwise conform to the provisions of the Act." The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the Act. Whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The Act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the Territory having the other requisite qualifications; but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land. Whether the fee passed out of the United States before the claim was "proved up," it is not necessary now to consider. For the purposes of the present suit, it is enough to show that the occupant got no title himself, beyond that of a mere right of possession, until he had completed his four years of continued residence and cultivation.

That such was the clear intention of Congress

we think is manifested in many provisions of the Act. Thus, where married persons "Have complied with the provisions of the Act, so as to entitle them to the grant as above provided, whether under the late provisional government of Oregon or since, and either shall die before patent issues, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament, duly and properly executed according to the laws of Oregon." This evidently related to such married persons as had completed their four years' residence and cultivation, and had done the other things required in the meantime; that is to say, had given notice of the precise tract claimed (section 6), and had proved the commencement of their settlement and cultivation (section 7). These were the provisions to be complied with "so as to entitle them to a grant." As there could be no grant until there was some person entitled to receive it, the conclusion would seem to be irresistible that, under this provision, married settlers had no estate in the land which they could devise by will, until from being qualified settlers only they had become qualified grantees. Having completed their settlement, and nothing remaining to be done but to get their patent, their estate in the land was one they could devise by will, or which would go to the surviving husband or wife and children or heirs of a deceased married person. Not so, however, with the mere possessory rights which preceded a compliance with the provisions of the Act so as to entitle the settlers to their grant of the land.

Again; "No alien shall be entitled to a patent for land, granted by this Act, until he shall produce to the Surveyor-General of Oregon record evidence that his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of intention to become a citizen of the United States, after the passage of this Act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this Act shall descend to his heirs at law or pass to his devisees, to whom, as the case may be, the patent shall issue." An alien who had declared his intention to become a citizen, or who should do so before December 1, 1850, was a qualified settler, but he was not a qualified grantee until he had completed his naturalization. As no patent could be issued to him before his naturalization, provision was made for the disposition of the "possessory right" which one who had declared his intention, after the passage of the Act, could acquire as an authorized settler. By the requisite residence and cultivation, accompanied by the prescribed preliminary notice and proof of claim and settlement, the alien settler could perfect his right to a patent as soon as he completed his naturalization, but until he was in a condition to "prove up" for a patent, his rights in the land were "possessory" only.

Another provision is equally significant: "All future contracts by any person entitled to the benefit of this Act, for the sale of the land to which he may be entitled under this Act before he or they have received a patent therefor, shall be void." This must refer to sales after

the necessary residence and cultivation were complete, because the grant was only to a settler "who shall have resided upon and cultivated the same for four consecutive years." This implies continuous residence and cultivation by the person or persons who make the claim. There is no provision by which the possession of one can be added to that of another, so as to complete the requisite term. The grant was to the occupant who had himself conformed to the provisions of the Act. The sale of a possessory right could have no other effect than that of an abandonment of the settler's "claim" and a grant to the purchaser of the right to enter upon the abandoned lands and begin a new settlement of his own.

This intention is even more distinctly shown in section 5, which being *in pari materia* with section 4, may be resorted to as in some degree showing the meaning of both sections. There the language is, "That, to all white male citizens * * * who shall in all other respects comply with the foregoing section, * * * there shall be and hereby is granted," etc. This indicates clearly that there was to be no grant except to persons who, by complying with the provisions of the Act, had qualified themselves to take.

We conclude, therefore, that under section 4 there was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute required in order to protect his claim and keep it alive. Down to that time he was an authorized settler on the public lands, but not a grantee. His rights in the land were statutory only, and cannot be extended beyond the just interpretation of the language Congress has used to make known its will.

This brings us to the consideration of section 8, which, in substance, provided that if a settler died before the expiration of the required four years' continued possession, all his rights should descend to his heir at law, including his widow, if he left one, and that proof of his compliance with the conditions of the Act up to the time of his death should be sufficient to entitle them to the patent.

Here is a plain indication that the right of the settler before the expiration of his four years' continued possession was something less than a title in fee to the land, for the provision is not that the land shall descend, but the settler's rights only. Had it been supposed that the title was already in the settler, subject only to defeasance, if the conditions subsequent to the grant should not be performed, we cannot but think that provision would have been made for a transfer of the land free of the conditions, instead of only the settler's rights. The object of Congress, undoubtedly, was to allow a settler's heirs to succeed to his possessions and thus keep his rights alive. But for some such provision all rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force.

See 11 Otto.

Hence, it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land on making the requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, but from the United States. The title, it is true, was granted to them by reason of the possessory rights of their ancestor, but these were rights which he could not transfer and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. Whether they took immediately on his death or after proof of his compliance with the provisions of the Act while in life, need not be decided. It is enough for this case that when their ancestor died he had nothing in the land which he could transmit to them, and that what they afterwards got came from the United States and not from him. All his rights in the land were dependent on his completion of the four years' possession; but in consideration of what he had done Congress made his heirs the special objects of its bounty if he died before his own grant had been secured. We attach no importance to the word "descend," as used in this section. In section 4 the word selected to convey substantially the same idea was "entitled." The thing done was to give the heirs of a settler the benefit of his rights and to designate them as the recipients of the bounty of the government, instead of him.

We have not overlooked the fact that, by the territorial enactments of Oregon, a settler's claim might descend to his heirs as real estate, and that his possessory rights might be disposed of by will. But all these enactments are in conflict with the Act of Congress and, therefore, inoperative. The heirs of the settler took only such title as Congress gave them. The territorial government could not add to or take from that grant. It is not contended that under the Act of Congress a settler might devise his interest in the land, unless the fee passed to him before his death.

It follows from this that Loring, at the time of his death, had no devisable estate in the land, and that the heirs of his devisee cannot maintain this suit. This makes it unnecessary to consider any of the questions that have been argued.

The decree of the Circuit Court is affirmed.

Cited—101 U. S., 520; 6 Sawy., 399.

WILLIAM G. PHILLIPS, *Appt.*,

v.

BENJAMIN F. GILBERT ET AL.

(See S. C., 11 Otto, 721-726.)

Mechanics' lien—personal decree—liability of sureties.

1. A mechanics' lien for materials for and work on a row of buildings is not void because of its being claimed on the whole row of buildings, and not on the buildings separately.

2. Where an undertaking was filed in the suit to release the property from the lien, the complainant may take a personal decree only against the defendant, and may bring an action at law against the sureties on the undertaking.

[No. 87.]

Argued Nov. 26 and Dec. 1, 1879. Decided Jan. 5, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. Geo. F. Appleby and **W. E. Edmonston**, for appellant.

Messrs. Enoch Totten and **S. R. Bond**, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

The controversy in this case is as to the validity of a mechanics' lien claimed by the appellant upon certain houses and lots in the City of Washington. The defendant, Gilbert, in August, 1871, was the owner of the lots, and proposed to erect a row of brick buildings thereon, and agreed with the appellant that the latter should find the materials and build the houses (six in number) for the aggregate price of \$32,000, to be paid by installments as the work progressed. Phillips, the appellant, commenced the houses and proceeded in their construction until the amount accruing to him was upwards of \$12,000; when, the payments being behind, and certain incumbrances on the property not being lifted, as Gilbert had agreed they should be, he, Phillips, on the 23d of May, 1872, filed a mechanics' lien, pursuant to the Act of Congress then in force. This Act, passed February 2, 1859, 11 Stat. at L., 376, declared that any person who should, by virtue of a contract with the owner of any building, perform labor or furnish materials for the construction or repair thereof, should, upon filing the proper notice, have a lien upon the building and the lot upon which it was situated. The notice of lien was required to be filed in the office of the clerk of the district court at any time after the commencement of the building, and within three months after its completion; and the clerk was required to record it. The Act declared that such liens should have precedence over all other liens or incumbrances which attached upon the premises, subsequently to the time of giving the notice. For enforcing the lien, the Act provided a summary action at law and an execution against the premises, with a provision, in the 11th section, that the defendant might file a written undertaking, with surety to be approved by the court, to the effect that he would pay the judgment that might be recovered, and costs, and thereby release the property from the lien. By a subsequent Act, passed in February, 1867, 14 Stat. at L., 403, it was declared that the proceeding to enforce any lien should be by bill or petition in equity, and that the decree, besides subjecting the thing upon which the lien had attached to the satisfaction of the plaintiff's demand against the defendant, should adjudge that the plaintiff recover his demand against the defendant, and have execution as at law.

The bill was filed under this Act on the 11th of June, 1873, and set forth the original contract, the performance of the work to the amount (as alleged) of \$16,000, of which \$5,000 was claimed to be unpaid, the filing and recording of the lien; and the further facts that Gilbert had executed certain deeds of trust on the property to secure certain loans specified in the bill,

and that on the 16th day of December, 1872, he had conveyed the entire property to the defendants, Boughton and Moore; and that on the 1st of February, 1873, Boughton and Moore executed six deeds of trust, one on each house and lot, to trustees, to secure six certain notes payable to the defendant, the Connecticut General Life Insurance Company; and prayed an account and a sale of the property, payment and general relief. The defendants were Gilbert, Boughton and Moore, the Connecticut Insurance Company, and the trustees in the several deeds of trust.

On the 25th of June, 1873, the defendants filed an undertaking entered into by Gilbert, Boughton, Moore, J. G. Bigelow and one W. J. Murtagh; Bigelow being, as it appears, the agent of the Connecticut Insurance Company in effecting the loan for which the six last deeds of trust mentioned in the bill were given as security. The substance of this undertaking was, that the undertakers would pay any judgment that might be rendered (including costs) upon or on account of the claim for lien made by the complainant. No further notice of this undertaking seems to have been taken in the proceedings.

Boughton and Moore demurred to the bill, mainly on the ground that the claim for lien was void because made in gross upon six separate lots, without specifically setting forth the amount claimed upon each.

Gilbert filed an answer averring that the complainant had been fully paid for all the materials and work furnished by him; and the Connecticut Insurance Company filed a separate answer, setting up their loan upon the property, the amount of which they stated to be \$36,000; and alleging that, when they made this loan, Phillips, the complainant, executed and delivered to them a release of the lots from the effect and operation of his lien; and that upon the faith of this release they made the loan to Boughton and Moore; and they insisted that the complainant was estopped from proceeding on his claim for lien. They further stated that the release, together with the abstract of title with which it was placed, had been lost or mislaid; and they annexed to their answer a paper, which they averred to be a substantial copy of said release. This answer was verified by the affidavit of Bigelow. The alleged copy of release was dated January 10, 1873, and purported to be directed to the clerk of the circuit court, requesting him to release the property in question from the mechanics' lien filed by Phillips on the 23d day of May, 1872. Thereupon Gilbert filed an amendment to his answer, alleging that he was informed and believed that such a release had been made by the complainant.

Replications being duly filed, the parties went into proofs:

On the 30th of March, 1874, an issue was directed to be tried by a jury, to ascertain whether Gilbert was indebted to Phillips for work and materials in the construction of the buildings in question; and if indebted, how much, after deducting all payments and set-offs. Upon this issue the jury, on the 14th of June, 1875, found that Gilbert was indebted to Phillips for the cause aforesaid, after deductions, in the sum of \$4,020.

Besides the question of indebtedness, the

principal contest upon the proofs was, whether Phillips had executed a release as set up in the answer of the Insurance Company, so as to estop him from claiming any lien upon the premises. That he did execute some paper of the kind was admitted by himself when examined as a witness; but his allegation is that he had bid off the property at a trustee's sale in November, 1872, and that the paper executed by him was given to Bigelow, the Company's agent, for the purpose of raising a loan to himself; but that another arrangement was made whereby he gave up his bid and never received a deed for the property, and abandoned his application for the proposed loan; and that Gilbert induced Boughton and Moore to purchase the property, and the loan was made by the Insurance Company to Boughton and Moore; and he, Phillips, was induced to go on with the building of the houses for them on the same terms upon which he had engaged to do it for Gilbert, but upon the distinct understanding that the amount due him, and for which he held his lien, should be paid out of the moneys received from the Insurance Company; that he never intended to give up his lien unless he had got the loan himself, or was paid the amount due him.

Without going into an examination of the testimony on this subject, it is sufficient to say that we have come to the conclusion that the facts were substantially as contended by Phillips, and that the agent of the Insurance Company knew perfectly well that Phillips never intended to give up his lien after his negotiation for a loan fell through. We are, therefore, of opinion that he was not estopped by the paper referred to, which seems to have unaccountably disappeared, and the contents and date of which are not clearly proved.

We are satisfied, therefore, that when this suit was commenced, the complainant's lien was good against the property for the amount found by the jury to be due to him, unless it was void for the reason stated in the demurrer of Boughton and Moore, namely: its being claimed on the whole row of buildings, and not on the buildings separately. We think, however, there is nothing in this objection. The contract was one, and related to the row as an entirety and not to the particular buildings separately. The whole row was a building, within the meaning of the law, from having been united by the parties in one contract, as one general piece of work.

We are clear, therefore, that a decree ought to be entered in favor of the complainant against Gilbert, personally, for the amount found to be due to him, with interest from the date of the verdict.

The effect of the undertaking filed in the suit was, to release the property from the lien and to oblige the complainant to have recourse for security of payment to the parties who entered into said undertaking. It would facilitate the ends of justice if a decree could be made at once against the undertakers, as is done against stipulators in admiralty proceedings. But we find no precedent for such a course upon a bond or undertaking given by way of indemnity in proceedings at common law or in chancery, unless it be expressly so stipulated in the instrument, or unless the parties enter into a recognizance, which is matter of record.

See 11 OTTO.

Our conclusion, therefore, is, that the decree of the Supreme Court of the district must be reversed and the cause remanded, with instructions to enter a personal decree in favor of the complainant against the defendant Gilbert, for the amount of \$4,020, with interest and costs; and that execution issue thereon; and further, to decree that the lien claimed by the complainant was a valid lien at the commencement of this suit; but that, by reason of the undertaking filed in the cause, the buildings and lots mentioned in the pleadings became released and discharged from the lien; and that the complainant have leave to proceed at once upon said undertaking in an action of law to be brought for that purpose; also, that the complainant have a decree for the costs against the defendants, Gilbert, Boughton and Moore, and the Connecticut General Life Insurance Company of Hartford.

The decree is reversed, accordingly.

UNITED STATES, *Plff. in Err.*,

v.

G. L. KIMBALL, Admr. of ROBERT W. WISHART, Deceased.

(See S. C., 11 Otto, 726-728.)

Action against Internal Revenue Collector—credits in—when entitled to.

1. In a suit against a Collector of Internal Revenue, on his bond, for taxes charged to him under section 3218, R. S., he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection.

2. The certificate of the Commissioner of Internal Revenue is a condition precedent to a credit by the First Comptroller of the Treasury before suit, but not to a defense upon the facts if a suit is brought.

3. The presentation to the Commissioner of Internal Revenue, by a collector, of a claim for credit in his account, and its rejection, will entitle the collector to prove his claim in a suit against him by the United States, to collect what is due from him on his account.

[No. 131.]

Argued Dec. 24, 1879. Decided Jan. 5, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

This action was brought in the court below by the United States, upon the bond of Robert W. Wishart, for moneys alleged to have been received by Wishart as Collector of Internal Revenue.

The case sufficiently appears in the opinion. **Mr. Edwin B. Smith, Asst. Atty-Gen.**, for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

In a suit against a Collector of Internal Revenue on his bond for a balance of taxes charged to him under the provisions of sec. 3218, R. S., he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection. The certificate of the Commissioner of Internal Revenue is a condition precedent to a credit by the First Comptroller

of the Treasury, before suit, but not to a defense upon the facts if a suit is brought.

The presentation to the Commissioner of Internal Revenue by a collector of a claim for credit in his account, and its rejection by him, is such a presentation of the claim "to the accounting officers of the Treasury for their examination," and disallowance by them, as will permit the collector, under sec. 951, R. S., to make proof of his claim in a suit brought against him by the United States to collect what is due from him on his account.

Judgment affirmed.

UNITED STATES, *Appt.*,

v.

HENRY CLAMORGAN ET AL.

HENRY CLAMORGAN ET AL., *Appts.*,

v.

UNITED STATES.

CYPRIAN CLAMORGAN, *Appt.*,

v.

UNITED STATES.

(See S. C., 11 Otto, 822-831.)

Uncertain claim.

Uncertainty of location and vagueness of description of a Spanish claim are sufficient grounds for its rejection.

[Nos. 81, 82, 93.]

Argued Dec. 9, 10, 1879. Decided Jan. 5, 1880.

APPEALS from the District Court of the United States for the Eastern District of Missouri.

The cases are stated by the court.

Messrs. R. H. Bradford, Jas. L. Bradford, W. Drummond, A. D. Anderson and William R. Walker, for Clamorgan *et al.*
Mr. S. F. Phillips, Solicitor-Gen., for United States.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal by the United States from a decree of the District Court for the Eastern District of Missouri.

The decree was, that appellees recover of the United States certificates under the 6th section of the Act of Congress of June 22, 1860, for 94,186 acres of land, to be located on any of the public lands of the United States subject to private entry, in lieu of the original concession by the Spanish authorities to Jacques Clamorgan, their ancestor, all of the land embraced in that concession having been disposed of by the United States. The Statute of 1860, 12 Stat. at L., 85, having expired by its own terms, was revived by the Act of June 10, 1872 and, under this, appellees brought their suit against the United States in May, 1873. The statute in question was the subject of very full consideration by this court at its last Term, the result of which is reported in the case of *Scully v. United States* [*ante*, 164], and as we see no reason to modify the construction then given to it,

we might, but for the very large amount involved in the present suit, decide it by a simple reference to that case as the foundation of our judgment.

The Act of 1860 was the latest, as it was intended to be the end, of a series of statutes for the adjustment of claims to land the title to which passed by the Louisiana purchase to the United States, but to portions of which private claims existed arising under the Governments of Spain and France, during the period of their proprietorship. These claims were in all stages of progress and all conditions of perfection and imperfection, from the merest permissive license to occupy, to the perfected grant identified by surveys and well defined boundaries.

Immediately upon taking possession of the country, Congress began to legislate on the subject of these claims, and from that day to the Act of 1872, the statute-books abound with laws designed to enable the claimants to establish their rights.

Several commissions were organized before whom they could appear, and as these commissions would expire, by the terms of the law or by the time limited for prosecuting the claims, they were renewed or others substituted in their place. In most cases, these commissions were only authorized to hear testimony and report it to Congress, with an opinion in favor of or against the claim. In other instances, the courts were empowered to hear and decide, and summary modes of procedure were authorized. In all this matter, Congress, whether acting directly upon the cases brought before it or by statutes conferring authority on other tribunals, has acted with a sincere desire to do justice to those who, by the transfer of this large domain, were remitted to our Government for recognition of their rights. The treatment of these claimants has been governed by a patience in hearing and rehearing, by extension of time and repetition of opportunity to establish their claims and a careful regard for every equitable consideration favorable to claimants, which merits the name of generosity rather than strict justice; and it was in this spirit that, after all jurisdiction to hear and confirm these claims had ceased to exist in any other tribunal than Congress, that body passed the Act of 1860, and renewed it for a short period in 1872.

But over half a century had passed since Congress had first created a tribunal to hear them. The system of congressional surveys had been extended over the territory in which the lands were supposed to be located, and the legal title had passed by government sales and patents to innocent purchasers, who held, therefore, with that title the superior equity. In its liberality, however, towards these dilatory or unfortunate claimants, that Act provided that, whenever a claim was established under it, to lands so sold by the United States, the successful claimant might have other lands of the same amount to be selected by him from any public lands liable to private sale. In many cases, indeed in far the greater number of cases, these lands were vastly superior in value to those to which the claim had originally attached.

It may well be supposed, however, that while Congress was thus anxious to be both generous and just to this class of claimants, it would, in view of the period which had elapsed during

which they might have established their claims and the opportunities which had been given them to do so, impose such limitations on the exercise of the right here granted as would protect the Government against false and fraudulent claims, supported by forged documents and perjured evidence, easily procured and difficult of detection and refutation, by reason of the great lapse of time and the death of those who could tell most of the transaction. We, accordingly, find that, with regard to the large body of these claims, Congress required that, after the evidence had been sifted through the registers and receivers, and reviewed by the Commissioner of the General Land Office, the final confirmation of the claim should remain with that body. As we said, however, in *Scull v. United States*, a much more limited and well defined class of claims might, at the option of the claimants, be prosecuted in the District Courts of the United States, whose territorial jurisdiction included the *locus in quo* of the controversy. Over a suit thus brought, Congress retained no further control, and the judgment of the district court, subject to an appeal to this court, was made conclusive. The claimants in the present case have invoked this alternative, and if their case does not come within the class of which that court has jurisdiction, as defined by Congress, they must fail on this appeal.

There was excluded from confirmation, under this Act, either by the courts or by the favorable report of the officers of the Land Department, any claim which had been theretofore presented for confirmation before any Board of Commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means, or which had already been twice rejected on the merits by previous Boards.

But aside from this exclusion, the description of the class of cases in which the district court has jurisdiction to decree confirmation is found in the 11th section of the Act, and it is copied and construed in the opinion in *Scull's Case*, at page 418 of 98 U. S. [*ante*, 165].

We again epitomize that construction:

1. The documents, surveys, possession or other acts on which claimant relies, must have been completed during the period of the actual possession of the Government, prior to that of the United States, under which the claim is asserted.

2. The claimant, or those under whom he holds, must have been out of possession for twenty years or more before the suit is commenced.

3. The claim must be sustained: under a complete grant or concession from such Government, or order of survey duly executed; or by other mode of investiture of original title in the claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed, natural or ascertainable boundaries, or initial points, courses and distances, by competent authority, prior to the cession of such lands to the United States.

We also said in that case that the action under that statute is substantially an action of ejectment in which the United States consents to be a defendant and sued as if in possession and the bar of the Statute of Limitations removed.

In the case before us, neither the claimants nor any of their predecessors in interest were ever in possession of the land, nor was any survey of it made under the former Government, nor has any survey yet been made for the purpose of locating the grant. There has never been any separation of it from the public domain nor any attempt to separate it.

Is there any such definition of fixed, natural, ascertainable boundaries, with courses and distances, in the supposed concession as will identify the land so as to make this separation?

As we have already said, no attempt has been made to make an actual survey which would establish an answer to this question. A sufficient reason for this may be found in the following extract from the decree itself:

"And the parties to the above suits having by stipulation and agreement of record referred to the court *six plans or maps representing different modes of locating said concession*, * * * and the quantities of land represented by said plans having now been determined and reported to the court by a sworn expert, * * * it is ordered and decreed that the plan marked 'I' truly represents the lands conceded to Jacques Clamorgan."

The quantity of land embraced in the largest of these plans is estimated by this expert at 1,810,240 acres, and in the one adopted by the court, at 94,136 acres; the former being twenty times as much as the latter. The expert testifies that the estimate is as accurate as can be made in the absence of an actual survey in the field. And yet the claimants who appeal to this court, in order to get the largest of these amounts, did not even attempt to make an actual survey of the concession, which, if they are correct, embraces a highly civilized and thickly settled population, with no other difficulty in making such survey than what is found in the descriptive language of the grant. It is reasonable to suppose that that difficulty was known to be insurmountable, and this is confirmed by the irreconcilable differences of the conjectural plats, on which the government is to be *calculated* out of land scrip worth over \$2,000,000. That the selection of one of these plats, almost at hazard, is to be made the foundation of the judgment of the court is directly opposed to the construction we have given to the section of the Act under which the court exercises this jurisdiction.

But if we examine the description afforded by this supposed concession for ourselves, we must arrive at the same conclusion. The only description is that found in Clamorgan's petition asking Lieut-Gov. Trudeau for the concession, and is as follows: "A tract of land on the western side of the Mississippi, some leagues above the mouth of the Missouri, bounded on the one side by the little river called La Charette, or Dardenne, and on the other by the little river called Au Cuivre, one on the south, the other on the north of the boundaries to those two sides; also 60 arpents of land in front, on the banks of the Mississippi, immediately adjoining the mouth of the first above named river, La Charette, in descending the current of the Mississippi; and again 60 arpents in front, also, on the banks of the Mississippi, adjoining immediately to the upper side of the mouth of the second above named river, Au Cuivre, in as-

cending the current of the Mississippi; the depth of the three different above described tracts of land to be extended by two lines starting from the banks of the Mississippi, one from the most southern and the other from the most northern point of the front of the above demanded tracts, which two lines shall be run parallel on each side, in a westerly direction, until they reach the top of the high hills in the rear; and from there the said two lines to be continued and prolonged in the same westerly direction until they reach a point at the distance of 200 arpents from the foot of said hills, and then those two extreme points shall be connected together by a straight line which shall be so run as to form the fourth side of the said three tracts here above demanded; the said lines encompassing in their extent all the waters of the above mentioned rivers, La Charette *alias* Dardenne, and Au Cuivre, in order that hereafter the petitioner may erect saw and grist mills thereon, also place there a number of cattle, have slaughter-houses, and send salt meat to the capital." The Charette and the Au Cuivre Rivers, and the point where each enters the Mississippi, are known or ascertainable. So, also, it is clear there could be ascertained the points 60 arpents above the mouth of the one, and as many below the other. But the point mentioned as the top of the high hills in the rear, in a westerly direction, is not known and cannot be ascertained from any evidence in this record.

It is also clear from the plats presented to us that any two lines drawn west or westerly from points on the Mississippi River, 60 arpents north and south of the mouths of the Charette and Au Cuivre, parallel to each other, would cross one or both of those rivers, and leave a large part of the land lying between them out of the survey. Nor is any attempt made to identify the high hills or two hundred arpents from the foot of said hills, where the line shall be drawn which is to close the survey by connecting the two lines first mentioned.

In short, without elaborating this matter as we did in *Scull's Case*, it is apparent that when Clamorgan petitioned for his land and undertook to describe what he asked for, he had no knowledge of the ascending course of the two streams he mentioned, nor of the hills, if there were any, west of the Mississippi, nor of anything else probably but the bottom lands adjoining that river.

If the survey which the Spanish manner of granting public lands required, and which the order of Lieut-Gov. Trudeau required in this case, had been made, these mistakes would have been corrected, and the final concession from Governor Carondelet, who alone could make such a grant, would, either in that document or by reference to the executed survey, have given a sufficient description. In *Scull's Case* there was an attempt to supply the want of an actual survey by what the royal surveyor called "a figurative plan," and on this Governor Carondelet issued the final grant.

But in the present case there was neither an actual survey, nor a figurative plan, nor a final concession. And, as we have already shown, no such description was in the petition of the original claimant as will enable any one to identify the land or make a definitive location of it.

That we do not attach more importance to

this want of a sufficient description of land granted than Congress intended may be seen by a reference to the third class of section 3 of the Act, in which Congress directs the land-officers "To include all claims which, in their opinion, ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, *uncertainty of location, vagueness of description*, or any other cause sufficient in their opinion to justify such rejection." Obviously, even before this Board, which was only to report to Congress, uncertainty of location and vagueness of description were held to be sufficient grounds for their rejection of the claim. Much more is it a good ground in an action in court, under the limitations of the Act which we have considered as binding the court.

Two other serious exceptions are taken to claimants' title to recover.

It is said that there was no completed grant made by the Spanish Government; because Governor Carondelet, who alone could make such a grant, has not done so.

And certainly it is open to grave doubt whether the extract from a letter of Carondelet to Trudeau, in which, among other things, he expresses his approval of the *motives* of Trudeau in making the order of survey in favor of Clamorgan, can be construed into an official act, which amounts to a grant, at a time when no survey had been made, nor any reason given for not making it.

So, also, the petition of the present claimants in the district court in this suit shows that this claim was before different tribunals under the several Acts on that subject, and was reported against in both instances, and that this was long ago.

Counsel for Government insist with much force of argument that the claim was thus "*twice rejected on its merits*," within the meaning of the statute under which we are now proceeding. But we do not think it necessary to examine either of these points critically, because we are satisfied that, on the first ground we have discussed, the case comes within that of *Scull*, and is not so well supported as that was in the matter on which it was decided.

The judgment of the District Court is, therefore, reversed and the case remanded, with directions to dismiss the petition on the merits.

This renders unnecessary the consideration of the appeal of the claimants from the same decree.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

WILLIAM T. AYERS, Exr., of CHARLES P. GAGE, Deceased, Appt.,

v.
CITY OF CHICAGO ET AL.

(See S. C., 11 Otto, 184-187.)

Review of order—removal of causes.

1. This court has power to review an order of the Circuit Court remanding a cause to the State Court, from which it had been removed.

2. Where a plaintiff is a citizen of the same State as the defendant in the State Court, the suit is not removable, under the rule settled in Removal Cases, ante, 593.

[No. 42.]

Submitted Nov. 4, 1879. Decided Jan. 12, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois. The case is stated by the court.

Mr. M. W. Fuller, for appellant.

Messrs. W. C. Goudy, James F. Bonfield, Elliott Anthony and F. Adams, for appellees:

This is not an attempt on the part of Ayers to remove a part of the case, but the case is wholly removed as to the plaintiff, and all the defendants, and he bases the right to removal wholly upon the Act of 1875. Under this Act it is held that it is necessary that the state citizenship of each individual plaintiff shall be different from the state citizenship of each individual defendant, and that where one or more of the defendants are of the same State as the plaintiff, and one of the defendants of another and different State, the latter cannot have the cause removed.

Petterson v. Chapman, 13 Blatchf., 395.

Even under the Law of 1866, in an action very much like the one at bar, the Supreme Court holds that a single foreign defendant cannot have the cause removed.

Gardner v. Brown, 21 Wall., 36 [88 U. S., XXII., 527].

The crucial test seems to be: can the case be determined without the presence of the other co-defendants? If not, then it is not removable.

See, also, *Knapp v. R. R. Co.*, 20 Wall., 117 (87 U. S., XXII., 328); *Case of the Sewing-Machine Companies*, 18 Wall., 553 (85 U. S., XXI., 914); *Carraher v. Brennan*, 7 Biss., 497; *In re Frazier*, 7 Cent. L. J., 227; *Donahoe v. Mariposa Land Mining Co.*, 1 Pacif. Coast L. J., 211; *Ex parte Grimbald*, Vol. 8, Cent. L. J., 151; *Howland Coal Co. v. Brown*, 13 Bush (Ky.), 681.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 27th of December, 1873, David A. Gage and Eliza M., his wife, citizens of Illinois, conveyed to George Taylor, also a citizen of Illinois, a large quantity of real estate in Cook County, Illinois, in trust to secure the City of Chicago, an Illinois municipal Corporation, against loss by reason of the indebtedness of Gage as Treasurer of the City. The trustee was authorized to take possession of and manage the property, collect the income, pay taxes, etc., and, under the direction and with the concurrence of the Comptroller of the City, sell and convey the property as soon as it could be done to the interest of all concerned, paying the proceeds into the treasury of the City in liquidation, *pro tanto*, of whatever sum should be found due from Gage, as late Treasurer, to the City. If, when the debt was paid, any of the property remained unsold, it was to be reconveyed to Gage. Should the debt not be paid in eight months, the Comptroller was authorized to order a peremptory sale, on such terms as to him seemed best. The amount of the debt to the City was not stated in this deed of trust.

On the 20th of October, 1874, the City of Chicago filed a bill in equity in the Superior Court of Cook County against Gage and his wife and Taylor to enforce this trust. In the bill it was alleged that the debt of Gage to the City amounted to something more than \$500,000; that more than eight months had elapsed since the execution and delivery of the deed of trust; and that the Comptroller of the City had di-

rected Taylor, the trustee, to make a peremptory sale of the property, or so much thereof as was necessary, for cash, but that he had refused to do so. The prayer of the bill was that the amount due from Gage to the City might be determined, and that Taylor might be directed to sell the property to pay the debt.

On the 17th of November, 1874, Gage and his wife answered, admitting the execution of the trust-deed, but denying "That there was any indebtedness due from said David A. Gage to the said City, which it was his duty to pay over to his successor," and denying "that said Gage neglected, failed, or refused so to do." To this answer a replication was filed December 22 and December 30, Taylor answered, admitting all the allegations of the bill except as to the amount due the City, and declaring his willingness to proceed with the execution of the trust as soon as the amount of the debt was ascertained. April 2, Gage moved the court for a continuance of the cause on his affidavit showing the absence of a material witness, by whom he expected to prove his defense against the account as made out by the City.

On the 5th of April, 1875, while this motion for a continuance remained undisposed of, William T. Ayers, a citizen of Alabama, executor of the will of Charles P. Gage, also at his death a citizen of Alabama, obtained a judgment in the Circuit Court of the United States for the Northern District of Illinois against David A. Gage for \$3,065.92, and on the 8th of the same month filed a petition in the State Court setting forth that he, as a judgment creditor of David A. Gage, claimed a lien on the property included in the trust-deed, and asking that he might be made a party defendant to the suit pending in that court, with leave to answer. The prayer of this petition was granted, and at once Ayers filed an answer setting up his judgment and averring that the trust-deed was void for want of consideration; and further, that even if found to be valid, there was but a small amount of the debt it was intended to secure still unpaid, and that there was enough of the trust property to pay his judgment after the claim of the City was satisfied. On the same day he filed a cross-bill, which was in the nature of a creditors' bill, to subject the trust property to pay his judgment. In this bill he alleged that there was nothing due from Gage to the City, and set forth with much particularity the defenses which Gage had against the claim made by the City. As soon as these pleadings were filed, he presented his petition, accompanied by a sufficient bond, for the removal of the suit to the Circuit Court of the United States for the Northern District of Illinois, alleging for cause that he was a citizen of the State of Alabama, and all the other parties were citizens of Illinois; "That, in the said original bill there is a controversy which is wholly between the said complainants and your petitioner, and which can be fully determined as between them;" and that, as to the cross bill, "the controversy therein is wholly between citizens of different States." The State Court ordered the cause transferred, and on the first of May Ayers filed a transcript of the record in the Circuit Court, and had the suit docketed there. Afterwards the parties appeared; and on motion of the City the cause was remanded to the State

Court. From that order Ayers appealed to this court. After the appeal was docketed the City moved to dismiss because the order remanding the cause was not one from which an appeal is allowed, and because the order was not on the merits of the cause, nor a final order, judgment, or decree from which an appeal lies. This motion was submitted with the case on its merits.

There is no doubt of our jurisdiction. Section 5 of the Act of 1875, 18 Stat., 472, is as follows:

"That if, in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case, cognizable or removable under this Act; the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

The order appealed from in this case comes directly within the last clause of this section. It follows that the motion to dismiss must be overruled.

The original bill and cross-bill constitute one suit. *Ayres v. Carver*, 17 How., 591 [58 U. S., XV., 179]; *Ex parte R. R. Co.*, 95 U. S., 221 [XXIV., 355]. A cross-bill, too, must grow out of the original suit. It cannot bring in new and distinct matters. It is "A proceeding to procure a complete determination of a matter already in litigation." 2 Dan. Ch. Pr., 1549, and *n. 2*.

Ayers was permitted to make himself a party because he claimed to have acquired a lien on the trust property pending the suit. He was allowed to take part in a controversy then existing between Gage and the City. He has no dispute with Gage; neither has he any separately with the City. The most that can be said is that he and Gage have a controversy with the City as to its lien on the property, and that Gage, who is on the same side of that controversy with him, is a citizen of the same State with the City. Such being the case, the suit was not removable under the rule settled in *Removal Cases* [ante, 593].

The order of the Circuit Court remanding the cause is affirmed.

Cited—101 U. S., 641; 6 Sawy., 222.

JEROME B. POLLARD, *Plff. in Err.*,
v.
NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.

(See S. C., 11 Otto, 223-225.)

Former judgment—when a bar.

1. A judgment in an action of *assumpsit*, brought
840

by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of *assumpsit* on the same contract, by the husband alone, to recover for the same injuries.

2. A different rule prevails when the action is in tort against the carrier for breach of his public duty, except, perhaps, in States like New Jersey, where by statute the husband may, in such an action, add claims in his own right to those of his wife.

[No. 140.]

Argued Jan. 7, 8, 1880. Decided Jan. 12, 1880.

IN ERROR to the Circuit Court of the United States for the District of New Jersey.

This was an action brought in the court below, by the plaintiff in error against the defendant in error, to recover damages occasioned by an injury to his wife, alleged to have been caused by the negligence of the defendant, while she was a passenger upon the defendant's road. The damages alleged in the declaration were that the plaintiff had been subjected to large expense for medicine and medical aid, etc., and had been deprived of the labor and services of his said wife.

Among other defenses the defendant set up that of former recovery.

Pollard and his wife had previously brought an action in the same court against the same defendant to recover damages occasioned by the same injury, and had recovered a judgment which had been paid.

The damages alleged in the declaration in this last mentioned action were that "The said Sarah H. Pollard has suffered great pain, both of body and mind, and during all of said time has been unable to perform her accustomed work and duties, and unable to move from place to place without suffering great pain, and the said injuries by her so sustained as aforesaid, are of a permanent character," etc.

The plaintiff demurred to the plea of the defendant setting up the defense of former recovery, and the court below overruled this demurrer and entered final judgment in favor of the defendant.

See, *R. R. Co. v. Pollard*, 22 Wall., 341 (89 U. S., XXII., 877).

Messrs. Albert A. Abbott and John S. Abbott, for plaintiff in error:

The damages claimed by the present plaintiff were not claimed in the former action, and they were not and could not have been recovered therein.

1 Chit. Pl., 35, 16th Am. ed.; *Lewis v. Babcock*, 18 Johns., 443; *Russell v. Corne*, 1 Salk., 119; *Holmes v. Wood*, cited in 2 Wills, 424; *Whitcomb v. Barre*, 37 Vt., 148; *Kavanaugh v. Janesville*, 24 Wis., 618; *Hooper v. Haskell*, 56 Me., 251.

The Statute of New Jersey, Nixon's Dig., 4th ed., p. 735, affords no exception to this point. It relates to actions *ex delicto* only. In this connection see *Brockbank v. R. R. Co.*, 7 Hurl. & N., 834.

A former recovery is binding only upon parties or their privies who have a mutual or successive relationship to the same right or thing.

The former recovery concludes the parties only in the character and as to the right in which they sue or are sued.

Big. Estop., 2d ed., p. 65; *Leggett v. R. R. Co.*, 2 L. & E., No. 18, p. 497; *Rathbone v. Hooney*, 58 N. Y., 467.

The present plaintiff was not a party to the former action in his own right, but in the right of his wife; and he was joined as a party to that action only because of that relationship.

The plaintiffs in the former action had no joint right to recover for the damages which the present plaintiff alone sustained.

Messrs. James B. Vredenburg and J. W. Scudder, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

A judgment in an action of *assumpsit*, brought by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of *assumpsit* on the same contract, by the husband alone, to recover for the same injuries. A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except, perhaps, in States like New Jersey, where, by statute, the husband may, in such an action, add claims in his own right to those of his wife. *Rev. Laws, N. J., 851, sec. 22.*

Judgment affirmed.

LUCY C. FLAGLOR GAY ET AL., *Appts.*,

v.

CATHARINE PARPART.

(See S. C., 11 Otto, 391, 392.)

Bond on appeal—motion to dismiss or affirm.

1. The condition of a bond on appeal, that the appellants "Shall duly prosecute their said appeal with effect and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in the Supreme Court," covers fully all the requirements of the statute.

2. In such case, the appellee cannot couple with a motion to dismiss, a motion, under Rule 6, to affirm, on the ground that the appeal was taken for delay only.

[No. 989.]

Submitted Jan. 5, 1880. Decided Jan. 12, 1880.

MOTIONS to vacate *supersedeas* and dismiss appeal from the Circuit Court for the Northern District of Illinois.

The statements appear in the opinion of the court.

Messrs. Edward S. Isham, Robert S. Lincoln, L. Trumbull and C. F. Peck, for appellants.

Messrs. L. Proudfoot and Geo. Herbert, for appellee:

Mr. Chief Justice Waite delivered the opinion of the court:

These motions are founded on an alleged defect in the form of the condition of the bond. By section 1000 R. S., the security to be taken on a writ of error or an appeal, where the writ or the appeal is a *supersedeas* and stays execution, must be "That the plaintiff in error or the appellant shall prosecute his writ or appeal to effect and, if he fail to make his plea good, shall answer all damages and costs." The condition of the bond in this case is, that the appellants "Shall duly prosecute their said appeal with effect and, moreover, pay the amount of costs and damages rendered and to be rendered

See 11 OTTO.

in case the decree shall be affirmed in said Supreme Court."

The object of the statutory requirement undoubtedly is, to secure to the opposite party his damages and costs, in case the judgment or decree shall not be reversed, and that, we think, is the legal effect of this bond. If, on the final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed and the writ of error or appeal has not been prosecuted with effect. In our opinion the language of the bond covers fully all the requirements of the statute. The motions to dismiss the appeal and vacate the *supersedeas* are, therefore, overruled.

The appellee has coupled with her motion to dismiss, a motion, under Rule 6, to affirm, because it is manifest that the appeal was taken for delay only. Clearly this is not a case for the application of that rule.

WILLIAM C. M. BAKER, *Appt.*,

v.

ELIZABETH SELDEN.

(See S. C., 11 Otto, 99-107.)

Copyright—book-keeping—art of—blank books—Selden's ledger.

1. The exclusive property in a system of book-keeping cannot be claimed, under the law of copyright, by means of a book in which that system is explained.

2. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell and use account books prepared upon the plan set forth in such book.

3. The description of an art in a book, although entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.

4. Blank account-books are not the subject of copyright.

5. The mere copyright of Selden's "Condensed Ledger, or Book-keeping Simplified," did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.

[No. 95.]

Argued Dec. 2, 3, 1879. Decided Jan. 19, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

Messrs. Alphonso Taft, E. F. Noyes and H.

P. Lloyd, for appellant:

Complainant has contributed to the useful arts "a system of ruling books in which accounts are kept." That is all.

This is not the subject of copyright. It is a contribution to useful mechanical art, not to literature. It conveys no thought, gives no information, expresses no idea. It is a mechanical process of ruling, which any stationer's clerk could perform with simple pen and ruler.

This was evidently the idea of the inventor, for he applied to the Patent Office for letters patent to cover his system of ruling lines.

This point is practically conceded by the learned counsel for appellee in the oral argument. He describes the state of the art when Selden invented his rulings. This refers only to patent-rights. He also says that "The Selden system is an artificial system for the art of book-keeping." These are his exact words. They do not refer to authorship, but solely to invention.

Our claim that Selden's ruled lines are not the subject of a copyright, is supported by the entire tenor of the decision of this court in the case of *Perris v. Hexamer*, decided at the October Term, 1878 (*ante*, 308).

It is further supported by the reasoning of the learned Judge in the opinion rendered in the *Trade-Mark Cases*, at the present Term (*ante*, 550).

It is fully confirmed by the opinion of *Vice-Chancellor Malins*, in the case of *Page v. Wisden*, 20 Law Times (N S.), 435, where a form of ruled lines quite similar to Selden's was distinctly held not to be a subject of copyright.

Messrs. C. W. Moulton and M. I. Southard, for appellee:

What is the proper subject of a copyright under the statute?

R. S., sec. 4952.

"The literary property intended to be protected by the Act is not to be determined by the size, form or shape in which it makes its appearance, but by the subject-matter of the work."

Drone, Copyr., 142.

What subject-matter may be copyrighted is not to be ascertained by reference to lexicographers; but by the scope and object of the Legislature. The statute is somewhat general in its provisions, and the specific subjects comprehended within them, must be left to judicial interpretation. *Drone*, Copyr., 143.

The meaning of the terms employed, as that of "book," "chart," etc., are comprehensive and embrace many subjects not included in the popular sense and acceptance. They have a legal meaning entirely different. A "song," a "diagram," a "map," a "sheet of music," etc., have been adjudged to fall within the definition of "book."

This interpretation was given under the old English Statute of 8 Anne, which is similar to the Statute of the United States in this respect.

Drone, Copyr., 140, *et seq.*; *Bach v. Longman*, Cowp., 623; *Hime v. Dale*, 2 Camp., 27, *note*.

And the same liberal construction has been adopted by the text writers and courts in the United States.

2 Kent, Com., 311; *Clayton v. Stone*, 2 Paine, 382; *Seoville v. Toland*, 6 West. L. J., 84; *Drury v. Ewing*, 1 Bond, 540.

The essential tests are:

(1) Is the subject-matter original?
(2) Is it a material contribution to useful knowledge?

Drone, Copyr., 181.

Such we conceive to be the distinguishing features of what may be the subject-matter of copyright under the statute; and the copyright of appellee, we submit, falls clearly within the scope of the law, in so far as it is a contribution to useful knowledge. It embraces one of the most necessary features of every day business life, and serves a purpose of usefulness that needs no demonstration.

Mr. Justice Bradley delivered the opinion of the court:

Charles Selden, the testator of the complainant in this case, in the year 1859 took the requisite steps for obtaining the copyright of a book, entitled "Selden's Condensed Ledger, or Book-keeping Simplified," the object of which

was to exhibit and explain a peculiar system of book-keeping. In 1860 and 1861, he took the copyright of several other books, containing additions to and improvements upon the said system. The bill of complaint was filed against the defendant, Baker, for an alleged infringement of these copyrights. The latter, in his answer, denied that Selden was the author or designer of the books and denied the infringement charged, and contends on the argument that the matter alleged to be infringed is not a lawful subject of copyright.

The parties went into proofs, and the various books of the complainant, as well as those sold and used by the defendant, were exhibited before the examiner, and witnesses were examined on both sides.

The book or series of books, of which the complainant claims the copyright, consists of an introductory essay explaining the system of book-keeping referred to, to which are annexed certain forms or blanks, consisting of ruled lines and headings, illustrating the system and showing how it is to be used and carried out in practice. This system effects the same results as book-keeping by double entry; but, by a peculiar arrangement of columns and headings, presents the entire operation, of a day, a week or a month, on a single page or on two pages facing each other, in an account-book. The defendant uses a similar plan so far as results are concerned; but makes a different arrangement of the columns, and uses different headings. If the complainant's testator had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of arrangement; but if it be assumed that the system is open to public use, it seems to be equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book considered merely as a book explanatory of the system. Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account books arranged on substantially the same system; but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work; or that he has infringed Selden's right in any way, unless the latter became entitled to an exclusive right in the system.

The evidence of the complainant is principally directed to the object of showing that Baker uses the same system as that which is explained and illustrated in Selden's books. It becomes important, therefore, to determine whether, in obtaining the copyright of his books, he secured the exclusive right to the use of the system or method of book-keeping which the said books are intended to illustrate and explain. It is contended that he has secured such exclusive right, because no one can use the system without using substantially the same ruled lines and headings which he has appended to his books in illustration of it. In other words; it is contended that the ruled lines and headings, given to illustrate the system, are a part of the book

and, as such, are secured by the copyright; and that no one can make or use similar ruled lines and headings, or ruled lines and headings made and arranged on substantially the same system, without violating the copyright. And this is really the question to be decided in this case. Stated in another form, the question is whether the exclusive property in a system of book-keeping can be claimed, under the law of copyright, by means of a book in which that system is explained. The complainant's bill and the case made under it, are based on the hypothesis that it can be.

It cannot be pretended and, indeed, it is not seriously urged, that the ruled lines of the complainant's account-book can be claimed under any special class of objects, other than books, named in the law of copyright existing in 1859. The law then in force was that of 1831, 4 Stat. at L., 436, and specified only books, maps, charts, musical compositions, prints and engravings. An account-book, consisting of ruled lines and blank columns, cannot be called by any of these names, unless by that of a book.

There is no doubt that a work on the subject of book-keeping, though only explanatory of well known systems, may be the subject of a copyright; but, then, it is claimed only as a book. Such a book may be explanatory either of old systems, or of an entirely new system; and, considered as a book, as the work of an author conveying information on the subject of book-keeping and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The mere statement of the proposition is so evident that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs or watches or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty or want of novelty of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.

The difference between the two things, letters patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art.

If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture or composition of matter. He may copyright his book, if he pleases; but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries.

The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book, without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art, makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams, which merely stand in the place of words, there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book.

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application.

Of course, these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said that their form is their essence, and their object the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition as are the lines of the poet or the historian's periods. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book, their essence consists only in their statement. This alone is what is secured by the copyright. The use by another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art, would, undoubtedly, be an infringement of the copyright.

Recurring to the case before us, we observe

that Charles Selden, by his books, explained and described a peculiar system of book-keeping, and illustrated his method by means of ruled lines and blank columns, with proper headings on a page, or on successive pages. Now, whilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell and use account books prepared upon the plan set forth in such book. Whether the art might or might not have been patented, is a question which is not before us. It was not patented, and is open and free to the use of the public. And, of course, in using the art, the ruled lines and headings of accounts must necessarily be used as incident to it.

The plausibility of the claim put forward by the complainant in this case arises from a confusion of ideas produced by the peculiar nature of the art described in the books which have been made the subject of copyright. In describing the art, the illustrations and diagrams employed happen to correspond more closely than usual with the actual work performed by the operator who uses the art. Those illustrations and diagrams consist of ruled lines and headings of accounts; and it is similar ruled lines and headings of accounts which in the application of the art, the book-keeper makes with his pen, or the stationer with his press; whilst in most other cases the diagrams and illustrations can only be represented in concrete forms of wood, metal, stone, or some other physical embodiment. But the principle is the same in all. The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters patent.

The remarks of *Mr. Justice Thompson* in the circuit court in *Clayton v. Stone*, 2 Paine, 392, in which copyright was claimed in a daily price-current, are apposite and instructive. He says: "In determining the true construction to be given to the Act of Congress, it is proper to look at the Constitution of the United States, to aid us in ascertaining the nature of the property intended to be protected. 'Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.' The Act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science: and it would, certainly, be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent and durable character. The term 'science' cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject-matter of which is daily changing, and is of mere

temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the Act of Congress is, 'for the encouragement of learning,' and was not intended for the encouragement of mere industry, unconnected with learning and the sciences. * * * We are, accordingly, of opinion that the paper in question is not a book the copyright to which can be secured under the Act of Congress."

The case of *Cobbett v. Woodward*, L. R., 14 Eq., 407, was a claim to copyright in a catalogue of furniture which the publisher had on sale in his establishment, illustrated with many drawings of furniture and decorations. The defendants, being dealers in the same business, published a similar book, and copied many of the plaintiff's drawings, though it was shown that they had for sale the articles represented thereby. The court held that these drawings were not subjects of copyright. Lord Romilly, M. R., said: "This is a mere advertisement for the sale of particular articles which anyone might imitate, and anyone might advertise for sale. If a man, not being a vendor of any of the articles in question, were to publish a work for the purpose of informing the public of what was the most convenient species of articles for household furniture, or the most graceful species of decorations for articles of home furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs of each article he described, such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if, in fact, it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement; provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser."

Another case, that of *Page v. Wisden*, 20 L. T. (N. S.), 435, which came before *Vice-Chancellor Malins* in 1869, has some resemblance to the present. There a copyright was claimed in a cricket scoring-sheet, and the Vice-Chancellor held that it was not a fit subject for copyright, partly because it was not new, but also because "To say that a particular mode of ruling a book constituted an object for a copyright is absurd."

These cases, if not precisely in point, come near to the matter in hand and, in our view, corroborate the general proposition which we have laid down.

The case *Drury v. Ewing*, before *Judge Leavitt* in the Ohio Circuit, reported in 1 Bond, 540, which is much relied on by the complainant was one where a copyright was claimed in a chart of patterns for cutting dresses and bas-

ques for ladies, and coats, jackets, etc., for boys. It is obvious that such designs could only be printed and published for information, and not for use in themselves. Their practical use could only be exemplified in cloth on the tailor's board and under his shears; in other words, by the application of a mechanical operation to the cutting of cloth in certain patterns and forms. Surely the exclusive right to this practical use was not reserved to the publisher by his copyright of the chart. Without undertaking to say whether we should or should not concur in the decision in that case, we think it cannot control the present.

The conclusion to which we have come is, that blank account-books are not the subject of copyright; and that the mere copyright of Selden's book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.

The decree of the Circuit Court must be reversed and the cause remanded, with instructions to dismiss the complainant's bill.

RICHARD C. GREENLEAF ET AL., Copartners, as C. F. HOVEY & Co., *Plffs. in Err.*,

v.

JOHN Z. GOODRICH, LATE COLLECTOR OF CUSTOMS.

(See S. C., 11 Otto, 278-285.)

Duty Act—similar goods—designation.

1. Under the Tariff Acts of 1861 and 1862, duties, at the rate of thirty per cent *ad valorem*, and two cents per square yard, were chargeable on goods known in trade as *poil de chèvres*, reps, plaids, lusters or Saxony dress-goods.

2. The statute does not contemplate that goods classed under the words "of similar description" shall be in all respects the same. The phrase "of similar description," is not a commercial term.

3. Commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws.

[No. 127.]

Argued Dec. 22, 1879. Decided Jan. 19, 1880.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This was an action brought in the court below, by the plaintiffs in error, against Goodrich, the defendant in error, to recover an alleged excess of duties collected by the defendant as Collector of the Port of Boston, upon certain goods imported by the plaintiffs.

The facts are stated in the opinion.

Judgment having been rendered for the defendant, the plaintiffs sued out this writ of error.

Mr. Chas. Levi Woodbury, for plaintiffs in error.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

That the goods imported by the plaintiffs were subject to a duty of thirty per cent under the Act of March 2, 1861, 12 Stat. at L., 192, is not denied. They belonged to the class de-

scribed in that Act as "Manufactures, not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool or worsted, or flax." The controversy between the parties now is over the question what was added to that duty by the Act of July 14, 1862, 12 Stat. at L., 553.

By the 3d item of section 13 of the Act of 1861 a duty of twenty-five per cent *ad valorem* was imposed upon "All delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of wool, gray or uncolored, and on all other gray or uncolored goods of similar description;" "on bunting and on all stained, colored or printed, and on all other manufactures of wool, or of which wool shall be a component material, not otherwise provided for, a duty of thirty per cent *ad valorem*."

By section 22 of the same Act a duty of thirty per cent was levied in the mixed material clause quoted above. A subsequent Act, passed on the 5th of August, 1861, 12 Stat. at L., 292, amended the 3d item of section 13 of the Act of March 2, 1861, by striking from it the word "wool" wherever it occurred, and inserting the word "worsted" in lieu thereof.

Thus stood the law when the Act of 1862 was enacted. It was an Act to increase the duties leviable under the Act of 1861. The 9th section enacted that in addition to the duties theretofore imposed there should be levied, collected and paid "On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair or goat's hair, and on all goods of similar description, not exceeding in value forty cents per square yard, two cents per square yard.

On bunting, worsted yarns, and on all other manufactures of worsted, or of which worsted shall be a component material, *not otherwise provided for*, five per cent *ad valorem*."

A subsequent section of the Act imposed an additional duty of five per cent *ad valorem* also on "Manufactures *not otherwise provided for*, composed of mixed materials, in part of cotton, silk, wool or worsted, hemp, jute or flax."

An examination of these provisions will reveal very plainly that the classification of the articles made subject to an increased duty is not the same as it was in the Act of 1861. The first clause of the 3d item of section 13 of the Act of 1861, as amended in August, embraced only delaines composed wholly or in part of worsted and goods of similar description, woven in the gray or uncolored. The Act of 1862 grouped with them delaines made wholly or in part of wool, mohair or goat's hair, and also delaines composed wholly or in part of worsted and goods of similar description, not in the gray or uncolored. It was, therefore, much more comprehensive than the former Act. So the 2d clause of the 3d item of the 13th section of the Act of 1861 differs much from the corresponding clause of the Act of 1862.

Similar changes of classification appear when the mixed material clauses of the two Acts are compared. The changes were evidently not without a purpose.

Such were the statutory provisions when the plaintiffs' importations were made. The Collector exacted duties at the rate of thirty per cent *ad valorem*, and two cents per square yard, claiming that the goods were goods of similar

description to the delaines mentioned in the 9th section of the Act of 1862, and did not exceed in value forty cents per square yard. On the other hand, the plaintiffs claimed that the goods having been classed under the Act of 1861, among manufactures of mixed materials, not otherwise provided for, and subjected to a duty of thirty per cent, continued in that class under the Act of 1862, and were, therefore, chargeable only with a duty of 35 per cent. Accordingly, having paid the duty exacted by the Collector, under protest, they have brought this suit to recover the difference between 35 per cent *ad valorem*, and 30 per cent and two cents per square yard.

It appeared in evidence that the goods were known in trade and were bought and sold as *as poil de chèvres*, reps, plaids, lustres, Saxony dress-goods. They were always woven in colors, the yarns being dyed or colored before weaving. They never existed in the gray or uncolored condition. But they were made, as delaines are made, with a cotton warp and a worsted weft, the difference between them and delaines (as stated in the plaintiff's protest) being that delaines are a fabric of all wool, or cotton warp and worsted weft, and made of yarns not dyed, the cloth being printed or dyed in the piece. It further appeared that as early as 1857 both the all-wool delaines and those with cotton warp and wool or worsted filling were known in trade by names changed from time to time, to suit the fancy of importers and purchasers. It also appeared that in several other particulars the goods of the plaintiffs differed from delaines. To these differences it is unnecessary now to refer in detail.

Now, conceding, as we may, that the plaintiffs' goods came under the mixed material clause of the Act of 1861, being excluded from the delaine clause, that embraced only goods woven in the gray, it is not perceived how that can throw any light upon the proper construction of the Act of 1862, which obviously intended a different classification. Undoubtedly, Acts of Congress *in pari materia* are to be construed with reference to each other. And it may be admitted that when, in a later Act, Congress uses expressions that had a recognized meaning in a former Act relating to the same subject, they intend to use them in the same sense in which they were first used, that is, with their recognized meaning. But this rule has no bearing upon a case like the present. This is not a question respecting the meaning of terms. We cannot see, therefore, that the circuit court erred in refusing to affirm the plaintiffs' first four points, and in declining to rule under what clause of the Act of 1861 the imported goods fell. After all, the question for that court was the construction of the Act of 1862, and the construction given was, we think, correct. It could not have been different if the court had undertaken to construe with it the clauses of the Act of 1861. As we have said, the changes of classification and of phraseology made in the Act of 1862 show an intention to take out of the mixed material clause of the former Act (which was limited to manufactures not otherwise provided for) some descriptions of goods which the Act placed there, and by transferring them to another class, subject them to the additional duty prescribed for that class. If not so, what was the

necessity for a reclassification? Why change the language? It would have been sufficient to declare what additional duty should be paid by each class as formerly arranged. The Act of 1861, therefore, could furnish no aid to the construction of the Act of 1862, and reference to it was unimportant, except for the purpose of discovering the percentage of duties it imposed.

The fifth point was properly refused. The words "of similar description" in the delaine clause of the Act of 1862 cannot be affirmed to have referred only to such goods as have the greater number of characteristics in common with delaines. Some common characteristics are of much more importance than others in determining resemblances.

The sixth point propounded was as follows: "Revenue laws designate and class substances according to the general usage and known denominations of trade. The words 'all goods of similar description' in the Tariff Act of 1862 refer to a similarity for revenue purposes with goods previously enumerated, and this is determined by what was then known and classed among merchants as similar goods; and if being woven in the gray or natural color of the worsted and other materials of which they are composed is found to have been an important and pervading characteristic, commonly distinguishing goods known among merchants as of similar description with delaines, then the goods on which the duties in this case were assessed were not of similar description with delaines, unless the jury find they were so woven in the gray or natural color, and unless these goods possessed all the pervading characteristics which in 1862 were commonly understood among merchants as distinguishing goods, known in commerce as of a similar description with delaines, from all other goods, the plaintiffs are entitled to a verdict." This point the court declined to affirm, and we think rightly, for several reasons.

There was no evidence, so far as it appears, to justify its presentation. The record exhibits nothing tending to show what was commonly understood among merchants as distinguishing goods, known in commerce as of a similar description with delaines, from all other goods. Nor was there any evidence that there were any goods known by merchants, or in commerce, as goods of a similar description with delaines; much less was it in proof that being woven in the gray was regarded by merchants as determining that goods so woven were not of similar description with delaines. In regard to all these matters, the record is silent. Composed, as the goods were, of the same materials as delaines, having a similar general appearance and intended for the same uses, they might well have been of similar description with colored delaines, though there were differences in the process of manufacture.

The statute does not contemplate that goods classed under the words "of similar description" shall be in all respects the same. If it did, these words would be unnecessary. They were intended to embrace goods like, but not identical with delaines.

The court charged the jury, in answer to a prayer of the defendant, that the similarity referred to in the expression "'goods of similar description,' in the Act of 1862, is a similarity in respect to the product, and its adaptation to

uses, and to its uses, and not merely to the process by which it was produced, and that if a class of goods were not in 1862 commercially known as delaines, it does not follow that they were not goods of similar description, within the meaning of the statute." And again; "These words are to be taken and understood in their popular and received import, as generally understood in the community at large at the time of the passage of the Act." Other similar instruction was given, and the court called attention to all the alleged dissimilarities urged by the plaintiffs, including the fact that delaines are woven in the gray, and that the plaintiffs' goods were not, and summed up as follows:

"If you find that the product or result is an article for ladies' dresses made with a cotton warp and worsted filling, the question for your determination is, whether the two kinds of goods are substantially the same and alike. The process of manufacture, the worsted in the goods of the plaintiffs being dyed previous to weaving, is an element to be considered by the jury in coming to their conclusion, but not alone and distinct from all others which may have been established. It is for the jury to determine, from all the evidence in the case, whether, by the colored filling made and woven in the way and manner described with a cotton warp, the product is or not an article substantially similar and like the delaine fabrics; whether or not, while varying more or less in some particulars from delaines, the goods were or not substantially the same or substantially different from them. If substantially the same article, then the duties were properly assessed; but if they were substantially different, and the plaintiffs' goods were not of a similar description to the delaine fabrics, then they were not subject to the additional duty."

Notwithstanding the strenuous objections urged against such a submission to the jury, we think it was correct. At least it was quite as favorable to the plaintiffs as they had a right to demand. Reliance is placed upon the rule, which we admit to be established, that the commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws. But the present is not a case of commercial designation of articles. The phrase "of similar description" is not a commercial term, and if it were, there is no evidence in the record to show what it is understood to mean among merchants and importers. In *Mail-lard v. Lawrence*, 16 How., 251, we have an instructive case bearing upon this subject. There the question was whether shawls came under one schedule of the Act of 1846, 9 Stat. at L., 42, imposing a duty of 25 per cent under another charged with a 30 per cent duty. In schedule C was included "Clothing ready-made and wearing apparel of every description, of whatever material composed, made up or manufactured," and it subjected them to 30 per cent duty. Schedule D described "Manufactures of silk, or of which silk shall be a component material, not otherwise provided for, manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for," and imposed a 25 per cent duty. The circuit court had been requested to instruct the jury that if they should find that at the date of the Act the

shawls in question were commercially known as manufactures of worsted, or of which worsted was a component material, and that they were not known in trade as clothing ready-made, or as wearing apparel, they were subject only to a duty of 25 per cent. This instruction was refused, and this court held correctly; holding that, while it was true that where words of art, or phrases, are novel or obscure, as in terms of art, it was proper to explain them by reference to the art or science to which they were appropriate, the rule was not so when the words or phrases are familiar to all classes, grades and occupations; and that the popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private transactions. The court added, that if it could be conceded that, in the opinion of mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the Legislature designed a departure from the natural and popular acceptance of language. The case was rested on the basis that "wearing apparel" was not a technical term. Much less is the phrase, goods "of a similar description."

Upon the whole, therefore, we think there was no error in the charge of the Judges in the court below, and, therefore, the judgment is affirmed.

AMERICAN BIBLE SOCIETY, *Appt.*,

v.

JOHN A. GROVE ET AL.

(See S. C., 11 Otto, 610-612.)

Removal of causes—Act of 1875.

1. Suits cannot be removed from the State Courts on account of prejudice or local influence, unless the party opposed to him who petitions for the removal, is a citizen of the State in which the suit is brought.

2. Under the Act of March 3, 1875, in suits pending when the Act was passed, the petition must be filed at the first term of the court thereafter at which the cause could be tried.

[No. 107.]

Submitted Dec. 16, 1879. Decided Jan. 19, 1880.

APPEAL from the Circuit Court of the United States for the Western District of Missouri.

The case is stated by the court.

Mr. George P. Strong, for appellant, referred to *Girardy v. Moore*, 5 Cent. L. J., 78; *Comrs. v. R. R. Co.*, 5 Cent. L. J., 102.

Mr. L. Danford, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This was a suit begun on the 6th of March, 1868, in a state court, by a part of the heirs at law of Jacob E. Grove, to set aside his will. The defendants were the executors of the will, the legatees or devisees, and some of the heirs. The case was tried four times in the state court, and the venue was changed twice. At three of

NOTE.—*Removal of causes to U. S. Courts under Act of March 2, 1867, for local prejudice.* See note to *Gaines v. Fuentes*, 92 U. S., XXIII., 524.

the trials the jury disagreed. At the other a verdict was given for the plaintiffs, which the court set aside. The last trial commenced April 14, 1875, at the January adjourned Term of the court, and resulted in a disagreement of the jury. At the next Term, beginning on the third Monday in May, the cause was continued.

On the 21st of September, 1875, the American Bible Society, one of the defendants in the suit, a New York Corporation, and a legatee under the will, filed its petition for the removal of the cause to the Circuit Court of the United States. The ground of removal is thus stated in the petition:

"That said John A. Grove and others, plaintiffs as aforesaid, are residents and citizens of the State of Ohio, and other States other than the State of New York; that none of said plaintiffs reside in or are citizens of the State of New York; that said controversy is wholly between citizens of different States, and can be fully determined as between them; that petitioner is actually interested in said controversy, being the only party whose interests plaintiffs profess to desire to affect in said controversy; that the amount involved in said controversy exceeds \$5,000. Petitioner further states that it has reason to believe and does believe, that from prejudice and local influence it will not be able to obtain justice in said Circuit Court of Macon County aforesaid." Accompanying the petition was the necessary bond, and an affidavit of the attorney of the petitioner, stating his belief of the facts set forth, and that from local influence and prejudice the petitioner would not be able to obtain justice in the state court. It nowhere appears from the petition or the record that the plaintiffs or either of them were citizens of Missouri.

A copy of the record in the suit was duly filed in the Circuit Court of the United States, and the cause docketed there. At the first Term the plaintiffs appeared and moved that the cause be set down for hearing; but the court adjourned without disposing of the motion. On the 6th of March, 1876, and during the vacation, the plaintiffs filed in the office of the clerk another motion to remand the cause, on the grounds, among others: 1, that the petition for removal was not filed before or at the term in which the cause could be first tried; and, 2, that it did not appear that the plaintiffs, or either of them, were citizens of Missouri. At the next Term this motion was granted. To reverse that order this appeal has been brought.

We think the decision below was right. The courts of the United States are not required to take any suit until in some form their jurisdiction is made to appear of record. This rule applies to suits coming to them by removal as well as to those in which they issue the original process.

Suits cannot be removed from the state courts on account of "prejudice or local influence," unless the party opposed to him who petitions for the removal is a citizen of the State in which the suit is brought. The express provision of the statute is, that "When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed, on the petition of the latter." Rev. Stat., sec. 639, subsec. 3. The Act of March 3, 1875, 18 Stat. at L. 470, has not changed this

provision of the Revised Statutes. Removals for this cause still depend on that section, which is a reproduction of the Act of 1867, 14 Stat. at L. 558. As the plaintiffs are not shown to have been citizens of Missouri, it is clear that the defendants were not entitled to take the case to the Courts of the United States on this ground.

To effect a removal under the Act of March 3, 1875, the petition must be filed in the State court "Before or at the term at which said cause could be first tried and before the trial thereof." Sec. 3. This has been held to mean, in respect to suits pending when the Act was passed, that the petition must be filed at the first term of the court thereafter at which the cause could be tried. *Removal Cases* [ante, 593]. The Act took effect from the time of its approval, March 3. The case was actually tried once in the state court, on the 14th of April following. The jury disagreeing, it was continued at that Term and also at the May Term. The petition for removal was not filed until September afterwards. Clearly this was too late.

It is unnecessary to consider any of the other objections to the jurisdiction of the Circuit Court which have been raised.

Judgment affirmed.

Cited—19 Blatchf., 37; 174; 51 Wis., 579; 9 N. W. Rep., 658; 20 N. W. Rep., 786.

EDWARD T. WORTHINGTON AND ISAAC M. WORTHINGTON, as Admsrs. of ELISHA WORTHINGTON, Deceased, *Pliffs. in Err.*,

v.

MARTHA W. MASON.

(See S. C., 11 Otto, 149-153.)

General exception insufficient—evidence.

1. Where prayers for instructions were presented as a whole, refused as a whole, and excepted to in the same manner, if any one of them was rightfully rejected, no error was committed.

2. When complaint is made of the instructions of the court given or refused, the proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them. It is not sufficient to show that the judge assumed them in his charge to the jury.

[No. 121.]

Submitted Dec. 19, 1879. Decided Jan. 26, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The case is stated by the court.

Mr. A. H. Garland, for plaintiffs in error.

Messrs. A. & L. H. Pike, A. N. Sutton, W. H. Sutton, W. A. Cook and Dodge & Johnson, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

The defendant in error recovered a judgment, against plaintiffs in error, of \$12,000, based on a *quantum meruit*, for work and labor and services rendered to their intestate in his lifetime; to reverse which this writ of error is brought.

The errors assigned relate solely to prayers for instruction to the jury, refused by the

court, and exceptions to the charge of the Judge. The bill of exceptions shows a paper signed by defendants' counsel, in which the court is asked to affirm a series "of propositions of law as governing the case," seven in number. They were presented as a whole and refused as a whole, and excepted to in the same manner.

Under the well settled rule of this court, if any one of these propositions was rightfully rejected there was no error in the action of the court, because it was not the duty of the court to do anything more than pass upon the prayer as an entirety. *Beaver v. Taylor*, 93 U. S., 54 [XXIII., 798]; *Transportation Line v. Hope*, 95 U. S., 301 [XXIV., 478]. We shall presently see why there is no error in the rejection of this prayer.

The charge of the court in full is embodied in the record, and to this the defendants took two exceptions. They are thus stated:

"And the defendants excepted at the time said charge was given by the court to the following parts and thereof, to wit: to so much of said charge as states the law to be that if Colonel Worthington, the owner of the plaintiff as a slave, took the plaintiff to Oberlin, in the State of Ohio, and there placed her in school to be educated, the Constitution and laws of Ohio immediately dissolved the relation of master and slave previously existing between Colonel Worthington and the plaintiff, and that the plaintiff thereby became a free woman, and could never thereafter lawfully be claimed or held by Colonel Worthington as his slave in virtue of his previous ownership of her; and that the subsequent return of the plaintiff, from the State of Ohio to the residence of the intestate in this State, did not affect her liberty or rights as a free woman which she had acquired by the voluntary action of the intestate and by the operation of the Constitution and laws of the State of Ohio.

And defendants, also, at the time excepted to the following clause of said instructions, to wit: 'And in considering the question of what would be reasonable and just compensation to the plaintiff for her services, you are at liberty to take into consideration any evidence tending to establish the special agreement heretofore referred to; and if you find [by] such special agreement a contract was made, that is, that the intestate, for the purpose of inducing the plaintiff to remain with him and render the services alleged to have been rendered, agreed to convey or devise to the plaintiff, in payment for such services, specified portions or parcels of his estate; and that the plaintiff did remain with the intestate and perform the required services until the death of the intestate; then, as throwing light on the transactions between the parties and as tending to show the value the parties themselves placed upon the services of the plaintiff, you are at liberty to take into consideration the value, as disclosed by the evidence, of such specific parcels of real estate which you may find the intestate agreed to convey or devise to plaintiff for such services, and considering the special contract (if you find it proven) for this purpose only, it rests with you, under your oaths and judgments, considering all the facts and circumstances in the case disclosed by the evidence, to say what would be a fair, reasonable and just compensation to the

See 11 OTTO.

plaintiff for her services; but in no event can you allow the plaintiff a greater sum than the value of the specific property which plaintiff claims was to be conveyed or devised to her therefor.'"

There is in no part of this bill of exceptions any statement of the evidence. There is no statement that any evidence was offered, or that any was objected to. With the exception of a reference to it in the charge of the court, there is nothing to show what was proved, or what any of the evidence tended to prove. The prayers for instruction, therefore, may have been hypothetical and wholly unwarranted by any testimony before the jury.

The exceptions to the charge of the court, just recited, are in the same condition. The principal one of them, and the point on which the argument of plaintiff in error is chiefly founded, is, that the court erred in telling the jury that "If Col. Worthington, the owner of the plaintiff as a slave, took her to Oberlin, in the State of Ohio, and placed her in school to be educated, the Constitution and laws of Ohio immediately dissolved the relation of master and slave previously existing between Col. Worthington and the plaintiff, and that the plaintiff thereby became a free woman," * * * and her subsequent return to the residence of Worthington in Arkansas did not affect her rights to freedom.

The plaintiff nowhere states in her petition that she was ever the slave of Worthington, though she alleges that she was his natural daughter.

As none of the evidence given or offered on the trial is set out in the bill of exceptions, we cannot presume against the verdict that plaintiff ever was the slave of Worthington.

The counsel for defendant in error raises this objection, and the very learned counsel for plaintiffs in error, who did not try the case below, admits this objection to be fatal to his effort to reverse the judgment, unless we can hold, from language used by the Judge in his charge to the jury, that the fact was proved.

It is certainly true that the Judge does say, in that part of his charge which relates to that subject, that the former slavery was a conceded fact in the case. His language, in addressing the jury, while discussing the propositions of defendants' counsel, is as follows:

"Among the conceded facts in the case are these: that the mother of the plaintiff was a slave and the property of Col. Worthington at the date of plaintiff's birth, and that the plaintiff is the natural daughter of Col. Worthington. The mother of the plaintiff having been a slave at the date of plaintiff's birth, it results that she was born a slave, and at her birth was the property of Col. Worthington, her natural father."

But we do not look to the charge of the Judge for the state of the evidence on which that very charge is to be held right or wrong. The Judge cannot be permitted to cure the error of his law propositions by assuming as facts what may not have been proved. This very part of the charge is excepted to by plaintiffs in error on the ground that its law was erroneous. If the verdict had been for defendants below, the plaintiff there might have excepted, because the facts thus stated were not conceded. As we understand the principles on which judgments

here are reviewed by writ of error, that error must appear by some ruling on the pleadings, or on a state of facts presented to this court. Those facts, apart from the pleadings, can only be shown here by a special verdict, an agreed statement duly signed and submitted to the court below, or by bill of exceptions. When in the latter, complaint is made of the instructions of the court given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question to which the instructions apply.

This is not to be sought for, however, in the comments of the court to the jury on the testimony.

The proof of facts which make the charge erroneous must be distinctly stated as proved, or that evidence was given tending to prove them.

And it is not sufficient to show that the Judge assumed this in his charge to the jury; it must be certified to this court distinctly under his hand.

It would be very dangerous to permit verdicts, fairly rendered, to be reversed in this court on the recitation of facts supposed to be proved, found only in a long comment of the judge on the testimony.

This would be to usurp the function of the jury, and the verdict might be set aside in this court because the court below understood the evidence in one way, and the jury in another; or, as in the present case, because the Judge was of opinion that a fact was proved which the jury refused to believe.

When, therefore, the question is on the soundness of the judge's law as given to the jury, he must, on his due responsibility, certify to the appellate court, and not to the jury, the evidence on which he pronounced the law.

We are not furnished by counsel with any case precisely in point. Probably no bill of exceptions was ever certified to an appellate court before, which contained nothing but the charge and the objections made to it.

We have a strong analogy, however, in certain cases decided by this court under the Act of 1865, sections 649 and 700 of the Revised Statutes. Under that Act the court, sitting by consent of parties to try a case without a jury, could make a special finding of facts, in the nature of a special verdict, on which the court could review the judgment rendered. It has been frequently urged in this court to permit an opinion of the court below, when it states the facts on which it was based to stand for such special finding. But this court has uniformly refused to assent to this, though the opinion was in the record and sufficiently full as to the facts, and many such cases have been affirmed here for want of the formal finding of the special facts by the court though they might have been collected from the opinion. The case of the *Ins. Co. v. Boon*, 95 U. S., 117 [XXIV., 395] is one of these. *Ins. Co. v. Tweed*, 7 Wall., 51 [74 U. S., XIX., 66], is also in point.

The defect in the bill of exceptions, here pointed out, affects in like manner the other exception to the charge of the court and the refusal to grant the instructions asked. Because, therefore, the record discloses no error which this court can notice, *the judgment of the Circuit Court is affirmed.*

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—103 U. S., 73.

BANK OF AMERICA, *Plff. in Err.*,

v.

VIRGINIA BANKS AND ANDREW D. BANKS.

(See S. C., 11 Otto, 240-247.)

Husband and wife—property of—agent of wife—separate estate—purchases on credit—estoppel by deed,

1. Leased premises cultivated by the husband in his own name and for his own benefit are not plantations of the wife, although the title is in her, within the meaning of the section of the Mississippi Statute, which enacts that all contracts made by the husband and wife, or by either of them, may be enforced and satisfaction had out of her separate estate.

2. The provision that makes the husband the agent of the wife to purchase plantation supplies for her plantation, applies only to those plantations which are cultivated for the wife's account and benefit.

3. Supplies procured for the use of his *employés* are not plantation supplies for account or benefit of the wife, the contract for which can be enforced against her separate property.

4. Nor does the statute oblige the wife to pay for property purchased on credit; the rule being that such an obligation cannot be enforced.

5. A married woman cannot, by her own act, enlarge her capacity to convey or bind her separate estate.

6. In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. Hence, a married woman is not estopped by her covenants.

[No. 17.]

Argued Jan. 16, 1880. Decided Jan. 26, 1880.

ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. W. B. Pittman, Alex'r Porter Morse and A. B. Pittman, for plaintiff in error.

Messrs. William L. Nugent and J. R. Chalmers, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Married women, as the Code of the State provides, may rent their lands or make any contract for the use of the same, and may loan their money and take securities for its payment, and employ it in trade or business; and the express enactment is, that all contracts made by the husband and wife, or by either of them, to obtain supplies for the plantation of the wife, may be enforced and satisfaction secured out of her separate estate. Provision is also made that when a married woman engages in trade or business as a *feme sole* she shall be bound by her contracts made in the course of such trade or business, in the same manner as if she was unmarried. Code, Miss., 1871, sec. 1780.

Sufficient appears, to show that the first named defendant is a married woman, and that the other defendant is her husband; that they executed three promissory notes, each for the sum of \$2,000, payable to their own order, and that they indorsed the same in blank; and that the

plaintiffs are the lawful holders of the several notes. Payment being refused, the plaintiffs instituted the present suit, and pray judgment for the amount against the separate property of the first named defendant.

Process having been served, the defendants appeared and pleaded three pleas in answer to the declaration: (1) That they never promised in manner and form as alleged. (2) That they had fully paid and satisfied the notes before the suit was instituted. (3) That the first named defendant, when the notes were made and indorsed, was a married woman, and that the same were made and indorsed by her as the surety and accommodation indorser of her husband, for the purpose of enabling him to obtain money to carry on a plantation cultivated by him and not by his wife; and that the notes were not made and indorsed in payment of money and supplies furnished to the wife to enable her to cultivate a plantation belonging to her as her separate property, in accordance with a contract made to that effect with the plaintiffs; and that the notes and indorsements as to the first named defendant are without legal consideration, and that she is not liable to pay the same.

Prepayment was denied by the plaintiff, and it in its replication to the third plea of the defendants avers that the notes described in the declaration were not made and indorsed by the wife as an accommodation surety for the husband, as alleged in the third plea. Instead of that, it alleges that the notes were made and indorsed by her in payment of necessary plantation supplies to enable her to cultivate her separate plantation; that the same were furnished and delivered to her by certain commission merchants; and that the notes were given for the payment of such plantation and family supplies and necessities for family use, as a married woman is allowed by law to purchase on credit and to bind her separate estate therefor.

Leave to amend the declaration and replications was subsequently granted to the plaintiffs, and it appears that amended counts were filed in pursuance of the authority granted; but it is not necessary to reproduce the new pleadings, as they do not vary the material issues between the parties. Continuance followed, when the parties entered into a stipulation to waive a jury, and that the matters of fact, as well as of law, should be tried by the court. Hearing was had, and the findings of the circuit court are as follows: (1) That the husband was discharged, before the commencement of the suit, from all liability upon the notes, as alleged in his plea. (2) That the first named defendant was a married woman at the time she executed the notes, and the wife of the other defendant, as averred in defense. (3) That the notes were executed not to secure any existing indebtedness, but as a security for such advances in money and supplies as the parties to whom the notes were delivered might thereafter make upon the order of the husband, for plantation purposes. (4) That the parties to whom the notes were delivered did thereafter make large advances to the husband, in money and supplies, that remain unpaid, of which an amount as large in value as the aggregate of the three notes was forwarded to the parties and used in the cultivation of two plantations owned by the wife and her two children

by a former marriage; that the husband was cultivating those two plantations during the year in question, on his own account and in his own name, under a verbal contract of lease made by him with his wife for a stipulated money rent. (5) No proof was exhibited that the parties to whom the notes were delivered or the plaintiffs knew whether the wife was or was not interested in such plantation enterprise; but the court finds that they did know of her interest in the property of the plantations, and that the whole of the account was kept in the name of one of the plantations; and that it contained many items for supplies furnished for another plantation in the cultivation of which the husband was interested, and other items having no relation to plantation matters. (6) That a deed of trust of one of the plantations was executed by the husband and wife contemporaneously with the making of the notes to secure the payment of the same, in which it is recited that it is made to secure the indebtedness of the wife. Based on these findings, the circuit court rendered judgment for the defendants; and the plaintiffs excepted, and sued out the present writ of error. All the facts are found by the court, and the only error assigned is that the court misapplied the law to the facts.

Marriage, by the rules of the common law, gave the husband a freehold tenure in the estates of inheritance in land of the wife, and the right to the rents and profits during their joint lives. During coverture the husband must sue in his own name for any injury to the profits of the land; but for an injury to the inheritance it was required that the wife must join in the action. 2 Kent, Com., 12th ed., 131.

Money, goods and personal chattels in possession vested absolutely in the husband, and became his property as completely as property purchased with his own money; and such property never went back to the wife unless given to her by the husband in his lifetime or by his will, and in case of his death it vested in his executors. Choses in action did not vest absolutely in the husband, but he acquired the power to sue for and recover or release or assign the same, and when recovered and reduced to possession, and not otherwise, the money, in most cases, became absolutely his own.

Husband and wife during coverture were regarded as one person at common law, in most respects; from which it followed, as a general rule, that the wife could neither sue nor be sued without joining her husband. Great changes in the rules of the common law in that regard were made, even before the Colonies separated from the parent country. Deeds of indenture in transferring the real property of the wife, with the consent of the husband, were substituted in the place of fine and recovery; and when it became settled that the wife might hold a separate estate, many other exceptions to the rule that she could neither sue nor be sued without joining the husband, were sanctioned by judicial authority.

Exceptions, almost without number, have been admitted by the courts, and many more have been added to the catalogue by legislation, until in some jurisdictions it is difficult to say that there is anything left of the ancient rule. Questions of the kind in the State of Mississippi

depend almost entirely upon statute regulations and the decisions of the state courts in construing those provisions.

Contracts made by the wife at the period mentioned in the declaration, or by the husband with her consent, for family supplies or necessities, including wearing apparel of herself and of her children, or for their education, or for buildings on her land or premises and the materials therefor, or for work and labor done for the use, benefit or improvement of her separate estate, were by statute declared to be binding on her, and that satisfaction might be had for the same out of her separate property. Code 1857, sec. 25, p. 336.

Supplies for the comfort, convenience and maintenance of the family and the education of her children must be contracted for by the wife, and, if not purchased directly by her but by the husband, they imposed no liability on her separate property, unless the husband had her consent to act. Unlike that, the rule is that supplies for her plantation, or for the repairs or improvement of her separate estate, or for work, labor and services in cultivating the same, the contracts may be made by husband and wife, or either of them. *Clopton v. Matheny*, 48 Miss., 286, 295.

Orders for supplies to her plantation, if filled, bind the separate property of the wife, whether bought by herself or her husband with or without her consent; the rule being in that State that the husband is for that purpose the agent of the wife *in invitum*, and that he is made so by legislative enactment. Code 1871, sec. 1780; Code 1857, 336. Her separate estate is bound for such supplies, even when purchased by the husband without her direction. *Cook v. Ligon*, 54 Miss., 368, 373.

Nothing, say the court in that case, will discharge her estate save an express contract that it shall be released, or something equivalent to it. Neither the acceptance of the note of the husband nor the recovery of the judgment on such note will have that effect. Plantation supplies may include money advanced for the purpose of purchasing the same: farming utensils, working stock or other things necessary for the cultivation of a farm or plantation, which latter designation must depend upon the usage and custom of agricultural pursuits. *Herman v. Perkins*, 52 Miss., 813.

Express statutory provision exists in the State, that married women may rent their lands or make any contract for the use thereof, and may loan money in their own name, take securities therefor and employ it in trade or business; and it is equally clear that she may rent her separate estate to her husband as well as to strangers. *Robinson v. Powell*, Sup. Ct. Miss., not reported.

Beyond doubt, the two plantations belonged to the wife and her two children by a former marriage, but it is equally certain that the husband cultivated the same, during the year in question, on his own account and in his own name, under a verbal contract of lease made by him with his wife for a stipulated money rent. Supplies for the plantation of the wife, whether purchased by her or by the husband, bind her separate estate; and if she had cultivated these two plantations during the year referred to, the plaintiff would be correct, but the finding of the circuit court shows conclusively that she did

not cultivate either of those plantations during that year. Her authority to lease the premises is not denied, and the finding of the court establishes the fact that she did not cultivate either plantation during the period when these supplies were furnished.

Leased premises cultivated by the husband in his own name and for his own benefit are not plantations of the wife, within the meaning of the section of the statute which enacts that all contracts made by the husband and wife, or by either of them, may be enforced and satisfaction had out of her separate estate. Code 1871, sec. 1780; Code 1857, p. 336.

Nor is the contract in this case one made by the husband with the consent of the wife, which may also be satisfied out of her separate property. Nothing of the kind is pretended; and if it were, it could not be supported for a moment as the findings of the court do not contain anything to give such a proposition the least countenance whatever.

Suppose the plantations were leased to the husband and were cultivated by him that season in his own name and for his own benefit; still it is suggested by the plaintiffs that neither the party to whom the notes were delivered nor themselves had any knowledge of the lease, or that the husband purchased the supplies without the consent of the wife or authority of law. Even if that be conceded, it will not benefit the plaintiffs, as it only shows that they acted imprudently and without due caution, the settled decision of the courts of the State being that the provision that makes the husband the agent of the wife to purchase plantation supplies for her plantation applies only to those plantations which are cultivated for the wife's account and benefit, and not to those she has leased and which are in the possession and under the control of the tenant. *Grubbs v. Collins*, 54 Miss., 485, 489.

Enough appears in the findings of the court to show that the plantations were in the exclusive control of the husband, and that the supplies were procured for the use of his *employees*, and that they were not plantation supplies for account or benefit of the wife. Neither the words of the statute nor the decisions of the state courts permit such a contract to be enforced against the separate property of the married woman. In order that the contract may bind the separate property of the wife, she must be the beneficiary of the cultivation, and the supplies must, in fact, have been purchased for her account and benefit. Her plantation, says Simrall, *Ch. J.*, is the predicate of her power to make the contract and, he adds, that a false representation that she has such property will not estop her from averring that the fact is otherwise.

Nor does the statute oblige her to pay for property purchased on credit, the rule being that such an obligation cannot be enforced. Contracts made in the purchase of supplies for the cultivation of her own plantation, where the cultivation is on her own account and for her own benefit, may be enforced against her separate property. Previously, says the *Chief Justice*, the word was used by the law-maker to include all those things required and used by the planter in the production and preparation of the crops for consumption and sale.

If it be said that the family must be supported, and that the term ought to embrace food and raiment for them, the answer to the suggestion is furnished by a subsequent part of the same section, which provides that supplies, necessities and conveniences for the family are not necessarily chargeable on the wife's property. She is not liable for such expenses; unless she bargains to be, or unless the husband, with her consent, buys them on her account. *Wright v. Walton*, not reported [56 Miss., 1]. Verbal contracts of lease, not exceeding the term of one year, are valid by the laws of the State. Code 1871, sec. 2892.

Much discussion of the question of estoppel is unnecessary, as it is clear that a married woman cannot, by her own act, enlarge her capacity to convey or bind her separate estate. *Palmer v. Cross*, 1 Smed. & M. (Miss.), 48.

Facts recited in an instrument may be controverted by the other party in an action not founded on the same instrument, but wholly collateral to it. Recitals of the kind may be evidence for the party instituting the suit, but they are not conclusive. *Carpenter v. Buller*, 8 Mees. & W., 209, 213; *Herman, Estop.*, sec. 238; *Lowell v. Daniels*, 2 Gray, 161, 169; *Champlain v. Valentine*, 19 Barb., 485, 488.

In order to work an estoppel, the parties to a deed must be *sui juris* competent to make it effectual as a contract. Hence, a married woman is not estopped by her covenants. Plainly, the wife was not competent to purchase supplies for the plantation of the husband and, therefore, cannot be estopped by these recitals. *Bigelow, Estop.*, 276; *Jackson v. Vanderheyden*, 17 Johns., 167.

Viewed in the light of these suggestions, it is clear that there is no error in the record. *Tyler, Inf. & Cov.*, 726.

Judgment affirmed.

JOHN A. J. CRESWELL ET AL., COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY, *Appts.*

v.

THOMAS M. LANAHAN ET AL.

SAME v. SAME.

(See S. C., 11 Otto, 347-352.)

Estoppel—ratification of officer's act—effect of.

1. Where a company borrowed money, and its note was given for it by its actuary, and the fund was honestly applied in payment of pressing liabilities of the company, and the trustees individually were advised of the transaction and made no objection, the validity of the note cannot be effectually denied by the company.

2. Where such actuary made the exchange of securities and was held out to the world as competent to do what he did, and it was done in conformity to the established usage of the company in all such cases, the company cannot deny that he had the powers he habitually exercised, and thus assumed to have.

3. Where the transaction was made known to the trustees individually, and they never objected, it was a binding ratification. The company was concluded, and the commissioners after its insolvency are in no better position.

[Nos. 143, 152.]

See 11 OTTO.

Argued Jan. 8, 12, 1880. Decided Jan. 26, 1880.

APPEALS from the Supreme Court of the District of Columbia.

The appellants filed in the court below two bills in equity, to compel the defendants to deliver up certain promissory notes.

The facts are stated in the opinion.

Mr. Enoch Totten, for appellants:

First. The Freedman's Savings and Trust Company was a corporation organized for a specific purpose, and the statute provided that the securities could be transferred only by the affirmative voice of seven members of the Board of Trustees. A transfer of securities made in any other manner is void.

Head v. Ins. Co., 2 Cranch, 127; *Perrine v. Canal Co.*, 9 How., 172; *U. S. v. Bk.*, 21 How., 364 (62 U. S., XVI., 133).

Second. The funds and securities of the Freedman's Savings and Trust Company constituted a trust fund, and persons dealing with them did so at their peril, and, if in possession of any of them, may be called to account as if they were trustees.

Perry, Trusts, secs. 217, 223 and 224.

Third. The fact that the defendant paid value for the notes, does not alter the case, because the rule is, that in cases where a man buys trust property, with notice of the trust, he shall be charged with the trust, in respect to the property

Perry, Trusts, sec. 217; *Oliver v. Piatt*, 3 How., 401; 2 Story, Eq. Jur., secs. 395, 1257, 1258.

Mr. S. T. Wallis, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

Several of the documents referred to by the witnesses in this case (143) have been lost or destroyed, and there is some uncertainty and conflict in the testimony with respect to them and the transactions to which they relate. The discrepancies are not material, and the substantial facts appear with sufficient clearness to enable us satisfactorily to dispose of the controversy. A statement, somewhat condensed, will be sufficient for the purposes of this opinion.

In 1873, the Corporation represented by the appellants found itself seriously embarrassed for the want of means to meet its current daily liabilities. In November or December of that year, the Company borrowed from the appellee Lanahan the sum of \$10,000, for which it gave its note, payable at sixty or ninety days—probably bearing a high rate of interest—and secured by \$20,000 of the improvement bonds of the District of Columbia at their par value. The note was executed by the actuary of the Company. The loan was negotiated by the appellee, Juan Boyle, who acted as the agent of the Company, by virtue of a written document under the hand of its president and its corporate seal. The money was applied in payment of depositors. The Institution was suffering from the financial revulsion initiated and precipitated by the failure of Jay Cooke & Co., and which swept over the entire country. It was deemed better to make loans at the interest paid, whatever it was, than to sell securities at the rates which then ruled in the markets.

About the first of May, 1874, it was agreed between Lanahan and Boyle that the former should

lend the latter \$21,000, including the note of the Company for \$10,000, and that Boyle should procure the Company to transfer to Lanahan a note of Anna Boyle and others to the Company for \$8,000, secured by deed of trust to Eaton and Stickney, and the note of Juan Boyle to the Company for \$2,500, secured by another deed of trust to the same parties. Other collaterals, with which the Company had nothing to do, were also to be delivered by Boyle to Lanahan. Boyle thereupon delivered the note for \$10,000 to the Company, and the Company transferred and delivered to Lanahan the two notes of \$8,000 and of \$2,500. Both these notes were then overdue. This terminated Lanahan's dealings with the Company, and these are the notes involved in this controversy. The bill, without imputing fraud, avers that Lanahan is not entitled to hold them, and prays that he may be decreed to deliver them to the complainants.

At the same time that Boyle delivered to the Company its note for \$10,000, he made a full and final settlement with it of all the liabilities of himself and of Juan Boyle & Co. He was found indebted to the Company, after deducting the note of \$10,000, in the sum of \$28,522.38. Boyle thereupon gave the note of Juan Boyle & Co. for \$28,000, and secured it by certain collaterals, and paid the balance in cash. Subsequently the collaterals proved to be worthless, Boyle & Co. became insolvent, and the debt is hopelessly lost to the Company. It was considered safe by the actuary at the time of the transaction. Eaton, one of the trustees in the deeds of trust, died, and by proper proceedings the respondent, Cull, was substituted for him and Stickney. The 3d section of the Act of Congress, 18 Stat. at L., 510, chartering the Institution is as follows:

"The business of the Corporation shall be managed and directed by the Board of Trustees; who shall elect from their number a president and two vice-presidents, and may appoint such other officers as they may see fit; nine of the trustees, of whom the president or one of the vice-presidents shall be one, shall form a quorum for the transaction of business at any regular or adjourned meeting of the Board of Trustees; and the affirmative vote of at least seven members of the Board shall be requisite in making any order for or authorizing the investment of any moneys, or the sale or transfer of any stock or securities belonging to the Corporation, or the appointment of any officer receiving any salary therefrom."

On the 18th of September, 1873, the Board of Trustees authorized and empowered the officers of the Company to assign and transfer any of the registered stock of the United States standing in its name.

On the 13th of December in that year, the same Board directed the finance committee to authorize those officers to negotiate the securities of the Company in such manner as to relieve the bank from its embarrassment.

There was no formal order touching either of the transactions of Lanahan with the Company, but they were communicated, as were all others, daily, to the individual members of the Board. There is no proof that any objection was ever made. Several of the trustees expressed an earnest desire that the Company should escape from the embarrassments by which

it was surrounded, and be able to avoid bankruptcy. The threatened catastrophe proved inevitable. On the 29th of June, 1874, it closed its doors, and a few days later went into liquidation. In the transactions with Lanahan, in making the loan and giving the note in one case, and in transferring and handing over the two notes in the other, the actuary was governed by the settled usage of the Bank in all such cases.

It is a striking fact that there is nothing in the record which casts the slightest shadow of bad faith upon either of the respondents, or upon the president or actuary of the Company. It does not appear that a dollar of its means went fraudulently into the pockets of either of those parties.

The case naturally divides itself into two parts, each of which requires separate consideration:

(1) As to the loan of \$10,000, and the note given to the lender.

(2) The transfer of the two Boyle notes.

The question presented as to the first point is easy of solution. The money was fairly borrowed. The note was given for it, and the fund was honestly applied in payment of pressing liabilities of the Company. The trustees, individually, were advised of the transaction and made no objection. It would be a perversion of the plainest principles of reason and justice to permit the validity of such a security to be effectually denied. It cannot be done. *De Groff v. Linen Thread Co.*, 21 N. Y., 124; *Parish v. Wheeler*, 22 N. Y., 494; *Bradley v. Ballard*, 55 Ill., 413; *Steamboat Co. v. McCutchen*, 13 Pa., 13.

Courts do not look at such transactions with the microscopic eyes of a special demurrer.

The second point hardly admits of more doubt than the first one.

The Company took up its note given to Lanahan, and gave him in place of it the two notes of the Boyles, amounting together to \$10,500. When this was done, Juan Boyle paid the Company \$522.38. This was more than the difference in amount between the note first named and the other two. Certainly the Company could sustain no possible injury from this exchange. It paid a debt overdue, and took up its note by parting with two of its securities. With the residue of the settlement between Boyle and the Company, Lanahan had nothing to do. He was neither a party nor privy. As to him it was *res inter alios acta*. It cannot in anywise affect his rights, and may properly be laid out of view.

If the two notes which he received can be wrested from him, the Company will have had the full benefit of the loan, and have got back its note without paying anything, while he will have lost the entire amount. This is a suit in equity. It would be a singular equity that could work out such a result.

But further; the actuary who made the exchange of securities was held out to the world as competent to do what he did. It was done in conformity to the established usage of the Company in all such cases. Under such circumstances, the Institution cannot be permitted to deny that he had all such powers as he habitually exercised, and thus assumed to have. *Merch. Bk. v. State Bk.*, 10 Wall., 604 [77 U. S., XIX., 1008].

The transaction, like all others, was made known to the trustees individually, and they never objected. This intelligent acquiescence was a binding ratification. *Kelsey v. Bk.*, 69 Pa., 426; *Hilliard v. Goad*, 34 N. H., 230; *Christian University v. Jordan*, 29 Mo., 68; *Sherman v. Fitch*, 98 Mass., 59.

The arrangement was first challenged after the Company became bankrupt and went into the hands of the appellants.

The Company was concluded, and the appellants can be in no better position. They, like assignees in bankruptcy, can have no rights, legal or equitable, but those of the insolvent party whom they represent. *Gibson v. Warden*, 14 Wall., 244 [81 U. S., XX., 797].

The appellants are not entitled to any relief.

Other legal views which are applicable lead to the same conclusion, but it is unnecessary to pursue the subject further.

This opinion disposes also of case No. 152. The two cases are the same, *mutatis mutandis*.

The decrees of the Supreme Court of the District of Columbia are affirmed.

ALONZO J. PHELPS ET AL., *Plffs. in Err.*,
v.

GEORGE C. HARRIS ET AL.

(See S. C., 11 Otto, 370-383.)

Decree in equity, when not a bar—power to sell—arbitration.

1. A decree in an action to remove a cloud upon a title, which was dismissed on the ground that the case was not one in which a court of equity could give relief, is not *res judicata*, so as to constitute a bar to a subsequent action of ejectment for the same land between the same parties.

2. A power to sell and exchange or to dispose of, includes the power to make partition of lands, according to the decisions of Mississippi, which this court adopts in this case.

3. The objection that the trustee did not give his personal attention to the partition of the property, but, by agreement, submitted it to the arbitrament of disinterested persons, is not sufficient to invalidate the transaction.

[No. 572.]

Submitted Jan. 6, 1880. Decided Jan. 26, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Mr. G. Gordon Adam and *W. G. Phelps*, for plaintiffs in error.

Mr. William L. Nugent, for defendants in error.

Mr. Justice Bradley delivered the opinion of the court:

This was an action of ejectment for certain lands in Sharkie County, Mississippi, brought by Alonzo J. Phelps and Mary B. Phelps, his wife, the plaintiffs in error, against the defendants in error, of whom George C. Harris and Helen S. Harris, his wife, were admitted to defend as landlords, the other defendants being their tenants in possession of the property in dispute. The principal question in the case is, whether Henry W. Vick, father of the plaintiff, Mary B. Phelps, and trustee under a deed made by his wife, Sarah,

See 11 OTTO.

in 1850, and also trustee under the will of his brother, Grey Vick, made in 1849, had authority under those instruments to make partition of the lands given and devised therein to and for the use of his children. If he had such authority, and exercised it in a proper manner, the plaintiffs have no title, and the judgment must be affirmed. If he had not such authority, or did not exercise it effectually, the plaintiffs are entitled to recover either all the land in controversy or an undivided part thereof, and the judgment must be reversed. The facts of the case are set out in a special finding of the court below.

By the deed of Sarah Vick, referred to, in which her husband joined, she conveyed certain lands of which she was seised, to a trustee, to be held upon trust for her own separate use for life, with remainder to her children in fee; subject to certain powers of sale and exchange, and with the following proviso:

"Provided further, that said trustee is to permit the said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah Vick, during her life, and as agent and trustee for her children after her death, to superintend, possess, manage and control said property for the benefit of all concerned. Said Henry W. Vick is to have power to sell and exchange said property after the death of said Sarah Vick, and to apply the proceeds to the payment of the debt due to the trustees of the Bank of the United States; if such debt is paid, the proceeds of the sale to be re-invested; and be subject to the trusts of this deed."

The deed closes with this paragraph:

"My intention is that said Henry W. Vick shall be regarded, for the purposes of this deed, not merely as an agent, but also a co-trustee, and I desire he may be required to give no security for the performance of his duties; and the said Jonathan Pearce [the trustee] is not, in any manner, to be responsible for the acts and conduct of said Henry W. Vick."

Sarah Vick died in 1850, leaving four children by her said husband, viz.: Mary B. Vick (now said Mary B. Phelps), Henry G. Vick (under whom the defendants claim), Ann P. Vick and George R. C. Vick, all under age and unmarried.

By the will of Grey Jenkins Vick, referred to, the said Grey devised certain lands and other property to the grandchildren of his father and mother, among whom were the said children of Henry W. and Sarah Vick, and constituted the said Henry W. Vick trustee for his said children, giving him full power to dispose of all or any portion of said property which might fall to said children, and invest the proceeds in such manner as he might think proper for their benefit. After the said Grey's death, the said Henry W., as trustee of his said children, became seised in severalty by partition with the other devisees, of the proportion of lands devised to his said children, upon the trusts of the will.

In December, 1856, Henry G. Vick, the eldest of said four children of Henry W. and Sarah Vick, became of age, and soon after demanded from his father an account of his trust, and that his portion of the property held under said deed and will should be set off to him in severalty, and threatened to file a bill in equity for

that purpose. They finally agreed to leave the matter to their attorneys, who decided that Henry G. Vick, having become of age, had the right to demand a division of the property, and to have his share set off to him; and the said attorneys signed a written instrument proposing the mode in which such division should be made, to wit: through the intervention of disinterested persons to be chosen by the parties. This plan was adopted; and Henry W. Vick and his son entered into a written agreement to that effect, designating the persons for making the partition, and binding themselves to stand to and abide by their decision. The arbitrators made an award by which the lands in controversy in this suit were allotted to said Henry G. Vick; an indenture was made between him and his father to carry the partition into effect; and he remained in possession of the lands set off to him until his death in May, 1859. It is this partition which is called in question by the plaintiffs.

Henry G. Vick died without issue, having first made a will by which he devised the lands in controversy, which were set off to him as aforesaid, to Miss Helen S. Johnston, now said Helen S. Harris, the defendant, who, after his death, went into possession thereof, and has ever since continued in possession.

The contention of the plaintiffs is, that Henry W. Vick had no authority, either under his wife's deed or under the will of Grey J. Vick, to make partition of the lands; that the partition made with Henry G. Vick was void; that he acquired no separate estate thereby, and had no power to devise the lands specifically; and that the plaintiff, Mary B. Phelps, as sole surviving child of Henry W. and Sarah Vick (the others having died without issue), is entitled to recover the property.

In pursuit of the supposed rights of Mary B. Phelps, the plaintiffs, in February, 1871, exhibited a bill in the Chancery Court of Washington County, in which the lands in controversy were then situated, against the defendants, George C. Harris and Helen, his wife, to remove the cloud from the supposed title of said Mary, raised by said partition and the will of Henry G. Vick. The defendants relied on the validity of said partition and will, and the question was fully contested. In November, 1873, a decree was made dismissing the bill. An appeal was taken, and the Supreme Court of Mississippi affirmed the decree. The plaintiffs then brought this action of ejectment; and one of the questions in the cause is, whether the decree in the chancery suit did not render the controversy *res judicata*. The plaintiffs contended that it did not, and that the only effect of the decree was, to decide that a bill to remove the cloud from the title would not lie, leaving the parties to all their legal rights in an action at law.

On this question the court below finds and concludes as follows:

"And the court here now finds as a fact, from an inspection of the record in the said chancery cause, that the question as to the validity of the partition of the lands aforesaid, made by the said Henry W. Vick and the said Henry G. Vick under the deed of the said Sarah Vick and the will of said Grey J. Vick, and the power of said Henry W. Vick to make such partition, as well as the validity of the devise made by the said

Henry W. Vick to the said Helen S. Harris, was directly raised by the bill in said cause and litigated between the parties; and that the said Supreme Court adjudged and decided that the said partition and devise were both valid and effectual, and that the said Henry W. Vick had full power and authority to make the said partition with the said Henry G. Vick. Which decision so made by said court was done to determine the jurisdiction of the court in said cause, and that said Supreme Court decided that the said chancery court had no jurisdiction thereof, and that if the said complainants therein have any right to the lands described therein, and which are the same for which this action of ejectment is brought, it is a legal title which must be enforced in an action at law."

The decree of the Chancery Court of Washington County, which was affirmed by the Supreme Court, was in the following words: "The court being of opinion that the complainants are not entitled to the relief prayed for in their bill, or to any relief in the premises from this court, it is, therefore, ordered, adjudged and decreed that the said complainants' bill of complaint be and the same is dismissed, and that complainants pay the costs, etc."

The bill was filed under a Statute of Mississippi, which declared as follows: "When any person, not the rightful owner of any real estate in this State, shall have any deed or other evidence of title thereto, or which may cause doubt or suspicion in the title of the real owner, such real owner may file a bill in the chancery court of the county in which the real estate is situated, to have such deed or other evidence of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession, or be threatened to be disturbed in his possession or not, etc." R. S. Miss., 1871, sec. 975, p. 191.

It is probable that the only effect of this statute was to enable owners of land not in possession to file a bill for the removal of clouds upon their title; since the ordinary jurisdiction of a court of chancery is sufficient to enable owners in possession to file such a bill. The questions: what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent amongst these are: first, that the title or right of the complainant must be clear; and, second, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it. For it is held that, where the complainant himself has no title, or a doubtful title, he cannot have this relief. "Those only," said *Mr. Justice Grier*, "who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." *Orton v. Smith*, 18 How., 263 [59 U. S., XV., 393]; and see, *Ward v. Chamberlain*, 3 Black, 430, 444 [67 U. S., XVII., 319, 326]; *West v. Schnebly*, 54 Ill., 523; *Huntington v. Allen*, 44 Miss., 654; *Stark v. Starrs*, 6 Wall., 402 [73 U. S. XVIII., 925]. And as to the de-

defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law. *Overing v. Foote*, 43 N. Y., 290; *Meloy v. Dougherty*, 16 Wis., 269. Justice Story says: "Where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be canceled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury." 2 Eq. Jur., sec. 700, a.

The Supreme Court of Mississippi, in their opinion in the case between the present parties, which is reported in 51 Miss., 789, say: "This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law, the trial of ejectments. He who comes into a court of equity to get rid of a legal title, which is allowed to cast a shadow on his own title, must show clearly the validity of his own title, and the invalidity of his opponent's. *Banks v. Evans*, 10 Sm. & M., 35; *Huntington v. Allen*, 44 Miss., 662. Nor will equity set aside the legal title on a doubtful state of case. The complainant, to enable him to maintain such a suit, must be the real owner of the land, either in law or equity. Had the defendant, Mrs. Harris, derived her title to the property in controversy even from a doubtful exercise of power, that of itself would be sufficient to preclude the complainants from a resort to equity, upon the well settled principles above laid down. The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure, and transferred to a court of equity under the pretense of removing clouds from title." *Phelps v. Harris*, 51 Miss., 789, 793. The court further concludes that this limited jurisdiction does not draw to it the right to take jurisdiction of the whole controversy in relation to the title to the land, right of possession, rents, etc., and thus usurp the jurisdiction belonging to the courts of law.

It is true that the court, in the former part of its opinion, discussed the question of the validity of the partition made by H. W. Vick and his son, and held that the partition was good, and that the title of Henry G. Vick to the lands in controversy was perfect; and as a consequence, that the defendant's title was also perfect. But this discussion was entered into for the purpose of showing that the title of the defendant was not so devoid of validity as to constitute a mere cloud on the title; and, consequently, that the case was not one in which a court of equity could give relief.

We think, therefore, that the court below was right in determining that the decree in the equity case did not render the main controversy *res judicata*, but only decided that the bill would not lie; in other words, that it was not a proper

case for a court of equity to determine the rights of the parties.

This brings us to the merits of the controversy, involving the question whether the partition made between Henry W. Vick and his son, Henry G. Vick, was valid. The plaintiffs contend that neither the deed of Sarah Vick, nor the will of Grey J. Vick, gave to Henry W. Vick the power to make partition. The substance of those instruments, so far as relates to the question under consideration, has been recited. By the deed of Sarah Vick, the trustee therein named was directed to permit her husband, Henry W. Vick, as his agent, and as agent and trustee for herself and her children, "To superintend, possess, manage and control said property for the benefit of all concerned."

And it is added: "Said Henry W. Vick is to have power to sell and exchange said property after the death of said Sarah Vick, and to apply the proceeds to the payment of the debt due to the trustees of the Bank of the United States; if such debt is paid, the proceeds of the sale to be re-invested and be subject to the trusts of this deed." The codicil to the will of Grey J. Vick, made Henry W. Vick a trustee for his, H. W. Vick's, children, and gave him full power to dispose of all or any portion of the property devised by said will, which might fall to said Henry's children, and to invest the proceeds in such manner as he might think proper for their benefit. These were the express powers granted. Henry G. Vick, one of the children, came of age and demanded his portion separate from the rest. No question is made about his right to have such division made. Had Henry W. Vick no power to co-operate with him in making such a division? That is the question. In the one case power is given to sell and exchange, superintend, possess, manage and control for the benefit of all concerned; in the other, full power to dispose of all or any portion, and invest the proceeds in any manner he might think proper for the children's benefit.

The question whether a naked power to sell or exchange implies a power to make partition is discussed by Sir Edward Sugden in his work on Powers. He says: "It is clear that a power to make partition of an estate will not authorize a sale or exchange of it; but it has frequently been a question amongst conveyancers, whether the usual power of sale and exchange does not authorize a partition, and several partitions have been made by force of such powers under the direction of men of eminence. This point underwent considerable discussion on the title, which afterwards led to the case of *Abell v. Heathcote*, 4 Bro. Ch., 278; *S. C.*, 2 Ves., Jr., 98. Mr. Fearne thought the power did authorize a partition, on the ground that a partition was in effect an exchange." Sugden adds, that the Lords Commissioners, Eyre, Ashurst and Wilson, before whom the case was first heard, all thought that the power was to receive a liberal construction, as its object was to meliorate the estate. Eyre thought that, upon the word *sell*, the trustees should have a power of making partition, because it was in effect to take quite a new estate. Ashurst and Wilson thought, that whatever power might be derived from the word *sell*, the other words of the power, *convey for an equivalent* (which were also used), were sufficient. But they made no

decision. Upon the cause coming before Lord Rosslyn, he determined that the power was well executed, and founded his opinion upon its being in effect an exchange, as the consequences and effects of a partition and exchange, as to the interests of the parties, are precisely the same. Sir Edward then notices the decision of Lord Eldon in the case of *McQueen v. Farquhar*, 11 Ves., 467, that a power to sell simply, does not authorize a partition. He then adds: "Until the question shall receive further decision, it can scarcely be considered clear that a power to exchange will authorize a partition," but he proceeds to show that the decision in *Abell v. Heathcote* must have been based on the power to exchange, and not on any additional words. After referring to the case of *Atty-Gen. v. Hamilton*, 1 Madd., 214, which was not decisive of the point, Sugden closes his discussion by saying: "But as Lord Rosslyn has observed, this objection may be obviated where there is a power of sale. The undivided part of the estate may be sold, the trustees may receive the money and then lay it out in the purchase of the divided part, and although the sale is merely fictitious in order to effect the partition, it should seem that the transaction cannot be impeached." 2 Sugd. Powers, 479-482, 7th ed., 1845.

We have quoted more largely from Sugden's work because of his great authority on questions of real estate and equity. It will be seen that he regards it as doubtful whether the power to make partition is included in the power to sell and exchange; but that partition may be effected indirectly under the power to sell, by actually selling the undivided interest, and purchasing a separate interest with the proceeds. The last edition of Sugden on Powers, published in 1861, has no change in the text on this subject.

In the case of *Doe v. Spencer*, 2 Exch., 752, decided in 1848, *Baron Rolfe*, afterwards Lord Cranworth, speaking for the court, held, in accordance with Mr. Preston's note to Sheppard's Touchstone, p. 292, that two tenants in common might effect a partition by the exchange of a moiety in one part for a moiety in the other part; and thence concluded that a power of exchange given to trustees would be sufficient to enable them to effect a partition with their cotenant in this way; although it was supposed that between more than two parties it could not be done. *Vice-Chancellor Kindersly*, in a subsequent case, reviewing this decision of the Court of Exchequer, well remarked, that if this can be done between two tenants in common, there seems to be no good reason why it may not be done between three or more.

The plaintiffs place great reliance on the case of *Brassey v. Chalmers*, 16 Beav., 223, in which the Master of the Rolls held that a power to sell and dispose did not give the power to make partition; at least, he refused to compel a purchaser to accept a conveyance, where such a partition had been made. The case, however, was appealed, and the Lords Justices, without deciding the point, suggested the filing of a bill for partition, upon which the partition made might be confirmed, if found beneficial. This course was adopted, and resulted in a confirmation of the partition, and a decree confirming the title. *Brassey v. Chalmers*, 4 De G. M. & G., 528; *S. C.*, 31 Eng. L. & E., 115. So that

this case left the point still undetermined. This was in 1853, and no notice of the case is taken in the last edition of Sugden on Powers, published in 1861.

A review of the cases and text books on this subject was made by *Vice-Chancellor Kindersly* in 1856 in the case of *Bradshaw v. Fane*, 2 Jur. (N. S.), 247, and the conclusion to which he came, was, that it was still doubtful whether a power to sell and exchange would, or would not, authorize a partition. The same thing is stated in *Lewin on Trusts and Trustees*, 3d ed., p. 417.

In a recent case, however, *In re Frith*, L. R., 3 Ch. Div., 618, decided in 1876 by Sir George Jessel, Master of the Rolls, it was distinctly adjudged, after a masterly review of all the previous authorities, that a power to sell and exchange does include the power to make partition. In delivering his judgment, the Master of the Rolls concludes as follows: "This is the state of the authorities. Lord St. Leonards says that it wants another decision to make it quite clear. I am willing to give the decision (supposing the doubt is not taken away by the decision of the Court of Exchequer followed by the *Vice-Chancellor*, Kindersly) that the passage in the Touchstone (declaring that joint-tenants, tenants in common, and coparceners cannot exchange the lands they do so hold, one with another, before they make partition) is not good law, and that you can have such an exchange, and if you can have such an exchange, why could not the power authorize the exchange of an undivided moiety in Whiteacre for another undivided moiety in Blackacre? I decide that it does. We have conflicting opinions between what the judges said in *Doe v. Spencer* and what the *Vice-Chancellor* intimated his opinion to be. It is not necessary for me to decide that question. I must say, if I had to decide it, I should be inclined to follow the opinion of the *Vice-Chancellor* instead of the Court of Exchequer, for if it can be done as between two, I do not see why it could not be done as between more than two, but I have not to decide that question now."

It would seem, therefore, to be finally settled in England, that a power to sell and exchange does include the power to make partition, and that all doubt on the subject has been removed; and we have not been referred to any decisions in this country which lead to a contrary result. This disposes of the case so far as the power under the deed of Sarah Vick is concerned.

The power given to the trustee by the codicil to the will of Grey J. Vick is not quite so clear. The testator constituted H. W. Vick a trustee for his children, and gave him full power to dispose of all or any portion of the property devised in the will that might fall to them, and invest the proceeds in such manner as he might think proper for their benefit. The expression "to dispose of" is very broad, and signifies more than "to sell." Selling is but one mode of disposing of property. It is argued, however, that the subsequent direction to invest the proceeds indicates that a sale was meant. But this does not necessarily follow. Proceeds are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of

land or real estate and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with; and the lands received would be the proceeds. It is to be considered that the words used are contained in a will, to which the rules of construction applicable to ordinary speech are to be applied, except where technical terms are employed. In a well considered book on the construction of wills, the rule of interpretation is laid down thus: (1) "In construing a will, the words and expressions used are to be taken in their *ordinary, proper and grammatical* sense; unless upon applying them to the facts of the case, an ambiguity or difficulty of construction, in the opinion of the court, arises; in which case the primary meaning of the words may be modified, extended or abridged, and words and expressions supplied or rejected, in accordance with the presumed intention, so far as to remove or avoid the difficulty or ambiguity in question, but no farther." (2) "As a corollary to, or a part of, the last proposition, *technical* words and expressions must be taken in their *technical* sense, unless a clear intention can be collected to use them in another sense, and that other can be ascertained." Hawkins, Construction of Wills, pp. 2, 4.

Now, whilst it may be true that when the words "disposed of" are used in connection with the word "sell," in the phrase "*to sell and dispose of*," they may often be construed to mean a disposal by sale; it does not necessarily follow that when power is given generally and without qualification by associated words, to dispose of property, leaving the mode of disposition to the discretion of the agent, that the power should not extend to a disposal by barter or exchange, as well as to a disposal by sale. The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical signification. Taking the whole clause in the codicil together, it is equivalent to an authority to dispose of the property as the trustee should deem most for the interest of his children; and this would include the power to barter or exchange as well as the power to sell.

In the case of *Frith*, already cited, the terms of the power were "*to sell, dispose of*, convey and assign the tenements, or any part thereof, by way of absolute sale for such a price in money, or by way of *exchange* for such equivalent in lands, as to the trustees should seem reasonable." The Master of the Rolls, in analyzing this phraseology, said: "Of course the word 'sell,' refers to 'sale,' and the word 'exchange' refers to 'dispose of' and, therefore, it comes to this, whether a trust including a power to dispose of by way of exchange for an equivalent in other lands, authorizes trustees to dispose of the undivided moiety, which they are empowered to dispose of, for another undivided moiety." This quotation shows that the words "disposed of" are properly applied to an exchange.

If this construction of the language of the will is correct, the conclusion arrived at in relation to the power given by the deed of Sarah Vick is applicable to that given by the will; for, since it imports a power to exchange, it likewise imports a power to make partition.

See 11 OTTO.

But without assuming to lay down as a general rule the interpretation which we have suggested, in view of the clearly expressed opinion of the Supreme Court of Mississippi on the precise point, we feel justified in adopting it in this case. In disposing of the equity case on appeal, that court fully considered the power of the trustee, Henry W. Vick, both under the deed and under the will, and came to the unanimous conclusion that he had full power and authority to make the partition in question. As to the power under the will the court had no doubt, and as to that given by the deed they relied on the authority of *Abell v. Heathcote* and the opinions of Sugden and Mr. Fearne. And although this conclusion was not embraced in the decree so as to become *res judicata*, yet it was the ground on which the decree was rested. The precise question before the court was, whether the power exercised by the trustee was or was not clearly in excess of powers given by the instruments under which he assumed to act. The court looked into these instruments and said, without hesitation: "The trustee acted entirely within the scope of his powers and, therefore, it is not clear that he acted in excess of those powers, but the contrary." Whilst the point adjudicated was the conclusion that he had not clearly exceeded his powers, the reason for that conclusion, namely: the decided opinion that he had acted within the scope of his powers, was fairly within the inquiry presented for determination. The opinion is not absolutely binding, it is true, but it is entitled to great weight on the question as to the actual law of Mississippi, and can hardly be called an extra-judicial opinion.

The objection, that the trustee did not give his personal attention to the division of the property, but, by agreement with his son, submitted it to the arbitration of disinterested persons, we do not regard as sufficient to invalidate the transaction. It was confirmed and carried into effect by his executing the requisite indenture for that purpose. Had the matter been carried into the courts, a commission would have been appointed to make the partition, in whose appointment the trustee would have had less to say than he had in the selection of the persons mutually chosen by himself and his son. And it seems to us that the intervention of disinterested persons for appraising the property and making the allotment was judicious and proper. It is the course most commonly pursued by those who desire to make a division of property. It is laid down as a rule that "Trustees may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it;" and this is said to arise "from the usage of mankind. If the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as, if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; so in the employment of stewards and agents." Lewin, Tr., 3d ed., p. 293. Again; "The trustee cannot without responsibility delegate the general trust for sale; but there seems to be no objection to the employment of agents by him, where such a course is conformable to the common usage of business, and the trustee acts as prudently for the *cestui que trust* as he would

have done for himself." Lewin, Tr., 3d ed., p. 422.

But this is rather a question affecting the responsibility of the trustee than the validity of his acts. The trustee in this case had power to make partition. He did make partition, and carried it out by executing the proper conveyance between himself and his co-tenant. The partition is valid, although the trustee may be responsible for the manner in which it was affected by him.

The decree of the Circuit Court is affirmed.

COLORADO CENTRAL RAILROAD COMPANY, *Plff. in Err.*,
v.

ASHER A. WHITE, Admr. of SIMON WHITE,
Deceased.

(See S. C., 11 Otto, 98, 99.)

Division of opinion.

If the Judges of the Circuit Court are divided in opinion as to any question of law which is material to the determination of a cause presented to them, the jurisdiction of this court may be invoked to settle the differences; but in such cases, if it appears upon the record that no such disagreement actually existed, this court will not consider the question, even though it may be certified in form.

[No. 641.]

Submitted Jan. 12, 1880. Decided Feb. 2, 1880.

IN ERROR to the Circuit Court of the United States for the District of Colorado.

The case is sufficiently stated by the court.

Mr. H. M. Teller, for plaintiff in error.

Mr. John Q. Charles, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a writ of error brought by the Corporation, defendant below, to reverse a judgment against it for less than \$5,000. The record shows that after a verdict in favor of the plaintiff below, the defendant moved for a new trial; and on that motion the question arose, whether, "under the facts and circumstances shown in evidence," a certain instruction of the court to the jury "was or was not erroneous." The record then proceeds as follows: "On which question the opinions of the Judges were opposed, and final judgment entered on a verdict for the plaintiff. Whereupon, on motion of the defendant, by its counsel, that the point on which the disagreement so happened may, during the term, be stated under the direction of the Judges, and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing statement of the pleadings and the facts, which is made under the direction of the Judges, be certified according to the request of the defendant, by its counsel, and the law in that case made and provided." The certificate thus ordered is signed by the Circuit Judge and the District Judge. As the law now stands, if the Judges in the Circuit Court disagree, a judgment must be entered in accordance with the opinion of the presiding judge, who, in this case, was the Circuit Judge. R. S., sec. 650. If he had been

of the opinion that the instruction was wrong, the order, necessarily, would have been in favor of granting a new trial. Because the new trial was not granted, therefore, we must conclude that he thought the instruction right. To bring about a disagreement under these circumstances, the District Judge must have held that the instruction was wrong; but, instead of that, we find his opinion in the record, apparently delivered in disposing of the motion for a new trial, in which he maintains with much force the correctness of the instruction.

In view of these facts, as the amount in dispute is less than our jurisdiction requires, we must decline to take cognizance of the case. If the Judges below are not able to agree upon the decision of any question of law which is material to the determination of a cause presented to them, our jurisdiction may be invoked to settle the differences; but in such cases, if it appears upon an examination of the whole record that no such disagreement actually existed, we ought not to consider the question, even though it may be certified in form.

Writ dismissed.

UNITED STATES, *Appt.*,

v.

HANCE LAWSON.

(See S. C., 11 Otto, 164-169.)

Fees of collector—voluntary payment.

1. A Collector of Customs is entitled, in addition to his salary, to certain fees collected by him.

2. Where such collector, upon the peremptory order of the Commissioner of Customs, paid such fees into the U. S. Treasury, the payment was not voluntary so as to prevent his recovering them, as wrongfully exacted. He was liable to a penalty if he refused.

[No. 886.]

Submitted Jan. 22, 1880. Decided Feb. 2, 1880.

APPEAL from the Court of Claims.

The case is stated by the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellant.

Mr. John Scott, Jr., for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Compensation to Collectors of the Customs, from the organization of the Government to the present time, has been chiefly derived from certain enumerated fees, commissions and allowances, to which is added a prescribed sum, called "salary," much less than a reasonable compensation for the service required by the officer. 1 Stat. at L., 64, 316, 627, 704.

Sufficient appears, to show that by these several Acts certain enumerated fees and commissions were made payable to the Collectors of the Customs, and that they were also entitled to certain proportions of fines, penalties and forfeitures. By the same Acts they were required to keep accurate accounts of all fees and official emoluments by them received, and of all expenses for rent, fuel, stationery, and clerk hire, and to report the same annually to the Comptroller of the Treasury, but they were allowed to retain to their own use the whole amount of the emoluments collected from those

sources, without any limitation. Maximum rate of compensation was subsequently prescribed, which was \$5,000, and it was made applicable to all collectors without any discrimination. 2 Stat. at L., 172.

It was provided by that Act that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than \$5,000, the surplus should be accounted for and paid into the Treasury. Districts for the collection of the customs were, at a later period, divided into two classes usually denominated the enumerated and the non-enumerated ports, and the *maximum* rate of compensation to collectors was diminished. 3 Stat. at L., 695.

Under that Act the maximum for the enumerated ports was \$4,000 and for the non-enumerated ports \$3,000, and the provision in respect to both classes was that the excess, after deducting the expenses incident to the office, should be paid into the Treasury as public money.

For a considerable period of time these regulations were satisfactory, but when the policy was changed, the free list much enlarged and the rates of duty reduced, experience showed that the emoluments of collectors from those sources were not sufficient to give them a reasonable compensation. Temporary expedients were resorted to for several years by the passage of an annual Compensation Act, as will be seen by reference to the Acts of Congress during that period. *U. S. v. Walker*, 22 How., 299-308 [63 U. S., XVI., 382, 384]; *U. S. v. Macdonald*, 5 Wall., 647, 655 [72 U. S., XVIII., 512, 515].

Importers, under various antecedent Acts of Congress, were allowed to place certain goods in the public stores under bond, at their own risk, without the payment of the duties, until the goods were withdrawn. Public stores were accordingly rented, and as the business increased, the rent and storage received by the collector of the merchants making deposits in the stores exceeded the amount paid to the owners of the same, and there was no law requiring the collector to account for the excess. Congress interposed and regulated the subject. 5 Stat. at L., 432; R. S., sec. 2647.

By that enactment collectors are required to include in their quarterly accounts all sums received for rent and storage in the public stores beyond the rents which are paid to the owner, and if the excess in any one year exceeds \$2,000, it is made their duty to pay such excess into the Treasury as part and parcel of the public money. *U. S. v. Macdonald*, 2 Cliff., 270, 282.

Two thousand dollars of the amount, under the Act of Congress then in force, might be retained by the collector in addition to the amount received from other lawful sources of emolument, provided the latter did not exceed the maximum rate allowed to the office. Receipts from the other sources of emolument were to be accounted for as before; but the effect of the new provision was to add \$2,000 to the compensation of a collector, if his office earned that amount from rent and storage. Custom dues of every kind received by a collector are now required to be credited in his quarterly accounts, no matter from what source of emolument the money is derived; and the

See 11 Otto.

U. S., Book 25.

provision is, that whenever the emoluments of any collector, other than one of the enumerated ports, "Shall exceed \$3,000, the excess shall in every such case be paid into the Treasury for the use of the United States; but the provision does not extend to fines, penalties or forfeitures, or the distribution thereof." R. S., 2691.

Apply the rule prescribed in that provision to the case before the court, and it is clear that the Collector, if the compensation he received from other sources of emolument, after deducting the incidental expenses of his office, amounted to \$3,000, would not have a right to retain any portion of the excess received for rent and storage beyond what he paid to the owners of the stores rented. His right in such a case, provided the aggregate of his receipts from the other sources of emolument, after deducting the incidental expenses of his office, was insufficient to give him the maximum compensation allowed, would be to retain enough from the amount derived from that source to make up the deficit.

Judgment was rendered in favor of the petitioner, and the United States appealed to this court. No formal assignment of errors is filed, but the proposition submitted in argument is, that the petitioner voluntarily paid the amount claimed into the Treasury, and that he cannot now maintain any action to recover it back.

Nothing appears in this case, to warrant the conclusion that the petitioner ever collected anything for rent and storage, or that any such matters are in controversy in this case, as will hereafter more fully appear.

Special findings were made by the court to the effect following: that the petitioner held the office in question from April 19, 1867, to April 1, 1875, and that he received from the United States during that period a salary at the rate of \$1,200 per annum; that, on the 18th of July subsequent to his appointment the Commissioner wrote him, acknowledging the letter of the petitioner of a prior date, and stated that the \$1,200 salary given him by the Act creating his district constituted his entire compensation, and that he was required to account for all fees.

Directions could hardly be more peremptory; and the Court of Claims finds that, in consequence of that letter, the petitioner accounted for and paid into the Treasury all moneys collected by him as duties on imports and tonnage, except what was expended for office rent, fuel and expenses, and for the services of his deputy and clerks.

During his term of office he collected as fees \$9,066.43, of which he paid out \$623.48 for office rent, fuel and expenses, and \$2,492.29 for the services of his deputy and clerks, for which sums he was allowed credit in his accounts.

None of these matters can be controverted; and the fifth finding of the court below shows the balance of the sum collected as fees, to wit: the sum of \$5,950.66, was by him, without protest, paid into the Treasury of the United States. All of the facts are stated in the findings of the court; and they also find that the petitioner, under the Acts of Congress, collected tonnage taxes to the amount of \$11,839.23, and that he paid the same to the Government.

It appears that the district in which the petitioner is Collector was formed out of a part of a district created by the original Collection Act,

and that it was continued as such until the passage of the Act abolishing it, and that the Act creating the new district provided that the collector of the same shall receive an annual salary of \$1,200. 1 Stat. at L., 33; 14 Stat. at L., 410.

Much discussion of the proposition that the petitioner would have been entitled to all he demands if he had seasonably claimed it or made the payment, when it was officially required, under protest, is certainly not required, as it is not denied in argument; but if it were required to give the authority for the conceded right, the effort would not be attended with much difficulty. Express provision was made by the 2d section of the Compensation Act, that collectors might demand and receive the fees therein prescribed. They were also given a salary of \$250, and were required to keep an accurate account of all fees and official emoluments and all expenditures for rent, fuel, stationery and clerk hire, and to transmit the same under oath to the Comptroller of the Treasury. 1 Stat. at L., 706-708. Corresponding provision is now contained in the Revised Statutes which is applicable to the case under consideration. R. S., sec. 2654.

Percentages for the collection of duties of import and tonnage were also allowed by the original Act, and are contained in the Revised Statutes. Sec. 2659. Three per cent is allowed to the Collector of this port, and he is also entitled to a salary of \$200 by the original Act, which for certain purposes may still be regarded as in force. Accounts are still required to be rendered by the officer under oath. Secs. 2639, 2641.

Instances may, perhaps, be cited where it would be reasonable to conclude that Congress intended to make the salary of the collector his entire compensation, by using appropriate words to manifest such intention; but it is clear to a demonstration that the general rule is the other way, as appears from all the Compensation Acts passed since the Treasury Department was organized. Salary, in all the Acts, is one of the allowances, but it will be found in every such Act that fees, commissions, other allowances, or percentages are also included in the list. Proof of that proposition is found in the Revised Statutes as well as in the Acts of Congress which were the subject of revision. If more be needed to confirm the proposition, it will be found in the decisions of this court, to which reference has already been made. It is not even suggested that the Acts of Congress allowing fees, percentages and commissions are repealed and, if not, it may well be that such allowances were intended, as heretofore, to supplement the small salaries prescribed in cases like the present.

Suppose that is so; still it is contended by the United States that the payments were voluntarily made, and that the money cannot be recovered back. Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred that the party felt that, if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of the

Collector. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we cannot hold that the payments were voluntary, within the meaning of the judicial rule which, in consequence of the payment, denies to the party making the same the right to recover it back.

Beyond all question, the money was wrongfully exacted, and it is equally certain that in equity and good conscience it ought to be returned, or so much of it as is not barred by the Statute of Limitations. It was demanded of him by his official superior, and the Act of Congress exposed him to a penalty if he refused to comply. 14 Stat. at L., 187; R. S., sec. 3619.

Comment upon the plea of limitations is unnecessary, as the charges barred by the Statute were excluded from the judgment.

Governed by these views, we hold, as the court below held, that the petitioner is entitled to recover the fees paid into the Treasury after May 22, 1869, as stated in the opinion of the court, less \$2.30 of tax paid on his salary, making, as properly adjusted in the opinion of the court below, the sum of \$5,605.38, for which the judgment was rendered.

Judgment affirmed.

Cited—101 U. S., 170, 172.

UNITED STATES, *Appt.*,

v.

TIMOTHY E. ELLSWORTH.

(See S. C., 11 Otto, 170-174.)

Voluntary payment.

Where a Collector of Customs pays into the U. S. Treasury, upon the peremptory order of the Commissioner of Customs, moneys, to which he is entitled as part of his official compensation, and was subject to a penalty for refusal to comply with such order, the payments cannot be regarded as voluntary so as to preclude him from maintaining an action to recover them.

[No. 884.]

Submitted Jan. 8, 1880. Decided Feb. 2, 1880.

APPPEAL from the Court of Claims.

The case is stated by the court.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellant.

Mr. J. W. Douglass, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Goods imported at the period mentioned in the declaration might be stored, under the Warehouse Acts, in the public stores legally established at the port of which the petitioner is Collector.

Due indemnity to the United States was given by the railroad company, at whose request the public stores in this case were established, against loss arising from decay, waste or damage to the goods there deposited.

Moneys, to a large amount, as specified in the declaration, were paid to the petitioner, as such Collector, to re-imburse the Treasury for the salaries of inspectors having charge of the

goods deposited in such stores. Pursuant to the Act of Congress, the Collector rendered, under oath, a quarter yearly account to the Treasury, of the sums of money collected for rent and storage, beyond the rent paid for the stores to their owners. 5 Stat. at L., 432; R. S., sec. 2647.

Statutory requirement also exists elsewhere, that all moneys received by collectors for the custody of goods in bonded warehouses shall be accounted for as storage, under the 5th section of the prior Act. 14 Stat. at L., 188. Such requirement is enforced by a penalty as follows: that every officer or agent who neglects or refuses to comply with the same "Shall be subject to be removed from office, and to forfeit to the United States any share or part of the moneys withheld to which he might otherwise be entitled." R. S., sec. 3619. Yearly payments of the same, as the petitioner alleges, were made by him through mistake, and that he made application to the commissioner for leave to correct his account; but the commissioner refused the request and declined in advance to repay the petitioner any part of the said moneys. What the petitioner alleges in that regard is, that a part of the money derived from that source, not exceeding \$2,000 in any one year, belonged to him, under the Act requiring accounts as to rent and storage.

Annual payments on that account were made by the petitioner, as he alleges, for the period of eight years during which he held the office, amounting in all to the sum of \$14,535.23. Maximum compensation of his office is \$4,500, as follows: salary, fees and commissions not exceeding \$2,500. R. S., sec. 2675. Nor exceeding \$2,000 in any one year from rent and storage. R. S., sec. 2647.

Out of the annual receipts for rent and storage the plaintiff claims an amount not exceeding \$2,000 in any one year, to which he adds the entire receipts from all other sources of emolument, and from the aggregate of these receipts he deducts the amount of his yearly compensation, and by that mode of computation his claim is as stated in the declaration.

Two pleas were filed in behalf of the United States: (1) They deny each and every allegation of the petition. (2) They allege that the petition was not filed within six years after the claim first accrued.

Charges barred by the Statute of Limitations were rejected, and the court below rendered judgment in favor of the petitioner for the balance, amounting to the sum of \$11,954.73, as appears by the transcript.

Special findings of fact were duly filed in the record, as required by the rules of the court, to the effect following: that the petitioner was Collector of the port from March 5, 1870, to January 25, 1878, and the Act of Congress shows that the maximum of his compensation was as stated in his petition; that two freight depots are located at that port, and that from the time the petitioner became Collector, to June 15, 1877, the apartments of the depots were constantly and exclusively used for the storage of goods in bond, seized goods and goods unclaimed.

Compliance with the treasury regulations in establishing such depots is also shown by the findings of the court, and that two inspectors were constantly kept there in charge of goods

stored in those depots during that period, and that the amount of their salaries was annually re-imbursed to the United States through the Collector by the railroad companies at whose request the depots were established, as shown by the statement exhibited in the fifth finding of the court. All these amounts were duly entered in the quarterly accounts of the petitioner, and were paid to the Treasurer of the United States in compliance with official instructions.

Peremptory instructions were given to the officer, that all moneys of every description, not received by warrant on the Treasury, must be actually deposited, as they would be charged in the Collector's account. His compensation, as received, was derived wholly from the other statutory sources of emolument, the findings of the court showing that he was not paid anything out of the yearly amounts collected from rent and storage. Due credit was given for the annual amounts he received from the other sources of emolument during the six years, within the Statute of Limitations, as exhibited in the seventh finding of the court; and the same finding also contains a statement showing the additional amounts required for each of those years to bring up the compensation of the Collector to the maximum rate.

Argument, to show that the aggregate received from all sources of emolument, including the receipts from rent and storage, is sufficient to justify the claim of the petitioner, is certainly unnecessary, as it is clear to a demonstration that the computations of the court below are correct. Plainly, it follows from those computations that the Collector is entitled to that rate of compensation, unless it be denied that the receipts from rent and storage, as explained in the opinion just read in the case of *U. S. v. Lawson* [ante, 860], are not properly included in that aggregate.

Sums received for rent and storage, not exceeding \$2,000 in any one year, if duly included in the quarterly accounts of collectors, are as much due to such officers of the non-enumerated ports as to the incumbents of the larger offices, and their right to the same rests on the same foundation. Actual necessity has always existed, since the Treasury Department was established, for more storehouses for the deposit and safe-keeping of imported merchandise than the United States owned, and it cannot be doubted that all such as have been placed under the statutory control of collectors and have been used for that purpose according to law are, during the period they are so controlled, used and occupied, public storehouses, within the meaning of the Act of Congress requiring collectors to include receipts from that source in their quarterly accounts, and allowing them to retain out of the same a sum not exceeding \$2,000 in any one year. *U. S. v. Macdonald*, 5 Wall., 647, 659 [72 U. S., XVIII., 512, 517]; *S. C.*, 2 Cliff., 270, 282.

None of these matters are controverted by the Solicitor-General; but he insists that the payments were voluntary, and that the accounts having been settled cannot be opened, even if it appears that the demand and payments were both made under a mistake of law. Responsive to the first suggestion, the same answer may be given to it as that given by the court to a similar suggestion in the preceding case.

You will also bear in mind, said the commissioner, that all moneys of every description, not received by warrant on the Treasury, must be actually deposited. Had he added: if you fail to comply, the law will be enforced, his meaning could not be misunderstood, as the Act of Congress provides that the gross amount of all moneys received from whatever source *for the use of the United States*, with an exception immaterial in this case, shall be paid by the officer or agent receiving the same into the Treasury at as early a day as practicable, without any abatement, etc. R. S., sec. 3617.

Penalties are prescribed for a non-compliance with that requirement, as follows: every officer or agent who neglects or refuses to comply with that provision shall be subject to be removed from office and to forfeit any part or share of the moneys withheld, to which he might otherwise be entitled. 14 Stat. at L., 187; R. S., sec. 3619.

Viewed in the light of these penal provisions, the payments in question, made under the peremptory order of the commissioner, cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner.

Judgment affirmed.

HARVEY TERRY, *Plff. in Err.*,

v.

BENJAMIN F. LITTLE ET AL.

(See S. C., 11 Otto, 216-218.)

Liability of stockholders—proportionate liability—joint action.

1. The individual liability of stockholders in a corporation is always a creature of statute.

2. Where the language of the charter is that the stockholders are "Liable and held bound for any sum not exceeding twice the amount of their shares," the provision is, in legal effect, for a proportionate liability by all stockholders.

3. Under such charter, the suit to enforce the liability should be in the nature of a suit in equity, by or for all creditors, and it cannot be at law by one creditor for himself alone against two of many individual stockholders.

[No. 151.]

Argued Jan. 16, 1880. Decided Feb. 2, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of North Carolina.

The case is stated by the court.

Mr. Harvey Terry, for plaintiff in error.

Messrs. Joseph J. Davis and W. N. H. Smith, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

By section IV. of the charter of the Merchants' Bank of South Carolina, at Cheraw, it was provided that, in case of the failure of the bank, "Each stockholder, copartnership or body politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within

twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her or their share or shares." It is alleged in the complaint that the bank failed March 1, 1865. The general assets have since been collected and applied to the payment of debts, under the provisions of an Act of the Legislature of South Carolina, passed March 13, 1869, placing the bank in liquidation. Debts to the amount of several hundred thousand dollars are still unpaid. The capital stock was \$400,000, divided into shares of \$100 each. Of these shares the defendant, Benjamin F. Little, owned, at the time of the failure, one hundred and ten, and John P. Little one hundred and fifty-eight. On the 21st of August, 1875, Terry, the plaintiff, commenced an action at law in the Circuit Court of the United States for the Western District of North Carolina, against the defendants jointly, to recover from them, on account of their individual liability as stockholders, the amount due him from the bank for \$5,440 of its bills which he held. The defendants demurred to the complaint, and among others assigned for cause, in substance: 1, that the individual liability of the stockholders as created and defined by this charter could not be enforced in an action at law by one creditor for his sole use, to the exclusion of others; and 2, that, even if it could, the defendants cannot be joined in one such action because their liability is not joint but several. The circuit court sustained the demurrer and gave judgment for the defendants. This writ of error has been brought to reverse that judgment.

The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, what liability has been created. There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. The remedy must always be such as is appropriate to the liability to be enforced. The statute which creates the liability may declare the purposes of its creation and provide directly or indirectly a remedy for its enforcement. If the object is to provide a fund out of which all creditors are to be paid, share and share alike, it needs no argument to show that one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund.

The language of this charter is peculiar. The stockholders are not made directly liable to the creditors. They are not in terms obliged to pay the debts, but are "Liable and held bound * * * for any sum not exceeding twice the amount of * * * their * * * shares." This, as we think, means that on the failure of the bank, each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is, in legal effect, for a proportionate liability by all stockholders. Undoubtedly, the object was to furnish additional security to creditors, and to have the payments when made applied to the liquidation of

debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, it must be enforced by or for all. The form of the action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone, is entirely inconsistent with any idea of distribution. As the liability of the stockholder is not to any individual creditor, but for contribution to a fund, out of which all creditors are to be paid alike, the appropriate remedy is by suit to enforce the contribution, and not by one creditor alone to appropriate to his own use that which belongs to others equally with himself. We think this case comes clearly within the rule laid down in *Pollard v. Bailey*, 20 Wall., 520 [87 U. S., XXII., 376], to which we adhere.

The second ground of demurrer is equally fatal. The liability of the stockholders is several and not joint. Each stockholder is bound for his own share and no more. No judgment can be rendered against him for what another should pay. It follows that in an action at law each stockholder must be separately sued. In equity it is different, for there the decree can be molded to suit the exigencies of the case; and each stockholder can be held liable and proceeded against for what he is bound to pay, and no more. Undoubtedly, under the provisions of some charters, suits at law may be maintained by one creditor against one or more of the stockholders. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability. All we decide is that, under this charter, the suit to enforce the liability should be in the nature of a suit in equity, by or for all creditors, and that it cannot be, at law, by one creditor for himself alone, against two stockholders who are not jointly liable on account of the shares standing in their respective names.

Judgment affirmed.

WELLS W. LEGGETT ET AL., *Appts.*,

v.

BENJAMIN F. AVERY ET AL.

(See S. C., 11 Otto, 256-260.)

Re-issued patent.

It is a fatal objection to the validity of re-issued letters patent, that the Commissioner, in the re-issue, allowed the patentee a claim for an invention different from that described in the surrendered letters, and which he had disclaimed.

[No. 755.]

Submitted Jan. 8, 1880. Decided Feb. 2, 1880.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The case is stated by the court.

Mr. M. D. Leggett, for appellants.

Mr. John E. Hatch, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

This was a bill in equity filed by the appellants against the appellees for an injunction to restrain the latter from infringing certain letters patent.

patent for an improvement in plows, and for an account of profits and an assessment of damages. The letters patent claimed by complainants and set forth in their bill, were originally granted to one Matthew G. Slemmons on the 9th day of October, 1860, surrendered and re-issued on the 22d day of June, 1869, extended for seven years from the 9th day of October, 1874, and again surrendered and re-issued on the 10th day of November, 1874. One of the defenses made by the defendants was, that the last re-issue embraced certain claims for alleged inventions, which had been expressly disclaimed by the patentee as a condition of getting the patent extended, and which are the specific claims which the defendants are charged with infringing. The fact on which the defense is based seems to be well founded. In the original patent, granted in 1860, the only thing claimed was, "The arrangement of the two curved shoulder beams, A, A, a clevis, B, transverse bar, D, m, slotted adjustable handles, E, E, b, and notched and mortised shovels, C, C, e, in the manner and for the purpose described." The specification commences by saying, "My invention consists in the particular arrangement of the several parts in the manner and for the purpose hereinafter described." Of course, this was a claim for a combination of a number of particulars, and was a very narrow patent, for no one would infringe it who did not use all the parts in the combination as described. It is not pretended that the defendants have done so.

But in 1869 the patentee surrendered this patent and obtained a re-issue, embracing six different claims, which were as follows:

"1. The two converging beams A A, each one of which has a shovel standard, A, formed by bending its rear end, substantially as described.

2. The converging beams A A, connected together and constructed with curved shovel standards A' A' upon them, substantially as described.

3. The union of the front ends of plow-beams, which have their rear ends bent to form shovel standards, by means of a clevis or device by which the team is hitched to the implement, substantially as described.

4. The converging plow-beams A A, having shovel standards A' A' formed on them, in combination with handles F F and handle supporting braces E E, substantially as described.

5. In combination with the foregoing, the manner, substantially as described, of adjusting the handles F F, and securing them to the beams at any desired angle.

6. Constructing of one piece of metal a plow-beam, A, and a curved shovel standard A', with a shoulder d formed on the latter, substantially as described."

The defendants allege that most of these claims were for devices that had long been in public use, and that the patentee never attempted to vindicate his title to them by instituting any suits against those who had used them; and evidence on the subject was introduced which it would be necessary for us to examine, if the case depended on this issue. But early in 1874 the patentee, on behalf of the present plaintiffs and appellees [appellants] who had purchased the patent, applied for an extension for another seven years. This was opposed by those who were interested

in the subject matter, and the acting Commissioner of Patents refused to grant the extension unless the patentee would abandon all the claims in the re-issued patent of 1869, except the fifth. Thereupon a disclaimer was filed accordingly, and the patent was extended for the fifth claim only, which the defendants have not infringed. This disclaimer was filed on the 5th of October, 1874; and the extension was granted on the 9th of the same month. On the same day another re-issue was applied for, including substantially the claims which had been rejected and disclaimed. The examiner refused to pass the application; but it was persisted in and, finally, on the 10th of November, 1874, the re-issue was granted on which the present suit was brought. This re-issue contains the following claims:

“1. Two diverging beams, A A, that have their rear ends bent to form shovel standards, the said beams being fastened rigidly together, substantially as described, at and springing from the point of attachment for the draft.

2. Two diverging beams, A A, that have their rear ends bent to form shovel standards, and their front ends fastened rigidly together and merged into a device, substantially as described, whereby the plow may be attached to the draft.

3. The combination, substantially as described, with the two plow-beams A A, of the handles F F, and adjustable handle supporting braces E E.”

It is obvious, on inspection, that the first and second of these claims are for substantially the same inventions which were disclaimed before the extension, and are for different inventions from that which was included in and secured by the letters patent as extended. The court below deemed this, amongst other things, a fatal objection to the validity of the re-issued patent. We agree with the circuit court. We think it was a manifest error of the Commissioner, in the re-issue, to allow to the patentee a claim for an invention different from that which was described in the surrendered patent, and which he had thus expressly disclaimed. The pretense that an “error had arisen by inadvertence, accident or mistake,” within the meaning of the patent law, was too bald for consideration. The very question of the validity of these claims had just been considered and decided with the acquiescence of the patentee and the express disclaimer on his part. If, in any case where an applicant for letters patent, in order to obtain the issue thereof, disclaims a particular invention, or acquiesces in the rejection of a claim thereto, a re-issue containing such claim is valid, which we greatly doubt, it certainly cannot be sustained in this case. The allowance of claims once formally abandoned by the applicant, in order to get his patent through, is the occasion of immense frauds against the public. It not unfrequently happens that, after an application has been carefully examined and compared with previous inventions, and after the claims which such an examination renders admissible have been settled with the acquiescence of the applicant, he, or his assignee, when the investigation is forgotten and perhaps new officers have been appointed, comes back to the Patent Office and, under the pretense of inadvertence and mistake in the first specification, gets inserted in the re issued patent all that had been previously rejected. In this manner, with-

out an appeal, he gets the first decision of the office reversed, steals a march on the public, and on those who before opposed his pretensions (if, indeed, the latter have not been silenced by purchase), and procures a valuable monopoly to which he has not the slightest title. We have more than once expressed our disapprobation of this practice. As before remarked, we consider it extremely doubtful whether a re-issued patent can be sustained in any case where it contains claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his patent. Under such circumstances, the rejection of the claim can, in no just sense, be regarded as a matter of inadvertence or mistake. Even though it was such, the applicant should seem to be estopped from setting it up on an application for a re-issue.

The decree of the Circuit Court is affirmed.

Mr. Justice Harlan did not sit in this case.

Cited—102 U. S., 228; 112 U. S., 359, 644; 10 Biss., 406; 19 Blatchf., 142.

INTERNATIONAL BANK ET AL., *Appls.*,
v.

HOYT SHERMAN, Assignee in Bankruptcy
of BENJAMIN F. ALLEN, ET AL.

WILLIAM HICKLING, *Appt.*,

v.

SAME.

(See, S. C., 11 Otto, 403-407.)

Assignee in bankruptcy—action by—void transfer.

1. An assignment in bankruptcy relates to the commencement of the proceeding, and the title of the assignee to all the property and effects of the bankrupt becomes vested as of that date.

2. The time within which an assignee in bankruptcy can commence an action, begins to run when the assignee is appointed.

3. A transfer of property by the bankrupt, after commencement of the bankrupt proceedings, is void, although the act of bankruptcy, upon which the adjudication was founded, was introduced into the petition by an amendment made after such transfer.

[Nos. 972, 1042.]

Submitted Jan. 12, 1880. Decided Feb. 2, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The cases are stated by the court.

Messrs. A. M. Pence and Julius Rosenthal, for appellants in No. 972, *Albion Cate* in No. 1042.

Messrs. J. S. Polk and L. H. Bisbee, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

These are suits in equity. Our attention will first be given to the first named case. The bill was filed by the appellee, Hoyt Sherman, as assignee in bankruptcy of Benjamin F. Allen, to reach certain securities therein described, which were transferred to the appellants by the bankrupt to secure the payment of two promissory notes of T. A. Andrews & Co., a firm consisting of T. A. Andrews and the bankrupt. One

of the notes was for \$15,000, and was held by the International Bank. The other was for \$5,000, and was held by the appellant, Hickling. On the 23d of February, 1875, a creditor's petition was filed in the district court praying that Allen should be declared a bankrupt. On the 9th of March, Allen appeared before the District Judge. The hearing was postponed until the 16th of that month. Allen was given until that time to answer, and leave was given to the creditors to amend their petition, by adding new causes of bankruptcy or otherwise. Nothing further material was done in the case until the 16th of April following, when Allen filed his answer denying that the aggregate of the claims of the petitioning creditors amounted to one third of the debts provable against him. Ten days was thereupon allowed for other creditors to unite with the petitioners, and the leave before given to amend the petition was continued. On the 22d of April following, Receiver Burley was permitted to unite with the petitioning creditors by signing the petition, which he did, and the petitioning creditors, including Burley, thereupon amended their petition. The amount of the debts of the bankrupt then represented was sufficient. The amendment set forth an act of bankruptcy by Allen in not paying his commercial paper within six months next preceding the time of filing the petition. An order of adjudication was duly entered, and on the 12th of July, 1875, an assignment was made to Hoyt Sherman, as assignee. The assignment included all the property and effects of every kind in which Allen, the bankrupt, "Was interested or entitled to have on the 23d day of February, A. D. 1875."

The continuity of the proceeding from the outset was unbroken. The original petition was amended by inserting an act of bankruptcy which occurred before the petition was filed, as before stated, but the original petition was in nowise either dismissed or abandoned. There is no pretense for alleging either.

The assignment related back to the commencement of the proceeding, which was by filing the petition on the 23d of February, 1875, and the title of the assignee to all the property and effects of the bankrupt became vested as of that date. R. S., 980, sec. 5,044.

This bill was filed on the 7th of July, 1877. It was amended twice, but the amendments were chiefly verbal. Their effect was only to give greater precision to the charges already made. The framework of the bill remained the same. No new cause of action was introduced. The changes were not such as could have any effect with respect to the statutory limitation as to suits by or against assignees in bankruptcy. The limitation in such a case is two years. R. S., sec. 5057. The time begins to run when the assignee is appointed. Bump, Bankruptcy, 558. The appellee having been appointed assignee on the 12th of July, 1875, and the bill having been filed on the 7th of July, 1877, it escaped the bar of the limitation prescribed by five days. The statute, therefore, does not affect the case, and may be laid out of view. No further remarks as to this aspect of the proceeding will be necessary.

The assets involved in this controversy were transferred to the appellants on or about the 20th of March, 1875. The bill proceeds upon See 11 Otto.

the assumption, and charges that the title vested in the assignee for all the purposes of this case on the 23d of February, 1875, and that hence, when the transfer was made by the bankrupt, he had no title and no control over the property. This is denied by the appellants. They insist that as the act of bankruptcy upon which the adjudication was founded was introduced into the petition by an amendment made on the 22d of April following, the title of the assignee cannot be held to have vested at an earlier time, and that Allen, therefore, had the title when he made the transfer.

The court below held according to the theory of the bill.

The statute is clear and imperative. Its constitutional validity is not questioned. It contains no qualification. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it. In the disposition of property among creditors, equality is equity. It was the genius and purpose of the statute to secure this result, as far as possible, from the moment its aid was invoked, whether by debtor or creditor. The power of amendment is incidental to all judicial administration. Its exercise is vital to the ends of justice. *Tilton v. Cofield*, 93 U. S., 163 [XXIII., 858]. The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were *ipso facto* in abeyance until the final adjudication. If that were in his favor they revived and were again in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civilitur mortuus*. Those who dealt with his property in the interval between the filing of the petition and the final adjudication, did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them. In this case the title of the assignee is, in all respects, just what it would have been if the bankrupt had done nothing, and there had been no interposition by the appellants. Otherwise the efficacy of the Act depended not upon its own language and meaning, but was only what others outside of the proceeding might choose to permit it to be. This would be a solecism, and largely defeat the purpose of the statute and the policy of Congress in enacting it. We concur entirely in the opinion of the circuit court upon the subject.

The bankrupt was under arrest upon civil process when the transaction complained of by the bill occurred, and the appellants knew of the filing of the petition against him, and of his utter insolvency when they received the assets.

Our opinion in this case disposes also of No. 1042. The record shows that the rights of Withrow were settled and provided for by a decree in another litigation to which he and the assignee were parties. The cross-bills were properly dismissed.

The decrees of the Circuit Court are affirmed.
Cited—104 U. S., 230.

SCHOOL DISTRICT NO. 56, OF RICH-
ARDSON COUNTY, NEBRASKA, *Plff.*
in Err.,

v.

ST. JOSEPH FIRE AND MARINE INSUR-
ANCE COMPANY.

(See S. C., 11 Otto, 472.)

Submission of cause—observance of rules.

1. Where a cause is submitted and Rule 21, which provides that "When a statute of a State is cited, it shall be printed at length," either in or with the brief, is disregarded by both parties, the submission will be set aside and the cause restored to its place on the docket.

2. This court still insists on a strict observance by counsel, of all rules intended to facilitate its examination of causes, especially those submitted.

[No. 714.]

Submitted Jan. 6, 1880. Decided Feb. 2, 1880.

IN ERROR to the Circuit Court of the United States for the District of Nebraska.

The case is stated by the court.

Messrs. E. Estabrook and Geo. P. Uhl,
for plaintiff in error.

Messrs. Willard P. Hall and B. R. Vineyard,
for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This cause was submitted on the 6th of January under the 20th Rule. Its decision depends on a careful consideration of several statutes of Nebraska. Rule 21 provides (par. 4, subdivision 3) that "When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length," either in or with the brief. That rule has been entirely disregarded by both parties in this case. For this reason *the submission is set aside and the cause restored to its place on the docket.*

We must insist on a strict observance by counsel of all rules intended to facilitate our examination of causes, especially those submitted. Although, in general, the statutes of the States are to be found in the Congressional Library, we do not have them at our rooms where, necessarily, cases are investigated. A little trouble on the part of counsel in obeying this particular rule, will expedite materially our labors. We take this opportunity of calling special attention to this subject.

OSCAR H. BUTTERFIELD ET AL., *Appts.*,
v.

MARY A. SMITH, *Admrx. de bonis non*, etc.,
of JULIUS C. WRIGHT, Deceased.

(See S. C., 11 Otto, 570-572.)

Executors' settlement—final settlement.

1. An executor, by charging himself with a note as part of the assets of the estate and settling his accounts on that basis, shows that he supposed the debt valid in the hands of the testator.

2. Final settlements of administrators and exec-

utors, when adjudicated, have the force and effect of judgments as between the parties thereto, but as to no one else.

[No. 784.]

Submitted Jan. 8, 1880. Decided Feb. 2, 1880.

APPEAL from the Circuit Court of the United States for the District of Kansas.

The case is stated by the court.

Messrs. Alfred Ennis and Hentig & Sperry, for appellants:

Final settlements of executors and administrators have the force and effect of a judgment.

The above mentioned settlement was a judgment in favor of each of the distributees against the executor, George P. Wright, and when the said executor died, the only thing for the administratrix *de bonis non* to do, was, to see that the money was properly distributed pursuant to the order of the court; and if the money was not forthcoming, the distributees had their remedy upon the bond of the executor, George P. Wright, or his estate. She cannot go back of the final settlement of the 23d day of April, 1875. All prior to that time, had been fully administered.

See, *Brown v. Brown*, 53 Barb., p. 217; *Campbell v. Thatcher*, 54 Barb., 382; *State v. Stevenson*, 12 Mo., 182; *Picot v. Biddle*, 35 Mo., 29, 41, 43; *Williams v. Petticrew*, 62 Mo., 461; *Tate v. Norton*, 94 U. S., 746, 751 (XXIV., 222, 224); *Musick v. J. Beebe*, 17 Kan., 47; *Sheetz v. Kirtley*, 62 Mo., 417; *Singleton v. Garrett*, 23 Miss., 196; *Lambeth v. Elder*, 44 Miss., 81.

This last case is directly in point, and all of the above authorities show that a final settlement has the force and effect of a judgment. Let us apply it to this case.

The complainant introduces no proof. The appellants introduce, in support of their answer, the final settlement of the executor and his inventory, showing that he had the mortgage, and that, in his final settlements, he permits judgments to go against him for the whole amount of the inventory, less credits therein allowed; and included in that judgment is the mortgage now in suit. If the distributees have a judgment against George P. Wright for their money, what right have they to pursue the appellants and seek to take their lands from them? None whatever.

Messrs. C. M. Foster and G. C. Clemens, for appellee:

The record in question does not show on its face that this note has been paid. It is, at most, a far-fetched inference. There was no decree of the court on the subject.

If it be contended that this is an admission, on the part of the executor of the estate, that the debt has been paid, the answer is that the executor at that time is not the complainant in this case, and that the admissions of one do not bind the other.

Pease v. Phelps, 10 Conn., 62.

Mr. Chief Justice Waite delivered the opinion of the court:

This suit was brought to foreclose a mortgage made by Daniel M. Adams and wife to Julius C. Wright to secure a note for \$5,000. Wright, the mortgagee, died in 1874, leaving a will, by which he appointed George B. Wright his ex-

101 U. S.

ecutor. The will was admitted to probate, and the executor qualified. In the inventory of the estate this mortgage was included as part of the assets. In April, 1875, the executor made application to the court for a final settlement. In his accounts he charged himself with the full amount of the inventory and, after the allowance of the proper credits, a balance was found in his hands which was ordered to be distributed in a specified manner, according to the terms of the will, but a balance of \$6,840.25, one share, was left in his hands with directions "To invest for Charles Wright, or pay the money pursuant to the will." The executor died in 1877, and afterwards the complainant below was appointed administratrix *de bonis non*, with the will annexed, of the estate of Julius C. Wright. On the 26th of October, 1877, she commenced this suit, to which the mortgagors, Adams and wife, and the appellants, with others, were made defendants. Adams and wife did not answer, but as to them the bill was taken as confessed. The appellants answered, setting forth that they were the owners of the mortgaged property, and then, by way of defense to the mortgage: 1, that they were informed and believed that the note and mortgage sued on were not the property of the estate of Julius C. Wright, but that the same were the property of Adams, the mortgagor, and were executed by him for the purpose of cheating and defrauding his creditors, and especially the appellants; and, 2, that the note sued on had been paid to George P. Wright, executor, "As appears by the inventory and his final settlement, copies of which are hereto attached, marked exhibits A and B."

No proof was put in on either side. The first defense, therefore, was clearly not sustained. Adams, the mortgagor, by not answering the bill, admitted the validity of the note, and the executor of the mortgagee, by charging himself with the note as part of the assets and settling his accounts on that basis, showed that he supposed the debt a valid one in the hands of the testator.

As to the second defense, it is claimed that the probate records attached as exhibits to the answer, showing the inventory and distribution, are conclusive evidence that the debt has been paid. Undoubtedly, final settlements of administrators and executors, when adjudicated, have the force and effect of judgments as between the parties to such settlements; but neither Adams nor these appellants were parties to this settlement, which concluded the executor and distributees, but no one else. Nothing is more common than for an executor or an administrator to charge himself with debts due the estate before they are collected, and thus expedite a final settlement. It would be dangerous to hold that, as between the executor or administrator and the debtor, such a settlement was conclusive evidence of the actual payment of the debt and the discharge of the debtor. The question presented by the answer is not whether the estate now owns the note and mortgage, if still unpaid, but whether it has been paid.

Decree affirmed.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

See 11 OTTO.

BERNARD D. D'AUTERIEVE ET AL.,
Appts.,
v.
UNITED STATES.

(See S. C., "*Dauterive v. United States*," 11 Otto, 700-707.)

Spanish claims to land—uncertain boundaries.

Claims, to land lying within the States of Florida, Louisiana or Missouri, by virtue of any grant or other evidence of title bearing date prior to the cession of the Territory out of which those States were formed, which contain no boundaries nor any means to determine either the location or the extent of the supposed grant, and which were not legally surveyed before such cession, cannot be sustained.

[No. 489.]

Submitted Jan. 8, 1880. Decided Feb. 2, 1880.

APPEAL from the District Court of the United States for the District of Louisiana.

The case is stated by the court. See, also, 15 How., 14.

Mr. Edward Janin and *Albert Janin*, for appellants.

Mr. S. F. Phillips, *Solicitor-Gen.*, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Claimants to land lying within the States of Florida, Louisiana or Missouri, by virtue of any grant, concession, order of survey, permission to settle, or other written evidence of title bearing date prior to the cession of the territory out of which those States were formed, may make application to certain commissioners for the confirmation of their title, or they may, at their option, proceed by petition in the district court within whose jurisdiction the lands are situated. 12 Stat. at L., 85.

Either party aggrieved by the decree in the case may appeal directly to the Supreme Court as of right, neither affidavit or security being required of the claimant, other than for costs. Pursuant to that authority the appellants presented their petition to the District Court of the District for Louisiana, asking for the confirmation of their title to the same, except as to such parts thereof as have been granted by the United States or confirmed to other parties, as to which they pray that they may be adjudged to be entitled to indemnity in certificates of location to the same extent of land.

Sufficient appears, to show that the same claim was presented to the same district court twenty years earlier, and that on appeal to the Supreme Court the claim was rejected. *U. S. v. D'Auterieve*, 15 How., 14. Full report is there given of the origin, nature and extent of the claim, and in view of that fact it is not deemed necessary to reproduce the allegations of the petition in this opinion, as the whole substance of the same is given in the opinion of the court in that case.

Due appearance was entered in behalf of the United States in this case, and the district attorney filed an answer to the petition, setting up several defenses, as follows: (1) That no such grants or *mesne* conveyances as those under which the petitioners claim were ever made. (2) That if any such grants were ever made as alleged, which is denied, that the lands were

NOTE.—*Missouri private land claims.* See note to *Bois v. Les Bramell*, 45 U. S. (4 How.), 449.

never separated by metes and bounds or actual survey from the mass of the public domain, and are, therefore, null and void by reason of uncertainty of location and vagueness of description, both as to the boundaries of the grants and to their extent.

Tracts of land of great extent were granted by royal charter to a certain association called the Western Company, and the claim of the appellants is that that company made concession of the tract in question to the grantor of their ancestor, the tract at the date of the concession being four leagues front on the right bank of the Mississippi River and extending back to the River Atchafalaya, a distance of ten or twelve miles. Neither the the royal charter granting the land to the Western Company nor the concession to the grantor of their ancestor is given in evidence. Nothing of the kind is pretended, but the appellants allege that the letters patent, bearing date in 1717, were issued in the name of the Sovereign of France, by which the said company was created, and that by the 5th article of the same, all the lands, coasts, ports, havens and islands of the Province of Louisiana were given and granted to the said company, with power to give, sell and grant the same to others, and that the company during that year or early in the next year conveyed the tract antecedently described to the grantor of their ancestor.

Their theory is that the concession was made by the French authorities before the Province was ceded to Spain. History shows that France subsequently, by a secret Treaty, transferred the Province to Spain in pursuance of the stipulations between the contracting parties. When the first Governor under the Spanish rule visited the Province he reduced the tract to a front of twenty arpents, to which no objections appear to have been made by the claimant; but the successor of that magistrate, three years later, when he assumed the functions of Governor of the Province, enlarged the front to forty-four arpents, which, perhaps, was done at the request of the claimant. Galvez was the third Governor of the Province after the cession to Spain, and he, in the exercise of his powers, took away from the heirs of the alleged purchaser the whole front to the depth of forty arpents from the Mississippi River, leaving them nothing except what is called, in legal phrase, the back lands.

Throughout these several changes in the alleged title of the ancestor of the appellants and his immediate heirs, all parties appear to have acquiesced without any complaint. Nor do the appellants now claim any of the front land on the River Mississippi, neither the four leagues nor the forty or forty-four arpents. Instead of that, their claim is to the back lands, the side lines commencing at a point forty arpents from the Mississippi River and extending back to the River Atchafalaya. Even as reduced the claim is a large one, amounting to perhaps 500,000 acres, but it is not more than one fifteenth part of the original claim, as appears by the documents exhibited in the transcript.

3. Besides denying the authenticity of the concession, the answer also denies in the most explicit terms that the tract, as described in the evidence, ever extended back to Atchafalaya River.

4. Support to that proposition is derived in the answer by referring to the regulations adopted two years before the second Governor under Spanish rule enlarged the front to forty-four arpents, which provide that all grants fronting upon rivers shall be limited to a depth of forty arpents. White, *Recopilacion*, p. 299, art. 1.

5. That the case is in all respects the same as that previously decided by this court. *U. S. v. D'Auterieve*, 15 How., 14, 23.

No record of the concession, say the court in that case, has been produced, and after a thorough examination of the archives, both at New Orleans and in the appropriate offices for the deposit of such records, none can be found. Mention was then made of the proof exhibited in the case, which, it seems, consisted only of certain historical sketches given to the public, of the first settlement of the Province under the direction of the Western Company, together with some documentary evidence relating to the plantation of the alleged original donee through his agents, such as powers of attorney and some intermediate transfers of the titles in the charge of the agency. These are given in detail, but the court remarks that, unfortunately, neither the historical sketches nor the documentary evidence furnish any information as to the extent of the concession or its boundaries. Speaking to the same point, the court say that the tract claimed as derived from the original donee is without boundaries or location, and the court proceeds to remark that the only description that has been referred to, or which the court has been able to find, after a pretty thorough search, even in historical records, is that it was a concession of a large tract upon the right bank of the Mississippi River, opposite Manchac, a point some twenty leagues above New Orleans. We have no evidence of the extent of the concession on the river or the depth back, say the court, or of any landmarks designating the tract, by which it can be regarded as severed from the public domain.

Governor Unzaga, who succeeded the first Spanish officer of that rank, ordered a survey of the tract, and it appears it was made by the public surveyor and that it was returned and approved in the same year. Special attention to that fact was called in the argument of the prior case, and it was urged that it furnished evidence of an incipient step to establish an incomplete title under our Treaty of Cession, and the court entered into a full examination of the proposition and the evidence to support it, which consisted chiefly of the field notes of the survey.

Reference is made to the claim in some of the intermediate conveyances as a plantation or concession by the name of the first agent of the company, or by the name of the "Bayou Goula Village," the name of a place on the river where the Tribe of Indians of that name made their headquarters. Satisfactory evidence is exhibited that the public surveyor surveyed the front to the depth of forty arpents, but it must be remembered that the front of the tract on the river to the depth of forty arpents was given up, and that it was subsequently assigned by the Governor to other emigrants, and no part of it is now claimed by the appellants.

Back concessions, it seems, were seldom made, and in no instance of which there appears to be any authentic account, except to

the proprietor of the front and, where made, uniformly had a depth of forty arpents, reckoning from the rear line of the first concession, but the same form of title appears to have been required in the one case as in the other, and in no case could a fee simple estate be acquired from the Government without the severance of a definite tract from the mass of the public lands under the operation of a complete grant. 4 Ops. Attys-Gen., 683.

Such a severance might be made by the grant itself, if it contained specific boundaries, or was well defined by courses and distances, or other authentic and definite description of the tract. It is not pretended that either boundaries or courses and distances, or any other authentic or definite description of the tract, was given in the supposed concession. Where such evidence of the location and description of the tract is wanting in the concessions, they may and often have been supplied by what is called a judicial survey, nor is it doubted that an official survey under the order of the Governor might have a like effect.

Beyond doubt, such a survey was made of the front on the river; but this court decided, in the case already referred to, that there is not the slightest pretense that the tract as surveyed under that order of the Governor extended back further than the usual depth of forty arpents from the river. No support to the theory of appellants, that it extended back to the River Atchafalaya, is exhibited in the record. Nor do the field notes or the *proces verbal* of the surveyor who made the field notes and the survey give the proposition the least countenance.

Under our Treaty of Cession, the United States acquired in sovereignty all the lands in the Province which had not before been granted by one or the other of the two prior sovereigns and severed as private property from the royal domain. It was incumbent, therefore, upon the appellants to show that the land in question had been so granted by the antecedent authorities, else the United States are entitled to recover it. *U. S. v. King*, 7 How., 833, 849.

Subsequent concessions were made by the Spanish authorities within this claim, which, as well as the action of the authorities in resuming the possession of the larger portion of it, show conclusively that no such right as is now claimed by the appellants was recognized by those authorities.

Since the cession of the Province, the right of such a claimant is the same as it would have been if the jurisdiction had not been transferred; from which it follows that rejected claims, which had no validity at the date of the Treaty, impose no obligation upon the United States as the successor of the foreign Sovereign.

Cases of the kind have frequently been before the court, in which the Act of Congress authorizing such litigations has been construed and the rights which it confers defined. We adopt the construction given to the Act in the last reported case upon the subject, as follows: (1) That the claimant or those under whom he holds must have been out of possession for twenty years or more. (2) That the land must be claimed by a complete grant or concession or order of survey or other mode of investiture of title in the original claimant by separation of the tract from the mass of the public domain, either by

actual survey or defined, fixed, natural boundaries or initial points and courses and distances by the competent authority, prior to the Treaty of Cession. (3) That those conditions do not apply where the title was created and perfected during the period of the actual possession of the Government under which the claim is asserted. Titles in fee simple which were complete when the jurisdiction of the Province was transferred to the United States needed no confirmation, as they are fully protected by the Treaty of Cession. *U. S. v. Percheman*, 7 Pet., 51, 88; *U. S. v. Wiggins*, 14 Pet., 334, 349. (4) That the title must be complete under the former Sovereign; that is, the land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise; that nothing must be left to doubt or discretion in its location; and if there was no actual survey previously made which a surveyor can follow, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*; or, in other words, the separation of the tract from the public domain must not be a mere conjectural separation, but complete, without any element of discretion or uncertainty. *Seull v. U. S.* [ante, 164, 165]; *Smith v. U. S.*, 10 Pet., 326, 334.

Apply those rules to the case before the court, and it is clear that the decree of the court below must be affirmed. Even if it be conceded that the concession is proved, it is clear that it has no boundaries, nor does it contain any means to determine either the location or the extent of the supposed grant.

Grants of the kind which do not contain any description by which the land can be located, and are not connected with a survey, do not create private property under the Treaty of Cession. Where the concession contains no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain, the claim of the donee cannot be sustained, it having been repeatedly decided by this court that if the description is vague and indefinite, as in the case before the court, and there is no official survey to give it a certain location, it will create no right of private property which can be maintained in a court of justice. *U. S. v. King*, 3 How., 773, 787.

Legal survey will often be sufficient to establish the locality of the tract, and may have the effect to establish its extent; but if the claimant shows no survey under the former Sovereign, it lies on him to establish the boundaries of his concession and to identify his land with such certainty as to show what particular tract was segregated from the public domain, and if he fails to do it, then he has no judicial remedy, and if he seeks confirmation he must go to Congress. *U. S. v. Boisdore*, 11 How., 63, 96; *Le-compte v. U. S.*, 11 How., 115, 127; *U. S. v. Forbes*, 15 Pet., 173, 184.

Attempt is not made to show that the supposed concession contained any definite boundaries or any other means of establishing its locality or of defining its extent, nor is it pretended that the tract as now claimed by the appellants was ever surveyed by the public surveyor, antecedent to the Treaty of Cession to the United States. Conclusive proof to the con-

trary is exhibited in the opinion of this court delivered by *Mr. Justice Nelson*, which conclusion is fully sustained by the field notes of the survey of the front, and by the *proces verbal* and the figurative plan exhibited in the transcript.

Decree affirmed.

Ex Parte DENVER AND RIO GRANDE RAILWAY COMPANY.

(See S. C., 11 Otto, 711-721).

Mandamus to inferior court.

This court has power by *mandamus*, to enforce prompt compliance with its mandates, but it will not, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion.

[No. 10 Orig.]

Argued Jan. 12, 13, 1880. Decided Feb. 2, 1880.

APPPLICATION for *mandamus*. The case is stated by the court.

Messrs. J. P. Usher, L. K. Bass, Roscoe Conkling, Wells, Smith & Macon, S. Shellabarger, Wager Swayne, and Theodore F. H. Meyer, for petitioner.

Messrs. Sidney Bartlett and George O. Shattuck, opposed.

Mr. Justice Harlan delivered the following opinion:

This is an application, by petition, for a writ of *mandamus* to the Judges of the Circuit Court of the United States for the District of Colorado, commanding them to proceed and give final decree, in accordance with the opinion and mandate of this court, in the suit of the Cañon City and San Juan Railroad Company against the Denver and Rio Grande Railway Company. The history of this litigation is set forth in *R. Co. v. Alling* [ante, 438], et seq., to which reference is here made. The present application is supported by an exemplified copy of the proceedings had in the circuit court at its May Term, 1879, after the filing therein of the opinion and mandate of this court.

The main contention of the Denver and Rio Grand Railway Company was, that the court below had failed and refused to comply with the mandate of this court; that, upon filing the mandate, that Company became entitled, absolutely and beyond the discretion of the circuit court, to withhold a decree restoring it, at once and unconditionally, to the possession of the Grand Cañon of the Arkansas River; dissolving the injunction granted against it in that suit; adjudging that it had the prior right to occupy and use that cañon for the purpose of constructing its railroad therein; and requiring the Cañon City and San Juan Railway Company, its officers, agents, servants and *employés*, to refrain from interfering with or obstructing the Denver and Rio Grande Company in such occupancy and use of the cañon, or in the construction of its railroad in and through the same.

It is essential to a proper understanding of the present application, to recall some of the

leading facts in this litigation. The controversy between these two companies arose out of their respective claims to occupy and use the Grand or Big Cañon of the Arkansas River for railroad purposes. The circuit court, upon the original hearing, held the prior right and location to be with the Cañon City Company, with liberty, however, to the Denver Company to exhibit its bill in any court of competent jurisdiction to compel the former company to so locate and construct its road as to permit the convenient and proper location by the Denver Company of its road, or, if two roads could not be conveniently constructed and operated in the cañon, to occupy the track and roadway of the Cañon City Company. While the causes were under submission in this court at its last Term, it was represented that, after the rendition of the decree in favor of the Cañon City Company, the parties and corporations concerned had entered into binding agreements, whereby the Atchison, Topeka and Santa Fé Railroad Company, in its own right, and in connection with the Pueblo and Arkansas Valley Railroad Company (the successor of the Cañon City Company), had become and was equitably the owner of all the property, rights and interests of the Denver Company, and entitled to the control of its affairs, business and suits of every kind. Upon that ground, the Pueblo Company moved that the submission be set aside and the appeals dismissed, while the Atchison Company moved that it have permission to intervene in this court and, by its solicitor, consent to such dismissal!

These motions were denied, for the reasons given in the former opinion. It was there said, that if the directors of the Denver Company, in prosecuting the appeals to final judgment, violated any trust committed to their hands, or any agreement which was binding upon the Corporation and the minority stockholders, remedy might be sought "In some court of original jurisdiction, into which, upon proper pleadings, all persons interested may be summoned." The court also said: "If, since those decrees were entered, the Atchison, Topeka and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad have, by valid contracts, acquired a controlling interest in the property, rights and affairs of the Denver Company, that interest can be asserted by appropriate proceedings, and will not be affected by anything we may determine upon the issues presented by these appeals."

Upon the merits of the cases it was held:

That the intention of Congress by the Act of 1872 was to grant to the Denver Company a present beneficial easement in the particular way over which its designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the Company's charter and the Act of Congress;

That, when such location and appropriation were made, the title, which was previously imperfect, acquired precision and, by relation, took effect as of the date of the grant;

That the Denver Company, by its occupancy of the Grand Cañon on 19th April, 1878, for the purpose of constructing its road through that defile, came then, if not before, into the

NOTE.—The Supreme Court will not review the discretionary action of the court below. See note to *Barrow v. Hill*, 54 U. S. (13 How.), 54.

enjoyment of the present beneficial easement conferred by the Act of Congress of June 8, 1872, 17 Stat. at L., 339, and was entitled to have secured against all intruders whatever, the privileges or advantages which belonged to that position;

That such right was, however, subject to the provisions of the Act of March, 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company, duly organized, might use and occupy the *cañon* for the purposes of its road, in common with the road first located.

The opinion concluded as follows:

"It results, from what we have said, that the court below erred in enjoining the Denver Company from proceeding with the construction of its road in the Grand *Cañon*. The decree, as entered, can only be sustained upon the assumption that the Cañon City Company had, by prior occupancy, acquired a right superior to any which the Denver and Rio Grande Railway Company had to use the *cañon* for the purpose of constructing its road. But that assumption, we have seen, is not sustained by the evidence, and is inconsistent with the rights given by the Acts of Congress to the Denver Company. The Denver Company should have been allowed to proceed with the construction of its road unobstructed by the other company. Where the Grand *Cañon* is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile, where this course is impracticable, the court, by proper orders, should recognize the prior right of the Denver and Rio Grande Railway Company to construct its road. Further, if in any portion of the Grand *Cañon* it is impracticable or impossible to lay down more than one road-bed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that tract for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the Act of March 3, 1875, 18 Stat. at L., 482, to use the same road-bed and track, after completion, in common with the Denver Company.

The decrees in these causes are, therefore, reversed, with directions to set aside the order granting an injunction against the Denver and Rio Grande Railway Company, and also the order dissolving the injunction granted in its favor, and dismissing its bill. By proper orders, entered in each suit, the court below will recognize the prior right of that Company to occupy and use the Grand *Cañon* for the purpose of constructing its road therein, and will enjoin the Cañon City and San Juan Railway Company, its officers, agents, servants and *employés*, from interfering with or obstructing that Company in such occupancy, use and construction. It may be that, during the pendency of these causes in the court below, or since the rendition of the decrees appealed from, the Cañon City and San Juan Railway Company has, under the authority of the circuit court, constructed its road-bed and track in the Grand *Cañon*, or in some portion thereof. In that event, the cost thus incurred in those portions of the *cañon*

See 11 OTTO.

which admit of only one road-bed and track for railroad purposes, may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require.

The court will make such further orders as may be necessary to give effect to this opinion."

It appears from the transcript of the proceedings had in the court below, after the return of the causes, that the Pueblo and Arkansas Valley Railroad Company was permitted, against the objection of the Denver Company, to file supplemental bills, showing that it was the successor of the Cañon City Company and setting out in detail, among other things, the same facts substantially that were relied upon in this court in support of the motions made at the last Term to set aside the submission and dismiss the appeals. The prayer of the first supplemental bill was that those facts might be considered and that, upon the hearing, the original decrees might be permitted to stand without modification or change.

An order was entered in the Circuit Court, on the 14th July, 1879, in which, after reciting the mandate of this court, and the reversal of the original decree of July, 1878, it was declared that the said decree theretofore given and allowed "be vacated and set aside," with costs to the Denver Company to the date of the filing of the mandate.

It was also adjudged that the right of the Denver Company "To first locate and construct its railway upon the way mentioned and described in the bill of complaint herein, as against the Cañon City and San Juan Railway Company and the Pueblo and Arkansas Valley Railroad Company, and as of the date of the commencement of this suit, and the date of said decree, is recognized and established."

The decree proceeds:

"Forasmuch, however, as it is alleged by the said plaintiff (the Cañon City and San Juan Railway Company), in certain supplemental bills by it filed herein, that since the said decree the said defendant (the Denver and Rio Grande Railway Company) hath granted, sold or otherwise yielded to the said plaintiff its right of way in the premises; and forasmuch as it is also alleged by the said plaintiff that since the said decree the said plaintiff hath built wholly or in part upon the said way, and upon the line heretofore located by the said defendant, a railway of such gauge and structure as the said defendant hath proposed to build, for which, as to the whole or some part thereof, the said defendant ought in equity and good conscience to pay the reasonable value, and because the value of said railway is at present unknown to the court, no further decree touching the ultimate right of the parties can be given or allowed until the court shall be better advised in the matters aforesaid.

And it is considered by the court that the relations of the parties of and concerning the line of railway heretofore constructed, or now in process of construction as aforesaid, ought not to suffer any change pending such inquiry touching the facts upon which the further and final judgment and decree of the court will be given, therefore, let each of the parties be enjoined and restrained from doing any act or thing towards building and completing the said line of

railway until the further order of the court. Nor shall either of the said parties interfere with the present possession of the other in the said line of railway, but each shall remain in the possession of that part which it now holds until the further order of the court. And of this order, the parties shall take notice without writ or further service. But if either of the said parties shall desire to construct another line of railway on the same right of way, without interfering with the grade or road-bed constructed by the said plaintiff or the Cañon City and San Juan Railway Company, it shall be at liberty to do so."

The order then provided for the appointment of three engineers, one to be nominated by each of the parties and one to be selected by the court, who were required to ascertain and report to the court to what extent, in the construction of two roads from Cañon City to the 20th mile post, must the two companies occupy the same track; whether the Grand Cañon of the Arkansas was broad enough to enable both companies to proceed without interference with each other in their respective roads, or, if one be already constructed, then whether such constructed line will interfere with or render impracticable the construction of a second line; whether, in the narrow portions of the cañon, there is any place where such a course was impracticable, and if so, whether any road-bed or railroad has been constructed in such place or places, and the cost and reasonable value of same; whether, if two roads shall be built on the Arkansas River from Cañon City to the 20th mile post, to what extent should they be located on opposite sides of the river, and the relative cost thereof; what has been done by the Cañon City Company or the Pueblo and Arkansas Valley Railroad Company towards constructing a railroad from Cañon City to the 20th mile post, and what is its value and its location, with reference to the Arkansas, its defiles and cañons; and what part of the line so constructed is on the public domain; what part on lands owned by individuals or corporations, and what is the value of each part separately.

Upon a subsequent day of the same Term the Denver Company, by petition, suggested that the decree rendered was not full and complete, and that the court had not awarded all the relief to which it was entitled under the opinion and mandate of this court. The circuit court, however, held that further and final decree should be deferred until the matters set forth in the decree of July 14, 1879, were determined.

Thus stood the case, in its essential features, when the petition for *mandamus* was filed in this court. Subsequently, the attention of the court was called to the final decree rendered in the circuit court in January, 1880.

After a careful consideration of all that has been said in support of the present application, we are of opinion that a *mandamus* should be denied. Our former opinion discloses the fact that many matters growing out of this litigation were necessarily left undisposed of, and were remitted to the circuit court for such determination as the rights and equities of the parties required under the circumstances existing at the time its action was invoked. We took care to say that nothing determined upon the issues presented upon the original appeals would affect

the question as to whether the Atchison, Topeka and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, had, by valid contract, subsequent to the decree of July, 1878, become the owner of the property, or entitled to the control of the rights, affairs and suits of the Denver Company. That question, in distinct terms, was left open for subsequent adjudication, in a court of original jurisdiction, upon proper pleadings and by appropriate proceedings. We expressly limited our decision to a determination of the rights of the parties as they existed when the decrees of July, 1878, were rendered, and as manifested in the records then before us. Whether, therefore, the supplemental bills, filed upon the return of the causes, raised, in proper form, the question as to the right of the Atchison, Topeka and Santa Fé Railroad Company, or the Pueblo and Arkansas Valley Railroad Company, under the alleged contracts made with the Denver Company subsequent to the decrees of July, 1878, to control the pending suits so far as they affected the interests of the latter Company; whether the Denver Company, in consequence of said alleged contracts, had lost or waived the right, improperly denied to it by the decree of July, 1878, of occupying the Grand Cañon for the purpose of constructing its road; were matters about which the circuit court was at liberty, and was bound to exercise its judicial discretion.

It is contended that the circuit court plainly disobeyed our mandate when declining to make such orders as would place the Denver Company, upon the filing of the mandate, in the actual occupancy or possession of the Grand Cañon, without reference to or without awaiting the determination of the claim which the Cañon City Company, or its successor, had on account of money expended in the construction of its road in the Grand Cañon, or in that portion of it which admitted of but one road-bed or track. It is true that we said, referring necessarily to the rights of parties as they existed at the date of the decree of July, 1878, that the circuit court erred in enjoining the Denver Company from constructing its road in the Grand Cañon; and that that Company should have been allowed to proceed without obstruction from or interference by the latter Company. We, therefore, directed, among other things, that the order granting the injunction should be set aside, and that, by proper orders, the prior right of the Denver Company to occupy and use the cañon be recognized. These directions were substantially complied with. The prior right of the Denver Company to locate and construct its railway in the cañon was expressly recognized and established by the order of July 14, 1879. It is true that the injunction was not, in terms, dissolved, but the final decree of July, 1878, upon which its efficacy depended, was expressly vacated and set aside. The injunction, necessarily fell with the decree. The foundation upon which it rested was destroyed when the decree was annulled. Had our directions gone no further than to dissolve the injunction against, and to recognize the prior right of, the Denver Company, the present application would rest upon stronger grounds than it does. We could not, however, ignore the fact that, possibly, during the pendency of these causes in the court below, or subsequent to the decree of July, 1878,

the Cañon City Company, or its successor, had, under the authority or sanction of the court, expended money in the construction of its road-bed and track in some portions of the Grand Cañon. "In that event," we said, "the cost thus incurred in those portions of the cañon which admit of only one road-bed and track for railroad purposes may be ascertained and provided for in such manner and upon such terms and conditions as the equities of the parties may require." We gave no direction as to the mode in which such cost should be ascertained, or as to the terms and conditions to be imposed in any provision made for it. Those matters were left for the determination of the court below, according to the principles of equity.

It was undoubtedly competent for that court, in the exercise of its judicial discretion, to have put the Denver Company, upon the filing of the mandate, into immediate possession of the Grand Cañon, including the road-bed and track which the Cañon City Company had constructed in the narrow portions of that defile. But the propriety of orders to that effect would have depended upon the equities of the parties as they existed at the time the action of the court, in that direction, was sought. It was not in violation of our mandate that the circuit court, after setting aside and vacating the decree of July, 1878, and recognizing the prior right of the Denver Company, should suspend further action as to the ultimate rights of the parties until the matters set out in the supplemental bill, and recited in the decree of July 14, 1879, were inquired into.

We recognize, in its fullest extent, the power of this court, by *mandamus*, to enforce prompt compliance with its mandates; but it is not consistent with the principles and usages of law that we should, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. "The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record acting within the scope of its judicial authority." *Ex parte Taylor*, 14 How., 3; *Ex parte Many*, 14 How., 24; *U. S. v. Lawrence*, 3 Dall., 42; *Ins. Co. v. Wilson*, 8 Pet., 291; *Ex parte Hoyt*, 13 Pet., 279; *Ex parte Whitney*, 13 Pet., 404; *Ex parte Newman*, 14 Wall., 152 [81 U. S., XX., 877.] The remedy for any errors committed by the circuit court, either in the decree of July 14, 1879, or in the final decree of January, 1880, is by appeal to this court. We, therefore, forbear, at this time, any expression of opinion as to the existence or non-existence of errors in those decrees to the prejudice of either party. We decide nothing more upon the present application, than that this is not a case which, in our judgment, calls for interposition by a writ of *mandamus*.

One of the reasons assigned in oral argument why the application for *mandamus* should be favorably considered is, that, by the Act of Congress of March 3, 1877, 19 Stat. at L., 405, amending the Act of June 2, 1872, 17 Stat. at L., 339, the time within which the Denver and Rio Grande Railroad Company must complete its road as far south as Santa Fé, will expire on June 2, 1882; in default whereof, it will forfeit, as to the unfinished portion of the road, the rights and privileges granted by the Act of See 11 OTTO.

1872. The time limited, it is urged will expire before an appeal from the final decree of January 2, 1880, can be reached upon the docket of this court in the usual course of its business.

We recognize the force of this suggestion, and feel it to be our duty, under the circumstances, to afford the parties an opportunity to secure an early and final determination of their respective rights in the premises. To that end, upon an appeal being perfected and upon the filing in this court of a transcript of the record, we will hear a motion to advance this cause for consideration at the present Term.

Mandamus denied.

Mr. Justice Field:

I dissent from the order of the court denying the *mandamus* prayed. When the circuit court dissolved the injunction restraining the Denver Company from taking possession of the Grand Cañon, there was only a seeming compliance with our mandate, for soon afterwards the court restored the injunction, thus practically defeating our judgment. But as the court has decided to advance the hearing of the appeal from the final decree entered in the court below, on application of the appellants, I will refrain from further comment until that appeal is heard.

Mr. Justice Swayne and *Mr. Justice Bradley* also dissented from the order refusing the *mandamus*.

Cited—103 U. S., 238.

STEPHEN DUNCAN, *Appt.*,

v.

WILLIAM GEGAN ET AL.

(See S. C., 11 Otto, 810-813.)

Removal of cause—effect of.

1. The transfer of a suit from a State Court to the Circuit Court does not vacate what has been done in the State Court previous to the removal. The Circuit Court takes up the case where the State Court left off.

2. Where the questions presented by new pleadings in the Circuit Court are in all respects the same as those settled by the Supreme Court of the State, the appellant is concluded by its decree. [No. 929.]

Submitted Jan. 13, 1880. Decided Feb. 2, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Feb. 2, 1855, Elam Bowman executed a mortgage to Stephen Duncan, on 3,400 acres of land in the Parish of Tensas, Louisiana. His wife intervened in the act and made the usual renunciations of her rights in favor of Duncan. This mortgage was inscribed on the next day, and re-inscribed Sep. 13, 1865.

January 10, 1861, Bowman executed another mortgage on 1,920 acres, a part of the same land, to William M. Shaw, tutor of William Gegan, in which his wife did not join. This mortgage was inscribed on the same day.

Dec. 26, 1865, Duncan brought suit in the State District Court for the Parish of Tensas, and obtained judgment May 19, 1866. May 18, 1866, Mrs. Bowman obtained a judgment against her husband for \$13,278.42, and interest, with

a legal and tacit mortgage on all his property, to take effect for \$9,325 from the years 1840 and 1845, and for \$3,953.42 from Jan. 1, 1852. The property was advertised to be sold under each of these judgments, Apr. 3, 1869. On that day Gegan, who had obtained his majority, instituted suit in the same court, making Duncan and Mrs. Bowman parties defendant. He alleged that Mrs. Bowman's judgment was fraudulent and collusive, and that his mortgage was superior in rank to that of Duncan, by reason of Duncan's failure to re-inscribe his mortgage within ten years from the time of its first inscription. The issues thus arising were tried together, and judgment rendered thereon in the District Court, Nov. 3, 1869. Appeal was taken from this judgment, by all the parties, to the Supreme Court of the State, where the judgment of the District Court was reversed and a new judgment rendered by the Supreme Court, settling the relative rights of the parties and the priority of the several mortgage liens. Judgment of the Supreme Court was filed in the district court, June 4, 1870. The opinion of the Supreme Court of the State contained the following:

"Mrs. Bowman holds the first mortgage for \$9,325 on all the property of her husband and for the whole of her judgment, \$13,278.42, with interest as allowed on the 1,480 acres not subject to Gegan's mortgage. Gegan has the second mortgage on the 1,920 acres described in his act, and Duncan comes last, as his mortgage takes effect only from the day of its re-inscription. It follows that if the 1,420 acres will pay Mrs. Bowman's mortgage she will take none of the proceeds of the land mortgaged to Gegan. But if not, she can claim no part of the \$3,953.42 until Gegan is paid. And if there is any surplus after paying the said two sums to Mrs. Bowman and that due Gegan, it will go to Duncan. As the record shows that the land was not sold at the date of the appeal, the cause must be remanded for distribution."

July 12, 1870, Gegan and Mrs. Bowman took out executions, the former seizing the part subject to his mortgage, and the latter the entire property. Sep. 3, 1870, the sheriff sold the property to Mrs. Rebecca M. Smyth. The entire proceeds of the sale were insufficient to satisfy Mrs. Bowman's claim.

Apr. 26, 1876, Duncan filed his petition for the removal of the suit to the United States Circuit Court. The transcript was filed in that court and after exceptions to the jurisdiction had been overruled, Duncan filed a bill making the present appellees defendants and seeking to have the judgment of Mrs. Bowman set aside, and his own mortgage declared superior to that of Gegan. The defendants answered, and after various proceedings the circuit court rendered a decree to the effect that the rank of the several mortgages had been finally determined by the Supreme Court of the State, and that it appeared that the sum arising from the sales of the real estate had been distributed and applied in the manner required by said judgment. Duncan's bill was therefore dismissed, and from this decree of dismissal he appealed.

Messrs. Robert Mott and Thomas J. Semmes, for appellant.

Messrs. Henry B. Kelly and Henry L. Lazarus, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This decree is affirmed.

The transfer of the suit from the State Court to the Circuit Court did not vacate what had been done in the State Court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State Court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State Court would have had if the suit had remained there. It takes the case up where the State Court left it off.

Before the suit of *Gegan v. Bowman* was removed to the Circuit Court, the rank of the appellant's mortgage had been finally settled by the judgment of the Supreme Court of the State on appeal. That was no longer an open question between the parties to that litigation. All the court from which the removal was afterwards made could do was to distribute the proceeds of the sale of the property in accordance with the directions of the Supreme Court. It had no power whatever to change the order of priorities as settled by the appellate court.

The question of the right to make the transfer is not before us. Duncan, who caused the removal to be made, is the only party who complains of the decree below, and he cannot object here to what has been done below by his own procurement. We confess it is not easy to see how a party could swear to his belief, that from prejudice or local influence he could not obtain justice in the State Court, when all that court had to do was to divide the proceeds of a sale by paying them out in a certain way, and as to which there was apparently no possible chance of dispute. But still it was so sworn, and the Circuit Court took jurisdiction against the motion of the opposite party. Of that no complaint is now made by the appellees.

It follows, then, that, whether the proceedings which were afterwards had in the Circuit Court at the instance of the appellant were part of the original suit removed from the State Court, or a new and distinct suit begun in the Circuit Court by the appellant himself after the removal, the judgment of the Supreme Court of the State on the appeal in the original suit, concludes him as to his rights thus litigated and disposed of. As it is apparent that the questions presented by the new pleadings in the Circuit Court are in all respects the same as those settled by the Supreme Court of the State, it follows that the Circuit Court was right in holding that the appellant was concluded by that decree.

Affirmed.

Cited—104 U. S., 50; 105 U. S., 396; 2 McCrary, 442.

CENTRAL TRUST COMPANY OF NEW YORK, Receiver of the NEW YORK STATE LOAN AND TRUST COMPANY, *Appt.*,

FIRST NATIONAL BANK OF WYANDOTTE, KANSAS.

(See S. C., 11 Otto, 68-71.)

Promissory note, transfer of—guaranty.

1. A promissory note, payable to A or order, cannot be transferred so as to cut off the defenses of

101 U. S.

the maker, except by the indorsement of the payee.

2. A guaranty is not a negotiation of a bill or note, as understood by the law merchant.

[No. 270.]

Submitted Jan. 13, 1880. Decided Mar. 1, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Mr. Samuel W. Packard, for appellant.

Messrs. Sleeper & Whiton, for appellee.

Mr. Justice Strong delivered the opinion of the court:

This case, as made by the bill, answers, replications and proofs, is as follows: on the 24th day of September, 1874, the First National Bank of Wyandotte, Kansas, made its promissory note at Chicago, Illinois, in these words: “\$5,000.”

CHICAGO, Illinois, Sept. 24th, 1874.

Four months after date we promise to pay to Cook County National Bank, of Chicago, or order, five thousand dollars, with interest at the rate of — per cent per annum after due, value received, all payable at Cook County National Bank.

(Signed)

B. JUDD,

Cashier 1st Nat'l Bank, Wyandotte, Ka's.
\$6,000 Wyandotte Co. and City bonds as collateral.”

The note was made and delivered to the Cook County Bank, in pursuance of an arrangement between that bank and Judd, the cashier of the Wyandotte Bank, by which it was agreed the latter should execute a four months' note for \$5,000, with security, and have the same discounted by the Cook County Bank, and the proceeds placed to the credit of the Wyandotte Bank, but not to be drawn against so as to reduce the credit for such proceeds below \$4,000, such note to remain with the Cook County Bank, and to be surrendered to the maker on the renewal or close of the account. It was distinctly understood between the officers of the two Banks, when the note was given, that it should be held by the Cook County Bank as a memorandum, and not be negotiated or separated from the Wyandotte city and county bonds for \$6,000 accompanying it, which were delivered contemporaneously with it as collaterals. Accordingly, the sum of \$4,000, part of the proceeds of the discount, was suffered to remain on deposit, to the credit of the Wyandotte Bank, until the Cook County Bank failed, became insolvent and passed into the hands of a receiver. At the time of such failure and the appointment of a receiver there was also an additional credit of \$868 due from the Cook County Bank to the Wyandotte Bank. When, therefore, the note matured there was due from the payee to the maker of the note, the sum of \$4,868. But before its maturity, to wit: on the 7th day of October, 1874, the Cook County Bank, in violation of its agreement above mentioned, passed the note to the New York State Loan and Trust Company, by which it was discounted, without any knowledge of any defense which the Wyandotte Bank had against it, or any knowledge of the origin of the note and of the agreement between the two Banks, other than what the face of the note revealed.

See 11 OTTO.

U. S., Book 25.

The note was protested when it fell due, and it is now held by the receiver of the Trust Company, and the collaterals, the municipal bonds, are held still by the Cook County Bank.

This bill has been filed to compel its surrender and the surrender of the Wyandotte city and county bonds on the payment of \$132, the difference between \$5,000 and \$4,868, the sum standing to the credit of the Wyandotte Bank against the payee, the claimant offering to pay that sum.

In view of these facts, fairly deducible from the evidence, it is manifest that, as between the complainant and the Cook County Bank, there is a perfect defense against the note to the extent of \$4,868, the sum standing to the credit of the Wyandotte Bank due from the payee. On the payment of \$132 the maker of the note has a clear equity to have it surrendered, together with the municipal bonds held as collaterals.

But it is claimed that the Trust Company having received the note before its maturity, and having discounted it in the usual course of business without any knowledge of any equities or defense against it, is entitled to hold it free from any defense which the maker could set up against the payee; that is, against the Cook County Bank.

A large portion of the argument before us has been expended upon the questions whether, inasmuch as the note was given by the cashier of the Wyandotte Bank at Chicago, and was made payable at a future day, it was not void under the general banking law. We pass those questions as unnecessary to be considered. If it be conceded the note was valid at its inception, it is certainly true the maker had a good defense against while it was in the hands of the payee, and we do not perceive that the manner in which the Trust Company or its receiver obtained it puts them or either of them in any better position than the payee occupied.

The note was not indorsed to the Trust Company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the Trust Company would hold it, unaffected by any equities between the maker and the payee. But instead of an indorsement, the President of the Cook County Bank merely guarantied its payment, and handed it over with this guaranty to the Trust Company. The note was not even assigned. There was written upon it only the following:

“For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at ten per cent per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

(Signed)

B. F. ALLEN,

Pres't.”

In no commercial sense is this an indorsement, and probably it was not intended as such. Mr. Allen had agreed that the note should not be negotiated and for this reason, perhaps, it was not indorsed. That a guaranty is not a negotiation of a bill or note as understood by the law merchant, is certain. *Snevily v. Elkel*, 1 Watts & S., 203; *Lamourieux v. Hewitt*, 5 Wend., 307;

Miller v. Gaston, 2 Hill, 188. In this case, the guaranty written on the note was filled up. It expressed fully the contract between the Cook County Bank and the Trust Company. Being express, it can raise no implication of any other contract. *Expressum facit cessare tacitum*. The contract cannot, therefore, be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract. 2 Pars. Notes and B., 46 *et seq.*, n.

At best, therefore, the defendants below can claim no more or greater rights than those of the Cook County Bank, and the complainants are entitled to a return of the note and of the collaterals on payment of the sum of \$132.

The decree of the Circuit Court is affirmed.

Cited—2 McCrary, 570; 92 Ind., 309; 47 Am. Rep., 147.

TOWNSHIP OF EMPIRE, *Plff. in Err.*,

v.

SMEDLEY DARLINGTON.

(See S. C., 11 Otto, 87-92.)

Power of township to issue bonds—additional subscription—inconclusive decree.

1. The Township of Empire, in Illinois, by subscribing to the stock of and issuing its bonds to the Danville, etc., Railroad Company for \$50,000, did not exhaust its power under the charter of that company, but was authorized to subscribe an additional amount of \$25,000 to the stock of the Indianapolis, etc., Railway Company, formed by the consolidation of the first named and another company, and issue its bonds therefor, under the Illinois Statute of Feb. 28, 1854.

2. The power of the Township of Empire to make an additional subscription, beyond the original of \$50,000, was a right and privilege of the railroad company which, under the general law of the State, passed to the consolidated company.

3. A decree in an Illinois court perpetually enjoining taxation to pay such bonds, and declaring them void, did not conclude any bondholders proceeded against as "unknown owners and holders," who were not served with process and did not appear, nor bondholders residing in other States who were proceeded against only by constructive service.

[No. 1097.]

Submitted Jan. 15, 1880. Decided Mar. 1, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois.

This was an action of *assumpsit* brought in the court below by Darlington (originally two actions; afterwards consolidated in that court), upon certain bonds and coupons. Judgment was rendered for the plaintiff, and the defendant sued out this writ of error.

The case is stated by the court.

Mr. L. Weldon, for the plaintiff in error:

By the consolidation of the Danville, Urbana, Bloomington and Pekin Railroad Company with the Indianapolis, Crawfordsville and Danville Railroad Company, a new corporation was created, by the name of "The Indianapolis, Bloomington and Western Railroad Company" and the original companies were dissolved.

R. R. Co. v. Ga., 98 U. S., 359 (*ante*, 185); *McMahan v. Morrison*, 16 Ind., 172; *Lauman v. R. R. Co.*, 30 Pa., 42.

There was no power vested in the electors, the corporate authority of the Township of Empire, under the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, to hold an election and vote to subscribe to the capital stock of the Indianapolis, Bloomington and Western Railroad Company, and issue its bonds in payment therefor to that Company, the original company having been dissolved.

Burroughs, Tax., 413; *Nugent v. Supervisors*, 19 Wall., 241 (86 U. S., XXII., 83); see, *East Lincoln v. Davenport*, 94 U. S., 801 (XXIV., 322); *Big Grove v. Wells*, 65 Ill., 263.

It is a rule of universal application, that where the power to make the contract for the corporation never existed on the part of the officers of the township, negotiable securities issued by them are invalid in the hands of all persons.

Middleport v. Ins. Co., 82 Ill., 562; *School Directors v. Fogleman*, 76 Ill., 189; *Bissell v. Kankakee*, 64 Ill., 249; *South Ottawa v. Perkins*, 94 U. S., 260 (XXIV., 154), *McClure v. Oxford*, 94 U. S., 432 (XXIV., 129); *Marsh v. Fulton Co.*, 10 Wall., 683 (77 U. S., XIX., 1042); *School Directors v. Sippy*, 54 Ill., 287.

The Missouri cases can have no application to this case, for the reason that the Statute of that State is wholly different from the Statute of Illinois, and the rule of decision in the courts of that State is different from the rule in Illinois.

Bissell v. Kankakee, *supra*; *Ryan v. Lynch*, 68 Ill., 160; see, also, *Mayor v. Roy*, 19 Wall., 468 (86 U. S., XXII., 164); *South Ottawa v. Perkins*, *supra*; 1 Dill. Mun. Corp., 524; *Clark v. Des Moines*, 19 Ia., 199; *Marsh v. Fulton Co.*, 10 Wall., 676 (77 U. S., XIX., 1040); *Chisholm v. Montgomery*, 2 Woods, 584.

Mr. S. M. Cullom, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

Under the provisions of an Act of the Legislature of Illinois, approved February 28, 1867, and in conformity to the result of a popular election duly called, and held on the 3d June, 1867, the Township of Empire, in that State, made a subscription of \$50,000 to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, a corporation created under the laws of Illinois. That company was given, by its charter, power to locate, construct and complete a railroad from Pekin, through, or as near as practicable to, certain designated towns, to the eastern boundary of the State.

In payment of the subscription, bonds of the Township, of like amount, were issued and delivered to the company.

On the 20th day of August, 1869, that company consolidated with the Indianapolis, Crawfordsville and Danville Railroad company, an Indiana corporation, the consolidated company assuming the name of the Indianapolis, Bloomington and Western Railway Company. The consolidated railroad formed a continuous line of road from Indianapolis, Indiana, to Pekin, Illinois.

On the 12th of October, 1869, an election was held in the Township of Empire for the purpose of ascertaining the sense of its people upon the proposition to subscribe, upon certain conditions, the sum of \$25,000, as additional stock in aid of the construction and completion of the Indianapolis, Bloomington and Western Railroad. The election resulted in favor of the subscription, which being made, bonds to that amount were issued in the name of the Township and delivered to the company.

The bonds were in the customary form, dated March 20, 1870, and signed by the township supervisor and clerk. Each one contained a recital that it was issued "Under and by virtue of a law of the State of Illinois, entitled 'An Act to Amend the Articles of Association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to Extend the Powers of and to Confer a Charter upon the Same,' approved February 28, 1867, and in accordance with the vote of the electors of said Township, at the special election held October 12, 1869, in accordance with said Act. And the faith of the Township of Empire is hereby pledged for the payment of the said principal sum and interest as aforesaid."

The present action involves the validity of the bonds and the coupons thereto attached of the \$25,000 issue, some of which are held by the defendant in error.

Their validity is assailed upon several grounds, each of which will be briefly examined:

First. It is contended that the election held on the 8d June, 1867, under the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, whereby the subscription of \$50,000 was made and bonds issued in payment thereof, exhausted the power of the Township under that charter, and that any additional subscription was without authority of law.

This position is clearly untenable. The 12th section of the charter of the railroad company furnishes a conclusive answer to this proposition. That section declares that "To further aid in the construction of said road by said company, any incorporated town or townships in counties acting under the township organization law, along the route of said road, may subscribe to the capital stock of said company in any sum, not exceeding \$250,000." That the plaintiff in error belongs to the class of townships described in that section, is not disputed. Its right, consequently, to make subscriptions, from time to time, until they reached the prescribed limit, seems to be too clear to require argument in its support. The charter contains no word, clause or section indicating that the authority of the Township to make subscriptions ceased after the first subscription. The Legislature fixed a limit beyond which the Township could not go in its subscriptions to the company in question, but left it free—the people consenting by popular vote—to make subscriptions in such sums and at such times as it deemed necessary or proper, within the aggregate amount named in the section which has been quoted.

Second. The next proposition urged upon our attention is, that by the consolidation to which we have referred a new corporation was created by the name of the Indianapolis, Bloomington and Western Railway Company, and the original companies dissolved; that there was no

power vested in the electors, the corporate authority of the Township of Empire, under the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, to hold an election, to subscribe stock and issue bonds to that new company. This proposition is equally untenable with the first.

By a general statute of Illinois, in 1854, and in force as well at the date of the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company, as when it was consolidated with the Indianapolis, Crawfordsville and Danville Railroad Company, express authority was conferred upon all railroad companies then organized or thereafter to be organized, which then had or might thereafter have their *termini* fixed by law, whenever their road or roads intersected by continuous lines, to "Consolidate their property and stock with each other, and to consolidate with companies out of this (that) State, whenever their lines connect with the lines of such companies out of this (that) State." That statute further provided that the consolidated company, by the name agreed upon, should be a body corporate and politic, and "Shall have all the powers, franchises, and immunities which the said respective companies shall have by virtue of their respective charters, before such consolidation passed, within the State of Illinois." Ill. R. S. Gross, 3d ed., pp. 537, 538.

It thus appears that whatever powers, franchises, and immunities were enjoyed by the Danville, Urbana, Bloomington and Pekin Railroad Company, under its charter, passed, upon the consolidation, to the consolidated company. The power of the Township of Empire to make as we have held it could, an additional subscription, beyond the original of \$50,000, was in its essence, a right and privilege of the railroad company which, under the general law of the State, passed to the consolidated company. *Scotland Co. v. Thomas*, 94 U. S., 682 [XXIV., 219]; *Henry Co. v. Nicolay*, 95 U. S., 619 [XXIV., 394].

It was evidently so understood by the parties concerned; for while the bonds very properly refer to the Act of February 28, 1867 (which is the charter of the Danville, Urbana, Bloomington and Pekin Railroad Company), as the statute which specifically authorized their issue, the petition of citizens asking an election, and the notice of the election of October 12, 1869, distinctly show that the additional subscription of \$25,000 to be voted on was for additional stock in aid of the construction and completion, not of the Danville, Urbana, Bloomington and Pekin Railroad, but "of the Indianapolis, Bloomington and Western Railroad." If the popular vote had been, in terms, in favor of a subscription to the capital stock of the Danville, Urbana, Bloomington and Pekin Railroad Company, and the subscription had been made in that form, there would be some reason to contend that the subscription would have been a nullity, since no such company then had a distinct separate existence. But when, as here, the vote was taken and the subscription made with direct reference to the construction and completion of the original line by the consolidated company, which had previously succeeded to all the powers, franchises and immunities of the Danville, Urbana, Bloomington and Pekin Railroad Company, there would seem to be no ground

whatever to question the validity of the bonds issued and delivered to the company in payment of the subscription.

Third. It is scarcely necessary to say that the decree in the Circuit Court of McLean County, Illinois, rendered in 1878, perpetually enjoining the assessment and collection of taxes for the purpose of paying the bonds and coupons in question, and declaring said bonds and coupons to be void, did not conclude the rights of the defendant in error. The bondholders were proceeded against by constructive service, as "unknown owners and holders." The defendant in error was not served with process, nor did he appear. If the decree was binding upon the citizens and courts of Illinois, as to which we express no opinion, it was ineffectual as to bondholders residing in other States, who were proceeded against only by constructive service. *Brooklyn v. Ins. Co.*, 99 U. S., 362 [*ante*, 416].

Judgment affirmed.

Cited—101 U. S., 413; 105 U. S., 76; 107 U. S., 545; 55 Vt., 497; 45 Am. Rep., 635.

TOWN OF ROBERTS, *Plff. in Err.*,

v.

MATTHEWS BOLLES ET AL.

(See S. C., 11 Otto, 119-129.)

Negotiability of municipal bonds—bona fide purchaser—state decision.

1. In Illinois, municipal bonds payable to bearer are negotiable, by delivery only, and an action may be maintained thereon in the name of the holder thereof.

2. In that State, municipal bonds issued in pursuance of a popular election, defectively called and held, are not invalid in the hands of a *bona fide* purchaser.

3. This court does not feel bound, in any case in which a point is first raised in the Courts of the United States and has been decided in a circuit court, to reverse that decision contrary to its own convictions, in order to conform to a state decision made in the meantime.

[No. 146.]

Submitted Jan. 15, 1880. Decided Mar. 1, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below, by the defendants in error against the plaintiff in error, upon certain bonds and coupons.

The facts are stated by the court.

Messrs. A. J. Bell and John W. Ross, for plaintiff in error:

1. By the statutes of Illinois, as uniformly construed by the Supreme Court of that State, the bonds described in declaration of plaintiffs below could not be transferred so as to invest the legal title in the bearer, except such bonds be indorsed in writing by the Hamilton, Lacon and Eastern Railroad Company.

Hilborn v. Artus, 3 Scam., 344; *Roosa v. Crist*, 17 Ill., 452.

2. The court below, in deciding that the title to said bonds was in the plaintiffs, enforced the Statute of Illinois making notes, bills, bonds, etc., assignable; and, by the uniform rule in-

variably held by this court, the courts of the United States, in enforcing state statutes, must adopt the clear construction of those statutes made by the highest tribunal of the State enacting the statute. This is not a question as to whether, by the general commercial law of the country, negotiable bonds are transferable by mere delivery, but whether the Statute of Illinois on that subject makes them so transferable, as those bonds are issued or pretended to be issued under and by virtue of the laws of that State. The court below should have adopted the ruling of the State Court, and held that plaintiffs were not the legal holders of said bonds.

Nesmith v. Sheldon, 7 How. 812; *U. S. v. Morrison*, 4 Pet., 124; *Green v. Neal*, 6 Pet., 291; *Swift v. Tyson*, 16 Pet., 1; *Harpending v. Dutch Church*, 16 Pet., 494; *Adams v. Nashville*, 95 U. S., 21 (XXIV., 370); *Elmwood v. Marcy*, 92 U. S., 289 (XXIII., 710); *Leffingwell v. Warren*, 2 Black, 599 (67 U. S., XVII., 261).

3. The election mentioned in the bonds declared on was a nullity because called without authority by the Town Clerk, the application to him to call the same having been signed by only twelve legal voters and tax payers instead of twenty-four, as required by the law, and only ten days' notice having been given by the clerk, when the law required twenty days.

Private Laws, Ill., 1867, Vol. 1, 366, sec. 1; also, of 1869, Vol. 3, 361, sec. 1; *People v. Cline*, 63 Ill., 394; *R. R. Co. v. Coyer*, 79 Ill., 373; *Marshall Co. v. Cook*, 38 Ill., 44; *Harding v. R. R. Co.*, 65 Ill., 90, and cases therein cited on p. 92.

4. As to innocent holders:

I concede that it is the settled doctrine of this court, as first announced in *Knox Co. v. Aspinwall*, 21 How., 539 (62 U. S., XVI., 208), and as stated in *Coloma v. Eaves*, 92 U. S., 484 (XXIII., 579), and restated in many other cases, "That, where legislative authority has been given to a municipality or its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact and binding on the municipality, for the recital is itself a decision of the fact by the appointed tribunal." But this rule of estoppel, as above cited, depends upon the fact that the statute can be construed so as to constitute the officer, designated to issue the bonds, the tribunal to decide the fact as to whether the precedent conditions were complied with or not. The statute in this case, as construed and decided by the Supreme Court of Illinois, does not constitute the supervisor or the town clerk, either separately or associately, such tribunal; therefore, the sound rule of this court, above set forth, does not apply in this case.

Williams v. Town of Roberts, 88 Ill., 12; *Marshall Co. v. Cook* (*supra*); *Schuyler Co. v. People*, 25 Ill., 181; *Clark v. Hancock Co.* 27 Ill., 305.

NOTE.—*Negotiability of railroad bonds.* See note to *White v. Vt. & Mass. R. R. Co.*, 62 U. S., XVI., 221.

5. When the bonds in this case were issued, it was the well settled law of the State of Illinois, that when the Legislature of the State authorized a municipality to subscribe stock to a railroad company and issue bonds in payment thereof, the law must be pursued in all its material requirements, else the bonds, when issued, will be void, in whosoever hands they may be found.

Schuyler Co. v. People (supra); *Clark v. Hancock Co.* (supra); *Marshall Co. v. Cook* (supra).

The construction which prevails in the state courts at the time municipal bonds are issued, upon questions touching their validity, enters into and forms a part of them, as the settled law of those contracts; and the municipality issuing the bonds and the purchaser of the same are each bound by such construction.

Gelpcke v. Dubuque, 1 Wall., 175 (68 U. S., XVII., 520); *Olcott v. Supervisors*, 16 Wall., 678 (83 U. S., XXI., 382); *Havemeyer v. Iowa Co.*, 3 Wall., 294 (70 U. S., XVIII., 38); *Mitchell v. Burlington*, 4 Wall., 270 (71 U. S., XVIII., 350); *Christy v. Pridgeon*, 4 Wall., 196 (71 U. S., XVIII., 322); 1 *Dill. Mun. Corp.*, 2d ed., sec. 416 b; *King v. Wilson*, 1 Dill., 555, 1871; *Bk. v. Iola*, 2 Dill., 353, 1873.

Mr. Geo. O. Ide for defendants in error:

The municipal bonds offered in evidence were payable to bearer and negotiable by delivery and, consequently, were properly admitted in evidence without any written indorsement of the nominal payee, the railroad company.

In contemplation of law, commercial paper drawn payable to a specified individual or bearer, is solely payable to the person who is or may become the bearer. There is no difference in this respect between paper payable to bearer alone, and that payable to a particular person or bearer. Both pass by delivery and no indorsement is necessary.

Bk. v. Wister, 2 Pet., 319, 326; *Bonnafee v. Williams*, 3 How., 577; *Bradford v. Jenks*, 2 McLean, 180; *Bullard v. Bell*, 1 Mas., 243; *Dean v. Hall*, 17 Wend., 216; *Seabury v. Hungerford*, 2 Hill, 83; *Dole v. Weeks*, 4 Mass., 451; *Grant v. Vaughan*, 3 Burr., 1516, 1524; *Story, Prom. N.*, 51, sec. 36, 7th ed. 3 Kent, Com., 91 (marg., 78); *Edw. Bills*, 646, 647; *Byles, Bills*, 228; 2 *Abb. U. S. Pr.*, 19.

The Illinois Statute only requires an assignment of notes when drawn payable to a particular payee. It does not in terms require a note payable to "bearer" to be indorsed. On the contrary, the 8th section of the Statute of Negotiable Instruments expressly provides that the title to such commercial paper shall pass by delivery.

Gross, Stat. of Ill., p. 461, cap. 73, sec. 4; Rev. Stat. of Ills., p. 719, sec. 8.

Prior to the enactment of the 8th section of the present statute, the decisions of the Supreme Court of the State were to the effect that notes payable to bearer were negotiable by delivery, and no indorsement was necessary to enable the holder to sue upon them. Banknotes also, payable to a particular person or bearer, were held to have been negotiable at common law without the aid of any statute, and are not within the operation of the Illinois Statute.

McHenry v. Ridgely, 2 Scam., 310; *Br. Co. v. Perry*, 11 Ill., 468.

See 11 OTTO.

Municipal bonds are put by the Illinois Supreme Court on the same footing as bank-bills; and thus, like bank-bills, although payable to a railroad company or bearer, are transferable by delivery.

Johnson v. Stark Co., 24 Ill., 93; *Mercer Co. v. Hubbard*, 45 Ill., 143.

Whether or not the bonds in suit were negotiable, merely, is a question of commercial law, in the solution of which this court is not bound by the opinions of the State Court.

Supervisors v. Schenck, 5 Wall., 784 (72 U. S., XVIII., 559); *Swift v. Tyson*, 16 Pet., 18; *Aurora City v. West*, 7 Wall., 105 (74 U. S., XIX., 50); *Pine Grove v. Talcott*, 19 Wall., 666 (86 U. S., XXII., 227).

In this court, the decisions have uniformly treated municipal bonds, payable to a specified railroad company or bearer, as negotiable by delivery merely, so as to vest the legal title in the holder.

Mercer Co. v. Hackett, 1 Wall., 84 (68 U. S., XVII., 548); *Woods v. Lawrence Co.*, 1 Black, 389 (66 U. S., XVII., 122); *Moran v. Comrs.*, 2 Black, 722-731 (67 U. S., XVII., 342-347); *Humboldt v. Long*, 92 U. S., 643 (XXIII., 753).

The same rule has been applied to Illinois bonds, issued and sold in the same way without indorsement.

Coloma v. Eaves, 92 U. S., 484 (XXIII., 579); *Warren Co. v. Marcy*, 97 U. S., 96 (XXIV., 977); *Randolph Co. v. Post*, 93 U. S., 505 (XXIII., 957); *Nugent v. Supervisors*, 19 Wall., 244, 253 (86 U. S., XXII., 83, 90); *Kenicott v. Supervisors*, 16 Wall., 459 (83 U. S., XXI., 319).

There was no error in sustaining the demurrer to the third and fourth pleas. The plaintiffs below were *bona fide* purchasers of the bonds before due, for value paid, and without notice of the alleged defenses. They were protected by the recitals of compliance with the law, contained in the bonds. They were also vendees of previous *bona fide* purchasers, as to whom no notice is alleged.

Coloma v. Eaves (supra); *Warren Co. v. Marcy*, (supra); *Marcy v. Oswego*, 92 U. S., 638 (XXIII., 748); *Kenicott v. Supervisors* (supra); *Supervisors v. Schenck* (supra); *Grand Chute v. Winegar*, 15 Wall., 356, 373 (82 U. S., XXI., 170, 174); *St. Joseph Township v. Rogers*, 16 Wall., 644, 662, 665 (83 U. S., XXI., 328, 337, 338); *San Antonio v. Mehaffy*, 96 U. S., 314 (XXIV., 817); *Comrs. v. Bolles*, 94 U. S., 108 (XXIV., 47).

Mr. Justice Harlan delivered the opinion of the court:

This case involves the validity of certain township bonds, bearing date April 7, 1871, issued in the name of the Town of Roberts, in the County of Marshall, Ill., and made payable to the Hamilton, Lacon and Eastern Railroad Company, or bearer, on the 7th of April, 1874, with interest from date, payable annually, on the presentation and surrender of the interest coupons as they matured.

Each bond, signed by the supervisor of the Town, attested by its clerk, and certified upon its face to have been duly recorded in the township registry of bonds, as directed by law, recites that it "is one of a series, amounting in the aggregate to \$30,000, and consisting of thirty bonds, numbered from 1 to 30, inclusive, each of which is for \$1,000, and all of which are of

even date herewith, and are issued in accordance with the laws of the State of Illinois, in payment of a subscription made by said Town of Roberts for three hundred shares of the capital stock of the Hamilton, Lacon and Eastern Railroad Company, which said subscription was made by said Town by virtue of a vote of a majority of the voters of said Town in favor thereof, at a special election had for such purpose in said Town on the 25th day of March, 1869, in pursuance of the provisions of the laws of the State of Illinois, and of the several Acts of the General Assembly of the State of Illinois incorporating said company."

It is found as a fact in the case that, in January, 1872, defendants in error purchased in good faith, the bonds in the market, without notice of any defense thereto, and paying therefor at the rate of 93½ cents on the dollar.

The first plea alleges that the payee named in the bonds, the railroad company, had never indorsed them, or any of them, in writing, and that by the law of Illinois in force when they were made, as well as when they were sold by the company, without such indorsement, they were not transferable so as to vest the title thereto, and the right to sue thereon in the name of the holder.

A demurrer to that plea was sustained and, as we think, properly so. It is true that the Supreme Court of Illinois, in *Hilborn v. Artus*, 3 Scam. (4 Ill.) 344, held that under a statute of that State, then in force, notes payable to a person or bearer could not be transferred, or assigned by delivery only, so as to authorize the holder by delivery to sue in his own name. "There is one way," the court said, "by which he can do so, and that is by virtue of the assignment indorsed on the note itself. The indorsement gives the right to sue in the name of the assignee." That construction of the Illinois Statute was followed in *Roosa v. Crist*, 17 Ill., 450. But in *Bridge Co. v. Perry*, 11 Ill., 467, it was decided that bank-notes payable to bearer, or payable to a particular person or bearer, were not embraced by the provisions of the statute, or by the reasons which caused its passage; and that the holder, by delivery merely, could maintain an action thereon, unless it appears that he obtained them *mala fide*. The statute, it was said, applied "Only to instruments that were not negotiable by the common law or the custom of merchants."

In *Johnson v. Stark Co.*, 24 Ill., 75, the court put municipal bonds and coupons on the footing in this respect, of bank-bills, and thus brought that class of commercial securities within the rule announced in *Bridge Co. v. Perry*. Its language was: "It seems to be the well settled doctrine that state, county, city and other bonds and public securities of this character are negotiable by delivery only, without indorsement, in the same manner as bank-bills, especially when they are payable to bearer." Subsequently, in *Mercer Co. Suprs. v. Hubbard*, 45 Ill., 139, which was an action on coupons attached to bonds issued by a county in payment of a railroad subscription, the court said: "More recent decisions place these coupons in the condition of bank-bills payable to bearer, and no one will deny such bills can be given in evidence in a suit by the bearer against the bank issuing them, under the common

counts. We see no difference between coupons payable to bearer for a sum certain, and a bank-bill. They alike pass by delivery only." Finally, in *Town of Eagle v. Kohn*, 84 Ill., 292, it was said: "It is the well settled doctrine that bonds of this character are to be treated as commercial paper; and this court has held coupons attached to them to be negotiable by delivery only, without indorsement."

It is thus seen that by repeated adjudications of that court, prior to the Statute of 1874, municipal bonds payable to bearer were excepted from the rule announced in *Hilborn v. Artus* and *Roosa v. Crist*.

But all doubt upon the subject is removed by the 8th section of the Act approved March 18, 1874, revising the laws of Illinois in relation to promissory notes, bonds, due-bills and other instruments of writing, which was in force when this action was commenced. It provides "That any note, bond, bill or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof." R. S. Ill., 719, sec. 8.

This Act, though not in force when defendants in error acquired the bonds in suit, applies, we think, to actions commenced after it took effect.

We are satisfied that this plea, tested alone by the law of Illinois, and without reference to the decisions of this court upon the subject of commercial securities, is insufficient.

The third plea, to which a demurrer was also sustained, proceeds upon the ground that the election of March 25, 1869, was called without competent authority, and conferred no power upon the supervisor and town clerk, or either of them, to subscribe to the stock or issue the bonds in question, and that the latter were, consequently, void.

Of the facts set out in the plea, it is alleged that the defendants in error had "constructive notice," prior to their purchase of the bonds, to wit: on the day they bear date.

The questions of law presented under this plea arise out of certain facts which it is necessary to state somewhat in detail.

By an Act of the Legislature of Illinois, approved March 5, 1869, it is provided that any incorporated town or township of any county through or near which the Hamilton, Lacon and Eastern Railroad Company may be located, or is about to be located, might, by a vote of the people thereof, subscribe to the corporate stock of the company any sum not to exceed \$100,000 each; such vote to be ascertained by an election held in the manner prescribed by and in conformity with the provisions of an Act, approved March 6, 1867, authorizing certain designated counties and townships, cities, incorporated towns and corporations in said counties, to subscribe to the capital stock of any railroad then or which might thereafter be incorporated in the State of Illinois. The Act of March 5, 1869, made it the duty of the clerk of each township, subscribing stock under its authority, to keep, in duplicate, a complete register of the bonds issued, showing their numbers, amount, date, and rate of interest, and deliver one copy of the same to the county clerk of his county.

Under the Act of March 6, 1867, to which

reference is made by the Act of March 5, 1869, elections, to take the sense of the people upon subscriptions to the capital stock of a railroad company, could be called and held, upon the application of twenty legal voters and tax payers of the county, township, city or incorporated town in whose behalf it was proposed to make the subscription, such application specifying the amount and the conditions of the proposed subscription. The notice of such election was required to be posted, in the case of a township, by the clerk thereof, in three of the most public places of such township. If a majority of such voters voting at said township election favored the subscription, then it was made the duty of the supervisors thereof to make the subscription; and when the subscription was accepted or received, to cause the bonds to be issued in compliance with the popular vote. Private Laws Ill., 1867, Vol. I., p. 866.

The 5th section of the Act of March 6, 1867, provides that "No mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds so issued: *Provided*, That there is a majority of the voters at such election in favor of such subscription."

A few weeks after the election of March 25, 1869, to wit: on 17th April, 1869, the Legislature of Illinois passed an Act which, in its 2d section, declares that subscriptions of stock made by certain townships, including that made by the Town of Roberts of \$30,000 to the capital stock of the Hamilton, Lacon and Eastern Railroad Company (quoting from the Act), "Be each legalized, and are hereby made valid and binding, according to the terms thereof; and the several supervisors of said townships shall issue, in due form, the bonds of their respective townships for the amount of stock subscribed for, according to the terms and conditions of said subscription, and shall deliver said bonds to said railroad company." Pri. L. Ill., 1869, Vol. III., p. 302.

With these facts before us, we come to the examination of several propositions which have been pressed with much force upon our attention.

It is contended that the election mentioned in the bonds declared on was a nullity, because called upon an application signed by only twelve, instead of twenty, legal voters and tax payers, and because only ten days' notice thereof was given, when the law required twenty; that the law is imperative in these respects, and that the failure to comply with its requirements rendered the bonds void, even in the hands of innocent holders for value; that such was the settled law of Illinois, as declared by the Supreme Court of that State prior both to the election of March 25, 1869, and to the issuing of the bonds; and, finally, that such prior judicial declarations are to be regarded as part of the local statutes, binding upon this court, according to its own decisions.

Undoubtedly, there are several decisions by the Supreme Court of Illinois of the character indicated by counsel; but unless we are greatly in fault in our examination, no one of them relates to a municipal subscription, or to an issue of bonds, under a statute containing a provision similar to section 5 of the Act of March 6, 1867, under which the election in question was held. That Act rests the validity of bonds, issued un-

der its authority, upon the essential fact that the majority of voters at the election voted, as in this case, in favor of the subscription. In that event, it expressly declares that the bonds shall not in any way become invalidated by reason of *mistake in the giving of the notice, or in the canvass or return of votes, or the issuing of the bonds*. These words are without effect, if the municipality issuing the bonds can avoid their payment because its agents or constituted authorities committed mistakes such as are specified in the statute. If the town clerk gave a notice of ten instead of twenty days, based upon an application of twelve instead of twenty legal voters and tax payers, was not this a mistake "in the giving of the notice" and "in the issuing of the bonds?" The purchaser of the bonds, if chargeable with notice of these facts, was, in terms, assured by the statute that no such mistakes as those facts indicated would invalidate the bonds, if the majority of the voters at the election had approved the subscription. He had the right to rely upon these legislative assurances, unless the 5th section of the Act of March 6, 1867, was in violation of the Constitution of the State. We do not, however, feel justified in declaring that provision of the Act to be in conflict with that instrument. We are referred to no decision of the State Court which so decides. On the contrary, that court, in *Burr v. Carbonale*, 76 Ill., 455, which was a case of municipal bonds, said: "These bonds having been issued in the exercise of a power constitutionally conferred, must be binding on the municipality, although some irregularities in the form of notice of the election, want of the precise words on the ballots, and others of like character, may have occurred."

It is true that, according to the settled construction of the Constitution of Illinois in force in 1869, the Legislature could not require or compel the corporate authorities of a county, city or town, against or without its consent, to subscribe to the stock of a railroad company. But it could *authorize* such corporate authorities to make subscriptions with or without referring the question to the people immediately interested.

In *Keithsburg v. Frick*, 34 Ill., 405, the Supreme Court of Illinois, speaking by the late Chief Justice Breese, held that it was by no means a necessary element in municipal subscriptions to the stock of railroad corporations that there should be a vote of the inhabitants of the town or city authorizing them; "That it was competent for the Legislature to bestow the power directly on the corporation without any other intermediary." The authority of that case, upon some points therein determined, has, perhaps, been shaken by later decisions in the same court. But in *Marshall v. Silliman*, 61 Ill., 218, the court, while holding that the Legislature could not clothe the supervisor and town clerk, without the consent of the people, with discretionary power of taxation or of creating a debt—they not being the corporate authorities of the township in the sense of the Constitution—yet approved *Keithsburg v. Frick* so far as it ruled that those who were the corporate authorities of a town, within the meaning of a State Constitution, might be empowered by the Legislature to subscribe to the stock of a railroad corporation, and issue bonds therefor,

without taking a vote of the people. *R. R. Co. v. Morris*, 84 Ill., 410.

Certainly the Legislature could prescribe the mode of ascertaining the sense of the voters, who alone, it is claimed, were the corporate authorities of the town, within the meaning of the State Constitution. And as it might, in the Act of March 6, 1867, have allowed the election to be called upon the application of a less number of voters and tax payers than twenty, and to be held after a notice of ten days, rather than twenty, we do not see any ground to question its right, consistently with the State Constitution, to declare, in advance, that if the majority of voters at the election favor the subscription, the bonds issued in payment thereof should not be invalidated by mistakes of the kind specified in the 5th section of that Act. The mistakes here complained of were not such as necessarily affected the substance or essence of the election and, consequently, it cannot be said that the subscription was made or the bonds issued without the consent of the corporate authorities or the legal voters of the township. The application for the special election and the notice therefor were not so radically defective as to justify us in saying, as matter of law, that a debt for a railroad subscription was thrust upon the legal voters and tax payers of the township without their having a reasonable opportunity to vote upon the question of subscription. It is not a case where bonds have been issued by the supervisor and town clerk, without any previous election whatever to authorize them so to do. It is a case of bonds issued in pursuance of a popular election, defectively called and held, and as to which the Legislature declared that the bonds should not be invalidated by mistakes in giving the notice and, in issuing them, if there was "A majority of votes at such election in favor of such subscription."

In this respect the case in hand is different from *Elmwood v. Marcy*, 92 U. S., 289 [XXIII., 710]. In the latter case, when the notice for the election was given, there was no provision in the charter of the town or in any statute of the State authorizing the subscription. Its power to subscribe had then been exhausted; nor was any notice there given under or with special reference to the subsequent Act allowing additional subscriptions. Nothing here determined conflicts with the decision in *Elmwood v. Marcy*.

Independently, therefore, of the curative Act of April 17, 1869, we are of opinion that the bonds sued on are not invalid by reason of the departure from the provisions of the Act of March 6, 1867, in the matter of the application for and notice of the election of March 25, 1869.

But a further contention of the plaintiff in error is that the Supreme Court of Illinois, in *Williams v. Town of Roberts*, 88 Ill., 1, decided in June, 1878, nearly four years after the commencement of this action, and three years after the entry of the judgment in this case, held not only that the curative Act of April 17, 1869, was in violation of the Constitution of the State, but that the election of March 25, 1869, was a nullity, conferring no power upon the supervisor of the town to make the subscription and issue the bonds.

In reference to the alleged conflict of the last named Act with the Constitution of Illinois, we give no opinion. The views we have ex-

pressed as to the validity of the bonds, under the Act of March 6, 1867, particularly its 5th section, render it unnecessary to consider or determine the constitutional validity of the curative Act of 1869. It is, however, claimed that we are obliged to accept the decision in *Williams v. Town of Roberts*, as conclusive against the validity of these particular bonds. We cannot give our assent to this proposition, for the reason, if there were no other, that that decision does not touch the precise point upon which we sustain their validity, despite the defective application and notice for the election of March 25, 1869. No reference is made, in that case, to the 5th section of the Act of March 6, 1867, upon which we have commented. The Supreme Court of Illinois, in the case alluded to, undoubtedly held that the defects in the application and notice rendered that election a nullity, and that, because of such defects, the subscription was made and the bonds issued without authority of law. But we are not informed as to the effect which, in the opinion of that court, is to be given to the 5th section of the Act of March 6, 1867. If the court had gone further, and decided that section to be unconstitutional; or that the defective application and notice for the election were not mere mistakes within the meaning of that section; or that the bonds declared on were null and void, notwithstanding the legislative declaration that they should not be invalidated because of any mistake in giving the notice, in issuing the bonds, or in the canvass or return of votes, then its decision would have been an authority in point, covering the precise question before us. If we should be mistaken in this, it does not follow that we should except that decision as conclusive of this case. That would depend upon our approval or disapproval of the decision upon its merits. In *Pease v. Peck*, 18 How., 599 [59 U. S., XV., 520], we said that this court would not feel bound, "In any case in which a point is first raised in the Courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of the State." *Morgan v. Curtienius*, 20 How., 1 [61 U. S., XV., 823].

For these reasons we are of opinion that the demurrer to the third plea was properly sustained.

The facts set out in the fourth plea clearly do not constitute a defense to the action. We could not hold otherwise without overturning the settled doctrines of this court in reference to municipal bonds issued in payment of subscriptions to the capital stock of railroad corporations. Our remarks in *Brooklyn v. Ins. Co.* [ante, 416] are applicable to this case, and support the action of the court in sustaining a demurrer to the fourth plea.

Other considerations might be suggested in support of the judgment, but what we have said is sufficient to dispose of the case.

Judgment affirmed.

OZIAS M. HATCH ET AL., *Appts.*

v.

CHARLES A. DANA.

(See S. C., 11 Otto, 205-215.)

Action against stockholders—liability of.

1. A creditor of an insolvent corporation may proceed against one or more delinquent stockholders, to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution.

2. Although, by the terms of the subscriptions, stockholders were to pay for the shares set opposite their names respectively, "as called for by the said company," a court of equity may enforce payment of such stock subscriptions, although there have been no calls for them by the company.

[No. 1059.]

Submitted Jan. 13, 1880. Decided Mar. 1, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

This was a bill in equity, filed in the court below by Dana against the Chicago Republican Club, a corporation organized under the laws of Illinois (and against which he had a judgment on which execution had been returned unsatisfied) by Hatch and Williams, the appellants, and others. The bill was in the nature of a creditors' bill, and was for the benefit of the complainant, and such other creditors as might come in, etc. It sought to establish the liability of the stockholders of the corporation on unpaid subscriptions.

Judgment was rendered against Hatch and Williams, from which they appealed.

The case is further stated by the court.

Mr. D. T. Littler, for appellants:

A late elementary authority, Thompson, *Liability of Stockholders*, section 353, thus asserts the rule in equity in cases of creditors' suits in this class of cases:

Moreover, the bill must be filed against all the shareholders, unless some valid excuse is shown for not bringing them in. This must necessarily be so, otherwise the main object of as-

serting the jurisdiction of equity: equalizing the burdens of shareholders and preventing the multiplicity of suits, would be defeated. Under such a bill an account of the debts and assets of the corporation will be taken, of the amount of capital not paid in, and of the amount due from each shareholder. A receiver appointed in a creditor's suit against a corporation cannot maintain a bill in equity against a single shareholder, to collect what is unpaid on his subscription. The cases supporting the rule are:

Wood v. Dummer, 3 Mas., 312; *Hadley v. Russell*, 40 N. H., 109; *Erickson v. Nesmith*, 46 N. H., 371; *Mann v. Pentz*, 3 N. Y., 415; *Pierce v. Construction Co.*, 38 Wis., 253; *Adler v. Brick Mfg. Co.*, 13 Wis., 57; *Coleman v. White*, 14 Wis., 700; *Carpenter v. Bk.*, 14 Wis., 705 note; *Umsted v. Buskirk*, 17 Ohio St., 118; *Story, Eq. Jur.*, sec. 1252.

The unpaid subscriptions for stock in an insolvent corporation constitute a trust fund for the benefit of all creditors of the corporation alike or *pro rata*, and it is not permissible for one creditor to absorb the same to the exclusion of others.

2 *Story, Eq. Jur.*, sec. 1252; *Wood v. Dummer* (*supra*); *Morgan v. R. R. Co.*, 10 Paige, 290; *Mann v. Pentz* (*supra*); *Masters v. Rossie Mining Co.*, 2 Sandf. Ch., 301; *Coleman v. White*, (*supra*); *Crease v. Babcock*, 10 Met., 525; *Carpenter v. Bk.* (*supra*); *Umsted v. Buskirk* (*supra*); *Pollard v. Bailey*, 20 Wall., 520 (87 U. S., XXII., 376); *Terry v. Tubman*, 92 U. S., 156 (XXIII., 537).

Messrs. E. B. McCagg and **A. L. Knapp**, for appellee:

1. Dana's judgment against the Chicago Republican Company, and its insolvency and withdrawal from business, entitled him to call upon a court of equity to enforce, for his benefit, the collection from delinquent stockholders in the corporation, of the amount of their unpaid stock subscriptions.

R. R. Co. v. McDaniel, 56 Ga., 191; *Ang. & Ames, Corp.*, sec. 602; *Henry v. R. R. Co.*, 17

v. Calef, 53 Me., 471; *Union Iron Co. v. Pierce*, 4 Biss., 327.

Whatever remedy is provided by statute, must be strictly pursued. *Lowry v. Inmann*, 46 N. Y., 119; *Moies v. Sprague*, 9 R. I., 541; *Haskins v. Harding*, 9 West. Jur., 622.

As to the individual liability of stockholders declared by statute in the various States, see, *Conklin v. Furman*, 48 N. Y., 527; *Boynnton v. Andrews*, 63 N. Y., 93; *Harris v. Nowel*, 1 Abb. N. C., 127; *Shelington v. Howland*, 67 Barb., 14; *Brockway v. Innes*, 39 Mich., 47; S. C., 33 Ar. Rep., 348; *Lowry v. Parsons*, 52 Ga., 356; *Boyd v. Hall*, 56 Ga., 563; *Von Glahn v. Lattimer*, 73 N. C., 333; *Larrabee v. Baldwin*, 35 Cal., 155; *French v. Teschemaker*, 24 Cal., 518; *Young v. Rosenbaum*, 39 Cal., 646; *Flash v. Conn*, 16 Fla., 423; S. C., 26 Am. Rep., 721; *Upton v. Burnham*, 3 Biss., 520; *Allen v. Ward*, 10 Bk. Reg., 285; *Wheelock v. Kost*, 77 Ill., 206; *Slocum v. Prov. St.*, etc., Co., 10 R. I., 112; *Stewart v. Lay*, 45 Iowa, 604; *Bayliss v. Swift*, 4 Iowa, 648; *Booth v. Campbell*, 37 Md., 522; *Dodge v. Minn.*, etc., *Roofing Co.*, 16 Minn., 368; *First Nat. Bk. v. Almy*, 117 Mass., 476; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass., 532; *Pres. Sav. Inst. v. Jackson*, etc., *Rink*, 52 Mo., 552.

A contract by a stockholder, to pay a corporate debt, where no personal liability is imposed by charter or by statute, must be in writing. *Trustees, etc., v. Flint*, 13 Met., 539.

Where stock of a member is forfeited he ceases to be a stockholder, and cannot be held liable as such for corporate debts. *Allen v. Montgomery R. R. Co.*, 11 Ala., 437; *Mills v. Stewart*, 62 Barb., 444; 41 N. Y., 384; *Macauley v. Robinson*, 18 La. Ann., 619.

NOTE.—*Individual liability of stockholders for corporate debts.*

The individual liability of stockholders depends solely on positive provisions of law. *Nichols v. Thomas*, 4 Mass., 232; *Whitman v. Cox*, 13 Me., 335; *Ireland v. Palestine*, etc., T. Co., 19 Ohio St., 369; *Gray v. Coffin*, 9 Cush., 192; *Shaw v. Boylan*, 16 Ind., 384; *Vincent v. Chapman*, 10 Gill & J., 279.

Representations to the public, by a stockholder, that he is individually liable, will not make him so. *Reid v. Eaton Mfg. Co.*, 40 Ga., 98.

In some States, inhabitants of towns and members of quasi corporations are liable on a judgment and execution against the town or corporation. *Gaskill v. Dudley*, 6 Met., 551; *Chase v. Merimac Bank*, 19 Pick., 564; *Mercers Bk. v. Cook*, 4 Pick., 405; *Jewett v. Thames Bk.*, 16 Conn., 511; *See. Eccl. Soc. v. First Eccl. Soc.*, 23 Conn., 255; *Adams v. Wiscasset Bk.*, 1 Me., 364.

A general statute imposing liability for corporate debts upon stockholders is not considered as imposing a penalty, but as recognizing an obligation arising upon contract. *Norris v. Wraschall*, 34 Md., 492; *Wickson v. Nesmith*, 46 N. H., 371; *Coring v. McCullough*, 1 N. Y., 47; *Coleman v. White*, 14 Wis., 700.

In some States, the statutory remedy to charge stockholders individually with corporate debts is in equity only. *Bassett v. St. Albans, etc., Co.*, 47 Vt., 313; *Smith v. Hucklebee*, 53 Ala., 191; *McRae v. Locke*, 114 Mass., 96; *Emmert v. Smith*, 40 Md., 123; *Atwood v. R. I. Agr. Soc.*, 1 R. I., 376; *Griffith v. Mangam*, 10 Jones & Sp., 369; 73 N. Y., 611.

In others it is at law. *Culver v. Third Nat. Bk.*, 64 Ill., 528; *Stilphen v. Ware*, 45 Cal., 110; *Hathorn*

See 11 OTTO.

Ohio, 187; *Ogilvie v. Ins. Co.*, 22 How., 380 (63 U. S., XVI., 349); *Upton v. Tribilcock*, 91 U. S., 45 (XXIII., 203).

2. Nor was it necessary that he should make all the delinquent stockholders parties defendant to his bill.

Ogilvie v. Ins. Co. (supra); *Bartlett v. Drew*, 57 N. Y., 587.

Mr. Justice Strong delivered the opinion of the court:

That the complainant recovered a judgment against the Chicago Republican Company for the sum of \$6,419.17, on the 12th day of April, 1871, which remains unreversed and unsatisfied, and that an execution was issued thereon and returned wholly unsatisfied, no property having been found upon which a levy could be made, are well established facts. It is also established that the respondents, Hatch and Williams, who are now appellants, were subscribers to the capital stock of the company at its inception, each to the extent of \$10,000, of which they have paid only thirty per cent. As there is no claim or evidence that they have parted with their stock, each remains in debt to the company in the sum of \$7,000, and the object of the present bill is to subject that indebtedness to the payment of the complainant's judgment. Upon these facts the circuit court decreed that the complainant should recover from the defendants the sum of \$9,378.72, the amount due upon his judgment against the company at the date of the decree, but that of the said sum no more than \$7,000, with interest from the date of the decree, should be collected from either of the aforesaid defendants, that sum being the amount due from each of them to the company.

It is from this decree, the two defendants, Hatch and Williams, have appealed, and two principal assignments of error are now urged against it. They relate less to the merits of the complainant's claim, that is, to his equity to be paid the amount of his judgment out of the unpaid stock subscriptions due to the company, than they do to the mode and regularity of his proceeding.

This bill is an ordinary creditor's bill, the sole object of which is to obtain payment of the complainant's judgment. It is true it is brought on behalf of the complainant and all other creditors of the corporation who might choose to come in and seek relief by it, contributing to the expense of the suit. But no other creditors came in; and it does not appear that there is any other creditor, unless it be one of the stockholders, who was made a defendant, and who filed a cross-bill which he afterwards dismissed. All the stockholders were not made defendants.

The bill was not a bill seeking to wind up the company. It sought simply payment of a debt out of the unpaid stock subscriptions.

That unpaid stock subscriptions are to be regarded as a fund, which the corporation holds for the payment of its debts, is an undeniable proposition. But the appellants insist that a creditor of an insolvent corporation is not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution. They insist also, that, by the terms of the subscriptions for stock made

by these appellants, they were to pay for the shares set opposite their names respectively, "as called for by the said company;" that the company made no calls for more than thirty per cent; that, therefore, this company could not recover the seventy per cent unpaid without making a previous call; and that a court of equity will not enforce the contract differently from what was contemplated in the subscription.

These positions, we think, are not supported by the authorities, certainly not by the more modern ones; nor are they in harmony with sound reason, when considered with reference to the facts of this case. The liability of a subscriber for the capital stock of a company is several, and not joint. By his subscription, each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is, that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes.

In *Ogilvie v. Ins. Co.*, 22 How., 380 [63 U. S., XVI., 349], the question was considered. That was a case in which several judgment creditors of a corporation had brought a creditor's bill against it and thirty-six subscribers to its capital stock. The bill alleged that the complainants had recovered judgments against the company, upon which executions had been issued and returned "no property;" that the other defendants had severally subscribed for its stock; and that the subscriptions remained unpaid, payment not having been enforced by the company. The prayer of the bill was that these other defendants might be decreed to pay their subscriptions, and that the judgments might be satisfied out of the sum paid. It was objected, as here, that the bill was defective for want of proper parties; but the court held the objection untenable. In delivering the opinion of the court, Grier, J., said: "The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders, corporators, or debtors. If A is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction

out of B as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In that way, all the other stockholders or debtors may be made to contribute." The court, therefore, directed a decree against the respondents severally for such amounts as appeared to be due and unpaid by each of them for their shares of the capital stock.

This case is directly in point, and it does not stand alone. In *Barlett v. Drew*, 57 N. Y., 587, it was ruled that when the property of a corporation had been divided amongst its stockholders before all its debts had been paid, a judgment creditor, after the return of an execution unsatisfied, might maintain an action, in the nature of a creditor's bill, against a stockholder to reach whatsoever was so received by him, and that he was not required to make all the stockholders parties to the action; that he had nothing to do with the equities between the stockholders, unless he chose to intervene to settle them. This is much beyond what the complainant needs in this case. It is enforcing against stockholders in severalty what the corporation could not enforce, without any regard to the equities of one against the others.

So in *Pierce v. Construction Co.*, 38 Wis., 253, which was a proceeding analogous to a creditor's bill, and brought to enforce payment to a judgment creditor of the company of unpaid subscriptions to its capital stock, it was ruled the complaint was not bad because all the stockholders were not made defendants. This, it is true, was a proceeding under a statute, but it was a statute enacting substantially this equity rule.

In *Marsh v. Burroughs*, 1 Woods, 468, a bill of certain creditors who had recovered judgments against a bank, to recover from some stockholders who had not paid in full their subscriptions, non-joinder of parties was set up in defense. *Mr. Justice Bradley* said: "A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust or demand of his debtor, in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability, he might never get his money."

The case of *Wood v. Dummer*, 3 Mas., 308, upon which the appellants largely rely, was not an attempt to reach unpaid stock subscriptions. It was sought to follow the property of a corporation paid over to its shareholders before its debts were paid. But even in that case the bill was sustained, though all the shareholders were not made defendants. Those not sued appear to have been treated only as convenient, not as necessary parties.

The cases of *Pollard v. Bailey*, 20 Wall., 520 [87 U. S., XXII., 376], and *Terry v. Tubman*, 92 U. S., 156 [XXIII., 537], are not in conflict with *Ogilvie v. Ins. Co.* They arose under statutory provisions imposing upon the stockholders of banks a liability for the debts of the cor-

poration, "in proportion to their stock held therein." It was this liability beyond the stock subscription which was sought to be enforced, and as it was only a proportional liability, its extent could be ascertained only when the obligation of the other shareholders was taken into consideration. Hence it was ruled that the proper mode of proceeding was by bill in equity in which an account of the debts and stock could be taken and a *pro rata* distribution could be made. Not a hint was given that *Ogilvie v. Ins. Co.* was intended to be questioned or qualified. Indeed, the cases of *Pollard v. Bailey* and *Terry v. Tubman* have little analogy to it, or to the case we have now before us. They were both suits at law. The debt due by these appellants to the corporation of which they are members is a fixed and definite one, and it is neither more nor less because other debts may be due to the company from other stockholders.

We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporations. In all that he had no interest. The appellants may have had such an interest and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not yet lost.

That the appellants are not protected by the fact, if such was the fact, that their subscriptions for stock were payable "as called for by the company," we think is clear. Assuming that such a clause in the subscription meant more than an agreement to pay on demand, and that it contemplated a formal call upon all subscribers to the stock of the company, the subscriptions were still in the nature of a fund for the payment of the company's debts, and it was the duty of the company to make the calls whenever the funds were needed for such payment. If they were not made, the officers of the company violated their trust, held both for the stockholders and the company. And it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents. But in this case the company went out of business before the complainant obtained his judgment, and it does not appear that since that time it has had any officers who could make the calls. Before that time its president was dead. However this may be, it is well settled that a court of equity may enforce payment of stock subscriptions, though there have been no calls for them by the company. In *Henry v. R. R. Co.*, 17 Ohio, 187, a suit brought by a judgment creditor of a corporation to enforce payment by its stockholders of their unpaid subscriptions, for which calls had not been made, it was held that when a company ceases to keep up its organization, and abandons all action under the charter, a proceeding at the instance of the creditor becomes indispensable. It was further said: "When a company, becoming insolvent, as in this case, abandons all action under its charter, the original mode of making calls upon the stockholders cannot be pursued. The debt,

therefore, from that time must be treated as due without further demand." This means, of course, as between the debtor and the creditor of the corporation. After all, a company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor.

In the English courts a *mandamus* is sometimes awarded to compel the directors to make the necessary calls. *Queen v. Victoria Park Co.*, 1 Ad. & El. (N. S.), 544; *Queen v. Ledgard*, 1 Ad. & El. (N. S.), 614; *King v. Dock Co.*, 4 B. & Ad., 360. But this remedy can avail only when there are directors. The remedy in equity is more complete, and it is well recognized. *Ward v. Mfg. Co.*, 16 Conn., 593. In such cases it is nowhere held, so far as we know, that a formal call must be made before a bill can be filed. Indeed, the filing of the bill is equivalent to a call. Before it is filed, the court has no jurisdiction of the matter. In bankruptcy, an assessment or a call may be made, for the assignee of a bankrupt corporation succeeds to its rights and becomes the legal owner. Not so in equity.

In *R. R. Co. v. McDaniel*, 56 Ga., 191, a creditor's bill very like the present was filed. It was objected by the stockholders, who were defendants, that it was for the directors of the company and not for the court to call in the stock subscriptions, and that their contract only obligated them to obey a call emanating from the company; but it was ruled that "Principle and sound reason accord with authority that equity will grant relief in all such cases."

In view of these considerations, we think none of the assignments of error are sustained.

The decree of the Circuit Court is, therefore, affirmed.

Cited—103 U. S., 509.

AMERICAN AND FOREIGN CHRISTIAN UNION, *Appt.*,

v.

MATILDA YOUNT ET AL.

(See S. C., 11 Otto, 352-362.)

Contract by corporation—powers of, within other States—conveyance for benevolent purpose—estoppel.

*1. While, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States. Its residence in one State creates no insuperable objection to its power of contracting in another.

2. It is a principle as inviolable as it is fundamental and conservative, that the right to hold land and the mode of acquiring title to land, must depend altogether upon the local law of the territorial sovereign. But in harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, including the acquisition of real es-

tate, unless it is prohibited from so doing either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest court.

3. We cannot presume that it is now, or was in 1870, against the public policy of Illinois, that one of its citizens should convey real estate there situated to a benevolent or missionary corporation of another State of the Union for the purpose of enabling it to carry out the objects of its creation, since that State permitted its own corporations, organized for like purposes, to take real estate, within its limits by purchase, gift, devise or in any other manner.

4. The children and heirs at law of a citizen of Illinois, who has conveyed to a New York corporation real estate in Illinois, cannot, in an action to set aside the conveyance upon the ground that it was against the public policy of Illinois, raise the question that the grantee corporation has acquired a larger quantity of real estate than its charter allowed. That question does not concern them, if the title has passed by valid conveyance from their ancestor.

5. The cases of *Carroll v. East St. Louis*, 67 Ills., and *Starkweather v. Am. Bible Soc.*, 72 Ills., examined and distinguished from present case.

[No. 325.]

Submitted Dec. 17, 1879. Decided Mar. 1, 1880.

APPPEAL from the Circuit Court of the United States for the Southern District of Illinois.

The case is stated by the court.

Mr. W. J. Henry, for appellant:

The corporation is clothed everywhere with the charter and the powers given to it by the statute creating it, where its existence is recognized by state comity.

Bk. v. Earle, 13 Pet., 519; *Story*, Conf. L., 2d ed., secs. 37, 38; *Head v. Prov. Ins. Co.*, 2 Cranch, 127; *Root v. Godard*, 3 McLean, 102; *Hayden v. Davis*, 3 McLean, 276.

The rule firmly established by authority is, that a corporation of one State can take and hold lands in another State by purchase or mortgage, when consistent with its charter, and not prohibited by positive law.

Note to 2 Kent, Com., 12th ed., 283; *Lumbard v. Aldrich*, 8 N. H., 31; *Libbey v. Hodgdon*, 9 N. H., 396; *State v. R. R. Co.*, 25 Ver., 433; *Lathrop v. Bk.*, 8 Dana (Ky.), 114; *Bk. v. North*, 4 Johns., Ch., 370; *Baird v. Bk.*, 11 Serg. & R., 411; *Thompson v. Swoope*, 24 Pa., 437; *Am. Bible Society v. Marshall*, 15 Ohio St., 573; *Leazure v. Hillegas*, 7 Serg. & R., 313; *Fairfax v. Hunter*, 7 Cranch, 603; *Runyan v. Coster*, 14 Pet., 123; *Bk. v. Montgomery*, 2 Scam., 423; *Merrick v. Van Santvoord*, 34 N. Y., 214; *Bk. v. Godfrey*, 23 Ill., 579; *State v. Sherman*, 22 Ohio, 433; *Page v. Heineberg*, 40 Vt., 81; *N. Y. Dry Dock v. Hicks*, 5 McLean, 111; *Farmers' Loan & Trust Co. v. McKinney*, 6 McLean, 11; *Henriques v. Dutch West India Co.*, 2 Ld. Raym., 1533.

The capacity of a foreign corporation to take and hold title to real estate cannot be raised collaterally. Such a question can only be made in behalf of the State in a direct proceeding.

Haugh v. Cook Co. Land Co., 73 Ill., 23; *People v. Mauran*, 5 Den., 399; *Page v. Heineberg*, 40 Ver., 81; *Brown v. Philipps*, 16 Iowa, 210.

In the case of *Ramsey v. Ins. Co.*, 55 Ills., 314, the court uses this language: "It is the settled rule, that a party who has contracted with a corporation *de facto*, is never permitted to allege any defect in its capacity to contract or sue. All such objections, if valid, are duly available on behalf of the sovereign power of the State.

Stone v. Oil Co., 41 Ill., 85; *Bradley v. Ballard*,

101 U. S.

NOTE.—Citizenship of corporation and its stockholders; voluntary associations; holders of bonds of corporation secured by mortgage; general answer waives objections to residence. See note to *Hope Ins. Co. v. Boardman*, 9 U. S. (5 Cranch), 57.

55 Ill., 414; *Bowen v. Cross*, 4 Johns. Ch., 373; *Glass Co. v. Dewey*, 16 Mass. 94; *Smith v. Sheeley*, 12 Wall., 361 (79 U. S., XX., 431).

Where there is a right in the grantee to take and hold land for any purpose, if there is a capacity in the vendor to convey, there is a complete sale as soon as the conveyance is made, and if the corporation in purchasing violates or abuses the power to do so, that does not concern the vendor or his heirs; it is a matter between the State and the corporation.

Chambers v. St. Louis, 29 Mo., 576; *Grant, Corp.*, 113; *Doe, ex dem. Hayne, v. Redfern*, 12 East, 96; *Myers v. Croft*, 13 Wall., 295 (80 U. S., XX., 563); *Laud v. Hoffman*, 12 Am. Law Reg. (N. S.), 146).

Even if the Society was unincorporated, so that it would have no legal capacity to take by deed, the grantor and his heirs are estopped by the covenant of warranty from questioning the capacity of the grantee.

Terrett v. Taylor, 9 Cranch, 43; *Carver v. Jackson*, 4 Pet., 1; *Big. Estop.*, 276; *Buckingham v. Hanna*, 2 Ohio St., 558.

Messrs. E. S. Terry and Wm. Springer, for appellees:

The power of a foreign corporation to hold lands in the State of Illinois has been denied by its highest judicial authorities.

The Supreme Court of Illinois has held that "A corporation created in another State for the sole purpose of buying and selling lands, has no power to purchase and hold the title to lands in this State, as it is against the general policy of our legislation on the subject of domestic corporations, and would tend to create perpetuity; that it is well settled that a corporation created in our State cannot exercise its functions in another State or sovereignty, without permission of the latter, express or implied; that the right to such exercise of its functions depends upon comity, and that such comity is inadmissible when contrary to its policy or prejudicial to its interests."

Carroll v. E. St. Louis, 67 Ill., 568.

The principles above enunciated were afterwards, by the same court, fully recognized and affirmed in *Starkweather v. Am. Bible Society*, 72 Ill., 55.

The principle thus established has become, in this State, a rule of property, and will be recognized by this court as such.

Beauregard v. New Orleans, 18 How., 497 (59 U. S., XV., 469); *Pease v. Peck*, 18 How., 595 (59 U. S., XV., 518); *Congdon v. Goodman*, 2 Black, 574 (67 U. S., XVII., 257); *Gardner v. Collins*, 2 Pet., 58.

They will follow state rulings though unsettled, taking the last decision as their guide.

Dred Scott v. Sandford, 19 How., 393 (60 U. S., XV., 691); *Leffingwell v. Warren*, 2 Black, 599 (67 U. S., XVII., 261); *Williams v. Kirtland*, 13 Wall., 306 (80 U. S., XX., 683); *Walker v. State Harbor Comrs.*, 17 Wall., 650 (84 U. S., XXI., 744); *Strader v. Graham*, 10 How., 82; *Jackson v. Chew*, 12 Wheat., 153; *Christy v. Pridgeon*, 4 Wall., 196 (71 U. S., XVIII., 322).

Mr. Justice Harlan delivered the opinion of the court:

This suit involves the title to certain lots or parcels of land in the State of Illinois, alleged to be of the value of \$10,000, and described in See 11 Otto.

a conveyance purporting to have been executed on 19th May, 1870, by Stephen Griffith, a citizen of that State, to the American and Foreign Christian Union, a Corporation created in the year 1861 under the laws of the State of New York providing for the incorporation there of benevolent, charitable, scientific and missionary societies.

The place of business and principal office of the appellant was and is in the City of New York, but there seems to be no inhibition, in its charter, upon the exercise of its functions in other States. The declared object of its incorporation was, "By missions, colportage, the press and other appropriate agencies, to diffuse and promote the principles of religious liberty and a pure evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists."

The appellees, who are the children and heirs at law of the grantor, pray for a decree declaring the conveyance to be null and void, and requiring the appellant to convey to them the premises in dispute. They broadly claim that, by the settled law of Illinois, a foreign corporation cannot take or hold lands in that State, and that, consequently, no title passed to the appellant from their ancestor. That is the fundamental proposition in the case, and is the only one which counsel for the appellees, in support of the decree below, has deemed it necessary to discuss with any fullness.

By the Statute of New York under which appellant was organized, it was made capable of taking, receiving, purchasing and holding real estate for the purposes of its incorporation, and for no other purpose, to an amount not exceeding the sum of \$50,000 in value, and personal estate for like purposes to an amount not exceeding \$75,000 in value, the clear annual income of such real and personal estate not, however, to exceed the sum of \$10,000. No question is made here as to its right, consistently with its own charter and the laws of New York, to acquire, for the purposes of its creation, real estate within, at least, the quantity designated by its charter.

The appellant, then, having this capacity by its charter, and not being expressly prohibited from exercising its powers beyond the State which created it, we proceed to inquire whether it was forbidden by the laws of Illinois in force in the year 1870 from taking title by conveyance to real property within the limits of that State, for the objects designated in its charter. For, besides the admitted incapacity of a corporation of one State to exercise its powers in another State, except with the assent or permission, expressed or implied, of the latter, it is a principle "As inviolable as it is fundamental and conservative, that the right to hold land, and the mode of acquiring title to land, must depend altogether on the local law of the territorial sovereign." *Runyan v. Oster*, 14 Pet., 122; *Lathrop v. Bk.*, 8 Dana, 114.

By a general law of Illinois, enacted in 1859, any three or more persons of full age, citizens of the United States, a majority of whom were also required to be citizens of that State, could become a body politic and corporate for benevolent, charitable, educational, literary, musical, scientific, religious or missionary purposes, and in their corporate capacity take, receive, pur-

chase and hold real and personal estate, and for charitable purposes only, sell and convey the same. Laws of Ill., 159, p. 20; Gross, Rev., 124.

Corporations formed under that law were made capable of taking, holding or receiving any property, real estate or personal, by *gift, purchase, devise or bequest*, or in any other manner. As to real estate purchased by them for their own use, authority was given to sell the same, with any building erected thereon, and invest the proceeds in the purchase of another lot, or in the erection of another building, or both. As to such as was devised or given to them for any specified benevolent purpose, authority was conferred to sell the same and apply the proceeds in aid of that purpose, such real estate, however, not to be held more than five years.

This general statute was in force when the conveyance to appellant was executed. It thus appears that when appellant's rights accrued under that conveyance, the statutes of Illinois expressly provided for the incorporation of societies having objects similar to those of the American and Foreign Christian Union, and with capacity to take, receive and hold real property, by gift, purchase, devise, bequest or in any other manner, for the purposes of their creation. Shortly after the passage of the general Law of 1859, to wit: at its session of 1861, the General Assembly of Illinois created a large number of religious and charitable corporations, with like capacity to take, receive and hold real and personal property; and in the year 1863 it expressly exempted from taxation real and personal property which the American Bible Society, a Corporation of New York, then owned or might thereafter acquire in the State of Illinois not exceeding \$50,000 in value; also all Bibles and Testaments in its depositories, and any articles of personal property necessary for the prosecution of its objects. Pri. L. Ill., 1863, p. 26.

The conclusion is not to be avoided that the State, prior to 1870, authorized, if it had not steadily encouraged, the organization of societies for benevolent, charitable, religious and missionary objects, and endowed them with capacity to acquire by purchase, gift or devise real estate for the purposes of their creation. It had not then, nor, so far as we are informed, has it since, passed any statute expressly forbidding corporations of other States, having like objects, from taking, receiving, purchasing or holding real property in that State to the same extent and for the same purposes as were allowed to its own corporations of that class. Nor is our attention called to any statute in force in 1870, or subsequently, which expressly or in terms, forbade foreign corporations from exercising, within the State of Illinois, the functions with which they were endowed by the respective States creating them, or which made the express permission by statute of that State a condition precedent to the recognition within its jurisdiction of the corporations of other States. Although, as a general proposition, a corporation must dwell in the State under whose laws it was created, its existence as an artificial person may be acknowledged and recognized in other States. "Its residence in one State creates no insuperable objection to its power of contracting in another." *Runyan v. Coster* [supra]. In *Covell v. Colorado Springs Co.*, decided at present Term [ante, 547] we said: "If the policy

of the State or Territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its Legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law. Telegraph companies did business in several States before their Legislatures had created or authorized the creation of similar corporations; and numerous corporations existing by special charter in one State are now engaged, without question, in business in States where the creation of corporations by special enactment is forbidden." In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State or by its public policy to be deduced from the general course of legislation or from the settled adjudications of its highest court. There was here no such direct legislation during or prior to the year 1870, nor can the existence of such a public policy be inferred from the general course of legislation or judicial decisions in Illinois up to and including that year, in relation to religious, benevolent, charitable or missionary societies created in other States.

But it is contended that the precise question now under consideration has been heretofore decided by the Supreme Court of Illinois adversely to these views in *Carroll v. E. St. Louis*, 67 Ill., 568, and *Starkweather v. Bible Society*, 72 Ill., 50, and that this court is obliged to follow the construction of the state law and give effect to the public policy of Illinois, as announced by the highest court of that State. Our obligation to follow, without question, these decisions arises, it is claimed, out of the express provisions of the Act of Congress declaring that the laws of the several States, except when the Constitution, treaties or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This provision was incorporated in the original Judiciary Act, and has been retained in the statutes of the United States to the present time. Under it we have often declared that the construction given to a state statute by the highest judicial tribunal of such State is to be accepted in the Federal Courts as a part of the statute whenever they are required to determine questions, or ascertain rights arising out of or dependent upon such local statute. But how far the Federal Courts, in the ascertainment and enforcement of property rights, dependent upon the statute law, or the settled public policy of a State, are bound by the decisions of the State Court, rendered after such rights were acquired or became vested, is a different question, and one of the gravest importance. The rule upon this subject has been announced, with some qualifications arising out of the circumstances of the particular cases, heretofore decided in this court. Its extended discussion is not, however, essential in this case,

since the decisions of the Supreme Court of Illinois, upon which counsel for appellees rely, do not, in our judgment, necessarily conclude the precise point here involved.

In *Carroll v. E. St. Louis* [supra], the question before the court was, whether the Connecticut Land Company, a corporation created in another State for the sole purpose of buying and selling lands, had power to purchase and hold title to lands in the State of Illinois. The decision was that it could not, for the reason—and no other is assigned—that if the company were permitted to exercise its functions in Illinois to the full extent authorized by its charter, it could acquire lands without limit as to quantity, and hold them in perpetuity; that such privileges had never been accorded by Illinois to her own domestic corporations, and were inconsistent with her settled public policy against perpetuities, as indicated not by direct express enactment, but with absolute certainty, by the general course of its legislation from the very organization of the State.

Two of the Judges dissented from the opinion, so far as it held invalid a transfer of land by the corporation to a purchaser.

The subsequent case of *Starkweather v. Bible Society* [supra], involved the title to certain real estate, an undivided interest in which was devised by one Starkweather to the Trustees of the American Bible Society, established in 1816, to have and to hold the same for its use, but not to be entitled to the same, or its income, until his youngest child became of age. The claim of the Bible Society was denied, by the court, upon the following grounds: (1) That by the laws of New York, as declared by the highest court of that State, it had not the capacity to take title to real property in New York by devise. (2) That New York had no power to create a body incapable of taking land in that State by devise, and yet with power to so take lands in a foreign jurisdiction. (3) And by way of argument, that if New York was to so enact, and other States were to so consent, then such bodies might so receive and hold lands; but, said the court, the former had not so enacted, nor had Illinois so consented, since, when the will of Starkweather was probated, September 16, 1867, there was no statute of Illinois which authorized foreign corporations to hold lands by devise in that State. (4) The principles announced in *Carroll v. E. St. Louis* were regarded as conclusive against the claim of the Bible Society, "As," said the court, "all of the inconveniences and injuries are as likely to ensue in this, and other cases like it, as in that." (5) The devise being illegal and void, the court could not decree a sale of the real estate devised and direct the payment of the proceeds to the society.

We are of opinion that the *Starkweather* case does not determine the particular question we have been considering. It does not decide that the devise to the Bible Society was void solely because of the absence of some statute expressly and affirmatively authorizing or permitting devises of real estate in Illinois to corporations of other States. The absence of such a statute was referred to, as we suppose, for the purpose of showing that the admitted incapacity of the Bible Society, under the law of its own creation, to take real estate by devise, and its consequent inability in that mode to acquire real estate situ-

ated elsewhere could not be removed or be met by anything in the legislation of Illinois, since no statute in force when the will was probated conferred upon foreign corporations the right to acquire real property in that State by devise.

The *Starkweather* case was held to be concluded by the principles announced in the *Carroll* case, for the reason, perhaps, that the property devised could, consistently with the will of the testator and the charter of the society, have been held for a period of time beyond that allowed to similar corporations of Illinois holding lands in that State. Upon no other ground are we able to understand how the *Starkweather* case was concluded by the principles announced in *Carroll v. E. St. Louis*. Neither decision warrants the conclusion that, at the date of the deed to appellant, a benevolent, religious or missionary corporation of another State, having authority under its own charter to take lands, in limited quantities, for the purposes of its incorporation, was forbidden, by the statutes or the public policy of Illinois, from taking title, for such purposes, to real property in that State under a conveyance from one of its citizens, duly executed and recorded as required by its laws. The conveyance to the appellant can be sustained without in any degree impairing or doing violence to the fundamental principle enunciated in the *Carroll* case, viz.: that corporations cannot acquire lands in Illinois in large quantities, to be held, or which may be held in perpetuity. It can also be sustained, without violating the main proposition laid down in the *Starkweather* case, viz.: that a foreign corporation, forbidden by the laws of the State creating it, to acquire lands there, by devise, could not, by that mode, take lands in Illinois, in the absence of a statute of that State assenting thereto. We cannot presume that it is now, or was in 1870, against the public policy of Illinois that one of its citizens should convey real estate there situated to a benevolent or missionary corporation of another State of the Union, for the purpose of enabling it to carry out the objects of its creation, when that State permitted its own corporations, organized for like purposes, to take real estate within its limits, by purchase, gift, devise, or in any other manner.

We have considered these questions with reference to the law of Illinois at the date of Griffith's conveyance. But our conclusions are strengthened by her subsequent legislation. We refer particularly to the general statute passed in 1872, providing for the organization of corporations for pecuniary profit, or for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads, other than horse and dummy railroads, and the business of loaning money, with authority to own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, and to sell and dispose of the same when not required for the uses of the corporation. All real estate acquired in satisfaction of any liability or indebtedness, and not necessary and suitable for the business of the corporation, was required to be annually offered at public auction, and if not sold within five years, its sale could be enforced by information in the name of the State against the corporation. Section 26 of that general statute expressly recognizes the right of foreign corporations to

acquire real estate in Illinois. Its language is: "Foreign corporations and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this State, except as provided for in this Act." Hurd, Ill. Rev., 1879, p. 290.

Distinct provision was made in the same statute for the organization of societies, corporations and associations, not for pecuniary profit, with capacity to take, purchase, hold and dispose of real and personal estate for purposes of their organization. The statute imposes on the corporations last described no restrictions as to the quantity of estate they may take and hold, except that it must be for the purposes of their organization. Churches, congregations or societies formed for religious worship, when incorporated under that statute, in addition to grounds for burying and camp-meeting purposes, were limited to ten acres of ground for houses, buildings or other improvements for the convenience and comfort of such congregations, church or society.

If the settled public policy of Illinois in 1870 forbade a benevolent missionary corporation of another State from taking title to real estate in Illinois for purposes of its organization, a general statute would hardly have been passed in 1872 recognizing the right of foreign corporations organized for pecuniary profit to hold real estate in Illinois, to the same extent and under like powers with domestic corporations of the same class.

2. Appellees, in their pleadings, allege that the lots conveyed by their ancestor to the American and Foreign Christian Union were not required or necessary for the convenience or transaction of its business. These allegations are both insufficient and immaterial; insufficient, because it may be true, and yet the appellant, with the lots in dispute added to its property, may not have had more real estate than its charter permitted; immaterial, because if, as we hold, the appellant could, consistently with its own charter and the law of Illinois, take title to real property in that State for the purposes of its creation, its acquisition of a larger quantity of real estate than its charter allowed, or than its business required, or than was consistent with the law of Illinois, was not a question which the appellees have any right to raise. If the title passed by valid conveyance from their ancestor, it is of no concern to them that the appellant has acquired or is holding more real estate than its charter authorizes.

We forbear the discussion of any other question arising upon the assignments of error. It is apparent from the record and the argument of counsel that the judgment of the court below was based upon the conclusion that the appellant, being a foreign Corporation, was forbidden by the law of Illinois from taking title to the property in controversy. No proof was taken, nor was the case heard upon the issue as to the mental capacity of Griffith to execute the

conveyance of 1870, or as to its having been obtained by fraudulent solicitations and representations upon the part of the agents of the appellant Corporation. The parties should have an opportunity to prepare the cause, and have it heard upon those issues.

The decree is reversed, with directions to overrule the demurrer to the cross-bill and the exceptions to the answer, and for such further proceedings as may be consistent with this opinion.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—8 N. W. Rep., 390; 15 N. W. Rep., 104.

HUGH SHAW ET AL., *Plffs. in Err.*,
v.

MERCHANTS' NATIONAL BANK OF ST.
LOUIS.

(See S. C., "*Shaw v. R. R. Co.*," 11 Otto, 557-567.)

Negotiable bills of lading—state statute—effect of—bona fide purchaser—mistake in verdict.

1. A statute of a State making bills of lading negotiable, means that they may be transferred by indorsement and delivery, so as to give to the indorsee a right to sue on them in his own name.

2. Such statute does not charge the negotiation of them with all the consequences which attend or follow the negotiation of bills and notes.

3. No statute is to be construed as altering the common law, further than its words import.

4. The purchaser of a bill of lading, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and is not entitled to hold the merchandise covered by the bill against its true owner.

5. Where there was a verbal mistake of the clerk in entering the verdict, but the judgment was entered properly, as the verdict was amendable in the court below, this court will regard the amendment as made.

[No. 157.]

Argued Jan. 19, 20, 1880. Decided Mar. 1, 1880.

NOTE.—*Negotiability and transfer of bill of lading; effect of transfer.*

The bill of lading passes the property when it is indorsed and intended so to operate, in the same manner as a direct delivery of the goods would do if so intended; and it operates no further. *Newson v. Thornton*, 6 East, 41; *Gardner v. Howland*, 2 Pick., 599; *Mears v. Waples*, 3 Houst., 582; *Empire Trans. Co. v. Steele*, 70 Pa. St., 190; *Brower v. Peabody*, 13 N. Y., 121; *Indiana, etc., Bk. v. Colgate*, 4 Daly, 41.

A mere indorsement of a bill of lading, without a delivery thereof, does not transfer the property in the goods. *Buffington v. Curtis*, 15 Mass., 527; S. C., 8 Am. Dec., 115.

The assignment of a bill of lading *bona fide* and for value, will vest the legal interest of the consignee in his assignee, although made after arrival of goods. *Chandler v. Belden*, 18 Johns., 157; S. C., 9 Am. Dec., 193; *First Nat. Bk. v. Crocker*, 111 Mass., 163.

A bill of lading is transferable by the custom of merchants so as to vest the title of the assignor in the transferee. Consignee may transfer a bill of lading by indorsement. *Salters v. Everett*, 20 Wend., 267; S. C., 32 Am. Dec., 541; *Newhall v. C. P. R. R. Co.*, 51 Cal., 350; *Walter v. Ross*, 2 Wash. (C. C.), 283.

By the custom of merchants, bills of lading are transferable by indorsement and delivery so as to pass the title to the goods as effectually as if the goods were delivered, so long as they are in transit. *Lickbarrow v. Mason*, 1 Smith, Lead. Cas., 848 and *n.*; 2 T. R., 63; *The Thames v. Seaman*, 81 U. S., XX., 804; *Shaw v. R. R. Co.*, *supra*; *Pease v. Gloache*, 1 L. R. C. P., 219; *Meyerstein v. Barber*, 2 L. R. C. P., 45; 4 L. R. Eng. & Ir. Ap., 317; U. R. R. & T. Co. v.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. William Henry Lee and **James E. Gown**, for plaintiffs in error.

Messrs. Robert N. Wilson and **George Junkin**, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is: what title had Miller & Brother as against the Bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother? The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the Bank to secure the payment of an accompanying discounted time draft. That indorsement vested in the Bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of \$8,500. The jury has found, however, that there was no negligence of the Bank or of its agents in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

Yeager, 34 Ind., 1; *Robinson v. Stuart*, 68 Me., 61; *Halliday v. Hamilton*, 78 U. S., XX., 214; *Crapo v. Kelly*, 83 U. S., XXI., 430; *Gibson v. Stevens*, 3 McLean, 560; *Walter v. Ross*, 2 Wash., 287; U. S. v. Del. Ins. Co., 4 Wash., 422; *Atl. Ins. Co. v. Conard*, 4 Wash., 676; *Marsh v. Pedder*, *Holt*, 74; *Webb v. Anderson*, *Taney*, 512; *Holbrook v. Wright*, 24 Wend., 169; *Summer v. Hamlet*, 12 Pick., 76; *Pratt v. Parkman*, 24 Pick., 42; *Caldwell v. Ball*, 1 Term R., 205; *Brand v. Lisle*, *Yelv.*, 164; *Wright v. Campbell*, 4 Burr., 2046; *Wood v. Roach*, 2 U. S. (2 Dall.), 180.

An indorsement of a bill of lading without the authority, consent or knowledge of the owner of the goods, transfers no title even to an indorsee in good faith. An indorser having no title to the goods, cannot convey any. *Brower v. Peabody*, 13 N. Y., 121; *Dows v. Perrin*, 16 N. Y., 325; *First Nat. Bk. v. Shaw*, 61 N. Y., 283; *Tison v. Howard*, 57 Ga., 410; *Decau v. Shipper*, 35 Pa. St., 239.

Where the shipper attaches the bill of lading to a draft for the price; and indorses same to one who discounts the draft, the goods are thereby pledged for the payment of the draft, and a special property therein passes to the transferee. *Holmes v. German Security Bk.*, 87 Pa. St., 525; *Holmes v. Bailey*, 92 Pa. St., 57; *First Nat. Bk. v. Crocker*, 111 Mass., 163; *Hathaway v. Haynes*, 124 Mass., 311; *Joslyn v. Grand T. R. Co.*, 51 Vt., 92; *Emery v. Irving Nat. Bk.*, 25 Ohio St., 360; S. C., 18 Am. Rep., 299; *Ind. Nat. Bk. v. Colgate*, 4 Daly, 41; *Com. Bk. v. Pfeiffer*, 22 Hun, 327; *Mar. Bk. v. Wright*, 48 N. Y., 1; *Heiskell v. Farms*, etc., *Nat. Bk.*, 89 Pa. St., 155; 33 Am. Rep., 745; *Farms & Mechs. Nat. Bk. v. Hazelton*, 78 N. Y., 104; S. C., 34 Am. Rep., 518.

The holder of a bill of lading indorsed to him as security for such a draft, may replevin goods or sue

See 11 Otto.

U. S., Book 25.

56

It is, therefore, to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother, under these circumstances, acquired thereby a good title to the cotton as against the Bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The Statute of Pennsylvania declares simply, they "Shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "They shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i. e.*, by indorsement and delivery. Neither undertakes to define the effect of such a transfer.

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule, bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The

for conversion where goods are delivered to consignee without payment of draft. *Mar. Bk. v. Wright*, 48 N. Y., 1; *Heiskell v. Farms*, etc., *Nat. Bk.*, 89 Pa. St., 155; S. C., 33 Am. Rep., 745; *Stollenwerck v. Thacher*, 115 Mass., 224; *First Nat. Bk. v. Dearborn*, 115 Mass., 219.

An indorsement or written transfer of a bill of lading is not necessary. Delivery, with intent to pass title to the goods, is sufficient. The possession of a bill of lading, whether indorsed or not, is *prima facie* evidence of title as against any person not showing a better title. *Mich. Cent. R. R. Co. v. Phillips*, 60 Ill., 190; *Tison v. Howard*, 57 Ga., 410; *Glidden v. Lucas*, 7 Cal., 26; *Pratt v. Parkman*, 24 Pick., 42; *Adams v. O'Connor*, 100 Mass., 515; S. C., 1 Am. Rep., 137; *First Nat. Bk. v. Dearborn*, 115 Mass., 219; *Fifth Nat. Bk. v. Bayley*, 115 Mass., 223; *Allen v. Williams*, 12 Pick., 297; *Low v. De Wolf*, 8 Pick., 101; *City Bk. v. Rome*, etc., R. R. Co., 44 N. Y., 136; *Merch. Bk. v. Union R. R. & T. Co.*, 69 N. Y., 373; *Bates v. Stanton*, 1 Duer, 85; *Indiana Nat. Bk. v. Colgate*, 4 Daly, 41; *Jeffersonville*, etc., R. R. Co. v. *Irvin*, 46 Ind., 180.

A bill of lading is not at common law technically negotiable, like a bill of exchange. *Hale v. Milwaukee Dock Co.*, 29 Wis., 482; *Patison v. Culton*, 33 Ind., 240; *Howard v. Shepherd*, 9 C. B., 297; *Thompson v. Downing*, 14 Mees. & W., 403; *Tison v. Howard*, 57 Ga., 410; *Dows v. Greene*, 24 N. Y., 638; *Stollenwerck v. Thacher*, 115 Mass., 224.

Where the bill of lading is in triplicate, indorsee of first set obtains title as against subsequent indorsee of the others. *The Tigress*, *Brown & L.*, 38; *Glyn v. East & W. Ind. Docks*, 5 L. R. Q. B., 129; *Meyerstein v. Barber*, 2 L. R. C. P., 38; 4 L. R. Eng. & Ir. App., 317.

893

term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made before the maturity of the bill or note, in due course of business, and be made for value to a *bona fide* holder, the maker or acceptor cannot set up against the indorsee any defense which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer and, therefore, negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order or bearer, but its indorsement or delivery does not cut off the defenses of the maker or acceptor against it, or create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "Of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, *J.*, it has become a general rule of the commercial world to hold bills of exchange as, in some sort, sacred instruments in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it, that is, nothing short of *mala fides* will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. *Goodman v. Harvey*, 4 Ad. & E., 870; *Goodman v. Simonds*, 20 How., 343 [61 U. S., XV., 934]; *Murray v. Lardner*, 2 Wall., 110 [69 U. S., XVII., 857]; *Matthews v. Poythress*, 4 Ga., 287. The

rule was first applied to the case of a lost bank-note, *Miller v. Race*, 1 Burr., 452, and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in *Peacock v. Rhodes*, 2 Doug., 633, to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the Bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the Bank's right.

Bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the

ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in *Goodman v. Harvey*, *Goodman v. Simonds*, *Murray v. Lardner* (*supra*), and in *Phelan v. Moss*, 67 Pa., 59, is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother; more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

This disposes of the principal objections urged against the charge given to the jury. They are not sustained. The other assignments of error are of little importance. We cannot say that there was no evidence in the case to justify a submission to the jury of the question whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft. It does not appear that we have before us all the evidence that was given, but if we have, there is enough to warrant a submission of that question.

The exceptions to the admission of testimony, and to the cross-examination of Andrew H. Miller, are not of sufficient importance, even if they could be sustained, to justify our reversing the judgment. Nor are we convinced that they exhibit any error.

There was, undoubtedly, a mistake in entering the verdict. It was a mistake of the clerk in using a superfluous word. The jury found a general verdict for the plaintiff. But they found the value of the goods "eloined" to have been \$7,015.97. The word "eloined" was inadvertently used, and it might have been stricken out. It should have been, and it may be here. The judgment was entered properly. As the verdict was amendable in the court below, we will regard the amendment as made. It would be quite inadmissible to send the case back for another trial because of such a verbal mistake.

The judgment of the Circuit Court is affirmed.

Cited—107 U. S., 158; 2 McCrary, 499.

SAMUEL M. GATES, ALBERT M. WOOD
AND MILTON McKNIGHT, as GATES,
WOOD & McKNIGHT, *Plffs. in Err.*,
v.

JAMES L. GOODLOE, *Ext.* of ROBERT C.
BRINKLEY, *Deceased*.

See 11 OTTO.

(See S. C., 11 Otto, 612-621.)

Substitution of assignee, as party—discharge from rent—lessees dispossessed by military authority.

1. An assignee in bankruptcy can be substituted in this court as plaintiff in error, where his assignor has received his discharge in bankruptcy.

2. A lessee was discharged from liability to the lessor for rent of property in Memphis during the period when the rents and profits arising therefrom were required by the Federal military authorities, occupying and controlling that city, to be paid directly to them.

3. Lessees, when dispossessed by military authority and deprived of the use and control of the leased property, are discharged from liability to the lessors for rent accruing during the period of such dispossession.

[No. 96.]

Argued Dec. 3, 4, 1879 Decided Mar. 1, 1880.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is stated by the court.

Messrs. Luke W. Finlay, W. A. Maury and B. M. Estes, for plaintiffs in error.

Mr. J. B. Heiskell, for defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

The motion to dismiss this writ of error must be denied.

The original decree in the second Chancery Court of Shelby County, Tennessee, was for \$8,821.49, and against S. M. Gates, A. M. Wood and Milton McKnight, partners under the name of Gates, Wood & McKnight. Upon appeal to the Supreme Court of Tennessee, that decree, to the extent of \$7,840.25, was affirmed on the 13th day of October, 1875. On the 1st of August, 1876, Gates and Wood, two of the partners, received discharges in bankruptcy, releasing them individually from all provable debts and claims existing against them on 22d of April, 1876, other than debts which, by law, were excepted from the operation of a discharge in bankruptcy. The present writ of error was sued out on 30th October, 1876, all the partners uniting in suing it out. Appellee now moves to dismiss the writ upon the assumption that the assignee in bankruptcy could alone prosecute a writ of error from the final judgment of the state court. Undoubtedly, the assignee in bankruptcy of Gates and Wood had the right to prosecute a writ of error from the decree complained of, so far, at least, as it concerned those whom he represented. If the bankrupts could not themselves, under any circumstances, properly sue out the writ after their discharge, and upon that question we express no opinion, all difficulty in that respect has been removed by the application of the assignee himself for an order here substituting him as plaintiff in error. His application is now granted, and he is allowed to prosecute the writ in behalf of the bankrupts, Gates and Wood. Independent, however, of that application, we are not prepared to say that McKnight, the partner against whom no bankruptcy proceedings were instituted, might not have sued out the writ, using for that purpose, if necessary, the names of all the parties against whom the original decree was rendered. With both the assignee in bankruptcy and McKnight before the court, there is no sound reason why the cause should not proceed to a final determination upon the errors assigned.

Coming, then, to the merits of the case, we find that the plaintiff in error specially claimed a right or immunity in virtue of an authority exercised under the United States. The right or immunity, so claimed, was denied, first in the court in which the suit originated, and subsequently in the Supreme Court of the State of Tennessee.

The facts upon which that claim rests, or out of which it arises, are briefly these:

On the 6th June, 1862, military possession was taken of the City of Memphis by the Union forces then engaged in suppressing armed insurrection against the national authority. During the succeeding month, General Sherman, having been previously assigned by competent military authority to the command of the District of West Tennessee, reached that city with reinforcements, and assumed control of the forces in that locality.

Shortly thereafter he published orders, re-opening trade and communication with the surrounding country, and prescribing rules in conformity with which travel in and out of the city should be conducted. On the 7th of August, 1862, pursuant to orders from General Grant, his superior officer, specific instructions were issued by him to the quartermaster in charge at Memphis, concerning vacant stores and houses in that city, and also as to buildings which were occupied, but the owners of which had "gone South," leaving agents to collect rent for their benefit. With reference to the latter class of buildings his instructions, or rather orders were: "Rent must be paid to the quartermaster. No agent can collect and remit money South without subjecting himself to arrest and trial for aiding and abetting the public enemy."

The object of these regulations was thus distinctly set forth by General Sherman in his letter of instructions: "I understand that General Grant takes the rents and profits of this class of real property, under the rules and laws of war, and not under the Confiscation Act of Congress; therefore, the question of title is not involved; simply the possession, and the rents and profits of houses belonging to our enemies, which are not vacant, we hold in trust for them or the Government, according to the future decision of the proper tribunals." He concluded his letter in these words: "We have nothing to do with confiscation. We only deal with possession and, therefore, the necessity of strict accountability, because the United States assumes the place of trustee, and must account to the rightful owner for his property, rents and profits. In due season, courts will be established to execute the laws, the Confiscation Act included, when we will be relieved of this duty and trust. Until that time, every opportunity should be given to the wavering and disloyal to return to their allegiance to the Constitution of their birth or adoption."

These instructions do not appear in the present transcript, although they constitute a part of the archives of the War Department, and belong to the public history of the late civil war. Some question may be made as to our right to take judicial notice of them in the determination of this case. But, apart from them, the record sufficiently establishes the fact that the military authorities adopted the general

policy indicated by General Sherman's letter of instructions, and a rental agent, designated by those authorities, was charged with the duty, among others, of collecting rents of houses which, although occupied, belonged to persons who had "gone South." To that class of property belonged a storehouse, occupied by Gates, Wood & McKnight, under a lease executed at Memphis, in 1859, by R. C. Brinkley, the testator of defendant in error, for a term of five years, and for the stipulated rent of which the lessees had executed their several promissory notes, payable quarterly during the whole period of the lease. Brinkley, upon the approach of the Union forces, left his home in Memphis and went within the lines of the Confederate forces, where he remained until 1864.

Gates, Wood & McKnight were notified by the military rental agent, in the summer of 1862, to pay him the rents going to Brinkley. They refused to recognize that order, or to so pay the rents and, by reason of such refusal, were dispossessed by the military authorities. Those of their subtenants who expressed a willingness to comply with the order were permitted to remain in the occupancy of the premises, paying rent, however, directly to the rental agent of the United States. From the time the lessees were thus dispossessed, until July 11, 1863, the property remained under Federal military control, and all rents arising therefrom were collected by the rental agent, who, in the exercise of his functions, was recognized and sustained by the general commanding the Union forces in that district. During that intermediate period, the lessees were neither in possession of the premises, nor permitted by the military authorities to receive any rents accruing therefrom. Their rent notes, covering the period during which they were thus kept out of possession, remained, however, outstanding, in the hands of the lessor or his agent. They constitute the foundation of the judgment or decree in this suit.

Are the lessees liable to the estate of Brinkley for rent, as stipulated in the lease of 1859, for the period when the storehouse was under control of the Federal military? There is no claim here for rents subsequent to July 11, 1863, since, on that day, possession was delivered or control surrendered to the lessor's son, under an arrangement made by him with the military authorities. After the return of the lessor to Memphis, in 1864, the latter took control of the property, and enjoyed the rents. Upon the solution of the foregoing question this case depends.

The Supreme Court of Tennessee were of opinion that the lessees were not discharged from liability upon their contract with Brinkley, by reason of the action taken by the military authorities touching the rents accruing from the property in question. That court recognized the hardship of the case upon the lessees, but consistently with its views of the law the relief asked for could not be given.

We are unable to give our assent to the conclusion reached by that learned court. It is inconsistent with our decision in *Harrison v. Myers*, 92 U. S., 111 [XXIII., 606], where we held the lessee discharged from liability to the lessor for rent of certain property in New Orleans during the period when the rents

and profits arising therefrom were required by the Federal military authorities, occupying and controlling that city in the year 1862, to be paid directly to them. There is some difference in the facts of the two cases, but in their essential features they are alike. That case, it may be here observed, was determined in this court after the rendition of the present decree by the Supreme Court of Tennessee.

Brinkley, in his answer, claims to have gone within the insurrectionary lines as a private citizen and upon private business. He testified that he "Never had the honor to go or act in any other capacity, then, before, or since." It was, however, shown that in 1861 he became a member of a military Board organized in hostility to the United States. It does not appear when his connection with that body terminated, or when the Board itself ceased operations. But it does appear from his own admissions that he had, prior to the occupation of Memphis by the Union forces, contributed money towards the equipment of military companies organized in that State with the avowed purpose of resisting the authority of the National Government. When he abandoned his home and entered the military lines of the enemy he was, beyond question, in full sympathy and active co operation with those who sought, by armed force, to overthrow the Union. Neither in his answer nor in his deposition does he intimate that he had any sympathy with the United States in its efforts to suppress insurrection. He was, therefore, in the very fullest legal sense, an enemy of the Government during his stay within the military lines of the rebellion, liable to be treated as such both as to his person and property. His remaining there was in plain violation of law and in disregard of duty. In *The William Bagaley*, 5 Wall., 377 [72 U. S., XVIII., 533], we said that "It was the duty of a citizen when war breaks out, if it be a foreign war and he is abroad, to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable, and adhere to the regular established government."

The general commanding the Union forces at Memphis was charged with the duty of suppressing rebellion by all the means which the usages of modern warfare permitted. To that end he represented for the time and, in that locality, the military power of the Nation. He did not assume authority to confiscate Brinkley's rents, nor did he seize them as booty of war; but, by his subordinates, collected and held them subject to such disposition as might be thereafter made of them by the decisions of the proper tribunals. They were seized, *flagrante bello*, in that portion of the Territory of the United States the inhabitants whereof had been declared to be in insurrection. There was no such "Substantial, complete and permanent military occupation and control" as has been sometimes held to draw after it a full measure of protection to persons and property at the place of military operations. *Planters' Bk. v. Union Bk.*, 16 Wall., 495 [83 U. S., XXI., 478]. No pledge had then been given by the constituted authorities of the government which prevented the commander of the Union forces from doing all that the laws of war authorized, and that, in his judgment, under the circumstances attending his situation, was necessary

or conducive to the successful prosecution of the war. He was not bound to risk the possibility of Brinkley's rents being transmitted to him beyond the Union lines. To have permitted the latter to enjoy the benefit of them in any form during his voluntary absence within the military lines of the insurrection might have encouraged him to remain under the protection of the enemy, adding by his presence and means to the enemy's ability to continue the struggle against the government. If, therefore, in the judgment of the commanding general, the security of his own army, or the diminution of the enemy's resources, required that he should prevent those within the Confederate military lines from receiving or using in any way, while there, rents accruing from real estate within the Federal lines, it would be difficult to show that the mode adopted by him to effect that result was not a proper military precaution, entirely consistent with the established rules of war, and having direct connection with the great end sought to be accomplished by the war, to wit: the destruction of armed rebellion, and the complete restoration of the national authority over the insurrectionary district.

The action of the military authorities in seizing the rents arising from the property which Brinkley had leased to Gates, Wood & McKnight not being, then, in violation of law; that which was done being regarded as having been done by the authority of the United States in lawful defense of the national existence against armed insurrection; it results, necessarily, as we think, that the lessees, when dispossessed by military authority and deprived of all future use and control of the leased property, were discharged from liability to the lessors for rent accruing during, at least, the period of such dispossession. They were not discharged from liability for rent which previously accrued. But since the consideration for their promise to pay rent, from time to time, was the possession and use of the leased property during the term and upon the conditions specified in the lease, and since such enjoyment and use were materially interrupted and prevented by the interference of the law, or of lawful public authority, to which both parties were amenable, the lessees, it seems to the court, ought to be protected against liability for the rent stipulated in the contract of 1859, for the period they were thus kept out of possession and enjoyment of the property. The events and contingencies causing that result were not such as the parties anticipated, nor such as we can suppose were in contemplation when the contract was made. Otherwise they would, it must be assumed, have been provided for in the contract.

The conclusion thus reached is abundantly sustained by authority. Indeed, many of the authorities would justify us in holding the action of the military authorities to have worked the dissolution of the entire contract of lease from the moment the lessees were dispossessed.

In *Melville v. De Wolf*, 4 El. & Bl., 844, the plaintiff sued for wages agreed to be paid to him as a mariner and carpenter on board of a foreign ship going to the Pacific Ocean. In the course of the voyage, complaint was made to a British consul, at a foreign port, of an offense alleged to have been committed by the master of the ship. The consul, in pursuance of a

British statute, and having power and jurisdiction so to do, caused the master to be conveyed to England, under restraint, to be there proceeded against in respect of the offense charged; and the consul, having power and jurisdiction so to do, caused the plaintiff to leave the ship, and proceed to England as a witness. The latter did not return to the ship, or render any further services thereon for the defendant. The question in the case was as to the liability of the defendant for wages according to the articles signed, for the period subsequent to the departure of the plaintiff for England under the direction or order of the consul. The Court of Queen's Bench, speaking by Lord Campbell, *C. J.*; said: "The money paid into court covered the plaintiff's demand for wages during the whole time that he had served on board the ship; and we think that, upon the facts proved, the ship-owners were not liable to pay him wages for a longer period. By authority of the British Legislature he was then separated from the ship at a foreign port and sent to England, without any reasonable possibility of his ever being able to rejoin the ship during the voyage in which he was engaged. No blame is to be imputed to him, and there has been no forfeiture of wages; but he cannot be considered as having earned the wages in dispute. After he was sent home from Montevideo to England, he neither served under the articles actually or constructively; and as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must then be considered as dissolved by the supreme authority of the State, which is binding on both parties." Again; "Then an act being done by public authority, which rendered any further performance of the contract impossible, we think that the contract was dissolved."

Esposito v. Bowden, 7 El. & Bl., 763, has some bearing upon the question. Bowden, a British subject, contracted to make a voyage to Odessa, a Russian port, and bring from there goods belonging to the other contracting party. Before the voyage was completed, war between England and Russia intervened. Bowden thereupon declined to execute the contract, and was sued for damages for failing to do so. The Court of Queen's Bench said: "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at the time it is declared, and of which it makes the further execution unlawful and impossible, the authorities establish that the effect is to dissolve the contract, and to so absolve both parties from further performance of it."

The same doctrine was announced in *Barker v. Hodgson*, 3 Mau. & S., 267, where Lord Ellenborough said: "If, indeed, the performance of this covenant has been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he has thus been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable in damages."

In his treatise on the law relative to Merchant Ships and Shipping, 11th ed., by Shee, 453, Lord Tenterden says: "If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the perform-

ance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved."

To the same effect speak *Chancellor Kent*, 3 Kent, 248, and *Mr. Chitty* in his treatise on Contracts, 11th Am. ed., 1077. The last named author says: "So the non-performance of a contract will be excused where such non-performance is occasioned by an act done by public authority."

Further citation of authorities would seem to be unnecessary. The reasons assigned in the adjudged cases and by elementary writers, in support of the principles announced in the foregoing authorities, apply to this case and should control its determination. The lessees having been permanently deprived, by competent public authority, of the possession of the leased property, the use of which was the sole consideration for the notes sued on, they were discharged from liability upon the notes, which represented the rents accruing during the period of military occupancy and control.

The decree of the Supreme Court of Tennessee is reversed, with directions to enter or to cause to be entered in the proper court a decree of perpetual injunction in accordance with the principles of this opinion.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—107 U. S., 264.

MARY P. COLLINS, Admrx. of NAPOLEON COLLINS, Deceased, Appt.,

THE STEAMER FLORIDA, Her Tackle, etc.

(See S. C., "The Florida," 11 Otto, 37-43.)

Capture in neutral waters—disavowal of.

1. A capture of a vessel in neutral waters is valid as between belligerents. But the neutral sovereign, whose territory has been violated, may interpose and demand reparation, and is entitled to have the captured property restored.

2. The title to captured property always vests primarily in the government of the captors. When the capture is disavowed by such government, it becomes for all purposes as if it had not occurred, and a libel for the same as prize of war cannot be sustained.

[No. 92.]

Argued Dec. 2, 1879. Decided Mar. 2, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. B. F. Butler, Frank W. Hackett and Wm. E. Chandler, for appellant.

Messrs. Charles Devens, Atty-Gen., and S. F. Phillips, Solicitor-Gen., for appellee.

Mr. Justice Swayne delivered the opinion of the court:

On the night of the 7th of October, 1864, the United States Steamer Wachusett, under the command of Commander Collins, captured the rebel steamer Florida, in the Port of Bahia, in the Empire of Brazil. The Florida had gone there to supply herself with provisions and for the repair of her engine. She was anchored under cover of a Brazilian vessel of war, on the side next to the shore, and Commander Collins was notified that if he attacked her he would be fired upon by a neighboring fort and by the

war vessels of the Empire then present. The commander, availing himself of the darkness of the night, approached and fired upon The Florida, received her surrender, attached a hawser to her extending from his vessel and towed her out to sea. He was pursued by a Brazilian war vessel, but escaped with his prize by superior speed. The steamers reached the United States at Hampton Roads. There The Florida was sunk by a collision, and lies where she went down. The American consul at Bahia was on board of The Wachusett at the time of the attack and incited it and participated in the seizure. He returned to the United States with Commander Collins.

The Brazilian Government demanded the return of the vessel and other reparation by the United States. A correspondence ensued between the two Governments, and the matter was amicably adjusted.

The commander libeled The Florida as prize of war. The court below dismissed the case, and he appealed to this court.

The legal principles applicable to the facts disclosed in the record are well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See, Grotius, *De Jure Belli*, B. 3, ch. 4, sec. 8; *Bynkershoek*, 61, ch. 8; *Burlamaqui*, Vol. II., pt. 4, ch. 5, sec. 19; *Vattel*, B. 3, ch. 7 sec. 132; *Dana*, *Wheat.*, sec. 429 and *n.*, 208; *The Phoenix*, 3 Rob. Adm. Rep., 373; 5 Rob. Adm., 21; *The Anne*, 3 Wheat., 435; [*La Amistad de Rues*], 5 Wheat., 385; *The Santissima Trinidad*, 7 Wheat., 283, 496; *The Sir Wm. Peel*, 5 Wall., 517 [72 U. S., XVIII., 696]; *The Adela*, 6 Wall., 266 [73 U. S., XVIII., 821]; 1 Kent, *Com.*, last. ed., pp. 112, 117, 121.

Grotius, speaking of enemies in war, says: "But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are."

A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

The libelant was not entitled to a decree in his favor, for several reasons.

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.

The case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. *Phillips v. Payne*, 92 U. S., 130 [XXIII., 649].

These things must necessarily be so; otherwise the anomaly would be possible that, while the government was apologizing and making reparation to avoid a foreign war, the offending officer might, through the action of its courts, fill his pockets with the fruits of the of-

See 11 OTTO.

fense out of which the controversy arose. When the capture was disavowed by our government, it became, for all the purposes of this case, as if it had not occurred.

Lastly, the maxim, "*Ex turpi causa non oritur actio*," applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act.

The Brazilian Government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy and the ethics involved in his conduct.

The decree of the Supreme Court of the District of Columbia is affirmed.

JAMES F. MEGUIRE, *Plff. in Err.*,

DESSIL M. CORWINE AND QUINTON CORWINE, *Exrs.* and *Exr.* of RICHARD M. CORWINE, Deceased.

(See S. C., 11 Otto, 108-112.)

Contract void as against public policy—question for jury.

1. Where one agreed to procure the appointment of another as special counsel of the United States in certain litigated cases, and to assist him in managing and carrying on their defense, and in consideration thereof was to receive one half of the fees received by such counsel in such cases; held, that the contract was fraudulent and void as against public policy.

2. A judge has no right to submit a question where the state of the evidence forbids it.

[No. 201.]

Argued Jan. 28, 29, 1880. Decided Mar. 2, 1880.

IN ERROR to the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. Fred P. Stanton, for plaintiff in error.

Mr. Enoch Totten, for defendants in error.

Mr. Justice Swayne delivered the opinion of the court:

The plaintiff in the court below is the plaintiff in error here.

The first count in the declaration avers that, in consideration of the assistance to be rendered by the plaintiff to the defendants' testator in procuring him to be appointed special counsel of the United States in certain litigated cases known as the "*Farragut Prize Cases*," and also in consideration of the assistance to be rendered by the plaintiff in managing and carrying on the defense in those cases, which assistance was accordingly rendered, the testator promised the plaintiff to pay him one half of all fees which the testator should receive as such special counsel, and that the testator did receive as such special counsel in those cases, \$29,950, of which sum the plaintiff was entitled to be paid one half, etc.

The second count is substantially the same

NOTE.—What contracts are void as against public policy, or as illegal; illegal consideration, when a defense; agreement not to bid; for lobby services; for contingent fees; to prevent competition. See note to *Bartie v. Nutt*, 29 U. S. (4 Pet.), 184.

with the first, except that it avers the consideration of the contract to have been the assistance to be rendered by the plaintiff in the defense of the cases named, and is silent as to the stipulation that he was to assist in procuring the appointment of the testator as special counsel for the government.

The third is a common count alleging the indebtedness of the testator to the defendant for work and labor, to the amount of \$12,975.

It appears by the bill of exceptions that the plaintiff called three witnesses to establish the contract upon which he sought to recover. Lovel testified that "The testator also stated that he had agreed to pay the plaintiff one half of all the fees he should receive in said cases, for his aid in getting the appointment of special counsel and for the assistance which the plaintiff was to render in procuring testimony and giving information for the management of the defense in said cases."

"On cross examination, the witness said he knew, before his said conversation with R. M. Corwine, and before Corwine was employed, that Mr. Meguire, the plaintiff, had the selection of counsel in said cases, the Treasury Department only restricting him to the selection of a man who was familiar with admiralty practice, and Mr. Meguire was to utilize the information he professed to have at that time. The bargain, as witness understood it, was that, in consideration of Meguire's procuring Corwine to be employed as special counsel in those cases, and of assisting him in getting evidence and information, Corwine agreed to pay to the plaintiff (Meguire) one half of the fees which he (Corwine) might receive from the United States for services in said cases.

The plaintiff then called Lewis S. Wells, another witness in his behalf, who, being duly sworn, stated that since the commencement of this suit, he thought, sometime last year, he met the testator (R. M. Corwine, deceased) in the Treasury Department, and had a conversation with him about the plaintiff and the *Farragut Cases*. Mr. Corwine was very angry, and said that he had agreed to pay Mr. Meguire one half of his fees in the *Farragut Cases*, and had paid him one half the retainer received in 1869, and \$4,000 in July, 1873, and had taken his receipt in full. That he had found out that plaintiff had not been the means of his appointment as special counsel, and he thought he had paid the plaintiff enough."

Wells testified further, that upon two occasions the testator told him the plaintiff was assisting him in the preparation of the defense in the *Farragut Cases*, and that he had agreed to pay to the plaintiff one half of his fees for the plaintiff's services. This is all that is found in the record touching the terms and consideration of the contract. It was in proof by a late solicitor of the Treasury that the plaintiff strongly urged on him the employment of the testator as special counsel, and that at the instance of the plaintiff he called the attention of the Secretary of the Treasury to the subject, and that the appointment of the testator was thus brought about. The plaintiff had been a clerk in New Orleans, in the office of Colonel Holabird, Chief Quartermaster of the Department of the Gulf, during the war, and had possession of Holabird's papers, from which he derived

the facts communicated to the testator for the defense of government in the prize suits in question. It was not controverted that the amount of fees received by the testator was \$25,950, and that he paid over to the plaintiff \$4,475 before the breach occurred between them. The further sum of \$8,500 was claimed by the plaintiff, and this suit was brought to recover it. The learned counsel for plaintiff in error complains in his brief that "In the charge of the court, page 10, the jury were instructed that 'the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties made another and a distinct contract;' and in the first instruction asked by the defendants and given by the court the jury were told that such an arrangement is void, because it is contrary to public policy, and the plaintiff cannot recover in any form of action for any services rendered or labor performed in pursuance thereof." * *

* "There can be no doubt that this charge was fatal to the plaintiff's whole case. The jury were not allowed to infer, as they well might have done from the testimony of more than one of the witnesses, that the testator, after his appointment as special counsel, recognized an implied agreement to pay the plaintiff half of his fees for the services of the latter rendered during the progress of the business."

In our view of the record this is the turning point of the case. The objection taken to the instructions referred to is not so much to them in the abstract as the concrete. The complaint is, that they closed the door against the inference of another contract which the jury might have drawn from the testimony in the case. To this there are several answers. If there were such testimony, it should have been set forth in the record. After a careful examination, we have been unable to find any. The instructions expressly saved the right of the jury to find another and a different contract, and their attention was called to the subject. They found none. The contract objected to by the court as fatally tainted was proved by witnesses called by the plaintiff himself. He neither proved nor attempted to prove any other. It was, then, neither claimed nor intimated that any other had been made. After the views of the court were announced, it was too late for the plaintiff to change his position and claim for the jury the right to wander at large in the field of conjecture and find as a fact what the evidence wholly failed to establish, and which, if found, would have thrown on the court the necessity to set aside the verdict and award a new trial.

A judge has no right to submit a question where the state of the evidence forbids it. *Bk. v. Eldred*, 9 Wall., 544 [76 U. S., XIX., 763]. On the contrary, where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly. *Merch. Bk. v. St. Bk.*, 10 Wall., 604 [77 U. S., XIX., 1008]. The practice condemned in *Bk. v. Eldred* is fraught with evil. It tends to create doubts which otherwise might not and ought not to exist, and may confuse the minds of the jury and lead them to wrong conclusions. If the instructions here under consideration are liable to any criticism, it is that

they were more favorable to the plaintiff in error than he had a right to claim.

The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. *Marshall v. R. R. Co.*, 16 How., 314; *Tool Co. v. Norris*, 2 Wall., 45 [69 U. S., XVII., 868]; *Trist v. Child*, 21 Wall., 441 [88 U. S., XXII., 623]; *Coppell v. Hall*, 7 Wall., 542 [74 U. S., XIX., 244]. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds, of the class to which the one here disclosed belongs, are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism.

In *Trist v. Child* [*supra*], while recognizing the validity of an honest claim for services honestly rendered, this court said: "But where such services are blended and confused with those which are forbidden: the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. * * * Where the taint exists it affects fatally, in all its parts, the entire body of the contract. In all such cases *potior conditio defendantis*. Where there is turpitude, the law will help neither party." These remarks apply here. The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fundamentally and fatally defective, he could not recover. Conceding all his exceptions, other than those we have considered, to be well taken, the errors committed could have done him no harm, and opposite rulings would have done him no good. In either view, these alleged errors are an immaterial element in the case. *Barth v. Clise*, 12 Wall., 400 [79 U. S., XX., 393].

The judgment is affirmed.

Not sitting, Mr. Justice Strong.

Cited—103 U. S., 276; 111 U. S., 252.

FREDERICK W. PELTON, TREASURER OF
CUYAHOGA COUNTY, OHIO, Appt.,

v.

COMMERCIAL NATIONAL BANK OF
CLEVELAND, OHIO.

(See S. C., 11 Otto, 143-148.)

Assessment of bank shares—injunction.

*1. Although the statutes of a State provide for the valuation of all moneyed capital for purposes
*Head notes by Mr. Justice MILLER.

NOTE.—Taxation of stock or shares in corporations does not impair obligation of contracts; taxation of shares in national banks and of other corporations. See note to Providence Bk. v. Billings, 29 U. S. (4 Pet.), 514.

When an injunction to restrain the collection of a tax will be granted. See note to Dows v. Chicago, 78 U. S., XX., 65.

See 11 OTTO.

of taxation at its true cash value, including shares of the national banks, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while national bank shares are assessed at their full value, is a violation of the Act of Congress which prescribes the rule by which those shares shall be taxed by state authority.

2. In such case, on a payment or tender of the sum which the bank shares ought to pay under the rule established by the Act of Congress, a court of equity will enjoin the state authorities from collecting the remainder.

[No. 827.]

Argued Dec. 4, 5, 1879. Decided Mar. 2, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The case is stated by the court.

Messrs. Grannis & Griswold, for appellant.

Mr. R. P. Ranney, for appellee.

Mr. Justice Miller delivered the opinion of the court:

The Bank, which was plaintiff below, was one of those organized under the Act of Congress of 1864, creating a national banking system, by virtue of which it can sue in the Circuit Courts of the United States. The suit is a bill in equity to enjoin the Treasurer of the County of Cuyahoga, in which the City of Cleveland lies, from collecting a tax alleged to be illegal, and the decree of the Circuit Court is in favor of the complainant. The chief ground of objection to the tax set out in the bill, and that which is mainly relied on in argument here, is, that the Act of the Ohio Legislature of April 12, 1877, entitled "An Act for the Equalization of Bank Shares for Taxation," under which the tax complained of was finally assessed, is in conflict with the Constitution of Ohio on the subject of the uniformity of taxation and, therefore, void.

But there is also a distinct allegation that the tax, as assessed, is in conflict with section 5219 of the Revised Statutes of the United States, because greater than that assessed on other moneyed capital in the hands of individuals, citizens of that State.

It is an appropriate duty, which this court is called upon to perform very often, to protect rights founded on the Constitution, laws and treaties of the United States, when those rights are invaded by state authority. But it is a very different thing for this court to declare that an Act of a State Legislature, passed with the usual forms necessary to its validity, is void because that Legislature has violated the Constitution of the State.

It has long been recognized in this court that the highest court of the State is the one to which such a question properly belongs; and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the state court, it would be indelicate to make such a decision in advance of the state courts, unless the case imperatively demanded it. We will, therefore, inquire first whether the decree of the Circuit Court can be sustained on the other ground.

The bill states very distinctly that the principle on which the valuation of the shares of the Bank for taxation is made "Destroys the uniformity of the rule fixed by the Constitution, and violates the obligation thereby imposed to treat all property alike, to the end that all property may bear an equal burden of taxation, and

is subversive of the Act of Congress allowing such shares to be taxed and intended to protect the owners thereof from greater burdens than were imposed on other moneyed capital at the place where the Bank was located." "The necessary effect," it is added, "of the proceedings had in the assessment and levy of the taxes standing against the shareholders of your orator, and now about to be enforced, has been to deprive such shareholders, both in the matter of valuation and equalization, of all benefit of the Constitution and general laws of the State, by which only uniformity in the burden of taxation upon all descriptions of property could be secured, to take from them the security afforded by the limitation in the Act of Congress and to impose upon them such excessive exactions as to make the franchises granted by said Act comparatively useless." The answer, by way of denial, says that "The taxes mentioned in said complainant's bill, assessed upon the shares of said complainant's banking association, are not taxed at a greater rate than is imposed by the State of Ohio upon other moneyed capital in the hands of individual citizens of said State resident in the City of Cleveland, where said banking association is established and located."

It is thus very clear that, whether the taxation of which the Bank complained was a tax on its shares greater than on other moneyed capital invested in Cleveland, was a question fairly raised by the pleading.

The argument is advanced here which we have just considered in *People v. Weaver* [ante, 705], namely: that if the amount of tax assessed on these bank shares is governed by the same percentage on the valuation as that applied to other moneyed capital, the Act of Congress is satisfied, though a principle of valuation is adopted by which inequality and injustice to the owners of Bank shares must necessarily result. We do not propose to go over that argument again. The cases were considered together in conference, because they involved that principle. It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax the shares at a greater rate within the meaning of the Act of Congress.

It is not asserted that any different percentage on the valuation established was applied to these two classes of capital. The bill very clearly shows that the source of the evil was in the unequal valuation.

Taking the answer, with the meaning which the counsel who drew it attaches in argument here to the words, "taxed at a greater rate," it may be said to amount, as a negative pregnant, to an admission that the valuation was unequal, as charged in the bill. Not only so, but it is not denied in argument that while all the personal property in Cleveland, including moneyed capital not invested in banks, was in the assessment valued far below its real worth, say at one half or less, the shares of the banks, after deducting the real estate taxed to the banks separately, were assessed at their full value, or very near it. The only witness who testified on the subject in this case at all was the Auditor of the County of Cuyahoga for the

years 1876 and 1877, who had been for many years previously an *employé* in the auditor's office. He says that, as county auditor, he was a member of the Board of County Equalization, and acted as such in equalizing the valuation of the shares of the various national and other banks during those years; that the valuation placed on the shares of the national banks was higher in proportion than the valuation on other personal property, including banking capital. He says the matter was talked over in the Board and that it was their aim to make it higher, and that the value placed by them on national bank shares was intentionally higher than the assessed value returned by private banks.

It is necessary here to examine into the mode of assessing the tax as provided in the Act of 1877, which related solely to the tax on bank shares. The 1st section required the cashier of every incorporated bank to make report to the county auditor of the names and residences of its shareholders, the par value of each share, and other facts necessary to enable the auditor to ascertain the value of those shares. The 2d section required the auditor to assess those shares at their true value in money, after deducting the real estate, and to transmit the assessment with the report of the auditor to the annual Board of Equalization of the county in which the Bank was located. This Board was composed, in cities of the class to which Cleveland belonged, of the county auditor and six citizens appointed by the city council. By the 3d section of that Act this Board was authorized to hear complaints and equalize the valuation of the shares of such banks or banking associations, as fixed by said county auditor, and with full authority to equalize said shares according to their true value in money. It is to be remembered that the witness whose testimony we have stated was the county auditor who made the first assessment or valuation of these shares, and he was a member of this City Board which had authority to equalize that valuation. And it was of this City Board he was speaking when he said that they had assessed bank shares generally higher than other personal property, including, of course, other moneyed capital; and that they had assessed the shares of the national banks higher than private banks, and that it was their aim to do so. It is also important to observe, in reference to another view of the question presently to be considered, that this discrimination was neither an accident nor a mistake, nor a rule applied only to this Bank, but that it was a principle deliberately adopted to govern their action in the valuation of all the shares of national banks, and applied to them all without exception. It appears, by the testimony of this witness, that there were seven national banks in the City of Cleveland whose shares, as equalized by the City Board for taxation, amounted to \$3,236,500, to all of which this rule of valuation, making their taxes much higher than on other moneyed capital, was applied, and that this was done for two years at least, and probably many more.

This Act of 1877, however, provided another Board of Equalization, composed of the Auditor of State, Treasurer of State and Attorney-General, to whom all the assessments of bank shares made by the county and city boards were to be referred, and to whom no other property was

referred, for an equalization, which included the whole State. This Board could do no more than increase or diminish the valuation of Banks for each county and city, so as to make them conform to some standard of equality among themselves which that Board might adopt. But the result of their action must be such that it did not increase or diminish the aggregate value of the amount returned by the county auditors of the whole State more than \$100,000.

This Board, for the taxes now in contest, increased the valuation of the shares of the plaintiff Bank \$250,000 above the sum of \$912,000, at which it had been assessed by the County Board, and it increased the valuation of the shares of all the national banks of Cleveland from the sum of \$3,236,500 to \$4,046,045.

It is thus seen that the auditor and the City Board of Equalization valued these shares higher in proportion to other moneyed capital in Cleveland to an extent which the witness does not state, but which may be supposed to be thirty per cent, as it is shown to be in comparison with real estate; and the State Board added about one fourth to that, so that the tax on the national bank shares, against which relief is sought in this suit, is between fifty and sixty per cent on its real value, greater than on other moneyed capital, and, therefore, to that extent forbidden by the Act of Congress.

For this injustice and this violation of the law there ought to be some remedy. To the specific one of an injunction by a suit in chancery and, indeed, to any remedy by the Bank, many objections are raised; but as all of them have been considered and overruled in the case of *Cummings v. Bk.* [ante, 903], which was argued at the same time this case was, it is unnecessary to repeat here what is said in that case.

As the complainant has paid so much of the tax as was not in violation of the Act of Congress, we think the decree of the Circuit Court enjoining the collection of the remainder was right, and it is accordingly affirmed.

Dissenting, *Mr. Chief Justice Waite.*

Cited—101 U. S., 155; 103 U. S., 735; 105 U. S., 319; 10 Biss., 272, 505; 10 N. W. Rep., 566.

WILLIAM CUMMINGS, TREASURER OF LUCAS COUNTY, *Appt.*,
v.

MERCHANTS' NATIONAL BANK OF TOLEDO.

(See S. C., 11 Otto, 153-164.)

Ohio law taxing national banks—rule of valuation—unequal assessment—remedy.

*The Constitution of Ohio declares that "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all the real or personal property, according to its true value in money." And the Legislature has passed laws providing separate State Boards of Equalization for real estate, for railroad capital, and for bank shares, but there is no State Board to equalize personal property, including all other moneyed capital. The equalizing process as to all other personal property and moneyed capital ceases with the County Boards.

*Head note by *Mr. Justice MILLER.*

See 11 OTTO.

Throughout a large part of the State of Ohio, including Lucas County, in which the plaintiff Bank is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one third of its true value, ordinary personal property about the same, and moneyed capital at six tenths of its true value. The State Board of Equalization of bank shares increased the valuation of these shares to their full value. This court holds:

1. That the Act creating the Board for equalizing bank shares is not void as a violation of the Constitution of Ohio, because if the local assessors would discharge their duty by assessing all property at its actual cash value the operation of the equalizing Board would work no inequality of taxation, and a law cannot be held to be unconstitutional which in itself does not conflict with the Constitution, because of the injustice produced by its maladministration.

2. The rule or principle of unequal valuation of different classes of property for taxation, adopted by local Boards of assessment, is in conflict with the Constitution of Ohio and works manifest injustice to the owners of bank shares.

3. When a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power.

4. The appropriate mode of relief in such cases is, upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess.

[No. 563.]

Argued Dec. 4, 5, 1879. Decided Mar. 2, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The case is stated by the court.

Messrs. Hamilton & Ford, Richard Waite, S. O. Griswold and J. K. Hamilton, for appellant, cited: *Wilson v. Supervisors*, 47 Cal., 91; *R. R. Co. v. State*, 25 Ind., 177; *Whitney v. Ragsdale*, 38 Ind., 107; *McVeagh v. Chicago*, 49 Ill., 318; *Tappan v. Bk.*, 19 Wall., 490 (86 U. S., XXII., 189); *State R. R. Tax Cases*, 92 U. S., 575, 611 (XXIII., 663, 672); *Bk. v. Hines*, 3 Ohio St., 1; *Muscatine v. R. R. Co.*, 1 Dill., 536; *High, Inj.*, sec. 255; *Cooley, Tax.*, 127, 154; *Burroughs, Tax.*, 61.

Mr. Wager Swayne, for appellee, cited: *Zanesville v. Richards*, 5 Ohio St., 589; *Bk. v. Hines*, 3 Ohio St., 15; *Merrill v. Humphrey*, 24 Mich., 170; *Cooley, Tax.*, 157; *Henry v. Chester*, 15 Vt., 460; *Torrey v. Millbury*, 21 Pick., 665; *Weeks v. Milwaukee*, 10 Wis., 207; *R. R. Co. v. Boone Co.*, 44 Ill., 243; *Rogers v. Goodwin*, 2 Mass., 477; *Packard v. Richardson*, 17 Mass., 131; *Lavo v. People*, 87 Ill., 405; *Schettler v. Fort Howard*, 43 Wis., 49; *Hearsey v. Supervisors*, 37 Wis., 75; *Marsh v. Supervisors*, 42 Wis., 502.

Mr. Justice Miller delivered the opinion of the court:

The appellee, being a banking association organized under the National Banking Law of the United States, brought in the Circuit Court for the Northern District of Ohio its bill in equity to enjoin the Treasurer of Lucas County from collecting a tax wrongfully assessed against the shares of its stockholders, payment of which was demanded of the Bank. The feature of the assessment of which appellant complains is, that in the valuation of the shares of the Bank for the purpose of taxation they were estimated at a much larger sum in proportion to their real

value than other property, real and personal, in the same city, county and State, and, that this was done under a statute of the State, and by a rule or system deliberately adopted by the assessors for the avowed purpose of discriminating against the shares of all bank stock. Though there is in the argument of counsel an attempt to invoke the aid of the Act of Congress relating to the taxation of the shares of the national banks, we are unable to see, either in the original or supplemental bill, any sufficient allegation on that subject. One clause of the bill asserts that the law of the State, which is the principal subject of complaint, and the tax and assessments under it, are in violation of the Constitution of Ohio and of the Act of Congress; but the vice charged against the assessment is that it is "Three times the proportionate amount which is charged to real property, moneys and credits listed for taxation in said County of Lucas and charged upon said duplicate."

The standard of comparison in the Act of Congress is, "Other moneyed capital in the hands of individual citizens of the State." We do not think we are called on to decide whether a tax which is assailed on the ground of violating that statute is void for that reason until the case, by positive averment, or by necessary implication of such averment, is shown to be within the prohibitory clause.

But the Bank has the same right, under the laws and Constitution of Ohio, to be protected against unjust taxation that any citizen of that State has, and by virtue of its organization under the Act of Congress it can go into the courts of the United States to assert that right; so that if the assessment on its shares was a violation of the constitutional provision of that State concerning uniformity of taxation, the Circuit Court had jurisdiction of that question, concurrent with the State Courts, and we must review its decision.

It is, however, manifest, from the form of the bill in this case and the tenor of the argument in this court, that its object is to have a decision that the State Statute of 1876, which provides specifically for taxation of bank shares, and for nothing else, is void as a violation of the Constitution of that State, as the purpose of the suit against the Treasurer of Cuyahoga County by the Bank at Cleveland [*ante*, 901] is designed to test the subsequent Statute of 1877, which is a substitute for that of 1876.

The two cases were advanced on our docket out of their order, and heard at the same time by this court, on the ground that they both involved the revenue law of the State. We have expressed in that case the reasons which induced us to avoid deciding that question, if it can be done without prejudice to the rights of the parties involved, and we shall see as we progress in the examination of this case whether it can be done.

But we must dispose of some preliminary questions, the first of which is the supposed incapacity of the Bank to sustain this or any other action for the alleged grievance, because, as the persons taxed are the individual shareholders, the damage, if any, is theirs, and they alone can sue to recover for it or to prevent its collection.

The Statutes of Ohio under which these taxes are assessed require the bank officers to report to the county auditor who makes the original

assessment, the names of all its stockholders, their places of residence, and the amount held by each of them, and all the other facts necessary to a fair assessment.

It also authorizes the Bank to pay the tax on the shares of its stockholders and deduct the same from dividends or any funds of the stockholders in its hands or coming afterwards to its possession, and it forbids the Bank to pay any dividends on such stock, or to transfer it or permit it to be transferred on their books, so long as the tax remains unpaid.

In the case of the *Bk. v. Com.*, we held that a Statute of Kentucky, very much like this, which enabled the State to deal directly with the Bank in regard to the tax on its shareholders, was valid and authorized a judgment against the Bank which refused to pay the tax. 9 Wall., 353 [76 U. S. XIX., 701]. It is true, the Statute of Kentucky went further than the Ohio Statute, by declaring that the Bank *must* pay the tax, while the latter only says it may. But the Ohio Statute, by the remedies it provides, places the Bank in a condition where it must pay the tax or encounter other evils, of a character which creates a right to avoid them by instituting legal proceedings to ascertain the extent of its responsibility before it does the acts demanded by the statute.

It is next suggested that since there is a plain, adequate and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

The reply to that is, that the Bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders; an agency created by the Statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the Bank to collect it from them. The Bank, as a corporation, is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere.

But the Statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880; Vol. LIII., Laws of Ohio, 178, secs. 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal Courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal Courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden v. Morton* [*ante*, 453]. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the Statute, is to be enforced, and can only be ap-

properly enforced in the equity side of the court.

The Statute also answers another objection made to the relief sought in this suit, namely: that equity will not enjoin the collection of a tax except under some of the well known heads of equity jurisdiction, among which are not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The Statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such taxes when paid, showing clearly an intention to authorize both remedies in such cases.

Independently of this Statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given.

Article XII., section 2, of the Constitution of the State of Ohio declares that "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all the real and personal property, according to its true value in money;" and section 3, that "The General Assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues of every description—without deduction—of all banks now existing, or hereafter created, and all bankers, so that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals."

In construing this provision of the Constitution the Supreme Court of Ohio has said that "Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the *mode of the assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a state tax, it must be uniform over all the State; if a county, town or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property must be taxed alike, *equally*, which is taxing by a uniform rule." *Bk. v. Hines*, 3 Ohio St., 15.

We are not aware that this decision has ever been overruled. It will be seen also that the Constitution requires all property to be taxed "according to its true value in money." It is said that the various statutes for assessing the taxes are all based upon this principle of valuation, and a statute of May, 1868, is cited in the brief as enacting that all property of every

description within the State shall be entered for taxation at its true money value. If this principle, so clearly embodied in the Constitution as expounded by the Supreme Court, had been made the rule of action by those who have charge of the administration of the laws for assessing taxes, there could be no place for the complaint of plaintiff in this case.

The State, however, by her legislation, has adopted a system of valuation of property into which we must look for a moment to enable us to appreciate the effect of the evidence as to the actual valuation of which plaintiff complains.

Instead of having all property subject to taxation valued by one commission or authorized body, there are at least four different bodies acting independently of each other in regard to as many different classes of property in the process of final estimate of values for taxation.

The first of these concerns real estate, which is valued once in each decade, that valuation remaining unchanged during the whole ten years, except that what is called the new constructions of each year is added to the original sum. The assessments of real estate by the district assessors in the county, and the ward assessors in the large cities, is first submitted to a County or City Board of Equalization, and this again to a State Board of Equalization, to be elected once in ten years by the electors of each senatorial district. Of this Board the Auditor of State is a member. The functions of this final Board seem to be to increase or decrease the county valuations of real estate returned to them, according as they are found to be above or below the true money value of the property. But in doing this they only act on a county or city valuation as a whole, and not on the particular pieces of property assessed; and they cannot reduce or increase the entire valuation for the State more than twelve and a half per cent of the aggregate.

Personal property (other than bank shares and railroad property) and the new constructions in real estate are assessed annually by district and ward assessors in the counties and cities, and their assessment is returned to a County or City Board of Equalization, and we are not aware that this valuation is subject to any further equalization or submitted to any further correction. This assessment, of course, includes all personal property, money, credits and investments of capital other than those in banks and railroads. In regard to railroads, there is a submission of all of them to a State Board of Equalization, which finally passes upon the assessments of the counties. In reference to banks, which are first assessed by the county auditor, there is also a State Board of Equalization, whose function is limited to equalizing throughout the State the valuation of *the shares of incorporated banks*.

We thus see that one Board of Equalization has charge of the valuation of the real estate of the whole State once in every ten years, another has charge of the valuation of railroad property every year, and a third has charge of the valuation of shares of incorporated banks every year, and the amount fixed by these State Boards is, in every instance, the final basis of taxing that species of property for State and county purposes.

We are asked to decide that, as to this final

Board of Equalization of bank shares, whose function is to equalize the valuation of those shares, *as among themselves*, throughout the State, with no power to consider the valuation of real estate which comes before another Board only once in ten years, or other personal property and invested capital which never comes before any State Board, that its operations must necessarily produce inequality in valuation as it regards other property and is, therefore, void, as in conflict with the State constitutional rule of uniformity, and with the 3d section of the same article of the Constitution, declaring "That all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals."

But there are two reasons why we cannot so hold: 1. It might be that in every instance the result would be the valuation of bank shares at a lower ratio in proportion to its real value than that of any other property and, therefore, plaintiff would have no ground of complaint. And, secondly, what is more important, if these original valuations and equalizations are based always, as the Constitution requires, on the actual money value of the property assessed, the result, except as it might be affected by honest mistakes of judgment, would necessarily be equality and uniformity, so far as it is attainable. So that, while it may be true that this system of submitting the different kinds of property subject to taxation to different Boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful, while the statute is valid.

The evidence, we are compelled to say, shows this to be true of the case before us.

It may be summed up in the statement, that the assessors of real property, the assessors of personal property, and the Auditor of Lucas County, in which is the City of Toledo, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed at one third of its actual value, and money or invested capital at six tenths of its value, and that the assessment of the shares of incorporated banks, as returned by the State Board of Equalization for taxation to the Auditor of Lucas County, was fully equal to the selling prices of said shares and to their true value in money. This is shown by the testimony of four or five district assessors, by the Auditor of the County for the year 1876, and for several previous years, who had been long an *employé* in that office. It is also shown by this witness that at one time the Auditor of Lucas County held a conference with the auditors of the Counties of Fulton, Williams, Defiance, Henry, Paulding, Ottawa, Wood, Sandusky, Seneca and Van Wirt, and that the rule by which property was valued in Lucas was the result of this conference, and was to be applied in all these counties. The district assessors, whose duty it was to make this primary valuation of all per-

sonal property (except bank stocks and railroad property), also testify that for the year 1876 they had a meeting, and adopted that rule of valuation as their guide, and so applied it. All this is uncontradicted. Nor is there any question that while the auditor probably returned the bank shares of Toledo at six tenths of their value, or thereabouts, the State Board of Equalization increased it so that, as the cashier of this bank swears, its shares were assessed at their full cash value.

The testimony before us in the case argued with this [*ante*, 901] shows that the same rule of valuation was adopted in Cuyahoga County with the same effect on the shares of the incorporated banks of Cleveland. It probably pervades the system of assessment for the entire State of Ohio, and may have caused the necessity of Boards of Equalization quite as much as mistakes of judgment or other sources of inequality which these Boards are designed to remedy. But while these separate Boards, acting upon returns of different classes of property, and limited in each case to equalizing the value as between the same class in different counties, have no common or united action among themselves, and no common power to equalize the valuation of the different classes of property in relation to each other, it is obvious that their capacity to produce the uniformity which the Constitution was intended to effect, is very small indeed. They have no power at all to affect the valuation of real estate except once in ten years. They have no power over the valuation of personal property, including all money capital, except bank shares, as it is fixed by the County and City Boards; and these being beyond their control, the effort of the State Board to raise the assessment of the shares of banks to their value in money only increases the glaring inequality arising from the valuation of the County Boards.

It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The Constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases "salable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. *Burr., Tax.*, p. 227, sec. 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.

And while it may be true that there has not been in other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual value, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value. If we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will, probably, be found in the difficulty of subjecting personal property, and especially invested capital, to the inspection of the assessor and the grasp of the collector. The effort of the landowner, whose property lies open to view, which can be subjected to the lien of a tax not to be

escaped by removal or hiding, to produce something like actual equality of burden by an undervaluation of his land, has led to this result. But, whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property around which the Constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy. The complainant having paid to defendant, or into the Circuit Court for his use, the tax which was its true share of the public burden, *the decree of the Circuit Court enjoining the collection of the remainder is affirmed.*

Mr. Chief Justice Waite, dissenting:

I feel compelled to withhold my assent to this judgment. There can be no doubt that the shares of this Bank were overvalued as compared with other property in the city; but if a State provides, by a valid law, for the valuation of property for taxation, and furnishes appropriate tribunals for the correction of errors before a tax is assessed, if complaint is made, I think it is not within the power of a court of equity to enjoin the collection of the tax simply because of an inequality in valuation; and this as well when the error arises from the adoption by the valuing officers of a wrong rule applicable to many cases, as from a mistake in judgment as to a single case. The valuation, as finally fixed by the proper officers, or equalizing Board, under the law, is, in my opinion, conclusive when there has been no fraud. As it seems to me, this case comes within the operation of this principle.

Cited—101 U. S., 148; 103 U. S., 735; 105 U. S., 319; 19 Blatchf., 184; 10 N. W. Rep., 586; 10 Biss., 272, 505.

PEOPLE'S BANK OF BELLEVILLE, *Plff.*
in Err.,
v.

MANUFACTURERS' NATIONAL BANK
OF CHICAGO.

(See S. C., 11 Otto, 181-184.)

Power of national bank to guaranty paper—estoppel—ratification.

1. A national bank, on transferring a promissory note, may guaranty it.

2. It is to be presumed that the Vice-President had the power to make such guaranty in the name of the Bank, and the Bank is estopped to deny it.

3. The retention and enjoyment of the proceeds of the transaction by the Bank constituted an acquiescence in such act as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards.

[No. 873.]

Submitted Jan. 22, 1880. Decided Mar. 2, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. The case is stated by the court.

Mr. Charles W. Thomas, for plaintiff in error, cited: *R. R. Co. v. Howard*, 7 Wall., 392 (74 U. S., XIX., 117); *Kelsey v. Bk.*, 69 Pa. St., 426; *Bredin v. Dubarry*, 14 Serg. & R., 30; *Gordon v. Preston*, 1 Watts, 387.

See 11 OTTO.

Mr. Justice Swayne delivered the opinion of the court:

This case was submitted to the court without the intervention of a jury. The court found the facts and gave judgment for the defendant. The plaintiff thereupon sued out this writ of error and brought the case here for review. The Act of Congress regulating the procedure adopted seems to have been carefully complied with.

The plaintiff and defendant, in the court below, are respectively the plaintiff and defendant in error here. For convenience, we shall speak of them in this opinion by their former designations.

The facts lie within a narrow compass, and there is no controversy about any of them.

On the 8th of August, 1873, Henry E. Picket made his ten promissory notes of that date, each for \$5,000, all payable to his own order, indorsed by him, all bearing interest at the rate of ten per cent, payable semi-annually and all payable one year from date. Eight of these notes are described in the plaintiff's declaration. Picket delivered the notes to the defendant to be negotiated to the plaintiff, pursuant to a prior agreement between him and the defendant, that the latter should so negotiate the notes and apply the proceeds to the cancellation of other indebtedness then due from him to the defendant. On the 8th of August, 1873, M. D. Buchanan, Vice-President, and one of the directors of the defendant, with the knowledge and consent of the president and cashier of the defendant, who were also directors, but without any authority from the Board of Directors, as a Board, or of a majority of them individually, or any notification to the Board of Directors, as a Board, transmitted the notes to the plaintiff with a letter, in which occurs the following language: "In accordance with your telegram I herewith hand you ten notes of \$5,000 each," etc., * * * "We debit your account \$50,000." * * * "This bank hereby guarantees the payment of the principal sum and interest of said notes." This letter was written below one of defendant's letter-heads, and signed "M. D. Buchanan, Vice-President." The notes were also indorsed, "Henry E. Picket," and below, "M. D. Buchanan, Vice-President Manufacturers' National Bank." The defendant was the plaintiff's correspondent at Chicago, and the plaintiff's account with the defendant was debited with \$50,000 on account of the notes. At the same time, Picket's paper in the defendant's hands was canceled to the same amount. All the notes were protested at maturity for non-payment, and due notice was given to the defendant. Nothing has been paid on either of the notes. Besides a special count in the declaration upon the guaranty of each of the eight notes involved in this suit, there was a common count for money had and received.

The case was submitted in this court without an oral argument. The opinion of the learned Judge who decided the case in the circuit court is not in the record, and no brief has been submitted on behalf of the defendant. A few remarks will suffice to give our view of the law touching the rights of the parties.

The national Banking Act, 13 Stat. at L., 99, R. S., 999, sec. 5136, gives to every bank created under it the right "To exercise by its

Board of Directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, by receiving deposits," etc. Nothing in the Act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly, a bank might indorse, "waiving demand and notice," and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the Vice-President had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences.

The doctrine of *ultra vires* has no application in cases like this. *Merch. Bk. v. St. Bk.*, 10 Wall., 604 [77 U. S., XIX., 1008].

All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the defendant from resisting the demand of the plaintiff. *Whart. Ag.*, sec. 89; *Big. Estop.*, 423; *R. R. Co. v. Howard*, 7 Wall., 392 [74 U. S., XIX., 117]; *Kelsey v. Bk.*, 69 Pa., 426; *Steamboat Co. v. McCutchen*, 15 Pa., 13.

A different result would be a reproach to our jurisprudence.

Whether, if the guaranty were void, the fund received by the defendant as its consideration moving from the plaintiff could be recovered back in this action upon the common count, is a point which we do not find it necessary to consider. See, *U. S. v. Bk.*, 96 U. S., 33 [XXIV., 647].

The judgment of the Circuit Court is reversed and the case is remanded, with directions to enter a judgment in favor of the plaintiff in error.

Cited—112 U. S., 165.

STEPHEN E. JONES, Assignee in Bankruptcy of CHARLES H. CLIFTON, *Appt.*,

v.

CHARLES H. CLIFTON ET AL.

(See S. C., 11 Otto, 225-231.)

Marriage settlement—trustees—revocation—husband's interest—good faith.

1. A husband has a right to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors.

2. Real or personal property may be given or devised to, or settled upon a married woman, either

before or after marriage, for her separate and exclusive use, without the intervention of trustees.

3. The power of revocation and appointment to other uses, reserved to the husband in the deeds, do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made.

4. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will, or which passes to his assignee in bankruptcy.

5. The presence of his reservation in the deed does not tend to create an imputation upon his good faith and honesty in the transaction.

[No. 695.]

Submitted Dec. 8, 1879. Decided Mar. 2, 1880.

APPEAL from the Circuit Court of the United States for the District of Connecticut.

The appellant brought this suit in equity in the court below, attacking the validity of two deeds made by the bankrupt, the appellee, Charles H. Clifton, directly to his wife, the other appellee, and seeking a decree declaring them to be invalid, and that the property purporting to be conveyed thereby had vested in and should be surrendered to the appellant. On the hearing a decree was entered dismissing the bill with costs; and thereupon an appeal was immediately prayed and allowed in open court.

Messrs. B. H. Bristow and James A. Beattie, for appellant:

The deeds here, nominally, convey the property to the separate use of Mrs. Clifton, but they do not in fact, nor are they in the nature of a provision for her; nor did they distinctly separate the property from Clifton's other estate. It remained as much under his dominion after as before the deeds were made. The separate estate of a married woman is that alone of which she has exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases.

Petty v. Malier, 14 B. Mon., 247; *Harris v. Harbeson*, 9 Bush, 402; 2 Perry, Trusts, 2d ed., sec. 651.

The powers here are such as would have enabled Clifton to dispose of the property for his own benefit when he saw fit, and for him to have done so would not have been fraud on the powers.

1 Sugd. Pow. (marg.) pp. 471, 225; 2 Sugd. Pow. (marg.) pp. 181-198; *Aleyn v. Belcher*, 1 Eden, 132; *S. C.* 1 Lead. Cas. in Eq. (marg.) 377.

The legal title to the property remained in Clifton. The deeds being void at law, only an equitable interest, if anything, could pass by them, the legal title remaining with the husband, who, in a proper case would be treated as a trustee for the wife.

1 Bish. Mar. Wom., sec. 717.

Clifton, then, under these deeds, held the legal title to the property, coupled with the power of disposing of it for his own benefit. This seems to be nothing less than absolute ownership.

Bath & Montague's Case, 3 Ch. Cas., 100; *Brand's Case*, Ley, 39; *Bainton v. Ward*, 2 Atk., 172; *Ashfield v. Ashfield*, 2 Vern., 287; *Troughton v. Troughton*, 3 Atk., 656; *S. C.* 1 Ves., 86; *White v. Sansom*, 3 Atk., 411.

As these deeds really make provision for Clifton himself, by means of the large powers reserved, they are fraudulent and void, even as to subsequent creditors.

NOTE.—Settlement or conveyance for benefit of wife and child; when good, or void as to creditors. See note to *Sexton v. Wheaton*, 42 U. S. (1 How.), 219.

Brinton v. Hook, 3 Md. Ch., 477; 2 Sugd. Pow. (marg.), 234; *Turback v. Marbury*, 2 Vern., 510; *Peacock v. Monk*, 1 Ves., 132; see, Burr. Assign., 2d ed. 179; *Riggs v. Murray*, 2 Johns. Ch., 565; *S. C.*, 15 Johns., 571.

Mr. Martin Bijur and *Bijur & Davie*, for appellees.

Mr. Justice Field delivered the opinion of the court:

This is a suit to set aside two deeds executed by Charles H. Clifton, to his wife, and to compel a transfer of the property embraced in them to his assignee in bankruptcy. Clifton married in 1870, and was possessed at the time of a large estate. Previously to his marriage he had taken out three policies of insurance on his life, each for \$10,000. Soon after his marriage he took out two additional policies on his life, each for the same amount as the previous ones. In October, 1872, by his deed-poll he conveyed to his wife, in consideration of the love and affection he bore her, to hold as her separate estate, free from his control, use and benefit, a small parcel of land in the City of Louisville, in the State of Kentucky; and by the same instrument, upon the like consideration, and to be held for the same separate use of his wife, he assigned to her the five policies of insurance on his life.

The deed contained a clause reserving to himself the power to revoke the grant and assignment, in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare.

In April, 1873, by another deed-poll, he conveyed to his wife, upon like consideration of love and affection, to hold as her separate estate, free from his control, use or benefit, two other parcels of land; one consisting of a lot in the City of Louisville, Kentucky, and the other his country place in the County of Jefferson, in that State, comprising thirty-eight acres. The instrument contained a reservation of a power of revocation and appointment to other uses similar to that of the first deed, the power of appointment, however, being somewhat fuller, in providing for its execution either by deed or writing, to take effect as a devise under the Statute of Wills in Kentucky.

These deeds were properly acknowledged and recorded in the counties where the real property was situated. At the time of their execution, the grantor was not in any business, and did not intend engaging in any; was worth about \$250,000, and owed only a few inconsiderable debts, which were soon afterwards paid. The deeds were made at the urgent solicitation of his wife, who perceived that his habits were those of an indiscreet young man, somewhat inclined to dissipation, and she was naturally desirous of providing against a possible waste of his property.

In 1873, a general financial panic passed over the country; the values of all kinds of property greatly depreciated in the market, and land in the country could scarcely be disposed of at any price. By the shrinkage in values and losses in the subsequent years of 1874 and 1875, by his being surety for others, and by bad management, his estate was wasted, and he became hopelessly insolvent. In December 1875, upon

his petition, he was adjudged a bankrupt by the District Court of Kentucky. The complainant was subsequently appointed assignee of his effects, and received an assignment of his property. The proved debts against him amounted to \$13,000, and his estate in the hands of the assignee was of little value.

The assignee seeks to set aside the deeds upon various grounds, which, however, may be embraced in the following: 1. That they are void, because made directly to his wife, without the intervention of a trustee, and so passed no interest to her; 2. That, by the reservation to the grantor of a power of revocation and appointment to other uses, they were designed to hinder and defraud his future creditors, whilst he retained the control and enjoyment of the property; and, 3. That the power of revocation and appointment were assets which passed to the assignee in bankruptcy, and can be executed by him for the benefit of creditors.

The questions thus presented, though interesting, are not difficult of solution. The right of a husband to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts, as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by *Chief Justice Marshall* in *Sexton v. Wheaton*, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others. In that case the husband had purchased a house and lot within the District of Columbia, and taken the conveyance in the name of his wife, and afterwards made improvements upon the property. Subsequently he became involved in debt, and his creditors, having obtained a judgment against him, filed a bill to subject this property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying that if the conveyance were upheld the wife might be compelled to account for the value of the improvements. But the court held, after an extended consideration of the authorities, that, as the husband was at the time free from debt, the conveyance was to be deemed a voluntary settlement upon her; and as it was not made with any fraudulent intent, it was valid against subsequent creditors; and that the improvements upon the property stood upon the same footing as the conveyance, it appearing that they had been made before the debts were contracted. 8 Wheat., 229. That case does not differ in principle from the one before us. The husband in this, as in that one, was free from debt when he made the deeds, which were voluntary settlements upon his wife. It cannot make any substantial difference that in the case cited the money of the husband was expended in the purchase of the property, and the conveyance was taken in the name of the wife; and that in the present case the property was owned at the time by the husband, and was transferred directly by him to her. The transaction, in its essential features, would have been the same as now, if the husband had sold his lands and invested the

proceeds in other property and taken a conveyance in her name. The circuity of the proceeding would not have altered its character nor affected its validity. In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legal or moral, to provide for them, as in the case of a wife or children or parents, the only question that can properly be asked is: does such a disposition of the property deprive others of any existing claim to it? If it does not, no one can complain if the transfer be made matter of public record, and not be designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee, whether it be by direct conveyance from the husband or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees, in order that the property conveyed may be held as her separate estate beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required. This has been established in courts of equity, says Story, for more than a century, so "That whenever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also." Eq. Jur., sec. 1380. And he adds to this observation, that "It will make no difference whether the separate estate be derived from her husband himself or a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice." There is nothing in the circumstances attending the execution of the deeds in this case which should prevent the full application of the doctrine stated for the protection of the wife's interest against the claim of the assignee for the benefit of the creditors of the husband. *Lloyd v. Fulton*, 91 U. S., 485 [XXIII., 365].

The powers of revocation and appointment to other uses reserved to the husband in the deeds in question, do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended "To meet the ever-varying interests of family connections." *Riggs v. Murray*, 2 Johns. Ch., 565. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to everyone, that the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud and, ex-

cept when made solely to guard against the extravagance and imprudence of the settler, such settlements have, in many instances, been annulled on that ground. Several of them are cited in the very able and learned opinion of the District Judge who presided in the circuit court when this case was there heard. The law in England, by which property can be kept in the same families for many years, has, perhaps, caused greater importance to be given in that country than in this to the insertion in deeds of settlement of a power of revocation and appointment to other uses. Here the absence of the reservation is only a fact to be explained, and is to have more or less weight, according to the circumstances of each case. In the case before us, the husband does not appear to have had his attention drawn to the reservation. He desired to have the property settled upon his wife, and he intrusted the preparation of the deed to his counsel. There was clearly no fraudulent intent on his part; no proof of any such intent was produced or stated to be in existence. The only fraud asserted in argument to exist, is constructive fraud arising from the reservation in question. But its presence in the deed, as is clear from all the authorities, does not tend to create an imputation upon his good faith and honesty in the transaction. *Huguenin v. Basely*, 14 Ves., 273; *Coutts v. Acworth*, L. R., 8 Eq., 558; *Wollaston v. Tribe*, L. R., 9 Eq., 44; *Everitt v. Everitt*, L. R., 10 Eq., 405; *Hall v. Hall*, L. R., 14 Eq., 365; *Phillips v. Mullings*, L. R., 7 Ch. App., 244; *Hall v. Hall*, 8 Ch. App., 430; *Toker v. Toker*, 3 De G., J. & S., 487.

As is very justly observed in the opinion of the court below, the insertion of the power of revocation and new appointment, so far from proving that the grantor contemplated a fraud upon his future creditors, tends to show the contrary. Should he revoke the settlements, the property would revert to him and, of course, be liable for his debts; and should he exercise the power of appointment for the benefit of others, the estate appointed would be liable in equity for his debts.

The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could, indeed, exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a chose in action. It did not, therefore, in our judgment, constitute assets of the bankrupt which passed to his assignee.

Decree affirmed.

Cited—111 U. S., 118; 112 U. S., 353.

JAMES H. SIMMONS, *Plff. in Err.*

2.

AUGUST WAGNER.

(See S. C., 11 Otto, 260-263.)

Possession of public lands—void subsequent patent.

1. One in possession of public lands, under a certificate of the register that he had paid for the same,

without a patent, can successfully defend against an action of ejectment to recover the possession by the holder of a patent issued upon a subsequent purchase of the land as part of the public domain.

2. When lands have once been sold by the United States and the purchase money paid, the lands sold are no longer subject to entry, and a subsequent patent of the same lands to another person is void.

[No. 1040.]

Submitted Jan. 22, 1880. Decided Mar. 2, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois. The case is sufficiently stated by the court.

Messrs. **A. L. Knapp** and **Clinton L. Conkling**, for plaintiff in error.

Mr. Chas. P. Wise, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This was an action of ejectment brought by Simmons, the plaintiff in error, against Wagner, the defendant, to recover the possession of the N. E. fr. 1-4 sec. 19, T. 4, N. R. 9 W. of the third principal meridian, Illinois. Simmons claimed title under a patent from the United States, dated April 25, 1871, granting him the lands as the assignee of one Mecke, who entered them at the Land-Office January 25, 1871. Wagner claimed through a purchase made under the old credit system, April 17, 1816, by one John Lewis, and a paper bearing date July 8, 1829, which purported to be a certificate of full payment of the purchase money in favor of William Russell.

A trial was had to the court without a jury, and resulted in a judgment for the defendant. There was no special finding of facts, but the evidence is set out in full in a bill of exceptions, which concludes as follows: "The court found the issue joined for the defendant on the ground that the premises in controversy, on the issue of the final certificate to William Russell, ceased to be a part of the public domain, and were not thereafter subject to entry by individuals or sale by the United States; and to which finding the plaintiff then and there excepted."

To justify this conclusion, the court must have found as a fact that the final certificate in question was a genuine document, and issued by the proper officer in the regular course of his official duty. This finding is conclusive on us, for we have many times decided that a bill of exceptions cannot be used to bring up the evidence for a review of the findings of fact. *The Abbotsford* [ante, 168], and the cases there cited. We have to consider, then, upon this branch of the case, only the question whether one in possession under such a certificate, without a patent, can successfully defend against an action of ejectment to recover the possession by the holder of a patent issued upon a subsequent purchase of the land as part of the public domain.

It is well settled that when lands have once been sold by the United States and the purchase money paid, the lands sold are segregated from the public domain and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. *Wirth v. Branson* [ante, 86]; *Frisbie v. Whitney*, 9 Wall., 187 [76 U. S., XIX., 668]; *Lytle v. Arkansas*, 9 How., 314. Where the right to a patent has once become vested in a

purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty. *Barney v. Dolph*, 97 U. S., 652 [XXIV., 1063]; *Stark v. Starrs*, 6 Wall., 402 [73 U. S., XVII., 925].

This leads us to the inquiry, whether Lewis and his assigns had, under the facts as found, acquired a vested right in the lands when the entry was made by means of which Simmons got his patent. By the statute under which Lewis made his entry in 1816, it was provided that purchases of public lands might be made on credit and that when payment of the purchase money was completed the register of the Land-Office should give, "A certificate of the same to the party and, on producing to the Secretary of the Treasury the same final certificate, the President of the United States is hereby authorized to grant a patent of the lands to the said purchaser, his heirs or assigns." 2 Stat. at L., 76, sec. 7. It follows, then, that if the final certificate in this case was genuine and valid, as, in effect, it has been found to be, Russell, the assignee of Lewis, had the legal right to demand from the President a patent for the lands described. This, certainly, was a complete segregation of the lands in controversy at that date. The sale to Mecke and patent thereon to Simmons, more than thirty years afterwards, were null and void and conveyed no title as against Russell and his assigns. It is of no consequence whether the assignees of Russell could get a patent in their own names or not. After the certificate issued, the lands were no longer in law a part of the public domain, and the authority of the officers of the government to grant them, otherwise than to him or some person holding his rights, was gone. The question is not whether Wagner, if he was out of possession, could recover in ejectment upon the certificate, but whether Simmons can recover as against him. He is in a situation to avail himself of the weakness of the title of his adversary, and need not assert his own. We think it clear, therefore, that the court below was right in giving judgment for defendant on the facts found.

Several exceptions were taken, during the progress of the trial, to rulings on the admissibility of evidence. While errors have been formally assigned on all these exceptions, only a few have been insisted on in the argument. Some have been already disposed of, as the objections were made entirely upon the assumption that nothing short of a superior legal title could defeat the patent which Simmons held. There was some evidence to prove the signatures of the register to the final certificate. That was one of the facts in the case, and the general finding in favor of the validity of the certificate is equivalent to a finding that its due execution had been proved. The question here is, not whether the deeds from Lewis to Russell, without the clerk's certificate as to the official character of the officer before whom the acknowledgment was made, would be sufficient to justify the Register of the Land-Office in issuing his final certificate; but whether, in this action, they were admissible without such certificate to prove the fact that an assignment had been actually made. For aught we know, they were

properly certified when presented to the register. Copies from the county records were offered in evidence below, and the records were made in 1816, long before any action was had by the register. It is not claimed that any certificate was necessary to authenticate them for record or to make them admissible as evidence in the cause.

On the whole, we see no error in the record, and the judgment is affirmed.

Cited—10 N. W. Rep., 522.

UNION PASSENGER RAILWAY COMPANY, *Plff. in Err.*,
v.
PHILADELPHIA.

(See S. C., 11 Otto, 528-540.)

License fee of city railroad—taxation—increase of license fee—charter rights.

1. A clause in a charter of a city railroad company, that the company shall pay such license for each car run as is paid by other passenger railway companies in the city, which was \$30, is not a contract that the license charged for such cars should never exceed the sum of \$30.

2. Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all.

3. A subsequent Act of the Legislature, which required such companies to pay the annual license of \$50 for each car, is not unconstitutional as violating a contract.

4. Where power to alter, revoke or annul any charter of incorporation was vested in the Legislature by the Constitution of the State, before the defendant company was incorporated, the Legislature may increase such license fee.

[No. 177.]

Argued Jan. 29, 1880. Decided Mar. 2, 1880.

ERROR to the Supreme Court of the State of Pennsylvania.

The case is stated by the court.

Messrs. F. Carroll Brewster and David W. Sellers, for plaintiff in error.

Messrs. Charles E. Morgan, Jr., and William Newton West, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Stipulations in a statute of a State, exempting certain property, rights or franchises from taxation, or engaging that the same shall be taxed only at a certain rate, if made for a valuable consideration received by the State whose Legislature enacted the stipulation, is a contract and, as such, comes within the rules of decision specifying the description of contracts entitled to protection from modification or repeal under the guaranty of the 10th section of the 1st article of the Constitution.

Exemptions of the kind, however, are to be strictly construed, the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms, and that, in order that it may be effectual, it must appear that the contract was made in consequence of some beneficial equivalent received by the State, it being conceded that if the exemption was granted *only* as a privilege it may be recalled at the pleasure of the Legislature. *Cooley*

ley, Const. Lim., 4th ed., 342; *Cooley*, Tax., 146.

Companies were created by the Legislature of the State, more than thirty years ago, for running street cars in the streets of the plaintiff City, whose charters made it necessary that the managers should obtain the consent of the City Councils before they commenced to use and occupy the streets for that purpose. Ordinances were accordingly passed by the city authorities which required companies organized under such statutes to pay for the use of the City a license fee of \$30 for each car intended to be run. Subsequent charters of the kind were granted by the Legislature, which did not contain any provision requiring the companies or their agents to procure the consent of the authorities of the City before they could use the public streets for the running of their passenger cars.

These companies denied the validity of the license charge, which gave rise to litigation and to new legislation, by which authority was given to the City Councils to provide by ordinance for the proper regulation of omnibuses or vehicles in the nature thereof, and to that end it was enacted that they might, from time to time, pass ordinances to provide for the issuing of licenses to as many persons as may apply to keep and use omnibuses or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor, and to provide for the punishment of the owners and drivers of the same for any violation of the provisions of the ordinances to be created by virtue of the authority conferred. *Sess. L. Pa., 1850, 469.*

Authority was, by that Act, expressly vested in the city authorities to pass ordinances upon the subject therein described, and to charge a reasonable annual license fee for the license or other sum for the same. Pending the period during which that enactment continued to be in operation, the Legislature of the State passed the Act incorporating the defendant Company, with the powers, privileges, duties and obligations expressed in the Act of incorporation. *Sess. L. Pa., 1864, 300.*

Corporate privileges of the usual character are, by the charter, granted to the Company, and the 10th section provides that whenever their dividends shall exceed six per centum per annum on the par value of the capital stock, the Company shall pay for the use of the City a tax of six per centum on such excess over six per centum on the par value, and that they shall also pay "Such license fee for each car run by the Company as is now paid by other passenger railway companies."

Railway companies running cars on the streets of the City were required to pay at the time the defendant Company was incorporated, for each and every car intended to be run, the annual license fee of \$30, as appears by the ordinance then in force and fully set forth in the agreed statement of facts. Annual payments to that amount, it seems, were made by the defendant Company, which may be inferred from the fact that the plaintiff City makes no claim for any deficit during that period.

Coming to the matter in controversy, it appears that the Legislature, on the 11th of April, 1868, passed the Act which is the principal subject of controversy. Section 1 provides that the passenger railway corporations of the City

shall pay annually to the City in the month of January, the sum of \$50, as required by their charters, for each car intended to run over their roads during the year, and that they shall not be obliged to pay any larger sum; and the same section provides that the City shall have no power to regulate such companies unless so authorized by the laws of the State. Sess. L. Pa., 1868, 849.

Regular payments, as required, were made by the defendant Company until the year 1875, when they refused to pay any greater sum than \$30 per year for each car run. Payment of the excess beyond \$30 being refused, the authorities of the City instituted the present suit in the common pleas to recover the balance as claimed. Service was made, and the parties having appeared, filed the agreed statement of facts exhibited in the transcript. Hearing was had, and the court of original jurisdiction rendered judgment in favor of the plaintiff City for the sum of \$4,218.60. Dissatisfied with the judgment, the defendant Company removed the cause into the Supreme Court of the State, where the judgment was affirmed. Still not satisfied, the defendant Company removed the cause into this court, and assigns for error the following causes: (1) That the Act of the Legislature, defining the duties and liabilities of railway companies, is in conflict with that provision of the Constitution which prohibits a State from passing any law impairing the obligation of contracts. (2) That the judgment of the court below is in conflict with that provision of the Constitution.

Attempt was made about the time the defendant Company was incorporated to support the theory that a street passenger car was not a vehicle in the nature of an omnibus, and that the street passenger cars were not taxable in any form under the legislative Act which authorized the city authorities to issue licenses to persons to keep and use omnibuses or vehicles in the nature thereof, upon the ground that the street passenger car was not a vehicle in the nature of an omnibus. Controversy arose, and the Supreme Court of the State effectually disposed of the question in favor of the City.

Questions of importance were decided by the court in that case, most or all of which are more or less applicable to the case before the court. They are as follows: (1) That a grant to a corporation to carry passengers in cars over the streets of a city does not, necessarily, involve exemption from liability to municipal regulations, the right granted being neither greater nor less than that possessed by a natural person. (2) That when a corporation is authorized to pursue a specified business within a municipality, it is intended that the business shall be conducted under the rules, restrictions and regulations which govern others transacting the same business. (3) That the right to construct cars and own a railway neither enlarges nor diminishes the right to run cars and carry passengers, and that a reasonable charge for the use of the privilege to transact such a business is not a denial of the right. (4) That an ordinance, requiring passenger cars to be numbered and pay a stipulated sum when licensed, is a valid police regulation, and that such an ordinance might be passed under the Act which authorized the city authorities to pass ordinances for the licensing

of omnibuses and other vehicles of conveyance of a like nature.

Since that decision, it is not doubted that the subject of imposing license fees, in cases like the present, is within the jurisdiction of the city authorities, if the statute under which they have exercised such jurisdiction is a valid Act passed in pursuance of the Constitution.

When the Company was incorporated, the charter, as before remarked, contained the provision providing for the payment of a six per cent tax on the excess of dividends over six per cent on the par value of the stock, and the further provision that the Company shall also pay such license for each car run as is now paid by other passenger railway companies in the city. What the defendants contend is that the closing enactment of the section amounts to a contract that the railway company shall never be required to pay any greater license fee than was then required of such companies running passenger cars on the streets of the City. Other railway companies at that time paid an annual license of \$30, and the defendants insist that the Act of the Legislature increasing the license to \$50 per annum is unconstitutional and void.

Two answers are made to that proposition by the plaintiff City, either of which is sufficient to show that the judgment must be affirmed: (1) That the language of the Act of incorporation referred to does not amount to a contract of any kind, and certainly not to such a contract as that attempted to be set up by the defendants. (2) That, even if the language employed in the charter is sufficient to amount to a contract that the license charge should not exceed the amount paid at that date by other such companies, still it cannot benefit the defendants, for the reason that the Constitution of the State in force when the Act of incorporation was passed provides that the Legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever in their opinion it may be injurious to the citizens, subject only to the condition that the alteration, revocation or annulment shall be made in such manner "that no injustice shall be done to the corporators." Art. 1, sec. 26; Purdon, Dig., 9th ed., p. 17.

Exemptions of the kind set up are to be strictly construed, but it is unnecessary to invoke that canon of construction to any considerable extent, as the language employed is not sufficient to take the case out of the rule that the alleged exemption will not be sustained unless it be expressed in clear and unambiguous terms. Taken in their widest sense, the words employed are no more than sufficient to warrant the construction that the Legislature intended that the Corporation should not then be required to pay any greater charge as license than other companies were required to pay for the same privilege, and it may, perhaps, be regarded as a guaranty against invidious exemptions adverse to the corporators in future legislation upon the subject; but it is plain that there is nothing in the language of the section to warrant the court in holding that the Legislature intended to contract that the license charged for such passenger cars should never exceed the annual sum of \$30.

Railway companies of the kind, it appears, were first required to pay an annual sum of \$50 for each car run the year previous to the passage of the Act

which is the subject of controversy in the present litigation. Neither party refers to that Act as of any importance in this case, except as a part of the state legislation upon the subject. Then comes the Act in controversy, to which reference has already been made. Sess. L. Pa., 1868, 848.

When the street railway system of the City was comparatively in its infancy, the city authorities, under the legislative Act empowering them as such authorities to charge reasonable fees for granting licenses to such companies, fixed the sum at \$80 per annum for each car run. Regulations of the kind were in force and operation when the charter of the defendant Company was granted. Other companies previously incorporated were at the time paying only that sum per annum for each car, and the 10th section of the charter granted to the defendant Company provided that the then new Company should pay the same as was paid by the other passenger railway companies.

Beyond doubt they were required to pay the same amount as was paid by the other companies, and it is, perhaps, a reasonable construction that, without further legislation, they could not be required to pay any greater sum, but the language of the section does not, in terms, contain any such prohibition. None of the other companies have any such immunity from increased taxation, and if construed to have that effect in favor of the defendant Company it would have an extremely invidious operation at the expense of all other similar companies. Invidious exemptions are not favored, nor ought they to be, as they are, in principle, utterly opposed to the rule of equality, which ought always to prevail in imposing public burdens.

Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. *Crawford v. Burrell*, 53 Pa., 219; *Cooley, Tax.*, 152. Common burdens should be sustained by common contributions, regulated by fixed rules, and be apportioned, as far as possible, in the ratio of justice and equity. *Sutton v. Louisville*, 5 Dana, 28, 31.

Viewed in the light of these suggestions, it is clear that the State never made such a contract with the defendant Company as that supposed in the assignment of errors.

It seems that the Supreme Court of the State, when it became their duty at an earlier period to examine the question, came to the conclusion that the power to impose the license or tax might be supported as a police power derived under the Act passed for the regulation of omnibuses or vehicles in the nature of the same, it appearing that at that time no legislative Act had conferred the express power to tax the cars of the Company. *R. Co. v. Philadelphia*, 58 Pa., 119-124.

Since that the Act in question in this case has been enacted, which itself requires all such companies without discrimination to pay the annual license or tax of \$50 for each car intended to be run over the city roads during the year.

Stress, it appears, was laid in the court below upon the words of the Act, "as required by their charters," as if the obligation did not arise unless it was created by the terms of the charter; but the Supreme Court showed, con-

clusively, that the Act of the Legislature, when properly construed, did not sustain the proposition, and it appears to have been abandoned. Charters of the kind, as the Supreme Court showed in the opinion given in this case, required obedience to the lawful ordinances of the City under the exercise of its municipal powers, which, as the Supreme Court there say, is plainly evidenced by the remainder of the section imposing the tax of \$50, by which the Legislature took away from the City all power by ordinance or otherwise to regulate passenger railways, "Unless authorized by the express terms of a law referring directly to such corporations."

Voluntary payments of the amount imposed by the new Act were made by the Company for sixty or seventy cars, from which the Supreme Court of the State held that it followed as a legal conclusion that the Company had accepted the Act.

All power to regulate such companies, by ordinance or otherwise, was taken away from the City during that period, and the court held that, inasmuch as the Company had enjoyed the benefit of that prohibition ever since it was enacted, it must be understood that they have accepted the Act. Some weight is, doubtless, to be given to that argument, but it is clear that the right of the State to impose such a tax, rate or imposition in the future cannot be taken away by mere implication arising from a direction to pay a certain sum, the universal rule being that it requires some plainer negative of the power of the State to levy moneys for public purposes than is found in such a direction. Indications of such an intention might, perhaps, be found in other statutory provisions, sufficient, when added to such a direction and when taken together as a whole, to amount to a contract to relinquish the power; but when it is sought to prove such an exemption the statutory evidence of the same must be plain and unambiguous, and if not direct it must at least be such as is inconsistent with any other hypothesis, and conclusive that such was the intention of the Legislature. *Cooley, Const. Lim.*, 4th ed., 341.

II. Much discussion of the second proposition, in view of the conclusive support given to the first, is quite unnecessary. Power to alter, revoke or annul any charter of incorporation was vested in the Legislature by the Constitution more than a quarter of a century before the defendant Company was incorporated.

Even when the language of the charter is sufficient to amount to a contract, it was twice admitted by *Judge Story*, in *Dart. Coll. v. Woodward*, that alterations and amendments may be made in the charter, where the power for that purpose is reserved to the Legislature in the Act of incorporation. 4 *Wheat.*, 518, 708, 712.

Acts of incorporation, granted subsequently to the adoption of the Constitution, must be construed as if the provision of the instrument in question was embodied in the charter. Private charters, of the kind importing such an exemption, are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified; and the general rule is, that the grant of the franchise on that account can no more be resumed

by the Legislature, or its benefits be diminished or impaired without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the Act of incorporation, or by some immemorial usage or general law of the State in operation at the time the charter was granted. *Holyoke Co. v. Lyman*, 15 Wall., 500, 511 [82 U. S., XXI., 133, 137].

Charters of private corporations duly accepted, it must be admitted, are, in general, executed contracts, but the different provisions, unless they are clear, unambiguous and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being, that, whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms. *Rice v. R. R. Co.*, 1 Black, 358 [66 U. S., XVII., 147]; *Charles River Bridge v. Warren Bridge*, 11 Pet., 420.

Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and Acts extending the privileges of corporate bodies are to be taken most strongly against the corporators. *Sedgwick, Stat.*, 2d ed., 292; *Lees v. Canal Co.*, 11 East, 645.

Vested rights, it is conceded, cannot be impaired under such a reserved power, but it is clear that the power may be exercised and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation. *College Cases*, 13 Wall., 190, 218 [80 U. S., XX., 550, 554].

Tested by these considerations, it is clear, even if it be admitted that the language of the charter is sufficient to import a contract, that the power of the Legislature under the Constitution is amply sufficient to justify that department of the State to pass the Act raising the license for each car from \$30 to \$50.

Judgment affirmed.

Cited—9 Biss., 557.

WILLIAM T. WOLSEY ET AL., AND THE
STATE OF IOWA, *Appts.*,
v.
RICHARD B. CHAPMAN.

(See S. C., 11 Otto, 755-772.)

Lands donated to Iowa—reservation of public lands from sale—President's order—grants to Iowa—adjustment between U. S. and Iowa—Des Moines Company.

1. The title of the Des Moines Navigation and Railroad Company to the lands donated to Iowa for the improvement of Des Moines River, by the Act of Aug. 8, 1846, is good as against the State and Railroad companies under the Railroad Grant of 1856, and as against preemptioners after 1855 under the Act of 1841.

2. There can be no reservation of public lands from sale except by reason of some treaty, law or authorized act of the Executive Department of the

See 11 Otto.

Government; and the acts of the heads of departments, within the scope of their powers, are in law the acts of the President.

3. An order sent out from the appropriate executive department in the regular course of business, is the legal equivalent of the President's own order, reserving lands from sale.

4. The grant by the United States to Iowa in 1861 was for the benefit of *bona fide* purchasers from the State under the grant of Aug. 8, 1846 and not to purchasers under the school land grant.

5. The adjustment of 1866 between the United States and Iowa settled no rights as between any other parties than the State and the United States.

6. The Governor had the right to convey to the Des Moines Company, under the Joint Resolution of Mar. 22, 1858, all the lands which had before that time been approved and certified to the State under the river grant, excepting such as had been sold or agreed to be sold by the officers of the State prior to Dec. 23, 1853, "under said grant."

[No. 104.]

Argued Dec. 11, 12, 1879. Decided Mar. 2, 1880.

A PPEAL from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Mr. Galusha Parsons, for appellants.

Messrs. Geo. G. Wright and E. C. Litchfield, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

This case presents again for consideration the Des Moines River improvement grant. 9 Stat. at L., 77. It is a suit in equity brought by Chapman, who claims under the river grant, to quiet his title as against Wolsey, whose rights depend on a patent from the State of Iowa granting the lands in dispute as part of lands ceded to the State under the 8th section of the Act of Congress passed September 4, 1841, entitled "An Act to Appropriate the Proceeds of the Sales of the Public Lands and to Grant Preemption Rights." 5 Stat. at L., 453. That section is as follows:

"Section 8. And be it further enacted, that there shall be granted to each State specified in the 1st section of this Act five hundred thousand acres of land for purposes of internal improvement; *Provided*, That, to each of the said States which has already received grants for said purposes there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid, make five hundred thousand acres, the selections in all of the said States to be made within their limits respectively in such manner as the Legislature thereof shall direct; and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or Proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States in said States, respectively, shall have been surveyed according to existing laws. And there shall be, and hereby is granted to each new State that shall be hereafter admitted into the Union, upon such admission, so much land as including such quantity as may have been granted to such State before its admission, and while under territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

Section 10 granted preemption rights in the public lands, but provided that "No lands included in any reservation, by any treaty, law or Proclamation of the President of the United States, or reserved for salines, or for other purposes; no lands reserved for the support of schools, nor the lands acquired by either of the last two Treaties with the Miami Tribe of Indians in the State of Indiana, or which may be acquired of the Wyandot Tribe of Indians in the State of Ohio, or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this Act; no sections of land reserved to the United States alternate to other sections granted to any of the States for the construction of any canal, railroad or other public improvement; no sections or fractions of sections included within the limits of any incorporated town; no portions of the public lands which have been selected as the site for a city or town; no parcel or lot of land actually settled and occupied for the purposes of trade and not agriculture; and no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this Act."

At that time Iowa was a Territory, organized under the Act of June 12, 1838. 5 Stat. at L., 235. On the 8th of August, 1846, Congress passed the Act making the Des Moines River grant, 9 Stat. at L., 77, the material parts of which are as follows:

"An Act Granting Certain Lands to the Territory of Iowa, to Aid in the Improvement of the Navigation of the Des Moines River, in said Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there be, and hereby is granted to said Territory of Iowa, for the purpose of aiding said Territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork (so-called) in said Territory, one equal moiety, in alternate sections, of the public lands (remaining unsold, and not otherwise disposed of, incumbered, or appropriated), in a strip five miles in width on each side of said river, to be selected within said Territory, by an agent or agents to be appointed by the Governor thereof, subject to the approval of the Secretary of the Treasury of the United States.

Section 2. *And be it further enacted*, That the lands hereby granted shall not be conveyed or disposed of by said Territory, nor by any State to be formed out of the same, except as said improvements shall progress; that is, the said Territory or State may sell so much of said lands as shall produce the sum of \$30,000, and then the sales shall cease until the Governor of said Territory or State shall certify the fact to the President of the United States that one half of said sum has been expended upon said improvements, when the said Territory or State may sell and convey a quantity of the residue of said lands sufficient to replace the amount expended; and thus the sale shall progress as the proceeds thereof shall be expended, and the fact of such expenditure shall be certified as aforesaid.

Section 4. *And be it further enacted*, That whenever the Territory of Iowa shall be admitted into the Union as a State, the lands hereby

granted for the above purpose shall be and become the property of said State for the purpose contemplated in this Act and for no other, provided the Legislature of the State of Iowa shall accept the said grant for the said purpose."

On the 28th of December, 1846, Iowa was admitted into the Union as a State. 9 Stat. at L., 117. By the Constitution, under which the admission was granted, the 500,000 acres of land to which the State became entitled by the Act of 1841 were appropriated to the use of common schools (Const. Iowa, 1846, art. 9, School Fund and Schools, sec. 3), and on the 2d of March, 1849, Congress, by a special Act, assented to this appropriation. 9 Stat. at L., 349.

On the 17th of October, 1846, the Commissioner of the General Land-Office requested the Governor of the Territory to appoint an agent to select the land under the river grant, at the same time intimating that the grant only extended from the Missouri line to the Raccoon Fork of the Des Moines River. On the 17th of December, a few days before the admission of the State, the territorial authorities designated the odd numbered sections as the lands selected under the grant. The State accepted the grant in form, by Joint Resolution of the General Assembly approved January 9, 1847. On the 24th of February following, the State created a "Board of Public Works," to whom were committed the work, construction and management of the river improvement, and the care, control, sale, disposal and management of the lands granted the State by the Act of 1846. This Board was organized September 22, 1847, and on the 17th of February, 1848, the Commissioner of the General Land-Office, in an official communication to the Secretary of the Board, gave it as the opinion of his office that the grant extended throughout the whole length of the river within the limits of the State. On the 19th of June, 1848, without any notice of a revocation of this opinion, a Proclamation was issued by the President, putting in market some of the lands above the Raccoon Fork which would go to the State if the Commissioner was right in the construction he gave the grant. This led to a correspondence on the subject between the proper officers of the State and the United States, which resulted in the promulgation of an official opinion by the Secretary of the Treasury, bearing date March 2, 1849, to the effect that the grant extended from the Missouri line to the source of the river. In consequence of this opinion, the Commissioner of the General Land-Office, on the first of the following June, directed the registers and receivers of the local land-offices to withhold from sale all the odd numbered sections within five miles on each side of the river above the Raccoon Fork.

Afterwards, the state authorities called on the Commissioner of the General Land-Office for a list of lands above the Raccoon Fork which would fall to the State under this ruling. The list was accordingly made out, and on the 14th of January, 1850, submitted to the Secretary of the Interior for approval; jurisdiction of matters of that kind having before that been transferred by law from the Treasury to the Interior department. On the 6th of April, the Secretary returned the list to the Land-Office with a letter declining to recognize the grant as extending above the Raccoon Fork without the

aid of an explanatory Act of Congress, but advised that any immediate steps for bringing the lands into market be postponed, in order that Congress might have an opportunity of acting on the matter if it saw fit.

On the 20th of July, 1850, the agent of the State having in charge the school lands and school fund gave notice at the General Land-Office that he had selected the particular piece of land in controversy in this suit as part of the 500,000 acre grant under the Act of 1841. Other lands coming within the river grant, if extended above the Raccoon Fork, amounting in the aggregate with this piece to 12,813 $\frac{51}{100}$ acres, were included in a list of similar selections approved at the Land Department in Washington on the 20th of February, 1851. Two days afterwards, February 22, the Board of Public Works of the State formally demanded of the Secretary of the Interior for the river grant all the alternate odd sections above the fork. On the 26th of July the order of the Secretary of the Interior, under date of April 6, 1850, withholding the disputed lands from sale, was continued in force until the end of the approaching session of Congress, in order to give the State an opportunity of petitioning for an extension of the grant.

On the 29th of October, 1851, the Secretary of the Interior, after consultation with the President and his Cabinet, and pursuant to a decision there made, wrote the Commissioner of the General Land-Office as follows:

"Sir:—I herewith return all the papers in the *Des Moines Case*, which were recalled from your office about the first of the present month.

I have reconsidered and carefully reviewed my decision of the 26th July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary. You will please, therefore, as soon as may be practicable, submit for my approval such lists as may have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Fork, as far as the surveys have progressed, or may hereafter be completed and returned."

The lists were made out accordingly, and the following indorsement put thereon by the Secretary:

"The selections embraced in the within list (No. 3) are hereby approved in accordance with the views expressed in my letter of the 29th instant to the Commissioner of the General Land-Office, subject to any rights which may have existed at the time the selections were made known to the Land-Office by the agents of the State, it being expressly understood that this See 11 OTTO.

approval conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of prior to the receipt by the local land-officers of the letter of the Commissioner of the General Land-Office, communicating the decision of Mr. Secretary Walker, to the effect that the grant extended above the Raccoon Fork."

No. 3 showed the vacant lands above the Raccoon Fork subject to the claim of the State, and included the particular parcel involved in this suit. On the 16th of March, 1852, the list was forwarded to the several local land-offices as showing the land which fell to the State under the construction given the river grant by the Secretary of the Treasury, March 2, 1849, and by the Secretary of the Interior, October 29, 1851.

On the 20th of August, 1853, the School Fund Commissioner of Webster County, under the authority of an Act of the General Assembly of the State of the 25th of February, 1847, entitled "An Act to Provide for the Management and Disposition of the School Fund," contracted to sell to William T. Wolsey the land about which this suit arose. The purchase money having been paid in full, the Governor of the State, on the 20th of December, 1854, issued to Wolsey a patent in the form required to pass title under such a sale. This patent purported, on its face, to have been granted as and for a conveyance of school lands.

On the 6th of January, 1854, after the contract of sale to Wolsey, but before the issue of the patent, the Commissioner of the General Land-Office formally withdrew the approval by the Land Department of the selection of lands as part of the 500,000 acre grant which fell within the river grant, according to the opinion of the Secretary of the Treasury, March 2, 1849, and the Secretary of the Interior, October 29, 1851. On the 30th of December, 1853, the Secretary of the Interior approved to the State, "under the Act of August 8, 1846, without prejudice to the rights, if any there be, of other parties," a list of the 12,813 $\frac{51}{100}$ acres erroneously approved, 20th February, 1851, as lands selected under the Act of 1841, "previous to the adjustment of the grant, and before it was known that they belonged to the State under the *Des Moines River* grant."

Until the 17th of December, 1853, the State itself, through its Board of Public Works, carried on the work of improving the river, paying the expense from the proceeds of the sales of the lands included in the river grant. A land-office had also been established for the sale of these lands. On that day the State entered into a contract with one Henry O'Reilly to complete the work. This contract O'Reilly transferred, with the consent of the State, to the *Des Moines Navigation and Railroad Company*, a New York corporation, and on the 9th of June, 1854, in consequence of this transfer, a new contract was entered into between the State and the corporation for the purpose of simplifying and more fully explaining the original contracts and agreements. By the new contract, the State agreed to convey to the company "All of the lands donated to the State of Iowa for the improvement of the *Des Moines River* by Act of Congress of August 8, 1846, which the said party of the second part (the State) had

not sold up to the 23d day of December, 1853." This was the date at which it was supposed the sale of the lands could be stopped at the State Land-Office after the contract with O'Reilly.

On the 15th of May, 1856, Congress passed an Act, 11 Stat. at L., 9, granting to the State of Iowa, to aid in the construction of certain railroads, every alternate section of land designated by odd numbers for six sections in width on each side of each of the several roads. The granting clause of the Act contained, however, the following proviso:

"And provided further, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this Act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

In 1856, the Commissioner of the General Land-Office decided not to certify any more lands to the State under the river grant, and thereupon the navigation company suspended work on the improvement. This led to a settlement between the State and the company, under the authority of a Joint Resolution of the General Assembly for that purpose, passed March 22, 1858, by which the State agreed to convey to the navigation company all the lands contained in the river grant which had been approved and certified to the State by the General Government, "Excepting all lands sold or conveyed, or agreed to be sold or conveyed by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant." Afterwards, May 3, 1858, the Governor of the State executed to the company a deed conveying the lands now in controversy, with others, by a specific description of sections, townships and ranges; and on the 18th of the same month he executed another deed, which purported, on its face, to have been made pursuant to the Joint Resolution of the General Assembly authorizing the settlement with the company, and described the lands in the exact language of general description used in the Resolution.

Chapman, the plaintiff below, has all the title to the lands involved in this suit which passed in this way to the navigation company.

At the December Term, 1859, of this court, and during the month of April, 1860, in the case of *R. R. Company v. Litchfield*, 23 How., 66 [64 U. S., XVI., 500], it was decided that the river grant as originally made did not extend above the Raccoon Fork, and thereupon, on the 18th of May, 1860, the Commissioner of the General Land Office sent to the registers and receivers of the local land-offices a notice to be promulgated, as follows:

"Notice is hereby given that the lands along the Des Moines River, in Iowa, and within the claimed limits of the Des Moines grant in that State, above the mouth of the Raccoon Forks of said river, which have been reserved from sale heretofore on account of the claim of the State thereto, will continue reserved for the

time being from sale or from location by any species of scrip or warrants, notwithstanding the recent decisions of the Supreme Court against the claim.

This action is deemed necessary to afford time for Congress to consider, upon memorial or otherwise, the case of actual, *bona fide* settlers holding under titles from the State, and to make such provision, by confirmation or adjustment of the claims of such settlers, as may appear to be right and proper."

On the 2d of March, 1861, 12 Stat. at L., 251, Congress passed the following Joint Resolution: "Joint Resolution to Quiet Title to lands in the State of Iowa.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That all the title which the United States still retain in the tracts of land along the Des Moines River, and above the mouth of the Raccoon Forks thereof, in the State of Iowa, which have been certified to said State improperly by the Department of the Interior as part of the grant by Act of Congress, approved August 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa, be and the same is hereby relinquished to the State of Iowa."

And on the 12th July, 1862, 12 Stat. at L., 543, the following Act was passed:

"*Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled*, That the grant of lands to the then Territory of Iowa, for the improvement of the Des Moines River, made by the Act of August 8, 1846, is hereby extended so as to include the alternate sections (designated by odd numbers) lying within five miles of said river, between the Raccoon Forks and the northern boundary of said State; such lands are to be held and applied in accordance with provisions of the original grant, except that the consent of Congress is hereby given to the application of a portion thereof to aid in the construction of the Keokuk, Fort Des Moines and Minnesota Railroad, in accordance with the provisions of the Act of the General Assembly of the State of Iowa, approved March 22, 1858; and if any of said lands shall have been sold or otherwise disposed of by the United States before the passage of this Act, excepting those released by the United States to the grantees of the State of Iowa, under the Joint Resolution of March 2, 1862, the Secretary of the Interior is hereby directed to set apart an equal amount of lands within said State to be certified in lieu thereof; *Provided*, That if the said State shall have sold and conveyed any portion of the lands lying within the limits of this grant, the title of which has proved invalid, any lands which shall be certified to said State in lieu thereof, by virtue of the provisions of this Act, shall inure to and be held as a trust fund for the benefit of the person or persons respectively whose titles shall have failed as aforesaid."

After the passage of the Joint Resolution of March 2, 1861, the Commissioner of the General Land Office called on the Governor of the State for a list of the tracts of land "held by *bona fide* purchasers of the State of Iowa" on that date. In response to this request, the Governor and Land Commissioner of the State, on the 20th of November, 1862, furnished the list required,

and, among others, included the tracts granted to the navigation company on the settlement made with that company under the Joint Resolution of March 22, 1858. This list was filed in the General Land Office December 1, 1862.

On the 30th of March, 1866, an Act was passed by the General Assembly of Iowa providing for the adjustment of certain land claims with the General Government. By this Act, Josiah A. Harvey, the Register of the State Land-Office, was appointed a commissioner to adjust the matters in dispute, and especially the excess of land which had been certified to the State above what it was entitled to receive under the Act of September 4, 1841, and the lands falling due under the Joint Resolution of March 2, 1861, and the Act of July 12, 1862.

This Act contained the following section:

"Section 2. Said commissioner shall proceed to Washington City and present said claims to the Department of the Interior, and urge the same to settlement as early and as speedily as may be consistent with the interests of the State; and he is hereby authorized to adjust the said excess of the 500,000 acre grant by permitting the United States to retain, out of the indemnity land falling to the State under said Act of Congress of July 12, 1862, an amount equivalent to such excess: *Provided*, That nothing herein contained shall be construed to be a relinquishment of the claim of the State under the said 500,000 acre grant to the $12,813\frac{55}{100}$ acres selected as a part of such grant, and subsequently rejected from a supposed conflict with the Act of Congress approved August, 1846, known as the Des Moines River grant; and the said commissioner is hereby instructed to secure a restoration of said selections as a part of the 500,000 acre grant, and a confirmation of the title of the State thereto, as a part of such grant."

Under this authority an adjustment was had with the United States, by which it appeared that the State was entitled to $558,004\frac{96}{100}$ acres, under the river grant, and that under the 500,000 acre grant it had received certificates for $22,660\frac{8}{100}$ acres more than it was entitled to if the $12,813\frac{55}{100}$ acres, also certified under the river grant, was not included, and $35,473\frac{54}{100}$ if it was. The excess was charged to the account of the river grant, and a balance struck accordingly. The Navigation and Railroad Company was not a party to this settlement. The adjustment was ratified by an Act of the General Assembly of the State passed March 31, 1868.

At the December Term, 1866, of this court, it was decided, in the case of *Wolcott v. Des Moines Co.*, 5 Wall., 681 [72 U. S., XVIII., 689], that the lands included in the river grant above the Fork, as finally settled by Congress, did not pass to the State for the benefit of the railroad companies under the Act of 1856, because, at the time of the passage of that Act, the lands were reserved for the purpose of aiding in the improvement of the Des Moines River and, therefore, fell within the proviso limiting the grant to lands not so reserved.

At the December Term, 1869, of this court it was decided in the case of *Riley v. Welles*, No. 397 on the docket of the Term, but not reported [reported in this edition, XIX., 648], that the lands above the Racoon Fork were so far "reserved" by the action of the officers of the United States as not to be subject to preemp-

tion in 1855, under the 10th section of the Act of 1841.

On the 3d of March, 1871, Congress passed an Act, 16 Stat. at L., 582, ratifying and confirming to the State of Iowa and its grantees the title to the lands, in accordance with the adjustment made in 1866; but expressly provided "That nothing in this Act contained shall be so construed as to affect adversely any existing legal rights, or the rights of any party claiming title, or the right to acquire title, to any part of said lands under the provisions of the so-called homestead or preempted laws of the United States, or claiming any part thereof as swamp lands."

At the December Term, 1872, of this court, after full consideration, the cases of *Wolcott v. Des Moines Co.*, and *Riley v. Welles* [*supra*] were distinctly affirmed in *Williams v. Baker*, 17 Wall., 144 [84 U. S., XXI., 561]; and in *Homestead Co. v. R. R. Co.*, 17 Wall., 153 [84 U. S., XXI., 622], it was said to be "No longer an open question that neither the State of Iowa, nor the railroad companies for whose benefit the grant of 1856 was made, took any title by that Act to the lands claimed to belong to the Des Moines River grant of 1846, and that the Joint Resolution of 2d of March, 1861, and Act of July 12, 1862, transferred the title from the United States and vested it in the State of Iowa for the use of its grantees under the river grant."

The State voluntarily made itself a party to this suit, for the purpose of defending its title to the lands in controversy as part of its school lands. An Act of the General Assembly was passed March 12, 1874, authorizing this to be done.

Upon this state of facts, the court below granted the relief asked by the bill and sustained the title of Chapman. To reverse that decree this appeal was taken.

The following propositions were relied upon in the argument for the appellants:

1. That the lands in question were not "reserved" lands within the meaning of the exception in section 8, of the Act of 1841.
2. That Chapman, claiming as he did under a patent from the State later in date than that to Wolsey, cannot impeach Wolsey's title in this action.
3. That Wolsey was such a *bona fide* purchaser from the State that the grant of Congress under the Joint Resolution of March 2, 1861, inured to his benefit.
4. That, as the lands had been sold by the State previous to December 23, 1853, no title passed to the Des Moines Navigation and Railroad Company under the settlement made upon the authority of the Joint Resolution of the General Assembly of March 22, 1858; and,
5. That by the adjustment and settlement between the State and the United States in 1866, the title of the State under the 500,000 acre grant, and as part of the school lands, was confirmed.

These several propositions will be considered in their order:

1. As to the right of the State, on the 20th of February, 1851, to select these lands as part of the 500,000 acre grant.

It has been settled in this court that the title of the Des Moines Company is good as against the State and railroad companies under the

railroad grant of 1856, and as against preemptioners after 1855 under the Act of 1841. We are not asked to disturb these rulings, and should not be inclined to do so if we were. It is contended, however, that the language used in the 8th section of the Act of 1841, defining the reservation, is so different from that of the 10th section, under consideration in *Riley v. Welles* and from that of the Act of 1856, involved in *Wolcott's Case* and the cases reported in 17 Wallace [84 U. S., XXI., 561, 622], as to render our former decisions of no controlling authority on the question now to be determined. We do not so understand the effect of those decisions. Whatever might be the force of such an argument if the cases involving the Act of 1856 stood alone, it seems to us impossible to distinguish the question now presented from that disposed of in *Riley v. Welles*. In that case the language under consideration was, "Lands included in any reservation, by any treaty, law or Proclamation of the President of the United States, or reserved for salines, or for other purposes," and in this, "Any public land, except such as is or may be reserved from sale by any law of Congress or Proclamation of the President of the United States." In the Act of 1856 the corresponding language is, "Any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever."

It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the Act of 1841. They were reserved also in consequence of the Act of 1846. The proper Executive Department of the Government had determined that, because of doubts about the extent and operation of that Act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land-officers to withhold all the disputed lands from sale. This withdrew the lands from private entry and, as we held in *Riley v. Welles*, was sufficient to defeat a settlement for the purpose of preemption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal. This, it is agreed, settles the present case, unless that decision resulted from the addition of the words, "reserved for saline or for other purposes," which appear in the 10th section and not in the 8th.

The object of all interpretation is to ascertain the intent of the law-makers; to get at the meaning which they wished their language to convey. A critical examination of particular words is never necessary except in cases of doubt. Sections 8 and 10 are parts of the same Act. By one, a grant of public lands to certain States for certain purposes was provided for; and by the other, preemption rights were given to individual citizens. Both had reference to public lands, and gave the respective beneficiaries the power of making their own selections. There seems to be no good reason why the selections of the preemptioneer should be restricted within narrower limits than those of the State,

and we cannot believe it was the intention of Congress to give a State the power to take lands under section 8, which had actually been reserved by the United States for any purpose whatever. It is true, in that section only reservation by a law of Congress or the Proclamation of the President are specially spoken of, but it must have been the intention to include in this all lawful reservations. In the 10th section a reservation by treaty is specially mentioned; but we can hardly believe it would be seriously contended that, under the 8th section, a State could select lands reserved by a treaty because the word "treaty" was omitted in that section.

The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law or authorized act of the Executive Department of the Government; and the acts of the heads of departments, within the scope of their powers, are in law the acts of the President. In *Wilcox v. Jackson*, 13 Pet., 498, the question was directly presented whether a reservation from sale by an order from the War Department was a reservation "by order of the President," and the court held it was. The language of the statute then under consideration was (p. 511), "Or which is reserved from sale by Act of Congress or by order of the President, or which may have been appropriated for any purpose whatever;" and in the opinion of the court it is said (p 513): "Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments, in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department, in requiring the reservation to be made, as being, in legal contemplation, the act of the President; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the Act of Congress." That case is conclusive of this, unless the word "proclamation," as used in the present statute, has a signification so different from "order" in the other as to raise a material distinction between the two cases. We see no such intention on the part of Congress. A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows, necessarily, from the decision in *Wilcox v. Jackson* that such an order sent out from the appropriate Executive Department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a Proclamation by the President reserving the lands from

sale as was contemplated by the Act. This being the case, under our former decisions, no title passed to the State by the approval of the selection of the lands in dispute under the Act of 1841. Being lawfully reserved from sale at the time of the selection, they were not included in the grant which that Act provided for.

2. As to the right of Chapman to question Wolsey's title.

Of this we entertain no doubt. If the State had no title when the patent issued to Wolsey, he took nothing by the grant. No question of estoppel by warranty arises, neither does the after acquired title inure to the benefit of Wolsey, because when the United States made the grant in 1861 it was for the benefit of *bona fide* purchasers from the State, under the grant of 1846. This is evident as well from the tenor of the Joint Resolution of 1861 as from the Act of 1862. The relinquishment under the Joint Resolution is of all the title which the United States retained in the tracts of land above the Racoon Fork "Which have been certified to said State improperly by the Department of the Interior as part of the grant by the Act of Congress approved August 8, 1846, and which is now held by *bona fide* purchasers under the State of Iowa;" and by the Act of 1862 the lands are, in terms, to be held and applied in accordance with the provisions of the original grant. This legislation, being *in pari materia*, is to be construed together, and manifests, most unmistakably, an intention on the part of Congress to put the State and *bona fide* purchasers from the State just where they would be if the original Act had itself granted all that was finally given for the river improvement. The original grant contemplated sales by the State, in execution of the trust created, and the *bona fide* purchasers referred to must have been purchasers at such sales. This being so, the grant, when finally made, inured to the benefit of Chapman rather than Wolsey. Neither took title from the State at first, and as the final grant from the United States was, in legal effect, to Chapman or his grantors, he has the right to have that fact declared by a judicial decision against Wolsey, who sets up his adverse claim.

3. As to the alleged *bona fide* purchase of Wolsey.

This has been substantially disposed of by what we have already said. He purchased under the school land grant. His patent so in terms declares. Consequently he cannot be a purchaser under the river grant, to confirm which, as has been seen, the legislation of 1861 and 1862 was had.

4. As to the adjustment of 1866.

We are clearly of the opinion that this adjustment settled no rights as between any other parties than the State and the United States. The conflicting claimants were not parties to that settlement. The agent of the State was instructed not to relinquish the claim of the State under the school land-grant, and he did not do so. The United States simply applied themselves to the adjustment of quantities under all the grants, and whenever they did speak were careful to say that nothing which was done should be construed as affecting adversely any existing rights. The result was to leave the whole question to the ultimate determination of the courts.

See 11 OTTO.

5. As to the right of the Governor to convey the lands in question to the Des Moines Company under the Joint Resolution of March 22, 1858, authorizing a conveyance upon settlement with the company.

The original contract between the State and the company contemplated a conveyance of all the river grant lands not sold by the State on the 23d of December, 1853. This should be construed in the light of the fact that the Act making the river grant provided for sales of the granted lands to furnish the means of making the required improvement and, if this contract stood alone, we should have no hesitation in holding that the sales referred to were such as had been made in the execution of the trust under which the lands were held, but if there could be any doubt on that subject, the Resolution which authorized the settlement removes all grounds for discussion. By that Resolution, all the lands which had before that time been approved and certified to the State under the river grant were to be conveyed to the company, excepting such as had been sold or agreed to be sold by the officers of the State prior to December 23, 1853, "under said grant." The land now in controversy had been so certified, and it had also been sold under that grant. Therefore, the Governor was expressly authorized to include it in his conveyance.

This disposes of all the questions urged upon our consideration, and the decree of the court below is, consequently, affirmed.

Cited—101 U. S., 774; 109 U. S., 331.

AUGUSTUS R. WRIGHT ET AL., *Plffs. in Err.*,

v.
GEORGE W. NAGLE ET AL.

(See S. C., 11 Otto, 791-797.)

Public franchises—ferries and bridges—right of State.

1. Exclusive rights to public franchises are not favored. If granted, they will be protected; but they will never be presumed.

2. The Statutes of Georgia do not confer on the inferior courts of its several counties the power of contracting away the right of the State to establish ferries and bridges in a particular locality.

3. The statutes give these courts the right to establish ferries or bridges, but not to tie the hands of the public in respect to its future necessities.

[No. 1098.]

Submitted Jan. 22, 1880. Decided Mar. 2, 1880.

IN ERROR to the Supreme Court of the State of Georgia.

The case is stated by the court.

Messrs. Fillmore Beall, O. A. Lochrane and E. N. Broyles, for plaintiffs in error.

Mr. J. Branham, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

NOTE.—Jurisdiction of U. S. Supreme Court to declare state law void, as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws; power of States to construe their own statutes. See note to Jackson v. Lamphire, 28 U. S. (3 Pet.), 280.

It is for state courts to construe their own statutes; Supreme Court will not review their decisions except when specially authorized to by statute. See note to Commercial Bk. v. Buckingham, 46 U. S. (5 How.), 317.

This was a suit in equity, brought by Wright and Shorter in the Superior Court of Floyd County, Georgia, to restrain the defendants from continuing and maintaining a toll-bridge across the Etowah River, at Rome, in that county. The facts are these: in July, 1851, the Inferior Court of Floyd County entered into a contract with one H. V. M. Miller, by which the court, for a good and valuable consideration, granted to Miller and his heirs and assigns forever, so far as it had authority for that purpose, the exclusive right of opening ferries and building bridges across the Oostanaula and Etowah Rivers, at Rome, within certain specified limits. Miller, on his part, bound himself by certain covenants and agreements appropriate to such a contract. He afterwards assigned his rights under the contract, so that when this suit was commenced the complainants, Wright and Shorter, were the owners. Large amounts of money were expended in building and maintaining the required bridges, and the franchise is a valuable one. In December, 1872, the commissioners of roads and revenue for the county authorized the defendants to erect and maintain a toll-bridge across the Etowah, within the limits of the original grant to Miller. The bill avers that "The said Board of Commissioners in the making and conferring of said franchise exercised legislative powers conferred upon it by the laws of the State; that the said grant is in the nature of a statute of the Legislature; that the same is an infringement of the said grant and contract made by the said superior (inferior) court to and with the said H. V. M. Miller, under whom complainants hold, and impairs the obligation and validity thereof, and is repugnant to the Constitution of the United States, art. 1, sec. 10, par. 1, which prohibits a State from passing any law impairing the obligation of contracts; and the complainants pray that the said grant to said defendants be by this court annulled and declared void, and the defendants perpetually enjoined from any exercise of the privileges thereby conveyed and granted."

There is no dispute about the facts, and in the answer it is expressly stated that the commissioners of roads and revenue "Are vested with legislative or *quasi* legislative powers and exclusive powers on this subject and, therefore, * * * the order making said bridge and streets public has all the authority, sanction and effect of an Act of the Legislature of the State, and cannot be interfered with by the unauthorized and void act of any public functionary of this State." The parties, by stipulation before the hearing, eliminated everything from the case except so much as was necessary to obtain "A final and legal decision upon the main question, to wit: whether or not the Inferior Court of Floyd County, Georgia, could and did grant to the complainants or their assignors an exclusive franchise, such as is set up and claimed in the complainants' bill, and whether or not, therefore, the subsequent grant of the bridge franchise, described in the pleadings, by the said Board of Commissioners to the defendants is or is not valid, and the right of complainants to the relief prayed for." It was also agreed that the defendants had title to the lands on which the piers of the bridge were built.

The superior court decided that the inferior court of the county had no power to grant Mil-

ler any such exclusive right as was claimed, and for that reason dismissed the bill. This decision was afterwards affirmed by the Supreme Court of the State on appeal, and to reverse that judgment this writ of error was brought.

Accompanying the submission of the case on its merits is a motion to dismiss because no federal question is involved.

Before proceeding to consider the questions presented by the record, we are called upon to dispose of a preliminary motion. On or before the 6th of December, 1879, the counsel for the respective parties stipulated, in writing, to submit the case on printed arguments under the 20th Rule. The plaintiffs in error ask leave to withdraw their stipulation, and set the cause down for oral argument when reached. We think their showing in support of that motion is insufficient, and that under the rule laid down in *Muller v. Dows*, 94 U. S., 277 [XXIV., 76], the stipulation must be enforced.

We think, also, that the motion to dismiss must be overruled. It is true, the court below disposed of the case by deciding that the state statutes did not authorize the inferior court to grant Miller an exclusive right to maintain bridges within the designated limits, and that in so doing it gave a construction to a state statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is when the state court "Has been called upon to interpret the contracts of States, 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries in conformity with state legislation." *Bk. v. Skelly*, 1 Black, 436 [66 U. S., XVII., 173]. It has been decided in Georgia that the right to receive tolls for the transportation of travelers and others across a river on a public highway is a franchise which belongs to the people collectively. *Young v. Harrison*, 6 Ga., 130. A grant of this franchise from the public in some form, is, therefore, necessary to enable an individual to establish and maintain a toll bridge for public travel. The Legislature of the State, alone, has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established having power for that purpose. The grant when made binds the public, and is, directly or indirectly, the Act of the State. The easement is a legislative grant, whether made directly by the Legislature itself, or by any one of its properly constituted instrumentalities. *Justices of Pike Co. v. Plank Road*, 11 Ga., 246. The complainants claim they have such a grant through the agency of the inferior court, acting under the authority of the Legislature. This is denied, because, as is insisted, the Legislature has not given the court power to make an exclusive grant. That was the precise question decided below, and under the exception to the rule just stated is reviewable here.

If the court erred in construing the statute and in holding that there was no contract, then the question is directly presented by the pleadings and the stipulation as to the facts, whether the subsequent action of the commissioners of roads and revenue is, in its legal effect, equivalent to a law of the State impairing the obligation of the contract as it was made. In this way, it seems to us, a federal question is raised

upon the record, which gives us jurisdiction.

We, therefore, proceed to consider whether the inferior court had the power to grant Miller the exclusive right. It certainly has done so, if the power existed. There is no doubt that the Legislature, under the Constitution of the State in force at the time, had authority to make such a grant. The only question is, whether power for that purpose had been delegated to the inferior court.

The statutes relied on by the plaintiffs in error as conferring that authority are:

1. An Act of December 1, 1805, Cobb, Dig. 945, as follows:

"The inferior courts in the several counties in this State are hereby empowered, if they shall deem it necessary, on application being made, to authorize the establishment of such ferries or bridges as they may think necessary, other than where ferries and bridges have already been established by law, and to allow such rates for crossing thereat as are usual or customary on watercourses of the same width: *Provided, nevertheless*, That the Legislature shall, at all times, retain the power of making such alterations in the establishments made by the justices of the inferior courts as to them may seem proper."

2. An Act of December 19, 1818, Cobb, Dig. 952:

"Section 29. The justices of the inferior courts of each county, in this State, or a majority of them, shall have power and authority to hear and determine all matters which may come before them relative to roads, bridges, etc., as are authorized by law, either in term time, or while sitting for ordinary purposes, or at any special meeting held for that purpose."

"Section 33. The inferior courts shall have power to establish ferries, to rate the toll to be taken, as well those already established as any which may hereafter be established, within the several counties within which they may severally reside; and, generally, all other matters relative to ferries which may, in their judgment, be of public utility, any law to the contrary notwithstanding."

4. An Act of December 26, 1845, Cobb, Dig. 958:

"That the justices of the inferior court of the several counties in this State, or a majority of them, be and they are hereby authorized to contract for the building and keeping in repair of public bridges for such time and in such way as they may deem most advisable, either by letting the same to the lowest bidder, hiring hands for that purpose, or in any other way that to them may appear right and proper. And should they at any time let the same to the lowest bidder, that they be authorized to require and receive the same bond that commissioners now do."

It is conceded that these statutes contain all the authority the inferior court of Floyd County had to make the contract in question. Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed. Every statute which takes away from a Legislature its power will always be construed most strongly in favor of the State. These are elementary principles. The question here is, whether the Legislature of Georgia conferred on the inferior

courts of its several counties the power of contracting away the right of the State to establish such ferries and bridges in a particular locality as the ever changing wants of the public should in the progress of time require. In our opinion it did not. It gave these courts the right to *establish* ferries or bridges, but not to tie the hands of the public in respect to its future necessities. The right to establish one bridge and fix its rates of toll does not imply a power to bind the State or its instrumentalities not to establish another in case of necessity. In fact, the Act of 1805, which remained in full force until the contract with Miller was made, expressly retained power for the Legislature to make such alterations of what might be done by the courts as should seem to be proper. The Act of 1818 gave the courts general power over all matters relative to ferries, and authorized them to hear and determine all matters which should come before them in relation to roads and bridges; but there was no express repeal of the proviso of the Act of 1805, and there is no such inconsistency between the two Acts as to amount to a repeal by implication. Such being the case, the original power retained by the Legislature over the Acts of the courts in this particular remained in full force. The Act of 1845 related only to the building and repairing of such public bridges as were not owned by private individuals or corporations. It conferred no new powers in respect to the bargaining away of public franchises. We see nothing in the case of *Shorter v. Smith*, 9 Ga., 517 to the contrary of this. All the court there decided, was, that an exclusive right had not been granted. The question of power in the inferior courts to make such a grant was not involved, and certainly not decided. The language of the court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case.

Upon the whole, it seems to us that the Supreme Court of the State was right in its decision, and the judgment is, therefore, affirmed.

NATHANIEL A. COWDREY, *Appt.*,

v.

J. V. W. VANDENBURGH ET AL., as J. V.
W. VANDENBURGH & Co.

(See S. C., 11 Otto, 572-576.)

Non-negotiable demands—power of sale.

1. The purchasers of non-negotiable demands, from others than the original owner of them, can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim.

2. When the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they will be protected.

[No. 1075.]

Submitted Jan. 14, 1880. Decided Mar. 8, 1880.

APPEAL from the Supreme Court of the District of Columbia.

NOTE.—Transfer of bills and notes by assignment; obligation of assignor or transferor. See note to *Pease v. Dwight*, 47 U. S. (6 How.), 190.

The case is stated by the court.

Mr. J. H. Bradley, for appellant:

In equity, the indorsement and delivery of the certificates was a valid assignment of all the interest of the assignor, and that interest was subject only to the state of accounts existing between the parties to whom the certificate was given, and the District of Columbia.

These certificates were choses in action. They were assignable at law and in equity. These are familiar principles. Both at law and in equity the assignee took, subject to the state of accounts between the original parties, and all other equities of which he had notice. The effort here is to make him subject to equities between the assignor and third parties, of which he had no notice.

Baldwin v. Ely, 9 How., 599; *Talty v. Freedman's Sav. & Trust Co.*, 93 U. S. 326 (XXIII., 887); *Chealey v. Taylor*, 3 Gill., 251; *McNulty v. Cooper*, 3 Gill. & J., 218; *Cox v. Sprigg*, 6 Md., 274; *Bentley v. McKim*, 7 H. & J., 501; *McNeil v. Bk.* 46 N. Y., 325.

But if we are mistaken in this, then we say the defendant was an innocent *bona fide* purchaser for full value, and was led into these purchases by the *indicia* of title exhibited by the indorsement of the complainants, viz.: the fact that they had a marketable value and passed by delivery on sale; and they were in the possession of third persons, the papers having this *indicia* of title, and this by reason of complainant's culpable negligence. If there was any fraud on the part of the person to whom they were first indorsed and delivered, the purchaser cannot be affected thereby.

Taylor v. Gitt, 10 Pa., 431; *Wheeler v. Hughes*, 1 Dall., 23; *Metzgar v. Metzgar*, 1 Rawle., 227; *McMullen v. Wenner*, 16 Serg. & R., 21; *McNeil v. Bk.* (supra); *Rov v. Dawson*, 1 Ves., 331; *Stones v. Hourly*, 1 Ves., Sr., 165; *Slade's Case*, 4 Co., 95; *Ryall v. Rowles*, 1 Ves., Sr., 367; *Ryall v. Rolle*, 1 Atk., 177; *Dearle v. Hall*, 3 Russ., 1; *Loweridge v. Cooper*, 3 Russ., 30; *Moore v. Bk.*, 55 N. Y., 41.

Mr. Jas. G. Payne, for appellees:

The rule which applies to these certificates controls, not only the title which Vandenberg & Co., could give, but equally the title which Mandel and Blumenberg could give. Cowdrey could take only an equitable title, that is, subject to all the equities between the antecedent parties to the papers, whether he had notice of such equities or not. The purchaser of such a chose in action must abide by the case of the person from whom he buys. In other words, the former takes the exact position of the latter.

Davies v. Austen, 1 Ves., Jr., 247; *Williamson v. Thomson*, 16 Ves., 443; *Glyn v. Baker*, 13 East, 509; *Andrews v. Pond*, 13 Pet., 65; *Mickles v. Townsend*, 18 N. Y., 575; *Norton v. Rose*, 2 Wash. (Va.), 233; *Bush v. Lathrop*, 22 N. Y., 535; *Reeves v. Kimball*, 40 N. Y., 299; *Schafer v. Reilly*, 50 N. Y., 66; *Bircleback v. Wilkins*, 22 Pa., 26; *Cutts v. Guild*, 57 N. Y., 229.

Mr. Justice Field delivered the opinion of the court:

The complainants, composing the firm of Vandenberg & Co., of the District of Columbia, had, previously to December 6, 1873, entered into contracts with the Board of Public Works of the District for grading, paving and

improving certain streets in the City of Washington. On that day, their account, amounting to \$8,451.88, for work on one of the streets, was audited and allowed, and a certificate of the auditor to that effect was issued to them. On the 17th of February following the complainants borrowed of the defendant, Blumenburgh, the sum of \$3,160 for six months, and deposited with him as collateral security the certificate, to be returned upon the payment of the money. The certificate was at this time indorsed by them in blank. When the money became due, they called with the amount and accrued interest at the former place of business of Blumenburgh to pay the debt and take up their certificate; but he had disappeared, and no one there knew when he had left or whether he had gone. The complainants could not find him nor any one representing or acting for him; and, what was of more consequence, they could not find their certificate either. He had clandestinely departed from the city; and they charge in their bill, in substance, that he always intended to cheat and defraud them; and that, without their knowledge, he has disposed of the certificate to some one, who, in conjunction with him, is attempting to wrongfully use it, and thus deprive them of their property.

By the legislation of Congress relating to the District of Columbia, certificates of allowed and audited accounts, like that in question, could be surrendered to a Board of Audit, and certificates of indebtedness against the District received for them; and these latter certificates could be exchanged for interest-bearing bonds of the District. The complainants, informed that the certificate belonging to them had been presented to the Board of Audit by agents of Blumenburgh, or of persons to whom it had been passed, for the purpose either of obtaining money therefor or bonds of the District, filed the present bill to arrest the further use of the certificate, and compel its restitution to them. Learning afterwards that the appellant, N. A. Cowdrey, of New York, claimed to be owner of the certificate, and was seeking to obtain for it from the Board of Audit a certificate of the indebtedness of the District, for which an interest bearing bond could be issued, they amended their bill, and brought him in as a defendant.

In his answer he admits the possession of the certificate, and avers, in substance, that he purchased it in the ordinary course of business of a broker in Washington for value, with other certificates of a similar character, but does not state what amount he paid for it; that he was at the time ignorant of the transaction between complainants and Blumenburgh stated in the bill; and that the certificate had the blank indorsement of the complainants, which justified him in concluding that they had parted with their interest; and he insists that he is, therefore, entitled to protection as a *bona fide* holder for value without notice. To the answer a replication was filed, and its affirmative allegations are unsupported by any proofs. The answer cannot, therefore, be taken as evidence on his behalf. He must, therefore, be treated as one standing in the place of Blumenburgh, and holding the certificate subject to the claim and equities of the original holder. The certificate was not a negotiable instrument which could pass by indorsement and delivery. It was not a promise to pay

any sum, nor was it an order upon anyone or upon any fund for the payment of money, or for the delivery of anything of value. It was simply a statement that the account of the complainants for work done by them upon one of the streets of Washington had been audited and allowed by an officer of the city, whose duty it was to ascertain and certify as to the amount and price of the work done by a contractor. Whoever takes such a certificate, whether with or without notice, takes it subject to all the rights and equities of the actual owner, as much so as if it were tangible property in the streets.

The cases where, by law, certificates of a similar character are made negotiable can have no application. It is not pretended that any law of Congress has made the certificates of the auditors of the District of Columbia negotiable, or given to them any special character beyond that which they purport on their face to possess. Nor can any weight be given to the suggestion that, by custom, these instruments are considered and treated as negotiable paper in the District. There was no evidence offered of the existence of any such custom, even had such evidence been admissible, to contravene an established rule of law.

That the purchasers of non-negotiable demands, like the certificate here, from others than the original owner of them can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim, is established by all the authorities. He must, in such case, as Lord Thurlow said, abide by the case of the person from whom he buys. *Cutts v. Guild*, 57 N. Y., 229; *Ingraham v. Disborough*, 47 N. Y., 421; *Bush v. Lathrop*, 22 N. Y., 535.

If the pledgee, Blumenburgh, had written over the blank indorsement of the complainants a formal assignment to himself of the claim, and in that form had sold the certificate to Cowdrey for value, it is possible that the latter might have successfully insisted that the complainants were estopped from asserting, as against him, ownership of the claim. The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected. The case of *McNeil v. Bk.*, in the Court of Appeals of New York, contains a clear statement of the law on this head. There, it is true, a certificate of stock was pledged with a blank assignment and power of attorney indorsed, which the pledgee afterwards filled up, and then disposed of the stock. It was evident that the owner contemplated that the blanks in the assignment and power should be filled up, if it should ever become necessary. 46 N. Y., 325.

But the principle stated by the court is applicable where no such intention is manifested. The rights of innocent third parties, as the court there observes, "Do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." Here the complainants could have expressed in their indorsement the purpose of

the deposit of the certificate with Blumenburgh; that it was as security for a specified sum of money; and thus imparted notice to all subsequent purchasers or assignees that the pledgee held only a qualified interest in the claim. But having indorsed their name in blank, they virtually authorized the holder to transfer or dispose of the certificate by writing an absolute assignment over their signature. Had it, therefore, appeared in this case that Cowdrey paid any money for the certificate, and took it with the assignment which he himself afterwards wrote over the signature of the complainants, we are inclined to think that his defense would have been sustainable. But as he has not shown that he parted with any value for the claim, and no assignment was at the time indorsed over the blank signature, he must be treated as standing in the shoes of his alleged vendor, Blumenburgh.

Decree affirmed.

Dissenting, *Mr. Justice Swayne* and *Mr. Justice Miller*.

EDWIN C. LITCHFIELD, *Appt.*,

v.

COUNTY OF WEBSTER, IN THE STATE OF IOWA, AND JONATHAN HUTCHISON, TREASURER OF SAID COUNTY,

AND

CROSS APPEAL.

(See S. C., 11 Otto, 773-781.)

Iowa lands—taxation of—delay in payment—enjoining collection.

1. The lands which passed to the *bona fide* purchasers from the State of Iowa under the Joint Resolution of Congress, approved March 2, 1861, did not become taxable by the laws of the State before that date.

2. The revenue year of the State for 1861 commenced before March; therefore, the lands were not taxable for that year but were for the year 1862, and thereafter.

3. Where a State, under whose authority a tax is levied, sets up a title in itself, to the property taxed, adverse to that of the true owner, and forbears to enforce the collection until the title is adjusted, no claim can be made by it for extraordinary compensation on account of such delay in payment of the tax.

4. In such case a court of equity may enjoin the collection of the extraordinary compensation which the revenue laws of the State give for a delay in payment of taxes.

[Nos. 1002, 1003.]

Submitted Dec. 22, 1879. Decided Mar. 8, 1880.

CROSS appeals from the Circuit Court of the United States for the District of Iowa.

This was an action in equity, commenced in the court below by Edwin C. Litchfield against the County of Webster, in the State of Iowa, and Jonathan Hutchison, its Treasurer, for the purpose of enjoining respondents from collecting taxes levied for the years 1859 to 1866 inclusive, on lands claimed to be owned by the complainant, and for other relief. The court below decided that the taxes levied for the years 1862 to 1866 inclusive, were legal and constituted a lien upon the lands in question. The court however relieved the complainant from the statutory penalties and simply added

six per cent interest to the taxes. A decree having been entered in accordance with the opinion, both parties appealed to this court.

The case is fully stated in the opinion of the court, and in the case therein referred to, of *Wolsey v. Chapman*, No. 104, of this Term, *ante*, 915.

Mr. George C. Wright, for Litchfield.

Mr. J. F. Duncombe, for the County and its Treasurer.

Mr. Chief Justice Waite delivered the opinion of the court:

The primary question to be decided in this case is as to the time when the lands, which passed to the *bona fide* purchasers from the State of Iowa under the Joint Resolution of Congress, approved March 2, 1861, 12 Stat. at L., 251, became taxable by the laws of the State. The controversy is about taxes assessed for the years 1859, 1860, 1861, 1862, 1863, 1864, 1865 and 1866.

The facts affecting the title are fully stated in the case of *Wolsey v. Chapman*, decided at the present Term [*ante*, 915], where we held, following the principles settled in *R. R. Co. v. Litchfield*, 23 How., 66 [64 U. S., XVI., 500], *Wolcott v. Des Moines Co.*, 5 Wall., 681 [72 U. S., XVIII., 689], *Riley v. Welles*, not reported [reported in this edition, XIX., 648], *Williams v. Baker*, 17 Wall., 144 [84 U. S., XXI., 561], and *Homestead Co. v. R. R. Co.*, 17 Wall., 153 [84 U. S., XXI., 622], that the United States continued to own the lands until the adoption of the Joint Resolution. Nothing was included in the original river grant of 1846, 5 Stat. at L., 453, except the lands below the Racoon Fork. While, on account of the action of the Executive Department of the General Government, those above the Fork were reserved from sale and did not pass to the State when selected as school lands under the Act of 1841, or as railroad lands by the grant of 1856, 11 Stat. at L., 9, and were not open to preemption entry, they were not actually donated by the United States to the State, or to the purchasers from the State, until the Joint Resolution was adopted. The grant made by that Resolution was just as much an original grant as it would have been if the Act of 1846, 9 Stat. at L., 77, had never been passed. The order of the Executive Department, reserving them from sale, neither transferred any title to nor created any interest in the State. It simply retained the ownership in the United States. While the subsequent gift was, undoubtedly, induced by what had happened before, the United States, until it was made, continued to be the proprietor of the lands, both in law and in equity. Such being the case, they were not taxable before March 2, 1861. They, down to that time, actually belonged to the United States, and no one else had any interest whatever in them.

This disposes of the taxes for the years 1859 and 1860, but another question arises as to those of 1861. Under the revenue laws of Iowa, in force at that time, government lands entered or located, or lands purchased from the State, could not be taxed for the year in which the entry, location or purchase was made. Laws of Iowa, Rev., 1860, p. 110, sec. 711, par. 7. In *The R. R. Co. v. Brown*, 39 Iowa, 655, this was held to mean that government lands were not taxa-

ble until the next year after a patent could be demanded for them. To the same general effect are *R. R. Co. v. Cherokee Co.*, 37 Iowa, 483; *Goodrich v. Beaman*, 37 Iowa, 563; *R. R. Co. v. Woodbury Co.*, 38 Iowa, 498. The revenue year of the State for 1861 commenced before March. It is clear, therefore, that the lands were not taxable for that year. They were neither entered, located, purchased from the State, nor patented, within the meaning of the revenue laws, until then.

We think, however, that for the year 1862 and thereafter they were taxable. By the Joint Resolution, Congress relinquished all the title the United States then retained to the lands which had before that time been certified by the Department of the Interior as part of the river grant, and which were held by *bona fide* purchasers under the State. No further conveyance was necessary to complete the transfer, and the description was sufficient to identify the property. The title thus relinquished inured at once to the benefit of the purchasers for whose use the relinquishment was made. All the lands involved in this suit had been certified, and Litchfield or those under whom he claims were *bona fide* purchasers from the State. It matters not, so far as this branch of the case is concerned, that at that time there were doubts as to whether the United States retained any title which could pass under the Resolution. That question has now been settled in favor of Litchfield, and it has also been decided that after the Resolution went into effect the United States had no longer any interest in the property, legal or equitable. It became private property and, as such, subject to taxation under the revenue laws of the State.

It only remains to consider whether, under the circumstances of this case, it is within the power of a court of equity to enjoin the collection of the interest or penalty which the revenue laws of the State require the Treasurer of the County to collect, in case taxes legally assessed are not paid within the time fixed by law. The statutes regulating this matter are as follows:

"Section 759. On the first day of February, the unpaid taxes, of whatever description, for the preceding year, shall become delinquent, and shall draw interest, as hereinafter provided; * * *

Sec. 760. The treasurer shall continue to receive taxes after they have become delinquent, until collected by distress and sale; but if they are not paid before the first of March, he shall collect as a penalty for non-payment, from each tax payer so delinquent, one per cent of the amount of his tax additional, and if not paid before the first day of April, he shall collect another one per cent additional, and so for each full month which shall expire before the tax shall have been paid. The treasurer shall, in all cases, make out and deliver to the tax payer a receipt for taxes paid, stating the time of payment, the description of the land, the amount of each kind of tax, the interest on each, and costs, if any, giving a separate receipt for each year; and shall make the proper entries of such payments in the books of his office, and such receipt shall be in full for his taxes that year; * * *

By section 761 the clerk of the County Board

of Supervisors is required to keep full and complete accounts with the county treasurer and, among other things, to charge him with "interest on delinquent taxes;" and "on the first day of each month ascertain the amount of delinquent and unpaid taxes of all classes on said day, and charge said treasurer in said account with one per cent on the amount thereof to be collected by him, as provided in section 52 (sec. 760) of this Act." Laws of Iowa, Rev. 1860, pp. 118, 119. On the first day of October in each year the treasurer is required to offer at public sale all the lands on which the taxes for the previous year had not been paid. Of this sale, notice was to be given by advertisement. Sec. 763, p. 119.

It appears, from the agreed statement of the parties, that the lands about which this controversy arises amount in the aggregate to 32,602 $\frac{2}{100}$ acres. Of this 3,301 acres are part of the school lands selected by the State under the Act of 1841, the particulars of which appear in the case of *Wolsey v. Chapman*, *supra*, and about 17,000 acres fall within the limits of the railroad grant of 1856, also referred to in that case. In respect to the school lands, it appears that the State has at all times claimed title adverse to that of Litchfield and his grantors. In the adjustment of the controversies with the United States, as was seen in that case, the agent acting on behalf of the State was specifically required not to relinquish any claim of the State to its selections under the Act of 1841; and even at the present Term of this court the State has appeared here as a litigant, asserting its own title and that of its grantees as superior and paramount to that of Litchfield.

As to the railroad grant of 1856; the agreed statement shows that, on the demand of the State, the 17,000 acres now in controversy were certified for the benefit of the Dubuque and Pacific Railroad Company. This claim on the part of the State was maintained and constantly asserted adversely to Litchfield until the case of *Wolcott v. Des Moines Co.*, 5 Wall., 681 [72 U. S., XVIII., 689], was decided in this court at the December Term, 1866. That decision settled the dispute as to these lands, and from that time Litchfield has paid all taxes as they were annually assessed.

The State has never claimed adversely to Litchfield any portion of the remaining 12,000 acres, but the United States maintained that the title did not pass by the Joint Resolution of March 2, 1861, 12 Stat. at L., 251, so as to cut off preemption and homestead entries. That question remained open until the December Term, 1869, of this court, when it was settled in the case of *Riley v. Welles* [*supra*]. Until then, or, at least, until the adjustment between the United States and the State, in 1866, the title of the navigation company and its grantees to this portion of its lands was disputed by the United States, and sales conflicting with those of the navigation company were made at the Government Land-Offices.

On the 21st of September, 1860, the Treasurer and Recorder of Webster County wrote to the agent of the navigation company, the grantor of Litchfield, to the effect that the lands were on the tax book, but that until the title was adjusted they would not be advertised for sale. Before that time, on the 14th of June,

1860, the Auditor of State wrote the auditors of the several counties in which the disputed lands were situated, as follows:

"We conclude, in view of the so-called river lands, and the further question as to their being liable to tax, that it would be well not to offer them for sale for the taxes until these matters are determined or adjusted in some manner. There are two questions in regard to them. Firstly, has the State any title to them under the river grant? which it is reported has been decided in the negative, but of which we have no official information; 2d, whether they are taxable prior to 1859 as the property of the river company or their grantees. The last question I thought had been decided by our courts, but learn from Attorney-General Rice that there is some doubt about it. Upon the whole, it is thought best not to sell at present, lest it may lead to unnecessary trouble and expense."

It also appears from the statement of facts that, during the years 1863, 1864, 1865 and 1866, the taxes charged against the property were, in some particulars, in excess of what the law allowed. No person was designated on the tax book as owner. Anyone could pay the taxes and get a receipt. If one of the contesting claimants paid them supposing the lands were his, he could not, if he finally failed to maintain his title, recover from the real owner what he thus advanced. We so held in *Homestead Co. v. R. R. Co.*, 17 Wall., 153 [84 U. S., XXI., 622].

It thus appears that, while Litchfield or his grantor was in reality the owner of the lands from 1862 to 1866, and bound to pay the taxes for those years as assessed, the State, from which the taxing power came, disputed his title and set up an adverse claim in its own right to something more than 20,000 acres. At the same time, the United States disputed his ownership of the remaining 12,000 acres. All this was known to the state authorities; and in view of the facts the State, by its proper officer, gave notice to the parties in interest that the lands would be put on the annual tax books and charged with the taxes the owner should pay, if the title had passed out of the United States or the State, in law or in equity, but that, to avoid "unnecessary trouble and expense," no legal steps would be taken to enforce the collection "until the title was adjusted." This we understand to be the legal effect of the instructions of the Auditor of State to the treasurers of the several counties in which the disputed lands were situated, and the communication from the Treasurer of Webster County to the agent of the navigation company, made while the tax books of 1859 and 1860 were in his hands for collection. As soon as the title was adjusted, and even before, Litchfield or those under whom he claims commenced the payment of the annual taxes as they fell due, and offered to pay those of 1862, 1863, 1864, 1865 and 1866, with interest at the rate allowed by law for delay in the payment of ordinary debts; but the Treasurer declined to receive less than the statutory interest or penalty, unless the taxes of 1859, 1860 and 1861 were included. Although the lands were advertised for sale in 1862 and annually thereafter, they were purposely withheld from sale until this suit was commenced.

Under these circumstances, we think equity

may relieve against that part of the statutory interest which is in the nature of a penalty. This provision was, undoubtedly, made to secure promptness in the payment of taxes when actually due and demandable. It was evidently not intended so much as punishment for non-payment as compensation for delay. In all parts of the statute, except section 760, it is spoken of as interest. In one place in that section it is termed a penalty, but in another referred to as interest. The amount increases as the time of payment is put off. Now, it seems clear to us that if a State, under whose authority a tax is levied, sets up a title in itself to the property taxed adverse to that of the true owner, and to save "unnecessary trouble and expense," forbears to enforce the collection until the "title is adjusted," no claim can properly be made for extraordinary compensation on account of a delay in payment of the tax which may fairly be said to have been brought about by its own wrongful acts. Under the circumstances, Litchfield and his grantor might well have supposed that the taxes as charged were not to be treated as "delinquent," until in some form it had been determined whether the lands taxed were in law taxable. It now appears that the adverse claims of the State and the United States were unjust, and that Litchfield is bound for the payment of the taxes of 1862 and thereafter. He, therefore, actually owes the money called for by the taxes, and may properly be charged with such interest after the taxes became due as is by law payable on other money obligations; but the extraordinary compensation given by the statute for delay in payment of taxes charged on the tax books, and in the regular process of collection, occupies a different position. It is an elementary principle in equity jurisprudence, that if money is lying dead to meet an obligation, and delay in its payment is caused by the fault of him to whom it is to be paid, interest during the delay is not recoverable. Here the delay was caused by the improper interference of the State and the United States with the title. Litchfield himself has been guilty of no fraud or willful default. The State has voluntarily abstained from enforcing the collection because of doubts about its right to do so, and Litchfield has had the use of his money while the dispute remained unsettled. As soon as the title was adjusted he offered to pay what was actually due, with ordinary interest; and this was refused. Under these circumstances, we think the court below was right in enjoining the collection of all penalty or interest in excess of six per cent per annum. In *Stryker v. Polk Co.*, 22 Iowa, 137, there is a strong intimation that in a case like this such relief might be granted. None of the objections which were found to granting the injunction asked for in that case exist here, and it is clearly made to appear that the action of the State affected the title of this plaintiff prejudicially. Such a case was made by the bill and established by the evidence. It may fairly be inferred from what is said in *Litchfield v. Hamilton Co.*, 40 Iowa, 66, that in such a case the courts of the State would afford the remedy.

Although taxes in Iowa are levied and collected by the counties, all is done under the authority of the State, and the counties are charged with whatever is done by the State af-

fecting the rights of the tax payer. No complaint is made by Litchfield of the amount found due from him by the court below, if the decree is in other respects right, as we find it to be.

Decree affirmed, each party to pay the costs of his own appeal.

EDWIN C. LITCHFIELD, *Plff. in Err.*,

v.

COUNTY OF HAMILTON ET AL.

(See S. C., 11 Otto, 781.)

The case of Litchfield v. County of Webster, *ante*, 925, followed, in regard to certain taxes on lands in Iowa.

[No. 174.]

Submitted Jan. 28, 1880. Decided Mar. 8, 1880.

IN ERROR to the Supreme Court of the State of Iowa.

See the preceding case for the facts.

Mr. George G. Wright, for plaintiff in error.

Mr. D. D. Chase, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a writ of error to the Supreme Court of the State of Iowa. The only federal question presented is, whether the lands in Hamilton County, which Litchfield holds by the same title he did those in Webster County, involved in the case just decided [*ante*, 925], were taxable for the years 1859, 1860, 1861, 1862, 1863, 1864 and 1865. For the reasons stated in the other case, we held that the taxes for 1859, 1860 and 1861 are illegal, and their collection should be enjoined, but that those for 1862 and the following years are properly collectible. The court below decided that they were legally assessed for all the years, and decreed that they be paid in full, with all interest, penalties and costs. The liability of Litchfield for interest and penalties after 1861 does not present any federal question.

We, therefore, *reverse the decree of the State Court and remand the cause*, with directions to enjoin the collection of all taxes and charges on the lands in question for the years 1859, 1860 and 1861, but with leave to enter such further decree in reference to the taxes of 1862 and thereafter as the court shall be advised may be proper under the circumstances.

MANUEL DE LIANO, *Appt.*,

v.

MYRA CLARK GAINES.

Final decree, what is not.

A decree having been entered referring the cause to a master to state an account, and a motion made that the master proceed no further on account of alleged settlement between parties, an order, denying the motion and directing that the cause proceed, is not a final decree from which an appeal will lie to this court.

[No. 192.]

Submitted Mar. 11, 1880. Decided Mar. 15, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is sufficiently stated by the court.

Messrs. Henry B. Kelly, George L. Bright and Henry L. Lazarus, for appellant.

Messrs. Shellabarger & Wilson and C. E. Fenner, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

A decree having been entered referring this cause to a master, to state an account of rents and profits, Liano, the appellant, appeared in court and moved that the master be directed to proceed no further with his accounting, by reason of an alleged compromise and settlement that had been made by the parties in respect to the matters in dispute. The court, after a hearing, denied the motion, and directed that "the cause proceed." From this order Liano took this appeal.

It needs only a statement of the facts, to show that we have no jurisdiction. The decree appealed from is not a final decree.

The appeal is dismissed.

JAMES VANCE ET AL., *Appts.*,

v.

A. R. BURBANK ET AL.

(See S. C., 11 Otto, 514-521.)

Decision of Land Department, when conclusive—fraud—wife, right of—infants.

1. Where the question in dispute is one of fact, as to whether one, when he demanded his patent certificate as against other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years and had otherwise conformed to the requirements of the Donation Act, and this was determined by the Land Department, after a contest in which the contending parties appeared, and a full opportunity was given to be heard; such determination, in the absence of fraud, is conclusive on all questions of fact.

2. Fraud, in respect to which relief can be granted in this class of cases, must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department. False testimony or forged documents, even, are not enough.

3. The wife of the settler, or her heirs, get nothing before the husband, or some one for him, proves up the claim under the Act; whatever would bar her will necessarily bar her heirs.

4. Notwithstanding the infancy of the children, the decision of the Land Department concludes them as well as their father.

[No. 553.]

Submitted Dec. 16, 1879. Decided Mar. 15, 1880.

APPEAL from the Circuit Court of the United States for the District of Oregon.

The case is stated by the court.

Mr. W. Lair Hill, for appellants.

Mr. J. N. Dolph, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a suit in equity commenced on the 24th of December, 1877. The case made by the bill is as follows:

On the 20th of July, 1848, Lemuel Scott, a married man, settled on six hundred and forty acres of land in Oregon, and became a claimant thereof under the laws of the provisional government. On the 27th of September, 1850, Congress passed the "Donation Act," 9 Stat. at L., 496, the provisions of which are fully

See 11 OTTO.

stated in *Hall v. Russell*, decided at the present Term [*ante*, 829]. At the date of this Act, the wife of Scott lived with him on the land, and he had all the qualifications of a "settler." The lands were not then surveyed. Mrs. Scott died April 9, 1851, leaving three children, Louisa, aged five years; Caroline, aged three years, and Almeda, aged one year. Louisa and Almeda are plaintiffs in this suit.

On the 8th of October, 1852, one Joel Perkins notified the Surveyor-General of the Territory of his claim under the Donation Act to a certain tract of land as a settler. A description of this claim was duly entered in the proper book. The next day, October 9, Scott notified the Surveyor-General of his claim as a married man, which was also duly entered. The same day he presented the Surveyor-General with his proof of four years' residence, cultivation, etc., as required by section 7, and demanded a certificate of proof of compliance with the law and a designation of the part of the land inuring to himself, "and that part inuring to the said Mary Jane Scott, his wife." The claims of Scott and Perkins conflicted, and because of this the Surveyor-General declined to issue a certificate to Scott.

On the 23d of August, 1853, Scott and Perkins, in order to settle and adjust the conflict of claims between them, entered into an agreement, whereby Scott was to relinquish to Perkins all the land lying south and west of a certain line pointed out by the parties at the time on the premises, and Perkins relinquished to Scott all east and north of the same line. The parties, on the same day, undertook to reduce this agreement to writing, and Perkins, representing "That he knew and had correct information as to the courses, bearings and distances by which to describe and locate said agreed line, by referring to and connecting it with the public surveys," gave a description intended for that purpose, which was adopted.

Scott had no knowledge "of the courses, bearings and distances to connect the agreed lines with the public surveys," and relied wholly on the correctness of Perkins' representations. It is alleged that, in point of fact, the description as given by Perkins was false and made to deceive, and that the line as put into the written instrument was not the same which had been pointed out on the land when the settlement was agreed to, but gave Perkins about ninety acres more than he should have had. This ninety acre tract is the property now in dispute.

The agreement, reduced to writing under these circumstances, was signed in duplicate by both parties. Shortly after this was done, it was, as it is alleged, orally agreed between Scott and Perkins that Scott should send his copy to the Surveyor-General, and if he would allow Scott to change his notification so as to make his boundaries conform to the agreement, the copy should be filed; but if he would not, the compromise was to be abandoned. On the 27th of August, 1853, Scott sent his copy to the Surveyor-General, who refused to allow the change in the notification to be made. When this was done, Scott did not know of the alleged mistake in the description of the line. Afterwards, Perkins sent his copy of the agreement to the Surveyor-General's office and had

it filed. In the meantime, the Surveyor-General, to whom Scott presented his copy, had gone out of office and a new incumbent was in his place.

On the 8th of May, 1854, Perkins, as is alleged, by means of false affidavits and the agreement thus fraudulently obtained from Scott, proved his compliance with the law under a settlement commenced June 30, 1849, and obtained a patent certificate for his claim, including the premises in controversy. Shortly afterwards, he left Oregon and never returned. On the 2d of March, 1855, Scott, as soon as he heard of what had been done, filed his protest against the allowance of the claim of Perkins, on the ground that the affidavits produced were false. He also petitioned the register and receiver to re-examine the case, "To the end that the claim and rights of said Lemuel Scott and of the heirs of his deceased wife might be secured and protected." This application was refused.

In May, 1850, Perkins executed a deed to the Board of County Commissioners of the County of Yam Hill, purporting to convey all his claim to a part of the disputed premises. Afterwards, the Probate Court of the County, acting as a Board of County Commissioners, claiming the right to enter the lands under the provisions of the Town Site Law of 1844, 5 Stat. at L., 657, caused a plat and survey to be made for that purpose. On the 19th of April, 1858, the County Commissioners of the County, having first obtained the permission of the Commissioner of the General Land-Office therefor, entered the land so surveyed as a town site, and the Town of La Fayette is located thereon. This plat and town embrace the land described in the deed from Perkins to the county.

On account of the conflict of boundaries between the town site tract, the Perkins claim and the Scott claim, Scott and the heirs of Perkins, he having died, were notified to make their contests for their respective tracts when the proceedings for the entry of the town site were pending. The children of Mrs. Scott were not notified. Pursuant to this notice, however, Scott and the heirs of Perkins did appear, and depositions were taken; but as soon as all the depositions in behalf of the town site entry were in, and before Scott was ready with his witnesses, the case was heard and decided adversely to his claim. He then petitioned for a rehearing, which was granted on the order of the Commissioner of the General Land-Office.

In November, 1859, a deputy-surveyor was appointed by the Surveyor-General to make a survey of the Scott claim. This survey was made and the plat filed. Thereupon Scott demanded a patent certificate in accordance with the plat, and a designation of the part which was to be for his own benefit and that which was to be for the benefit of his wife and her heirs.

Further testimony was then taken on the rehearing which was granted by the commissioner, and on the first of February, 1862, the register and receiver decided against the Scott claim, and in favor of the town site and the Perkins claim. It is alleged that on this rehearing, "In addition to the false and fraudulent evidence hereinbefore referred to, further false and fraudulent evidence of residence upon

and cultivation of said Joel Perkins was produced by the heirs and representatives of said Joel Perkins, for the purpose of deceiving the officers of the Land-Office of the United States and defrauding the said Lemuel Scott and Caroline Scott and your orators."

From this decision of the register and receiver, Scott appealed to the Commissioner of the General Land-Office, and employed an attorney in Washington to look after the case. The attorney soon afterwards left Washington without notifying Scott. The appeal was heard in March, 1866, and the decision of the register and receiver affirmed. It is alleged "That, in transmitting said appeal to the Commissioner of the General Land-Office, the register and receiver, from whose decision the appeal was taken, failed and omitted to transmit therewith all the evidence which had been offered, introduced and used on the hearing before them, and that a large number of original depositions, exhibits and documents introduced and used in evidence before the register and receiver were not transmitted. That, among the said depositions, exhibits and documents which were not transmitted to the said commissioner, were some which had been taken, introduced and used on behalf of said Lemuel Scott on the hearing of said contest before the register and receiver, and which strongly supported the claim of said Lemuel Scott in said contest; and that, as your orators are informed and believe, the said Lemuel Scott was wholly ignorant of the omission to transmit said depositions, exhibits and documents; and fully supposed, until within one year last past, that all the depositions and evidence used in the contest before the register and receiver had been transmitted, along with the appeal." The case was heard and decided by the commissioner upon the evidence sent up and no other. Scott was not represented at the hearing by an attorney. From the decision of the commissioner, Scott appealed to the Secretary of the Interior, and employed new attorneys. This appeal was heard September 9, 1868, on the evidence sent up, and decided in favor of the Perkins claim. On the rendition of this decision, a patent certificate was issued in due form to the heirs of Perkins, for that part of the premises not included in the town site entry. A patent was made out ready for delivery March 14, 1872, but at the time of the commencement of this suit it had not been called for. A patent was issued and delivered to Yam Hill County on the town site entry some time in 1866.

Caroline Scott died August 28, 1864, leaving her father her sole heir at law. Louisa was married to James Vance in 1866, and Almeda was married to Livy Swan during the same year. On the 15th of October, 1877, Lemuel Scott conveyed to his two surviving daughters all his interest in the property.

Some of the defendants claim title under the town site entry, and some under the Perkins patent.

The prayer of the bill is, in substance, that the Perkins patent and the town site entry may be declared invalid as against the plaintiffs, and that the defendants may be required to convey to the plaintiffs such title as they respectively hold under the patent or entry.

The defendants demurred to the bill. This

demurrer was sustained and the bill dismissed. From that decree this appeal has been taken.

So far as this suit depends on the original title of Lemuel Scott, it is clear, under the well settled rules of decision in this court, that there can be no recovery. The question in dispute is one of fact; that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the Donation Act. This was to be determined by the Land Department, and as there was a contest, the contending parties were called on in the usual way to make their proofs. They appeared, and full opportunity was given Scott to be heard. He presented his evidence and was beaten, after having taken the case through, by successive stages on appeal, to the Secretary of the Interior. This, in the absence of fraud, is conclusive on all questions of fact. We have many times so decided. *Johnson v. Towsley*, 13 Wall., 72 [80 U. S., XX., 485]; *Warren v. Van Brunt*, 19 Wall., 646 [86 U. S., XXII., 219]; *Shepley v. Cowan*, 91 U. S., 330 [XXIII., 424]; *Moore v. Robbins*, 96 U. S., 530 [XXIV., 848]; *Marquez v. Frisbie*, at this Term [*ante*, 800]. The appropriate officers of the Land Department have been constituted as pecial tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are.

It has also been settled that the fraud, in respect to which relief will be granted in this class of cases, must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. *U. S. v. Throckmorton* [*ante*, 93]; *Marquez v. Frisbie* [*supra*]. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute.

The operative allegation in this bill is of false testimony only. That testimony Scott had full opportunity of meeting. Rehearings were granted him when the case seemed to require it, and he took all the appeals the law gave. The last decision was given by the highest department officer. If the evidence he presented to the register and receiver was not all considered on these appeals, it was clearly his own fault. It was more than six years from the time his first appeal was taken, before the final hearing was had. No fraud is charged on the register and receiver, or on the heirs of Perkins, in respect to the keeping back of the evidence. If any was, in fact, not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests. He does not now state what the omitted evidence was, or that it was anything more than cumulative. The extent of his averment is that it strongly supported his claim in the contest. For all we know, the other evidence might have been equally strong and might have covered the whole ground.

See 11 OTTO.

As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the Land Department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement. This was one of the matters that might have been presented to the Land Department and, therefore, is concluded by the decision of that tribunal. Under these circumstances, it would be gross injustice to attempt to open that inquiry at this late day in favor of Scott himself, or anyone claiming under him upon his own title, irrespective of any his wife may have had.

This brings us to inquire as to the rights of the children and heirs of the deceased wife. In *Hall v. Russell* [*ante*, 829], we held that a grant to a settler did not take effect as against the United States, so as to pass anything more than a possessory right in the lands occupied, until the completion of the four years' residence and cultivation, and a full compliance with all the other conditions of the Act. The statutory grant was to the settler; but if he was married, the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband. If he abandoned the possession before he became entitled to the grant, her estate in the land was gone as well as his. In the view we take of the case, it is unnecessary to decide when a settlement became perfected so as to establish a claim; or whether, if the wife died before the end of the four years, her heirs would be entitled to her half when the grant was completed. The question here is, whether the wife or her heirs gets anything before the husband, or some one for him, proves up the claim.

The "settler" is made by the statute the actor in securing the grant. He must notify the Surveyor-General of his claim. He must occupy and cultivate the land, and otherwise conform to the provisions of the Act; and he, or some one for him, must also make the final proof. When this is done, and he becomes entitled to the grant, his wife takes her share in her own right, but up to that time he alone makes the claim. His acts affecting the claim are her acts; his abandonment, her abandonment; his neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The Land Department, until the final proofs are made, knows only the husband. If contests arise, he is the party to be notified. He represents the claim, and whatever binds him binds all interested through him in the questions to be decided. For this reason, whatever might have been the rights of the children of Mrs. Scott if the claim had been successfully "proved up," their father was their representative in making the proof, and they must abide the consequences of what he did or omitted to do in their behalf. It follows that, notwithstanding the infancy of the children, the decision of the Land Department concludes them as well as their father.

This disposes of the case, and the decree of the Circuit Court is affirmed.

Cited—106 U. S., 452; 112 U. S., 32 7 Sawy., 433; 39 Ohio St., 387; 48 Am. Rep., 467.

PACIFIC RAILROAD COMPANY OF
MISSOURI, *Appt.*,

v.

GEORGE E. KETCHUM ET AL.

(See S. C., 11 Otto, 289-300.)

*Consent decree, review of—solicitor—admission—
jurisdiction—parties—sale.*

1. A consent decree in the Circuit Court can be appealed from. This court cannot consider any errors that may be assigned which were in law waived by the consent, but it has jurisdiction of the case.

2. Where it appears of record that a defendant assented to a decree through its solicitor, it is equivalent to a direct finding as a fact by the court, that the solicitor had authority to do what he did, and it binds this court on an appeal, so far as the question is one of fact only.

3. This is equivalent also to an admission by the company on the record that the facts exist on which the decree rests.

4. This court can consider under the appeal whether the court below had jurisdiction of the cause so as to authorize it to enter any decree. It is enough for the purposes of this appeal if the record shows that, when the consent was acted on by the court, jurisdiction was complete.

5. Consent cannot give the courts of the United States jurisdiction, but it may bind the parties and waive previous errors, if, when the court acts, jurisdiction has been obtained.

6. Where the controversy was between citizens of one or more States on one side and citizens of other States on the other side, of such a suit the Circuit Court had jurisdiction, and its decree is binding on the parties until set aside in the regular course of judicial proceedings.

7. A purchase, in the name of the solicitor of one whose property is sold, is not, necessarily, in and of itself invalid.

[No. 242.]

Argued Jan. 27, 28, 1880. Decided Mar. 22, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

The case is stated by the court.

Messrs. M. H. Carpenter, N. A. Cowdrey, Tremain & Tyler, J. R. Shepley, S. T. Glover, and Mason W. Tyler, for appellant:

To the bill of complaint, as filed, both the trustees and the Company might have made separate answers denying the misconduct of the trustees; and had this fact been determined against the plaintiff, that would have ended this suit.

Hence, it results that a part of the one and single controversy between the plaintiff and the mortgagor Company is a controversy between the plaintiff and citizens of his own State. That part of the controversy cannot be settled by the Federal Courts. It is only where there is one entire controversy, complete in itself, wholly between citizens of different States, and which can be completely determined between them, that the Federal Courts have jurisdiction. Where the controversy is as between the plaintiff, a citizen of one State, and one defendant, a citizen of another State, necessarily depends upon another controversy which is really between the plaintiff and citizens of his own State, and cannot be separated in judgment, the Federal Courts have no jurisdiction.

That is precisely this case. The plaintiff cannot recover against the Company unless he shall first succeed in establishing the misconduct of the trustees. To that part of the controversy the trustees are necessary parties defendant. The Company and the trustees have a joint interest in that part of the controversy. The Company is interested to defeat the plaintiff upon

this point, because that would defeat the suit. The trustees are interested to defeat the plaintiff upon this point, because, otherwise they lose control of the trust, may be taxed with costs and mulcted in damages. Therefore, this controversy, which is an integral, an inseparable part of the whole controversy, between the plaintiff and the Company, is outside of federal jurisdiction and, therefore, the court must dismiss this case, because there is no controversy in it which is entirely between citizens of different States, which condition alone would entitle the plaintiff to any relief.

Meyer v. R. R. Co., decided this Term (*ante*, 593.)

In the interest of a sound construction of this statute, it must be borne in mind that the word "controversy" is synonymous with the word "suit."

Curt. Com., sec. 73.

Marshall, *C. J.*, 5 Wheat., App., p. 16, says: "A case in law or equity was a term well understood and of limited signification. It was a controversy between parties which had taken a shape for judicial decision."

In the light of these authorities, the statute should be construed as though it read "In a suit between citizens of different States." And all the plaintiffs must be capable of suing all the defendants in the Federal Courts. The parties to the controversy must be corresponding parties to the suit. This is believed to be the doctrine of this court.

Osborn v. Bk., 9 Wheat., 856; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Childress v. Emory*, 8 Wheat., 668; *McNutt v. Bland*, 2 How., 9; *Huff v. Hutchinson*, 14 How., 586.

A consent decree is like the submission to arbitration; to be valid it must be within the submission.

Sprowl v. Stewart, 19 La. Ann., 433; *R. R. Co. v. Myers*, 18 How., 246 (59 U. S., XV., 380); *Burchell v. Marsh*, 17 How., 344 (58 U. S., XV., 96); *Hurst v. Hurst*, 1 Wash. (C. C.), 56; *Lyle v. Rodgers*, 5 Wheat., 394; *Boynston v. Frye*, 33 Me., 219; *Sawyer v. Freeman*, 35 Me., 546.

By the English practice, appeals are allowed from consent decrees in the following cases, to which we ask the court to refer:

Smith v. Turner, 1 Vern., 273 (in 1684); *Colwell v. Child*, 1 Cas. in Ch., 86.

In this case it was declared that it should not lie upon the plaintiff to show dissent, for it appears in the decree that it was the solicitor's assent, and if the decree want a sufficient foundation it is error, and the plaintiff shall not be put to show a negative.

In 1652 it was held in *Brooks v. Dickens*, which is quoted in *Colwell v. Child*, "That the assent of the solicitor was given in court; and the court knew such assent would not bind the party; and it was folly of the other party to proceed on that assent."

Also in the following cases:

Butterfield v. Butterfield, 1 Ves., 133; *Wood v. Griffith*, 1 Meriv., 35; *Buck v. Fawcett*, 3 P. Wms., 242; *Odell v. Crone*, 3 Dow., 61, 66, 75; *Beddell v. Dowse*, 6 Barn. & C., 264; *Brangan v. Gorges*, 7 Irish, Eq., 221; *Atty-Gen. v. Tomline*, 47 L. Jour. Ch., 473; *Stannard v. Harrison*, 24 Law. T. (N. S.), 570.

Appeals from consent decrees are held to be well taken in the state courts.

Saleski v. Boyd, 32 Ark., 74; *Brewer v. Conn.*, 9 Ohio, 189; *Sproul v. Stewart*, 19 La. Ann., 433.

Messrs. Geo. F. Edmunds, Melville C. Day and James O. Broadhead, for appellants:

The decree was entered by consent of all parties, including the appellant. From such a decree no appeal can be taken, for the reason that error cannot be alleged in respect of any proceedings to which the party has assented.

Cole v. Scott, 14 Jur., 25; *Carew v. Cooper*, 12 W. R., 767; *Ringgold's Case*, 1 Bland, 5; *Atkinson v. Manks*, 1 Cow., 709; 2 Dan. Ch. Pr., 973, 974, 4th ed.

The authority of the solicitor to consent cannot be inquired into or impeached on appeal, for the appeal must be solely on matters appearing in the record.

Mole v. Smith, 1 J. & W., 653; *Hobler's Case*, 8 Beav., 101.

Appeals from consent decrees are irregular and dismissible.

Toder v. Sansam, 1 Bro. P. C., 468.

The statute concerning appeals does not change these perfectly settled rules. The statute is general; like all such statutes, it must be construed according to the principles of common sense, and its application limited to those persons who are entitled to complain of the action of the court.

The English practice has always been in conformity with the propositions before stated; and there is no exception in such cases, even in respect to jurisdiction. The essential principle is, that the party consenting has no right to bring up and open the record to the inspection of this court for any purpose whatever. If the decree below be void, it will stay void; and the consent of parties in that case will only be a mere contract between them. If it is merely voidable, and the case be capable of an adjustment securing the jurisdiction, the consenting party is estopped from complaint as in the case of any other error. There can be no appellate jurisdiction in such a case, for the court below has made no decision in the full judicial sense. A trial here would be an original trial.

Corning v. Iron Co., 15 How., 451 (precisely in point); *Murphy v. Ins. Co.*, 25 Wend., 249; *Christ's Hos. v. Grainger*, 14 Jur., 339.

If the record were open for review, there was jurisdiction and no error.

(a) As to jurisdiction: the bill does not put the trustees in an attitude of controversy with the bondholders; and the answer of the trustees explicitly puts them in harmony with the interest of the bondholders and the object of the suit; so that the point against the jurisdiction is reduced simply to the fact that they stand on paper as defendants instead of co-plaintiffs. Both the Constitution and the Act of 1875, were directed to matters of substance and not of mere form.

(b) The suit was not premature, and was properly instituted on the merits. The six months' limitation of the power of the trustees after default mentioned in the mortgage, applied solely to proceedings *in pais* of the trustees. The equitable rights of bondholders to invoke judicial redress were in no manner interfered with. Before the decree was rendered, the default had continued more than six months, and it was the

See 11 OTTO.

right and duty of the court in that case, to order a sale of the whole property for the payment of the whole debt, for the whole debt was then in default, according to the terms of the mortgage.

(c) In the foregoing state of the case, however it might have been in the case of a strict foreclosure, the decree for sale, without first limiting the time within which the respondents should redeem, was perfectly correct in point of law, for it followed the provisions of the mortgage, and it was in accordance with the laws of Missouri. At any time before the sale, the debtor might have brought into the court all that it claimed to be due and applied for a stay of proceedings, and protected its interest, if it had any to protect.

Mr. Chief Justice Waite delivered the opinion of the court:

This case presents the following facts:

On the 10th of July, 1875, the Pacific Railroad, a Missouri Corporation, mortgaged its road and other property to Henry F. Vail and James D. Fish, trustees, citizens of New York, to secure a proposed issue of bonds amounting, in the aggregate, to \$4,000,000. This mortgage will hereafter be referred to as the "third mortgage." The bonds were to bear date as of May 1, 1875, and become payable twenty years thereafter, with interest at the rate of seven per cent, falling due semi-annually on the first days of November and May in each year. The principal object of this new issue was to take up, by exchange or otherwise, outstanding income and improvement bonds of the Company, amounting in all to \$3,500,000. The mortgage contained a clause to the effect that, if the Company should fail to pay the interest on any of the bonds thereby secured, for six months after the same became due and payable, and demand made therefor, or if the principal of any of the bonds, when payable, should not be paid for six months after demand, the trustees might, on the written request of holders of bonds to the amount of \$500,000, the principal or interest of which should then be in arrear and unpaid, sell the mortgaged property at public auction, in the City of St. Louis, giving notice thereof in a manner particularly specified, and execute and deliver conveyances to the purchaser, applying the proceeds of the sale to the payment of the bonds.

The property mortgaged was covered by other mortgages. One was to Uriah A. Murdock, James Punnett and Luther C. Clark, citizens of New York; another, to Edwin D. Morgan and Joseph Seligman, also citizens of New York; another, to Rufus J. Lackland and Dwight Durkee, citizens of Missouri; another, to James Baker, a citizen of Missouri, and Jesse Seligman, a citizen of New York; and all were prior in lien to that to Vail and Fish, the third mortgage.

Default having been made in the payment of the interest falling due November 1, 1875, on the bonds secured by the third mortgage, George E. Ketchum, a citizen of New York, claiming to be the owner and holder of many of the bonds, commenced this suit in the Circuit Court of the United States, for the Eastern District of Missouri, on the 11th of November, in behalf of himself and the other bondholders, to

foreclose the mortgage. To this suit the Railroad and the trustees of all the mortgages, including Vail and Fish, were made defendants, their citizenship being fully set forth in the bill. The superior right of all the prior mortgages was conceded, and it was also admitted that the full amount of their authorized issues was outstanding, but it was alleged that the interest on all, except that secured by the third mortgage, had been paid promptly as it matured, and that there was then no default. It was also alleged that the value of the property was greater than the amount of all the prior liens.

The bill further stated that about \$2,000,000 of the income and improvement bonds had been exchanged for the bonds secured by the third mortgage, and that about \$300,000 of the last named bonds had been negotiated otherwise than by exchange, and were then outstanding. It then set forth default in the payment of interest falling due November 1, 1875, after due demand made; that there was a large amount of money due from the Company for taxes; that the Company was without means to pay its valid obligations in full as they became due; that its commercial paper had been protested; that it was liable to actions, suits and proceedings on account thereof; and that there was great danger that the property covered by the mortgage might be attached or levied upon under execution or other legal process.

The bill then proceeds as follows: "Your orator further shows unto Your Honors that an application has been made by your orator, on behalf of himself and other holders of bonds secured by said mortgage to the defendants, Henry F. Vail and Henry D. Fish, to take proceedings to foreclose the aforesaid mortgage, and to protect the interest of your orator and such other holders; but that no such proceedings have been taken and, as your orator is informed and believes, some doubt is expressed whether, under such mortgage, they have the right to institute such proceedings, or any proceedings thereunder, by reason of the non-payment of the interest due November 1, 1875; and for such reason prefer not to take such proceedings; and your orator being apprehensive that his interest and the interests of other holders of like bonds may be seriously affected by delay in the institution of proceedings to foreclose said mortgage and to obtain possession of said property, has brought this action in his own behalf, and on behalf of all others similarly situated and holding like bonds secured by said third mortgage, and has made said Vail and Fish parties defendant herein."

The prayer was that the mortgaged property might be sold subject to the liens of the prior mortgages, and that, if necessary, an account might be taken. There was also a prayer in the usual form for the appointment of a receiver.

Process was duly issued and served on the 13th of December, 1875, on such of the defendants as were citizens of Missouri, and on the 8th of January, 1876, an order was taken for service on the non-resident defendants in the manner required by the rules of the court; but it does not appear that any such service was actually made. On the same 8th of January, one Thomas P. Akers, representing that he was a stockholder of the Company, that the mortgage sued on was a fraud, and that the Corporation

would not resist the suit, asked that he might be permitted to come in as a defendant to protect his interests. On the 7th of February, 1876, the Company filed an answer, in which it substantially confessed all the allegations of the bill, and asserted the binding character of the bonds and mortgage. The answer concluded, however, as follows: "But it says that it is informed that a portion of said stockholders claim that they are fraudulent and void, and that the directors of this defendant were guilty of fraud in issuing the same. Therefore, this defendant asks this honorable court to permit any of the stockholders aforesaid to become a party defendant to this suit, upon a proper showing, and make such defense in the premises as they may see proper." James Baker signed the answer as solicitor of the Company, as did also the secretary of the Company, and the corporate seal was affixed.

On the 16th of February, Cornelius K. Garrison and James Seligman, citizens of New York, and Thomas W. Pierce, a citizen of Massachusetts, representing themselves to be owners of \$1,797,000 of the bonds secured by the third mortgage, were admitted into the suit as plaintiffs with Ketchum, and united with him in the allegations of his bill. On the 25th of March, 1876, Peter Marie, Frank A. Otis, Robert L. Cutting, Jr., James D. W. Cutting, citizens of the State of New York, and George R. Fearing, a citizen of Rhode Island, all stockholders in the Company, asked to be made codefendants with Thomas P. Akers, with leave to defend the suit. On the 3d of April, a receiver was appointed with the usual authority, and Vail and Fish, as trustees, were authorized to exchange the bonds secured by their (the third) mortgage, for the income and improvement bonds, in accordance with the terms of the mortgage, and Akers and the County of St. Louis were given leave to file a cross-bill in thirty days. No action was taken on the petition of other stockholders to be made parties. On the 25th of April, Akers and St. Louis County filed an answer and cross-bill, in which the County of St. Louis set up a lien adverse to that of the mortgage; and both defendants alleged that the mortgage was executed in fraud of the rights of creditors and stockholders, stating particularly the defenses which the Company had thereto.

On the 5th of June, 1876, an adjourned Term of the court was held, and all the several trustees of the prior mortgages filed answers, setting up in form their respective mortgages and stating the amounts due. Each answer concluded with the statement that the answering defendant knew of no reason why the prayer of the bill should not be granted. On the next day Vail and Fish, as trustees, filed their answer, admitting all the allegations in the bill, and concluding as follows: "And these defendants, as trustees of the several and varied interests of the bondholders secured by said deed of trust, submit the same to the judgment of this honorable court, that the same may be duly provided for and protected, and ask that they may have such relief, including an allowance for the costs and expenses herein, as to your honorable court may seem meet." On the same day, Akers and St. Louis County dismissed their cross-bill and withdrew their answer without prejudice to the lien

claim of the county. This being done, all the several parties appeared in court by their respective solicitors, and the court having found, among other things, the amount of income and improvement bonds of the Company outstanding, and that the entire amount of the bonds secured by the third mortgage had been issued, some, however, being still in the hands of the trustees to complete the contemplated exchanges; that Ketchum was the owner of ten of the bonds, Garrison of fourteen hundred, James Seligman of three hundred forty-seven, and Pierce of fifty, and that the interest due November 1, 1875, had not been paid, although demanded, it was, "by the consent of all parties to the suit, through their solicitors of record," adjudged and decreed "That the said Pacific Railroad do stand absolutely barred and foreclosed of and from all equity of redemption of, in and to said mortgaged premises, property and franchises," and that the mortgaged property, etc., be sold at public auction, subject to the liens of the several prior mortgages, by a master, who was named, to pay and satisfy the amounts due by the Company upon the bonds, and any other indebtedness the court might order paid out of the proceeds, "Together with the costs of suit and of said sale, including the services of said trustees, and their solicitors' and attorneys' fees in and about the management of said trust, as may hereafter be ordered by the court." Provision was also made for notice of the time and place of sale, and a conveyance to the purchaser after confirmation. The terms of sale were fixed by the decree, and if the purchase was made by or for the bondholders, all but \$200,000 of the purchase money could be paid by a surrender of bonds, provision being made for paying such of the bondholders as did not come into the purchase their *pro rata* share of the proceeds. Sixty days' time was given after the sale, for all bondholders to come in and associate themselves with the purchasers, if the purchase should be made on account of the bondholders. Leave was also given the trustees of the mortgage to continue exchanges for the income and improvement bonds still outstanding. It was also ordered that nothing in the decree should be construed to prejudice in any manner the claim of St. Louis County, which had been set forth in its answer and cross-bill.

The property was sold under this decree to James Baker for the benefit of the bondholders. He had acted in the cause, as solicitor of the Company. On the 18th of September, a motion was made to confirm the sale. On the 22d of September, N. A. Cowdrey, Robert L. Cutting, Jr., Peter Marie, Frank A. Otis, Jacob Cromwell, George L. Kingsland, citizens of New York, and George R. Fearing, a citizen of Rhode Island, stockholders in the Company, filed a petition in court asking that they be made defendants in the suit, that the sale might be set aside, and that they have leave to defend, alleging the fraudulent character of the mortgage and that the directors were acting in bad faith towards the stockholders. This motion was denied, and on the 23d of October the sale was confirmed and a conveyance to Baker, the purchaser, ordered. On the 27th of January, 1877, the Pacific Railroad took this appeal.

See 11 OTTO.

The first question with which we are met is one of jurisdiction. It is contended on the part of the appellees that a consent decree in the circuit court cannot be appealed from, but we do not so understand the law. Section 692 of the Revised Statutes provides that an appeal shall be allowed from all final decrees in the circuit courts, etc., when the matter in dispute exceeds \$5,000, and that this court "Shall receive, hear and determine such appeals." This makes appeals to this court, within the prescribed limits, a matter of right, and requires us, when they are taken, to hear and decide them. If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing. We have, therefore, jurisdiction of this appeal.

This brings us at once to the inquiry whether the appellant, the Pacific Railroad, did consent to the rendition of the decree appealed from. It is stated affirmatively on the record that all parties, through their solicitors, did consent; but the appellant insists that its solicitor had no authority in that behalf. Early in the progress of the cause, the Company filed an answer under its corporate seal, and signed with its authority by its secretary and solicitor of record, in which every material allegation in the bill was confessed; and it was, moreover, positively stated that the bonds sued for were, in all respects, valid obligations of the Company and the mortgage a subsisting lien. In every instance in which the stockholders attempted to get into the case as parties, so that they might defend for the Corporation, it was asserted that the directors of the Company were false to their trust, and that they had either consented to or would not resist a decree. A solicitor may certainly consent to whatever his client authorizes, and in this case it distinctly appears of record that the Company assented through its solicitor. This is equivalent to a direct finding by the court, as a fact, that the solicitor had authority to do what he did, and binds us on an appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained. We take a case on appeal as it comes to us in the record, and receive no new evidence. Here the record states, in terms, that the Company assented to all that has been done. This is equivalent to an admission by the Company on the record that the facts exist on which the decree rests. On an appeal, therefore, we must take all the facts as admitted, and consider only whether the case is one in which, under any state of facts, the decree could be entered. The record showing as it does affirmatively, that the Company gave its consent to the decree, we need not inquire what we would do if the case depended alone on the consent of the solicitor. It may be true also that under the peculiar provisions of this charter the stockholders have a sort of supervisory power over the doings of the directors;

but they cannot avoid what has been done by the directors in a suit pending in a court against the Company, except by the employment of such remedies as are consistent with the orderly course of judicial proceedings. They cannot correct errors arising from what has thus been done by appeal, any more than the Company can. If they have been defrauded, they must apply for relief in the first instance to the court in which the fraud was perpetrated.

This disposes of all mere errors in form which are alleged against the decree. Parties to a suit have the right to agree to anything they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings. It was within the power of the parties to this suit to agree that a decree might be entered for a sale of the mortgaged property, without any specific finding of the amount due on account of the mortgage debt, or without giving a day of payment. It was also competent for them to agree that if the property was bought at the sale by or for the bondholders, payment of the purchase money might be made by a surrender of the bonds. And so of all the other provisions of the decree which are complained of. All these were matters about which the parties might properly agree; and having agreed, it does not lie with them to complain of what the court has done to give effect to their agreement. Although this appeal may have been instigated by the stockholders in opposition to the wishes of the directors, it is still the appeal of the Company, which was one of the parties to the agreement, and must be treated accordingly.

This leaves for our consideration, under the appeal from the decree of sale, only the question which was most strenuously pressed in the argument; that is to say, whether the court below had jurisdiction of the cause so as to authorize it to enter any decree. The objection is, that as Vail, Fish, Joseph Seligman, Punnett, Clark, Morgan, Murdock and Jesse Seligman were all citizens of the same State with Ketchum and the several parties who in the progress of the cause were admitted as co-plaintiffs with him, the suit was not between citizens of different States and, therefore, not within the jurisdiction of the Circuit Court.

The 1st section of the Act of March 3, 1875, 18 Stat. at L., 470, provides "That the Circuit Courts of the United States shall have original cognizance * * * of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there shall be a controversy between citizens of different States. * * *"

The same general language is used in the 2d section of the same Act, in respect to the removal of suits from the State Courts, and in *Removal Cases* at this Term [*ante*, 593] we held it to mean that when the controversy about which the suit was brought was between citizens of different States, the Courts of the United States might take jurisdiction without regard to the position the parties occupied in the pleadings as plaintiffs or defendants. For the purposes of jurisdiction, the court had power to ascertain the real matter in dispute, and arrange the parties on one side or

the other of that dispute. If in such arrangement it appeared that those on one side were all citizens of different States from those on the other, jurisdiction might be entertained and the cause proceeded with. That ruling, we think, applies as well to the 1st section as to the 2d.

For the purposes of this appeal, we need not inquire when the Circuit Court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree when rendered was consented to, it is enough, for the purposes of this appeal, if the record shows that when the consent was acted on by the court, jurisdiction was complete. Consent cannot give the Courts of the United States jurisdiction, but it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained.

The subject-matter of this action was the foreclosure of the third, or Vail and Fish, mortgage. As the case was made by the bill, there could be no controversy; that is to say, no dispute, with any of the trustees of the earlier mortgages, because their liens were admitted and their interest had been paid in full as it matured. No relief was asked against them. All that Ketchum wanted was a foreclosure of the mortgage in which he was interested, subject to their admitted prior claims. In no possible way could their interests be injuriously affected, if the facts set forth in the bill were true. To the bill as filed and the case as afterwards made, these trustees were but nominal parties. They would be bound by what might be done, but all they could by any possibility claim was conceded.

This leaves only to consider the position occupied by Vail and Fish. When the suit was begun, as well as when the decree was rendered, they were trustees of the mortgage under which Ketchum and his co-plaintiffs claimed. No allegations were made against them. All that was said about them was that they doubted their right to proceed. There was no antagonism between them and Ketchum and his associates. He wanted them to proceed; they did not know as they had the legal right to do so. In the meantime he, thinking his own rights, as well as those of his associate bondholders, would be injuriously affected by delay, commenced the suit to get done just what the trustees, if they had been willing to proceed, might have done. Whatever he did was for the trustees and in their behalf, and he really had no power to do more than the trustees might have done if they had been so inclined. It is needless to inquire what might have been the result if the trustees had seen fit to dispute the right of the plaintiff bondholders to go on. They did not do so, but, on the contrary, before the decree was rendered, came in and substantially availed themselves of the suit which had been begun, so that in the end the suit, in legal effect, became their suit. Although nominally defendants according to the pleadings, they voluntarily, in the course of the proceedings, arranged themselves on the same side of the subject-matter of the action with the plaintiffs. This they had the legal right to do. After that, clearly the controversy was between citizens of one or more States on one side and citizens of

other States on the other side, and when the decree was rendered the only thing to be done was to foreclose the mortgage sued on, as between the trustees of the mortgage acting with their beneficiaries and the railroad. Of such a suit the Circuit Court had jurisdiction, and its decree is, consequently, binding on the parties until set aside in the regular course of judicial proceedings.

This leaves only the question arising on the confirmation of the sale. The only objection here insisted on is, that Baker, the purchaser, was the solicitor of the appellant Company. His purchase, although nominally in his own name, was actually by and for the bondholders. He was used to hold the title until the bondholders could organize and take it. While purchases at judicial sales in the name of the solicitors and attorneys of parties whose property is sold will be scrutinized with jealous care, they will be sustained if no injustice is thereby done to the parties they represent. Here the Company, whom Baker represented as solicitor, confessed its inability to pay the debt it owed, and consented that the property held as security be sold. In the decree which it assented to, special provision was made for a purchase by or for the bondholders. We can see no harm which will result from permitting the solicitor of the Company to take the title for the bondholders under such a purchase. No complaint was made below of actual wrong. The only objection was that such a purchase was inconsistent with the duties of the solicitor. There was no speculation by the solicitor in the purchase. All he did was to hold the title until the real purchasers were in a condition to take it themselves. If there had been any proof of collusion or improper conduct on the part of the solicitor, resulting in wrong to the Company, the case would be different. As it is, we are called upon to decide whether a purchase in the name of the solicitor of one whose property is sold is, necessarily, in and of itself invalid. We think it is not. It will be scrutinized closely, but until impeached must stand. Slight circumstances may impeach it, but it is not, under all circumstances, invalid.

After a careful consideration of the whole case, we are unable to discover any error that can be corrected by appeal and, therefore, affirm the decree.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—101 U. S., 311; 104 U. S., 768; 111 U. S., 522; 112 U. S., 192; 6 Sawy., 222.

STATE OF SOUTH CAROLINA *ex rel.*,

WILLIAM L. TRENHOLM, *Ext., Plff. in Err.*,

v.

PETER C. GAILLARD, COUNTY TREASURER OF CHARLESTON COUNTY.

(See S. C., 11 Otto, 433-438.)

South Carolina law—new remedy—repeal of statute.

1. The Act of South Carolina of June 9, 1877, prescribing the mode of proving bills of the bank of See 11 OTTO.

the State tendered for taxes, is not a new contract but a new way of enforcing an old one.

2. The new remedy formed no part of the charter contract of the State. Passed as the Act was, long after the charter was granted and long after all the outstanding bills of the bank were issued, the State was restrained by no contract obligation from taking away or changing such remedy.

3. If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.

[No. 776.]

Argued Nov. 12, 13, 1879. Decided Mar. 22, 1880.

IN ERROR to the Supreme Court of the State of South Carolina.

The case is stated by the court.

Messrs. D. H. Chamberlain, Edward McCrady, Jr., C. R. Miles and William A. Brawley, for plaintiff in error.

Messrs. Le Roy F. Youmans, M. G. De Saussure and James Lowndes, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

In December, 1812, the State of South Carolina established a bank in the name and for the benefit of the State, and pledged the faith of the State to supply any deficiency in the funds specially set apart as its capital, and to make good any losses arising from such deficiency. The bank was authorized to issue notes and bills for circulation, and by section 16 it was provided "That the bills or notes of the said corporation originally made payable, or which have become payable on demand in gold and silver coin, shall be receivable at the Treasury of this State, either at Charleston or Columbia, and by all tax collectors, and other public officers in payment of taxes and other moneys due the State." The original charter was extended from time to time, and the bank continued in successful operation until the late civil war. At the close of the war it stopped business, and in 1868 the charter was repealed and provision made for winding up its affairs. Under the operation of this law, a large amount of the circulating notes was surrendered to the State and bonds of the State taken in exchange therefor. The time for presenting bills to be exchanged expired January 1, 1869, and only such bills as were issued prior to December 20, 1860, the date of the adoption of the Ordinance of Secession by South Carolina, could be presented at all. A considerable amount of bills issued before the repeal of the charter are still outstanding.

When the charter was granted *mandamus* was an existing remedy in the State for compelling public officers to perform their public duties, and in that way, under the practice which prevailed in the courts, tax collectors could have been required to receive the bills of the bank in payment of taxes.

On the 9th of June, 1877, the General Assembly of South Carolina passed an Act entitled "An Act to Provide the Mode of Proving Bills of the Bank of the State Tendered for Taxes, and the Rules of Evidence Applicable Thereto." Section 1 of that Act is as follows:

"Be it enacted, By the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, that the treasurers of the several counties in the State shall not receive

in payment of taxes of the State any bills of the corporation known as the President and Directors of the Bank of the State of South Carolina, which are not genuine and valid, or the payment of which is prohibited by the Constitution of the State and of the United States, or which have been funded by the State and since fraudulently uttered. And all bills of said corporation which shall be tendered in payment of any taxes, and shall not be received as payment, shall be inclosed in a package, sealed and signed by the party tendering the said bills, and by the treasurer to whom said tender is made; and said package shall be deposited by the treasurer with the clerk of the Court of Common Pleas for the County, who shall give duplicate certificates of said deposit, one to the party tendering said bills, and the other to the treasurer, to abide the decision of the court in any proceedings which may be instituted in regard to said bills; and that in all proceedings by *mandamus* or otherwise to compel the reception of bills of the said corporation as a legal tender for taxes to the State and refused, an issue shall be framed under the direction of the Judge, and at a regular Term of the Court of Common Pleas for the County wherein said bills are tendered shall be submitted to a jury to inquire and determine by their verdict if the bills so tendered in payment for taxes are genuine and valid bills of the said corporation, and have not been funded by the State and since fraudulently uttered, and are bills the payment of which is not prohibited by the Constitution of the State and of the United States. And upon the trial of said issue the burden of proof shall be upon the person tendering said bills to establish that the said bills are the genuine and valid bills of the said corporation, and have not been funded by the State and since fraudulently uttered; and that said bills are bills the payment of which is not prohibited by the Constitution of the State and of the United States, and if the jury shall, by their verdict, establish that the bills so tendered are genuine and valid bills of the said corporation, and have not been funded by the State and since fraudulently uttered, and are bills the payment of which is not prohibited by the Constitution of the State and of the United States, then the treasurer of the county shall receive such bills in payment of all taxes due the State. And if the jury shall by their verdict establish that the bills so tendered are not genuine or valid bills of the said corporation, or that they have been funded by the State and since fraudulently uttered, or that they are bills the payment of which is prohibited by the Constitution of the State and of the United States, it shall then be the duty of the clerk of the said court to cancel the said bills in the presence of the court, and to make a sealed package of the bills and file the same in his office with the record of the case."

During the fiscal year commencing November 1, 1877, and while this Act was in force, William L. Trenholm, as executor, tendered the Treasurer of Charleston County certain bills of the bank in payment of taxes charged against him. This tender being refused, the bills were inclosed in a package, sealed and signed by Trenholm and the Treasurer, and deposited with the clerk of the Court of Common Pleas of the County, he giving duplicate re-

ceipts therefor, to abide the decision of the court in any proceeding that might be instituted in regard to them. All this was done before November 1, 1878.

On the 24th of December, 1878, the General Assembly of the State passed another Act repealing that of 1877. This Act, in effect, provided that, in all cases in which any person against whom any taxes stood charged had theretofore tendered in payment the bills of the bank, he might, within sixty days after the passage of the Act, pay the taxes without penalty under protest in such funds as the Treasurer would receive. This being done, it was the duty of the Treasurer to pay the money so collected into the State Treasury, giving the Comptroller-General notice that the payment had been made under protest, and the person making the payment might at any time within thirty days sue the County Treasurer in the Court of Common Pleas of the County to recover back the money. If, on the trial, it should be determined that the taxes were wrongfully or illegally collected, for any reason going to the merits, it was made the duty of the court to certify of record that the same had been wrongfully collected and ought to be refunded, and of the Comptroller-General to issue his warrant for the refunding of the taxes, and this warrant was to be paid in preference to other claims on the Treasury.

After this last Act went into effect, the Treasurer of the County advertised the property, on which the taxes of Trenholm were charged, to be sold on the 17th of March, 1869, for default in the payment. Thereupon Trenholm, on the 13th of March, filed a petition in the Court of Common Pleas of Charleston County, under the Act of 1877, to have the requisite proof taken and the bills accepted in discharge of his taxes. In his petition he assumed all the burdens imposed by the Act of 1877, and sought to avail himself of the remedy there given. The Court of Common Pleas ruled that the prayer of the petition must be granted, and ordered the issues to be framed; but the Supreme Court of the State, on appeal, decided that the Act of 1877 was repealed by that of 1878 and, consequently, the proceeding, commenced as it was after the repeal, could not be sustained. The order for framing the issues was thereupon set aside and the petition dismissed. To reverse that judgment, this writ of error was sued out.

No question is raised in this case as to whether or not the Act of 1877 impaired the obligation of the contract of the State, which is contained in the bills of the bank, or the charter. By accepting the Act and bringing suit under it, Trenholm conceded its validity. He contends, however, that when he tendered his bills in payment of his taxes, and so far complied with the provisions of that Act as to allow the bills to be deposited with the clerk of the court to abide the result of any proceeding that might be instituted in regard to them, the State entered into a new contract with him, by which it agreed to accept his bills in payment of his taxes, if he established their validity in the way provided. It is the obligation of this alleged new contract which he claims has been impaired by the Act of 1878.

We cannot find from the record that this question was presented in this precise form to the

Supreme Court of the State, but it was undoubtedly involved in the case, and must have been decided directly or indirectly. No other question has been argued here.

As we look upon the Act of 1877, it does no more than provide a way of determining whether bills offered in payment of taxes are binding on the State. It provides a remedy in case a county treasurer shall wrongfully refuse to accept a bill that is offered him. It is, in fact, what its title says it is, "An Act to Prescribe the Mode of Proving Bills of the Bank of the State Tendered for Taxes, and the Rules of Evidence Applicable Thereto." It makes no offer of a new contract to a tax payer or billholder, but simply says to him, if your bills are any time refused when offered in payment of taxes, you may proceed in a certain way to compel their acceptance if they are genuine and valid. There is no new contract, but a new way of enforcing an old one.

By the Act of 1878, the remedy thus given has been taken away, with no saving in favor of tenders already made, except to give those who have made such tenders the right to pay their taxes under protest, without penalty, in sixty days, and sue to recover back what they have thus paid. They have still all their old remedies unless they have been taken away by the Act of 1878, which is not the question here. All we have to decide is, whether that Act has taken away from Trenholm the remedy he had under the one of 1877.

The new remedy formed no part of the charter contract of the State. Passed, as the Act was, long after the charter was granted and long after all the outstanding bills of the bank were issued, the State was restrained by no contract obligation from taking away or changing the remedy it then gave. All the cases in this court, where the question has arisen, agree in holding that "The States may change the remedy, provided no substantial right secured by the contract is impaired." It is enough if the contract is "Left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guaranty of the Constitution gives it protection to that extent." *Walker v. Whitehead*, 16 Wall., 314 [83 U. S., XXI., 357]; *Tenn. v. Sneed*, 96 U. S., 69 [XXIV., 610].

We agree with the Supreme Court of the State that the "proceeding" contemplated by the Act of 1877 was not "instituted" when the repeal took place. The tender and deposit of the bills laid the foundation for the authorized proceeding, but did not institute it. This is clear from the language. The bills are to be deposited "To abide the decision of the court in any proceeding which may be instituted," thus implying that when the deposit was made proceedings had not been instituted. These proceedings may be "By mandamus or otherwise, to compel the reception of the bills." The taxes are not paid by the tender. If the acceptance of the tender can be enforced, then the payment will be complete, but not before. This tender was made when a special remedy for its enforcement was allowed. Before Trenholm availed himself of that remedy it was taken away, and he was remitted to such as he had before this Act, or such as were substituted on the repeal, if that rightfully took away

those which existed when the charter contract was made. But whether this be so or not, is unimportant, because it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after. *R. Co. v. Grant* [ante, 231], and cases there cited. The simple question in this case is, whether this repeal was valid and constitutional as against Trenholm and his rights. We think it was, and the judgment is, consequently, affirmed.

WOODBURY PATENT PLANING-MACHINE COMPANY, Appt.,

v.

ALLEN W. KEITH.

(See S. C., 11 Otto, 479-494.)

*Patent right—abandonment—forfeiture—laches—
invention—objection to evidence—witnesses—
Woodbury's patent.*

1. The action of the Commissioner in granting a patent is not conclusive of the question whether or not there had been an abandonment.

2. It is open to every person, charged with an infringement, to show in his defense that the patentee had abandoned his invention before he obtained his patent. An intention to abandon need not be expressed in words.

3. An inventor may forfeit his rights by a willful or negligent postponement of his claims. There may be an abandonment as well after as before an application has been made and rejected or withdrawn.

4. Where the applicant for a patent did nothing for sixteen years after the rejection of his first application, during which time his invention was in public use, without objection from him, he must be held to have abandoned it.

5. Mere enlargement is not invention.

6. An objection to the examination of a witness should state specifically the ground of the objection, in order that the opposite party may have the opportunity of removing it, if possible.

7. Only the names of those who had invented or used the anticipating machine or improvement, and not the names of those who are to testify of its invention or use, are required to be pleaded.

8. Woodbury was not the original and first inventor of the improvement in planing-machines, for which the patent was granted to him; and if he was, his invention had been abandoned to the public before his patent was granted.

[No. 1105.]

Submitted Jan. 22, 1880. Decided Mar. 22, 1880.

A PPEAL from the Circuit Court of the United States for the District of Massachusetts. The case is stated by the court.

Messrs. A. A. Strout, Geo. F. Holmes, J. A. L. Whittier, and Charles M. Reed, for appellant.

Messrs. B. F. Thurston and David Hall Rice, for appellee.

Mr. Justice Strong delivered the opinion of the court:

The bill in this case is founded upon a patent granted to Joseph P. Woodbury on the 29th of April, 1873, for an alleged "new and useful improvement in planing-machines," numbered 138463. The specification declares the object of the improvement to be presenting the material to the cutter in such a manner as both to counteract, as far as practicable, the fluttering or tremor caused by the successive blows

of the knives, and the consequent wavy and uneven surface of the planed work, and at the same time to overcome more perfectly than theretofore the tendency in the knives of the rotary cutter to loosen and dislodge the knots and shakes, and to tear the fibers of the wood irregularly, instead of severing them smoothly along the exact surface desired. To accomplish this twofold object, the patentee proposed to make use of what he denominated "a yielding pressure-bar," made of such material and of such mass as to be rigid from end to end, with its under face flat, so that it may have an extended bearing upon the work longitudinally of the machine, and mounted upon springs, so as, within certain limits, to accommodate itself to the varying irregularities in the surface of the material operated upon. The specification then proceeds to state the patentee's supposed advantages of the alleged invention, and to describe, by reference to drawings, the patented device. The claims are four, all for combinations. They are as follows:

1. The combination of a rotary cutter and a yielding pressure-bar or bars, substantially as and for the purpose described.

2. The combination of a solid bed and a yielding pressure-bar or bars for the purpose of holding down the material while being acted on by the cutter, substantially as set forth.

3. The combination of a solid bed, a rotary cutter, and a yielding pressure-bar or bars, substantially as described.

4. The combination of the two pressure-bars, one of which is supported upon arms and the other upon springs, substantially as and for the purpose set forth.

It is this use of yielding pressure-bars in the combination which constitutes principally, if not wholly, the novelty of the device described in the patent. Planing-machines with a solid bed, rotary cutter, and devices for receiving and transmitting the power, had been known and in use long before Woodbury claimed to have made his invention. The Woodworth planing-machine, substantially the first of the class; had all these in combination, and in the same combination as they are found in the machine to which Woodbury applied his yielding bars, but instead of bars Woodworth used rollers to keep firmly in position the wood to be planed. Woodbury merely substituted bars for rollers. No doubt the substitution was an improvement. It enabled the pressure upon the wood to be brought nearer to the cutters than it could be in the Woodworth machine. It had a more extended bearing and, therefore, held the material more steady under the action of the knives or cutters, and the bars, perhaps, were less likely to be clogged by the chips cut in the operation of the machine.

On the 2d of March, 1874, the patentee sold and assigned his patent to the complainant, and it brought this suit against the defendant for an alleged infringement.

The answer of the defendant denies any infringement and attacks the validity of the Woodbury patent for several reasons, any one of which, if sustained, must bar the relief which the complainant seeks. It is denied that Woodbury was the first and original inventor of the improvement claimed, and it is averred that the invention described in his patent had been pub-

licly known and used for more than two years before his application for a patent was made, and that before that time his invention had been abandoned to the public. The answer contains other averments, which we think it unnecessary to set forth, because the controlling questions are, whether the device of Woodbury was the first and original invention, and whether, if it was, it was abandoned to the public before he obtained his patent.

Before proceeding to the consideration of the several defenses set up, it will be convenient to refer briefly to the history of Woodbury's alleged invention. Though the patent was not granted until 1873, the earliest application for it was made on the 3d of June, 1848. The invention appears to have been completed in the latter part of the year 1846, a caveat for it having been forwarded to the Commissioner of Patents as early as the 28th of May, of that year. The petition for the patent authorized and empowered J. James Greenough, as attorney for the petitioner, to alter or modify the specification, as he might deem expedient; and also to receive back any moneys which the petitioner might be entitled to withdraw, and to receipt for the same. Greenough, however, was not empowered to withdraw the application.

On the 20th of February, 1849, the application for a patent was rejected in the Patent Office, and no serious attempt appears to have been made to procure a re-examination, or to renew it, for a period of more than twenty years, though, during more than sixteen years of that time, the improved device had been in common use. In October, 1852, Greenough, the applicant's attorney, formally withdrew the application, and received back \$20, of which, however, Woodbury had no notice at the time. The attorney had no sufficient authority to withdraw the application, though he had to withdraw the fee. In 1854, five years after the application had been rejected in the office, Woodbury instructed Mr. Cooper, another patent solicitor, who was acting for him in another case, to call up and prosecute anew his rejected application. This, however, was not done. Mr. Cooper, it seems probable, was deterred from taking any action in regard to the matter, by a rule which, at that time, he thought was generally enforced in the Patent Office, viz.: that an application, rejected or not prosecuted within two years after its rejection, or withdrawal, should be conclusively presumed to have been abandoned. This rule was not always enforced, and it was reversed by the Commissioner in 1869, and in the revised Patent Act of 1870, Congress enacted: "That when an application for a patent has been rejected or withdrawn, prior to the passage of this Act, the applicant shall have six months, from the date of such passage, to renew his application or to file a new one; and that, if he omitted to do either, his application should be held to be abandoned. Upon the hearing of such renewed applications, abandonment shall be considered as a question of fact." It was within six months after the passage of this Act that Woodbury renewed his application, upon which the patent was granted.

In view of this history and of the other facts appearing in the case, the question is a grave one, whether the invention, even if Woodbury

was the first inventor, was not abandoned by him before his renewed application for the patent was made.

It is quite certain that the action of the Commissioner, granting the patent in 1873, is not conclusive of the question whether there had not been an abandonment. Under the 35th section of the Act of 1870, 16 Stat. at L., 198, abandonment is declared to be a question of fact. The rule of the Patent Office, though not always adhered to, had held it to be a question of law, in the cases to which it was applied, and the effect of the statute was rather to change the rule, than to make the decision of the Commissioner, granting a patent, an unreviewable decision that the invention had not been abandoned. In fact, the Commissioner may not be called upon to pass upon that question. No evidence respecting it may be before him, except mere lapse of time, and he has not, generally, the means of ascertaining what the action of an applicant for a patent has been, outside of the Patent Office. It surely cannot be claimed that patents obtained under the provisions of the 35th section of the Act are any more unimpeachable than those referred to in the 24th section. By that section the Commissioner is authorized to deal with the question whether the invention has been abandoned, as well as with the question whether it was in public use or on sale more than two years prior to the application. Yet, both these matters, as well as the originality of the invention, upon which the Commissioner must pass, may be contested in suits brought for infringement of the patent. Such defenses are allowed by the statute. It must, then, be open to every person, charged with an infringement, to show in his defense that the patentee had abandoned his invention before he obtained his patent.

It has sometimes been said that an invention cannot be held to have been abandoned, unless it was the intention of the inventor to abandon it. But this cannot be understood as meaning that such an intention must be expressed in words. In *Kendall v. Winsor*, 21 How., 322 [62 U. S., XVI., 165], this court said: "It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do, either by express declaration or by conduct equally significant with language; such, for instance, as an acquiescence with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a willful or negligent postponement of his claims." To the same effect is *Shaw v. Cooper*, 7 Pet., 292. These were cases, it is true, where the alleged dedication to the public, or abandonment, was before any application for a patent, but it is obvious there may be an abandonment as well after such an application has been made and rejected or withdrawn, as before, and evidenced in the same manner. In *Adams v. Jones*, 1 Fish. Pat. Cas., 527, Mr. Justice Grier said: "A man may justly be treated as having abandoned his application if it be not prosecuted with reasonable diligence. But involuntary delay, not caused by the laches of the applicant, should not work a forfeiture of his rights."

The patent law favors meritorious inventors by conditionally conferring upon them, for a limited period, exclusive rights to their inven-

tions. But it requires them to be vigilant and active in complying with the statutory conditions. It is not unmindful of possibly intervening rights of the public. The invention must not have been in public use or on sale more than two years before the application for a patent is made, and all applications must be completed and prepared for examination within two years after the petition is filed, unless it be shown, to the satisfaction of the Commissioner, that the delay was unavoidable. All this shows the intention of Congress to require diligence in prosecuting the claims to an exclusive right. An inventor cannot, *without cause*, hold his application pending during a long period of years, leaving the public uncertain whether he intends ever to prosecute it, and keeping the field of his invention closed against other inventors. It is not unfair to him, after his application for a patent has been rejected, and after he has for many years taken no steps to re-instate it, to renew it or to appeal, that it should be concluded he has acquiesced in the rejection and abandoned any intention of prosecuting his claim further. Such a conclusion is in accordance with common observation. Especially is this so when, during those years of his inaction, he has seen his invention go into common use, and neither uttered a word of complaint or remonstrance, or was stimulated by it to a fresh attempt to obtain a patent. When, in reliance upon his supine inaction, the public has made use of the result of his ingenuity, and has accommodated its business and its machinery to the improvement, it is not unjust to him to hold that he shall be regarded as having assented to the appropriation, or, in other words, as having abandoned the invention.

There may be, it is true, circumstances which will excuse delay in prosecuting an application for a patent, after it has been rejected, such as extreme poverty of the applicant, or protracted sickness. Of such cases we are not now speaking. None of these ordinary and accepted reasons for Woodbury's inaction during the more than sixteen years that elapsed between 1854 and his presentation of the new petition upon which his patent was granted, are found in this case.

His first application, as we have seen, was rejected on the 20th of February, 1849, and he was then informed from the Patent Office that he could "withdraw or appeal." Nothing, however, was done until October 4, 1852, when his attorney withdrew the application and received back \$30. True, the attorney was not empowered to withdraw the application, and it does not appear that Woodbury was then informed it had been withdrawn; but he was informed that the application had been rejected, and he gave no instructions to do anything more in the case, though instructions were asked and though he was frequently in communication with his attorney, who obtained for him another patent on the 20th of March, 1849. The rejected application was suffered to rest until February 27, 1854, when Woodbury wrote to Mr. Cooper, another attorney, informing him that he had a rejected application, filed in June, 1848, for an improvement in press ure with the rotary cutter, and asking him to call up the case and get a patent for the most

he could. Mr. Cooper made application for copies of the drawings and specification and for the letter of rejection, after having been informed that the application for the patent had been withdrawn; but nothing further was done, except that Cooper informed Woodbury the application had been withdrawn by his former attorney. Thus the matter rested. Cooper's connection with it ceased in September, 1854. No effort was made in the Patent Office to have the rejected application re-instated, though such an effort must have been successful had it been made and, apparently, Woodbury acquiesced alike in the rejection and in the withdrawal, until December, 1870, when his new application was made. During all this time he was in frequent communication with the Patent Office, prosecuting, and successfully, other applications for patents. He was not pressed by poverty to such an extent as to hinder his renewal of his application. This is shown by direct evidence, and by the fact that he had means to sue for and obtain other patents. Nor was he unwarned of the danger of delay. Very soon after 1854, if not before, the use of planing-machines containing pressure-bars in combination with rotary cutters and a solid bed, was general. The defendant's answer asserts that before December 5, 1870, and since the withdrawal of Woodbury's rejected application, many thousand planing-machines, containing his invention, had been constructed, sold and used in the United States, and this assertion is accepted in the appellant's brief. This fact must have been known by him. Upon this subject the evidence is very full. As we have seen, the distinctive element of Woodbury's invention was the substitution of yielding pressure-bars for the rollers employed in the Woodworth patent. A machine patented to Joseph E. Andrews in 1845 had those pressure-bars, and Woodbury was engaged for years in selling those machines. Between 1852 and 1854 three Cornell machines of the Woodworth patent, rotary cutter, yielding pressure-bars combined with a solid bed were used by John F. Keating in his shop at Boston. Mr. Woodbury was repeatedly there while they were in use, and examined them, but he never suggested that he had any claim to the use of pressure-bars in planing-machines. There is ample evidence also that hundreds of other machines containing the same device were manufactured and sold in Boston between the years 1854 and 1870, and were frequently seen by Mr. Woodbury, calling forth no remark from him indicating that they were invasions of his rights. In view of all this, it is of little importance that, from time to time, he expressed a hope to his brother and, perhaps, occasionally to some others, that he should some time and in some way obtain a patent. Such was not his language to the public. His inaction, his delay, his silence, under the circumstances, were most significant. Though not express avowals of abandonment, "to reason's ear they had a voice" not to be misunderstood. They spoke plainly of acquiescence in the rejection of his application for a patent. They encouraged the manufacture and sale of his invention.

And there is no sufficient explanation of Mr. Woodbury's conduct; nothing which can be regarded as an adequate excuse for it. The rule

of the Patent Office was not a statutory rule. It was, at most, only a rule of practice in the office, and it was not inflexible. The action of the office exhibits many instances in which departures from it were made before the Act of Congress of 1870 was passed, and even before Mr. Fisher, the Commissioner of Patents, abolished it. Case of *J. W. Cochran*, Comrs. Dec., 1869. If Woodbury did not intend to acquiesce in the rejection of his application, the rule was no bar to a movement by him to have it re-instated after its withdrawal. So he might have applied for a re-examination, or might have appealed, or might have filed a new one. Thus, he would have given notice that he did not intend to give up his invention to the public.

There is a wide difference between this case and *Smith v. Dental Vulcanite Co.*, 93 U. S., 486 [XXIII., 952]. In the latter case it appeared that, after three successive rejections, the last in 1856, the application was never withdrawn nor any portion of the fee claimed. Still the applicant did not remit his efforts. He was in ill-health and wretchedly poor. But he continued to assert his expectations of ultimately obtaining a patent; made frequent applications to his friends for advances to enable him to prosecute his claim; attempted to appeal; until finally, in 1864, eight years after the third rejection, the patent was obtained. The patentee had never relaxed his vigilance. He had left nothing undone which he could do. He had kept his flag constantly flying. Nobody had been encouraged by any act or inaction of his to appropriate his invention. His patent was, therefore, sustained, and sustained only because he had been guilty of no laches. The conduct of Woodbury was in striking contrast with that we have described, and which is described more fully on page 491 of the report [925].

We are constrained, therefore, to hold that Woodbury's invention was abandoned by him before he obtained his patent.

We also concur in opinion with the circuit court that the machine built by Alfred Anson, at Norwich, Connecticut, in 1843, anticipated Woodbury's invention. That machine was never patented, though an attempt was made to obtain a patent for it. On the 16th of August, 1848, Anson applied for a patent for what his specification denominated "A new and useful improvement in the construction of the stocks of rotating cutters for dressing and cutting window-sash stuff, etc." The specification was accompanied by a model and drawings in perspective and in detail. His application, however, was rejected; and on the 20th of August, 1844, he withdrew it, and received back \$30. We have before us the specification, drawings and model and, what is better, we have the original machine, with the testimony of its builder to identify it. That testimony, as well as that of other witnesses, proved clearly that the machine had at first, as it has now, all the elements in combination which compose the combinations claimed in the Woodbury patent. It had a rotary cutter. It had a solid bed under the cutter on which the material to be operated upon was placed, and over which it was moved and fed to the cutters by an endless chain. It had two yielding pressure-bars instead of rollers, adjusted by means of weights, to keep the material down on the bed, and so

arranged as to cause the pressure to be felt nearer to the cutter's edge than it could be brought to bear by pressure-rollers. The yielding pressure was effected by weights, and not by springs, as in the Woodbury machine, but these are plainly mechanical equivalents for each other.

Passing, for the present, consideration of the admissibility of the evidence respecting the Anson machine, which we will notice hereafter, we proceed to observe what it proves.

The machine was built and set up in the shop of Mr. Shepard, a sash and blind-maker, at Norwich, in 1843. It has been in operation there ever since, until it was taken out to be made an exhibit in this case, a period of more than thirty years. Some slight changes have been made in it, but none in the combination described. The evidence leaves no doubt in our minds that the pressure-bars were arranged so as to be yielding, in accommodation to the uneven surfaces of the material to be shaped or planed, and that they were intended to be so arranged for such uses. Anson himself testifies that he put in the pressure-bars because he could get these nearer the cut of the cutters than he could a roller; and in his specification filed in the Patent Office he stated, "The stuff is also kept steady by means of a bar passing from the stands *M* and *N*, which bar may be raised or depressed in the same manner and simultaneously with the shafts which hold the cutters by means of the screws." He testifies, also, that he made the front bar with a rounded front, for the purpose of receiving the stuff, and that, driving the stuff under it, it would yield and the weights below would keep the stuff steady when it came to the cutters. Moreover, an inspection of the machine is sufficient to convince us that the bars are yielding, within certain limits, capable of adjustment to any varying thickness of the stuff to be operated upon.

The appellant contends that the Anson machine fails to be an anticipation of the Woodbury invention, because, as they say, it has no solid bed. It plainly has, however, a solid bed, adequate for the purposes for which the machine was intended and used for cutting and planing light material, sash and blinds, and the bed is sufficiently solid for such uses. It may be admitted it would be too weak for general planing work upon boards or plank. It is comparatively a small machine. It would not cease to be the same machine, in principle, if any one or all of its constituents were enlarged and strengthened, so that it might perform heavier work. True, the bed is divided by a slit running longitudinally from one end to the other; but the two parts are arranged so as to constitute one bed, and it is not perceived why, if enlarged, it would not answer all the purposes of the Woodbury machine. Mere enlargement is not invention. The simplest mechanic can make such a modification. Woodbury's patent claims no particular form of a bed. It does not require the bed to be of any specified thickness, or constructed in one piece. Its purpose is to furnish a firm and unyielding support to the material when passing under the cutter, and that may be done as well by constructing the bed of two parts as of one. An anvil composed of two pieces is not the less an anvil, a solid block to resist the blows of a hammer. A solid

See 11 OTTO.

foundation of a house may be composed of more than one stone. We cannot but think this objection to the Anson machine as an anticipating device is entitled to no weight.

Secondly, the appellant contends that the machine has no such pressure-bars as are shown and described in the Woodbury patent. This objection we have already considered, perhaps as fully as need be. There is, it is true, a formal difference, but it is merely formal. The distinguishing feature of the patent is yielding pressure-bars in combination with two other elements. The Anson machine has those in the same combination. In both the machines they are substitutes for rollers, and intended to secure like advantages over the Woodworth patent, namely: while keeping down the stuff on the bed of the machine, to bring the downward pressure nearer to the line of the cut. If, in the Woodbury machine, the bars enable that pressure to be brought nearer than it is in the Anson, which is not apparent, the difference is only in degree of approximation. Such a difference would be effected in the Woodworth machine by simply changing the diameter of the rollers.

The third principal objection urged by the appellant is, that the Anson machine fails, as a whole, to perform the functions of the Woodbury machine. If by this is meant that heavy plank cannot be planed by it, the objection is well taken. For such a purpose it would need enlargement and strengthening; but that all the elements claimed for the patentee's combination are found in it, producing the same results, differing only in degree, if at all, is to us very apparent.

Upon the whole, after having studied carefully the evidence and the exhibits, we cannot doubt that every element found in the Woodbury machine, everything that was claimed by the patentee, existed in the same combination in the Anson machine, which was constructed and in full operation more than two years before Woodbury claims to have made his invention. Woodbury was not, therefore, the first and original inventor.

As the Anson machine has been in use, unchanged in the principles of its construction, from 1843 until it was taken from the shop to be made an exhibit in this case, it is not to be thrown aside as an abandoned experiment.

We have considered the case thus far, assuming that the Anson machine and all the testimony of witnesses respecting it is proper to be considered. The appellant objects, however, that most of the evidence is inadmissible, because the names of the witnesses called to sustain this defense of anticipation were not given in the answer. Section 4920, p. 960 of the Revised Statutes declares, that the proofs of previous invention, knowledge or use of the thing patented, may be given upon notice in the answer of the defendant, stating the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used. The statute does not declare that the names of the witnesses, who may be called to testify to such prior invention or use, shall be stated in the answer. It is only the names and residences of the persons alleged to have invented or to have had prior knowledge of the thing patented that are required.

The defendant's answer in this case, as amended, set out "That said alleged invention, described and claimed as new in the letters patent mentioned in the bill, or a substantial or material part thereof, was, before the alleged invention thereof by Woodbury, used by Alfred Anson, formerly of Norwich, and said use was known to Noah L. Cole, of said Norwich; said use being at said Norwich, in the State of Connecticut."

Anson and Cole were both examined and testified, without any objection to their competency because of want of notice. Hence it is too late to object to their testimony now. Had objection been taken at the time, the answer might have been amended. *Graham v. Mason*, 5 Fish. Pat. Cas., 6, per Clifford, J.; *Brown v. Hall*, 3 Fish., 581; *Phillips v. Page*, 24 How., 164 [65 U. S., XVI., 689]; *Roemer v. Simon*, 95 U. S., 214-220 [XXIV., 384-386].

A number of other witnesses were examined relative to the history of the Anson machine and to show that no material change had been made in its organization from 1843 to 1876, or from the time when it was first put into operation. Their names were not given in the defendant's answer, and it is now insisted that their testimony should not be received. It is, however, doubtful, to say the least, whether any objection was made to their testifying because their names had not been given in the answer. None was made specifically for that reason. After notice had been given that the defendant would proceed to take depositions at Norwich, the solicitors of the plaintiffs requested, in writing, to be informed of the names of witnesses proposed to be examined, asserting a right to such information, not under the statute, but under the English chancery rules. Clearly they had no such right under our equity rule. The names were not given in answer to the request, and when the witnesses were called the counsel for the complainants objected to their examination "for want of notice." Notice of what? The counsel of the defendant may well have understood the objection to be, that the names had not been furnished in response to the application of the complainant's solicitors, rather than that they had not been set out in the answer. An objection to the examination of a witness should state specifically the ground of the objection, in order that the opposite party may have the opportunity of removing it, if possible. Had this been done in the present case, the defendant might have postponed the examination and moved to amend his answer, if such amendment was needed.

But beyond this, it seems to be settled that the true construction of the Act of Congress is that only the names of those who had invented or used the anticipating machine or improvement, and not the names of those who are to testify of its invention or use, are required to be pleaded. It was so ruled by Grier, J., in *Wilton v. R. R. Co.*, 1 Wall., Jr., 195, and by Nelson, J., in *Many v. Jagger*, 1 Blatchf., 376. *Roemer v. Simon*, 95 U. S., 218 [XXIV., 385]. This is all that is necessary to protect a patentee against surprise. If, in regard to an invention claimed to have anticipated his own, he is informed by the defendant's answer of the names and residences of the alleged inventors, or who had prior knowledge of the thing patented, and

when and by whom it had been used, it is sufficient to apprise him of the defense, and to enable him to make all needful inquiries respecting it. He need not know who are to testify in regard to the invention or use; much less does he need to know who are to testify respecting the history and use of the prior invention, after the complainant's patent has been granted.

We think, therefore, the testimony of the witnesses objected to "for want of notice" was admissible. And even without it, the testimony of Anson and of Cole is sufficient to show the construction and use of the Anson machine in 1843, before Woodbury's invention was made.

Upon the whole, then, our conclusions are, that Woodbury was not the original and first inventor of the improvement for which the patent now owned by the complainants was granted to him, and that if he was, his invention had been abandoned to the public before his patent was granted.

It follows that the decree of the Circuit Court dismissing the bill must be affirmed.

Bill dismissed, with costs.

Cited—110 U. S., 494; 36 Ohio St., 393.

LOVELL & BAILEY, WILLIAM S. BAI-
LEY, JOSEPH F. LOVELL AND F. F.
GWATHMEY, *Plffs. in Err.*,

v.

JAMES DAVIS, Master of the ship ADORNA.

(See S. C., 11 Otto, 541-543.)

*Charter-party, recital in—reasonable diligence—
unavailing exception.*

1. A charter-party contained a recital that, at the date of its execution, the vessel was lying in the Harbor of New Orleans, while she was then actually at sea; held, that that recital was not a warranty or contract, but a representation, and if the charterers knew that the vessel was not there, so that they were not deceived or misled by the recital, it was immaterial.

2. Where the charter-party fixed no definite time for the vessel to be at New Orleans, ready to receive the cargo, the master was only bound to use reasonable diligence in bringing her to the port.

3. Where a question is asked a witness and objected to, and an answer permitted and an exception taken, but no answer of the witness is given, the exception is of no avail.

[No. 196.]

Argued Mar. 12, 1880. Decided Mar. 22, 1880.

IN ERROR to the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. **P. Phillips**, *Thos. Allen Clarke, F. L. Bayne* and **W. Hallett Phillips**, for plaintiffs in error:

As to first charge, see, *Dimech v. Corlett* 12 Moore P. C., 216.

As to second, see, *The Success*, 7 Blatchf., 552; *McAndrew v. Adams*, 1 Bing. (N. C.), 29, 38; *Lowber v. Bangs*, 2 Wall., 736 (69 U. S., XVII., 768); *Conkling v. Massey*, L. R. 8 C. P., 400; *Robinson v. U. S.*, 13 Wall., 366 (80 U. S., XXX., 654); *Humphrey v. Dale*, 26 L. J. (Q. B.), 137.

Mr. C. B. Singleton, for defendant in error.

Mr. Justice Miller delivered the opinion of the court:

This was an action on a charter-party, tried before a jury in the Circuit Court for the District of Louisiana.

The defense was that, by reason of the plaintiff's delay in presenting his vessel at New Orleans for receiving the cargo, the defendants had rescinded the contract and were justified in doing so. A verdict and judgment were rendered for the plaintiff, the master of the chartered vessel. The defendants bring this writ of error.

The charter party contains a recital that, at the date of its execution, the vessel was lying in the harbor of New Orleans, while the bill of exceptions shows that she was then at sea. The court charged the jury that if at the time the defendants signed the charter-party they knew that the ship was at sea, the words "now lying in the harbor of New Orleans" should be regarded as of no significance.

That language in the charter is not a warranty or contract, but a representation; and if the charterers *knew* certainly that the vessel was not there, of course they were not deceived or misled by the recital, which was probably part of a printed form that attracted no attention. The evidence on the subject of this knowledge is not in the record, and it is, therefore, to be presumed in favor of the action of the court that it was full and complete. There was no error in this instruction.

The court also charged the jury that as the charter-party fixed no definite time for the vessel to be at New Orleans ready to receive the cargo, the master was bound to use reasonable diligence in bringing her to the port, and was bound to use no more. If he did, the defendants were bound by the contract. If he did not use such diligence, they were not. To this charge, also, defendants excepted.

To the charge in the abstract there could be no just objection.

The plaintiffs in error argue, in effect, that it was not warranted by the testimony.

The evidence tended to show that the master was compelled to cross the bar at the mouth of the Mississippi and to sail one fourth of the way up the river to the city without the aid of a steam-tug (which was the usual mode of carrying such vessels up to New Orleans), because no such tug was in sight, and that then a tug which offered itself at the request of the defendants was refused because of the exorbitant charge asked for the remaining part of the voyage. The bill of exceptions does not set out all of the evidence, and what is found there is very meager, especially on this point.

Under what precise circumstances the master refused the aid of the tug which offered its services, to what extent the offer was exorbitant, how it came to be sent there by defendants, and then refused to serve without excessive compensation, are all unknown to us, but were probably clear to the jury. The charge by the court that the master was bound to use due and reasonable diligence furnished the general rule of law. If there was anything in reference to his refusal to employ the tug which made a more definite instruction proper, counsel for defense should have asked for it. But none was prayed.

We are not able to see, therefore, any error in the charge of the court.

A question was asked the master as to what he would have done if the tug-boat had offered to take him up the river at the usual rates, to
See 11 OTTO.

which defendants objected, and the question being permitted they excepted.

The answer is not given, and we cannot tell, therefore, whether it was favorable to plaintiff or defendants. It is settled law, at least in this court, that, under such circumstances, it is the evidence given which constitutes the error, if there be one, and this must be shown by the answer. *Nailor v. Williams*, 8 Wall., 107 [75 U. S., XIX., 348].

We see no error in the record, and the judgment is affirmed.

WILLIAM IMHAEUSER, Appt.,

JACOB E. BUERK.

(See S. C., 11 Otto, 647-664.)

Patent-right, infringement of—Buerk's patent.

1. A party, who merely substitutes another old ingredient for one of the ingredients of a patented combination, is an infringer, if the substitute performs the same function as the ingredient for which it is so substituted, and was well known at the date of the patent.

2. Buerk's patent for an improvement in watchmen's time detectors is valid, and is infringed by Meyer's improvement in watchman's time checks.

[No. 185.]

Argued Mar. 8, 9, 1880. Decided Mar. 22, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. A. V. Briesen, for appellant.

Mr. J. Van Santvoord, for appellee.

Mr. Justice Clifford delivered the opinion of the court:

Equivalents may be claimed by a patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, provided the arrangement of the parts composing the invention is new, and will produce a new and useful result.

Such a patentee may, doubtless, invoke the doctrine of equivalents as against an infringer of the patent; but the term "equivalent," as applied to such an invention, is special in its signification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine.

Pressure in a machine may be produced by a spring or by a weight; and where that is so, the one is a mechanical equivalent of the other. Cases arise also where a rod and an endless chain will produce the same effect in a machine; and where that is so, the constructor, in operating under the patent, may substitute the one for the other, and still claim the protection which the patent confers. Exactly the same function in certain cases may be accomplished by a lever or by a screw; and where that is so, the substitution of the one for the other cannot be regarded as invention.

Patentees of an invention, consisting merely of a combination of old ingredients, are entitled to equivalents; by which is meant that the patent, in respect to each of the respective ingredients comprising the invention, covers every

other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence, it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer, if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. *Gill v. Wells*, 22 Wall., 1, 28 [89 U. S., XXII., 699, 711].

Due process was issued against the present respondent and two others, to wit: Theodore Kahn and Charles Keinath, all of whom were duly served, but the respondent last named never filed an answer, and submitted to a decree *pro confesso*. Both of the other respondents appeared and jointly answered, setting up two principal defenses: (1) That the complainant was not the original and first inventor of the improvement. (2) They deny in their answer that they have in any manner infringed the patent of the complainant, or ever invaded any of his rights, as alleged in the bill of complaint.

Proofs were taken, the parties heard, and the circuit court having overruled both defenses, sent the cause to a master to ascertain what amount the complainant was entitled to recover. Hearing was had before the master, and he made a report, as required by the decretal order. Exceptions were filed by the respondents who were again heard before the circuit court in support of their motion to set aside the master's report. Modifications of an important character were made by the circuit court in the report of the master, both in respect to the amount adjudged to the complainant and in respect to the portions to be paid by the respective respondents, the decree being that the complainant do recover of the three respondents the sum of \$1,961; and also against the first two in the sum of \$3,748.28, with interest and costs, as therein specified.

Seasonable appeal was taken by the first named respondent, and since the appeal was entered here he has filed the following assignment of errors: (1) That the circuit court erred in holding that the patent of the complainant is good and valid. (2) That the circuit court erred in holding that the respondents have infringed the claims of the complainant's patent.

Patented time detectors for watchmen were known in the art prior to the date of the patent described in the bill of complaint, and it appears that the complainant, at a certain period anterior to that date, became the owner of such a patent and that he surrendered the same, and that it was re-issued in his name for the then unexpired portion of the term. Certain alterations were made in the specification of the re-issue and, as there described, the invention provided a watch for the watchman, which he carried with him in his rounds, so constructed that, by the insertion of a key kept at each of the stations he was required to visit, he could make a record within the watch indicating the several stations visited, with the precise time of each visit and the order in which the respective visits were made. Each watch was provided with a lock, so that the watchman had no access to its interior, and as the record of

each station could only be made by the peculiar key that belonged to such station, which was there made fast, the watchman could not deceive his employers by making a false record.

All these several functions were effected by using a watch or small portable clock movement inclosed in a strong case, the lid of which could be locked and the key kept by the employer. Like a watch, it had an arbor upon which the hour-hand was placed, and a drum was attached so as to revolve as the hour-hand revolved, the purpose of which was to carry the roll of paper to receive the marks indicating the time of each visit. By marks on the paper it was divided into spaces corresponding in their position, relatively, as respects the center of the watch, to the hours and minutes of the watch dial; and by lines drawn lengthwise it was also divided into spaces corresponding in number to the number of markers to be used in effecting the patented result.

Exterior to the watch movement, but within the case, there were placed small steel bars or springs, terminating each in a point bent at right angles, while the other end was fixed firmly to the circular plate or frame of the watch-movement. These springs were placed and held in a gang, one above another, so that the points were in a row perpendicular to the watch face, at and exterior to the point on the dial of the watch indicating the hour of twelve, and each point was directly opposite one of the longitudinal spaces in the strip of paper around the circumference of the drum.

What the inventor desired to accomplish was to show the exact time of each visit of the watchman, and it is obvious that if the point of one of the springs is pressed inward upon the revolving drum it will perforate the paper within its proper longitudinal division, and that the perforation will show the hour and minute at which it was made; and in order to permit such perforation without injuring the steel point, the periphery of the drum was channeled by narrow longitudinal grooves beneath each of the spaces in the paper placed around the drum to receive the marks. Keys were also provided varying from each other in the location and width of the bit and in the number of the bits, so that when one was inserted in the key-hole contiguous to the steel spring and turned, it would press one of the springs inward upon the paper and make the required perforation, while another would press two springs and make two perforations, another three, and so on, as more fully set forth in the specification. *Buerk v. Valentine*, 9 Blatchf., 479.

Since the term of that patent expired, the complainant has obtained a patent for the invention in controversy in this case, which, as he admits, is for the same purpose as the other, but which he insists is a valuable improvement in accomplishing the purpose for which both inventions were made. In its main features, the new improvement consists in dispensing with the drum entirely and the paper wound around its circumference. Instead of that, it attaches a circular disk to the arbor of the hour-hand to revolve therewith, and attaches thereto a circular flat paper dial, of larger diameter, divided by vertical lines, corresponding with the hours and minutes of a watch dial, and having a portion of its exterior divided into spaces by circular

lines drawn at uniform distances, and corresponding to the location of certain steel points as the paper disk is revolved. Beneath the circular plate forming the support or frame of the watch movement, the gang of steel bars or springs is firmly attached to the plate in such position that the points are in a straight line radial to the center, and over each point is a hole in the plate so that each can be pushed upward, the point thereof passing through the hole sufficiently to perforate the paper dial in the space corresponding to the point of the spring. Over the row of holes is placed a small strip of metal, called a fixed index, which is fastened to the circular plate or frame of the watch and extends towards the center of the disk and is raised sufficiently above the revolving disk to permit the paper dial to revolve freely under it and over the holes through which the spring-points are to rise; and to prevent injury to these points, holes are made in its under surface opposite each point, into which the points as they rise may enter, and then by the power of the spring be withdrawn to their respective positions below the plate. Devices, called keys, of a like character to those used in the prior invention, are provided to be inserted in a key-hole so located that the bit of the keys when turned will force the springs upwards instead of inwards, as in the other apparatus previously explained. Perforations are made by the combination in the exterior portion of the revolving paper dial, which indicate the precise hour and minute when it was made, and the particular key that was employed, with all the variations accomplished by the devices described in the specification of the prior patent.

Attempt is made in argument to support the first assignment of error chiefly by reference to three exhibits introduced in evidence by the respondents, which were known and used by the public prior to the date of the patent described in the bill of complaint. They are the patent of Schwilgue, the patent of Rowbotham, and the patent of Nolet.

Before entering upon a separate examination of these several patents, it is proper to remark that it is not pretended that any one of them embodies the entire invention secured to the complainant in his letters patent. Nothing of the kind is pretended, but it is insisted that each contains some feature, device or partial mode of operation corresponding in that particular to the corresponding feature, device or partial mode of operation exhibited in the complainant's patent.

Suppose that is so; still it is clear that such a concession cannot benefit the respondent, it being conceded that neither of the exhibits given in evidence embodies the complainant's invention or the substance of the apparatus described and claimed in his specification. Where the thing patented is an entirety, consisting of a single device or combination of old elements incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire invention is found in one prior patent, printed publication or machine, and another part in another prior exhibit, and still another part in a third exhibit, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first in-

ventor of the patented improvement. *Bates v. Coe* [*ante*, 68].

Authority is given to a defendant in an action at law or to a respondent in an equity suit to plead or set up in the answer that the patentee is not the original or first inventor of the improvement; but if the plaintiff or complainant introduces his patent in evidence, the burden is cast upon the defending party to prove his defense, which he may do by showing that the thing patented had been invented or discovered by some other person in this country prior to the alleged invention in the pending suit, or that it had been patented or described in some printed publication in this or any foreign country. R. S., sec. 4920.

Apply that rule to the facts of the case, and it is clear, to a demonstration, that neither of the exhibits given in evidence by the respondents constitutes any defense to the charge contained in the bill of complaint. *Curtis, Pat.*, 4th ed., sec. 98.

Similarities may, doubtless, be shown between certain features of the apparatus invented by Schwilgue and the apparatus patented to the complainant, as contended by the respondents; but they utterly fail to point out the differences, except in one or two particulars. They differ not only in construction but in the mode of operation, and in almost every particular which gives value to the device as a time detector for watchmen, the foreign patent being much more cumbersome and inconvenient than that of the complainant. Stationary detectors were employed at an early period, to secure fidelity in watchmen in making the rounds of their beat in factories or other business establishments. Detectors of the kind were soon followed by portable watch movements which were carried by the watchman, on which he stamped with ink or other coloring matter the proof of his visit to the several rooms within his beat. Enough appears, to show that the patent of Rowbotham was nothing more than an improved apparatus of that class, being evidently so unlike that of the complainant as not to deserve much examination.

Nor is it necessary to enter much into detail in disposing of the other exhibit introduced by the respondents, as it evidently belongs to the same class of detectors as the preceding, and bears little or no relation to the apparatus of the complainant.

Argument to show that the present apparatus of the complainant is, substantially, different from that described in the expired patent, cannot be required, as the comparison already given is amply sufficient to prove that difference to everyone not blinded by self-interest or prejudice. Tested by these considerations, it is plain that nothing remains for re-examination but the question of infringement.

Persons seeking redress for the unlawful use of their inventions, must allege and prove that they or those under whom they claim are the original and first inventors of the improvement, and that the patent for the same has been infringed by the party against whom the suit is brought. Where the patent in suit is introduced in evidence it affords a *prima facie* presumption that the invention is new and useful; but the burden to prove infringement never shifts if the charge is denied in the plea or

answer. Sufficient proof of infringement may be derived from the comparison of that which is used by the defending party with the description of the invention given in the specification of the patent which constitutes the foundation of the suit, and where the invention is embodied in a machine or apparatus, that mode of conducting the examination is usually the most satisfactory. Sufficient explanations of the complainant's patent have already been given, which need not be repeated.

None, it is presumed, will deny that the time detector sold by the respondents is, in appearance and general construction, similar to that described in the specification of the complainant. Beyond all doubt, the respondents employ a watch movement with a series of keys and a single hole, together with a revolving dial fastened to the watch arbor. Like the complainant, they dispense with the hour and minute hands of the watch and attach the false or paper revolving dial to the arbor of the apparatus. Their stationary index is exactly the same as that of the complainant, and they also employ a series of markers arranged radially to the center of the dial; but the markers are unyielding, while the index is so constructed as to enable the markers to perform the same function as those employed in the complainant's apparatus. They arrange their markers under the false dial, and place the yielding index over the back of the false dial, so that the marks are made from the inside instead of from the outside.

Expert testimony was taken by the complainant, and his witness testified that the apparatus of the respondents is substantially the same in construction and mode of operation as that described in the complainant's specification, and gave his reasons for the conclusion in substance and effect as follows: that the arrangement of the markers is in a line radiating from the center, the markers being made stationary, so that instead of pressing against the keys while the index supports the paper, the keys, supported by the stationary index, press the paper against the markers; the faces of the markers, instead of being simple points, form what is called small figures, and the divisions of the paper dial, by concentric circles, is omitted, it appearing that the different figures are made to indicate the different stations, but the arrangement of the gang of markers is preserved. It is denied by the respondents that the index in their apparatus yields; but the witness testifies that, by taking a sight over the edge of the case parallel to the dial when the watch is open, the stationary index is seen to yield, and acts as a spring. Taken as a whole, he regards the marking device as substantially similar to that employed by the complainant.

Unless there is some yielding, either of the markers or the index, it is not easy to see how the key could be turned without tearing the paper or breaking the key; from which it must follow, as contended by the complainant, that the respondents have substituted for his series of yielding spring-points and index a series of permanent or unyielding markers and a yielding index, retaining the other necessary elements of a false dial which shall receive the impressions by the use of the described keys.

Differences between the two arrangements undoubtedly exist, as is usually the case where

one is borrowed from the other without consent. Most or all of those differences are well described by the Circuit Judge in the case to which reference has already been made. Speaking of the infringing apparatus, he says that the gang of steel springs, instead of being placed beneath the circular plate or frame of the watch movement, is attached to the lid of the case of the instrument, immediately over the location of the gang of springs in the complainant's detector. When closed, the line or row of points is in the same straight line radially from the center, and in order to perforate the paper dial they must be pressed downward instead of upward. To that end the key-hole is placed in the side of the lid over the gang of springs instead of being placed in the body of the case below the springs. Instead of the fixed index placed over the holes through which the points rise to perforate the paper, the respondents have, in the same location, a row of holes in the plate or frame of the movement, into which the points enter, to protect them from injury when making the perforations. During the act of perforation the paper in the complainant's apparatus is sustained by the fixed index, but the necessity for that in the infringing apparatus is obviated by making the motion of the springs downward, whereby the plate of the watch performs the same function during such act.

Other minor differences exist in the manner the paper disk is attached to the revolving disk, which is fastened to the arbor of the watch movement, but they are not deemed to be of the substance of the infringed invention. Examples are also produced as exhibits where are shown watch dial hands on the detector of the respondents which do not appear on the apparatus of the complainant; but that is a matter not supposed to be included in the infringed patent.

Suffice it to say, without entering further into the comparison of the two specifications, that we are all of the opinion that the charge of infringement is fully sustained, both by the comparison of the specifications, one with the other, and by the proofs exhibited in the transcript.

Exceptions were taken to the master's report; but the rulings of the court in respect to the amount adjudged to the complainant for the infringement not having been assigned for error, are not the proper subject of re-examination. *Buerk v. Imhaeuser*, 14 Blatchf., 19.

Decree affirmed.

CHESTER A. ARTHUR, COLLECTOR OF THE
PORT OF NEW YORK, *Plff. in Err.*,

v.

WILLIAM E. DODGE ET AL., as PHELPS,
DODGE & Co.

(See S. C., 11 Otto, 34-37.)

Duty Act—sufficient protest.

1. Under sections 2503 and 2504, of the Revised Statutes, "tin plate" and "terne tin" are dutiable at only ninety per cent of the rate of fifteen per cent *ad valorem*.

2. A protest against the payment of illegal duties is sufficient if it is so distinct and specific as to

apprise the collector of the nature of the objection made to the duty imposed.

[No. 206.]

Argued Mar. 16, 17, 1880. Decided Mar. 29, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The defendants in error, Messrs. Phelps, Dodge & Co., imported into the Port of New York, subsequently to June 22, 1874, the date of the approval of the revision of the statutes, sundry invoices of tin plates and terne tin, upon which Collector Arthur exacted a duty of fifteen per centum *ad valorem*. Messrs. Phelps, Dodge & Co. claimed that the goods were only dutiable at ninety per cent of that rate.

The duty was paid under protest. Appeals were duly made to the Secretary of the Treasury; he affirmed the decision of the Collector; and this suit was commenced for the excess exacted by the Collector over the amount admitted to be due.

The following is a copy of the protest:

Sir: We do hereby protest against the payment of 15 per cent charged on sixteen hundred and fifty (1650) boxes of tin plates of the dutiable value of \$14,422 gold, contained in our entry made on the 23d day of September, 1874, per S. S. Algeria, from Liverpool, England, in cases marked, P. D. & Co., and various other marks; claiming that, under existing laws, said goods are only liable to a duty of 90 per cent of 15 per cent or 13½ per cent, because title 33, section 2503, of the codification of the revenue laws provides certain rates and duties on articles which are mentioned in Schedule E, of section 2504, with the provisions that all articles mentioned in 2503 shall have the benefit of 10 per cent reduction, one of the provisions, on all metals not herein otherwise provided for, and on all manufactures, of, etc., etc., includes tin plate, and we pay the amount exacted in order to get possession of the goods, and look to you for *refund* of the same.

Dated New York, September 29, 1874.

Judgment was rendered in favor of the plaintiffs, and the defendant sued out this writ of error.

Mr. S. F. Phillips, *Solicitor-Gen.*, for plaintiff in error.

Mr. John E. Parsons, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The principal question in this case is, whether, under sections 2503 and 2504 of the Revised Statutes, "tin plate" and "terne tin" are dutiable at fifteen per cent *ad valorem*, or at ninety per cent of that rate. It is conceded that, under the Act of 1872, 17 Stat., at L., 281, secs. 2, 4, which continued in force until the Revised Statutes went into effect, the duty was fifteen per cent *ad valorem*.

The sections of the Revised Statutes referred to, so far as they are material to the determination of the case, are as follows:

"Section 2503. There shall be levied, collected, and paid upon all articles mentioned in the schedules contained in the next section, imported from foreign countries, the rates of duty which are by the schedules respectively

prescribed; *Provided*, That on the goods, wares and merchandise in this section enumerated and provided for, imported from foreign countries, there shall be levied, collected and paid only ninety per centum of the several duties and rates of duty imposed by the said schedules upon said articles, severally; that is to say:

* * * * *

On all iron and steel, and on all manufactures of iron and steel, of which such metals, or either of them, shall be the component part of chief value, excepting cotton machinery.

On all metals not herein otherwise provided for, and on all manufactures of metals of which either of them is the component part of chief value, excepting percussion-caps, watches, jewelry and other articles of ornament: *Provided*, That all wire rope and wire strand, or chain made of iron wire, either bright, coppered, galvanized or coated with other metals, shall pay the same rate of duty that is now levied on the iron wire of which said rope or strand or chain is made; and all wire rope and wire strand or chain made of steel wire, either bright, coppered, galvanized or coated with other metals, shall pay the same rate of duty that is now levied on the steel wire of which said rope or strand or chain is made."

* * * * *

"Section 2504. Schedule E. Metals.

* * * * *

Tin in plates or sheets, terne, and tagger's tin; fifteen per centum *ad valorem*."

* * * * *

In *U. S. v. Bowen*, decided at the present Term [*ante*, 631], we held that the Revised Statutes must be treated as a legislative declaration by Congress of what the statute law of the United States was December 1, 1873, on the subjects they embrace, and that when the meaning was plain, the courts could not look to the statutes which have been revised to see if Congress erred in that revision. Looking, then, to this case, we find that Congress has declared the law to be that only ninety per cent of the rates of duty imposed by the schedules in section 2504 shall be collected on all metals not otherwise provided for in section 2503, and on all manufactures of metals of which either of them is the component part of chief value, and on iron and all manufactures of iron of which that metal shall be a component part of chief value. In this there seems no ambiguity, and if "tin plates" and "terne tin" are metal or manufactures of metal, or if they can be classed as iron or manufactures of iron in which iron is the component part of chief value, there cannot be a doubt that they come within the ninety per cent clause. They are classified in the schedules as metals. All the elements of which they are composed are metals. Their manufacture consists in the combination of the several component parts. The tin is still tin, and the iron still iron. There has been no substantial chemical change. All their metallic qualities still remain. They are what they purport to be, manufactures of iron, tin and sometimes lead, and the result is a new article of commerce, of which metals, as metals form the component parts. Although they have, when combined, a particular name, it is a name applicable to the element in the combination, whose

use it was intended in this way to secure. Percussion-caps, watches and jewelry and other articles of ornament, made of metal, must have been considered as manufactures of metal, or it would not have been necessary to except them by name from the operation of the reduction clause.

Without pursuing the subject further, it is sufficient to say that we are clearly of the opinion that the articles in question were dutiable only at ninety per cent of the rate of fifteen per cent *ad valorem*.

An objection is made to the sufficiency of the protest. The claim is, that it was not so distinct and specific as to apprise the Collector of the nature of the objection made to the duty imposed. "Technical precision," says *Mr. Justice Clifford*, for the court in *Davies v. Arthur*, 96 U. S., 151 [XXIV., 759], "is not required; but the objection must be so distinct and specific as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one that could be obviated." We have had no difficulty in reaching the conclusion that the protest in this case fully meets the requirements of this rule. No one could have any doubt of the nature and character of the claim that was made.

The judgment is affirmed.

Cited—104 U. S., 499.

GEORGE W. THOMAS ET AL., *Plffs. in Err.*,
v.

WEST JERSEY RAILROAD COMPANY.

(See S. C., 11 Otto, 71-87.)

Corporate powers—railroad lease—charter—void contract—ratification—ultra vires.

*1. The powers of corporations organized under legislative charters are only such as the statutes confer. Conceding that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

2. A lease by a railroad company, of all its road, rolling stock and franchises, for which there is no authority given in its charter, is *ultra vires* and void.

3. The ordinary clause in the charter, authorizing such corporations to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads, is no authority to lease its road and franchises.

4. The franchises and powers granted to such corporations are, in a large measure, designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligation without the consent of the State, is a violation of its contract with the State and is forbidden by public policy and is, therefore, void.

*Head notes by *Mr. Justice MILLER*.

NOTE.—Corporations possess only powers conferred by statute creating them, and those necessarily implied. See note to *Huntington v. Savings Bk.*, 96 U. S., XXIV., 777.

5. The fact that the Legislature, after such a lease is made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of such lease or an acknowledgment of its validity.

6. Where, in a lease of this kind for twenty years, the lessors have resumed possession at the end of five years, and the accounts for that period have been adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, and the case does not come within the principle that executed contracts which were originally *ultra vires* shall stand good for the protection of rights acquired under a completed transaction.

[No. 169.]

Argued Jan. 23, 1880. Decided Mar. 29, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. A. Sydney Biddle, Peter L. Voorhes and George W. Biddle, for plaintiffs in error.

Messrs. Samuel Dickson, John C. Bullitt and A. Browning, for defendant in error.

Mr. Justice MILLER delivered the opinion of the court:

The plaintiffs in error entered into a contract on the 8th day of October, 1863, with the Millville and Glassboro Railroad Company of New Jersey, which, in the resolution of the Board of Directors by whom it was initiated, is called a lease of the road. This agreement was confirmed by a vote of the stockholders and was to continue for a period of twenty years from the first day of April, 1863. It, however, contained a provision that the Railroad Company could at any time put an end to it upon three months' notice to the other party; but, in that event, arbitrators were to be chosen who should decide upon the value of the contract and the amount of damages incurred by and equitably and justly due to the other party by reason of such action. Under this provision the Railroad Company ended the contract and resumed possession of the road April 1, 1868.

About this time, by Acts of the New Jersey Legislature, the Millville and Glassboro Railroad Company was consolidated with the West Jersey Railroad Company, which succeeded to all the rights and obligations of the former company and the road was delivered by plaintiffs, on the first of April, 1868, to the latter.

Efforts at arbitration, which it is unnecessary to recite here, having proved abortive, the plaintiffs in error brought the present action in the Circuit Court for the Eastern District of Pennsylvania to recover the value of the contract and the damages sustained by them by its termination under the clause of the agreement already mentioned.

The court held the contract void, and instructed the jury to find a verdict for defendants. This writ of error brings up the judgment entered on that verdict, for review.

The ground on which the court so held, and on which the ruling is supported in argument here, is, that the contract amounted to a lease, by which the railroad, rolling stock and franchises of the Corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the Company.

It is denied by appellants that the contract can be fairly called a lease.

But we know of no element of a lease which is wanting in this instrument. "A lease for years is a contract between lessor and lessee, for possession of lands, etc., on the one side, and a recompense by rent or other consideration on the other." 4 Bac. Abr., 632.

"Anything corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent charges, and all other incorporeal hereditaments are included in the common law rule." Bouv. L. D., "Lease;" 1 Wash. Real. Prop., 310.

The railroad and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are leased to the plaintiffs for a period of twenty years by the Corporation. In return it receives from plaintiffs one half of all the gross earnings of the road as rent. The usual right of re-entry for failure to perform covenants, in addition to the special right to terminate the lease on notice, is found in the instrument, and the usual covenant for repairs and proper running of the road, equivalent to good husbandry on a farm, is also there.

The provision for complete possession, control and use of the property of the Company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and the exercise of the franchises of the Company. A solitary exception to this statement, of no value in the actual control of its affairs, is found in the sixth clause of the lease, which is a covenant that the lessees will discharge anyone in their service on the request of the Corporation, evidenced by a resolution of the Board of Directors.

But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way affects the question on which we are to pass. That question is, whether the Railroad Company exceeded its powers in making the contract, by whatever name it may be called, so that it is void.

It is, perhaps, as well to consider this question in the order of its presentation by the learned counsel for plaintiffs, upon whom the burden of showing the error of the circuit court devolved the duty of proving one of the following propositions:

1. The contract was within the powers granted to the Railroad Company by the Act of the New Jersey Legislature under which it was organized.
2. That, if this be not established, the lease was afterwards ratified and approved by another Act of that Legislature.
3. That, if both these propositions are found to be untenable, the contract became an executed agreement under which the rights acquired by plaintiffs should be legally respected.

The authority to make this lease is placed by counsel primarily in the following language of the 13th section of the Company's charter:

"That it shall be lawful for the said Company, at any time during the continuance of its charter, to make contracts and engagements

with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight or passengers, and to enforce the fulfillment of such contracts."

This is no more than saying, "You may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from other railroads or carrying companies should be carried over the road of this Company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language here used a permission to sell, to lease, or to transfer the entire road and the rights and franchises of the Corporation to others. To do so is to deprive the Company of the power of making those contracts which this clause confers and of performing the duties which it implies.

In the case of *R. Carriage & Iron Co. v. Riche*, decided in the House of Lords in 1875, and reported in 7 Eng. and Ir. App. Cas. [L. R. 7 H. L., 653], the memorandum of association, which, as Lord Cairns said, stands under the Act of 1862 in place of a legislative charter, thus described the business which the association was authorized to conduct: "The objects for which this company is established are to make, sell or lend on hire, railway carriages and engines, and all kinds of railway plant, fittings, machinery and rolling stock; and to carry on the business of *mechanical engineers and general contractors*; to purchase and sell as merchants, timber, coal, metals or other materials; and to buy and sell any such materials on commission or as agents." This company purchased a concession for a railroad in Belgium, and entered into a contract for its construction, on which it paid large sums of money. The company was sued afterwards on the agreement with Riche, the contractor, and the contract was held valid in the Exchequer Chamber by a majority of the judges, on the ground that, while it was in excess of the power conferred on the directors by the memorandum, it had been made valid by ratification of the shareholders, to whom it had been submitted.

The House of Lords reversed this judgment, holding unanimously that the contract was beyond the powers conferred by the memorandum above recited, and being beyond the powers of the association, no vote of the shareholders whatever could make it valid. The case is otherwise important in its relation to the one before us, but it is cited here for its parallelism in the construction of the clause defining the powers of the Company.

If a memorandum which described the parties as engaging in furnishing nearly all the materials, machinery and rolling stock which go to make a railroad and its equipments, and then empowered them to carry on the business of mechanical engineers and general contractors, cannot authorize a contract to build a railroad, surely the authority to build a railroad and to contract for carrying passengers and goods

over its own road and over others is no authority to lease out the road, and with the lease to part with all its powers to another company or to individuals. We do not think there is anything in the language of the charter which authorized the making of this agreement.

It is next insisted, in the language of counsel, that though this may be so, "A corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

This class of subjects has received much consideration of late years in the English courts, and counsel, on both sides of the present case, have relied largely on the decisions of those courts. Among the cases cited by both sides is that of *E. Anglian R. Co. v. Eastern Co. R. Co.*, 11 C. B., 775.

In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other railroads whose companies had introduced into Parliament a bill for consolidation under the name of East Anglian Railway Company, and to assume the payment of the parliamentary expenses of this Act of consolidation.

This covenant was held void as beyond the power conferred by the charter. "They cannot," said the court, "engage in a new trade, because they are incorporated only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be the object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority." This case, decided in 1851, was afterwards cited with approval by the Lord Chancellor in 1857 in delivering the opinion of the House of Lords in the case of *R. Co. v. Hawkes*, 5 H. L. Cas., 331; and it is there stated that it was also acted on and recognized in the Exchequer Chamber in the case of *McGregor v. R. Co.*, 2 L. J. (N. S.), Q. B., 69. Both these cases are cited approvingly in the opinion of Lord Cairns in the case of the *Ashbury Company*, on appeal in the House of Lords.

This latter case, as decided in the Exchequer Chamber [*Riche v. R. C. & I. Co.*], L. R., 9 Exch., 224, is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it

may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selbourn, Chelmsford, Hatherly and O'Hagan, and the broad doctrine established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of everyone of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the Railroad Company was without the power to make such a contract.

That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *R. R. Co. v. Winans*, 17 How., 30 [58 U. S., XV., 27]. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: "This conclusion (argument) implies that the duties imposed upon plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the Legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for

their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the Legislature. *Beman v. Rufford*, 1 Sim. (N. S.), 550; *Winch v. R. Co.*, 13 L. & Eq., 506."

And in the case of *Black v. Canal Co.*, 7 C. E. Green, 130 [22 N. J. Eq., 130], *Chancellor Zabriskie* says: "It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority." For this he cites some ten or twelve decided cases in England and in this country.

This brings us to the proposition that the Legislature of New Jersey has given her consent by an Act which amounts to a ratification of this lease.

That Act is entitled "A Supplement to the Act entitled 'An Act to Incorporate the Millville and Glassboro Railroad Company,'" approved April 10, 1867; and its only purpose was to regulate the rates at which freight and passengers should be carried. It reads as follows:

Be it enacted, etc., "That it shall be unlawful for the directors, *lessees* or *agents* of said railroad to charge more than three and a half cents per mile for the carrying of passengers, and six cents per ton per mile for the carrying of freight or merchandise of any description, unless a single package, weighing less than one hundred pounds; nor shall more than one half of the above rate be charged for carrying any fertilizing materials, either in their own cars or cars of other companies running over said railroad; *Provided*, That nothing contained in this Act shall deprive the said railroad company, or its *lessees*, of the benefits of the provisions of an Act entitled 'An Act Relative to Freights and Fares on Railways in the State,' approved March 4th, 1858, and applicable to all other railroads in this State."

It may be fairly inferred that the Legislature knew at the time the statute was passed that plaintiffs were running the road, and claiming to do so as *lessees* of the Corporation. It was not important for the purpose of the Act to decide whether this was done under a lawful contract or not. No inquiry was probably made as to the terms of that lease, as no information on that subject was needed.

The Legislature was determined that whoever did run the road and exercise the franchises conferred on the Company, and under whatever claim of right this was done, should be bound by the rates of fare established by the Act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, *lessees* and *agents* of the railroad.

The mention of the *lessees* no more implies a ratification of the contract of lease than the word "directors" would imply a disapproval of the contract. It is not by such an incidental use of the word "*lessees*," in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State.

It remains to consider the suggestion that the contract, having been executed, the doctrine of

ultra vires is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

And in regard to corporations, the rule has been well laid down by Comstock, *Ch. J.*, in *Parish v. Wheeler*, 22 N. Y., 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely: the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action; damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this, it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the Company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was, nevertheless, a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the Company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the courts.

We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision and, after a full examination of the authorities, we can see no error in the action of the Circuit Court, and its judgment is, therefore, affirmed.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Dissenting, *Mr. Justice Harlan*.
Not sitting, *Mr. Justice Bradley*.

Cited—107 U. S., 100; 1 McCrary, 196; 33 N. J. Eq., 162; 64 How. Pr., 23; 131 Mass., 258; 41 Am. Rep., 231; 36 Ohio St., 356; 38 Am. Rep., 596.

MRS. WIDOW B. FLEITAS, *Plff. in Err.*,
v.
JOHN COCKREM AND WILLIAM F. HAL-
SEY, RECEIVERS OF THE NEW ORLEANS NA-
TIONAL BANKING ASSOCIATION.

(See S. C., 11 Otto, 301-306.)

*Waiver of jury—former suit pending—attach-
ment bond—erroneous judgment.*

1. An agreement to waive a trial by jury suffi-
ciently appears if the record declares that "the
cause was called for trial by the court, the jury hav-
ing been waived in writing."

2. Where there was a plea of another suit pend-
ing for the same cause, the court may compel the
plaintiffs to elect whether they would submit to
judgment on the plea, or discontinue the first suit
and pay the costs thereof.

3. The fact that the amount of an attachment
bond is fixed by an order of a judge, makes no dif-
ference in Louisiana as to the effect of the invalid-
ity of an insufficient bond upon the subsequent
proceedings. According to the Code of that State,
as construed by its courts, the bond, on obtaining
an attachment given by the attaching creditor, must
be for a sum exceeding by one half that which he
claims.

4. Where such bond is not given, a judgment, so
far as it gives a privilege upon the property at-
tached, with recourse on the bond on which the
property attached was released, will be reversed.

[No. 186.]

Argued Mar. 9, 1880. Decided Mar. 29, 1880.

IN ERROR to the Circuit Court of the Unit-
ed States for the District of Louisiana.

The case is stated by the court.

Messrs. Charles Case and Robert Mott,
for plaintiff in error.

Messrs. J. D. Rouse and Wm. Grant, for
defendants in error.

Mr. Justice Bradley delivered the opinion
of the court:

This is an action on a promissory note for
\$5,000 and interest thereon at five per cent per
annum from maturity, December 21, 1871. Judg-
ment was rendered for the plaintiffs with
privilege upon property which was attached in
the course of the proceeding, with recourse on
the principal and sureties on the bond upon
which the property attached was released. The
defendant brought this writ of error.

It is assigned for error: first, that the issue on
one of the exceptions (*lis pendens*) was tried by
the court and not by a jury, no agreement to
waive a trial by jury appearing in the record.
The record, however, declares explicitly that
"The exception in this cause was called for
trial by the court, the jury having been waived
in writing." In the absence of anything to the
contrary, this is conclusive that the proper agree-
ment was made.

The next error assigned is, that after an ex-
ception had been filed by the defendant, alleg-
ing that another suit had been commenced
against her for the same cause in the Sixth Dis-
trict Court for the Parish of Orleans, and had
been removed into the Circuit Court of the Unit-
ed States, and was still pending, the said circuit
court allowed the plaintiffs to elect whether
they would, within a time limited, discontinue
that suit, which was first brought, and pay the
costs of the same. The record shows that the
court below did order that the plaintiffs might
elect to proceed in the present suit upon paying

the costs in the first suit, and discontinuing the
same; otherwise, the exception would be main-
tained. The plaintiffs did so elect, paid the
costs, and discontinued the first suit. The de-
fendant objected to this course, insisting that
she was entitled, upon her exception, to have
the present suit absolutely dismissed.

The exception of *lis pendens* is given by the
Code of Practice, art. 335, as follows: "There
are two kinds of declinatory exceptions: 1.
When the exception is taken to the competency
of the judge, pursuant to the rules above pro-
vided; 2. When it arises from the fact of an-
other suit being pending between the same par-
ties, for the same object, and growing out of
the same cause of action, before another court
of competent jurisdiction. In both cases the
suit must be dismissed, and the plaintiff decreed
to pay costs."

The former suit in the present instance not
being pending in "another court," but in the
same court, the case is not within the words of
the article. It has been held, however, to be
within its spirit. *Dick v. Gilmer*, 4 La. Ann.,
520. But in other cases, the pendency of the
former suit in another court has been deemed
material. *Weeks v. Flower*, 9 La., 385; *Succession of Ludwig*, 3 Rob. (La.), 92. And the ex-
ception is not necessarily a peremptory one in
any case; for if before the trial thereof the for-
mer suit be terminated, the exception, it is said,
will fail. *Schmidt v. Braun*, 10 La. Ann., 26.

Since the exception in the case of suit pend-
ing in the same court is not within the words of
the Code, but rests upon its equity, and since
in such cases both suits are under the control of
the court in which the exception is made, we
think the court might well exercise the discre-
tion which was done in the present case; in com-
pelling the plaintiff to elect whether he will
submit to judgment on the exception, or discon-
tinue the first suit and pay the costs thereof.

The remaining assignments of error relate to
the issue of an attachment in the case, and to
the privilege given by the judgment upon the
attached property, with recourse against the
sureties on the bond given for its release.

The attachment was issued upon a supple-
mental petition filed in the case, and sworn to
by one of the plaintiffs, stating the amount of
the debt, \$5,000 and interest thereon from De-
cember 21, 1871, and that the defendant resided
out of the State of Louisiana. The Judge be-
low made an order that an attachment be issued
upon the plaintiffs giving bond in the sum of
\$3,200, with solvent surety, etc. The writ was
issued, and under it the marshal, on the 11th of
January, 1877, attached a plantation and sugar-
house thereon, with its contents, consisting of
sugar and other property sufficient to satisfy the
claim; and on the 13th of January released the
property by the claimant giving a bond for its
release in the sum of \$9,000. On the same day,
the defendant entered a rule to show cause why
the attachment should not be set aside, upon
the ground, amongst others, that it was issued
without the plaintiffs giving the bond required
by law as a prerequisite therefor. This rule
was subsequently dismissed by the court below,
and a bill of exceptions was taken by the de-
fendant.

The fact that the amount of an attachment
bond is fixed by an order of a judge, makes no

difference in Louisiana as to the effect of the invalidity of an insufficient bond upon the subsequent proceedings. *Graham v. Burckhalter*, 2 La. Ann., 415.

The question is, whether the bond in this case was sufficient, being for only \$3,200, when the debt exceeded \$6,000. The law on the subject is based on article 245 of the Code of Practice, which is in the following words:

"Art. 245. A creditor, his agent, or attorney in fact, praying such attachment, must, besides, annex to his petition his obligation in favor of the defendant for a sum exceeding one half that which he claims, with the surety of one good and solvent person residing within the jurisdiction of the court to which the petition is presented, as a security for the payment of such damages as such defendant may recover against him in case it should be decided that the attachment was wrongfully obtained."

This law has stood in the same form in the Code of Practice since its first promulgation in 1825. But the words "for a sum exceeding one half that which he claims" are an incorrect translation of the French copy of the Code. The correct translation would be "for a sum exceeding by one half that which he claims." And the Supreme Court of Louisiana has always construed the law as though the word "by" had been inserted, as required by the correct translation, numerous cases being reported in which judgment has been reversed because the attachment bond did not exceed by one half the amount of the debt claimed, and no case being found to the contrary. See, *Williams v. Barrow*, 3 La., 57; *Jackson v. Warwick*, 17 La., 436; *Graham v. Burckhalter*, 2 La. Ann., 415; and cases referred to in the Code. It would seem that this settled construction ought to prevail. The reason for an attachment bond, as explained by the Supreme Court of Louisiana, requires the construction which was adopted. Prior to the adoption of the Code, a bond for double the amount of the demand was required. "Its object, and the object of all such laws," says the court, "is to secure the absentee from all damages he may sustain by illegal seizure of his property. An interpretation such as the plaintiff contends for would, in many instances, defeat the purpose of the Legislature. Damage is sometimes sustained by the debtor to the whole amount of the sum claimed from him, and a bond to half that amount would only be half security." [*Williams v. Barrow*], 3 La., 59.

As the law has never been changed, but stands now as it has stood for more than fifty years and, as no decision to the contrary of those referred to has ever been made, we think that we must be governed thereby.

This view receives support from the law which requires the plaintiff to give bond as a condition of arresting the person of the defendant. Originally no bond was required; but in 1856 an Act was passed to amend the 214th article of the Code respecting process of arrest, and prescribed a bond to be given by the plaintiff "for a sum exceeding by one half the amount of that which he claims." In this case the French copy is exactly the same as in the case of attachments.

So with regard to appeal bonds (art. 575), the Code of Practice from the first prescribed a bond "for a sum exceeding by one half," etc.; See 11 OTTO.

the French being the same as in the other cases.

It is true that, in 1868, an amendment of article 575 was passed changing the above words to "a sum exceeding one half the amount." This amendment was abrogated in 1870 in the new Code; but whilst it was in force a case occurred in which the court followed the altered reading, and considered a bond for "one half the amount" sufficient. But this may have been on account of the seemingly designed alteration of the law.

No such design can be asserted in the present case. The law stands in the same words in which it has always stood, and we think it must have its long accepted meaning.

For this cause the judgment of the circuit court must be reversed, so far as it gives a privilege upon the property attached, with recourse on the principal and sureties on the bond upon which the property attached was released. The rest of the judgment, not being affected by the error in question, should be affirmed. The suit was not commenced by attachment, but by citation, which was personally served upon the defendant, who appeared and filed the exception of *lis pendens* before the supplemental petition for an attachment was filed. Under these circumstances, it would be unjust to reverse the personal judgment for the amount of the debt. We are only required to reverse that portion of it which depends upon the attachment.

The judgment is, therefore, affirmed, except as to the last clause thereof, which gives a "privilege upon the property attached, with recourse on the principal and sureties on the bond upon which the property attached was released;" and as to that part, it is reversed, with costs.

PALMER C. SMITH ET AL., Admsrs., etc., and
EDWARD J. VAN METER, Admr., etc.,
Appts.

v.

JAMES C. AYER ET AL.

SAME, *Appts.*

v.

FIRST NATIONAL BANK OF WEST-
BORO, MASSACHUSETTS ET AL.

(See S. C., 11 Otto, 320-332.)

Notice to attorney—dealings with executor—illegal act—partnership—misappropriation.

1. Information to an attorney, is information to his client, and the latter is affected with notice of all facts, which notice can be charged upon his attorney.

2. A person dealing with an executor, exercising his power of disposition of the personal assets of an estate in his hands, to raise money, not for the estate, but for the business of a commercial firm, is bound to look into his authority to make such a disposition of them, and is held to a knowledge of all the limitations which the will, as well as the law, put upon his power.

3. Property thus held by an executor, acquired from him by third parties with knowledge of his trust and his disregard of its obligations, may be followed and recovered.

4. The authority of an executor to continue a specifically designated existing interest in the firm, does not extend to the use, in its business of any

other funds of the estate, or to the use of any property which he received in his official character to raise funds for that purpose.

5. Applying notes held by an executor, or using them to obtain money for that purpose, is a misappropriation of them, and the parties receiving them, knowing of the directions of the testator, cannot hold them against the claim of his representatives.

[Nos. 31, 32.]

Argued Apr. 8, 9, 1879. Decided Mar. 29, 1880.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The case is stated by the court.

Messrs. Miller & Frost and P. C. Smith, for appellants.

Messrs. C. C. Bonney and Goudy & Skinner, for appellees:

The legal title to the note sued for, was duly transferred to J. C. Ayer & Co., for value paid at the time of transfer and the right to assign and transfer it is unquestionable.

1 Redf. Wills, 3d ed., 131, 419; 3 Redf. Wills, 130, 137; *Farhall v. Farhall*, L. R., 7 Eq. Cas., 286; *Hough v. Bailey*, 32 Conn., 288; *Miles v. Durnford*, 2 Sim. (N. S.), 239; *Whale v. Booth*, 4 T. R., 625, note; *Dwight v. Newell*, 15 Ill., 335; *Petrie v. Clark*, 11 Serg. & R., 388.

The power granted by the will of Thomas T. Renick, is ample to authorize the pledge of the note in controversies to raise money; and to warrant the investment of the money so raised, in the printing-press works at Canton, Ohio.

Gandolfo v. Walker, 15 Ohio St., 274.

The transfer of the note in controversy to J. C. Ayer & Co., cannot be impeached unless for actual fraud, and no charge of such fraud is made in the pleadings or shown by the proofs.

1 Dan. Neg. Inst., secs., 184, 584, 769-777, 824, and cases cited; 1 Pars. Cont., 254, 255; *Walker v. Craig*, 18 Ill., 116.

The power of the executor of Thomas T. Renick to pledge the note to J. C. Ayer & Co. for money advanced at the time, is perfectly clear.

Gordon v. Preston, 1 Watts, 385; *Jackson v. Brown*, 5 Wend., 594; *Curtis v. Leavitt*, 15 N. Y., 161; *Petrie v. Clark*, 11 Serg. & R., 388; *Russell v. Plaipe*, 18 Beav., 21; *Perry, Trusts*, sec. 225, and cases cited; 3 Redf. Wills, 231; *Goodman v. Simonds*, 20 How., 343 (61 U. S., XV., 934); *Murray v. Lardner*, 2 Wall., 110 (69 U. S., XVII., 857); *White v. Bk.*, 3 Sandf., 222; *N. Y. M. Iron Works v. Smith*, 4 Duer, 362.

Even B. F. Renick, the executor, whose good faith is not impeached, could not be held liable for any loss arising from the pledge of the note and the investment of the money; and much less can Ayer & Co., to whom he transferred the note in controversy, be held responsible for any such loss.

3 Redf. Wills, 413; *Christy v. McBride*, 1 Scam., 78; *Rowan v. Kirkpatrick*, 14 Ill., 1; *Walker v. Craig*, 18 Ill., 116; *Williams, Exrs.*, 796.

Mr. Justice Field delivered the opinion of the court:

These are suits in equity to compel the delivery to the complainants of two promissory notes, each for \$39,250, alleged to belong to the estate of Renick Huston, deceased, brought

by the administrators *de bonis non* of that estate and the administrator *de bonis non* of the estate of Thomas T. Renick, deceased. They were commenced in a court of the State of Illinois and, upon application of the defendants, *Ayer et al.*, in the first case, and of the First National Bank, in the second case, were transferred to the Circuit Court of the United States for the Northern District of Illinois. That court dismissed the bill in both cases, and from its decrees they are brought here on appeal.

The facts out of which the suits arise are substantially these: In February, 1864, one Renick Huston, then a resident of Ohio, died possessed of a tract of land, about eighty acres in extent, near Chicago, Illinois. The legal title to the land stood in the name of Job R. Renick, but it is admitted that he held it as trustee for the estate of Huston, and to re-imburse Thomas T. Renick for certain expenditures incurred on account of the property. The deceased left a will, by which, after making certain bequests, he devised one third of the residue of his estate to Thomas T. Renick, whom he named as his executor, and to whom letters testamentary were issued. The property having been sold at different times for taxes, and being subject to various charges, Renick advanced money to a large amount, stated to be between \$20,000 and \$30,000, to redeem it from the sales and to pay off the claims upon it. He was authorized under the will to sell the real estate and, accordingly, in July, 1872, he sold it to one Joel D. Harvey for \$157,000, payable one fourth in cash and the balance in one, two and three years, for which notes were given, secured by a trust-deed of the property executed to one J. Edwards Fay. There were six notes in all, three being each for \$39,250, and the other three for the installments of interest as they fell due. They were all made payable to the order of Thomas T. Renick individually. The cash payment was sufficient to re-imburse him for his outlays, and he held the notes as executor of Huston's estate.

In August, 1873, Thomas T. Renick died in Ohio, leaving a will, and appointing his brother, Benjamin, executor of his estate. Letters testamentary were accordingly issued to Benjamin, and the notes of Harvey subsequently came into his possession as executor. At the time of his death the deceased held in his name an interest in a commercial firm, known as Tower, Classen & Co., engaged in the manufacture and sale of chromatic printing-presses, at Canton, Ohio, which he had acquired by funds belonging one third to himself, one third to the children of a deceased brother, and one third to a sister. In his will he made a request that the whole interest should be retained in the company, under the control of his brother, so long as the latter should deem it profitable. His own interest he bequeathed to his brother in trust for himself and certain nephews and nieces mentioned, in equal proportions, to be held and controlled by him so long as he should deem it advisable. Several other bequests were made by the testator to different parties, and the payment of an annuity to one of his brothers was directed. Soon afterwards Benjamin purchased the interest of Tower in the company, and then the firm name was changed to that of B. T. Renick & Co.

In September, 1873, the complainants, Palmer C. Smith and Job R. Renick, were appointed administrators *de bonis non* with the will annexed of the estate of Huston. And when the second note of Harvey was about maturing, application was made to Smith, as such administrator, to consent to extend the time of its payment and that of the third note. After some negotiation, and the maturity of one of the notes, Smith signed an agreement, in which, after reciting that the notes were the property of the estate of Renick Huston, deceased; that a suit was pending in Ohio affecting the property of the estate, and that until its termination it was desirable that the money should be invested; and that other parties—the West Chicago Land Company, to which portions of the real property had been sold—had assumed the payment of the notes and interest, he stipulated not to press the payment of the notes until such time as he should require the money by reason of the termination of the suit, the extension in no event to exceed two years. This agreement bears date September 12, 1874. The parties who had assumed the obligation to pay the notes were not content with the agreement without the signature of Benjamin Renick, executor of the estate of Thomas Renick, as the notes were in his possession and were payable to the order of his testator. After a good deal of negotiation, his signature, as executor of the estate of Thomas Renick, was obtained to a similar agreement for an extension of time, stipulating that he also would not press the payment of the notes unless he should require the money to make a settlement of that estate. It does not, however, contain the recital of the one signed by Smith, that the notes were the property of the estate of Huston. This agreement was not executed until the 19th of February, 1875, though it was dated back to the date of the one signed by Smith, and both agreements were placed in the hands of one James R. Goodman. On the same day the following indorsement was made on each of the notes:

“FEBRUARY 19th, 1879.

Payment of the within notes extended, as per contract of September 12th, 1874, now in the hands of James R. Goodman, Esq., for a period not exceeding two years from July 15th, 1874.

J. EDWARDS FAY, *Trustee, etc.,*

B. T. RENICK,

Executor and Trustee of Thomas T. Renick, deceased.”

In May following, the firm of B. T. Renick & Co., the successors, as mentioned, of Tower, Classen & Co., applied, through a broker in New York, to the defendants, J. C. Ayer & Co., of Lowell, Mass., for a loan of \$39,250, and offered to pledge as collateral security for the money one of the notes of Joel A. Harvey, given upon the purchase of the land near Chicago, and secured by a trust deed of the property. Ayer & Co. agreed to make the loan if the security was approved by their attorney, to whom it was referred to examine and report as to its sufficiency. The attorney made the examination. He testifies that he examined the two notes of Harvey and the deed of trust securing them, an abstract of title to the land, and a copy of the will of Thomas T. Renick; that he talked with the trustee under the trust-deed, and with Benjamin Renick, the executor
See 11 OTTO.

of Thomas T. Renick, in whose possession the notes were at the time; that Benjamin informed him that he wished to use the money borrowed in the business of B. T. Renick & Co., manufacturers of chromatic printing presses; that the establishment was the one designated in the will as that of Tower, Classen & Co.; and that the notes had each the indorsement of the extension mentioned. The attorney reported to Ayer & Co. that the security was valid and sufficient to pay the notes, and advised them to take the note first maturing. Immediately afterwards he was directed to complete the loan. He accordingly took the note of B. T. Renick & Co. for \$39,250, dated May 26, 1875, payable to Ayer & Co., at their office in Lowell, Massachusetts, and, as collateral security, received the note first falling due of Harvey for the same amount, both of which he transmitted to Ayer & Co. It is to compel a surrender of this note to the complainants that the first of the above named suits is brought.

In June following this transaction, the firm of B. T. Renick & Co. desired a further loan of \$30,000, and employed Mr. J. Edwards Fay to obtain it on the security of the third note of Harvey for \$39,250. Mr. Fay applied to the First National Bank of Westboro', Mass., for the loan. He showed to its officers the note of Harvey, having the indorsement extending the time of payment for a period not exceeding two years, pursuant to the agreement deposited with Goodman, and informed them of the trust-deed executed to him to secure its payment. The indorsement, as already seen, showed that the note was held by B. T. Renick as executor. He also told them of the loan made by Ayer & Co., upon the security of the second note, the examination then made by their attorney into the sufficiency of the security and his favorable report. He also mentioned the relation which Benjamin Renick, as executor of Thomas T. Renick, deceased, bore to the firm of B. T. Renick & Co., and that he made the application for the loan at the request of that firm. The bank thereupon agreed to make the loan. A note of B. T. Renick & Co., for \$30,000, dated June 1, 1875, payable on the 15th of July, 1876, was accordingly executed and delivered to it, with the note of Harvey as collateral security, and the money received. It is to compel a surrender to the complainants of the note thus pledged as collateral that the second of the above suits is brought. Soon after the bills were filed, Benjamin Renick resigned his position as executor of the estate of Thomas T. Renick, and Edward J. Van Meter was appointed in his place as administrator *de bonis non* with the will annexed, and by leave of the court a supplemental bill was filed in both cases, and he was allowed to appear in each as a co-complainant and join in the prayer for relief.

There is no question as to the actual ownership of the notes of Harvey taken by Ayer & Co. and the First National Bank of Westboro'. They belong to the estate of Renick Huston. The only interest which Thomas T. Renick had in them grew out of his relations to that estate for advances and services and as a residuary legatee. The question for determination is, whether Ayer & Co. and the Bank took the notes under such circumstances as to be able to hold them or either of them against the demand

of Huston's estate, or of that of the estate of Thomas T. Renick, from whose executor they were received. So far as the present suits are concerned, it is of no consequence to the defendants whether the notes be regarded ultimately as the property of the estate of Huston or of the estate of Thomas T. Renick. They can only insist that, as in their negotiations they knew nothing of the claims of Huston's estate, and dealt with the notes as the property of Renick's estate, they shall be entitled to all the protection which that fact may confer. We shall so treat the cases and consider their rights. There is no doubt that Ayer & Co. relied entirely upon the judgment of their attorney as to the power of the executor of the estate of Thomas T. Renick to pledge the note for moneys borrowed to be used in the business of the firm of B. T. Renick & Co. Still they must be held to know the law and the limitations which it prescribes to the powers of executors in the disposition of property coming into their hands as such officers; and, however free from intentional wrong, they must bear the responsibility of a mistaken judgment with respect to those limitations. The facts brought to the knowledge of their attorney in his inquiries respecting the note and the authority of Benjamin T. Renick to pledge it, are considered in law as brought to their knowledge. Information to him of all essential matters affecting the subject he was investigating was in law information to them, and their action must be adjudged accordingly. The law, indeed, goes much further than this; it considers the principal as affected with notice of all facts, notice of which can be charged upon the attorney. Here the attorney examined the will of Thomas T. Renick; he knew that the note in question was held by Benjamin T. Renick in his character as executor of Thomas' estate, and not in his own right; the agreement referred to in its indorsement of extension of time of payment made him acquainted with that fact. It stipulated not to press for payment of the note until the money was required for the settlement of that estate; and he was informed beforehand that the money to be borrowed on the pledge of the note in question as security was to be used in the business of B. T. Renick & Co.

The Bank of Westboro' had no attorney of its own in the transaction. It relied upon the representations of the attorney of B. T. Renick & Co., employed to negotiate the loan. He informed the Bank, however, of all facts essential to its knowledge, or acquainted it with such matters as upon inquiry would have given the information. It knew that the note was held by B. T. Renick as assets of Thomas T. Renick's estate, and not in his own right; it was so informed by the attorney; the indorsement on the note declared the fact also; and the agreement, to which the indorsement referred and to which its attention was called, would have removed all doubt on the subject, if any could have existed. It must be presumed to have known what it could thus easily have ascertained; and, dealing with an executor exercising his power of disposition of the personal assets of an estate in his hands, ostensibly to raise money, not for the estate or the settlement of its affairs, but for the business of a commercial firm, it was bound to look into his authority to

make such a disposition of them, and is held to a knowledge of all the limitations which the will as well as the law put upon his power.

There is no doubt that, unless restrained by statute, an executor can dispose of the personal assets of his testator by sale or pledge, for all purposes connected with the discharge of his duties under the will. And even where the sale or pledge is made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds. The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies; and, as in all other cases of trust, he is personally responsible for any breach of duty. And property thus held, acquired from him by third parties with knowledge of his trust and his disregard of its obligations, can be followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril.

The adjudications in support of this doctrine are very numerous. The doctrine pervades the whole law of trusts. In *Colt v. Lasnier*, reported in 9th Cowen, 320, *Chief Justice Savage*, of the Supreme Court of New York, after reviewing the cases, concludes that the correct rule both in England and in that State is: "That any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor, and that such person is responsible for the property thus received, either as purchaser or pledgee." And so, in many cases, it has been held that the payment by the executor, of his own private debt, with the assets of the testator is a *devastavit*; that is, a wasting of the estate. There are, indeed, some exceptions to this, as where the executor has paid debts of the testator with his own money to the value of the assets used. But, beyond a few exceptions of this kind, such a use of the assets is considered entirely indefensible, and the party receiving them will not be permitted to retain them, on the ground that the transaction itself gives him notice of their misapplication, and thus necessarily involves him as a participator in the fraud. And the doctrine is supported by many authorities, that where a party has reasonable grounds for believing that an executor intends to misapply them, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction. In the case of *Miller v. Williamson*, the Court of Appeals of Maryland held that the fact that the executor made an assignment of such assets to secure a debt owing to parties by a mercantile firm of

which he was a member, was sufficient, in contemplation of law, to notify them that he was about to commit a *devastavit*. 5 Md., 219. And where an administrator had assigned promissory notes of the estate in his hands for goods for his own use, the Supreme Court of Indiana held that it was a waste of the assets; and that if the assignee had knowledge, even from the nature of the transaction, that the administrator was thus acting in violation of his trust, the right of property in the notes was not divested, and he could not hold the notes or profit by such assignment as against those rightfully entitled to them. *Thomasson v. Brown*, 43 Ind., 203; see, also, *Fleld v. Schieffelin*, 7 Johns. Ch., 150, and *Petrie v. Clark*, 11 Serg. & R., 377.

In the cases at bar, the defendants, Ayer & Co., and the directors of the Bank knew that the pledging of the assets of the estate, of which Benjamin T. Renick was executor, to secure a loan for the business of a commercial house, was a misuse of them, unless, indeed, the will of his testator authorized it. The law imputed such knowledge to them. They could not say that such assets could be rightfully used as collateral security for loans to be employed in the business of a commercial house. It would be attributing to them the lack of ordinary good sense to suppose they entertained any such notion. The question then arises, whether the will of Thomas T. Renick authorized the assets of his estate, or the moneys to be raised upon them, to be used in the business of B. T. Renick & Co.

In that will the testator mentions a certain interest in the firm of Tower, Classen & Co. acquired by funds belonging to him, a sister, and the children of a deceased brother; and he desired that such interest should be continued in the firm, under the control of his brother, so long as the latter should deem it profitable; and that his own share should be retained in like manner for certain parties, so long as he should deem it advisable; and he bequeathed it to him as trustee for that purpose. It did not authorize the use of any of the general assets of the testator in that business, or the borrowing of money on its account. It may, indeed, be doubted whether the new firm of B. T. Renick & Co. can be considered as the same firm as Tower, Classen & Co. The change of the old firm by Tower's withdrawal may have taken from it the person upon whose judgment alone the testator relied for a wise management of its business. We cannot say that a confidence reposed in the firm, which existed when the will was made, would have been extended to another firm consisting of different associates. But, assuming that its identity remained after the change of members and name, it is perfectly clear that the authority of the executor to continue a specifically designated existing interest in the firm did not extend to the use in its business of any other funds of the estate, or to the use of any property which he received in his representative character, to raise funds for that purpose.

In *Burwell v. Mandeville*, reported in 2d Howard, 560, this doctrine is stated by this court with great distinctness. There the testator and one Cawood had been partners, and in his will the testator desired that his interest in the partnership should be continued until the expiration of the term limited by the articles between them, See 11 Otto.

the business to be continued by his partner, and the profit and loss to be distributed in the manner there provided. After his death, his partner carried on the business of the partnership, but failed before the expiration of the stipulated term; and the object of the suit was to reach the general assets of the estate of the testator to pay certain debts of the firm contracted after his decease. It was held that the general assets were not thus liable. The court observed that it was competent for partners to provide by agreement for the continuance of the partnership after the death of one of them; or for one partner by his will to provide for the continuance of the partnership after his death, and if it was consented to by the surviving partner, it would become obligatory. "But then," continues the court, speaking through *Mr. Justice Story*, "in each case the agreement or authority must be clearly made out; and third persons, having notice of the death, are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds; and if they trust the surviving party beyond the reach of such agreement or authority or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress. A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility, either to the funds already embarked in the trade, or to any specific amount to be invested therein for that purpose; and then the creditors can resort to that fund or amount only, and not to the general assets of the testator's estate, although the partner or executor or other persons carrying on the trade may be personally responsible for all the debts contracted." And after citing several authorities from the English reports in support of these positions, the learned Justice remarks, "That nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without, in effect, saying at the same time that the payments may all be recalled if the trade should become unsuccessful or ruinous." *Ex parte Garland*, 10 Ves., 109; *Ex parte Richardson*, 3 Madd., 138; *Pitkin v. Pitkin*, 7 Conn., 307; *Lucht, Admr., v. Behrens*, 28 Ohio 231.

According to the doctrine of this case, and many others to the same purport might be cited, there is no authority in the will of Thomas T. Renick justifying the use of the general assets of his estate in the business of B. T. Renick & Co., even if this firm be identical with that of Tower, Classen & Co. Applying the notes of Harvey held by his executor, or using them to obtain money for that purpose, was a misappropriation of them, as much so as if they had been used for any other private business. The parties receiving them, knowing of the directions of the testator, cannot hold them against the

claim of his representatives. The resignation of the executor who connived at this misappropriation having been accepted, and the administrator *de bonis non* with the will annexed having been appointed in his place, there is no objection to the prosecution of the suits in the latter's name, in conjunction with the representatives of Huston's estate, to compel the restoration of the notes. And as the notes in fact belong to the estate of Huston, the administrators *de bonis non* of that estate may insist that, when they are returned by Ayer & Co. and the National Bank of Westboro', they shall be delivered over to them.

In what we have thus said of the misappropriation of the notes, we have assumed that they belonged to the estate of Thomas T. Renick; for the defendants, Ayer & Co., and the Bank of Westboro' contend that they had a right to so treat them, as they were in the possession of his executor, claiming them as part of the assets of his testator. But the want of authority on the part of the executor to pledge them is only the more marked from the fact that his testator only held them as executor for another estate, although that fact has not been allowed to affect the defense.

The decree of the court below in both cases must, therefore, be reversed, and the court directed to enter a decree, in the first case, that the defendants, Ayer & Co., surrender the note of Harvey taken by them to the complainants, the administrators *de bonis non* of the estate of Renick Huston; and that a like decree be entered in the second case against the first National Bank of Westboro', to surrender to the same complainants the other note of Harvey held by it, and that all other parties be enjoined from interfering with their collection of the said notes; and it is so ordered.

Note.—Subsequent to the decision of these cases, the following opinion was delivered in response to certain petitions.

Mr. Justice Field delivered the opinion of the court:

The petition for a rehearing in the first case, and the petition for a modification of the decree in the second case, are both denied. The pledging of the notes of Harvey, belonging to the estate of Renick Huston, or to the estate of Thomas T. Renick—and for the purposes of these suits it matters not to which, as the representatives of both estates are parties complainant—as security for moneys borrowed for the use of a mercantile firm, was a plain misappropriation of the property of one of the estates. Our decree was that the notes should be returned to the representative of the estate from which they were wrongfully taken. The defendants retain their claims against the firm of B. T. Renick & Co., on its notes, and can prosecute them before the ordinary tribunals; and if any members of the firm have interests in the estate of Renick Huston, or of other deceased parties, they can seek to subject those interests to the payment of the claims without prejudice from our decree in these cases. Petitions denied.

MEMPHIS AND CHARLESTON RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE OF TENNESSEE AND SAMUEL WATSON, TRUSTEE OF THE BANK OF TENNESSEE.

(See S. C., 11 Otto, 337-341.)

Suit against State—right to sue.

1. That a State cannot be sued in its own courts, without its consent, is an elementary principle. This is a privilege of sovereignty.

2. The right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts; and the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given.

[No. 5.]

Submitted Oct. 27, 1879. Decided Mar. 29, 1880.

IN ERROR to the Supreme Court of the State of Tennessee.

The case is stated by the court.

Messrs. G. J. Pillow and *John Baxter*, for plaintiff in error.

Messrs. J. B. Heiskell, Casey Young and **B. J. Lea**, for defendants in error.

Brief by *Messrs. Hoadly, Johnson & Colston* and *E. L. Andrews*, for Tennessee bondholders.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 19th of January, 1838, the State of Tennessee established a bank in its own name and for its own benefit, and pledged its faith and credit to give indemnity for all losses arising from any deficiency in the funds specifically appropriated as capital. The State was the only stockholder, and entitled to all the profits of the business. The bank was, by its charter, capable of suing and being sued. At that time the Constitution of the State contained this provision: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Art. 1, sec. 17. No law had then been passed giving effect to this express grant of power, but in 1855 it was enacted that actions might be instituted against the State under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted. Code, sec. 2807. No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the Legislature.

In 1865 this law was repealed, and after that there was no law prescribing the manner or the courts in which suits could be brought against the State. On the 16th of February, 1866, an Act was passed to wind up and settle the affairs of the Bank, under which an assignment of all the property was made to Samuel Watson, Trustee. Afterwards, on the 16th May, 1866, the State and the trustee filed a bill in equity, in the Chancery Court at Nashville, against the Bank and its creditors, for an account of debts and assets and a decree of distribution. At the November Term, 1872, of the court, the Memphis and Charleston Railroad Company was admitted as a defendant to this suit, and given leave to file a cross-bill. This cross-bill

was accordingly filed, and set forth an indebtedness from the Bank to the Railroad Company, which accrued while the law allowing suits against the State was in existence, and sought to enforce the liability of the State under the indemnity clause of the charter. To this bill both the State and Watson, the Trustee, demurred, and assigned for cause, among others, that the State could not be sued. The demurrer was sustained by the Chancery Court, and the cross-bill dismissed. An appeal was then taken to the Supreme Court of the State, where the decree below was affirmed, upon the express ground that the repeal of the law authorizing suits against the State was valid, and did not impair the obligation of the contract which the Railroad Company had. All other questions were waived by the court, and the decision placed entirely on the ground that as the State could not be sued in its own courts, the bill must be dismissed. To reverse that judgment this writ of error was brought.

The question we have to decide is not whether the State is liable for the debts of the Bank to the Railroad Company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the State had withdrawn its consent to be sued, and the only question now to be determined is, whether that withdrawal impaired the obligation of the contract which the Railroad Company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.

The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract.

Here the State has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfillment. The courts are powerless. Everything after the judgment depends on the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is

See 11 OTTO.

left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy, in the legal sense of the term, which can only be carried into effect by entreaty.

It is clear, therefore, that the right to sue, which the State of Tennessee once gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given. This renders it unnecessary to consider whether in this suit a cross-bill could have been maintained by the Railroad Company if the right to sue had been continued, and also whether a remedy given after the charter of the Bank was granted, but in force when the debt of the Bank was incurred, might be taken away without impairing the obligation of the contract of the State to indemnify the creditors against loss by reason of any deficiency in the capital. Neither do we find it necessary to determine what would be a complete judicial remedy against a State, nor whether, if such a remedy had been given, the obligation of a contract entered into by the State when it was in existence would be impaired by taking it away. What we do decide is that no such remedy was given in this case.

Judgment affirmed.

Dissenting, *Mr. Justice Swayne* and *Mr. Justice Strong*.

Cited—101 U. S., 834; 106 U. S., 207, 227; 9 N. W. Rep., 742.

ADOLPHUS DURANT, *Appt.*,

v.

CHARLES S. STORROW ET AL.

(See S. C., "*Durant v. Essex Co.*," 11 Otto, 555-557.)

Mandate from this court—judgment by divided court.

1. On a mandate from this court affirming a decree of the circuit court, that court can only reverse the order of this court and proceed with the execution of its own decree as affirmed.

2. The judgment of this court, by a divided court, is just as much its judgment for all the purposes of the case in hand, as if it had been unanimous.

[No. 208.]

Argued Mar. 18, 1880. Decided Mar. 29, 1880.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. E. F. Hodges, for appellant:

The respondents urge the following charges of neglect and omission:

1. That the complainant, if aggrieved by the order dismissing his bill absolutely, could have appealed to the Supreme Court, and should have done so. We answer:

1. It is true such remedy was open to him, and upon appeal the bill would have been dismissed without question.

Kent v. Freehold L. & B. M. Co., L. R., 3 Ch., App., 493; *In re Wiltshire Iron Co.*, *Ex parte Pearson*, L. R., 3 Ch., App., 443; *Johnson v. Fox*, 5 J. J. Marsh, 647.

2. In equity, where a right has been lost by mistake or inadvertence, relief is granted if justice demands.

King v. Hamlet, 4 Sim., 223; *Rochester v. Lee*, 1 McN. & G., 467; *McNamara v. Arthur*, 2 Ball. & B., 349; *Pearse v. Dobinson*, 13 L. T. (N. S.), 518.

The complainant does not ask to have a deed set aside for mistake of law, but asks that his proceedings in this court may be relieved from disabilities arising from such mistakes.

3. The effect of a judgment by a divided court upon the existing equities and future remedies of the complainant was not defined, and counsel, learned in the law, might well believe that it was no bar to subsequent suits.

4. The complainant, acting upon the advice of those whose learning is assured by their professional leadership, and whose authority is sanctioned by their official relations to the court, selected remedies which the wisdom of the tribunals to whom he appealed rejected. This is precisely the mistake which invokes aid from the primal function of a court of equity. If he would have found relief upon appeal, and has not appealed because misled by the unusual form given to the case by the court, then when the error is discovered, he should be relieved from the consequences of the mistake.

Brooksbank v. Smith, 2 Y. & C. Exch., 58; *Hough v. Richardson*, 3 Story, 659; cases cited, Story, Eq., 1 (N. S.), 1521, *a*.

If upon appeal he would have been relieved, he should be here and now.

Evans v. Clement, 14 Ill., 209.

As to the lapse of time, see:

Buckner v. Forker, 7 Dana, 51; *Bond v. Hopkins*, 1 Sch. & L., 418; *Sturgis v. Morse*, 3 DeGex & J., 1; *Deniston v. Little*, 2 Sch. & L., 10 *n.*; *Hovenden v. Annesley*, 2 Sch. & L., 607; *Lindsay v. Lynch*, 2 Sch. & L., 1.

This is not a bill of review to which any technical rule can apply, but a petition to the court to correct an error in its record, addressed to that judicial discretion which regards substance and not form.

Partridge v. Osborne, 5 Russ., 195; *Elliott v. Balcom*, 11 Gray, 286; *Pearse v. Dobinson* (*supra*).

If it appears from the record that some right existed in the complainant that had not been decided or definitely adjudicated in the suit, then the bill should be dismissed without prejudice.

Stott v. Barkerville, 6 Munf., 20; *McNeill v. Cahill*, 2 Bligh, 228; *Woollam v. Hearn*, 7 Ves., 211-222; *Stevens v. Guppy*, 3 Russ., 171-185; *Lindsay v. Lynch*, 2 Sch. & L., 1; *Mortlock v. Butler*, 10 Ves., 292.

The record discloses the judicial assertions, that the complainant has rights, and that those rights have not been finally passed upon.

1. The circuit court passed a decree in his favor.

Upon the coming in of the master's report, the complainant declined to accept the decree, and claimed much more. Thereupon the court dismissed the bill without costs. This is a judicial determination that he had some right.

2. The Supreme Court Judges, upon full examination and two arguments, could not agree as to those rights.

(a) They could not decide that he had none; or

(b) They could not decide their value, and the mode of relief.

This non-adjudication by the Supreme Court is certainly conclusive proof that one half of the members were of opinion the complainant was entitled to some relief.

It seems fair to infer that the other members differed as to the mode of relief, rather than as to the right.

At all events, four of the Judges were of opinion he was entitled to have the decree dismissing his bill set aside.

It would be very rank presumption for us to offer argument to prove that an error is manifest upon this record, since both courts in terms assert and act upon the error.

Mr. James J. Storror, for appellees:

A decree of dismissal merely, and a decree of dismissal "without prejudice," are essentially different decrees.

If the court below enters one when it ought to enter the other, this is an error of substance, for which an appeal will lie, and which this court will correct upon such an appeal or upon motion.

Durant v. Essex Co., 7 Wall., 109 (74 U. S., XIX., 156); *Gaylords v. Kelshaw*, 1 Wall., 83 (68 U. S., XVII., 612); *Barney v. Baltimore*, 6 Wall., 289 (73 U. S., XVIII., 827); *Hobson v. McArthur*, 16 Pet., 195; *Perkins v. Fourniquet*, 14 How., 328.

The decree of 1855 was of dismissal generally; and when the mandate of 1858 ordered that decree to stand affirmed, the circuit court had not the power to vary it as requested. Upon motion of the complainant it expressly passed upon this question, and no attempt to revise that ruling was made from 1858 until 1874.

If there was fault or error at the time, it was not in the circuit court, which obeyed the mandate, but in this court, which issued it, and upon this topic the answers are:

(a) Error of this court can only be corrected by a direct and timely application to it, and no such application has been made.

Southard v. Russell, 16 How., 570; *Browder McArthur*, 7 Wheat., 58; *Bridge Co. v. Stewart*, 3 How., 424.

There has been an appeal in the former case, and after an appeal no bill of review will lie, either for errors of law apparent on the record, or for newly discovered evidence, "Unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and House of Lords in England, and we think it founded in principle essential to the proper administration of the law and to a reasonable termination of litigation between parties in chancery suits."

Southard v. Russell (*supra*).

(b) The necessary, legal and intended result of a division of opinion here upon an appeal in equity is, that the decision below shall stand affirmed, not merely as a disposition of a particular cause, but as a bar to further litigation.

Durant v. Essex Co. (*supra*); *Durant v. Essex Co.*, 8 Allen, 103.

The object of the petitioner is to revise the decision made and carried out in 1858, which was that such a decree should be then entered

as would bar further litigation. No power now exists to grant an application for this purpose, however or wherever made. It could only be done by an application for a rehearing which, by Rule 88, must be made at the same term, or by an appeal or bill of review. Sixteen years have elapsed, and in the United States Courts no appeal and no review in any form can be had after five years.

Story, Eq. Pl., secs. 410, 635; 3 Dan. Ch. Pr., 1726; p. 1629 of new ed.; *Thomas v. Harvie's Heirs*, 10 Wheat., 146; *Whiting v. Bk.*, 13 Pet., 6; *R. R. Co. v. Horst*, 93 U. S., 301 (XXIII., 901).

Mr. Chief Justice Waite delivered the opinion of the court:

This case shows that on or about the 11th of October, 1847, the present appellant filed his bill in equity in the court below against certain defendants for certain relief. After pleadings, proofs and hearing, that court dismissed his bill absolutely. Appeal was thereupon taken in due form to this court. After one hearing, we ordered a re-argument. Upon the re-argument, the decree below was affirmed "by a divided court." When our mandate went down, the present appellant, in May, 1858, asked the circuit court that he might have leave to discontinue his suit, or if that could not be done, that his "bill might be dismissed without prejudice." All these several requests were refused, and the court simply ordered execution on the decree which had been affirmed.

Afterwards, the appellant filed a new bill in the circuit court to obtain the same relief as in the old suit, but setting up what he called new matter. To this bill the former decree was pleaded in bar, and the plea sustained by the circuit court, because the first bill had been dismissed absolutely. From that decree an appeal was taken to this court, and at the December Term, 1868, in *Durant v. Essex Co.*, 7 Wall., 107 [74 U. S., XIX., 154], we decided that the decree, absolute in its terms, dismissing the bill on the merits, was a final determination of the controversy, and constituted a bar to any further litigation of the same subject between the same parties.

Thereupon, on the 29th of June, 1874, the appellant filed a petition in the circuit court setting up these facts and his newly discovered matter, and asked that the decree affirmed here in 1858, might "Be revoked or so modified that his bill of complaint be dismissed without prejudice to his further proceeding at law or equity." This petition was denied, and to reverse that order the present appeal was taken.

Waiving all questions as to the right of appeal from such an order, we are clearly of the opinion that the circuit court could do no otherwise than it did. On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal was taken, the power of the court below over its own decree was gone. All it could do after

that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The circuit court had no power after that to do what we might have done and did not do.

Decree affirmed.

Cited—102 U. S., 676.

SARAH S. WALDEN, *Appt.*,

v.

DARIUS S. SKINNER ET AL., Exrs. of
CHARLES S. HENRY, Deceased.

(See S. C., 11 Otto, 577-590.)

Relief in equity for mistake—formal parties.

1. Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments, when the defect or error arises from accident or misconception.

2. Mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different States.

[No. 176.]

Argued Mar. 15, 1880. Decided Mar. 29, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

The case is stated by the court.

Messrs. A. T. Akerman, B. H. Hill and H. B. Thompson, for appellant.

Messrs. A. R. Lawton and H. R. Jackson, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

Trusts are either express or implied, the former being such as are raised or created by the act of the parties, and the latter being such as are raised or created by presumption or construction of law. *Cook v. Fountain*, 3 Swanst., 585, 592.

Implied trusts may also be divided into two general classes: First. Those that rest upon the presumed intention of the parties. Second. Those which are independent of any such express intentions, and are forced upon the conscience of the party by operation of law. 2 Story, Eq. Jur., 9th ed., sec. 1195.

Sufficient appears to show that the complainant, on the 6th day of May, 1874, filed her bill of complaint in the court below against the respondents, to wit: Darius S. Skinner and John N. Lewis and Charles S. Hardee, executors of Charles S. Henry, deceased, who in his lifetime was the trustee of Penelope W. Tefft and her three children. Preliminary to the charging part of her complaint, she alleges and states that on the 28th of October, 1847, she intermarried with William P. Tefft, who, on the 9th of August, five years later, departed this life intestate and without children, leaving the complainant as his sole heir and legal representative; that on the 4th of June, six years subsequent to the death of her first husband, she intermarried

with Charles C. Walden, who, on the 8th day of December of the next year, departed this life testate, leaving no children by the complainant; and that he by his will bequeathed to her all the property and rights owned and possessed by her at the date of their marriage; and that the father of her first husband died intestate on the 30th of June, 1862, but that no administration was ever had upon his estate, and that his widow, the mother of her first husband, departed this life testate on the 11th of September, eleven years later; that her first husband had two brothers at the date of her marriage neither of whom ever married and both of whom died without children, as alleged in the bill of complaint; that at the death of the eldest of the two he had a life policy of insurance for \$5,000, which his administrator collected and paid to his two living brothers.

Allegations then follow in the bill of complaint, which relate more immediately to the subject-matter of the controversy, from which it appears that Elias Fort, June 28, 1831, conveyed a certain tract of land to Charles S. Henry and Stephen C. Greene, as trustees and in trust for Penelope W. Tefft and her three sons, William P. Tefft, Henry D. Tefft and Charles E. Tefft, and it is therein declared that the said property is for the use of the mother during her lifetime and the three sons, and that after the death of the mother it shall be for the use of the three sons alone as tenants in common, and that in case of sale "The proceeds to be re-invested upon the same uses and trusts as aforesaid, and if not sold, then the property, after the death of the mother, was to be distributed by said trustees to each of the said sons as shall survive and attain the age of twenty-one years."

Greene, one of the trustees, subsequently died, leaving Charles S. Henry the sole surviving trustee under the trust-deed, and she charges that on the 19th of July, 1848, the Mayor and Aldermen of the City of Savannah conveyed to him, as such trustee, a certain lot of land numbered five, Monterey Ward, in said city, the lot being then subject to certain annual ground-rents, as specified in the conveyance, and the complainant avers that the conveyance is informal and incomplete, inasmuch as the trustee never signed it, as it was intended, and that it fails to set forth and express the trust interests of the three children as it should do. Wherefore she alleges that it should be reformed and be made to conform to the purposes of the trust as created and set forth in the original trust-deed.

Persuasive and convincing reasons in support of that request are alleged, which will hereafter be reproduced when the merits of the controversy are considered.

Relief specific and general is prayed, as is more fully set forth in the transcript. Process was served and the respondents appeared, and after certain interlocutory proceedings filed separate answers.

All of the defenses to the merits are set up in the answer of the first named respondent, who admits all of the preliminary matters alleged in the bill of complaint. He also admits that there was in existence at the time of the first marriage of the complainant the trust estate held by the surviving trustee arising under the conveyance from Elias Fort to the said two trustees, which,

as he alleges, was held for the sole and separate use of the mother during her life, and remainder at her death to her three sons as tenants in common.

Prior to that transaction there is no controversy between the parties as to the facts, and he also admits that the authorities of the city conveyed the lot called Monterey Ward to the surviving trustee, but he alleges that, by the terms of the conveyance, the legal title to the lot vested in the trustee in trust for the sole and separate use of the mother, the trust being executory only so long and for such time as the *cestui que trust* should remain a *feme covert*; and he denies that the conveyance is informal and incomplete in any particular, or that it was ever expected or intended by anyone that the trustee should sign the same; and he avers that it was accepted by the trustee for the purposes therein set forth.

Attempt is also made to enforce that view by a specific denial of most of the reasons assigned in the bill of complaint in support of the request that the conveyance to the trustee, of the lot called Monterey Ward, may be reformed so as to conform to the trusts created and expressed in the antecedent trust-deed.

Both of the other respondents allege that they are citizens of the State where the suit is brought, and deny that the circuit court had any jurisdiction to make or execute any order, judgment or decree against them in the premises.

Proofs were taken, the parties heard, and the circuit court entered a decree in favor of the respondents, dismissing the bill of complaint. Prompt appeal was taken by the complainant to this court, and since the appeal was brought up she has filed the assignment of errors set forth in the brief of her counsel. They are ten in number, all of which will be sufficiently considered in the course of the opinion, without giving each a separate examination.

Before examining the questions presented in respect to the second deed, it becomes necessary to ascertain the true construction and meaning of the original trust-deed so far as respects the second trust therein created and defined. Eight hundred dollars constituted the consideration of the conveyance, and it was made upon the trust that if, during the lifetime of the mother of the three sons, it should be deemed advisable by her to sell and convey the premises, then upon this further trust that the trustees as aforesaid, or the survivor of them, upon her application and with her consent, signified by her being a party to the conveyance, will sell and convey the lot and improvements for the best price which can be obtained for the same, to any person or persons whatsoever, without applying to a court of law or equity for that purpose to authorize the same, and the proceeds thereof upon the same trusts as aforesaid to invest in such other property or manner as the mother of the sons shall direct and request for the same use, benefit and behalf.

Explicit and unambiguous as that provision is, it requires no discussion to ascertain its meaning; nor is it necessary to enter into any examination of the third trust specified in the conveyance, as it is conceded that the trust property was sold by the surviving trustee for re-investment during the lifetime of the mother at her

request, she joining in the conveyance as required by the terms of the instrument creating the trust.

Twenty-four hundred dollars were received for the conveyance of the trust property, and all of that sum, except \$600 turned over to the mother, was invested in buildings then being erected upon lot numbered five, called the Monterey Ward. Purchase of that lot had previously been made by the surviving trustee named in the original trust-deed, and it appears that the parties understood that it was to be upon the same uses and trusts as were contained in the trust-deed by which the title to the lot sold was acquired.

Proof that the new lot numbered five, called Monterey Ward, was purchased by the father and the three sons during the lifetime of the father, seems to be entirely satisfactory, and it is equally well established that each contributed one fourth part of the sum of \$240 paid for the purchase money of the lot. Satisfactory proof is also exhibited that Henry D. Tefft, one of the three brothers, died August 13, 1849, unmarried and intestate, and that he had a valid subsisting insurance upon his life in the sum of \$5,000, which his administrator collected and paid to his surviving brothers.

Eighteen hundred dollars of the proceeds arising from the sale of the property acquired by virtue of the first trust-deed were appropriated towards erecting buildings on the new lot purchased by the father and the three sons while in full life, and when the one whose life was insured deceased, the two survivors appropriated each his proportion of the money received to the same purpose, with the understanding that the property was subject to the same uses and trusts as the property previously acquired and sold.

Competent proofs of a convincing character are also exhibited in the transcript, that the first husband of the complainant contributed other sums towards completing the buildings, leaving no doubt that he paid his full proportion for the improvements as well as for the lot purchased of the city authorities.

Enough appears, to show that the buildings were completed more than two years before the first husband of the complainant died intestate and without children, when it is obvious that she became the sole heir to all the interest he possessed in the said estate, whatever it might be. Two years elapsed after the buildings were completed before the father of the three sons died, and the proofs show that during that period the complainant resided with the parents of her husband, and that her rights as his heir at law were uniformly recognized by the family; that she continued to reside there with her mother-in-law after the death of the senior Tefft, until the decease of his widow, and that throughout that period she paid one half of all repairs, taxes, insurance and other expenses of the property as if she were equally interested in the same with her mother-in-law, and was liable to bear an equal proportion of all such expenses.

Opposed to that is the proof that the mother-in-law, one year before her death, when in a low and depressed frame of mind, bequeathed the whole of the lot in question to the first named respondent, who is her nephew, and on

See 11 Otto.

the same day executed a deed to him of the entire property, to take effect in possession after her death. Sole title to the premises in fee simple is claimed by the respondent under those instruments, and he brought ejectment against the complainant to dispossess her of the premises, and it appears that she was at great disadvantage in attempting to defend the suit, because the trustee had omitted to see that the title was conveyed in trust for the benefit of the *cestuis que trust* as in the prior trust deed, as he should have done, to carry into effect the understanding of all the parties to the sale of the prior trust premises and the purchase of the lot in question. What she alleges is that the purchase of the new lot was made for the same *cestuis que trust* as those described in the deed of the old lot, and that the understanding of all was that the deed of the new lot should contain and declare the same uses and trusts in favor of the same persons, and the proofs to that effect are full and entirely satisfactory.

Support to that view is also derived from the fact that the surviving trustee in the old deed the grantee in the new deed, and that he is therein more than once described as trustee, and in the introductory part of the instrument is denominated trustee of Mrs. Penelope W. Tefft, wife of Israel K. Tefft, of the city and State previously mentioned in the same instrument.

Ten years before the suit was instituted the trustee in the new deed departed this life, and the other two respondents were appointed and qualified as his executors. Unable to obtain complete redress at law, the complainant prays that the deed of conveyance from the city, of the lot and improvements in question, may be reformed and be made to conform to the true intent and purpose for which the lot was purchased, and to that end that it may be made to include the same uses and trusts raised, created, and declared in the prior deed from Elias Fort, according to the understanding and agreement of all the parties.

Besides that she also prays that her equities in and to the property, including the improvements, may be set forth, decreed and allowed by the court, including such as are in her favor from the payment of taxes, insurance and repairs upon the property during the lifetime and since the death of her mother-in-law, and that the first named respondent may be enjoined from further proceeding in his ejectment suit to recover possession of the premises.

Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments, when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments. Where the mistake is admitted by the other party, relief, as all agree, will be granted, and if it be fully proved by other evidence, *Judge Story* says, the reasons for granting relief seem to be equally satisfactory. 1 *Story, Eq. Jur.*, 9th ed., sec. 156.

Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which, by mistake of the draftsman, either as to fact

or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement; the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties. *Hunt v. Rousmaniere*, 1 Pet., 1, 13; *Hunt v. Rousmanier*, 8 Wheat., 174, 211.

Even a judgment when confessed, if the agreement was made under a clear mistake, will be set aside if application be made, and the mistake shown while the judgment is within the power of the court. Such an agreement, even when made a rule of court, will not be enforced if made under a mistake, if seasonable application be made to set it aside; and if the judgment be no longer in the power of the court, relief, says Marshall, *Ch. J.*, may be obtained in a court of chancery. *The Hiram*, 1 Wheat., 440, 444.

Equitable rules of the kind are applicable to sealed instruments, as well as to ordinary written agreements; the rule being that if, by mistake, a deed be drawn plainly different from the agreement of the parties, a court of equity will grant relief by considering the deed as if it had conformed to the antecedent agreement. So if a deed be ambiguously expressed in such a manner that it is difficult to give it a construction, the agreement may be referred to as an aid in expounding such an ambiguity; but if the deed is so expressed that a reasonable construction may be given to it, and when so given it does not plainly appear to be at variance with the agreement, then the latter is not to be regarded in the construction of the former. *Hogan v. Ins. Co.*, 1 Wash. (C. C.), 419, 422.

Rules of decision in suits for specific performance are necessarily affected by considerations peculiar to the nature of the right sought to be enforced and the remedy employed to accomplish the object. Where no question of fraud or mistake is involved, the rule with respect to the admission of parol evidence to vary a written contract is the same in courts of equity as in those of common law; the rule in both being that when an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations. Proof of fraud or mistake, however, may be admitted in equity to show that the terms of the instrument employed in the preparation of the same were varied or made different by addition or subtraction from what they were intended and believed to be when the same was executed.

Evidence of fraud or mistake is seldom found in the instrument itself, from which it follows

that unless parol evidence may be admitted for that purpose the aggrieved party would have as little hope of redress in a court of equity as in a court of law. Even at law, all that pertains to the execution of a written instrument or to the proof that the instrument was adopted or ratified by the parties as their act or contract, is necessarily left to extrinsic evidence, and witnesses may, consequently, be called for the purpose of impeaching the execution of a deed or other writing under seal, and showing that its sealing or delivery was procured by fraudulently substituting one instrument for another, or by any other species of fraud by which the complaining party was misled and induced to put his name to that which was substantially different from the actual agreement. *Thoroughgood's Case*, 2 Coke, 5.

When the deed or other written instrument is duly executed and delivered, the courts of law hold that it contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol; but courts of equity, says *Chancellor Kent*, have a broader jurisdiction and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. Pursuant to that rule, he held it to be established that relief can be had against any deed or contract in writing founded on mistake or fraud, and that mistake may be shown by parol proof and the relief granted to the injured party whether he sets up the mistake affirmatively by bill or as a defense. *Gillespie v. Moon*, 2 Johns. Ch., 585, 596.

Parol proof, said the same learned magistrate, is admissible in equity to correct a mistake in a written contract in favor of the complainant seeking a specific performance, especially where the contract in the first instance is imperfect without referring to extrinsic facts. *Keisselbrack v. Livingston*, 4 Johns. Ch., 144; *Cathcart v. Robinson*, 5 Pet., 264.

Many cases support that proposition without qualification, and all or nearly all agree that it is correct where it is invoked as defense to a suit to enforce specific performance. Little or no disagreement is found in the adjudged cases to that extent, but there are many others where it is held that the rule is unsound when applied in behalf of a complainant seeking to enforce a specific performance of a contract with variations from the written instrument. Difficulty, it must be admitted, would arise in any attempt to reconcile the decided cases in that regard, but it is not necessary to enter that field of contest and conflict in the case before the court for several reasons: (1) Because, by comparing the original trust deed with the deed of the lot in question, in view of the attendant circumstances, the inference is very cogent that the second was designed and intended as a complete substitute for the first. (2) Because the proof shows to a demonstration that the consideration for the purchase of the second lot was paid in equal proportions by the father and each of the three sons. (3) Because it appears that the expensive improvements made upon the lot in question were made from the moneys of each of the three sons, advanced at the request of the father. (4) Because it appears that the family and every member of it understood

from the first and throughout that the trustee held the property in trust for the mother and the three sons. (5) Because the father, from the date of the deed to the time of his death, recognized the premises as acquired and held for the benefit of his wife and their three sons. (6) Because the mother of the three sons, after the decease of the first husband of complainant, recognized her as interested in the property, and continued to do so at all times throughout her life, until about the time she conveyed the lot in question to the respondent.

Both the deed and her will bear date September 28, 1872, and the proofs show that she was at the time in a low, depressed state of mind, and that she departed this life within one year subsequent to the execution of those instruments. Prior to that, and throughout the whole period subsequent to the death of her husband, the proofs show that she uniformly recognized the complainant as the owner of a moiety of the lot and the improvements, and always required her to pay one half of all repairs, taxes, insurance, and other expenses of the property.

By the terms of the original deed the property was conveyed to the trustees, subject to the payment of taxes, assessments and ground rent, to and for the sole and separate use, benefit and behoof of the mother and her three sons during her lifetime; and after her death to the three sons as tenants in common in equal parts, with the provision that if the mother during her lifetime should deem it advisable, she might sell and convey the premises; and that, in that event, the further trust was raised and created that the trustees or the survivor of them, upon her application and with her consent signified by becoming a party to the conveyance, might sell and convey the lot and improvements for the best price which could be obtained for the same, without any application to a court of law or equity for that purpose, and to invest the proceeds thereof upon the same trusts in such other property or manner as the mother should direct, and for the same use, benefit and behalf.

Provision was also made that if no such sale and reinvestment was made during the lifetime of the mother, then the trustees were to sell the same for the sole use and benefit of the three sons or the survivor or survivors of them, share and share alike, until the youngest should arrive at the age of twenty-one years, when the trustees might sell and convey the same at the request of such survivor or survivors, and divide the proceeds to the survivor or survivors, share and share alike.

Taken as a whole, the proofs show, to the entire satisfaction of the court, that the lot in question was purchased and conveyed to the surviving trustee upon the same trusts as those raised and created in the first deed; and that the trustee, through mistake, failed to have those trusts properly declared in the deed of trust to him as he should have done; and that the prayer of the bill of complainant, that the deed of the lot and improvements in question ought to be reformed and the rights of the complainant be ascertained and adjudged as if the deed in question contained the same trusts as those raised and created in the original trust-deed, is reasonable and proper and should be granted.

See 11 OTTO.

Courts of equity, beyond all doubt, possess the power to grant such relief, and the proofs, in the judgment of the court, are such as to entitle the complainant to such a decree, unless the remaining defense set up by the respondent must prevail. *Cooper v. Phibbs*, L. R. 2 H. L., 149, 186; *Cochrane v. Willis*, 34 Beav., 359, 366. Such a decree, of course, cannot now be made against the trustee, as he is not living; but the executors, as contended by the complainant, are competent to perform that duty, and she prays that the decree may be adapted to the present state of the parties.

Suppose all that is true; still it is contended by the principal respondent that the decree below is correct, because the claim is barred. Much discussion of that defense will not be necessary, beyond what is required to ascertain the facts.

When the father died, the complainant was living on the premises, and she continued to reside there most or all the time during the widowhood of the mother of her first husband, except while she lived with her second husband, and when he died she returned to live with her mother-in-law. During all that time the proofs show that she was constantly recognized as the lawful heir to the estate of her deceased husband, until about a year before the decease of the mother, who also resided on the premises. Prior to that, the rights of the complainant were unmistakably recognized, and nothing of consequence had occurred to indicate any intent to call her just right in question. Soon after that, however, the respondent commenced an action of ejectment against her to recover possession of the entire lot and improvements, she still being in possession and, doubtless, hoping and expecting that her rights would yet be acknowledged without the necessity of expensive litigation. Expectations of the kind not being realized, she filed the present bill of complaint. Laches are imputed to her; but the court, in view of the circumstances and of the embarrassments growing out of the obvious defects in the conveyance intended to secure her rights, is of the opinion that the evidence of laches is not sufficient to bar her right to recover in the present suit. Without more, these remarks are sufficient to show that the defense cannot be sustained, and it is accordingly overruled.

Two or three remarks will be sufficient to show that the objection that the Circuit Court has no jurisdiction to enter the required decree against the executors of the deceased trustee cannot be sustained. Jurisdiction as between the complainant and respondent is unquestionable; and, if so, it is clear that the fact that the trustee, if living, was a citizen of the same State with the complainant would not defeat the jurisdiction in a case where he is a mere nominal party, and is merely joined to perform the ministerial act of conveying the title if adjudged to the complainant. Where that is so, the executor, in case of the decease of the trustee, if authorized by the law of the State to execute such a conveyance, may also be joined in the suit under like circumstances, merely to accomplish the like purpose. Where the real and only controversy is between citizens of different States, or an alien and a citizen, and the plaintiff is, by some positive rule of law, compelled to use the name of another to perform merely

a ministerial act, who has not nor ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists. *McNutt v. Bland*, 2 How., 9, 15; *Browne v. Strode*, 5 Cranch, 303; *Coal Co. v. Blatchford*, 11 Wall., 172, 177 [78 U. S., XX., 179, 181].

Cases arise in the Federal Courts in which nominal or even immaterial parties are joined, on the one side or the other, with those who have the requisite citizenship to give the court jurisdiction in the case; and where that is so, the rule is settled that the mere fact that one or more of such parties reside in the same State with one of the actual parties to the controversy, will not defeat the jurisdiction of the court. Decisive authority for that proposition is found in a recent ruling of *Mr. Justice Miller*, in which he states, to the effect, that mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different States. *Arapahoe Co. v. R. Co.*, 4 Dill., 277, 283.

Nothing is claimed of the executors in this case except that they shall perform the ministerial act of conveying the title, in case the power to do so is vested in them by the law of the State, and the court shall enter a decree against the principal respondent to that effect. From all which it follows that the complainant is entitled, as between herself and the principal respondent, to the relief prayed in the bill of complaint; but the court, in view of all the circumstances, will not proceed to determine either the proportion of the trust property which belongs to the complainant or the amount she is entitled to recover of the said respondent. Instead of that, those matters are left to be ascertained and determined by the Circuit Court, with authority, if need be, to refer the cause to a master to report the facts, with his opinion thereon, subject to the confirmation of the Circuit Court.

Executors of the trustee, in such a case as the complainant alleges, are, under the law of the State, the successors of the deceased trustee, and that, as such, they may execute whatever remains executory in the trust at the time of his decease; from which it would follow, if that be so, that it will be the duty of the executors of the deceased trustee in this case, when the rights of the complainant are fully ascertained, to make the necessary conveyance to perfect her title to the same extent as the trustee might do if in full life. Express authority is reserved to the Circuit Court to ascertain the rights of the complainant as if the trust-deed was reformed, and to make the necessary decree to perfect her title in such mode and form as the law of the State and the practice of the state courts authorize and provide. *Crafton v. Beal* 1 Ga., 322; *Brown v. Tucker*, 47 Ga., 485.

Costs in this court will be taxed to the principal respondent in favor of the complainant, but no costs will be allowed against the other two respondents.

Decree reversed and the cause remanded for further proceedings in conformity with the opinion of the court.

Cited—19 Blatchf., 197.

JOSEPH M. DOUGLASS, *Plff. in Err.*,
v.

PIKE COUNTY, MISSOURI.

(See S. C., 11 Otto, 677-688.)

State construction of statute—latest decision—rule of construction—effect on bonds.

1. This court treats the construction which the highest court of a State has given to a statute of the State as part of the statute.

2. But where different constructions have been given to the same statute at different times, it will not follow the latest decisions, if thereby contract rights which have accrued under earlier rulings would be injuriously affected.

3. The true rule is, to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive.

4. The rights of the parties in regard to municipal bonds are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

5. This rule applied to bonds of a county in Missouri.

[No. 155.]

Argued Jan. 5, 6, 1880. Decided Mar. 29, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action brought in the court below by Jos. M. Douglass, the plaintiff in error, against the defendant in error on certain coupons detached from bonds, alleged to have been issued by the defendant in error in behalf of Cuivre Township, under the Township Aid Act of March 23, 1868. The defendant demurred to the petition, and the demurrer was sustained by the court below, upon the ground that the Act under which the bonds in question were issued was in conflict with section 14, article 11 of the Constitution of Missouri, adopted in 1865. Judgment was entered in favor of the defendant, and the plaintiff sued out the present writ of error.

Messrs. John H. Overall, J. O. Broadhead and Frederick N. Judson, for plaintiff in error:

The point raised upon the other side is, that since the decision of this court in *Cass County v. Johnston*, 95 U. S., 360 (XXIV., 416), the Supreme Court of Missouri in the cases of *State v. Brassfield*, 67 Mo., 331, wherein two Judges, out of the five constituting the court (two not sitting), made the decision, and *Webb v. Lafayette Co.*, 67 Mo., 353 (two Judges dissenting), has decided the Township Aid Act of 1868 unconstitutional, and all bonds issued under it void.

To break the force of these decisions, counsel cited, *State, ex rel. R. R. Co. v. Linn Co. Ct.*, 44 Mo., 504; *Ranney v. Baeder*, 50 Mo., 600; *State v. Sanderson*, 54 Mo., 203, dissenting opinion of Judge Napton, 67 Mo., 371; *Township of Pine Grove v. Talcott*, 19 Wall., 666 (86 U. S., XXII., 227); *State v. Miller*, 50 Mo., 129.

Mr. Thos. J. C. Fagg, for defendant in error:

NOTE.—Municipal bonds; how affected by change of ruling of highest court of State, or by change in Constitution. See note to *Mitchell v. Burlington*, 71 U. S., XVIII., 350.

The United States Courts will be controlled by the decisions of the State Courts after the issue of bonds, when the question is one that depends upon the construction of a local statute.

King v. Wilson, 1 Dill., 555; *Gelpcke v. Dubuque*, 1 Wall., 175 (68 U. S., XVII., 520); *Olcott v. Supervisors*, 16 Wall., 678 (83 U. S., XXI., 382); *Butz v. Muscatine*, 8 Wall., 575 (75 U. S., XIX., 490); *Supervisors v. U. S.*, 18 Wall., 71 (85 U. S., XXI., 771); *Chicago v. Sheldon*, 9 Wall., 50 (76 U. S., XIX., 594); *Pine Grove Township v. Talcott*, 19 Wall., 666 (86 U. S., XXII., 227).

Counsel also contended that the Supreme Court of Missouri had not, in the cases decided by it previous to 1878, directly decided the Act in question to be constitutional.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We are asked to reconsider our decision in *Cass Co. v. Johnston*, 95 U. S., 360 [XXIV., 416], because since that case the Supreme Court of Missouri, in *State v. Brassfield*, 67 Mo., 331, and *Webb v. Lafayette Co.*, 67 Mo., 353, has held the "Township Aid Act" which we sustained, to be unconstitutional. The question presented, as we view it, is not so much whether these late decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced. In the *Cass County* case we said that the Supreme Court of the State had often been called on to construe and give effect to the Act, and had never before that time in a single instance expressed even a doubt as to its validity. We have again examined all the cases, and find that what we then said was true. Judge Dillon, who filled the office of Circuit Judge in the Eighth Circuit with such distinguished ability during nearly all the time the Act was in operation from its original passage until after the recent decisions, remarked in *Westerman v. Cape Girardeau Co.*, 7 Cent. L. J., 354: "A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the Federal Courts of this State, and prior to the decision in *Harshman v. Bates Co.*, 92 U. S., 569 [XXIII., 747], none of the able lawyers defending these cases ever made a point that the Act of March 23, 1868, was unconstitutional." The reason is obvious. At the very outset it was thought best to take the opinion of the Supreme Court of the State on that subject. The Act went into operation in 1868, and in 1869, *State v. Linn Co.*, 44 Mo., 504, was decided. There a township had voted to subscribe to the stock of a railroad company, and the county court had made the subscription; but after this was done the court refused "To deliver the bonds, for the alleged reason, only, that the Act under which the subscription was made was unconstitutional and void." An application was then made for a *mandamus* to compel the delivery of the bonds; and the only questions presented by the counsel for the respondent in the argument of the case, as shown by the report, were those of constitutionality, and especially was it urged that the Act was repugnant to article 11, section 14, which, quoting from the opinion, "Declares the General Assembly shall not authorize any county, city or town to become a stockholder in or loan its credit to any com-

pany, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." All the objections presented were considered by the court, and in conclusion it was said: "The county court having made the subscription, the company is entitled to the bonds." It is quite true that the precise objection which has since been raised was not then urged or considered; but the alleged discrepancy between the Act and the Constitution was just as apparent then as it is now, and Judge Dillon, in *Foot v. Johnson Co.*, 6 Cent. L. J., 346, says: "Suits, in great numbers, on these township bonds have been brought in the Circuit Court of the United States for this district, and they have been defended by the ablest lawyers in the State, upon every ground that they conceived open to them; but this difference between the phraseology of the Constitution and the Act, so patent that it could not escape attention, was never presented or urged in any case, so far as either of us recollect, as invalidating the Act." In *Cass Co. v. Johnston*, we attributed this to the fact that in other cases it had been substantially decided that the language of the Act and that of the Constitution were, in legal effect, the same, and at that time took occasion to look somewhat critically into the rulings on that subject. We have again examined that question, and are satisfied with the correctness of our former conclusion. It is thought, however, that we did not give sufficient effect to the case of *State v. Sutterfield*, 54 Mo., 391. As to that, we said the question presented related to another clause of the Constitution, and that the decision was placed expressly on the ground of a difference between the two provisions. In this it is urged we were in error. The clause of the Constitution there under consideration was article 4, section 30, which is: "The General Assembly shall have no power to remove the county seat of any county, unless two thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal." Under this provision of the Constitution a statute was passed providing for elections in such cases, to the effect, "If it shall appear by such election that two thirds of the legally registered voters of said county are in favor of the removal of the county seat of such county, then," etc. In the opinion the court say: "There is no doubt that, in general, when an election is held to determine the choice of a candidate, or the determination of some question of public policy, the plurality required by law, whether it be a bare majority or two thirds or three fourths, is determined by the result of the vote cast, without regard to the number declining to vote; and this is upon the ground that a failure to vote is assumed, or may be presumed, to be an acquiescence in whatever result may be produced by the action of those who feel a sufficient interest in the election to go to the polls and vote, and for the further reason that in most cases there is no mode by which the number of absentees can be ascertained. * * * Our Constitution in regard to the proposed removal of county seats, it seems to me, hardly admits of two constructions. It prohibits the Legislature from removing them unless two thirds of the qualified voters shall, at a general election, vote for the removal. The words do

not imply an acquiescence or negative sanction, or a negative assent inferred from absence, but a positive vote in the affirmative; and the number of votes required is specifically named, and there is no difficulty in ascertaining what that number is, since the same Constitution provides for a registration, and points out who qualified voters are; and the statute in this case uses the words 'legally registered voters,' and requires two thirds of them to vote for the change." The court then refers to the case of *State v. St. Joseph*, 37 Mo., 270; *State v. Binder*, 38 Mo., 450, and *State v. Winkelmeier*, 35 Mo., 103, and says: "In none of these cases, however, was there any examination of or construction given to the precise language of the constitutional provision now under consideration. * * * The present case, however, presents very different considerations. The question of removing county seats was regarded by the framers of the Constitution as of sufficient importance to require very stringent provisions in that instrument, and an examination of the laws in force on this subject, at the time of the adoption of the new Constitution, will show the great importance of requiring a strict compliance with its provisions." We think, then, we were not in error in supposing that the court believed there was an essential difference between the two provisions of the Constitution, and especially so as the Judge who delivered the opinion of the court in *State v. Sutterfield*, by his dissent in the later cases of *State v. Brassfield*, and *Webb v. La Fayette Co.*, clearly indicates his disapproval of the effect upon the question now under consideration which was then given that case.

The legislative recognition of the difference between these two clauses of the Constitution is equally apparent. The Constitution went into effect in July, 1865, and it became the duty of the Legislature, at its next session, which commenced in November, to adapt the old laws to the new order of things. In this connection, it must be borne in mind that the provision for a registration of voters was first introduced into the policy of the State by this new Constitution.

The then existing law regulating the removal of county seats provided that "Whenever three fifths of the taxable inhabitants of any county, as ascertained by the tax list made and returned last preceding the application, shall petition the county court praying a removal of the seat of justice thereof to a designated place, the court shall appoint five commissioners," etc. R. S., Mo., 1855, p. 514, sec. 1. To meet the requirements of the new Constitution on this subject, an election was provided for, and it was enacted that if it should appear by such election that two thirds of "the legally registered voters" were in favor of the removal, commissioners should be appointed to perform the same duties prescribed in the old law. Gen. Stat. Mo., 1865, p. 223, secs. 20-22. Here it is evident the Legislature had in mind both the provision for registration of voters and the somewhat unusual requirement that two thirds of the qualified voters of the county should vote for the measure.

The old law respecting the subscription by the county courts to the capital stock of railroad corporations was as follows: "It shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a

majority of the resident voters who shall vote at such election under the provisions of this Act." Acts of 1860-61, p. 60, sec. 2. In adapting this to the new constitutional requirements, this is the language used: "It shall be lawful for the county court of any county, the city council of any city or the trustees of any incorporated town, to take stock, etc., provided that two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent to such subscription." Gen. Stat. Mo., 1865, p. 338, sec. 17. This, it will be seen, is the exact language of the Constitution itself, and the intention evidently was to leave its meaning to be ascertained by judicial construction. By another statute passed at the same session of the Legislature, the charter of the City of St. Joseph, which had before authorized subscriptions to the capital stock of railroad companies if a majority of the real estate owners in the city sanctioned the same, was amended so as to require that question to be submitted "To a vote of the qualified voters of said city, and in all such cases it shall require two thirds of such qualified voters to sanction the same." Acts of 1865-66, p. 269, sec. 1. At the same session, in amending the charter of the Town of Clarksville, evidently to accomplish the same object, this is the language employed: "After first having obtained the consent of the inhabitants, as required by the Constitution of the State." Gen. Stat. Mo., 1865, p. 254, sec. 1.

At the February Term, 1866, of the Supreme Court of the State, that court was called on. In *State, ex rel. Bassett, v. St. Joseph* [*supra*], to give a construction to the Act amending the charter of St. Joseph. Under that Act, an election was held on the 13th of January, 1866, to vote upon the question of an issue of bonds, and four hundred and four votes were polled, of which three hundred and thirty-six were in favor of and fifty-eight against the measure. The mayor refused to sign the bonds after the vote was taken, and a *mandamus* was asked to require him to do so. The only reason he gave for declining to sign the bonds was, that "He was in doubt whether the matter was to be determined by two thirds of the votes polled at the special election, or by two thirds of all the voters resident in the city, absolutely, whether voting or not." In the argument, in support of the application for the writ, the attention of the court was called to the fact that there was "No registry law by which the qualified voters in the city could be ascertained," and it was further said, "The votes cast at the last election for city officers and the votes cast at said subsequent election furnish the only correct criterion to ascertain the number of qualified voters in the city at the time said special election was held." In the opinion, mention is also made of the number of votes polled at the next preceding election; but the court, after stating the exact question put by the mayor as indicating his own doubts, uses this direct and unmistakable language: "We think it was sufficient that two thirds of the qualified voters who voted at the special election authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified

voters on that question. There would appear to be no other practicable way in which this matter could be determined." It is true, the bonds voted at this election were not to be used in payment of subscriptions to the stock of railroad companies, but the law construed was the one in which provision was made for such subscriptions. Following this, at the October Term, 1866, of the same court, was the case of *State v. Binder*, 38 Mo., 450, in which similar language in another statute was construed, and *State v. St. Joseph* cited as establishing the doctrine "That an election of this kind authorized for the very purpose of determining that question, on public notice duly given, was the mode contemplated by the Legislature as well as by the law for ascertaining the sense of the legal voters upon the question submitted, and that there could not well be any other practicable way in which such a matter could be determined. And," continues the court, "certainly, in the absence of any evidence to the contrary, it may be presumed that the voters, voting at an election so held, were all the legal voters of the city; or, that all those who did not see fit to vote (if there were any) acquiesced in the action of those who did vote, and so are to be considered as equally bound and concluded by the result of the election. *Ree v. Foxcroft*, 2 Burr., 1017; *Wilcox, Corp.*, 546." Certainly, after these two decisions, made under the circumstances that attended them, and with the mind of the court directed by counsel in their argument to the registration laws, it might fairly be assumed by the Legislature to have been judicially determined that the assent of two thirds of the qualified voters voting at an election duly called and notified, was the legal equivalent of the assent of two thirds of the qualified voters of an election precinct. Hence, it was that the session of the Legislature which began in January, 1868, and as soon, probably, as the effect of these decisions had become generally understood, to avoid all future doubts as to what was meant, the equivalent language, as construed by the courts, was used, instead of that of the Constitution itself. And so we find not only in the Township Aid Act, but in other Acts depending for their authority on the same clause of the Constitution, the requisite assent of those voting at an election was deemed by the Legislature to be the assent of the qualified voters.

It was under this state of facts and the law that *State v. Linn Co.* [*supra*], was heard and decided. Other objections to its constitutional validity than those which had formerly been considered were raised, argued and decided in favor of the law. From that time forward, and until long after the issue of the bonds now in question, the law was treated by the courts and the people as valid and constitutional. No lawyer, asked for a professional opinion on that subject, could have hesitated to say that it had been settled. It would seem as though every question which could be raised had in some form, directly or indirectly, been presented and decided. While some of the decisions were rendered before the passage of the Township Act, it is so clear that the peculiar language of that Act was the consequence of those decisions that we do not deem it unreasonable to give them all the effect they would have if made afterwards.

See 11 OTTO.

We are, then, to consider whether, under these circumstances, we must follow the later decisions to the extent of destroying rights which have become vested under those given before. As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected. The language of *Chief Justice Taney*, in *Rowan v. Runnels*, 5 How., 134, expresses the true rule on this subject. He said, p. 139: "Undoubtedly, this court will always feel itself bound to respect the decisions of the state courts and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States which, in the judgment of this court, were lawfully made." Afterwards, in *Ohio Ins. & Tr. Co. v. Debolt*, 16 How., 416, the same learned *Chief Justice*, after reiterating what he had before said in *Rowan v. Runnels*, uses this language: "It is true the language of the court in that case is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction." This distinction has many times been recognized and acted upon. *Supervisors v. U. S.*, 18 Wall., 71 [85 U. S., XXI., 771]; *Fairfield v. Gallatin Co.* [ante 544]. Indeed, if a contrary rule was adopted, and the comity due to state decisions pushed to the extent contended for, "It is evident," to use again the language of *Chief Justice Taney*, in *Rowan v. Runnels*, "that the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory." The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made. The rules which properly govern courts, in respect to their past

adjudications, are well expressed in *Boyd v. Alabama*, 94 U. S., 645 [XXIV., 302], where we spoke through *Mr. Justice Field*. If the Township Aid Act had not been repealed by the new Constitution of 1875, art. 9, sec. 6, which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing. We always regret to find ourselves in conflict with the courts of the States in matters affecting local law, but, when necessary, we cannot refrain from acting on our own judgment without abrogating our constitutional jurisdiction.

For these reasons, the judgment of the Circuit Court is reversed and the cause remanded, with directions to overrule the demurrer to the petition, and take such further proceedings, not inconsistent with this opinion, as law and justice may require.

Cited—101 U. S., 695; 105 U. S., 72, 295, 732; 107 U. S., 35; 109 U. S., 105.

SMEDLEY DARLINGTON, *Plff. in Err.*,
v.
COUNTY OF JACKSON.

(See S. C., 11 Otto, 688.)

Douglass v. Pike County, *ante*, 968, followed.

[No. 150.]

Argued Jan. 5, 6, 1880. Decided Mar. 29, 1880

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

This case was the same in its history and facts as No. 155, the names of the parties being changed. The bonds in question were issued by the defendant County in behalf of Kaw Township, for the benefit of the Wyandotte, Kansas and Northwestern Railroad Company.

Messrs. Henderson & Shields, for plaintiffs in error:

"The decisions of the Supreme Court of Missouri, commencing with the *Linn County* case, in 1868, and continuing down to 1878, in which the constitutionality of the Act of March 23, 1868, and the validity of bonds issued under it were in question, are supported by the decisions, not only of this court, but by nine tenths of the state courts of the Union."

McCrary, Elect., sec. 188; *Dill. Mun. Corp.*, sec. 215; *Damon v. Granby*, 2 Pick., 345-355; *Williams v. Lunenburg*, 21 Pick., 75; *Mad. Av. Bap. Ch. v. Oliver St. Bap. Ch. (The Church Case)*, 5 Rob. (N. Y.), 649; *First Parish v. Stearns*; 21 Pick., 148; *People v. Warfield*, 20 Ill., 163 (1868); *People v. Garner*, 47 Ill., 246 (1868); *Melvin v. Lisenby*, 72 Ill., 63 (1877); *People v. Wiant*, 48 Ill., 263; *L. & N. Railroad v. Davidson Co.*, 1 Sneed (Tenn.), 692; *Taylor v. Taylor*, 10 Minn., 107; *Gillespie v. Palmer*, 20 Wis., 544; *State v. Woodford*, 15 Kan., 50; *Reiger v. Commissioners*, 70 N. C., 319.

Messrs. John C. Gage and Geo. F. Edwards, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The questions presented in this case are identical with those decided in *Douglass v. Pike County*, the opinion in which has just been announced [*ante*, 968]. *This judgment is also reversed and the cause remanded, with the same order as in that case.*

ELISHA FOOTE, *Plff. in Err.*,

v.

COUNTY OF PIKE IN THE STATE OF MISSOURI.

(See S. C. 11 Otto, 688.)

Douglass v. Pike County, *ante*, 968, followed.

[No. 134.]

Argued Jan. 6, 1880. Decided Mar. 29, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action commenced in the court below by the plaintiff in error on certain coupons attached to bonds alleged to have been issued by the County Court of Pike County in behalf of Calumet Township, in payment of the subscription of that township to the capital stock of the Clarksville and Western Railroad Company. These bonds were issued under the authority of the Township Aid Act. The defendant demurred to the petition and judgment was rendered sustaining the same upon the opinion of the presiding Justice. The plaintiff sued out this writ of error.

The Judges were divided in opinion upon five questions of which the following are the first three:

First. Whether the petition sets forth a legal cause of action against the defendant.

Second. Whether the demurrer to the petition ought to be sustained.

Third. Whether the defendant had authority under the Constitution and laws of the State of Missouri to subscribe to the capital stock of the Clarksville and Western Railroad Company at the time said subscriptions were made, although two thirds of the qualified voters of the respective townships named did at a special election duly called and held therefor, actually vote in favor of said subscriptions.

Messrs. O. Guitar and Henderson & Shields, for the plaintiff in error, referred to, *State v. Saline Co.*, 45 Mo., 242; *State v. Saline Co., Ct.*, 48 Mo., 390; *Ranney v. Baeder*, 50 Mo., 600; *Rubey v. Shain*, 54 Mo., 207; *State v. Sanderson*, 54 Mo., 203; *State v. Cunningham*, 51 Mo., 479; *State v. Co. Ct. Bates Co.*, 57 Mo., 70; *State v. Clarkson*, 59 Mo., 149.

Messrs. Fillmore Beall, Geo. T. Edmunds and Thos. J. C. Fagg, for defendants in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This cause comes here with a certificate of division. Although several questions are certified, the only point seriously pressed in the argument is that just decided in *Douglass v. Pike County* [*ante*, 968]. For the reasons stated in the opinion in that case we answer the first and third questions in the affirmative and the second in the negative. This makes it unnecessary to consider the fourth and fifth.

This judgment is reversed and the cause remanded, with instructions to overrule the demurrer to the petition and take such further proceedings, not inconsistent with our opinion in Douglass v. Pike County [ante, 968], as law and justice may require.

SOUTH AND NORTH ALABAMA RAILROAD COMPANY, *Plff. in Err.*,

v.

STATE OF ALABAMA.

(See S. C., 11 Otto, 832-835.)

Suits against State.

Where, in suits against a State, the state courts are made little else than auditing boards, and if funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them, there is no such remedy for the enforcement of the contracts of the State as may not, under the Constitution of the United States, be taken away by a law of the State.

[No. 22.]

Argued Oct. 28, 29, 1879. Decided Mar. 29, 1880.

IN ERROR to the Supreme Court of the State Alabama.

On the 4th of April, 1874, the South and North Alabama Railroad Company, a Corporation chartered and organized under the laws of Alabama, exhibited a bill in the Chancery Court of Montgomery County, against the State of Alabama, as sole defendant. In this bill it was claimed that the State was liable to the Railroad Company as trustee, for a large sum of money received by the State from "The Three per Cent Fund" arising from the proceeds of the sales of public lands under the Act of Congress of Mar. 2, 1819, "To Enable the People of Alabama Territory to Form the Constitution and State Government, and for the Admission into the Union upon an Equal Footing with the Original States."

An amended bill was afterward filed in December, 1874.

The State, by its Attorney-General and by its Solicitor, appeared in the cause, and filed its answer to the original bill May 20, 1874. No answer was made to the amended bill. May 11, 1875, the State, by its Attorney-General, Mr. Sanford, entered a motion in the cause to dismiss it and to strike it from the docket, on the grounds that there is no law which authorizes suits to be brought or prosecuted against the State of Alabama, and that this suit cannot be further maintained because the law which may have authorized its institution has been repealed.

On this motion the Chancery Court dismissed the bill.

The complainant appealed from that decree to the Supreme Court of Alabama, and at its December Term, 1875, that court affirmed the decree of the Chancery Court. At the time when the original bill was filed, the statutes of Alabama permitted citizens of the State, and domestic corporations, to sue the State in the Chancery Courts as well as in the courts of law; but all such statutes were repealed by Act of the General Assembly approved December 18, 1874.

NOTE.—Effect of repeal of statute, on pending action. See note to U. S. v. Tynen, 78 U. S., XX., 153.

See 11 OTTO.

U. S., Book 25.

Messrs. Samuel F. Rice, Thomas G. Jones and A. A. Wiley, for plaintiff in error.
Mr. John T. Morgan, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This case, like that of *R. R. Co. v. Tennessee* [ante, 960], presents the question of the constitutionality of a law taking away the right to sue a State on its contracts. The Constitution and laws bearing on the question are much the same in Alabama as in Tennessee; but in Alabama it was provided "That if judgment should be rendered against the State, it was the duty of the Comptroller, on the certificate of the clerk of the court, together with that of the judge who tried the cause, that the recovery was just, to issue his warrant for the amount, but no certificate could issue until six months after the recovery of the judgment." Code 1867, sec. 2536. It was also the duty of the Treasurer to pay all warrants drawn on him by the Comptroller under the authority of law (Code, sec. 422), but the Constitution, in force then and now, provided in express terms that no money should be drawn from the Treasury but in consequence of appropriations made by law. Const., 1834 and 1870, art. 2, sec. 24.

The proceedings in this case were begun while these laws were in force; but before final hearing the laws were repealed, and thereupon, on motion of the State, the suit was dismissed for want of jurisdiction. The Supreme Court affirmed this decision; and the question is, therefore, directly presented by this writ of error, whether the repealing statute is valid and constitutional as against this appellant, so far as it affects the present cause of action, which accrued while the right to sue existed.

We are unable to see any substantial difference between this case and that of *R. R. Co. v. Tennessee* [supra]. Under both the Tennessee and Alabama statutes the courts are made little else than auditing boards. If funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them. In Alabama, a warrant for the payment may be secured, but the State may stop payment by withholding an appropriation. Perhaps the judgment creditor may take one step further towards the collection in Alabama than he can in Tennessee; but both States may refuse to pay, that is, may refuse to make the necessary appropriation, and the courts are powerless to compel them to do so. In neither State has there been granted such a remedy for the enforcement of the contracts of the sovereignty as may not, under the Constitution of the United States, be taken away.

Judgment affirmed.

Dissenting, Mr. Justice Swayne.

Mr. Justice Strong did not sit in the argument and took no part in deciding this case.

On petition for rehearing.

Mr. Chief Justice Waite delivered the opinion of the court:

We have examined with care the cases in Alabama referred to in the elaborate brief filed with this petition, and are unable to see that

they decide more than that a judgment creditor is entitled to his warrant on the Treasury for the amount of his recovery. No case has gone beyond this. The Treasurer must pay the warrant when issued, if he has funds in his hands appropriated for that purpose; but if there has been no appropriation, he cannot any more pay a warrant issued on a judgment than one lawfully issued without a judgment. Take this case as an illustration. The demand made by the Railroad Company is an extraordinary one, and involves a large amount of money. Should a recovery be had, and the warrant paid without reference to the specific appropriations, which had been made by the Legislature, of the funds in the Treasury, it would almost of necessity embarrass the government in its daily operations. The constitutional provision referred to in our former opinion was, among other things, intended to meet just such a state of facts. Knowing what appropriations are made, the Legislature provide the funds to meet them. If, from any cause, an unusual claim arises, the parties must wait for the payment until the Legislature can provide the money. The case is precisely like that of a judgment in the Court of Claims against the United States. By the Constitution of the United States, "No money shall be drawn from the Treasury but in consequence of appropriations made by law." Art. 1, sec. 9. Hence the party who gets a judgment must wait until Congress makes an appropriation before his money can be had.

The petition for rehearing is denied.

Cited—106 U. S., 207, 227; 9 N. W. Rep., 742.

DALLAS COUNTY, *Plff. in Err.*,

v.

ALFRED HUIDEKOPER.

Existence of corporation—when question cannot be raised.

1. In an action on bonds of a county issued in payment of its subscription to a railroad company, the point that the charter of the company had ceased before the company was organized is a question between the State and the company alone.

2. Whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in a collateral proceeding; particularly where the corporation did exist as matter of fact, and was, at that time, in the exercise of all its chartered franchises.

[No. 225.]

Argued Mar. 25, 1880. Decided Apr. 5, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri.

This was an action at law, brought in the court below by the defendant in error against Dallas County, the plaintiff in error, upon certain coupons detached from bonds issued by the County under authority of an Act passed by the State Legislature, to incorporate the Laclede and Fort Scott Railroad Company, which Act was approved Jan. 11, 1860. The circuit court made a special finding of facts upon which the law was declared to be with the plaintiff, and judgment was rendered accordingly. The defendant sued out this writ of error.

The defense relied upon was substantially the same as that relied upon by the County in its

equity action in the same court against Huidekoper, for which see No. 224, *post*.

Messrs. S. H. Boyd, A. D. Matthews, and B. L. Brush, for plaintiff in error.

Mr. Joseph Shippen, for defendant in error.

(Counsel relied upon nearly the same arguments and authorities as in the equity case, No. 224.)

Mr. Chief Justice Waite delivered the opinion of the court:

We think the only question in this case was settled by the Supreme Court of Missouri in *Smith v. County of Clark*, 54 Mo., 59, where it was held on a petition for rehearing, after the case had been once decided, p. 81, that "Whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in a collateral proceeding." In this case, as in that, the corporation "Did exist as a matter of fact, and was in the exercise of all its chartered franchises when the subscription was made and the bonds issued." That case, like this, was a suit upon coupons for interest attached to bonds issued by the County in payment of its subscription to the capital stock of a railroad corporation, and the point made was "That the charter of the company had ceased before the company was organized." That, the court said, was "a question between the State and the company," and gave judgment against the County. We had occasion to consider the same question in *Macon Co. v. Shores*, 97 U. S., 276 (XXIV., 889), and held the same way.

Judgment affirmed.

DALLAS COUNTY IN THE STATE OF MISSOURI, *Appt.*,

v.

ALFRED HUIDEKOPER.

SAME v. WILLIAM DAVOL.

Dallas County v. Huidekoper, ante, followed.

[Nos. 224, 226.]

Argued Mar. 25, 1880. Decided Apr. 5, 1880.

APPEALS from the Circuit Court of the United States for the Western District of Missouri.

The following statement and briefs apply specially to No. 224. No. 226 differed in no important particular.

This was a bill in equity filed in the court below, by Dallas County against Alfred Huidekoper, to enjoin the collection of two judgments recovered by him against the said County in said court, on interest coupons detached from bonds, alleged to have been issued by said County to the Laclede and Fort Scott Railroad Company to aid the company in the construction of its railroad, of which said Huidekoper claimed to be an innocent holder for value, and for other proper relief.

The bill avers that Huidekoper had theretofore brought two actions at law in the United States.

Circuit Court for the Western District of Missouri, against the appellant, for the collection of interest coupons detached from bonds issued by appellant, and therein had recovered judgments which said Huidekoper was proceeding to enforce by proceedings in *mandamus* for the levy and collection of taxes. Further averment is:

"And your orator further shows unto Your Honors, that the bonds from which the coupons sued on in said actions were detached, were bonds for \$1,000 each, purporting to have been made by the County of Dallas to the Laclede and Fort Scott Railroad Company, dated the first day of July, 1870, for value received, payable at the German American Bank, in the City of New York, at twenty years after date, with interest at the rate of seven per cent per annum, payable semi-annually, on the first days of July and January, of each year, on presentation and delivery at said bank of the interest coupons attached. The said bonds and each of them contained the following recital, and no other: 'This bond is issued pursuant to an order of the County Court of the County of Dallas, made on the 17th day of August, 1869, by authority granted in the charter of the Laclede and Fort Scott Railroad Company, by an Act of the General Assembly of the State of Missouri, entitled, 'An Act to Incorporate the Laclede and Fort Scott Railroad Company, Approved January 11, 1860,' that the said recital in said bond is the only power claimed by said county justices to issue the same.'"

"And your orator avers that no good or valuable consideration was ever given by said railroad company to your orator for the said illegal subscription to its pretended capital stock and issue of bonds and coupons as stated; that the certificates purporting to be certificates of stock in said pretended railroad company were illegally issued by persons having no authority to act for said railroad company, and that said stock and bonds were issued after the 14th day of June, 1870, when said railroad company had ceased to exist under said Act of January 11, 1860, and when said County Court of Dallas County had no power under the Constitution and laws of Missouri of 1865, to issue bonds to pay for the stock subscribed to said pretended railroad company, unless two thirds of the qualified voters of the County of Dallas, at a regular or special election held therein, shall assent thereto."

The relief prayed for was, that said judgments be annulled, and said Huidekoper be perpetually enjoined from enforcing them.

To which bill the respondent demurred, on the ground that the bill did not state facts sufficient to entitle appellant to any such relief as that prayed for; also to the jurisdiction of the court to grant such relief against a writ of *mandamus*.

The demurrer was sustained and the bill dismissed. The County brings the case here by appeal.

Messrs **S. H. Boyd, A. D. Matthews and B. L. Brush**, for appellant:

If there was no company authorized under the charter, as alleged in the bill and admitted by the demurrer, the bonds are illegal and void, even in the hands of innocent holders for value.

Marsh v. Fulton Co., 10 Wall., 683 (77 U. See 11 OTTO.

S., XIX., 1042); *Dallas Co. v. MacKenzie*, 94 U. S., 660 (XXIV., 182); *Harshman v. Bates Co.*, 92 U. S., 569 (XXIII., 747); *Steines v. Franklin Co.*, 48 Mo., 167; *Rubey v. Shain*, 54 Mo., 207.

The charter of the alleged company was repealed by the Constitution of 1865. The new Constitution of Missouri took effect July 4, 1865.

1 Wag. Stat., 365, art. XIII., sec. 7.

It will, doubtless, be contended that the question of corporation or no corporation is one between the State and the corporators. This may all be true; yet, the determination of that fact constitutes an important factor in solving the question, whether the county court had the power of making this subscription and issuing these bonds; and that the County had a good but unavailable defense, constituted the stronger reason for a court of equity to interfere by enjoining the collection of the judgment, until at last that question had been determined. A court of equity will enjoin the collection of a judgment where the party had a good, available defense at law, but which, from fraud or accident or mistake, not attributable to their own neglect or carelessness, they were prevented from asserting.

Hungerford v. Sigerson, 20 How., 156 (61 U. S., XV., 869); *Lansing v. Eddy*, 1 Johns. Ch., 49; *Bartholomew v. Yaw*, 9 Paige, 165; *Berry v. Thompson*, 17 Johns., 436; *Ins. Co. v. Young*, 1 Cranch, 336.

Mr. Joseph Shippen, for defendant in error:

I. Equity does not annul judgments at law and restrain their enforcements upon any ground set forth in the appellant's bill, which avers no fraud, accident or mistake.

Hungerford v. Sigerson, 20 How., 156 (61 U. S., XV., 869); *U. S. v. Throckmorton*, 98 U. S., 61 (ante, 93); *Brown v. Buena Vista Co.*, 95 U. S., 157 (XXIV., 422); *Crim v. Handley*, 94 U. S., 652 (XXIV., 216); *Hendrickson v. Hinckley*, 17 How., 443 (58 U. S., XV., 123).

II. The Missouri Constitution and general statutes of 1865, did not repeal the power previously granted to Dallas County by the General Assembly, by the 14th section of the charter of the Laclede and Fort Scott Railroad Company, to subscribe stock in said corporation and issue bonds therefor.

State v. Macon Co. Ct., 41 Mo., 453; *Smith v. Clark Co.*, 54 Mo., 558; *Callaway Co. v. Foster*, 93 U. S., 567 (XXIII., 911); *Scotland Co. v. Thomas*, 94 U. S., 682 (XXIV., 219); *Henry Co. v. Nicolay*, 95 U. S., 619 (XXIV., 394); *Schuyler Co. v. Thomas*, 98 U. S., 169 (ante, 88); *Cass Co. v. Gillett*, No. 98, Oct. Term, 1879 (ante, 585).

III. Said Constitution did not prohibit expressly or by implication, the power to organize corporations previously chartered by the General Assembly.

State v. Macon Co. Ct., 41 Mo., 453; *State v. R. R. Co.*, 48 Mo., 468.

IV. The alleged irregularities in the organization of the Laclede and Fort Scott Railroad Company could not have availed as a defense to the respondent's original actions at law, if pleaded and proven therein; much less can they be successfully invoked to annul the judgments recovered.

Daviess Co. v. Huidekoper, 98 U. S., 98 (ante,

112); *Coloma v. Eaves*, 92 U. S., 484 (XXIII., 579); *Randolph Co. v. Post*, 93 U. S., 502 (XXIII., 957); *Leavenworth Co. v. Barnes*, 94 U. S., 70 (XXIV., 63); *Douglas Co. v. Bolles*, 94 U. S., 104 (XXIV., 46); *Johnson Co. v. Thayer*, 94 U. S., 631 (XXIV., 133); *Cass Co. v. Johnston*, 95 U. S., 360 (XXIV., 416); *St. Louis v. Shields*, 62 Mo., 247; *Smith v. Clark Co.*, 54 Mo., 58.

Mr. Chief Justice Waite delivered the opinion of the court:

These are suits in equity to enjoin the collection of judgments against Dallas County on coupons for interest attached to the same class of bonds just considered in *Dallas Co. v. Huid-ekoper*, No. 225 [*ante*, 974], and relief is asked on the ground that the charter of the railroad company had expired before any organization was effected under it, and that this fact was not known to the County until after the judgment was rendered. After what has been said in the other case, it is clear that the bills were properly dismissed without considering the power of a court of equity to sustain such a suit, and the decree in each of the cases is, consequently, affirmed.

WILLIAM H. BURR, *Appt.*,

v.

JOHN G. MYERS.

Jurisdiction as to amount.

Where, in an equity action, a decree was rendered for the complainant for \$784.53, and the account involved a large number of items, amounting to several thousand dollars, but the items in the master's report which were excepted to, amounted only to \$1,773.76: held, that the latter amount is the only amount in dispute, and it is not sufficient with interest from date of master's report to date of decree to give this court jurisdiction.

[No. 223.]

Argued Mar. 24, 1880. Decided Apr. 5, 1880.

APPEAL from the Supreme Court of the District of Columbia.

This was an action in equity, brought in the court below by the appellant, for the purpose of having an account stated between him and the defendant, now appellee. The case was referred to the special auditor, who reported a balance due to Burr, of \$784.53. The account involved a large number of items, amounting in the aggregate to several thousand dollars. The complainant filed exceptions to the report of the auditor, as appear in the opinion of the court, but these exceptions were overruled by the court at Special Term, and judgment entered for the complainant for the amount awarded by the special auditor. This decree was affirmed by the court in General Term, and the complainant appealed to this court.

Mr. C. H. Armes, for appellant.

Messrs. John F. Hanna and James M. Johnston, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

The matters in dispute on this appeal are those presented by the exceptions to the master's report. These are:

First exception,.....	\$1,500.00
Second exception—First item,.....	\$13.25
Second item,.....	125.46
Third item,.....	17.50
Fourth item,.....	117.55
	273.76
Total, as of February 25, 1873.....	\$1,773.76

The addition of interest to this amount, from the date at which the master made up the account, until the decree below, will not make the value of the amount in dispute equal to that necessary to give us jurisdiction.

Appeal dismissed.

HENRY M. RICE AND MATILDA W.
RICE, HIS WIFE. *Appts.*,

v.

JONATHAN EDWARDS, Trustee.

Overruling demurrer—election to consider principal sum due.

1. It is not sufficient ground to reverse a decree in equity, that, on overruling defendant's demurrer to the bill, no leave to answer was given, where no application was made for time to answer and no harm to defendant resulted.

2. Where bonds contain a stipulation that on default in payment of interest, the principal shall become due at the option of the obligee, the election by the bondholders to consider the principal sum due is sufficiently proven by bringing a suit by the trustee on the deed of trust given to secure them and the production of the bonds at the hearing.

[No. 222.]

Submitted Mar. 24, 1880. Decided Apr. 5, 1880.

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The case is stated by the court.

Messrs. M. Lamphrey and C. K. Davis, for appellants.

Mr. H. R. Bigelow, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

This case shows that on the first day of May, 1874, Henry M. Rice applied to the Equitable Trust Company, of New London, Conn., for a loan of \$25,000, for five years, with interest at the rate of ten per cent per annum. His application resulted in his executing to the company twenty-five bonds, of \$1,000 each, payable five years after date, with interest semi-annually at the rate of seven per cent per annum. The difference between seven and ten per cent interest was taken in advance, the company deducting fifteen per cent from the face of the loan when paying over the money.

The bonds contained a provision to the effect that if default should be made in the payment of any one of the installments of interest as they fell due, and the default should continue for ten days, the principal of the bonds should become due at the election of the holders without notice. Payment was secured by a deed of trust from Rice and his wife to Edwards, the trustee.

Default was made in payment of an installment of interest falling due November 1, 1875, and in another due May 1, 1876. Thereupon Edwards, the trustee, on the 9th of September, 1876, filed a bill in equity to foreclose the trust,

alleging an election by the holders of the bonds to consider the principal sum due, as well as the interest. Rice and wife appeared and filed what is termed a "plea," to so much of the bill as avers that election was duly made that the principal should be due and payable, in which they denied all the allegations of the bill in that behalf. An issue was made on the averments in this plea, and on the 16th of July, 1877, the court below decided that the commencement of the suit and the production of the bonds at the hearing, was sufficient evidence of the election in the absence of any proof that the owners of the bond did not sustain the trustee in the course he had pursued. The cause was then at once referred to a master to ascertain the amount due. On the 6th of August a report was made, finding due at that date \$29,210.22 principal and interest, and on the same day the court entered the usual decree of foreclosure and sale for that amount. On the 20th of August, Rice appeared, by his solicitors, and moved the court to open the decree in respect to the amount due, and to refer the cause again to a master to state the account on the basis of deducting a proper sum for the interest taken in advance. Upon this petition an order was made on the master to compute, ascertain and report the amount which should be deducted for this cause. The master heard the parties and reported that a deduction of \$1,120.60 should be made for unearned interest paid in advance, but the court, upon consideration, refused to modify the decree as originally entered. Rice and his wife thereupon took this appeal.

The errors assigned are: 1, that, upon overruling the plea, a decree was entered without assigning the defendant to answer the bill as provided in equity Rule 34; 2, that there was no proof that any election had been made, before the suit was brought, to consider the principal due; and, 3 that the decree was not modified by deducting therefrom, \$1,120.60.

As to the first error assigned, it is sufficient to say that no application was made for time to answer, and it nowhere appears that the failure to conform to the rule has resulted in harm to the appellants. In *Allis v. Ins. Co.*, 97 U. S., 145 [XXIV., 1008], we said we would not reverse a decree for an immaterial departure from technical rules when we could see that no harm had been done. Here it is not pretended that the appellants have any other defense to the action than such as they set up in their plea, or presented to the court in their application for a modification of the decree. Upon both these defenses, they were fully heard, and the case is now here for review, with a sufficient record to enable us to pass upon all the questions presented. Under such circumstances it would be clearly wrong to reverse the decree because time was not given to file a formal answer, setting up what already appeared in the case.

We agree with the court below that the election by the bondholders, to consider the principal sum due, was sufficiently proven by the bringing of the suit by the trustee and the production of the bonds at the hearing.

The laws of Minnesota put no limit on the rate or amount of interest for which the parties may contract in writing. The contract in this case was to pay the fifteen per cent in ad-

vance, and the continuance of the loan for the five years was made dependent on the prompt payment of the semi-annual interest at the rate of seven per cent.

Decree affirmed.

GRAND TRUNK RAILWAY COMPANY OF CANADA, *Plff. in Err.*,

v.

NATHAN WALKER.

Negligence by railroad company.

In an action against a Railroad Company for negligence, an instruction to the jury that if the Company undertook to run its trains by telegraph, it was bound to have suitable telegraph lines and operators, and if it did not, and thus occasioned the injury sued for, it would be liable, is proper.

[No. 219]

Submitted Mar. 23, 1880. Decided Apr. 5, 1880.

IN ERROR to the Circuit Court of the United States for the District of Maine.

This was an action brought in the court below by Walker, the defendant in error, against the plaintiff in error, to recover damages for a personal injury received by Walker, in a collision between two trains on the railroad leased and operated by the plaintiff in error. Judgment was rendered in the court below for the plaintiff, and the defendant sued out this writ of error.

The case is further stated in the opinion.

The following is the opinion of *Judge Fox*, delivered on a motion for a new trial in the circuit court, Clifford, *J.*, also being present.

Fox, J. In March, 1873, the defendants were the lessees of the railroad from Island Pond to Portland, and the plaintiff was in their employment on the train for the distribution of ties for the repairs of the road. This train was known as the "tie train"; had its conductor and engineer, and its movements were directed and controlled by Chevalier, the train dispatcher at Island Pond, by means of the telegraph. On the 25th of March, this train, with the plaintiff, left Gorham for South Paris, with orders to work between these places, distributing ties, keeping clear of all regular trains, and arrived seasonably at Gilead before 9.50. The same day at 4.30 P. M., freight train No. 6 left Portland for Island Pond. Its movements should have conformed to the time-table of the Company, but it fell behind, and was thirty minutes late at Bryant's Pond. These two trains came into collision near West Bethel, about five and a half miles from Gilead, and the plaintiff sustained serious injuries, for which he has brought the present action. At the trial a verdict was rendered for the plaintiff, which the defendants move to set aside as against law and evidence.

For a correct understanding of the case, some explanations of the distances between the various stations on the road from Gilead to Bryant's Pond and the arrival and the departure of the trains is important.

Gilead is seventeen miles west from Bryant's Pond, with three stations intervening: first, West Bethel, about six miles from Gilead; then Bethel, three and seven eighths miles from West Bethel; next, Locke's Mills, about three miles

east from Bethel and four and a half miles east of Bryant's Pond. There was telegraph communication with but one of the stations between Gilead and Bryant's Pond in Bethel.

Chevalier, called by defendants, testified that he was the chief train dispatcher at Island Pond and, as such, had charge of the trains, made the crossing of regular trains when late, regulated the movements of the trains by telegraph, and was provided at Island Pond with all the means requisite to transact the business; that, by the seventeenth rule of the road, "The stoppage of trains having the right of track must invariably be secured before the crossing train is dispatched or the track considered to be clear"; that, on the morning of March 25, the telegraph operator at Gilead at 9.50 reported to him the tie train then at Gilead, and wanted orders; replied to him, "Wait a minute," then telegraphed to Island Pond, who replied "Ay, Ay"; commenced to give an order for Bryant's Pond for No. 6 train, and Bryant's Pond operator stopped me and reported No. 6 had started at 9.50; then telegraphed to Bethel and continued doing so for twenty-five minutes; got no answer till 10.22; then inquired where No. 6 was. Bethel replied "Gone"; reported No. 6 off at 10.15; had previously sent an order to the tie train at Gilead at 10.15 to cross No. 6 at West Bethel, but told the operator at Gilead to hold order a minute; told him to let the tie train go; he reported it away at 10.20. No. 6 left Bethel at 10.15, having right of way over tie train; gave no notice to No. 6 that tie train was to cross them at West Bethel. Collision was caused by my negligence in not sending No. 6 before I gave the order to the tie train. I violated above rule. With the business of the Grand Trunk, a telegraph is necessary at West Bethel; the telegraph operator was the ticket agent, and did all the work at Bethel. I understood he was absent twenty-five minutes in freight shed, out of his office, at the time.

The writ contains two counts; the second charging that by reason of the fault, negligence and carelessness of defendants in not providing careful and suitable superintendents, telegraph operators and other servants, and by reason of the fault, negligence, carelessness and mismanagement of said Corporation and its superintendents, train dispatchers, telegraph operators and other servants, in wrongfully and carelessly neglecting to telegraph, to warn and instruct the servants of said Company having possession, charge and control of another train belonging to said defendants, etc., and by other negligent acts and omissions of said defendants, the collision was occasioned, etc.

At the trial, the court instructed the jury, among sundry instructions not excepted to, that the defendants, if they undertook to manage and conduct the business of running their trains by telegraph, were bound to have a proper and fit telegraph line for this purpose, with a reasonable number of telegraph stations and operators to properly conduct and control the running of the trains; and it is for the jury to decide whether this duty was performed by the defendants, or whether they were guilty of negligence and want of ordinary care in this respect, by not having the regular number of telegraph stations and operators for conducting the business of the road; if they were guilty of such

negligence and want of ordinary care, and that occasioned the injury which otherwise would not have occurred, the jury would be authorized to find a verdict for plaintiff.

Although excepted to at the trial, the correctness of this ruling was conceded at the hearing on the motion for a new trial, by the learned counsel for the Corporation, and it is sustained by all the authorities and was merely the application of the rule of law, that when injuries to servants or workmen happen by means of improper and defective machinery and appliances used in the prosecution of the business, the master is accountable. *Snow v. R. R. Co.*, 8 Allen, 446, and cases there cited.

It is now argued that such was not the ground of action as set forth in the writ and, therefore, this instruction was improperly given, and for that cause a new trial should be had; that the claim as made in the writ was for negligence of the servants of the Company, and not for injuries occasioned by its own negligence. The second count, of which an abstract is before recited, does not clearly charge that the injury was occasioned by the negligence of the Corporation as well as by that of its telegraph operator and other servants; and while the specific negligence of the defendant is not as sharply defined in the writ as could have been desired, yet we think it is set forth as a ground of complaint, and after verdict is sufficient.

It does not anywhere appear that this objection was taken at the trial, and if it had been and an amendment requested, it should have been allowed under all the circumstances developed by the evidence. For a technical objection of this character a new trial should not be granted when justice has been done and the objection could be removed by an amendment before the new trial shall be had.

The instructions given being unobjectionable, a new trial can only be granted because the evidence was not sufficient upon this point to authorize the verdict. A careful revision of the testimony satisfies the court that the finding of the jury in this respect was warranted by the evidence. The question for the jury to pass upon was, whether this Company, conducting its running of trains to a great extent by telegraph, had provided the requisite number of telegraph stations and operators for its business. From Gilead to Bryant's Pond was seventeen miles, with three stations intervening, at only one of which, Bethel, were there any facilities for governing the movements of the trains by telegraph; and at that place the jury were warranted in finding that the various duties which the operator there had to perform, of ticket seller, freight agent, etc., as well as telegraph operator, were such that he could not properly discharge them all; and thus that the Company were requiring of him more than he could attend to, and so that it had failed to furnish a suitable operator at that point, leaving the whole distance of seventeen miles unprotected in this behalf. Admitting that the Company were negligent in this respect, it is claimed that the negligence of Chevalier in not detaining the tie train at Gilead, according to rule 17, but giving it the right of way over train No. 6, was also a cause of the injury; that here was double negligence; that of the defendants as well as their servant, who was a fellow-servant

of the plaintiff, and that the plaintiff cannot recover from the injury occasioned by the negligence of a fellow-servant. The correctness of this latter proposition or its applicability to this case we do not propose to consider, as, in our view, contributory negligence to defeat a right of action must be that of the party injured, which, it is not claimed, existed in the present case. *Paulineer v. R. R. Co.*, 5 Vroom, 155.

Motion overruled.

Judgment on the verdict.

Messrs. J. & E. M. Rand, for plaintiff in error.

Messrs. Strout & Holmes, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

Although much and probably all the testimony in this case is embodied in the bill of exceptions, the only exception taken below was to the following instruction to the jury:

"The defendants, if they undertook to manage and conduct the business of running their trains by telegraph, were bound to have a proper and fit telegraph line for this purpose, with a reasonable number of telegraph stations and operators to properly conduct and control the movements of the trains. And it is for the jury to decide whether this duty was performed by the defendants or whether they were guilty of negligence and want of ordinary care in this respect by not having the requisite number of telegraph stations and operators for conducting the business of the road. If they were guilty of such negligence and want of care and thus occasioned their jury which otherwise would not have occurred, then the jury would be authorized to find a verdict for plaintiff."

We see no error in this instruction as an abstract principle of law, and no complaint is made of it here on that account. The whole effort on the part of the plaintiff in error has been to show that, upon the evidence, the verdict ought to have been in its favor. That question, we cannot consider. The instruction was right, and certainly not so far inapplicable to the allegation in the writ as to justify a reversal of the judgment on that account.

The judgment is affirmed.

MERCHANTS' NATIONAL BANK OF
LITTLE ROCK, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 11 Otto, 1-6.)

Banking law.

Section 3413 of the Revised Statutes concerning banking associations, banks and bankers, is valid.
[No. 218.]

Submitted Mar. 23, 1880. Decided Apr. 5, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

See 11 Otto.

This was an action brought in the court below, by the United States, to recover the tax imposed by the Act of March 26, 1867, and section 3413, R. S., U. S.

In the present case the party charged with the paying out in question is a national Bank, and the notes paid out were those of the City of Little Rock.

The pleadings, which consist of complaint, answer and demurrer, present the question whether the above statute is constitutional, the objection being that the tax in question is virtually laid upon an instrumentality of the State of Arkansas.

Messrs. John McClure and *B. C. Brown*, for plaintiff in error.

Mr. S. F. Phillips, Solicitor-Gen., for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

This suit was brought by the United States to recover the tax imposed by section 3413 R. S., which is as follows: "Every national banking association, state bank or banker or association shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation paid out by them."

The only question presented is as to the constitutionality of this statute, the objection being that the tax is virtually laid upon an instrumentality of the State of Arkansas.

We think this case comes directly within the principles settled in *Bk. v. Fenno*, 8 Wall, 539 [75 U. S., XIX., 484], where it was distinctly held that the tax imposed by that section on national and state banks for paying out the notes of individuals or state banks used for circulation (Rev. Stat. sec. 3412) was not unconstitutional. The reason is thus stated by the *Chief Justice*: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." P. 549.

The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a state municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore, the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.

Judgment affirmed.

ALEXANDER C. BOWDITCH, Assignee of the Estate of CHARLES H. HALL, a Bankrupt, *Plff. in Err.*,

v.
CITY OF BOSTON.

(See S. C., 11 Otto, 16-22.)

Instructions to jury—destruction of property to prevent fire—Massachusetts law.

1. In the Courts of the United States, whenever, in the trial of a civil case, it is clear that the evidence will not warrant a verdict for a party, and that if such a verdict is rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find for the party entitled to its verdict.

2. At common law, everyone has the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there is no responsibility on the part of such destroyer and no remedy for the owner.

3. Under the Statutes of Massachusetts and the ordinances of Boston, in order that a person may recover for a building blown up in that City to prevent the spread of fire, at least three engineers of the fire department—the chief engineer being one, if present—must have consulted together touching the blowing up of that particular building.

[No. 210.]

Argued Mar. 22, 23, 1880. Decided Apr. 5, 1880.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. Geo. W. Morse, for plaintiff in error.

Mr. J. P. Healy, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

The plaintiff in error alleges and relies upon the following case.

A great fire occurred in the City of Boston on the night of the 9th and 10th of November, 1872. The bankrupt was then the lessee and occupant of the premises described in the declaration. The fixtures, merchandise and tools belonging to him in the part of the building covered by the lease were of the value of \$60,000, and his leasehold estate of the value of \$10,000. The fire did not first break out in the premises of the bankrupt, but that part of the building and the contents were in danger from its progress. Three fire engineers, then at a place of danger in the immediate vicinity, directed the building, including his premises, to be demolished, to arrest the spreading of the fire. The building was blown up and destroyed accordingly. This measure stopped the progress of the fire. The premises were left unfit for occupation, and the personal effects of the bankrupt before mentioned were destroyed by the catastrophe. This action is brought by the assignee in bankruptcy to recover what was thus lost to the bankrupt.

The claim is founded upon certain statutes

of the State of Massachusetts and an ordinance of the City of Boston. A brief reference to their provisions, material to be considered in this case, will be sufficient.

In cases of fire, any three of certain designated officers "May direct any house or building to be pulled down or demolished when they may judge the same to be necessary in order to prevent the spreading of the fire." Mass. Gen. Stat., ch. 24, sec. 4.

"If such pulling down or demolishing of a house or building is the means of stopping the fire, or if the fire stops before it comes to the same, the owner shall be entitled to recover a reasonable compensation from the city or town; but when such building is that in which the fire first broke out, the owner shall receive no compensation." Mass. Gen. Stat., ch. 24, sec. 5.

The City of Boston was authorized to establish a fire department, to consist of so many engineers, etc., "As the City Council, by ordinance, shall from time to time prescribe." Mass. Spec. Stats., 1850, ch. 22.

Pursuant to the authority thus conferred, the City Council, in the manner prescribed, created such a department, and declared that it should "Consist of a chief engineer and thirteen assistant engineers," etc. Ordinances of Boston, ed. 1869, sec. 1.

It was provided that "The chief engineer shall have the sole command at fires over all other engineers and officers and members of the fire department, and other persons who may be present at such fires," etc. Ord. of Boston, ed., 1869, sec. 6.

"Whenever it is adjudged at any fire; by any three or more of the engineers present, of whom the chief engineer, if present, shall be one, to be necessary, in order to prevent the spreading of the fire, to pull down or otherwise demolish any building, the same may be done by their joint order." Ord. of Boston, ed. 1869, sec. 11.

It appears that at the fire here in question the chief engineer and a number of the assistant engineers were present. Upon that subject there is no controversy.

The case was first tried in the District Court of the United States for that district.

The learned Judge who presided at the trial directed the jury to render a verdict for the defendant, which was, accordingly, done.

The plaintiff in error excepted, and having embodied in the record all the evidence given on the trial, sued out a writ of error and removed the case to the circuit court.

There the judgment of the district court was affirmed. A further writ of error has brought the case here for review.

It is now a settled rule in the courts of the United States that whenever, in the trial of a

NOTE.—Municipal corporation is not liable for damages for destruction of building to prevent spread of fire.

The destruction of private property by the fire department of a city to stay a fire, is not such an act as will sustain an action for damages against the city at common law, and is not taking private property for public use. *Keller v. City of Corpus Christi*, 50 Tex., 614; S. C., 32 Am. Rep., 613; 2 Dill. Mun. Corp., secs. 756, 757.

No action lies for the damage occasioned by acts done by way of self-defense against a common enemy, such as the destruction of property to prevent the spreading of a conflagration. *Russell v. Mayor*,

etc., of N. Y., 2 Den., 461; *Rex v. Pagham*, 3 B. & C., 355; 2 Man. & R., 463; *Surocco v. Geary*, 3 Cal., 72; *Amer. O. P. Works v. Lawrence*, 1 Zab., 248, 714; S. C., 3 Zab., 590; affg. 3 Zab., 9.

A municipal corporation is not liable, unless by express statute, for the destruction of a building torn down to arrest the progress of a fire, no matter whether done under the direction of the municipal officers, who had no authority so to direct, or by the bystanders on their own motion. *McDonald v. Red Wing*, 13 Minn., 38; *Republica v. Sparhawk*, 1 U. S. (1 Dall.), 357; *Mayor, etc., of New York v. Lord*, 17 Wend., 285; affd. 18 Wend., 126; *Field v. Des Moines*, 39 Iowa, 575; S. C., 18 Am. Rep., 46.

civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial. It is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice. *Merch. Bk. v. St. Bk.*, 10 Wall., 604, 637 [77 U. S., XIX., 1008, 1015]; *Improv. Co. v. Munson*, 14 Wall., 442 [81 U. S., XX., 867]; *Pleasants v. Fant*, 22 Wall., 116 [89 U. S., XXII., 780].

The rule in the English courts is substantially the same. *Ryder v. Wombwell*, L. R., 4 Exch., 32; *Giblin v. McMullen*, L. R., 2 P. C., 335. In the latter case it was said: "In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the *onus* of proof is imposed.

At the common law everyone had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the *Prerogative*, 12 Rep. [Coke], 13, it is said: "For the Commonwealth a man shall suffer damage, as: for saving a city or town, a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire, some of them involving the destruction of life itself, where the same rule is applied. "The rights of necessity are a part of the law." *Respublica v. Sparhawk*, 1 Dall., 357, 362; see also, *Mouse's Case*, 12 Rep. [Coke], 63; 15 Vin., tit. Necessity, sec. 8; *Cast Plate Co. v. Meredith*, 4 T. R., 794; *Am. Print W. v. Lawrence*, 1 Zab., 248; 3 Zab., 591; *Stone v. Mayor of N. Y.*, 25 Wend., 173; *Russell v. Mayor, etc., of N. Y.*, 2 Den., 461.

In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity. *Burlam.*, 145, sec. 6; *Burlam.*, 159, ch. 5, secs. 24-29; *Puffendorf*, B. 2, ch. 6.

The Statute of Massachusetts, as far as it goes, gives as a bounty that which could not have been claimed before. How far the statute trenches upon the legal and natural right which everyone possessed prior to its enactment, is a subject we need not consider.

All the questions arising in this case are questions of local law. It is our duty to consider the controversy as if we were a court of the State, and sitting there to apply her jurisprudence.

The subject was within her police power, and it was competent for her to legislate upon it as she might deem proper. It is wholly beyond the sphere of federal authority.

Whether the statute is to be construed strictly, as being in derogation of the common law, or liberally, as being remedial in its character, are points within the exclusive cognizance of her tribunals. The jurisdiction of the district court arose from the incidental fact that a claim in

behalf of a bankrupt's estate was involved, and that his assignee was the plaintiff.

In order to charge the City, "The remedy being given by statute only, the case must be clearly within the statute." * * * "The city is responsible by force of the statute only, and such responsibility is limited to the cases specially contemplated." *Taylor v. Plymouth*, 8 Met., 465.

The law of the case has been clearly laid down by the highest judicial court of the State, and we cannot do better than quote it at length.

"The plain intent of the statute is, that no house or building shall be demolished unless it shall be judged necessary by three fire-wards, or by the other officers authorized to act in their absence, or where no fire-wards have been appointed. It is the united judgment of the officers to whom the power is given, acting upon the immediate exigency, and determining the necessity which is contemplated by the statute. Its language is capable of no other reasonable interpretation. It is a joint authority expressly given to the officers designated, acting together, and cannot be exercised by a minority or by any one of them.

"It is not sufficient, therefore, that a general conclusion or judgment was arrived at by the three fire-wards or the other officers mentioned, that it was necessary to destroy some buildings in order to put a stop to the further extension of a fire. They must go further. They must determine upon the particular house or building which they shall adjudge necessary to be destroyed for the purpose. This cannot be left to the individual judgment of any one of the fire-wards." *Ruggles v. Nantucket*, 11 Cush., 433.

The validity of the ordinance creating the fire department was not questioned in the argument here, and we see no reason for doubt upon the subject. The statute which authorized the ordinance declared that "The engineers or other officers," appointed pursuant to the provisions of the latter, should be clothed with all the powers and duties "conferred upon fire-wards by the Revised Statutes or special acts relating to the City of Boston now in force," and that the City Council might "make such regulations in regard to their conduct and government" as it might see fit to ordain. For all the purposes of this case the engineers were fire-wards at and during the fire here in question. Several things were necessary to the validity of an order for the destruction of the tenement of the bankrupt:

At least three engineers of the fire department—the chief engineer, if present, being one—must have consulted together touching the blowing up of that particular building.

They must all have arrived at the conclusion that it was necessary to destroy it in order to arrest the progress of the flames.

They must all jointly and specifically have ordered that building to be destroyed.

Upon looking carefully through the record, we have failed to find the slightest proof that any three of the fire engineers ever consulted in relation to destroying the building to which this controversy relates; that any three, jointly or severally, expressly or by implication, gave an order that it should be destroyed; or that this particular building was ever present to the minds of any three of the engineers in that connection.

The Mayor was on the ground early after the commencement of the fire, and was there, actively engaged, until the next morning. He heard consultations as to the use of gunpowder, but his testimony is an entire blank as to the points here under consideration.

The chief engineer was called by the plaintiff and was fully examined.

He gave authority to numerous persons according to this formula:

"Col. Shepard will blow up buildings or remove goods as his judgment directs.

J. S. DAMRELL, *Chief Engineer.*"

The utter nullity of such an instrument is too plain to require remark.

In the course of the chief engineer's testimony these questions and answers occur:

"Q. You and the engineers did not direct the blowing up of any buildings in Boston by gunpowder?"

A. No, sir. Not when I was present. If any three engineers did so, when I was not present, I have yet to learn the fact.

Q. Did you know that any three engineers directed the demolishing of any building by gunpowder?

A. I do not know the fact."

The building was blown up by General Burt, the Postmaster of Boston. He had a written paper from the chief engineer, and it was in his possession when he testified. The document is not in the record, and its contents are not shown. Upon the points here in question his testimony was as follows:

"Q. Did you, at any time, consult with three of the engineers of the City, after you started the scheme of blowing up?"

A. I don't think we did. I had in my mind distinctly what to do, and we stuck to it until we got it done.

Q. You used your own discretion entirely?"

A. I intended to. I intended to keep that line plumb up, if I could, and not to let it get into the new postoffice building, and not get over into this part of the City."

These witnesses are unimpeached and uncontradicted, and what they say is conclusive. It is unnecessary to refer particularly to the rest of the testimony. Nothing is to be found in it in conflict with the parts we have quoted. It affords no ground for a plausible conjecture that the facts were otherwise. The plaintiff not only failed to prove what he claimed, but his own testimony counter-proved it and established the negative. The proposition was vital to his case.

The judgment of the Circuit Court is affirmed.

Cited—109 U. S., 482.

THE STEAMBOAT MAYFLOWER, EDGAR NOTT, OWNER, ET AL., *Appts.*,

v.

THE STEAMBOAT SABINE ET AL.

(See S. C., "*The Sabine*," 11 Otto, 384-391.)

Suits by salvors.

Salvage, what constitutes.

Salvors cannot proceed against the ship and cargo *in rem* and *in personam* against the consignees of the cargo, in the same libel.

[No. 212.]

Argued Mar. 19, 1880. Decided Apr. 5, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. C. B. Singleton and R. H. Brown, for appellants.

Mr. John A. Campbell, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

Salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture.

Three elements are necessary to a valid salvage claim: (1) A marine peril. (2) Service voluntarily rendered when not required as an existing duty or from a special contract. (3) Success in whole or in part, or that the service rendered contributed to such success.

Proof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perish, or, in case of capture, if it is not retaken, no compensation will be allowed. Compensation as salvage is not viewed by the admiralty courts merely as pay on the principle of *quantum meruit* or as a remuneration *pro opere et labore*, but as a reward given for perilous services voluntarily rendered, and as an inducement to mariners to embark in such dangerous enterprises to save life and property.

Sufficient appears, to show that important assistance was rendered by the steamer, *Mayflower*, and her crew to the steamer *Sabine*, in the nature of salvage service, as alleged in the libel. Both steamers were at the time in the Ouachita River, and each was bound on a trip to the Port of New Orleans. When The *Mayflower* approached the landing described in the libel, those in charge of her deck discovered that the steamer *Sabine* was in distress, and it appears that those in command of the latter steamer hailed The *Mayflower* and requested assistance. It also appears, from the pleadings, that the injured steamer had a cargo of six hundred and nineteen bales of cotton, consigned to various merchants at the port of destination, together with a number of passengers; that she and her cargo were in peril, owing to the fact that in attempting to back out from the landing she struck a snag or other obstruction beneath the surface of the river and became fast. Many of her flooring timbers and bottom planks were broken, and it is alleged that she had sixteen to eighteen inches of water in her hold and that it was rapidly gaining on her pumps.

Success attended the efforts of the salvors, both as to the steamer and her cargo, and they delivered all the cotton to the consignees. Before the cargo was delivered to the consignees they executed to the master of The *Sabine* an average bond, agreeing to pay their respective proportions of whatever sums should be found due as expenses, charges and sacrifices in consequence of the said disaster.

Efforts to settle the matter amicably having failed, the owner, master and crew of The *Mayflower* filed a libel in the district court against the steamer *Sabine* and her cargo and the several consignees to whom the cargo was

delivered. Process issued, and the return of the marshal shows that he seized the injured steamer. Service was also made upon the several consignees, but it is not shown that the cargo saved or any part of it was ever seized.

Due appearance was entered by the respective consignees, and they filed certain exceptions to the libel. Those still relied on are as follows: (1) That there was no seizure of the cargo and that a libel *in rem* cannot be maintained without a seizure. (2) That the consignees are not proceeded against as owners or possessors of the cargo. (3) That a suit *in personam* and a suit *in rem* cannot be maintained in such a case. (4) That a suit *in personam* for salvage services must be against those for whom the services were performed. (5) That the respondents are consignees, and that the cargo had been disposed of and accounted for to those who owned the cotton.

Hearing was had, and the district court sustained the exceptions and dismissed the libel as to the excepting parties. Dissatisfied with the decree of the district court, the libelants appealed to the circuit court, where they were again heard, and the circuit court affirmed the decree of the district court. Still not satisfied the libelants have appealed to this court, and now assign for error that the circuit court erred in holding that the 19th Admiralty Rule applies to the case, because, as they insist, that the libel in this case is not a suit *in rem* and *in personam* within the meaning of that rule, and that the exception should have been dismissed.

Suits for salvage may be *in rem* against the property saved or the proceeds thereof *in personam* against the party at whose request and for whose benefit the salvage service was performed. Power is vested in the Supreme Court to regulate the practice to be used in suits in equity or admiralty by the circuit or district courts as conferred by an Act of Congress, which has been in force for many years. 5 Stat. at L., 518; R. S., sec., 917.

Pursuant to that authority, the Supreme Court prescribed the preceding rule, which correctly describes the several modes in which salvors may seek compensation for unrequited salvage services. Salvors, under the maritime law, have a lien upon the property saved, which enables them to maintain a suit *in rem* against the ship or cargo or both, where both are saved in whole or in part. Such a remedy is the one usually pursued, and in view of the fact that the lien is maritime and exists quite independently of possession, it ordinarily affords the best mode of securing the payment of their salvage claims. Wms. & Br. Pr., 147; *The Elizabeth and Jane*, 1 Ware, 35; *The Bee*, 1 Ware, 332, 344. Suits of the kind may be enforced against the proceeds of the property, where it appears that the property saved had been previously seized under admiralty process and sold, and the proceeds paid into the registry of the court. Examples of the kind may be given, as where the property saved consisting of the the ship and cargo, and the same were subsequently seized for a violation of the revenue laws, and sold as perishable property before the libel for salvage was instituted, or where there were more than one set of salvors, and the first set caused the property to be seized and sold

See 11 Otto.

under an order of court before the second obtained process of attachment. Cases of the kind not infrequently arise, and in all such the proceeds in the registry of the court represent the property saved, and it is clear that the suit may be against the proceeds as provided in the 19th Rule. *The Blackwell*, 10 Wall., 12 [77 U. S., XIX., 874]; *The Evbank*, 1 Sumn., 400.

Services of the kind are often rendered by more than one set of salvors, and where that is so, the second, if they do not join with the first set, may, as before remarked, proceed against the proceeds, or they may, pending the proceeding in the suit, apply to the court by petition to be admitted as parties to the original libel. *Adams v. The Island City*, 1 Cliff., 210; *Norris v. The Island City*, 1 Cliff., 219.

Compensation in such a case is usually enforced by a libel *in rem*, but where the parties rendering the salvage service are employed and sent out by the owners or insurers, the persons employed may proceed *in personam* against their employers for compensation, even though they were unsuccessful, unless they contracted that their right to compensation should depend upon their success, as in the ordinary case of salvage service, without being antecedently employed.

Employers, in such a case, are liable to those rendering service, under such circumstances, in a suit *in personam*, within the last clause of the Admiralty Rule, but there is no authority for holding that salvors may proceed against the ship and cargo *in rem* and *in personam* against the consignees of the cargo in the same libel.

Libelants in a suit for collision may proceed against the ship and master or against the ship alone, or *in personam* against the master or the owner alone, but the terms of the 19th Rule are different, limiting the right of the salvor to a suit *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service was performed.

Important service, it may be assumed, was rendered by the libelants, but they were neither employed nor sent out by the consignees, nor did the consignees request them to go to the assistance or relief of the ship or cargo.

Concede that the request of the master for assistance would be sufficient to enable the salvors to maintain an action *in personam* against the owners of the property; still the concession will not benefit the libelants in this case, as the libel is against the ship and cargo and the consignees to whom the cargo was delivered; nor would they be in any better condition even if they had joined the owners instead of the consignees, as the difficulty would still remain that the proceeding is *in rem* against the ship and cargo and *in personam* against the owners of the cargo without joining the owners of the ship.

Persons to whom goods are consigned may be the owners of the goods, or the goods may be the property of the consignors, or they may even belong to a third party; the fact being that the consignees are named in the bill of lading merely as agents of the shipper to deliver the goods in pursuance of some letter of advice. Nothing appears in this case to explain the transaction, except that it is alleged in the libel that the different parcels of the cargo

when rescued were delivered to the several respondents therein described as consignees.

Authorities may, doubtless, be found to support the proposition that the salvors may proceed *in rem* against the ship and cargo or *in personam* against the owners of the property saved from the impending peril, but there is no well considered authority which gives any countenance to the theory that the two modes of proceeding may be joined in the same libel. *The Boston*, 1 Sumn., 328, 341; *The Hope*, 3 C. Rob., 215.

Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party; but actions *in personam* are those in which an individual is charged, personally, in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other.

Our admiralty rules were promulgated in accordance with the Act of Congress and, as Mr. Parsons says, they have all the effect of law, from which he draws the conclusion that no suit in such a case will lie against an owner *in personam* jointly with a suit *in rem* against the vessel. 2 Pars. Admr., 378; *Dean v. Bates*, 2 Woodb. & M., 87, 92; *The Atlantic v. The Ogdenburgh*, 1 Newb. Adm., 139.

Beyond all doubt, the views of Mr. Parsons are sustained by the true construction of the 19th Admiralty Rule, which is expressed throughout in the disjunctive form, and plainly requires the action, if against the property saved or the proceeds thereof, to be *in rem*, the alternative clause clearly referring to a case where the property saved has been sold and the proceeds of the sale have been deposited in the registry of the court. Plain as that part of the rule is, further discussion of it is not necessary, as the libelants scarcely attempt in that regard to controvert the theory of the respondents.

Suppose the respondents are correct in that respect; still the libelants insist that the form of the libel may be supported under the last clause of the rule, which gives the right to an action *in personam* against the party at whose request and for whose benefit the salvage service was performed, and their argument is that the service in the case resulted in a benefit to the owners of the cargo; but the case fails to show that the owners of the cargo ever requested the service, and it is clear that they are not joined in the libel. They, the libelants, must show the request and the benefit, and unless they show that both concur, they cannot make out a case even within their own theory; to which it may be added that the libel is against the consignees and not against the owner, unless it can be assumed that the consignees are the owners of the cargo, which certainly is not authorized by anything that appears in the transcript.

But there is not a circumstance in the case tending to show that any such request was made, either by the consignees of the cargo or the owners of the same; nor can it, for a moment, be admitted that such an action can be maintained either against the consignees or the owners merely because the saving of the cargo

resulted to their benefit. Volunteer assistance rendered to such property when in peril, and which is successful in saving the property or some portion of it, constitutes the proper foundation to support an action for salvage *in rem* against the ship and cargo or the proceeds thereof.

Reported cases may be found where the owners or insurers of such property, being informed that the property was in peril, sent out vessels and mariners for its assistance and relief, and in such a case it is, undoubtedly, true that the persons employed, both for their own services and for the use of the vessel or other appliances, may maintain a libel *in personam* to enforce the payment of just compensation for all such services.

There is a broad distinction, said Dr. Lushington, between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration. But if men are engaged to go out to the assistance of a ship in distress they are to be paid according to their efforts, even though the labor and service may not prove beneficial to the vessel or cargo. *The Undaunted*, 1 Lush., 90.

No one can doubt that for such service the proper remedy is an action *in personam*, as provided in the last clause of the Admiralty Rule prescribing the mode of procedure to recover salvage compensation. Unless the property saved is destroyed after having been restored, or is clandestinely removed from the jurisdiction, the salvors require no more convenient or effectual remedy than the action *in rem* against the property, as their compensation cannot exceed its value; and if destroyed without their fault or removed from the jurisdiction to defeat their remedy, no doubt is entertained that they may proceed *in personam* against the owners of the salvaged property, though the case is not specifically provided for in the 19th Rule, to which reference has been made. *The Emblem*, 2 Ware (Davies), 61; *The Boston* [supra]; Dunlap, Pr., 511; *The Trelawney*, 3 C. Rob., 216, n.

Mere employment to render such a service is no bar to such a libel, the rule being that nothing short of a contract to pay a given sum for the services to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will defeat the jurisdiction of the Admiralty Court. *The Camanche*, 8 Wall., 448, 477 [75 U. S., XIX., 397, 405].

Compensation for such services, if voluntarily rendered, cannot exceed the value of the property saved, and for that the salvors have a maritime lien on the property independent of possession, and which continues until the compensation is paid, so long as the property remains in specie. Macl. Ship., 2d ed., 593; *The Gustaf*, 1 Lush., 506; Maude & P., Ship., 3d ed., 487.

Viewed in the light of these suggestions, it is clear to a demonstration, that the decision of the Circuit Court is correct. *Nott v. Sabine*, 2 Woods, 211.

Decree affirmed.

Cited—7 Sawy., 277.

WILLIAM GUNTON ET AL., Trustees, etc.,
Appts.,
 v.

ANN C. CARROLL AND MARIA C. FITZ-
 HUGH, Executrices of DANIEL CARROLL,
 Deceased, ET AL.

(See S. C., 11 Otto, 426-432.)

Laches—contract, in equity—specific performance—arbitration.

1. Complainants in an equity suit are not chargeable with the laches caused by the defendants therein.

2. In equity, a contract for the sale of land is treated, for most purposes, precisely as if it had been specifically performed.

3. The principle is not inflexible, that the court will not specifically enforce the contract where the price is not fixed or is left to be fixed by arbitration.

4. Where land is agreed to be taken in part payment of a debt, the value at which it is to be taken to be fixed by arbitration, and the owner dies before appointing arbitrators, the agreement may be specifically enforced. If the valuation cannot be made *modo et forma*, the court will substitute itself for the arbitrators.

[No. 207.]

Argued Mar. 17, 18, 1880. Decided Apr. 5, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Mr. Jno. D. McPherson, for appellants.

Mr. Geo. F. Appleby, for appellees.

Mr. Justice Miller delivered the opinion of the court:

The appellants sue in their character of Trustees of the Bank of Washington. The charter of that bank expired a great many years ago, and the trustees who now bring this suit and conduct its affairs do so under an Act of Congress. At the time of the expiration of the charter, there was a large indebtedness to it on the part of Daniel Carroll, part of which was secured and other part not secured.

There were several judgments against Carroll in favor of the bank, and he had a suit in chancery for the adjustment of disputed matters in regard to this indebtedness.

On the 3d day of November, 1846, an agreement in writing was entered into between Carroll and these trustees by which all their disputes were settled, and the sum due by him to the bank ascertained, and mode of payment and security agreed upon.

This agreement is the foundation of the present suit. Among other things, completed at the time, was the payment of part of the debt by Carroll and the release of certain real estate from the lien of plaintiff's judgments. The transfer of judgments held by Carroll against other persons to the trustees, with an understanding that all that should be collected on them should be credited on the judgment of the bank against Carroll, and certain property known as the Sligo estate, in which Carroll had an undivided interest, was by him to be con-

veyed to the bank as soon as he could procure a partition with the other part owners. Carroll also covenanted that, after all this was done, he would give good security for any balance due by him to the bank. As the agreement with regard to the Sligo property is the matter of principal importance in this suit we give that part of it *verbatim*: "The said Daniel Carroll shall forthwith cause, at his expense, the property known as the Sligo estate, of which he is the owner of an undivided share to be legally or equitably divided between him and the other owner or owners thereof, and shall immediately thereafter, by a valid deed, convey the share or portion of said property which may be allotted to him unto the trustees of the said bank, or as they may direct, in fee simple, at such price as three competent freeholders—to be selected, one by the said Daniel Carroll, another by the trustees of said bank, and the third by the other two appraisers—shall estimate and adjudge the same to be worth, as if sold on a credit of three equal payments at one, two and three years, with interest thereon payable semi-annually; and the price, on the due execution of said conveyance to the trustees of said bank, or as they may direct, shall be credited against the said judgments, so as aforesaid held by the bank against said Daniel Carroll."

Much of the agreement was performed on both sides. Money was paid and property released, and the bill avers that all that the trustees agreed to do or could do was done; but it avers that there is, including interest, over \$40,000 of the original debt unpaid, and no security has been given. In reference to the Sligo property it is alleged that no partition was made by Mr. Carroll in his lifetime (he died in May, 1849), but that his devisees effected such partition in 1866, and have since sold some part of the property allotted to them in that partition and received the purchase money. It also alleges that the trustees were not aware that any such partition had been made until 1872, this suit having been commenced in 1876. They also set up an attempt, in 1875, to bring these matters before the court in the original chancery suit, pending when the agreement was made, by an amended bill and revivor, which was overruled.

The defendants, who are the devisees and executors under Carroll's will, filed a general demurrer to the bill, with twenty grounds of demurrer, which was sustained by the court below and the bill dismissed.

The demurrer being general to the whole bill must be overruled, if there is any part of the bill which entitles plaintiffs to relief.

The main ground of the demurrer is the lapse of time since the cause of action accrued, and this is relied on in reference both to the Statute of Limitations and the general doctrine of laches. If the judgments against Carroll have never been revived, by *scire facias* or otherwise, the debt which they represented is barred by limitation, and cannot be enforced by any proceeding at law for its collection. The bill is silent on that subject. It may admit of doubt whether, in the mere absence of any such allegation, the court will raise the presumption of payment on which the equitable defense is founded. Without deciding this, we think there is another ground on which defendants must be put to their answer, and in that answer they can plead or rely on

NOTE.—*Specific performance; plaintiff must show performance or readiness and offer to perform; when denied; decreed against subsequent purchaser with notice; where vendor is unable to fulfill wholly.* See note to Colson v. Thompson, 15 U. S. (2 Wheat.), 336; note to Hepburn v. Dunlop, 14 U. S. (1 Wheat.), 180; and note to Pratt v. Carroll, 12 U. S. (8 Cranch), 471. See 11 OTTO.

the statute, or lapse of time coupled with an averment that the judgments are no longer alive.

That matter concerns the Sligo property. No bill for specific performance could have been brought against Carroll or his devisees until the partition which the agreement required him to make was made. The delay in making this partition was the delay of Carroll and of his devisees after his death. For this the plaintiffs were in no manner chargeable with laches and should receive no detriment. *Fry, Specific Perf.*, sec. 740; *Ridgway v. Wharton*, 6 H. L. Cas., 292.

The partition was made in 1866, and the knowledge of it did not come to plaintiffs until 1872. If they had known it as soon as it occurred, six years, under all the circumstances, was no unreasonable delay on their part, seeing that defendants had taken twenty years to perform one part of the contract, namely: to make partition.

In 1872, as soon as they learned that the partition had been made, the trustees attempted to assert their rights by an effort to revive the old chancery suit out of which the agreement arose. Being defeated in this, they commenced the present suit in March, 1876. We think that, on the face of the bill, plaintiffs are not barred by lapse of time. If there are other matters not shown in the bill, which would make that a bar, no injury can accrue to defendants by requiring them to show them by way of answer or plea.

It is said, however, in regard to the Sligo property, that the original contract is one of which a court of equity cannot enforce specific performance, because the price to be paid for it is not definitely fixed, and because a court of equity cannot enforce the agreement to submit that price to the award of arbitrators.

It cannot be successfully disputed that, in the general terms thus stated, this is the established equity doctrine. And if this was a case in which the plaintiffs had agreed to buy and the defendants to sell, the conveyance of the property and the actual payment of the price resting in covenants yet to be performed, the latter being the sole consideration of the former, the principle would be applicable to this case.

It is, however, quite otherwise in the matter before us. This particular clause was only one of many which adjusted longstanding and complicated transactions and compromised a vexatious litigation. Money was paid, and liens released, surety discharged, and suits settled by this agreement. Plaintiffs parted with rights and Carroll received value under it, the consideration of which was, at least in part, this clause about the Sligo estate.

The contract differs in another particular from the cases cited to show that it cannot be enforced. The doctrine there rests upon the ground that the court must be enabled to enforce the payment of the price simultaneously with compelling the conveyance, and it cannot do this by enforcing an arbitration. But in the case before us the price was already paid. The money was in Mr. Carroll's hands. The only thing to be done was to determine how much of his debt to the bank was to be satisfied by the conveyance. The case is, therefore, one in which the land was sold to the bank and the purchase money left in the hands of the vendor.

By the terms of the agreement, Carroll was to convey immediately after partition, and then the price was to be ascertained. If he had conveyed, as it was his duty to do, or if his heirs had conveyed as soon as they had made partition, the conveyance would not be rescinded because they could not agree upon the price or upon arbitrators. With the title in plaintiffs and the money in possession of defendants, a court would find a way to ascertain the credit to be allowed on Carroll's debt to the bank.

Another view is the probability that Carroll's debt as to everything else is barred, and that the debt is three or four times the value of this property. So that its valuation is a mere form, immaterial to either party.

In view of a court of equity, a contract for the sale of land is treated, says *Justice Story*, for most purposes, precisely as if it had been specifically performed. The vendee is treated as the owner of the land and the vendor as the owner of the money. The vendor is deemed, in equity, to stand seised of the land for the benefit of the purchaser, and the trust attaches to the land so as to bind the heir of the vendor. See, 1 *Story, Eq. Jur.*, sec. 790, and the cases there cited. Of course, the equity here stated is the stronger when the purchase money is actually in the hands of the vendor.

Nor is the principle inflexible that the court will not specifically enforce the contract where the price is not fixed or is left to be fixed by arbitration.

The case of *Cheslyn v. Dalby*, 2 *Younge & C.*, 170 (Exch. Ch.), is very much like the present. Cheslyn being indebted to Dalby in a large unliquidated sum, gave a deed of trust to Dalby for money borrowed at the time, with a stipulation that it should also stand as security for the unliquidated debt of Dalby to be afterwards ascertained by arbitration. Cheslyn having paid the principal sum secured by the deed of trust, brought suit for a reconveyance, and Dalby filed a cross-bill to have his debt paid out of the property before this was done. The objection was raised that this was in the nature of specific performance, and the amount being uncertain and no award having been made, it could not be done. But the objection was overruled.

Baron Alderson, says: "1. It is admitted there is some balance due to Thomas Dalby, and it is agreed that the estate is to be subject to a lien for that balance. But, secondly, there is also an agreement as to a specific mode of ascertaining that balance in case of dispute. Now, the latter has failed by events over which the parties had no control. But it seems to me, notwithstanding this, the former part remains entire, and if Mr. Cheslyn has admitted that there is a balance due, and has by a deed, executed under such circumstances as that it ought to be enforced, agreed that his estate should be subject to a lien for that balance, why am I to decree a reconveyance of the estate without compelling him to fulfill that part of the agreement?" It was, accordingly, referred to a master to state an account in which this unascertained balance of Mr. Dalby's debt should be included.

In the present case, Mr. Carroll made his agreement, in which a balance unascertained was admitted to be due; the land was to stand in part payment of this balance. Mr. Carroll died

before arbitrators could be appointed to fix the sum at which the estate should be taken. The demurrer admits all this.

The case of *Dinham v. Bradford*, L. R. 5 Ch. App., 519, is another case in which where one partner was, in a certain event, to take the partnership assets at a valuation to be ascertained precisely as in the case before us, Lord Hatherley said: "Here is a man who has had the whole benefit of the partnership in respect to which this agreement was made, and now refuses to have the rest of the agreement performed on account of the difficulty which has arisen. * * * If the valuation cannot be made *modo et forma* the court will substitute itself for the arbitrators."

So of the case before us. Carroll has had all the benefit of the agreement, in releasing property from liens, in paying his debt by his claims on others, and in a long indulgence, and now, because he has died without appointing arbitrators, his heirs say this part of the agreement must fail.

We think, on the whole, the demurrer should be overruled, and defendants put to their answer, and for this purpose the *decree of the court below is reversed, and the case remanded to it for further proceedings.*

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

ROBERT F. SILLIMAN ET AL., *Appts.*,
v.
UNITED STATES.

UNITED STATES, *Appts.*,
v.

ROBERT F. SILLIMAN ET AL.

(See S. C., 11 Otto, 465-471.)

Duress, what is not.

1. Where claimants executed a new contract to the Government in place of the old one, on the Government refusing to carry out the old one, they cannot recover the greater compensation provided by the old contract.

2. The hardships of particular cases should not induce the courts to disregard the long-settled rules of law.

[Nos. 194, 195.]

Argued Mar 12, 1880. Decided Apr. 5, 1880.

CROSS appeals from the Court of Claims.
The cases are stated by the court.

Statement of the case by *Mr. Justice Harlan*:

The case as set forth in the findings of fact is this:

In 1863, claimants were partners in trade, doing business in the City of New York, under the firm style of Silliman, Matthews & Co. At various times they executed with the United States, the latter represented by Major Van Vliet of the Quartermaster's Department, several charter-parties for barges of which they were owners. The barges were delivered to the Quartermaster's Department, and remained in service during the periods respectively set forth in See 11 Otto.

The petition. The claimants were paid at the charter rates up to and including the 31st of October, 1863.

On the 2d of June, 1863, the Quartermaster-General, by letter, instructed Quartermaster Van Vliet that all double-decked barges then in service and used for transporting cattle, horses, etc., should, from and after the first of that month, be made to conform to a standard of compensation at rates not to exceed \$4 per ton per month.

The owners of the barges, being notified by Van Vliet of the Quartermaster-General's instructions, replied that their barges were only measured as single-deck, and that the rate of \$4 per ton per month would not pay them unless they were allowed to measure the upper deck also, and that rather than accept the reduction they preferred to have their boats discharged.

This reply of the claimants having been communicated to the Quartermaster-General, he directed Major Van Vliet to discharge the barges from service as rapidly as he could procure others upon the terms just stated, and under a new form of charter-party prescribed by the Quartermaster-General.

In reply to this direction Major Van Vliet, on the 22d of July, 1863, informed the Quartermaster-General that it was impossible to obtain barges at New York at the rates indicated by the latter, taking the registered tonnage as the standard of measurement, which represented only their hold-measurement, and not their actual carrying capacity; and that compensation at the rate of \$4 per ton of actual carrying capacity would exceed that stipulated for in the then existing charter-parties.

From July 22, 1863, till December, 1863, no further correspondence took place in regard to the barges, and they remained in the service as before.

On the 10th of December, 1863, the Quartermaster-General instructed Major Van Vliet that the double-decked barges chartered by the latter must be brought within the price stated in the letter of June 2, 1863, and that no higher rate would be allowed for them from and after December 1, 1863.

This instruction having been communicated by Major Van Vliet to the claimants, the latter, on the 14th of December, having before them the form of the new charter-party which had been proposed by the Quartermaster-General, stated to Major Van Vliet, by letter, that, rather than sign the new charter-party they had decided to have their barges returned to them, and that they would not let them for \$4 per ton per month.

On the 28th of December, 1863, the Quartermaster-General issued a circular letter to several quartermasters and assistant quartermasters, among whom was Major Van Vliet, stating that no payments would be made for charter money for services rendered and due after March 31, 1863, under any other form of charter-party than that which had, on the last named date, been prescribed by the Quartermaster-General.

After the date of the last mentioned letter, one of the claimants, Silliman, went to Washington and demanded of the Quartermaster-General the return of the barges to the claimants at New York. That officer replied that the

Government could not spare them; and when Silliman remonstrated with him against their retention by the Government, the Quartermaster-General said the Government needed the barges and would keep them, and he declined to pay the arrears then due the claimants for their services under the original charter-parties. Thereafter the claimants made repeated calls on Maj. Van Vliet for arrearages of money, and were informed that he was ordered not to pay them any until they had made new charter-parties.

On the 8th of January, 1864, the claimants addressed a letter to the Secretary of War, complaining of the treatment they had received from officers under him, stating that two of them had gone to Washington and could find no person who would modify the new charter-party so that they might accept the terms that could be agreed upon, and adding the following words:

"We now complain as follows, viz.:

1. That we have requested that our barges be returned to New York and delivered to us as per charter-party, and have been refused.

2. That we have 'certificates of service' for November and December, 1863, and the Quartermaster at New York has orders not to pay until we make new charters, and we refuse to make them as the blank charters dictate, but are willing to make some concession in price if any person can be named here to negotiate.

3. We desire to sell, if we cannot have our barges or obtain money for their use, as we cannot meet our obligations to our captains and crews without money to do it, and hope you will act favorably for us at an early date."

On the 5th of March, 1864, the claimants wrote to the Quartermaster-General, proposing to accept the new charter-parties from the first of the month nearest the acceptance of the same, with certain modifications.

These modifications were accepted by the Quartermaster-General on the 19th of March, 1864, with the exception of the date offered for their taking effect, which he required should be on the 1st of April, 1863.

On the 23d of March, 1864, the claimants, by letter to the Quartermaster-General, said as follows:

"We have been paid to November 1, 1863, and if we have to go back to April 1, 1863, we shall have to stop payment, as we have depended on this money to keep along in our business.

* * * We have been told by other parties that they dated new charters from December 1, and we can see no reason that they should be favored above us. * * * We cannot go back to April 1, 1863."

To this letter the Quartermaster-General replied, on the 11th of April, 1864, that all charter-parties, without exception, executed to take effect December 1, 1863, for vessels in the service April 1, 1863, had been required to take effect from the latter date.

After this letter the claimant, Matthews, went to Washington and had interviews with the Quartermaster-General and other officers in his office, in which he again remonstrated, as had before been done by his partner, Silliman; to which the Quartermaster-General replied that they had laid down the rule and were determined that nothing else should be done until the new charter-parties had been executed; that

until that was done they would keep the barges and not pay for them. Said Matthews, during his visit to Washington, finally agreed with Colonel Clary, an officer in the Quartermaster-General's office, to make the new charter-parties, stating that they did so under protest and yielded to necessity; and insisting, after he had agreed to make them, that it was wrong to make new charter-parties.

On the 16th of May, 1864, in pursuance of Matthews' agreement, the new charter-parties were signed by the claimants and an officer of the Quartermaster's Department.

The compensation therein stipulated to be paid after October 31, 1863, was, from and after that date, from time to time paid to the claimants for each of the barges, and when each payment was made the claimants, without objection or protest, gave a receipt therefor as "in full of the above account."

The claimants, in their petition, assert claims against the United States for certain balances, computed upon the basis of the original charter-parties, after crediting the several sums received from time to time under the last agreements or charter-parties, which they claim to have been executed under compulsion, and not, therefore, binding upon them.

They also sue to recover damages alleged to have resulted from the use of the barges in a negligent and improper manner by the agents of the Government, and for injuries done to them while in the government service, not attributable to ordinary wear and tear.

The Court of Claims held claimants bound by the terms of the charter-parties last executed, but allowed a portion of the damages claimed.

Both parties appealed from the judgment.

Messrs. T. J. Durant and C. W. Hornor, for appellants.

Mr. Chas. Devens, Atty. Gen., for United States.

Mr. Justice Harlan delivered the opinion of the court:

The barges in question were delivered by claimants to the Government under the original charter-parties, binding the latter to pay for their use at an agreed rate, during such period as they were retained in its service. The Government was as much bound by the terms of the contracts as were the claimants, and no alteration thereof could take place without the assent of both contracting parties.

The Quartermaster's Department demanded that the claimants should execute new charter-parties, containing stipulations essentially different as to compensation, from those embodied in the contracts under which the Government obtained possession of the barges. It announced its purpose to retain possession and withhold all compensation, unless and until the claimants executed the proposed new charter-parties. In other words, the department informed claimants that it would not comply with the provisions of the original contracts unless the claimants would submit to material alterations against their interests and to the advantage of the Government. Claimants distinctly refused to give their assent to the proposed alterations, and asked that the barges be returned. But this reasonable request was not complied with by the agents of the Government. Their conduct

was in plain violation of the rights of the claimants.

Had the claimants stood upon their contract rights, it is perfectly clear that the Government could have been compelled to pay the amount stipulated in the original contracts to be paid for the use of the barges. The claimants could have sued for each installment of rent as it became due, or when the Government returned the barges they could have sued, as they now sue, for the whole amount due under the original charter-parties. They had a full and complete remedy by suit against the Government, in the Court of Claims, for the enforcement of their rights under those contracts. That court had then, as it has now, jurisdiction to hear and determine all claims founded upon contracts, express or implied, with the United States. Its final judgments, sustaining such claims, were then as now made payable out of any general appropriation by law for the satisfaction of private claims against the Government.

Instead, however, of seeking the aid of the law, claimants, with a full knowledge of their legal rights, executed new charter-parties and, from time to time, received payments according to the rates prescribed therein; protesting, when the new agreements were signed, that they were executed against their wishes and under the pressure of financial necessity. They now seek the aid of the law to enforce their rights under the original charter-parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretense that a refusal, on their part, to accede to the illegal demand of the Quartermaster's Department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charter-parties. Nor were those charter-parties executed for the purpose, or as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract.

We are aware of no authority in the text books or in the adjudged cases to justify us in holding that the last charter-parties were executed under duress. There is present no element of duress, in the legal acceptance of that word. The hardships of particular cases should not induce the courts to disregard the long settled rules of law.

The case is one which, in some aspects, appeals strongly to the sense of justice of the Government, which cannot afford to reap the fruits of an arbitrary abrogation by its officers, of valid, binding contracts made in its name with the citizen. If, in view of the condition of the country during the recent war, the claimants were unwilling to embarrass or imperil the operations of the Government by contests in the courts as to property which, possibly, was needed by the military department for supply-

See 11 Otto. U. S., Book 25.

ing the necessities of our army, these facts only strengthen the claim of appellants to relief. But that relief must come from the Legislative and not from the Judicial Department.

We perceive no error in the judgment, and it is affirmed as to all parties.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—8 N. W., Rep., 514.

PORTIA GAGE, *Appt.*,

v.

PATRICK CARRAHER.

Remanding to State Court, of case removed.

A case which has been removed from a State to a Federal Court, will be remanded to the State Court, where part of the defendants are citizens of the same State with the plaintiff, and the controversy is not wholly between citizens of different States.

[No. 245.]

Submitted Apr. 6, 1880. Decided Apr. 12, 1880.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The question decided is stated by the court. *Messrs. Henry D. Beam and Augustus N. Gage*, for appellant.

Messrs. James E. Munroe and W. C. Gowdy, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

The order, *remanding this cause to the State Court*, is affirmed, on the authority of *Meyer v. Construction Co.* [ante, 593]. Carraher occupies one side of the controversy about which the suit is brought (that is to say, the title to the property in question), and Portia Gage, Henry H. Gage and John Forsythe the other. Henry H. Gage and Forsythe are citizens of the same State with Carraher. There is no controversy in the suit, which is wholly between citizens of different States, and which can be fully determined as between them.

FRANK J. BOWMAN, *Plff. in Err.*,

v.

EDWARD A. LEWIS ET AL., Judges of the St. Louis Court of Appeals.

(See S. C., "*Mo. v. Lewis*," 11 Otto, 22-33.)

Fourteenth constitutional Amendment—its construction and intent—laws and remedies—different courts in same State.

*1. The equality clause in the 1st section of the Fourteenth Amendment, viz.: that which prohibits any State from denying to any person the equal protection of the laws, contemplates the protection of persons, against unjust discriminations by a State; it has no reference to territorial or municipal arrangements made for different portions of a State.

2. It was not intended to prevent a State from arranging and parceling out the jurisdiction of its several courts as it sees fit, either as to territorial limits, subject-matter or amount, or the finality of their several judgments or decrees.

*Head notes by *Mr. Justice BRADLEY*

3. Each State has full power to make political subdivisions of its territory for municipal purposes, and to regulate their local government, including the constitution of courts, and the extent of their jurisdiction.

4. A State may, if it pleases, establish one system of law in one portion of its territory, and another system in another; provided, always, that it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, nor deprive any person of his rights without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws in the same district.

5. By the Constitution and laws of Missouri, a court called the St. Louis Court of Appeals has exclusive jurisdiction, in certain cases, of all appeals from the circuit courts in St. Louis and some adjoining counties; the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State. This adjustment of appellate jurisdiction is not forbidden by anything contained in the 14th Amendment.

[No. 904½.]

Argued Mar. 3, 1880. Decided Apr. 12, 1880.

IN ERROR to the Supreme Court of the State of Missouri.

The case is stated by the court.

Messrs. Frank J. Bowman, in person, and *David Wagner, Hiram J. Grover, J. S. Black, Geo. F. Edmonds* and *C. C. Simmons*, for plaintiff in error:

The record in this case shows that in the State of Missouri there is a denial of equal justice before the courts; remedial rights and privileges granted to a large portion of its citizens are denied to others; the citizens residing in one hundred and nine counties of the State enjoy the right and privilege of an unrestricted appeal to the Supreme Court of the State, and at the same time, in like cases, the right of appeal is denied to the citizens of the State residing in four of the counties in the easterly portion of the State, as also to those residing in the City of St. Louis.

It cannot be answered that the right and privilege of a hearing before the St. Louis Court of Appeals is a full equivalent for the deprivation of a hearing before the Supreme Court of Missouri; for the superiority of the wisdom and power of the latter, is recognized in the State Constitution, by giving to it superintending control over all other State Courts, and in some instances a right of appeal from the St. Louis Court of Appeals.

The duty of the State, under a republican form of government, to give equal remedial rights, is as imperative as that it impose equal burdens and obligations.

Vanant v. Waddel, 2 Yerg., 270; *Reynolds v. Baker*, 6 Cold., 221; *Walley v. Kennedy*, 2 Yerg., 554; *Bk. v. Cooper*, 2 Yerg., 621.

The right of the People of the State to provide by constitutional provisions for the establishment of intermediate appellate courts throughout the State is unquestionable; but to allow to a large portion of the citizens of the State, the remedial right and privilege of a hearing and adjudication of all questions concerning their legal rights and privileges before the Supreme Court of the State, and deny to other citizens of the State the same privilege, is in plain violation of the fundamental principle of perfect equality, recognized and guaranteed by the provisions of the Constitution of the United States.

Const., art. 4, sec. 4; Const. 14th Amend.; *Budd v. State*, 3 Humph., 490; *Vanant v. Waddel*, 2 Yerg., 270; *Jones v. Perry*, 10 Yerg., 59; *Bk. v. Cooper* (Special Court at Nashville), 2 Yerg., 599.

The provisions of the Constitution of Missouri herein complained of are without precedent. In no other State Constitution now in force can any similar provision be found.

If the plaintiff in error was of African descent, and the Constitution of Missouri prohibited any negro from appealing to the Supreme Court of the State for a redress of injuries, we apprehend that no doubt would be entertained that such a provision was a denial of the "equal protection of the laws," and in violation of the 14th Amendment of the Constitution of the United States, and this court would not hesitate to so decide.

Slaughter-House Cases, 16 Wall., 72 (83 U. S., XXI., 407).

The discrimination complained of in this case is not against the negro, but is against a class or portion of the citizens of the State of Missouri, equally entitled to protection from wrongful and unconstitutional discrimination and oppression of the dominant majority. These citizens of St. Louis are clearly entitled to as full a protection of their constitutional rights of equality before the courts of the State as though of African descent. To contend otherwise, and insist that protection of the constitutional right of equality before the law was alone guaranteed to persons of African descent by the adoption of the 14th Amendment, would lead to the inconsistent conclusion, that the very Amendment of the Constitution which sought to establish equality before the law, established inequality by giving preference to the rights of the negroes, in affording them a superior protection.

Bk. v. Okely, 4 Wheat., 244; *Munn v. Ill.*, 94 U. S., 125 (XXIV., 84).

Messrs. Henry Hitchcock and Chester H. Krum, for defendants in error:

The only right here said to have been denied to plaintiff in error, is the alleged right of appeal to a particular court. But due process of law does not in any case include a right of appeal as such, but only due notice and opportunity to be heard according to the settled course of judicial proceedings in such cases.

1. The right of appeal in any case, from or to any court, depends exclusively on the jurisdiction of such court, conferred by Constitution or statute, subject to constitutional provisions. The nature and extent of such jurisdiction in state courts rests exclusively in the discretion of the Legislature, and may be conferred or withdrawn at its pleasure, so that vested rights be not thereby impaired. It is matter of remedy, not of right, and is within the exclusive province of state legislation.

Ex parte McCordle, 7 Wall., 514 (74 U. S., XIX., 265); *Sharp v. Robertson*, 5 Gratt., 604-606; *Cooley*, Const. Lim., 361, and cases cited.

2. "Due process of law" never was held anywhere to include a right of appeal in any proceeding from any court, where due notice and opportunity was given for "hearing before condemnation, and judgment before seizure." This court has lately declared that it is not denied in any case where a party deprived of his property has had, "By the laws of the State, a fair

trial in a court of justice, according to the modes of proceeding applicable to such a case." It does not even include the right of trial by jury in the state courts, and in those courts is regulated by the law of the State, as there expounded.

Davidson v. New Orleans, 96 U. S., 105 (XXIV., 620); *McMillan v. Anderson*, 95 U. S., 41 (XXIV., 335); *Kennard v. La.*, 92 U. S., 480 (XXIII., 478); *Murray v. Hoboken, L. & I. Co.*, 18 How., 280 (59 U. S., XV., 376); *Walker v. Sauvinet*, 92 U. S., 93 (XXIII., 679).

It is absurd to contend that due process of law includes the right of appeal; seeing that, although the 5th Amendment, requiring due process of law in the Federal Courts, has been in force since the foundation of the government, yet from the beginning until now the right of appeal from the circuit courts has been denied without question, not only in civil cases involving less than \$2,000, now increased to \$5,000, but to every person convicted of, and executed for, a capital crime. The same words now applied to the States by the 14th Amendment, have the same meaning.

Davidson v. New Orleans, 96 U. S., 103 (XXIV., 619); *U. S. v. Cruikshank*, 92 U. S., 554 (XXIII., 592); *Slaughter-House Cases*, 16 Wall., 80 (83 U. S., XXI., 409); *Bk. v. Okely*, 4 Wheat., 244.

3. The provisions of the Missouri Act concerning attorneys, under which plaintiff in error was disbarred, include every element recognized by this court in *Kennard v. La.*, as together satisfying the constitutional requirement of "due process of law," including a hearing on appeal; although the Missouri Constitution provides a different appellate court for certain different classes of cases. And the decisions of the St. Louis Court of Appeals and the Missouri Supreme Court, appearing in the record, are of themselves conclusive in this court, unless shown to be contrary to the cited provisions of the United States Constitution.

Kennard v. La. (supra); *Walker v. Sauvinet, (supra)*; *McMillan v. Anderson (supra)*.

The provisions of section 12, article VI., of the Missouri Constitution, do not deny, to any person affected thereby, the equal protection of the laws of Missouri, in any case within those provisions.

1. This provision of the 14th Amendment is held by this court to be so clearly intended for the protection of the African race, that a strong case of state oppression, by denial of equal justice in its courts, would be necessary for its application to any other.

Slaughter-House Cases, 16 Wall., 81 (83 U. S., XXI., 410).

2. The question before this court is not whether, by the judgment of the circuit court, disbarring plaintiff in error, or by that of the Court of Appeals affirming that judgment, a wrong was done to him by reason of any error, irregularity or false judgment in that proceeding; but solely whether the law of Missouri touching the disbarment of attorneys, if followed, would have furnished plaintiff in error the protection guaranteed by the Constitution, namely: a protection in respect of his privilege to practice as an attorney in the courts of Missouri, equal to that afforded by the general laws of that State to any other person having the like privilege under like circumstances.

See 11 OTTO.

Kennard v. La. (supra).

3. The cases from Tennessee cited in plaintiff's brief furnish precisely the test above suggested, for equal laws, as compared with unequal, partial or oppressive ones.

The reiterated assertion which constitutes the plaintiff's brief, to the effect that the cited provisions of the Missouri Constitution deny to persons residing in certain portions of the State, "remedial rights and privileges" granted to residents of all other portions, is a completely erroneous representation of those provisions.

No one within the jurisdiction of the State of Missouri is thereby, in any case whatever, denied a writ of error from or an appeal to the Supreme Court of Missouri on the ground of his residence, nor on any other ground which is or may not be applicable to any other person in the State of Missouri, in like circumstances and situation.

The power to create and define the jurisdiction of the several courts of justice of any State, and to determine what shall be the procedure therein, is within the exclusive control of such State. Due process of law, in any State, is such process as, under the general laws thereof, is provided in the settled course of judicial proceedings. Even in suits at common law, it need not include a trial by jury.

Walker v. Sauvinet (supra).

The assertion in the brief for plaintiff in error, that the provisions of the Missouri Constitution here complained of are without precedent, is singularly incorrect, unless so literally meant as to be unworthy of notice.

Mr. Justice Bradley delivered the opinion of the court:

This is a writ of error to the Supreme Court, of Missouri, brought by Frank J. Bowman, the plaintiff in error, to reverse a judgment of that court refusing to issue a *mandamus* to the St. Louis Court of Appeals, consisting of the three Judges named as defendants in error. The object of the *mandamus* applied for by Bowman was to compel the St. Louis Court of Appeals to grant his application for an appeal from a judgment of said court to the said Supreme Court of Missouri, which application had been refused. The judgment which he complained of was an affirmance of a judgment previously given by the Circuit Court of the City of St. Louis removing him from practice at the bar.

By the Constitution and laws of Missouri, an appeal lies to the Supreme Court of that State from any final judgment or decree of any circuit court, except those in the Counties of St. Charles, Lincoln, Warren and St. Louis, and the City of St. Louis; for which counties and city the Constitution of 1875 establishes a separate court of appeal, called the St. Louis Court of Appeals, and gives to said court exclusive jurisdiction of all appeals from and writs of error to the circuit courts of those counties and of said city; and from this court, the St. Louis Court of Appeals, an appeal lies to the Supreme Court only in cases where the amount in dispute, exclusive of costs, exceeds the sum of \$2,500, and in cases involving the construction of the Constitution of the United States or of Missouri, and in some other cases of special character which are enumerated. No appeal is given to the Supreme Court in a case like the

present arising in the counties referred to, or in the City of St. Louis; but a similar case arising in the circuit courts of any other county would be appealable directly to the Supreme Court.

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the 14th Amendment of the Constitution of the United States, because it denies to suitors, in the courts of St. Louis and the counties named, the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

If this position is correct, the 14th Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only \$5 could, with equal propriety, complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

If, however, we take into view the general objects and purposes of the 14th Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The Amendment could never have been intended to prevent a State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "No State shall deny to any person within its jurisdiction the equal protection of the laws." It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States; and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in

like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts; one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto.

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions; trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State Government if it could not, in its discretion, provide for these various exigencies.

If a Mexican State should be acquired by treaty and added to an adjoining State or part

of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the 14th Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction.

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as or might have the effect of a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance.

It is apparent, from the view we have taken of the import and effect of the equality clause of the 14th Amendment, which has been relied upon by the plaintiff in error in this case, that it cannot be invoked to invalidate that portion of the judicial system established by the Constitution and laws of Missouri, which is the subject of complaint. This follows without any special examination of the particular adjustment of jurisdictions between the courts of Missouri as affected by its Constitution and laws. Such a special examination, however, if it were our province to make it, would readily show that there is no foundation for the complaint which has been made. The plaintiff in error has had the benefit of the right of appeal to the full extent enjoyed by any member of the profession in other parts of the State. In the outside counties they have but one appeal, from the Circuit Court to the Supreme Court. In St. Louis, he had the benefit of an appeal from the Circuit Court of St. Louis County to the St. Louis Court of Appeals. This is as much as he could ask, even if his rights of appeal were to be nicely measured by the right enjoyed in the outside counties. The Constitution of the State has provided two courts of appeal for different portions of its territory: the St. Louis Court of Appeals for one portion, and the Supreme Court for another portion. It is not for us, nor for any other tribunal, to say that these courts do not afford equal security for the due administration of the laws of Missouri within their respective jurisdictions. Where the decisions of the St. Louis Court of Appeals are final, they are clothed with all the majesty of the law which surrounds those of the Supreme Court. If, in certain cases, a still further appeal is allowed from the one court to the other, this fact does not derogate in the least from the credit and authority of those decisions of the former which, by the Constitution and laws of the State, are final and conclusive.

But this special consideration is an accidental phase of the particular case. The true ground on which the case rests is the undoubted power of the State to regulate the jurisdiction of its own tribunals for the different portions of its territory in such manner as it sees fit, subject only to the limitations before referred to; and our conclusion is that this power is unaffected

by the constitutional provision which has been relied on to invalidate its exercise in this case.

The judgment of the Supreme Court of Missouri is affirmed.

Cited—104 U. S., 80; 68 Ala., 64; 44 Am. Rep., 133.

AMOSKEAG MANUFACTURING COMPANY, *Appl.*,

v.

DAVID TRAINER ET AL., Trading as D. TRAINER & SONS.

(See S. C., 11 Otto, 51-67.)

Trade-mark—right to—restraining use of.

1. The object of a trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied.

2. A right to the exclusive use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired.

3. Where a label, used by the defendants, is not calculated to mislead purchasers as to the origin of the goods to which it is attached, and does not resemble the device of the complainant, except both have the letters "A, C, A," in their center, a bill to restrain defendants from the use of it cannot be sustained.

[No. 112.]

Argued Dec. 17, 1879. Decided Apr. 12, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. Geo. M. Dallas and Jas. E. Gown, for appellant.

Messrs. E. G. Platt, Samuel Dickson and John C. Bullitt, for appellees.

Mr. Justice Field delivered the opinion of the court:

This is a suit in equity to restrain the defendants from using on ticking manufactured and sold by them the letters "A, C, A," in the sequence here named, alleged by the complainant to be its trade-mark, by which it designates ticking of a particular quality of its own manufacture; and to compel the defendants to account for the profits made by them on sales of ticking thus marked.

It appears that the complainant, a Corporation created under the laws of New Hampshire, commenced the manufacture of ticking at Amoskeag Falls, in that State, some time prior to 1834, and marked its products with a label or ticket consisting of a certain device, within which were printed, in red colors, the name of the Company, its place of manufacture, the words "Power Loom," and in the center the single letter "A" or "B" or "C" or "D," according to the grade of excellence of the goods, the first quality being indicated by the first letter and the decreasing quality from that grade by subsequent letters in the alphabet. The device, apart from the words mentioned, was a fancy border in red colors, square outside and elliptical within, and the words in the upper and lower lines of the label were printed in a line corresponding with the inside curve of the border.

NOTE.—Trade-marks; when an injunction will be granted restraining the unauthorized use of. See note to *McLean v. Fleming*, 96 U. S., XXIV., 328.

In the year 1834, or about that time, the Company introduced an improvement in its manufacture, by which it produced a grade or quality of ticking superior to any which it had previously manufactured. For goods of this quality it used in its label or ticket, in place of the single letter A, the three letters A, C, A. The original device, with its colored border and printed words, indicating the company by which and the place where the goods were manufactured was retained; the only alteration consisting in the substitution of the three letters A, C, A, in place of the single letter A. Subsequently the Company changed its place of manufacture from Amoskeag Falls to Manchester, in the same State, and a corresponding change was then made in the label. The three letters mentioned were placed in the label or ticket on all goods of the very highest quality manufactured by the complainant, the single letter being retained in the labels placed on other goods to indicate a lower grade or quality. The combination of the three letters was probably suggested, as is stated, by the initials of the words in the Company's name, Amoskeag Company, with the letter A previously used, to denote the best quality of goods it manufactured. It is contended by the complainant that the combination was adopted and used to indicate, not merely the quality of the goods, but also their origin as of the manufacture of the Amoskeag Company. It is upon the correctness of this position that it chiefly relies for a reversal of the decree dismissing the bill.

On the part of the defendants the contention is, that the letters were designed and are used to indicate the quality of the goods manufactured and not their origin; that it was so adjudged many years ago in a case to which the Company was a party in the Superior Court of the City of New York, which adjudication has been generally accepted as correct, and acted upon by manufacturers of similar goods throughout the country; and that the letters, as used by the defendants on a label or ticket having their own device, and in connection with words different from those used by the complainant, do not mislead or tend to mislead anyone as to the origin of the goods upon which they are placed.

The general doctrines of the law as to trade-marks, the symbols or signs which may be used to designate products of a particular manufacture, and the protection which the courts will afford to those who originally appropriated them, are not controverted. Everyone is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. The symbol or device thus becomes a sign to the public of the origin of the goods to which it is attached, and an assurance that they are the genuine article of the original producer. In this way it often proves to be of great value to the manufacturer in preventing the substitution and sale of an inferior and different article for his products. It becomes his trade-mark, and the courts will protect him in its exclusive use, either by the imposition of damages for its wrongful appropriation or by restraining others from applying it to their goods and compelling

them to account for profits made on a sale of goods marked with it.

The limitations upon the use of devices as trade-marks are well defined. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose either to the manufacturer or to the public; it would afford no protection to either, against the sale of a spurious in place of the genuine article. This object of the trade-mark and the consequent limitations upon its use are stated with great clearness in the case of *Canal Co. v. Clark*, reported in the 13th Wallace, 311 [80 U. S., XX., 581]. There the court said, speaking through *Mr. Justice Strong*, that "No one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could the public would be injured, rather than protected, for competition would be destroyed. Nor can a generic name or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection." And a citation is made from the opinion of the Superior Court of the City of New York in the case of the present complainant against Spear, reported in the 2d of Sandford, 599, that "The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth and, therefore, have an equal right to employ for the same purpose.

Many adjudications, both in England and in this country, might be cited in illustration of the doctrine here stated. For the purpose of this case, and in support of the position that a right to the exclusive use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed cannot be acquired, it will be sufficient to refer, in addition to the decisions mentioned in Wallace and Sandford, to the judgment of the Vice-Chancellor in *Raggett v. Hindlater*, where an injunction to restrain the use by the defendants upon their trade label of the term "nourishing stout," which the plaintiff had previously used, was refused on the ground that "nourishing" was a mere English word denoting quality. L. R., 17 Eq., 29. Upon the same principle, letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation; but are open to use by anyone, like the adjectives of the language.

If, now, we apply the views thus expressed to the case at bar, we shall find the question involved to be of easy solution. It is clear from the history of the adoption of the letters A, C, A,

as narrated by the complainant, and the device within which they are used, that they were only designed to represent the highest quality of ticking which is manufactured by the complainant, and not its origin. The device previously and subsequently used stated the name of the manufacturer, and no purpose could have been subserved by any further declaration of that fact. And, besides, the letters themselves do not suggest anything, and require explanation before any meaning can be attached to them. That explanation when made is, that they are placed in the device of the Company when it is affixed to the finest quality of its goods, while single letters are used in the same device when it is attached to goods of an inferior quality. They are never used by themselves, but merely as part of a device containing, in addition to the border in red, several printed terms. Alone, the letters convey no meaning; they are only significant as part of the general device constituting the trade-mark. Used in that device to denote only quality, and so understood, they can be used by others for a similar purpose equally with the words "superior" or "superfine," or other words or letters or figures having a like signification.

We are aware that there is in the record the testimony of several witnesses to the effect that they understood that the letters were intended to indicate the origin as well as the quality of the goods to which they were attached, but it is entirely overborne by the patent fact that the label previously disclosed the name in full of the manufacturer and by the history of the adoption of the letters, as narrated by the complainant. As it was pertinently observed in the case in Sandford, if purchasers of the ticking read the name of the company, the letters can give no additional information, even if it be admitted that they are intended to indicate the name of the company. And if they do not read the name as printed, the letters are unintelligible. If an explanation be asked of their purpose in the label, the only reasonable answer which can be given is the one which corresponds with the fact that they are designed merely to indicate the quality of the goods.

But there is another and equally conclusive answer to the suit. The label used by the defendants is not calculated to mislead purchasers as to the origin of the goods to which it is attached. It does not resemble the device of the complainant. Its border has a different figure; it is square outside and inside. It has within it the words "Omega" and "Ring Twist," as well as the letters "A, C, A." Neither the name of the complainant, nor of the place where its goods are manufactured, nor the words "Power Loom," are upon it. The two labels are so unlike in every particular, except in having the letters A, C, A, in their center, that it is impossible that anyone can be misled in supposing the goods, to which the label of the defendants is attached, are those manufactured by the complainant. The whole structure of the case thus falls to the ground. There is no such imposition practiced upon the public and no such fraud perpetrated upon the manufacturers, in attempting to dispose of the goods of one as those of another, as to call for the interposition of a court of equity.

The decree of the Circuit Court is, therefore, affirmed.

See 11 OTTO.

Mr. Justice Clifford, dissenting:

Symbols or devices used by a manufacturer or merchant to distinguish the products, manufactures or merchandise which he produces, manufactures or sells, from that of others, are called and known by the name of trade-marks. They are used in order that such products, manufactures or merchandise may be known as belonging to the owner of the symbol or device, and that he may secure the profits from its reputation or superiority. 15 Am. Cyclopaedia, 832.

Equity courts, in all civilized countries, have for centuries afforded protection to trade-marks, the object of such protection being not only to secure to the individual the fruits of his skill, industry and enterprise, but also to protect the public against fraud.

Property in a trade-mark is acquired by the original application to some species of merchandise or manufacture of a symbol or device, not in actual use, to designate articles of the same kind or class.

Devices of the kind, in order that they may be entitled to protection in a court of equity, must have the essential qualities of a lawful trade-mark; but if they have, the owner becomes entitled to its exclusive use within the limits prescribed by law, the rule being that he who first adopts such a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to which its use has been applied by himself or his agents.

Prior use is essential to any such exclusive claim, as the right to protection begins from such actual prior use; nor does the right to protection extend beyond the actual use of the device. Hence the use of it on one particular article of manufacture or merchandise will not prevent another from using it on another and different class of articles, the rule being strictly applied that the right to protection in equity is limited to the prior use of the symbol by the owner.

Sufficient appears, to show that the plaintiffs, at an early period in the fourth decade of the present century, engaged in the manufacture of a fabric known as ticking of various grades and quality; and that, subsequently, they made a valuable improvement in the mode of manufacturing the fabric, which enabled them to produce a very superior article. Before the introduction of the improvement they had been in the habit of marking their products in that species of manufacture with one of the first four letters of the alphabet, to designate the different grades of their manufacture when offered for sale in the market. Thirty-four years ago or more they introduced the new improvement in the manufacture of the fabric, and adopted the distinctive trade-mark, of which a fac-simile is exhibited in the transcript. When examined, it will be seen that it consists of the corporate name of the complainants, with a rough engraved surrounding, and the letters A, C, A, plainly and conspicuously printed in the center of the circular outside edge.

Conclusive proof is exhibited that the peculiar combination of letters adopted by the complainants as a symbol of trade originated with them, and that it suggested itself to them as comprising the initial letters of their familiar corporate name, with the addition of the letter A at the close, which had previously been used

by them as indicating the best quality of the fabric manufactured by them before they made the alleged improvement.

Single letters of the kind are frequently used as a mark of quality; but the proofs in this case show, to a demonstration, that the peculiar combination of letters adopted by the complainants at the period mentioned were not adopted to denote quality merely, but as an appropriate and distinguishing trade-mark, symbol or device, to indicate to the public and to purchasers that the fabric which bears the mark was of the manufacture of the Manufacturing Company of the complainants. Beyond all doubt they adopted the symbol or device and affixed it to the fabric of their trade to indicate the origin and ownership of the article.

Few manufactured products bear, in their own external appearance, sufficient evidence of their real character to protect the purchaser against fraudulent imitations. Integrity in manufacture and uniformity in quality are high recommendations to purchasers, and manufactured goods falling within that category are much preferred, both by the purchasers and consumers of the same; and when, by long experience, the public have learned to associate these elements of recommendation with a special symbol or brand, the wide and profitable sale of the articles bearing the same is assured, and the exclusive possession and use of the symbol or brand becomes of great value to the real owner. Purchasers are also interested that such a trade-mark should receive protection, as it is a guaranty of genuineness, and its value is proportioned to the business reputation of the owners of the same and of the excellence of their manufactures. 4 Johns. Cyclopaedia, part II., p. 916.

Infringement by the respondents is charged, and the complainants pray for an injunction and for an account. Service was made, and the respondents appeared and set up various defenses, as follows: (1) That the alleged trade-mark was never designed or used as such, but merely to designate one of the grades of the fabric which the complainants manufactured. (2) That the complainants are estopped by a prior decision of a court of competent jurisdiction to set up that the alleged symbol is a trade-mark. (3) They admit that they mark their goods with the letters A, C, A, but they deny that the mark is fraudulent or that it is calculated to deceive the public. (4) They deny that their conduct is in the slightest degree fraudulent or inequitable, or that the sale of their goods injures the complainants.

Proofs were taken, hearing had, and the circuit court entered a decree dismissing the bill of complaint. Prompt appeal was taken by the complainants to this court, and they assign the following causes of error: (1) That the circuit court erred in entering a decree dismissing the bill of complaint. (2) That the court erred in not granting the injunction as prayed. (3) That the court erred in not decreeing that the complainants are entitled to an account. (4) That the court erred in not sustaining the bill of complaint.

Attempt is made in argument to show that the symbol of the complainants was not adopted by them for any other purpose than to designate the grade or quality of the fabric

which they manufacture and sell in the market; but it is a sufficient answer to that proposition to say that it is wholly unsupported by evidence, and is decisively overthrown by the proof introduced by the complainants.

Words or devices, or even a name in certain cases, may be adopted as a trade mark which is not the original invention of the party who appropriates the same to that use. Phrases, or even words or letters in common use, may be adopted for the purpose, if at the time of their adoption they were not employed by another to designate the same or similar articles of production or sale. Stamps or trade-marks of the kind are employed to point to the origin, ownership or place of manufacture or sale of the article to which it is affixed, or to give notice to the public who is the producer, or where it may be purchased. *Canal Co. v. Clark*, 13 Wall., 311, 322 [80 U. S., XX., 581, 583].

Subject to the preceding qualifications, a trade-mark may consist of a name, symbol, figure, letter, form or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, or to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry and fidelity. *Upton, Trade-Mark*, 9; *Taylor v. Carpenter*, 2 Sandf. Ch., 603.

Brands or stamps called trade-marks, says Waite, may consist of a name, figure, letter, form or device adopted and used by a manufacturer or merchant in order to designate the goods that he manufactures or sells, and to distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise. 6 Waite, Actions and Defenses, 21.

Such a manufacturer or merchant who first adopts such a trade-mark, and is accustomed to affix the same to a particular fabric of his manufacture or sale to distinguish it from all others, has a property in it, and may maintain an action for damages if used by another, or he may restrain another from using it by application to a court of equity. *Hall v. Barrows*, 4 De G. J. & S., 149, 156; *S. C.*, 12 W. R., 322, 323.

Judicial protection is granted in such a case upon the ground that the honest, skillful, industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, mark, device or symbol which serves to distinguish it as his, and from that of all others, shall receive the first reward of his honesty, skill or enterprise, and shall in no manner and to no extent be deprived of the same by another who to that end appropriates the same or a colorable imitation of the same to his production, so that the public are or may be deceived or misled. *Wolfe v. Barnett*, 24 La. Ann., 97; *Newman v. Alvord*, 51 N. Y., 189, 196; *Lee v. Haley*, L. R., 5 Ch. App., 155; *Blackwell v. Wright*, 73 N. C., 310, 313.

Nothing can be better established, says the Master of the Rolls, and nothing ought to be otherwise than fully established in a civilized

country, than that a manufacturer is not entitled to sell his goods under the false representation that they are made by a rival manufacturer. *Singer Mfg. Co. v. Wilson*, L. R., 2 Ch. Div., 434, 440; *Browne, Trade-Marks*, sec. 385; *Osgood v. Allen*, 1 Holmes, 185, 194.

When we consider, says Duer, the nature of the wrong that is committed when the right of property in a trade-mark is invaded, the necessity for the interposition of a court of equity becomes more apparent. He who affixes to his own goods an imitation of an original trade-mark, by which those of another are distinguished and known, seeks, by deceiving the public, to divert to his own use the profits to which the superior skill and enterprise of the other had given him an exclusive title, and endeavors by a false representation to effect a dishonorable purpose by committing a fraud upon the public and upon the true owner of the trade-mark. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf., 599, 605; *Collins Co. v. Brown*, 3 Kay & J., 423, 428.

Thirty years and more before the suit was commenced, the plaintiff Company adopted the trade-mark in question and affixed the same to their improved manufacture of ticking, and it appears from the evidence that they have continuously, from that date to the day the bill of complaint was filed, used the same as the symbol to designate that peculiar manufacture, which of itself is sufficient to show, if anything in the nature of proof can be, that the first defense set up in the answer ought to be overruled.

2. Much discussion of the second defense cannot be required, as the statement of the proposition that the complainants are estopped to ask relief in this case because they were partially unsuccessful in a prior suit against another party, is quite sufficient for its refutation. Neither argument nor authority is necessary to show that it has no foundation in law or justice, and it is equally clear that the supposed analogy between an admiralty decree *in rem* and a decree dismissing a bill in equity for the invasion of a trade mark is illusory, unfounded, and without the slightest legal effect.

Suppose that is so; still the respondents deny that the trade-mark which they use is in the slightest degree fraudulent, or that it is calculated to deceive the public. They admit that they use the letters A, C, A, but they deny that in any other respect they have used the trade-mark adopted by the complainants.

Manufacturers and merchants have severally the unquestioned right to distinguish the goods they manufacture or sell by a peculiar mark or device, so that the goods may be known in the market as the product or sale of the owner of the trade-mark or device, in order that they may thus secure the profits which the superior repute of the goods may be the means of giving to the producer or seller. *Gillott v. Esterbrook*, 48 N. Y. 374, 376.

Confirmation of that proposition is found in all the reported cases, and it is equally true that the owners of such trade-marks are entitled to the protection of a court of equity in the exclusive use of the symbols they have thus adopted and affixed to their goods, the foundation of the rule being that the public interest, as well as the interest of the owner of the trade-

mark, requires that protection. 2 Story, Eq. Jur., sec. 951.

Such a party has a valuable interest in his trade or business, and having appropriated a particular label or trade-mark indicating to those who wish to give him their patronage that the article is made or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good-will of his customers or of the patrons of his trade or business by sailing under his flag without his authority or consent. *Partridge v. Menck*, 2 Barb. Ch., 101.

Redress is given in such cases upon the ground that the party charged is not allowed to offer his goods for sale, representing them to be the manufacture of the first and real owner of the trade-mark, because by doing so he would be guilty of a misrepresentation, and would deprive the real owner of the profits he might make by the sale of his goods which the purchaser intended to buy.

Compensation for such an injury was in early times given to the injured party by an action of deceit at common law, long before the Court of Chancery attempted to exercise jurisdiction to grant relief for such wrongful acts. In such an action it is, doubtless, true that the plaintiff is required to allege that the party charged infringed the trade-mark with a fraudulent intent, and to prove the charge as alleged, in order to secure a verdict and judgment for redress. Certain early cases in equity may be found where it is held that it is requisite that the allegation and proof in a chancery suit should be the same; but the practice in equity has long been settled otherwise, the rule now being that the injury the owner of the trade-mark suffers by the offering for sale in the market of other goods side by side with his, bearing the same trade-mark, entitles the real owner of the trade-mark to protection in equity, irrespective of the intent of the wrong-doer, it being held that the injury done to the complainant in his trade by loss of custom is sufficient to support his title to relief.

Neither will the complainant be deprived of remedy in equity, even if it be shown by the respondent that all the persons who bought goods from him bearing the trade-mark of the real owner were well aware that they were not of the complainant's manufacture. If the goods were so supplied by the wrong-doer for the purpose of being resold in the market, the injury to the complainant is sufficient to entitle him to relief in equity.

Nor is it necessary, in order to entitle the party to relief, that proof should be given of persons having been actually deceived, or that they bought goods in the belief that they were of the manufacture of the complainant, provided that the court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. *Edelsten v. Edelsten*, 1 De G. J. & S., 185; *McAndrew v. Bassett*, 4 De G. J. & S., 380; *Sebastian, Trade-M.*, 70.

Two trade-marks are substantially the same in legal contemplation, if the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such purchaser usually gives, and to cause him to purchase the one supposing it to be the other. *Gorham Co. v. White*, 14 Wall., 511 [81 U. S., XX., 731];

McLean v. Fleming, 96 U. S., 245, 256 [XXIV., 828, 832]; *Adams, Trade-M.*, 107.

Difficulties attend the effort to describe with precision what resemblance is necessary to constitute an infringement and, perhaps, it is not going too far to say that the term is incapable of exact definition as applied to all cases. Grant that; and still it is safe to say that no manufacturer or merchant can properly adopt a trade-mark so resembling that of another engaged in the same business as that ordinary purchasers buying with ordinary caution are likely to be misled.

Positive evidence of fraudulent intent is not required where the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled through the unjustifiable use of the trade-mark to sell a simulated article as and for the one which is genuine. *McLean v. Fleming* (*supra*).

Unless the simulated trade-mark bears a resemblance to that which is genuine, it is clear that the charge of infringement is not made out, and it is, doubtless, true that the resemblance of the simulated one to the genuine must be such that the former is calculated to deceive or mislead purchasers intending to buy the genuine goods; but it is a mistake to suppose that the resemblance must be such as would deceive persons seeing the two trade-marks placed side by side. Exact definition may not be attainable; but if a purchaser looking at the article offered to him, said Lord Cranworth, would naturally be led from the mark impressed on it to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark fraudulent. *Franks v. Weaver*, 10 Beav., 297.

Apply that to the case before the court, and it is sufficient to control the decision; but the Chancellor went much further, and said, that if the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, he thought that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of the owner as the actual copy of his device. *Seizo v. Provezende*, L. R., 1 Ch. App., 192, 196.

When the entire trade-mark is copied, the case is free of difficulty, as the rule is universal that the infringer is liable; but the question is: when may it be said that a trade-mark has been taken by another? Answers to that question are found in several cases, of which no one is more satisfactory than that given by the Master of the Rolls in a recent case. He says that a trade-mark to be taken need not be exactly copied, nor need it be copied with slight variations, but it must be a *substantial portion* of the trade-mark; to which he adds, that it has sometimes been called the material portion, but that, as he states, means the same thing, and he then remarks that it means the *essential portion* of the trade-mark, and finally concludes the subject by saying that "What the court has to satisfy itself of is that there has been an essential portion of the trade-mark used to designate goods of a similar description." *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div., 434, 443; *Cod. Dig.*, sec. 342.

Argument to show that that rule is applicable to the case before the court is unnecessary, as

the proposition is self-evident; and if so, it is impossible to see how anyone can vote to affirm the judgment of the circuit court. Beyond all question, the letters A, C, A are the essential feature of the trade-mark adopted by the complainants, and the respondents admit in their answer and in argument that they use the same three letters in the same combination.

Complete imitation is not required, by any of the well considered cases. Instead of that, it is well settled that the proof of infringement is sufficient if it shows even a limited and partial imitation, provided the part taken is an essential portion of the symbol. None of the cases show that the whole must be taken, nor is it necessary to show that anyone has, in fact, been deceived, if the imitation is such as to prove that it is calculated to deceive ordinary purchasers using ordinary caution. Proof of actual intent to defraud is not required, but it is sufficient if the court sees that the trade-mark of the complainant is simulated in such a manner as probably to deceive the customers and patrons of his trade and business. *Filley v. Fissett*, 44 Mo., 168, 178; *Coats v. Holbrook*, 2 Sandf. Ch., 586, 626.

Courts of justice do not always use the same language in defining what is the requisite similarity in the two trade-marks to entitle the complainant to relief, but they substantially concur that if it be such that the public may be led to believe, while they buy the goods of the respondent, that they are buying an article manufactured by the complainant, the proof of similarity is sufficient. *Hirst v. Denham*, L. R., 14 Eq., 542, 552.

For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs. *Witherspoon v. Currie*, L. R., 5 Eng. & Ir. Ap., 508-519; *S. C.*, 27 L. T. (N. S.), 393.

Chancery courts will protect the property rights of a party in his trade-mark, and for its invasion the law will award compensation in damages. Legal redress will be accorded when it is shown that the symbol or device used by the wrong-doer is of such a character that, by its resemblance to the established trade-mark of the complainant, it will be liable to deceive the public and lead to the purchase of that which is not the manufacture of the proprietor, believing it to be his.

It is not necessary that the symbol or device should be a *fac simile* or a precise copy of the original trade-mark, or that it should be so close an imitation that the two cannot be easily distinguished by one familiar with the genuine device; but if the false or simulated one is only colorably different, or if the resemblance is such as may deceive a purchaser of ordinary caution, or if it is calculated to mislead the careless and unwary, and thus to injure the sale of the goods of the proprietor of the true device, the injured party is entitled to redress. *Colman v. Crump*, 70 N. Y., 573, 578; *Glenny v. Smith*, 11 Jur. (N. S.), 964.

Trade-marks usually exhibit some peculiar device, vignette or symbol, in addition to the name of the party, which the proprietor had a perfect right to appropriate, and which, as well as the name, is intended as a declaration to the public that the article is his property. Imitators frequently drop both the name and certain parts of the surroundings, and substitute their own name with a different vignette; but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded.

Proof of an intention to defraud is not required; but it is plain that the respondents acted with a design, and it would be absurd to suppose that they had no further object than the mere imitation of the trade-mark which they copied. On the contrary, it is obvious that they expected to gain an advantage in the sale of their goods by attaching their simulated device to fabrics resembling in appearance and quality the fabric of the complainants. Of course, they meant to secure to their goods a preference in the market which they otherwise would not have commanded; and it is difficult, if not impossible, to see how any such advantage could be gained unless the simulated trade-mark would enable them to sell their fabrics as that of the injured party. *Amoskeag Mfg. Co. v. Spear, supra; Fetridge v. Wells*, 13 How. Pr., 386.

Proprietors of a trade-mark, in order to bring the same under the protection of a court of equity, are not obliged to prove that it has been copied in every particular by the wrong doer. It is enough for them to show that the representations employed bear such resemblance to their symbol or device as to be calculated to mislead the public, who are purchasers of the article, and to make it pass for the one sold by the true owner of the trade-mark. *Walton v. Crowley*, 3 Blatchf., 440-447.

Candid men cannot read the record in this case without being forced to the conclusion that the respondents took the essential feature of the complainant's trade-mark, which they had used for forty years to designate the fabric of ticking which they manufactured, and which had become known throughout the United States as the authorized symbol to indicate that description of goods; and if so, it follows, to a demonstration, that the decree of the circuit court should be reversed.

Cited—108 U. S., 223; 2 McCrary, 512; 93 N. Y., 334, 336; 129 Mass., 326; 37 Am. Rep., 363.

GEORGE E. KETCHUM, ATLANTIC AND PACIFIC R. R. CO. ET AL., *Appts.*,

v.
CITY OF ST. LOUIS, Substituted for the
COUNTY OF ST. LOUIS, Intervener.

(See S. C., 11 Otto, 306-319.)

County bonds in aid of railroad—lien for—appropriation of fund—equitable right.

*1. An Act of the General Assembly of Missouri, approved January 7, 1865, under the authority of which the County of St. Louis issued its bonds to the extent of \$700,000, and loaned them to the Pa-

cific Railroad Company of Missouri, construed, and held to have created, when accepted by the Railroad Company and the county, an equitable lien or charge, in favor of the county, upon the earnings of the Railroad to the extent necessary, to meet the interest upon the bonds; such payments and lien continuing until the bonds were paid.

2. This equitable lien or charge exists and is enforceable not only against the funds in the hands of the receiver, but against the purchaser under the decree of foreclosure heretofore rendered and against whomsoever may hold the property or have custody of its earnings.

3. The Act of January 7, 1865, is of such character that all purchasers of bonds issued under mortgages subsequently executed and all purchasers of the property, in whatever mode, were bound to take notice of its provisions.

4. Where a debtor, by a concluded agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another from a designated source and directs such person to pay it to the creditors which he assents to do, this is an appropriation binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor.

5. A party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is agreed to be given with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates and all who take title thereto with notice of such trust can be compelled in equity to fulfill it.

[No. 162.]

Argued Jan. 21, 22, 1880. Decided Apr. 12, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Missouri.

This appeal is from a decree of the court below in favor of the appellee, upon its petition intervening in the foreclosure case of *Ketchum v. Pacific Railroad Co.*

The case is stated by the court. See, also, the opinion of the court in the foreclosure case, No. 242 of this Term, *ante*, 932.

Messrs. Melville C. Day, Jno. W. Noble, J. C. Orriek and James O. Broadhead, for appellants.

Messrs. Leverett Bell, Enoch Totten, N. A. Cowdrey, H. A. Clover, Frank J. Bowman, P. Phillips and Britton A. Hill, for appellees.

Mr. Justice Harlan delivered the opinion of the court:

The present appeal brings before us for examination a decree of the circuit court rendered April 25, 1877, adjudging that the County of St. Louis had an equitable lien or charge upon the earnings of the Pacific Railroad of Missouri, to whomsoever the same may be transferred or conveyed, prior and paramount to any mortgage or other lien thereon, to the extent of \$4,000 per month, payable monthly, from the first day of April, 1876, and \$1,000 payable in each month of December, to meet the interest upon \$700,000 of bonds issued by the County of St. Louis in the year 1875, and by it loaned to the Pacific Railroad Company, such payments to continue until the bonds are fully paid by the Company.

The decree declared the lien to exist and to be enforceable on the railroad property and franchises, against the funds in the hands of the receiver in this suit as well as the purchaser under the mortgage foreclosure sale to be hereafter referred to.

The learned Judge who heard this cause in

*Head notes by *Mr. Justice HARLAN*.

See 11 OTTO.

the circuit court rested the decree upon the proposition of law, that "If a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands, or to come into the hands, of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor."

Was there an agreement of the character indicated in this statement?

That is the first question to which we shall direct our attention.

The Pacific Railroad Company was incorporated by the Legislature of Missouri in the year 1849, with power to construct a line of railway from St. Louis to Kansas City, a distance of nearly three hundred miles. For the purpose of aiding in the construction of the road, the State from time to time loaned its bonds to the Company. They amounted in the year 1855 to more than \$7,000,000, and were secured by a first mortgage upon the property, franchises and income of the Company, with power of sale upon default in meeting the interest and principal of the bonds. Less than two hundred miles of the road was completed at the beginning of the recent civil war, and during its continuance but little progress was made in the work of construction.

By an Act approved February 10, 1864, the Company was authorized to borrow money "For the completion of the main road to Kansas City," and, for that purpose, to issue its bonds to the amount of \$1,500,000, "To be secured by a first mortgage on the main line of the road west of Dresden," so much of the bonds as were necessary to be applied to the completion of the road from its then terminus to Kansas City, and to no other purpose. For that object, and to that amount and extent only, the State, by the express words of the Act, relinquished her first mortgage lien and right of forfeiture upon the road west of Dresden, retaining, however, a second lien and mortgage thereon; such second lien and mortgage to become forthwith, upon the payment in full of the principal and interest of the bonds authorized by that Act, the first lien and mortgage, in every respect and as fully as those held by the State.

The Act created the office of Fund Commissioner, to be filled by appointment of the Governor, subject to confirmation by the Senate. It declared that such office should "Continue until the bonds issued for the completion of the road, and the state bonds loaned to said Railroad Company, with interest thereon, are fully paid out of the earnings, or exchanged for the first mortgage bonds of said road," as thereafter provided. The Fund Commissioner became entitled and it was made his duty to take possession of the \$1,500,000 of bonds authorized to be issued, negotiate the same, and their proceeds, together with the gross earnings of the road, from whatever source, to control and apply as directed in the Act.

Without referring to other provisions of the Act, it is sufficient to say that the State, through the Fund Commissioner, acquired, for its security, complete control of the earnings and income arising from the property.

Following the course of events in the history of this railroad, we find that in September, 1864, the State of Missouri was invaded by insurrectionary forces, which destroyed much of the property belonging to the Company, including bridges, depots, machine-shops and track. The cost of repairing the injury thus done and of completing and putting the road in successful operation was estimated by the Board of Directors at the sum of \$700,000. These facts were communicated to the County Court of St. Louis County by a committee of the Board, in a memorial, stating: "This sum we have lost as the result of the invasion. This amount we want the County to provide by issuing to the Company the bonds of the County, under authority to be given by the Legislature, bearing seven per cent interest, the same to be a loan to complete the road, the Company to refund to the County the principal and interest as the same matures."

The memorial concluded in these words: "If completed, we believe that the *earnings* of the road will soon furnish all the equipments required for the increased business, pay off the \$1,500,000 mortgage, provide for the payment of the county bonds now asked for, and in six or seven years commence paying on the bonds issued by the State for our benefit. But should the financial success of the enterprise not equal our expectations, the importance of the road, as a great artery of trade and commerce, will justify the expenditure asked for."

The Justices composing the County Court seem to have concurred in the propriety of the loan, but differed as to the conditions upon which it should be made. One of their number presented for adoption an order reciting the conditions which, in his judgment, should be embodied in any law authorizing bonds to be issued, viz.: that the State should relinquish so much of its mortgage upon the road as covered the rolling stock, which should then be mortgaged by the Company to the County as security for the \$700,000 of bonds to be issued; that the Company should pay into the county treasury, at least thirty days prior to the maturity of the interest, the full amount thereof, in default of which the whole debt should become due, with power in the County to foreclose the mortgage; and, finally, that the proposed Act should be submitted for acceptance or rejection to the actual tax payers of the County.

Another member of the County Court offered, as a substitute, the draft of an order embodying, among other things, an Act to be submitted to the Legislature authorizing the proposed issue of bonds. This substitute declared that, in view of the importance of the completion of the road to the tax payers of the County, the court would concur (in case application should be made by the Company) in the propriety of the passage of an Act "Securing the completion of said road and the interest of the County of St. Louis in the said bonds." The proposed Act contained this provision:

"Said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad; and the Fund Commissioner of the Pacific Railroad Company shall pay every month \$4,000, and \$1,000 additional each month of December, to the Treasurer of St. Louis

County, to meet the interest on the above seven hundred bonds; said payments to continue until said bonds are paid by the Pacific Railroad Company."

The substitute was adopted by the County Court and, being submitted to the Legislature of Missouri, that body, on the 7th of January, 1865, passed an Act containing additional provisions. It is here given at length, since the case depends mainly, if not altogether, upon the construction which may be given to its provisions:

"Section 1. The County Court of St. Louis County is hereby authorized to issue seven hundred county bonds of the denomination of \$1,000 each, having twenty years to run, and bearing interest at the rate of seven per cent per annum, payable semi-annually, the principal and interest payable in the City of New York, and loan said bonds to the Pacific Railroad Company for the completion of said road; said bonds to be issued under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad Company, such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued.

Section 2. The Fund Commissioner of the Pacific Railroad or such person as may, at any time hereafter, have the custody of the funds of said Railroad Company, shall, every month after said bonds are issued, pay into the County Treasury of St. Louis County, out of the earnings of said Pacific Railroad, \$4,000 and \$1,000 additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by the Pacific Railroad.

This Act to take effect and be in force from and after its passage."

This Act was accepted by the Railroad Company. It expressly agreed to comply with all its provisions. In conformity therewith bonds were issued by the County and delivered to the Railroad Company as follows: 100 bonds on 20th February, 1875; 200 bonds on 7th March, 1875, and 400 bonds on 5th May, 1875. They were sold by the Company, and the proceeds applied in the completion of the road to Kansas City.

On 15th of July, 1868, the Company executed a first mortgage on its franchises and property for \$7,000,000; on first of July, 1871, a second mortgage for \$3,000,000; and on 10th July, 1875, a third mortgage for \$4,000,000, the latter being the same mortgage which was foreclosed by decree rendered on 6th June, 1876, in the case of *R. R. Co. v. Ketchum* [ante, 932]. The decree of foreclosure and sale in that case was passed in the circuit court, and has been affirmed here, at the present Term, but without prejudice to the lien claim of St. Louis County.

In view of these and other facts, to be presently detailed, it is difficult to believe that the officers of the Company had any expectation whatever that the County would make a loan of \$700,000, without security of some sort, and upon the bare promise or covenant of a railroad corporation, staggering under an enormous indebtedness and without credit, that it would meet the interest upon the loan. We have seen that the committee appointed by the Company to seek financial aid from the county, expressed,

See 11 OTTO.

officially, the belief that upon the completion of the road its *earnings* would soon furnish all the equipments required for increased business, pay off the \$1,500,000 mortgage, *provide for the payment of the county bonds then asked for*, and in six or seven years thereafter commence paying on the bonds issued by the State for the benefit of the Company. But more significant as to the intention of the Company and as to the impression which it sought to produce upon the County Court is the fact that, immediately upon the passage of the Act, the president of the Railroad Company, with a view, of course, to influence the action of the County Court, presented to that body the written opinion of its counsel, prepared with unusual care, in which he declared: 1. That if the Act should be accepted by the Company, and the County should make the loan authorized, the Act would be binding upon all the parties, in favor of the County Court, to wit: the Company, the Fund Commissioner and the State. 2. That an agreement executed by the Company expressing its assent to such appropriation of the earnings of the road would create in favor of the County an equitable lien or charge upon the earnings, *pro tanto*. 3. That the direct authorization of such appropriations of the earnings, or rather the direction to the Fund Commissioner (the trustee) to pay this monthly appropriation out of funds, to the benefit of which it (the State) was entitled, was unquestionably a waiver or postponement of the interest of the State, *cestui que trust*, in favor of the County, to the extent and for the purpose specified in the Act.

"The Act," said counsel, "admits of no other construction." That opinion was filed and preserved by the clerk of the County Court among its records.

If the Railroad Company deemed it possible that the County would make a loan of \$700,000 upon the simple promise of the Corporation to save it harmless; if they had not believed that the County Court would exact ample security for the protection of its constituents against liability, it would scarcely have been suggested through counsel that the acceptance of the Act of January 7, 1865, would amount to a specific *appropriation* of so much of the earnings as would suffice to meet the interest until the bonds were paid off.

We next inquire, whether any different belief was indulged by the County Court. Did its members intend the loan to be made without securing the County in some effectual mode? These questions must, in view of all the circumstances, be answered in the negative. We have seen that, when the original application was made to the County Court, one of the Justices submitted a proposition requiring the Company to secure the loan by a mortgage upon the rolling stock, the State to that extent surrendering its mortgage or lien. The substitute which was adopted described the Act which it was proposed to submit to the Legislature as an Act "*Securing the completion of the road and the interest of the County of St. Louis in the issue of said bonds.*" The security which the proposed Act provided was a direction to the Fund Commissioner to pay the amount necessary to meet the interest, and to continue such payments until the bonds were paid by the Company. It is quite clear that a proposition to

make this loan, without providing some security against liability, would not have been entertained by the County Court.

As to the State, it is abundantly clear, from the language of the Act of 1865, without reference to the circumstances under which it was passed, that the Legislature, as an inducement to the County of St. Louis to come forward and save an important enterprise, in which the State was largely interested financially, intended to waive the prior statutory lien of the State to the extent necessary to secure the prompt liquidation of the interest on the proposed loan, during the whole period the bonds were outstanding and unpaid. The State, at that time, had control of the entire earnings of the Railroad, and if the Legislature did not intend to forego any priority or advantage then enjoyed by the State, but designed only to give authority to the County to issue its bonds, that purpose could have been accomplished by the 1st section of the Act of 1865, leaving the County and the Railroad Company to make such terms and conditions as suited them.

The 2d section of the Act shows, beyond question, that the purpose of the Legislature was not so restricted; that its intention was to provide full security to the County in the event the County Court exercised the authority given by the Act. The draft of the statute submitted by the County Court to the Legislature contained only a general direction to the Fund Commissioner to pay the interest, and to continue such payments until the bonds were paid off by the Company. But so fixed was the Legislature in the purpose to protect the County, that it extended that direction to "Such person as may at any time hereafter have the custody of the funds of the Company," and, by express words, required the payments of interest, whether by the Fund Commissioner or by such other person, to be made "out of the earnings of said Pacific Railroad." The object of these additions to the Act, as submitted by the parties, cannot be mistaken. The office of Fund Commissioner was created by statute and, consequently, its continuance depended upon the will of the Legislature. To meet the contingency of the abolition of that office, the same duty was imposed upon such person as at any time thereafter should have the custody of the funds of the Company. And that there might be no misapprehension as to the source from which funds to meet the interest were to be derived, the Legislature, in effect, gave the assurance that the *earnings* of the Railroad, by whomsoever held, should supply the amount necessary to that end.

In this connection we may notice another important difference between the Act, in the form in which it was submitted to the Legislature, and that in which it finally passed. The former provided that the bonds should be issued "Under such conditions as may be agreed upon between said County Court and the Board of Directors of the Pacific Railroad." But the Legislature added the words, "Such conditions to be binding on the parties, but shall not impair or affect the validity of the bonds after they are issued." These last words, but for the succeeding section of the Act, would have placed the County at the mercy of the Railroad Company, and rendered it liable to holders of bonds, whether the Company complied or not with the

conditions upon which the loan was made. It is manifest, that while the Legislature intended, by the language last quoted, to facilitate the sale of the bonds, and thereby secure the early completion of the road, it intended also, by the 2d section of the Act, to assure the County of St. Louis that its absolute liability to holders of its bonds was largely nominal, since, by that section, out of the *earnings* of the property, to the extent necessary, and whether the funds of the Company were in the custody of the Fund Commissioner or of some other person, the interest on the bonds should be paid at maturity, and such payments continued until the bonds were paid.

That the Legislature intended by the Act of 1865 to make a specific *appropriation* of the earnings for that purpose; that the prior lien of the State was, to that extent, waived in favor of the County; and that such appropriation and waiver were, by agreement of all the parties then interested in the property and the disposition of its income, to continue until the bonds themselves were paid or the County discharged from liability thereon, we entertain no doubt. It was not a simple, naked covenant to pay out of a particular fund; but the Act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of that fund; an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the Company, whether the Fund Commissioner or some other person, could respect without liability to the debtor for so doing. It was an arrangement, based upon a valuable consideration, which neither the State nor the Company, nor both, nor parties claiming under either, with notice, could disregard without the assent of the County, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in the accomplishment of which all the parties to the arrangement were directly interested. To construe the Act otherwise, will not only do violence to plain words, requiring no construction, but convict the Legislature of a deliberate design to entrap the County of St. Louis into incurring an enormous debt primarily for the benefit of the State, which controlled the earnings of the property for its own benefit.

It remains to inquire whether this agreement or arrangement can be carried into effect consistently with the settled principles of equity.

We remark that all parties claiming under mortgages executed by the Company after the acceptance of the Act of 1865—none others are interested in the determination of this case—are chargeable with notice of the appropriation of earnings made by that Act. "In this country," says Mr. Sedgwick, "the disposition has been, on the whole, to enlarge the limits of the class of public Acts, and to bring within it all enactments of a general character, or which in any way affect the community at large." Sedgwick, Stat. and Const. Law., p. 25. That Act related to matters in which the general public were concerned, and all were bound to take notice of its provisions.

We are of opinion that no insuperable obstacle exists in the way of a court of equity giving

effect to this agreement or contract between the parties as against those whom the law charges with notice thereof. The relief granted by the decree seems to be in accordance with established rules in such cases.

In *Legard v. Hodges*, Lord Thurlow said: "I take this to be a universal maxim, that wherever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raised a trust. These persons have so claimed; and, therefore, this is a pure trust estate," and they must be declared trustees. 1 Ves., Jr., 478. In the report of that case in 3 Bro. Ch., 531, the Chancellor says: "I take the doctrine to be true, that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement." Upon rehearing, the former decree was affirmed. 4 Bro. Ch., 422.

In *Re Strand Music Hall Co.*, 3 De G., J. & S., 147, the question arose whether that company had created a valid charge on their real property. "There can, I think," said Lord Justice Turner, "be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said on the part of the official liquidator that this intention was not well carried into effect. I apprehend, however, that where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

The doctrine is thus stated by Mr. Justice Story in his *Equity Jurisprudence*, Vol. II., sec. 1231: "Indeed, there is generally no difficulty in equity in establishing a lien, not only on real estate, but on personal property, or on money in the hands of a third person, wherever that is a matter of agreement, at least against the party himself, and third persons who are volunteers or have notice; for it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust." The author cites, in support of these views, *Legard v. Hodges* [supra].

So, also, in *Pinch v. Anthony*, 8 Allen, 536. "It is well stated that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is agreed to be given, with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfil it."

In the recent work of Mr. Jones on *Mortgages*, Vol. I., sec. 162, the author remarks: "In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts, which are wanting in one or both of these characteristics of a common law mortgage, are often used by parties for the purpose of pledging real property, or some

interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are, therefore, called equitable mortgages." So, also, in his treatise on *Railroad Securities*, p. 57, the same author says: "An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds, creates an equitable lien or charge." Willard, Eq. Jur., 462; *Watson v. Wellington*, 1 Russ. & M., 604; *Yeates v. Groves*, 1 Ves., Jr., 280; *Lett v. Morris*, 4 Sim., 607; *Ex parte Alderson*, 1 Madd., 53.

Further citation of authority would seem to be unnecessary. If any doubt exists as to the case coming within these recognized principles of equity, it is sufficient to say that the appropriation of the earnings of the Railroad Company as security for the loan by the County was in pursuance of a special Act of the Legislature; and in sustaining the decree below we give effect to the legislative will as to matters over which its authority unquestionably extended.

It will be observed that we have made no allusion to the Act of March 30, 1868, subsequent to the passage of which the first, second and third mortgages were executed. In behalf of the plaintiffs in error, it is contended that the Act of 1868 shows the construction given by the circuit court to the Act of 1865 to be inadmissible. The answer to this proposition is twofold: 1. The Act of March 30, 1868, furnishes upon its face, evidence to all that the State felt itself under obligation to provide for the security of the County on account of the loan made to the Railroad Company, under the authority of the Act of January 7, 1865. 2. Be that as it may, if, as we have held, the Act of 1865, and its acceptance by the parties, constituted a contract by which the State waived its lien, in favor of St. Louis County, to the extent and for the purpose therein indicated, and by which the State, the Railroad Company and the County appropriated the Company's earnings to the payment of the interest on the County's bonds, such payments to continue until the bonds were paid off by the Company, no subsequent legislation could deprive the County of the security thus acquired. Nor could parties, who claim under subsequent incumbrances, and who are chargeable with notice of the appropriation made by the Act of 1865, destroy the equitable lien of the County, even with the consent of the Railroad Company. With that lien the property itself was chargeable by whomsoever it or the funds accruing therefrom are or may be held.

By an order heretofore made in this court, the City of St. Louis was allowed to intervene in this cause for the purpose of protecting such interest as it may have herein, and for the purpose of being heard at the argument. The claim of the City is, that, by the Constitution and laws of Missouri, it has assumed the position formerly occupied by the County of St. Louis under the Act of January 7, 1865; that the installments of money required by the Act to be paid monthly into the county treasury are due and payable to the city treasury, and that it has been subrogated to the rights and

liabilities of the County as to all matters arising out of the issue of the bonds in question.

Since the making of that order, a written stipulation has been filed in this court signed by all the parties to the record, including the City, agreeing that, in the event the decree below is affirmed, the City of St. Louis shall be substituted therein in lieu and place of the County of St. Louis. The stipulation will be entered at large upon the record, and an order entered substituting the City to all the rights acquired by the County in virtue of the decree below.

We deem it unnecessary to allude to any other points discussed by counsel. We have noticed all deemed by us material. What has been said is sufficient to dispose of the cause upon its merits.

Perceiving no error in the decree, *it is, in all respects, affirmed.*

Mr. Justice Strong, dissenting:

I cannot concur in the judgment given in this case. I am unable to discover in the contract between the Company and the County, or in the Act of the Legislature, or in both, anything that created an equitable lien upon the earnings of the Railroad Company, or upon any of its property. Nothing more is expressed than a confident expectation that the earnings would prove sufficient to pay the interest on the county loan.

Also dissenting, *Mr. Justice Bradley.*

Cited—105 U. S., 523.

FRANK F. CASE, RECEIVER OF THE FIRST
NATIONAL BANK OF NEW ORLEANS,
App't.,
v.

NEW ORLEANS & CARROLLTON R. R.
CO., ALEXANDER BONNEVAL ET AL.

(See S. C., "*Case v. Beauregard*," 11 Otto, 688-692.)

Former decree, when a bar—bill to enforce lien.

1. Where a bill, filed to enforce a lien on property, has been dismissed on the merits, it is a bar to a second suit for the same cause of action, although the second bill contains additional allegations that, after the dismissal of the former suit, the complainant has obtained judgments and issued executions on his demand.

2. Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies.

[No. 191.]

Argued Mar. 11, 1880. Decided Apr. 12, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court. See, also, *ante*, 370; 91 U. S., 134, XXIII., 263; 78 U. S., 624, XX., 82.

Messrs. Charles Case, William Grant, and J. D. Rouse, for appellant.

NOTE.—Application of partnership assets to debts; rights of individual and partnership creditors therein. See note to U. S. v. Hack, 33 U. S. (8 Pet.), 271. Conclusiveness of judgments. See note to Bk. of U. S. v. Beverly, 42 U. S. (1 How.), 134.

Estoppel by judgment. See note to *Aspden v. Nixon*, 45 U. S. (4 How.), 467.

1004

Messrs. Henry C. Miller and J. A. Campbell, for appellees.

Mr. Justice Strong delivered the opinion of the court:

That the complainant's bill exhibits the same cause of action which was set forth in his former bill against these defendants, and that he now seeks the same relief as that which was sought in his first suit, is quite apparent. The identity of the claims and equities asserted, as well as of the relief asked, is shown by an inspection of the records, and it is hardly denied. The object of both suits was to follow and subject to the payment of a debt due by the partnership of May, Graham & Beauregard to the First National Bank of New Orleans, certain property alleged to have formerly belonged to the partnership, but which, before the first bill was filed, had been transferred to the Railroad Company. The claim made in each of the cases is that the Bank has a privilege or lien upon the property for the partnership debt; that the Railroad Company acquired the property with knowledge of the existence of the lien, and that it is charged with a trust in favor of the Bank. The decree dismissing the former bill must, therefore, be a bar to the present suit, it having been pleaded, unless the court which dismissed it was without jurisdiction of the case.

In the former bill it was not averred that judgment at law had ever been recovered against the partnership for the debt, and that an execution had been issued thereon and returned fruitless. The present bill contains such an averment. It is alleged that judgments at law were obtained against two of the members of the partnership on or about the 26th day of February, 1873, which was after the decree dismissing the former bill, and that executions issued upon those judgments had been returned that no property could be found. The complainant insists that this averment not having been made in the former bill, the decree of dismissal, though unqualified, cannot be regarded as a final adjudication of the equities between the parties, and that it is, therefore, no bar to the present suit.

It is, no doubt, generally true that a creditor's bill, to subject his debtor's interests in property to the payment of the debt, must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is, that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary; or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one, that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he had done all that he could do at law to obtain his rights.

But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible

101 U. S.

means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, "*Bona, sed impossibilia non cogit lex*." It has been decided that where it appears by the bill that the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner v. Adams*, 46 Mo., 95; *Postlewait v. Hoves*, 3 Iowa, 365; *Bk. v. Harvey*, 16 Iowa, 141; *Botsford v. Beers*, 11 Conn., 369; *Payne v. Sheldon*, 63 Barb., 169. This is certainly true where the creditor has a lien or a trust in his favor.

So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. *Thurmond v. Reese*, 3 Ga., 449; *Cornell v. Radway*, 22 Wis., 260; *Sander-son v. Stockdale*, 11 Md., 563.

In *Brisay v. Hogan*, 53 Me., 554, it was ruled that when a creditor seeks, by his bill, to obtain payment of his debt from land paid for by the debtor, but conveyed to his wife, a levy of an execution is unnecessary, if the debtor never had legal title to the land. See, also, *Day v. Washburn*, 24 How., 352 [65 U. S., XVI., 712].

The foundation upon which these and many other similar cases rest is, that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal processes.

But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. *Tappan v. Evans*, 11 N. H., 311; *Holt v. Bancroft*, 30 Ala., 193. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is, that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a Chancellor, it obviously makes a case for his interference.

Now, if we are correct in these views of equity jurisdiction, it is a plain inference that the decree pleaded in bar of the present suit was a final adjudication of the equities asserted by the complainant therein.

The bill in that case asserted, in the most ample terms, the remedilessness of the complainant at law. It averred that at and before the transfer and conveyances of the partnership property, sought to be charged, to the Railroad Company, each of the members of the partnership was largely indebted, without means, and in a state of insolvency, and that they had See 11 OTTO. U. S., Book 25.

since been and still were insolvent; so that a suit at law and the recovery of a judgment against them, or either of them, would not afford the complainant any relief, because neither of the partners have or had, since the dates of the pretended transfers of said partnership property, any property whatever upon which the complainant could levy an execution at law, or seize for the satisfaction of the debt due to the Bank. What more could have been necessary to show that the complainant had no remedy at law; that his remedy, if he had any, was in equity?

But this was not all. The bill charged that the conveyances of the partnership property and the transfers by which it had been vested in the Railroad Company, were illegal and fraudulent; that the Bank had a privilege or lien upon the property; and it prayed that the various acts of sale, transfer and conveyance by which the property that had belonged to the partnership had been conveyed to the Railroad Company, should be declared null and void, and that the property should be decreed to be liable to the payment of the amount due to the Bank.

Thus it appears the bill exhibited all that was necessary to give to the court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties, and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court, and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the Railroad Company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants. It would be idle, therefore, to reconsider the question whether the Bank has a lien upon the property he seeks to charge, or whether there had been a trust in the Bank's favor.

The decree of the Circuit Court is affirmed.
Cited—106 U. S., 655; 3 McCrary, 371.

CHARLES E. ANTHONY, *Plff. in Err.*,
v.
COUNTY OF JASPER.

(See S. C., 11 Otto, 693-700.)

Missouri county bonds—form of—notice of law—official signatures—forged bonds.

1. The Missouri Act to provide for the registration of bonds issued by counties and towns, applies to bonds issued under the township aid law.
2. It is within the power of a State to prescribe the form in which municipal bonds shall be executed, in order to bind the public for their payment. If not so executed, they create no legal liability.
3. Dealers in municipal bonds are charged with notice of the laws of the State, granting power to make the bonds they find on the market.
4. Purchasers of municipal securities must always take the risk of the genuineness of the official signatures, and of the official character of those who execute the paper they buy.

5. Bonds not issued by the proper authorities are, in legal effect, forged.

[No. 128.]

Argued Dec. 23, 1879. Decided Apr. 12, 1880.

IN ERROR to the Circuit Court of the United States, for the Western District of Missouri.

The case is stated by the court.

Messrs. Joseph Shippen, J. B. Henderson and Thos. C. Fletcher, for plaintiff in error:

The Act of the General Assembly of the State of Missouri, entitled "An Act to Facilitate the Construction of Railroads in the State of Missouri," approved Mar. 23, 1868, which is recited in the bonds, conferred the authority upon defendant to issue the bonds in controversy.

State v. Linn Co., 44 Mo., 504 (in 1869); *Ranney v. Baeder*, 50 Mo., 600 (in 1872); *McPike v. Pen*, 51 Mo., 63 (in 1872); *State v. Cunningham*, 51 Mo., 479 (in 1873); *Rubey v. Shain*, 54 Mo., 207 (in 1873); *State v. Bates Co.*, 57 Mo., 70 (in 1874); *State v. Clarkson*, 59 Mo., 149 (in 1875); *State v. Daviess Co.*, 64 Mo., 31 (in 1875); *State v. Cooper Co.*, 64 Mo., 170 (in 1876).

This point is expressly decided in *Cass Co. v. Johnston*, 95 U. S., 360 (XXIV., 416).

The Act of the General Assembly of the State of Missouri, entitled "An Act to Provide for the Registration of Bonds, Issued by Counties, Cities and Incorporated Towns, and to Limit the Issue thereof," approved Mar. 30, 1872, has no application to township bonds issued under the Act of Mar. 23, 1868, such as are now in controversy, because:

1. The Act does not embrace them expressly or in terms.

2. Nor by implication; for such implication is precluded by the distinct and peculiar character of these bonds, and by the inadaptability of the provisions of the Act thereto.

See, *State v. Linn Co.* (*supra*); *Jordan v. Cass Co.*, 3 Dill., 245; *State v. Clarkson*, 59 Mo., 149.

Said statute, even if held to be applicable to township bonds, is prospective and not retrospective in its effect, and cannot invalidate such bonds in the hands of a *bona fide* holder, which purport to have been issued prior to the law, in payment of a stock subscription made prior to the law.

The defendant is estopped from making its attempted defense against a *bona fide* holder of these bonds, by reason of their recitals.

The bonds were issued pursuant to law, under a two thirds vote of the qualified voters of Marion Township. They properly related back thereto, both in substance and in form, and received the date when the contract of taking the stock was effected. The bonds recite upon their face as follows:

"This bond is issued in pursuance to an order of the County Court of said County of Jasper, made by authority of an Act of the General Assembly of the State of Missouri, entitled 'An Act to Facilitate the Construction of Railroads in the State of Missouri,' and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two thirds of the voters of said Township.

In testimony whereof, said County of Jasper has executed this bond by the presiding Justice of the County Court of said County, under the order of said court, signing his name hereto, and by the clerk of said court, under the order

thereof, attesting the same, and fixing thereto the seal of said court.

This done at the office of the Clerk of said court, this 28th day of March, A. D. 1872."

By repeated familiar decisions on this subject, the U. S. Supreme Court has declared that purchasers of such bonds are entitled to rely upon their recitals.

Hackett v. City of Ottawa, Chic. Leg. News, 1878, 240; *Orleans v. Platt*, Chic. Leg. News, 1878, 279; *Mercer Co. v. Hackett*, 1 Wall., 83 (68 U. S., XVII., 548); *San Antonio v. Mehaffy*, 96 U. S., 312 (XXIV., 816); *Moultrie Co. v. Bk.*, 92 U. S., 631 (XXIII., 631); *Moran v. Comrs.*, 2 Black, 722 (67 U. S., XVII., 342); *Knox Co. v. Aspinwall*, 21 How., 539 (62 U. S., XVI., 208); *Roy. Brit. Bank v. Turquand*, 6 E. & B., 327; *Flagg v. Palmyra*, 33 Mo., 450.

Messrs. E. J. Montague, Alex. Graves, Fillmore Beall and William Young, for defendant in error:

The bonds sued on were antedated, to evade a statute, and hence, void in the hands of an innocent *bona fide* holder.

1 Wag. Stat. (Mo.), 243 a, sec. 4; *facts* 7th and 8th in record; *Bayley v. Taber*, 5 Mass., 285; *Bridge v. Hubbard*, 15 Mass., 96.

"Where notes are made void by express statute, they cannot become good in the hands of subsequent holders; and upon no such note can a subsequent holder have a valid claim against the maker."

1 Pars. Bills and N., 218.

Courts will not give validity to that which is made invalid by legislative enactment.

De Groot v. Van Duzer, 20 Wend., 390; *Crossley v. Arkwright*, 2 T. R., 603; *Dann v. Dolman*, 5 T. R., 641; *Bridge v. Hubbard*, 15 Mass., 96.

The bonds sued on were, in effect, forgeries. Merwin, one of the Judges of the County Court, and the County Clerk issued the bonds, without authority from the court to issue the same, and without the consent of the other Judge of the court, that the same should be issued.

John Purcell, and not R. S. Merwin, was the presiding Justice of the court Mar. 28, 1872; the day of the date of said bonds, and he continued so to be until Sep., 1872.

Koehler v. Iron Co., 2 Black, 715 (67 U. S., XVII., 339); *Dennison v. St. Louis Co.*, 33 Mo., 168; *Mayor v. Eschbach*, 18 Md., 276; *Treadwell v. Comrs.*, 11 Ohio St., 183; *Clark v. Des Moines*, 19 Iowa, 209; *Jones v. Muirbach*, 26 Tex., 235.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a suit upon interest coupons originally attached to bonds issued under the "Township Aid Act" of Missouri, and presents the following facts:

On the 10th of February, 1872, the Township of Marion, in Jasper County, upon a call duly made under the law, voted to subscribe \$75,000 to the stock of the Memphis, Carthage and Northwestern Railroad Company upon certain conditions, and on the 28th of March following, the County Court made the subscription on the terms and subject to the conditions specified.

On the 30th of March an Act was passed by the General Assembly of Missouri, entitled "An

Act to Provide for the Registration of Bonds Issued by Counties, Cities and Incorporated Towns, and to Limit the Issue thereof." Section 4 of that Act is as follows:

"Section 4. Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, such bond shall first be presented to the State Auditor, who shall register the same in a book or books provided for that purpose in the same manner as the state bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity of such bonds or the power of any county court, city or town council or Board of Trustees, or other authority to issue such bonds, and the remedy by injunction shall also lie at the instance of any tax payer of the respective county, city or incorporated town to prevent the registration of any bonds alleged to be illegally issued or founded under any provision of this Act."

On the 4th of June, 1872, the County Court ordered that \$50,000 of the bonds which had been voted should be issued, that the clerk have them registered according to law and, when registered, that they be deposited in escrow with some responsible banker in St. Louis.

John Purcell was the presiding Justice of the court in March. He continued in office until September, 1872, when he resigned, and R. S. Merwin was appointed in his place October 21, 1872. The bonds now in question were sealed with the seal of the court, affixed by the clerk, and signed by Merwin, as presiding Justice, and by the clerk in October, 1872, but antedated as of March 28. Merwin delivered them during the same month, with the first two coupons cut off, to the Union Savings Bank of St. Louis, for the use of Edward Burgess, a contractor for building the road. In November, Burgess sold them to one Wilson at fifty-five cents on the dollar, and the bank gave them up to the purchaser on his order. Neither the other Justice of the County Court, nor the court as a court, consented to what was done by Merwin, and the railroad company has never fully complied with the conditions of the vote authorizing the issue of the bonds. No registry of the bonds was ever made, as required by the Act of March 30, 1872, and they did not have upon them the certificate of registration. Anthony, the plaintiff below, was a purchaser for value of the bonds from which the coupons sued on were cut, and without any notice that they had been antedated, or were in any respect irregular or invalid.

The circuit court, on this state of facts, gave judgment against Anthony, and he has brought this writ of error.

All the questions presented in the argument of this case were disposed of in *Douglass v. Pike Co.*, decided at the present Term [*ante*, See 11 Orto,

968], except such as arise under the Act of March 30, 1872. That Act, it is claimed, renders the bonds invalid, because they were not registered and had no certificate of registry on them. Against this it is urged:

1. That the Act does not apply to bonds issued under the Township Aid Law; and,

2. That if it does, the County is estopped from denying that these bonds were actually issued on the day they bear date.

The first objection is, as we think, untenable. It does not appear to have been taken or considered below. While the bonds are township bonds, in the sense that they are payable out of taxes levied on the property in the township which voted them, they were issued by the County. The County Court, which represented the County in its corporate capacity, made the subscription voted by the township, and issued the bonds in the name of the County. Under the same authority the necessary taxes are to be levied on the property in the township, and from moneys obtained in this way the county treasurer is to pay the bonds and coupons as they mature. The bonds, on their face, acknowledge an indebtedness of the County "for and on account of" the township. Since townships have no corporate organization of their own they act through the County, which, for this purpose, represents them as, under other circumstances, it does the people of the whole County.

The Act in question is not confined to the bonds of counties, but embraces all issued by counties. As there can be no township bonds except they are issued by counties, it seems to us that they come within the descriptive words used in the 4th section, and we have been unable to find anything in the other parts of the Act manifesting an intention to give these words any other than their usual and ordinary signification. The object of the new legislation, undoubtedly, was to guard against unauthorized issues of this class of public securities. For this purpose a new policy was adopted by the State. The evil which the General Assembly had in view affected township bonds, as well as those of counties, cities or towns. In fact, as ordinarily the same officers put out the township bonds that did those of the county, it is impossible to discover any good reason for guarding one against frauds and mistakes rather than the other. The records of the county court should contain an account of all that has been done in this way by that body for the townships, and the chief financial officer of the county can as easily furnish the State Auditor with a statement of these obligations as he can of those of the county at large. When the State Auditor certifies to the county court the amount required during the next year to meet maturing coupons and costs and expenses, the special tax can be levied by the county court, under the Township Aid Law, as amended in 1871 (Wagner's Stat., 331, sec. 52), on the real estate and personal property in the township for whose account the bonds were issued. No embarrassment can possibly arise in this particular, for there is no such conflict between the two statutes as to produce a repeal by implication. The registration statute is supplementary only to that under which the bonds were originally issued.

This brings us to consider the question of estoppel. There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed, in order to bind the public for their payment. If not so executed, they create no legal liability. Other circumstances may exist which will give the holder an equitable right to recover from the municipality the money which the paper he has got represents, but he has no bond which he can enforce as such, or which can be put on the market as commercial paper. The Act now in question is, we think, of this character. It in effect provides that no bond issued by counties, cities or incorporated towns shall be valid, that is to say, completely executed, until it has been countersigned or certified in a particular way by the State Auditor. For this purpose, after being executed by the corporate authorities, it must be presented to that officer, and he must inquire and determine whether all the requirements of the law authorizing its issue have been observed, and whether all the conditions of the contract in consideration of which it was to be put out have been complied with. To enable him to do this, evidence must be submitted which he is required to file and preserve. If he is satisfied, the registry is made and the requisite certificate indorsed on the bonds. This being done, the execution of the bond is complete and, under the law, it may then be negotiated; that is to say, put on the market as valid commercial paper. When the certificate is found on the bond, the purchaser need not inquire whether what has been certified to is true. As against a *bona fide* holder the public is bound by what its authorized agents have done and stated in the prescribed form.

Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created. When the bonds now in question were put out, the law required that to be valid they must be certified to by the Auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider, in *McGarrahan v. Mining Co.*, 96 U. S., 316 [XXIV., 630], the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: "Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires." The same rule applies here. The object to be accomplished is the complete execution of a valid instrument such as the law authorizes public officers to put out and bind the public organization they represent for the payment of money. For this purpose the law has provided that the instrument must not only be signed and sealed on behalf of the county court of the county, but

it must be certified to or countersigned by the Auditor of State. Of this law all who deal in the bonds are bound to take notice.

In order to recover in this case, it became necessary for the plaintiff to prove that the bonds from which the coupons sued on were cut had been executed according to law. He did prove that they were signed by the presiding Justice and clerk of the court, and were sealed with the seal of the court. This, before the Act of March 30, 1872, would have been enough, but after that more was necessary. The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. Under such circumstances, a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he cannot bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, cannot charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating, under such circumstances, partakes of the character of a forgery, and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley v. Taber*, 5 Mass., 286; *S. C.*, 4 Am. Dec., 57, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain day, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that day, although they bore a previous date.

It matters not that when the bonds were voted the registration law was not in force. Before they were issued it had gone into effect. It did not change in any way the contract with the railroad company. The company was just as much entitled to its bonds when it complied with the conditions under which they were voted after the law as it could have been before. All the Legislature attempted to do was to provide what should be a good bond when issued. There was nothing changed but the form of the execution.

Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes, not only the genuineness of the signature itself, but the official character of him who makes it. This plaintiff is charged with notice of the fact that Merwin was not the presiding Justice of the County Court until October, 1872, and that he could not have signed the bonds in his official capacity until that time. Had he signed them in

March, he could not have bound the township for their payment. This is equivalent to notice that they were not in fact issued before March 30, and that, consequently, they were not valid because not certified by the Auditor of State.

This case is entirely different from that of *Weyanwega v. Ayling* [*ante*, 470], where we held the town was estopped from proving that the bonds were actually signed by a former clerk after he went out of office; because the clerk in office adopted that signature as his own when he united with the chairman in delivering the bonds to the railroad company, pursuant to the vote of the town. There the bonds were not only complete in form at the time they bore date, but when they were actually issued as genuine by the proper agents, one of whom was the clerk who should have signed them. Here they were not actually complete in form when they were issued and it was only by a false date inserted by one of the two agents required by law to unite in their execution, and without the knowledge or consent of the other, who never acted at all, that they were apparently so. They were never in a condition to be issued, and were never, in fact, issued by the proper authorities. They were, in legal effect, forged.

It follows that the judgment of the Circuit Court was right and it is, consequently, affirmed.

Dissenting, *Mr. Justice Clifford, Mr. Justice Swayne and Mr. Justice Strong.*

Cited.—102 U. S., 95, 298; 105 U. S., 750.

CHICAGO AND ALTON RAILROAD COMPANY, *Appt.*,
v.
SAMUEL H. TURRILL.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appt.*,
v.
SAME.

(See S. C., 11 Otto, 836.)

Interest on decrees—state rule.

1. Where this court affirmed a decree in a patent case “with interest at the same rate per annum that similar decrees bear in the courts of the State,” by the word *similar*, decrees for the payment of money was intended.

2. It was right for the circuit court to order that the decree affirmed be executed by the collection of the money found to be due, and interest, according to the established rule in the State.

[Nos. 250, 251.]

Argued Apr. 8, 1880. Decided Apr. 12, 1880.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois.

The case is sufficiently stated in the opinion. *Messrs. George Payson and Enoch Totten*, for appellants.

Messrs. Francis H. Kales and L. L. Bond, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

See 11 OTTO.

When these cases were here before, 94 U. S., 695 [XXIV., 238], we affirmed the decrees then appealed from “With costs and interest, until paid at the same rate per annum that similar decrees bear in the courts of the State of Illinois.” In this way we established the validity of the patent sued on, and directed the court below to proceed with the collection of its money decree, with such interest as similar decrees bear in the State. By “similar” we did not mean decrees in patent suits, for of such suits the state courts have no jurisdiction but decrees for the payment of money.

The courts of Illinois have uniformly held that money decrees carry interest at the rate of six per cent per annum, the statutory rate for judgments. For this reason it was right for the circuit court, when our mandate went down, to order that the decree affirmed be executed by the collection of the money found to be due, and interest, which, under the established rule in the State, will be at six per cent.

Affirmed.

Cited—110 U. S., 303.

HAMILTON E. O'REILLY, Assignee in Bankruptcy of WILLIAM H. EDRINGTON, JR., and CHARLES O. STEELE, Bankrupts, *Appt.*

v.
HENRY C. EDRINGTON AND WILLIAM H. EDRINGTON, JR., Adms., etc., of ELIZA M. EDRINGTON, Deceased.

Agreement of compromise, as evidence.

An agreement of compromise between the parties, not set forth or relied on in the pleadings, may be used in evidence, on the confirmation of the master's report and final decree in the cause, to show that the complainant had waived his objections to the amount of the recovery.

[No. 246.]

Argued Apr. 6, 7, 1880. Decided Apr. 19, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The case is stated by the court.

Messrs. W. K. Ingersoll, A. P. Morse and A. B. Pittman, for appellant.

Messrs. G. Gordon Adam and Durant & Hornor, for appellees.

Mr. Chief Justice Waite delivered the opinion of the court:

O'Reilly, as assignee in bankruptcy of Edrington, Jr., and Steele, filed a bill in equity in the District Court for the Southern District of Mississippi, to foreclose a lien in the nature of a mortgage in favor of Edrington, Jr., on an undivided two thirds of what was known as the Shipland plantation. In his bill he alleged it was important that the taxes on the property be paid from year to year, as the same should accrue; “That taxes in arrears be also paid; and that all clouds upon the title be removed; and that the said land be redeemed from any tax sales.” It was then alleged “That William H. Edrington, Jr., and Henry C. Edrington, as administrators of Eliza M. Edrington, deceased, and Charles S. Jeffords, claimed to have some

equitable claims upon the land aforesaid for money advanced by them, for the payment of taxes, the exact nature and extent of whose claims are unknown to your orator." The prayer was, among other things, "That the rights of the defendants, Charles S. Jeffords and William H. Edrington, Jr., and Henry C. Edrington, as administrators of Eliza M. Edrington, deceased, if any they have, be ascertained, declared and settled." The administrators, defendants, appeared the day the suit was begun, and filed an answer and cross-bill. The cross-bill set forth, in substance, that the lands had been sold for taxes, and conveyed to one Richardson, April 10, 1872; that Richardson had also paid the taxes on the lands for 1870; that the payments by Richardson were, for 1870, \$1,244.08, and at the tax sale \$1,754.87; that on the 29th of May, 1872, Mrs. Edrington, the deceased, paid Richardson, for a deed of the lands to her, \$3,142.89, being the amount advanced by him, and interest thereon \$143.94, and that she afterwards paid the taxes of 1872, amounting to \$1,907.11. The prayer was that the administrators might be decreed to have a lien on the lands, and that O'Reilly, the assignee, be required to pay to them the several amounts so advanced.

O'Reilly answered the cross-bill, admitting all the allegations except as to the amounts paid. As to these proof was demanded; but for such amount as should be found due, it was admitted that the administrators were entitled to the relief they asked. On the 28th of May, 1875, a decree was entered finding the amount due on the mortgage debt and ordering a sale of the property. As to the cross-bill and tax claims, all questions were reserved for future adjudications, and the decree in the principal suit was "Without prejudice to said parties in asserting their claims, either against the proceeds of said lands, when paid into the court, or against the lands themselves, in case the assignee shall become the purchaser thereof." On the 2d of December, the cause was referred to a master to ascertain and report the facts as to the tax claims, and he reported that payments had been made precisely as stated in the cross-bill, but that the taxes so paid covered the whole of the lands, and not two thirds only. The whole amount paid was \$5,050.01. He also reported that O'Reilly objected to refunding the taxes of 1870, which had been paid by Richardson before sale, and that he claimed he was not, under any circumstances, chargeable with more than two thirds of the whole amount, as his lien covered only that part of the land. He also reported that the administrators offered in evidence before him an agreement, of the date of April 30, 1874, between O'Reilly as assignee, and the counsel of the Edringtons, but objection being made by O'Reilly, it was not considered by him. By this agreement, to avoid further expenses of litigation, a compromise of all matters in controversy between the parties was effected, by which, among other things, O'Reilly, as assignee, was to pay the administrators such sums of money as were paid by said Eliza M. Edrington, in purchasing the tax title to said plantation, and such further sums as have been paid by her or her heirs and administrators in the payment of taxes for and on account of such plantation. And the administrators were

to release all claims. This agreement was made subject to the approval and confirmation of the District Court in bankruptcy. On the coming in of the report the agreement was approved by the court, and a decree entered to the effect that whenever the administrators should tender the assignee "deeds of quitclaim of all their interest in the lands described in the pleadings, including the one third interest in said lands not sold under the decree rendered herein," the said assignee should pay to them, from the proceeds of the sale then in his hands, the sum of \$5,050.01.

From this decree O'Reilly appealed.

The principal objection to the decree below is, that it was made on the basis of an agreement of compromise entered into before the suit was begun, when that agreement was not set forth and relied on in the pleadings. The case brought up by the appeal is that made by the cross-bill, where all the several items of tax claim are set out, showing what were for taxes paid and what for purchases at tax sales. In the answer, no objection was made because the claim included the taxes on the whole property, or because those for 1870 were paid before a sale. All O'Reilly required was proof of amounts; and that being made, the right to the relief asked was conceded. No exception was taken to the amount as reported by the master. The questions as to liability for the taxes of 1870, and for the full amount paid, rather than two thirds, were first raised at the hearing at the reference. When those questions came to be considered by the court, the agreement of compromise, after having been examined and approved, was received as evidence that the full amount should be allowed. While the agreement was not directly sued on, the amount it called for was claimed in the cross-bill. No defense was set up in the answer inconsistent with what had been agreed to, and, as the agreement has been perfected by the approval of the court, we see no reason why it may not be used in evidence to show that, for a valuable consideration, the assignee has waived the objections he now makes to the amount of the recovery. The decree, as rendered, is not for the specific performance of the agreement, but is one in which the rights of the administrators are "ascertained, declared and settled," in accordance with the prayer of the original bill, and establishing a lien on the lands for the taxes paid, and requiring the assignee to refund the amount expended, as asked for in the cross-bill.

Affirmed.

WILLIAM G. LANGFORD, *Appt.*,

UNITED STATES.

(See S. C., 11 Otto, 341-346.)

Maxim—lands taken for public use—jurisdiction of Court of Claims—restriction of—implied obligation.

*1. The maxim, that the King can do no wrong, has no place in our system of constitutional law, as

*Head notes by Mr. Justice MILLER.

NOTE.—*Eminent domain; the right to payment for private property taken for public use generally recognized. Fifth Amendment to Constitution applies only to Federal Government and not to States. See note to Withers v. Buckley, 61 U. S., XV., 816.*

applicable either to the Government or to any of its officers.

2. Query: whether, when Government takes awedly private property for public use, in a manner to make the taking the act of the Government, the just compensation for such property guaranteed by the Constitution can, in the absence of any other provision of law, be recovered in the Court of Claims.

3. However this may be, there does not arise such an implied contract to pay as is necessary to give that court jurisdiction, where the officer of the Government, asserting ownership in the United States, takes forcible possession of the land of the individual for the use of the Government.

4. Such a case, as it would be between individuals, is a tort, from which no implied contract to pay for use and occupation can arise.

5. The restriction of the jurisdiction of the Court of Claims to cases of contracts, express or implied, has reference to the well understood distinction between cases arising *ex contractu* and *ex delicto*, and is founded on the sound principle, that while Congress was willing to subject the Government to suits on valid contracts, which could only be valid when made by some one vested with authority to do so or something done by such authority which raised an implied contract, it did not intend to make the Government liable for the wrongful and unauthorized acts of its officers however high their place, and though done under a mistaken zeal for the public good.

6. The seizure, by an Indian agent, for the use of the agency, of buildings owned by a private citizen, under claim that they belonged to the Government, raises no implied obligation of the United States to pay for use and occupation.

[No. 239.]

Argued Apr. 2, 5, 1880. Decided Apr. 19, 1880.

APPEAL from the Court of Claims.
The case is stated by the court.

Messrs. B. F. Butler, E. Lander and Thomas Wilson, for appellant.

Messrs. Charles Devens, Atty-Gen., and John S. Blair, for appellee.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from the Court of Claims where a suit was brought by plaintiff to recover for the use and occupation of the lands and buildings which were the subject of controversy in the case just decided, between the same parties. The judgment of that court is against the claimants.

The first question arising in this case concerns the jurisdiction of the Court of Claims upon the suggestion of the Attorney-General, that the claim is not founded on contract, either express or implied. That court could have no cognizance of the case on any other ground, according to the express language of the statute defining its jurisdiction. *Rev. Stat., sec. 1059.*

The findings of the Court of Claims leave no doubt that the Indian agents, acting for the United States, took possession of the buildings erected many years before by the American Board of Commissioners for Foreign Missions, under which plaintiff asserts his rights, without their consent, and have retained that possession by force and against the will of that Board and of Mr. Langford. The United States always asserted that their possession was by virtue of their own title; that it was hostile to the title of claimant, and the hostility was such that the military of the United States was ordered to protect by force the occupation of the Government agents.

Conceding that the title, or even the right to possession of the premises, was in claimant, it would seem that the facts above stated show

See 11 OTTO.

that the act of the United States in taking and holding that possession was a tort of the most unequivocal character, if the Government can be capable of a tort, and that if the case were one between individuals every implication of a contract is repelled.

Counsel for claimant, admitting this to be true, makes a very ingenious argument to prove that the Government, in taking and using the property of an individual against his consent and by force, cannot be guilty of a tort, because the nature of the relation of the Government to its citizens, and the provisions of the Constitution, create an implied obligation to pay for property, or for the use of property, so taken. The argument rests on two distinct propositions. (1) That the maxim of English constitutional law, that the King can do no wrong, is one which the courts must apply to the Government of the United States, therefore there can be no tort committed by the Government. (2) That, by virtue of the constitutional provision that private property shall not be taken for public use, without just compensation, there arises in all cases where such property is taken for public use an implied obligation to pay for it.

It is not easy to see how the first proposition can have any place in our system of Government.

We have no King to whom it can be applied. The President, in the exercise of the executive functions, bears a nearer resemblance to the limited monarch of the English Government than any other branch of our Government, and is the only *individual* to whom it could possibly have any relation. It cannot apply to him, because the Constitution admits that he may do wrong, and has provided a means for his trial for wrong-doing, and his removal from office if found guilty by the proceeding of impeachment. It was not found in the mouth of any of the eminent counsel who defended President Johnson on his impeachment trial to assert that by law he was incapable of doing wrong, or that, if done, it could not, as in the case of the King, be imputed to him, but must be laid to the charge of the ministers who advised him.

It is to be observed that the English maxim does not declare that the Government or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offense.

We do not understand that, either in reference to the Government of the United States or of the several States or of any of their officers, the English maxim has an existence in this country.

The other point is one which requires more delicate handling.

We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind the Government, takes for public use, as for an arsenal, custom-house or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value.

It is to be regretted that Congress has made

no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the Government, acting by the forms which are sufficient to bind it, recognizes the fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.

What is pertinent to the present case is, that, conceding that principle, it does not confer on that court the authority to decide that the United States, in asserting the right to use its *own* property, is using that of an *individual*, and in taking possession of such property, under claim of title, and retaining it by force against a rival claimant, has come under an implied contract to pay him for the use of the property. In the first case, the Government admits the title of the individual and his right to compensation. This right to compensation follows from the two propositions, that it was private property and was taken for public use, neither of which is disputed.

It is a very different matter where the Government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the Government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise, any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied.

Congress, in establishing a court in which the United States may primarily be sued as defendants, proceeded slowly and with great caution. As at first organized, the Court of Claims was merely an auditing Board, authorized to pass upon claims submitted to it, and report to the Secretary of the Treasury. Such confirmed claims as he approved, he submitted to Congress with an estimate for their insertion in the proper appropriation bill. Such as he disapproved demanded no further action.

It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the Act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. *Gordon v. U. S.*, 2 Wall., 561 [69 U. S., XVII., 921]. An Act of Congress, removing this objectionable feature, having passed, the year after that decision, the appellate power of this court has been exercised ever since. The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

The reason for this restriction is very obvious

on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the Act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, as well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

The question is not a new one in this court.

In the case of *Nichols v. U. S.*, 7 Wall., 122 [74 U. S., XIX., 125], where a suit was brought in the Court of Claims to recover back money exacted of an importer in excess of the duties allowed by law, the court held that no contract to refund was implied, because the money, though paid under protest, was paid voluntarily, and for this reason, among others, that court had no jurisdiction.

In the case of *Gibbons v. U. S.*, 8 Wall., 269 [75 U. S., XIX., 453], an army contractor, who had agreed to furnish 200,000 bushels of oats at a fixed price, had, as this court held, after delivering part of the amount, been legally released from the obligation to deliver the balance. He was, however, carried before the military authority in a state of fear and trepidation and, to save himself further trouble, agreed to and did deliver the remainder of the oats. He sued in the Court of Claims for the difference between the contract price and the market price of the oats at the time of the delivery. One ground of his claim was, that he acted under duress and the constraint of fear, and his agreement to deliver at the contract price was void.

This court said, in answer to this argument, that "It is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officers, those acts being in themselves torts. * * * The language of the statutes conferring jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. * * * These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the General Government, though they have been committed while

serving the Government and in the belief that it was for its interest. In such cases, where it is proper for the Nation to furnish a remedy, Congress has wisely reserved the matter for its own determination."

With the re-affirmation of this doctrine, which excludes the present case from the jurisdiction of that court, *its judgment, dismissing the petition of plaintiff, is affirmed.*

Copy, foregoing opinion and head notes, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

Cited—106 U. S., 241; 112 U. S., 657.

THOMAS ALDRIDGE ET AL., *Appts.*,
v.

WILLIAM MUIRHEAD, Assignee in Bankruptcy of THOMAS ALDRIDGE, a Bankrupt.

(See S. C., 11 Otto, 397-403.)

Married women—husbands' creditors.

1. In New Jersey, when the title to real estate is conveyed to a married woman and paid for out of her separate estate, she is the *bona fide* owner of it, as if she were single.

2. A husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors.

[No. 244.]

Argued Apr. 6, 1880. Decided Apr. 19, 1880.

APPEAL from the Circuit Court of the United States for the District of New Jersey. The case is stated by the court.

Mr. R. Gilchrist, for appellants:

The following cases are upon the question of the construction of the married women's Acts of New Jersey:

Hornor v. Webster, 33 N. J. L., 397; *Huyler v. Atwood*, 26 N. J. Eq., 506; *Lewis v. Perkins*, 36 N. J. L., 133; *Green v. Pallas*, 1 Beas. (12 N. J. Eq.), 267; *Quidort v. Pergeaux*, 18 N. J. Eq., 478; *Wells Separate Prop. of Mar. Wom.*, Sec. 144; *Wilson v. Brown*, 2 Beas., 13 N. J. Eq., 277; *Peterson v. Mulford*, 36 N. J. L., 485; *Court of Errors*—citing many decisions; *Beal v. Storm*, 26 N. J. Eq., 373; *Symmes v. Strong*, 28 N. J. Eq., 132; *Stall v. Fulton*, 30 N. J. L., 430; *Black v. Black*, 30 N. J. Eq., 219; *S. P. in Penn.*, *Wells*, sec. 178; *Vreeland v. Vreeland*, 16 N. J. Eq., 523; *Atwater v. Underhill*, 23 N. J. Eq., 604, citing with approval the N. Y. case of *Knapp v. Smith*, 27 N. Y., 277; *Owen v. Cowley*, 36 N. Y., 600; *Naylor v. Field*, 5 Dutch. 29 N. J. L., 287; *Bk. v. Sprague*, 20 N. J. Eq., 24.

Messrs. Cortlandt Parker and John Linn, for appellee:

We insist as matter of law:

1. That Aldridge, alone, became liable in law to pay back to Hannah Buck, Sarah McClellan and Emma Powe any and all of the money which may have been had of either of them. He took the money and used it, and it became his to all intents and purposes. His wife had no power in law to bind herself to repay money borrowed to speculate in real estate.

See 11 OTTO.

Naylor v. Field, 5 Dutch., 29 N. J. L., 287; *Dilts v. Stevenson*, 17 N. J. Eq., 413, and cases cited on page 414; *Glann v. Younglove*, 27 Barb., 480; *Eckert v. Reuter*, 33 N. J. L., and cases cited; *Lewis v. Perkins*, 36 N. J. L., 133; *Hallowell v. Horter*, 35 Pa., 379.

2. If this last proposition is true, then it follows as a necessary result, that, even if Aldridge purchased the property in question with money obtained of Hannah Buck, Sarah McClellan and Emma Powe, it became his property, and he could not, by taking the deeds in the name of his wife, place it beyond the reach of his creditors.

3. That the property in question having been purchased by Aldridge with his own means, and the title taken in the name of his wife, it became, so far as the interests of his creditors were concerned, his property and his assignee in bankruptcy is, therefore, entitled to a conveyance of it to him.

Mr. Chief Justice Waite delivered the opinion of the court:

This is a suit in equity brought by the assignee in bankruptcy of Thomas Aldridge, to reduce to his possession, as part of the estate, property standing in the name of Anne Aldridge, the wife of the bankrupt. The theory of the bill is that the bankrupt, while largely indebted, purchased the property in controversy with his own means, and took the title in the name of his wife to keep it away from his creditors.

New Jersey has been among the most liberal of the States in modifying the rules of the common law prescribing the marital rights of the husband in the property of his wife and in protecting her against the claims of his creditors. In 1851 a widow was given the right to demand from the personal representative of her deceased husband all personal property which, at or immediately before her coverture, belonged to her, or which came to her during coverture by bequest, gift or inheritance, if it remained in his possession at the time of his death. Laws of 1851, p. 201. In 1852 it was enacted that a married woman might receive by gift, grant, devise or bequest, and hold for her sole and separate use, real and personal property, and the rents, issues and profits thereof, and that her sole and separate property should not be subject to the disposal of her husband or liable for the payment of his debts. Laws of 1852, p. 407. In 1857 married women were authorized to bind themselves by covenants in conveyances of their lands, provided their husbands joined with them in the deed (Laws of 1857, p. 485), and in 1862 it was enacted that if a married woman transacted business or purchased property, and thereby contracted debts, she might be sued at law for the recovery of the amount, and that any judgment thus obtained should bind her property. Laws of 1862, pp. 271, 272.

It is conceded by the counsel for the appellee that the Circuit Judge expressed the law of the State accurately when he said in his opinion, filed with the record, that "The courts of the State, in numerous decisions, have construed it (the Act of 1852) to authorize the acquisition by a married woman of personal property and real estate, and to intercept the common law right of her husband to reduce her personal

property to possession, and to appropriate the rents, issues and profits of her real estate, as an incident of his initiate estate by the curtesy." Another principle stated by the Circuit Judge is also conceded to be correct. It is as follows: "When, therefore, in New Jersey, the title to real estate is conveyed to a married woman, she must be considered the *bona fide* owner of it, as if she were a single female. But it must be intrenched in the real good faith by which an honest acquisition is distinguished. If it is purchased by her or for her, no matter by whom, and is paid for out of her separate estate, its validity cannot and ought not to be questionable. But if she has no separate estate, or that is disproportionately small compared with the consideration ostensibly furnished by her, and her means are materially supplemented by her husband's contribution from resources, whether money or its equivalent, which he could not rightfully so apply, such a transaction does not specially invite, as it certainly does not deserve, any legal sanction." It is equally true that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors. *Voorhees v. Bonesteel*, 16 Wall., 16 [83 U. S., XXI., 268].

Such being the law of the case, we come now to consider the facts. Mr. and Mrs. Aldridge, the appellants, were married in 1842. The wife had, at the time, money and personal property amounting to about \$1,000, which came to her by inheritance from a deceased relative. The most of this was invested soon after in furniture for the home of the family. The husband was an instrument-maker by trade, but at some time before 1857, left that business and engaged in the manufacture of oakum. In 1857 his factory was burned, and being unable to collect his insurance money on account of the insolvency of the company in which his property was insured, he failed and became utterly insolvent. After giving up all his property to his creditors, he remained largely in debt. Confessedly, in the early part of 1861 he had nothing. In May of that year he was appointed postmaster at Hudson City, New Jersey. The emoluments of this office were then considerably less than \$1,000 a year. He was also a real estate agent and conveyancer.

During that year Mrs. Aldridge received about \$400 from her father's estate in England. In September, a friend of the family had a lot for sale with a barn on it. The price was \$350, and the terms easy. A purchase of this lot was made in the name of the wife. Not more than \$25, if that, was paid down. The balance of the purchase money was secured by assuming a mortgage already on the lot for \$250, and giving another mortgage, in which the husband and wife joined, for \$75. Mrs. Aldridge, with the money she had received from her father's estate, and more which she borrowed from a maiden sister, converted the barn on the lot into a house. The cost of this was between \$1,000 and \$1,200, and the house was occupied by the family as a residence until 1869, when it was sold with the lot for something more than \$4,000.

In the course of the years 1863 and 1864, some female friends of Mrs. Aldridge, countrywomen of hers, loaned her \$1,900; one furnishing \$700

and the other \$1,200. She also borrowed further sums from her sister, who was frequently an inmate of the family, and seems to have had money. The precise sum got from her sister does not appear, but the evidence leaves no doubt in our minds that with this and the other sums borrowed she had as her separate capital more than \$3,000.

During the years 1863, 1864 and 1865 five different purchases of property were made in her name. The aggregate of all these, except the last, was only a little more than \$3,000 and credit was given on much of the purchase money. Some sales were made in the meantime and a little profit realized. The last of the five purchases was made in January, 1865. The money needed to make up what was wanted for the down payment was raised by a mortgage of one of the previous purchases. The property embraced in the last purchase was sold in the early part of 1866, and a profit of nearly \$4,000 realized. Many other purchases were made afterwards, but it is conceded that the money to make the payments came directly or indirectly from the returns of this last fortunate transaction.

While it may not be, in all cases, quite clear from what particular source the money came that was used in paying for each one of the earlier purchases, the testimony leaves no doubt with us that, as a whole, they were paid for from the loans made to the wife by her sister and friends, and that all the property she now has is the result of a judicious employment of the capital she thus acquired and its legitimate profits. While the negotiations were all made by the husband, the titles were openly taken in the name of the wife. The appellants were called on to answer whether the purchase money, or any part of it, was paid from the means of the husband, and they stated, under oath, most unequivocally, that it was not. This throws the burden of proof on the complainant and, after a full and careful examination of the whole case, we are unable to find that anything which the creditors of the bankrupt could have subjected to the payment of their debts ever went into the property that the wife now holds. Undoubtedly, the husband's services were largely the cause of the fortunate results; but, so far as we have been able to discover, they were devoted to the management of what was both, in law and in fact, her separate property. Her accumulations from that source do not belong to his creditors.

To our minds, it is an important element in this case that the transactions out of which this suit arose commenced thirteen years or thereabouts, before any attempt was made to impeach them. They were always open, and no effort at concealment was ever made. All deeds were taken in the name of the wife and promptly put on record. The husband's connection with all the purchases and sales must have been well known. The character of his own business must also have been understood. His bank accounts show that he was a large daily depositor in his own name. His checks were numerous and sometimes for considerable amounts. He seems sometimes to have been employed in the course of his business as land agent by heavy property owners. All his debts must have been contracted as early as 1857, and he

was not adjudged a bankrupt until 1873. During all the time between these dates it is not shown that anyone ever attempted to interfere with his own business or to reach the property in the name of his wife, some of which she had held six or seven years. This can be explained in no other way than upon the assumption that the creditors knew the money he was depositing was not, to any considerable extent, his own, and that his transactions in the name of his wife were, in fact, what they purported to be, the result of a judicious management of her separate estate. After such delay, we are not inclined to set aside what has been permitted to remain so long undisturbed, simply because of an inability to explain with exact certainty from what precise source the money came which went into the purchase of each particular parcel of property. It is sufficient, for the purposes of this case, that, with the money Mrs. Aldridge borrowed from her sister and friendly countrywomen, and the profits of her several investments, she had enough of her own, which was her separate estate, to make herself the owner of all she now has without interfering with the just rights of her husband's creditors. The consideration ostensibly furnished by her is not more than we are satisfied she had, and her means were not materially supplemented by contributions from her husband's resources that in law belonged to his creditors. Such services as he rendered in her behalf were no more than were consistent with all the obligations he was under to those to whom he was indebted, and there is no evidence to satisfy us that his own money was used to make any of the payments of purchase money.

That the several loans, which made up the capital invested, were to the wife and not to the husband, is, to our minds, entirely clear. The insolvency of the husband was well understood, and it is evident from all the circumstances that the friends who made the loans would never have done so had it not been supposed that the money was to be used for the benefit of Mrs. Aldridge, and that she and her estate were to become bound for the repayment. The laws of New Jersey authorized her to contract such debts, and made her separate estate liable therefor. The signature of the husband to the notes and mortgages did not, necessarily, make the money or the property for which they were given, his. It perfected the obligation of his wife and subjected her property to liability, but did not transfer her separate estate to him. Unless his means were actually used to pay her debts, his creditors have lost nothing they ever had a right to claim as in law or equity belonging to them. *Conrad v. Shomo*, 44 Pa., 193; *Brown v. Pendleton*, 60 Pa., 419. As he was at the time hopelessly insolvent, it cannot for a moment be supposed that credit was given to his personal obligation. The wife and her separate estate furnished the only security the parties supposed they had for the money which was loaned.

We have thought it unnecessary to go over the details of the evidence in an opinion. The result we have unanimously reached is, that the decree below should be reversed and the cause remanded with instructions to dismiss the bill with costs. *It is, consequently, so ordered.*

See 11 OTTO.

COUNTY OF LIVINGSTON, *Plff. in Err.*

v.

SMEDLEY DARLINGTON.

(See S. C., 11 Otto, 407-417.)

Illinois State Reform School—state statute.

*1. This court will not declare an Act of the State Legislature to be repugnant to the Constitution of the State, except there be a clear and strong conviction of their incompatibility with each other. In the enactment of laws the Legislature must exercise its judgment and discretion. Upon questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge.

2. The Act of the Illinois Legislature, establishing the State Reform School, examined. The provision, authorizing municipal corporations to donate money to secure its location within their limits, sustained, there being no settled or uniform construction of the State Constitution to the contrary, by the Supreme Court of the State.

[No. 232.]

Argued Mar. 31, 1880. Decided Apr. 19, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois. The case is stated by the court.

Messrs. Robert G. Ingersoll, E. C. Ingersoll, Merrick & Morris and William S. Bush, for plaintiff in error:

The state court, in the case of *Livingston Co. v. Weider*, 64 Ill., 427, decided that the bonds were void for want of power on the part of the county to issue them.

The power of towns as political subdivisions, to levy taxes, is limited to purely local corporate purposes, and is not extended to state purposes; for "It is now well settled that a town, in its corporate capacity, will not be bound, even by the express vote of a majority, to the performance of contracts, or other legal duties, not coming within the scope of the objects and purposes for which they are incorporated."

Anthony v. Inhabitants of Adams, 1 Met., 286; *Stetson v. Kempton*, 13 Mass., 272; *Spaulding v. Lovell*, 23 Pick., 79; *Hooper v. Emery*, 14 Me., 375; *Gale v. South Berwick*, 51 Me., 177; *Tash v. Adams*, 10 Cush., 252; *Hood v. Lynn*, 1 Allen, 105; *Adams v. Inhabitants of Wiscasset*, 5 Mass., 328; *Clayton v. Inhabitants of Hopkinton*, 4 Gray, 502; *Gove v. Epping*, 41 N. H., 544; *Op. of Justices*, 52 Me., 596; *Assumption of War Debts*, 53 Me., 591.

It is not a corporate purpose to provide for the public defense.

Alley v. Edgcomb, 53 Me., 446; *Barker v. Dizmont*, 53 Me., 576; see, also, *People v. Works*, 7 Wend., 488; *Lorillard v. Monroe*, 11 N. Y., 393.

The principle of the cases just cited applies to this case. If the money subscribed was not for the purchase or improvement of property to be owned and controlled by the County, but for an institution owned and controlled by the State, then the County Board was acting as agent for the State, and in levying taxes was authorized to levy them for a state purpose, in violation of the law of uniformity. The money to be raised and which was raised, was purely for the benefit of the State, to be paid into its Treasury; and if wrongfully obtained, the State is liable, not the County. If the State accepted illegal bonds and pledged, as security for their

*Head notes by Mr. Justice HARLAN.

payment, a county tax, unauthorized by law, then defendant in error is left to his remedy against the State alone, as a tax for state purposes must be uniform, in the rate of assessment, throughout the State.

A part cannot be taxed for the benefit of the whole.

Allhands v. People, 82 Ill., 235; *Slight v. People*, 74 Ill., 50; *R. R. Co. v. Lackey*, 78 Ill., 57.

Messrs. **Wayne McVeagh** and *L. E. Payson*, for defendant in error:

For what purpose, then, is taxation proper in Illinois, under the phrase "corporate purposes" named in the Constitution?

Our own court has frequently had this provision before it, and given to it a meaning which affords an easy solution of the question as it relates to this case.

See, *Shaw v. Dennis*, 5 Gilm., 10 Ill., 416; *Johnson v. Stark Co.*, 24 Ill., 88; *Taylor v. Thompson*, 42 Ill., 9; *R. R. Co. v. Smith*, 62 Ill., 273; *Nichol v. Nashville*, 9 Humph., 268.

From these cases this proposition is clearly deducible.

If the tax is for a public purpose, and is raised under authority from the Legislature, from either real or legally assumed benefit to the municipality, then it will be sustained.

Cooley in his work on Taxation, p. 114, treating of overlying taxing districts, cites the illustration of building a state capitol; that not only may the people at large be taxed for its construction, but any local district, which, in the opinion of the Legislature, was so situated as to be peculiarly benefited by the location of the building, might be burdened by an exceptional tax, and thus the taxable property of that district contribute twice to the same object.

So it was held in *Kirby v. Shaw*, 19 Pa., 258, 261; *Thomas v. Leland*, 24 Wend., 65; *Merrick v. Amherst*, 12 Allen, 500.

Is there any difference in principle, on the question being considered, between a state capitol and a state reform school? Is the one any less a state institution than the other?

Marks v. Purdue University, 37 Ind., 155.

If the Legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, that is conclusive.

Cooley, Tax., 450; *Litchfield v. Vernon*, 41 N. Y., 123; *People v. Lawrence*, 41 N. Y., 140; *Philadelphia v. Field*, 58 Pa. St., 320.

So held in Illinois.

Shaw v. Dennis, 5 Gilm., 10 Ill., 416.

The judicial tribunals cannot interfere with the legislative discretion, however onerous it may be.

Scovill v. Cleveland, 1 Ohio St., 126; *Hill v. Hagdon*, 5 Ohio St., 243; *Gordon v. Cornes*, 47 N. Y., 608; *Alcorn v. Hamer*, 38 Miss., 652.

The *Weider* case has been overruled by the Supreme Court of Illinois.

Burr v. Carbondale, 76 Ill., 455; see *Keithsburg v. Frick*, 34 Ill., 405; *R. R. Co. v. Morris*, 84 Ill., 411.

Mr. Justice **Harlan** delivered the opinion of the court:

The court is asked in this action to declare an Act of the General Assembly of Illinois to be repugnant to the Constitution of that State. The Act referred to was approved March 5, 1867. It established a State Reform School for

the discipline, education, employment and reformation of juvenile offenders and vagrants, between the ages of eight and eighteen years. The management of the institution was committed to a Board of Trustees, appointed by the Governor, by and with the consent of the Senate. Cook County was excepted from the operations of the Act, because a similar institution had been previously established in that County.

The Board, upon its organization, was required to proceed in the selection of a suitable site, in or near the central portion of the State, on which the necessary buildings should be erected. In determining such location, the trustees were directed to take into consideration any proposition, of the performance of which they had satisfactory assurance, to give to the State the lands necessary for the site of the "House of Refuge," or any materials or money to aid in the erection thereof. Any bond or other obligation executed to the people of the State, and delivered to the trustees of the institution, to secure any such site, money or materials, the Act declared, should be binding upon the parties executing the same. 1 Gross, Stat., 564.

On the 19th of April, 1869—the institution not then having been permanently located—an amendatory Act was passed, which, among other things, declared:

That any township, county, town or city might make a subscription in aid of the school, in money, bonds or lands, for the purpose of securing its location within its limits;

That such subscription, if by a county, should be made by resolution, to be adopted by a majority vote of its Board of Supervisors, at a regular or special meeting thereof; if by a township, by resolution of the supervisor, town clerk and assessor, acting as a Board for the township; if by a town, by resolution or ordinance of its Board of Trustees; and if by a city, by a resolution or ordinance passed in the usual manner;

That no subscription should be made by a township, town or city, except in pursuance of a popular vote, at an election called and held in the manner specified in the Act; and,

That the township, county, town or city making such subscription might provide for the payment of the principal and interest thereof, by tax upon the taxable property of such county, township, town or city, to be levied and collected as other taxes. 1 Gross, Stat., 564, *et seq.*

Under this legislation, the County of Livingston, through its Board of Supervisors, in consideration of the location of the school within its limits, and to aid in the erection of the necessary buildings, donated the sum of \$50,000, and, in payment thereof, issued county bonds, with interest coupons attached. The bonds, dated July 15, 1869, signed by the chairman and clerk of the Board of Supervisors, under the county seal, and reciting upon their face that they were executed and issued under the provisions of the Acts of March 5, 1867, and April 19, 1869, and in accordance with the resolution of the Board of Supervisors, were delivered to the trustees of the school, who caused them to be sent to Pennsylvania for sale. They were there sold, in open market, to citizens of that State, and the proceeds applied, by the

State of Illinois, to the completion of the buildings connected with the Reform School.

The institution went into operation as contemplated by the Legislature.

The present action was brought by Darlington upon some of the interest coupons, he, it is agreed, having become the legal holder thereof, in good faith, for a valuable consideration.

The circuit court gave judgment against the County.

Upon this writ of error the controlling question presented for our determination is, whether the Acts of the General Assembly of Illinois, under which the bonds were issued, are, as to the provisions authorizing municipal donations to secure the location of the Reform School, repugnant to the 5th section of article 9 of the Constitution of the State, ratified in 1848.

That section declares that "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

The argument of counsel in behalf of the county consists mainly of two propositions, viz.:

That, according to the settled construction by the Supreme Court of Illinois of the State Constitution, at the time the bonds in suit were issued, the General Assembly could not invest the corporate authorities of counties or other municipal organizations with power to assess and collect taxes for any except corporate purposes;

That it is equally well settled by the same court not to be a corporate purpose for a county or other municipal body to aid, by donation or otherwise, in the establishment of a state institution for the discipline, education, employment or reformation of juvenile offenders and vagrants.

In determining whether the General Assembly of Illinois has transgressed the fundamental law of that State, we recall what this court said in *Fletcher v. Peck*, 6 Cranch, 128, where it became our duty to consider whether a statute of Georgia was in conflict with its Constitution.

"The question," said Chief Justice Marshall, "whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its Acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The language was cited with approval in *R. Co. v. Smith*, 62 Ill., 268, where the Supreme Court of Illinois added:

See 11 OTTO.

"Enough has been cited to show the firm position of the judiciary, that the courts ought not and, in justice to the rights of a co-ordinate department of the State Government, cannot, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity." *Lane v. Dorman*, 4 Ill. (3 Scam.), 238; *People v. Marshall*, 6 Ill. (1 Gilm.), 672.

Adhering to these doctrines as vital in the relations which exist between the legislative departments of the several States and the courts of the Union, we first inquire as to the state of the law in Illinois, as declared by its highest judicial tribunal, at the time, July 15, 1869, the bonds in suit were issued and put upon the market for sale.

Prior to that date it seems to have been settled by that court:

1. In *Harvard v. St. Clair Drain Co.*, 51 Ill., 130, that, under the Constitution in force prior to that of 1848, and which contained no provision similar to section 5, article 9, of the Constitution of 1848, the right of the Legislature to confer upon municipal corporations the power of taxation for local or corporate purposes was constantly exercised and never denied or doubted; that section 5, article 9, of the Constitution of 1848, was not, therefore, intended as a grant of such power or to remove doubts as to its existence, but to define the class of persons to whom the right of taxation might be granted and the purposes for which it might be exercised; that, consequently, the Legislature could not constitutionally confer that power upon any other than the corporate authorities of a county, township, school districts, cities, towns and villages, or for any other than corporate purposes;

2. In *Johnson v. Stark Co.*, 24 Ill., 75, re-affirmed in *R. Co. v. Smith*, 62 Ill., 268; *Perkins v. Lewis*, 24 Ill., 208; *Butler v. Dunham*, 27 Ill., 474; *Keithsburg v. Frick*, 34 Ill., 405, and other cases, that the subscription by a county to the capital stock of a railroad company engaged in the construction of a road running through the limits was a corporate purpose, for the accomplishment of which the corporate authorities of the county could, under legislative sanction, assess and collect taxes upon persons and property within its jurisdiction; that such aid was a corporate purpose, because in the completion of such improvements "The whole community is either immediately or remotely interested, those near the line on which it passes in a larger, and those more remotely situated in a less degree, but all participate in its benefits;" that, among the corporate purposes for which a county may be taxed, are court-houses, jails, poor-houses, the opening and keeping of common highways, and the erection and maintenance of bridges.

3. In *Taylor v. Thompson*, 42 Ill., 9, followed by *Henderson v. Lagow*, 42 Ill., 360, 361; *Briscoe v. Allison*, 43 Ill., 291; *Misner v. Bullard*, 43 Ill., 470, and *Johnson v. Campbell*, 49 Ill., 317, that a tax levied by a township under legislative authority, and in pursuance of a popular vote, to pay bounties to persons who should thereafter enlist or be drafted in the Army of the United States, was a tax for a corporate purpose; that the framers of the Constitution intended to leave a large discretion to the Legislature as to what should be considered as falling within that phrase; that the phrase "corporate

purposes" should not receive "So narrow a construction as to justify the courts in holding that a municipality should not tax itself, although authorized by Act of the Legislature, because it might be a *debatable* question whether the proposed tax would promote the corporate welfare or not," that a tax for a corporate purpose is a "Tax to be expended in a manner which shall promote the general prosperity and welfare of the community which levies it; that every individual tax payer shall have a direct interest in the object for which the tax is levied, or be directly benefited by the expenditure, is unattainable in the very nature of things. General results are all that can be expected; and if it appears that a tax has been voted and levied with an honest purpose to promote the general well-being of the municipality, and was not designed merely for the benefit of individuals or a class, its collection should not be stayed by the courts."

In *Taylor v. Thompson* [*supra*], the court, by way of illustrating the doctrine there laid down, said: "The creation of a police force, the establishment of a reform school for juvenile offenders or a hospital for persons ill with contagious disease, would not directly benefit a non-resident taxed for their support; and yet no person would deny that these are proper ends of municipal taxation, and justly included in the phrase 'corporate purposes.'"

This analysis of the decisions of the Supreme Court of Illinois sufficiently indicates what was, at the time these bonds were issued, the established authoritative exposition of the phrase "corporate purposes." It is to be observed that when these bonds, by the joint action of the county and state authorities, were transmitted to the State of Pennsylvania for sale to its citizens, there was, in the published decisions of the state court, the broad declaration that "The establishment of a reform school for juvenile offenders" was, beyond question, a proper object of municipal taxation, and was a corporate purpose within the meaning of the Constitution.

It is necessary that we should now trace the course of decisions subsequently rendered by that court.

In *R. R. Co. v. Smith*, already cited, it was ruled that a township donation, made under legislative authority, and with the sanction of a popular vote, was a corporate purpose for which a tax could be assessed by the proper authorities of such township. The court there said: "It is contended that the appropriation was not for a corporate purpose. If it was for a public purpose, for the benefit of the inhabitants of the municipality, then it would be for a corporate purpose. The latter cannot be distinguished from the former; and all that we have said in relation to the public purpose of the tax will apply with equal force to a corporate purpose. * * * In *Taylor v. Thompson*, 42 Ill., 9, this court defined a corporate purpose to mean 'a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it.' We accept this definition," etc. *R. R. Co. v. Pinckney*, 74 Ill., 277; *Middleport v. Ins. Co.*, 82 Ill., 562; *Lippincott v. Pana*, decided October, 1879 [92 Ill., 24].

We come now to a case which, with entire respect for the very able and enlightened tribu-

nal by which it was determined, we are constrained to say, does not seem to be in line with its previous decisions, or with subsequent decisions to which we shall presently refer. We allude to *Livingston Co. v. Weide*, 64 Ill., 427, decided more than three years after the bonds and coupons in suit were issued under legislative authority, and their proceeds received and used by the State. That was a suit in chancery, commenced in the state court by the Board of Supervisors of Livingston County against the County Treasurer, to enjoin the latter from paying out money which had been collected to meet the interest upon the identical bonds whose validity is here questioned. None of the holders of the bonds were made parties to the suit. No attempt was made to bring them before the court in any form. It is not, therefore, binding upon them as a final adjudication of the questions now before us. *Brooklyn v. Ins. Co.* [*ante*, 416]; *Pennoyer v. Jeff*, 95 U. S., 714 [XXIV., 565]; *Empire v. Darling* decided at the present Term [*ante*, 878].

It was held in *Livingston Co. v. Weide*, not to be a corporate purpose, in the constitutional sense, to provide a location for a state institution. After stating it to be the duty of the Legislature to determine for the whole people the necessity for a state reform school, and that it was degrading to the State, and reflected no honor upon it to accept a donation from a particular locality to secure the location of a state institution, the court proceeds: "What peculiar interest have the tax payers of Livingston County, or non-residents owning property therein, in such an institution being located in their midst? What corporate purpose does it specially promote by such location? What is a reform school? It is a penitentiary on a small scale, as is evident from the statute cited. How can it be a corporate purpose to establish what all admit is a necessary evil, a state reform school, in any town? It is a state, not a corporate purpose."

Upon these grounds the bonds issued by the county were held to be null and void, by whomsoever owned. It is to be observed that the court, in that case, refers, but without disapproval, to the definition of corporate purposes as given in *Taylor v. Thompson* and, recognizing the inherent difficulty of laying down any precise rule applicable to every case, says: "The true doctrine is, such purposes, and such only (are corporate purposes) as are germane to the objects of the creation of the municipality, at least such as have a legitimate connection with those objects, and a manifest relation thereto."

The binding authority of that case is disputed by defendant in error upon the ground that his rights accrued long prior to its decision, and under a settled construction of the State Constitution favorable to the validity of the Acts of 1867 and 1869. He further contends that the rule announced in *Livingston County v. Weide* was substantially abrogated, if not entirely overthrown, by subsequent decisions of the same court, particularly those in *Burr v. Carbondale*, 76 Ill., 455, and *Hensley v. People*, 84 Ill., 544.

In *Burr v. Carbondale* the question presented was whether a tax, levied by a city under legislative authority, to pay interest on city bonds, issued to secure the location, within its limits, of a state institution, called the Southern Normal

University was or not a corporate purpose within the meaning of the Constitution of 1848. The court held that it was. And if we do not misapprehend altogether the grounds upon which the decision rests, they were: 1. That the university was, in the judgment of the court, an actual benefit to the community in which it was located. 2. That the bonds were issued after a vote of the people who were to be taxed for their payment. That case was distinguished from *Livingston Co. v. Weide* in these respects: that a state reform school was, in the judgment of the court, an undoubted injury, not an advantage, to the community in which it was located and, therefore, to aid it by municipal taxation was not a corporate purpose; and further, that the bonds, in that case, were issued without a vote of the people.

As to the objection that the bonds, under the State Reform School Act, were issued without taking the sense of the people, it is sufficient to say that the Board of Supervisors were the corporate authorities of the County, and that the Supreme Court of Illinois had decided, under the Constitution of 1848, as early as *Keithsburg v. Frick*, 34 Ill., 405, and again in *Marshall v. Silliman*, 61 Ill., 218, and, finally, in 1870, in *R. R. Co. v. Morris*, 84 Ill., 411, that it was "By no means a necessary element in these (municipal) subscriptions that there should be a vote of the inhabitants of a town or city authorizing them. It is competent for the Legislature to bestow the power directly" upon those who, in legal contemplation, were the corporate authorities of the municipality. *Roberts v. Bolles*, decided at the present Term [*ante*, 880].

In *Hensley v. People* [*supra*], it was held, upon the authority of *Burr v. Carbondale*, that a county tax levied in payment of bonds issued, under legislative authority, to secure the location, within that county, of a state industrial university, was a tax for a corporate purpose.

Upon this review of the decisions of the Supreme Court of Illinois, our conclusion is that, testing the validity of these bonds by the decisions of that tribunal, rendered prior to and unmodified at the date of their issue, we would be obliged to hold they were issued for a corporate purpose. And, while the doctrines announced in *Livingston Co. v. Weide*, if applied here, would establish their invalidity, the principles enunciated in previous cases, and in the subsequent cases of *Burr v. Carbondale* and *Hensley v. People*, seem quite as clearly to sustain their validity. If, as adjudged by the Supreme Court of Illinois, it was, within the true meaning of the Constitution of 1848, a corporate purpose to impose taxes to pay bounties to those who enlisted or were drafted in the Army of the United States, or to secure the location of a state normal or state industrial university, or to pay municipal bonds issued, by way of donation, to aid in the construction of a railroad; if taxation, in the constitutional sense, was for a corporate purpose whenever imposed for a public purpose; we do not perceive upon what just ground it can be held not to be a corporate purpose for a municipality to make, under express legislative authority, a donation to secure the location within its limits of a state reform school, wherein juvenile offenders and vagrants may receive such care, discipline, education and employment as, while effecting

or contributing to their reformation, will protect the community in which they live from the evils and dangers which confessedly result from idleness and vagrancy among the young.

Had the Acts, under which these bonds were issued, provided for the establishment of a reform school in Livingston County, for the discipline, education, employment and reformation of juvenile offenders and vagrants within its limits, it would not be claimed, in view of the course of decisions in the state court, that the Legislature has transcended its constitutional power. That the school established was a state institution, to be maintained after being established at the expense of the State, but in the benefits of which the County where it was located could participate, does not, it seems to us, affect the question of legislative power. It is a matter rather of public policy or expediency, the determination of which, the power existing, belongs to the Legislative Department. It was well said by the Supreme Court of Illinois, that, "In the enactment of laws the Legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge. It has also the undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it. A court, with any propriety, cannot arrogate to itself all power and wisdom in such matters; and if there be grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the Legislature." *R. R. Co. v. Smith*, 62 Ill., 273. In a previous case the court had said that "A proper respect for the Legislative Department requires us to regard its Acts as *prima facie* constitutional." *Taylor v. Thompson*, 42 Ill., 14.

We express no opinion as to what, in our judgment, is the true exposition of those parts of the Illinois Constitution to which reference has been made, or as to the wisdom or propriety of such legislation as that under examination.

Our purpose has been to ascertain what was the law of the State as expounded by its highest judicial tribunal. And while, perhaps, the judgment of the circuit court might, in view of our own decisions, be sustained upon other grounds, it is sufficient for the disposition of this case to say, that the adjudications of the state court do not show any such settled or uniform construction of the State Constitution upon the questions here involved as would justify us, with proper respect to the Legislative Department of Illinois, in holding that it had transgressed the fundamental law of the State.

The judgment is affirmed.

Cited—103 U. S., 570; 90 Ind., 29; 46 Am. Rep., 192.

JOHN BECHTEL ET AL., *Plffs. in Err.*,
v.
UNITED STATES.

(See S. C., 11 Otto, 597-601.)

Copies of papers from Treasury, when evidence—construction of statute—error must be proved.

1. Under the Act of 1797, in every case of delinquency where a suit has been instituted, a trans-

script from the books and proceedings of the Treasury may be admitted in evidence, and all copies of bonds, relating to or connected with the settlement of any account between the United States and an individual when certified, may be annexed to such transcripts, and are entitled to the same degree of credit which would be due to the original.

2. A remedial statute is to be liberally construed with reference to the purpose of its enactments.

3. Error must be affirmatively shown; it is not to be presumed.

[No. 156.]

Submitted Jan. 16, 1880. Decided Apr. 19, 1880.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The case is stated by the court.

Mr. Edward Salomon, for plaintiffs in error.

Mr. Edwin B. Smith, *Asst. Atty-Gen.*, for defendant in error.

Mr. Justice Swayne delivered the opinion of the court:

On the 25th of November, 1871, the defendants executed to the United States a bond in the penal sum of \$20,000, conditioned that Bock, Schneider & Co. should account and pay for the stamps therein mentioned as therein prescribed, and should do the other things therein required to be done, then the bond to be void, otherwise to be in force. The declaration (which is upon this bond) avers that thereafter the United States delivered to Bock, Schneider & Co. such stamps of the value of \$5,500, and that they had refused and neglected to pay for a portion of them of the value of \$4,400.

The defendants pleaded *non est factum*, performance and the non-delivery of the stamps.

The case was tried by a jury, and a verdict and judgment were rendered for the United States.

Upon the trial, the United States offered in evidence a certified copy of the bond and certified copies of the receipts of Bock, Schneider & Co. for the stamps, both from the Treasury Department, and a treasury transcript of the account of Bock, Schneider & Co., showing a balance of \$4,400 against them. The defendants objected to this evidence being received, and asked the court to instruct the jury to find in their favor. The court admitted the evidence, and refused the instruction. The defendants excepted as to both points.

"The defendants then asked the court to charge the jury and direct that the defendants were entitled to have deducted from the balance shown to be due by the treasury accounts ten per cent commission on the same, as allowed by the Act of Congress of June 30, 1864, 13 Stat. at L., 294, amended in 1870, and incorporated in the Revised Statutes under section 3425, page 677.

The court, after argument, denied the motion, and the defendants excepted.

The court thereupon directed the jury to find a verdict for the plaintiffs for the sum of \$4,400, principal, with interest from October —, 1872, to the date of said trial, at seven per cent per annum, being the sum of \$1,052.30, making a total of \$5,452.30; to which direction the defendants excepted.

The jury rendered a verdict as directed."

The brief of the counsel for the plaintiffs in error is confined to two points:

1. The admission of the documentary evidence from the Treasury Department; and,

2. The refusal of the court to instruct the jury to allow the deduction of ten per cent claimed by the defendants.

Our remarks will be confined to these subjects. We shall consider them in the order in which we have named them.

The suit was commenced and put at issue by the pleadings, and the copies and transcript from the Treasury bear date more than two years before the Revised Statutes were enacted, but their enactment was prior to the trial. They were approved by the President on the 22d January, 1874, and then took effect.

The repealing section, 5596, included the Act of March 3, 1797, ch. 20, 1 Stat. at L., 512; but section 5597 saved all rights which had accrued under any of the Acts thus abrogated. It declared that all such rights "Shall continue and be enforced in the same manner as if said repeal had not been made." Section 886 of the Revised Statutes, relied upon by the counsel for the plaintiffs in error, is not, therefore, the statutory provision by which the rights of the parties as to the point here in question are to be determined. They are governed by the 2d section of the Act of 1797, before mentioned, upon which section 886 of the later enactment is founded. They are materially different, and the latter is narrower than the former.

The Act of 1797 was the first regulation upon the subject made by Congress. The 2d section declares that "*In every case of delinquency where a suit has been or shall be instituted, a transcript from the books and proceedings of the Treasury, certified,*" etc., "shall be admitted in evidence, and the court trying the cause shall be thereupon authorized to grant judgment and award execution accordingly; and all copies of bonds," etc., "relating to or connected with the settlement of any account between the United States and an individual, when certified," etc., "may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court."

This section clearly comprehends the case before us.

The 1st section directs suit to be brought against "Any revenue officer or other person accountable for public money" who shall become a defaulter. If it be said that the 2d section is limited by the 1st to the classes of persons named, in the 1st, there are several answers.

It will be observed that the language of the 2d section contained no such restriction. It is general. Its terms are "*in every case of delinquency,*" and again, "*the settlement of an account between the United States and an individual.*" The Act contains seven sections. The 4th, 5th, 6th and 7th apply indisputably to all debtors of the United States, without discrimination.

The 3d section, fairly considered, must be regarded as no less comprehensive.

The 2d section, being remedial in its character and relating to the law of procedure, is to be liberally construed with reference to the purpose of its enactment. Sedgwick, *Statutory and Const. L.*, pp. 311, 315, and *n.*

This precise question came before the circuit court in *U. S. v. Lent*, 1 Paine, 417. *Mr. Justice Thompson* there said:

"The construction contended for on the part of the plaintiffs in error, that this provision, as to the admission of authenticated copies, is restricted to certain cases, where suits are commenced under authority given by the 1st section of the Act, *cannot be sustained*, although it is not perceived why the present is not such a case. But *the provision is general, and applies to all cases where the evidence is required*, and is founded upon a proper precaution to guard against the loss of the original."

See, also, *U. S. v. Lee*, 2 Cranch (C. C.), 462.

As the Act of 1797 has been repealed, we forbear to pursue the subject further.

A few words will be sufficient to dispose of the other point.

It arises under the Act of June 30, 1864, ch. 173, sec. 161. 13 Stat. at L., 294; R. S., sec. 3425. The deduction claimed of ten per cent is allowed by the statute to a purchaser "who furnishes his own die," etc. The defendants declined to give any evidence to the jury, and it certainly does not appear by the record that any was adduced on this point. But it is said it was treated by the Government at the trial as a conceded fact. There is no such admission here by the counsel of the United States.

We cannot look beyond the record, and that is silent upon the subject.

It is said, further, that the transcript shows the deduction from a charge for stamps of \$1,100, not here in controversy. It would be a long stride in dialectics, and one we are not prepared to take, from this fact to the inference, that the purchaser also furnished the die when the stamps in question were bought. The conclusion claimed from such premises would be a palpable *non sequitur*.

It is rather to be inferred that the allowance was made in one case because the die was furnished, and refused in the other because it was not.

Error must be affirmatively shown. It is not to be presumed.

The judgment of the Circuit Court is affirmed.

DELPHINE TRENIER, Admr., of JOHN TRENIER, Deceased, ET AL., Plffs. in Err.,

v.

ISABELLA P. STEWART.

(See S. C., 11 Otto, 797-810.)

Locality of land, question of fact—first title to Mexican grant—confirmation.

1. Whether the locality of a tract, as described in a Mexican grant, can be ascertained or not, is a question of fact to be found by a jury. Where evidence in respect to that issue was introduced by both parties, and it was properly submitted to the jury, their verdict is not open to revision in this court.

2. Where two titles to the same land depend exclusively for their validity upon the action of Congress, he who first obtains the title, and not he who first applied for it, has the better right.

3. If the title of the original donee was complete when the province was ceded to the United States, it is the superior title, and is protected by the Treaty of Cession.

4. Where Congress has confirmed the concession See 11 OTTO. U. S., Book 25.

to the donee as one derived from a former sovereign of the province, its genuineness and authenticity are established.

[No. 254.]

Argued Apr. 9, 1880. Decided Apr. 19, 1880.

IN ERROR to the Supreme Court of the State of Alabama.

The case is stated by the court.

Messrs. P. Phillips and W. Hallett Phillips, for plaintiffs in error.

Messrs. J. T. Morgan and Thos. H. Herndon, for defendant in error.

Mr. Justice Clifford delivered the opinion of the court:

Claims to land, when the Province of Louisiana was ceded to the United States, were, in many instances, incomplete, arising largely from the fact that the Governor of the Province, during Spanish rule, never had authority to issue a patent. Laws were, accordingly, passed by Congress very early after the jurisdiction was transferred, making provision for the adjustment of such inchoate claims, which in one form or another have been continued in force even to the present time.

Concessions of the kind having never received the sanction of the supreme power of the Province, they did not have the effect to segregate the tract conceded from the mass of the public lands, from which it followed that when the jurisdiction of the Province was transferred by the Treaty the legal title to all such tracts vested in the new sovereign until confirmed.

Complete titles, of which there were a few, mostly derived during the dominion of the French, needed no confirmation, as they were fully protected by the Treaty.

Sufficient appears, to show that the plaintiffs derive their title from Nicholas Baudin, an old French claimant, whose title, as the plaintiffs allege, was confirmed by an Act of Congress. 4 Stat. at L., 240. They rely upon the action of the commissioners appointed under that Act of Congress, and the proceedings of the commissioners shown in the State Papers, and the confirmation of the same by the subsequent Act of Congress relating to the same subject-matter. 4 Stat. at L., 358; 3 Am. St. Papers, pp. 19, 20; 5 Am. St. Papers, 180.

Evidence was given by both parties, as is fully set forth in the transcript and in the report of the case as prepared in the court of original jurisdiction. *Stewart v. Trenier*, 49 Ala., 492.

None of the other proceedings in the cause, prior to the bill of exceptions and the final judgment, removed here for re-examination, are material in this investigation, and they are omitted, with the remark that the parties will find them all fully set forth in the statement of the reported case.

Service was made, and the defendants having appeared pleaded the general issue. Both parties gave evidence, and the verdict and judgment were in favor of the plaintiffs. Exceptions were filed by the defendants, and they appealed to the Supreme Court of the State, where the judgment was affirmed. Still dissatisfied, the defendants sued out the present writ of error, and removed the cause into this court.

Since the cause was entered here, the defendants have assigned three errors, as follows: (1)

That the circuit court erred in holding that the concession under which the plaintiffs claim is a complete title. (2) That the circuit court erred in holding that the title derived under that concession, accompanied by the statutory confirmation referred to, is superior to that of the defendants as confirmed by the Act of Congress of an earlier date, and the patent issued to the party. (3) That the circuit court erred in treating the question of boundary as one to be determined by the court and jury, though the uncontradicted evidence showed that the tract could not be located by the description given in the concession.

Applicants for a concession in Louisiana as well as in California usually addressed a petition to the Governor for the land, and it seldom or never appears that any survey was had before the concession was issued. Surveys frequently followed the concession or grant; and where the proceeding is regular, it affords strong evidence to support the title of the claimant.

Regular concessions or grants were usually made in one of three ways: (1) Grants by specific boundaries, where, of course, the donee is entitled to the entire tract within the described monuments. (2) Concessions or grants by quantity, as of one or more leagues of land within a larger tract described by what are called out-boundaries, where the donee is entitled to the quantity specified and no more, to be located by the public authority, usually in a manner to include the improvements of the occupant, and with due respect to any descriptive recitals in the instrument. (3) Grants or concessions of a place or *rancho* by some particular name, either with or without specific boundaries, where the donee is entitled to the tract known by the name specified according to the boundaries, if boundaries are given, and if not, then according to the known extent and limits of the tract or *rancho* as shown by the proofs, including evidence of possession and the settlement and cultivation of the occupant. *Higuera v. U. S.*, 5 Wall., 827-834 [72 U. S., XVIII., 469-471].

Fee simple title is claimed by the plaintiffs as purchasers from the heirs of the original donee to whom the concession was made, November 21, 1710, by the authorized agents of the Sovereign of the Province as universally admitted. Full proof is also exhibited that the concession of the donee was confirmed September 15, 1713, by the Governor of the Province. Support to the theory that the concession is genuine and authentic is also derived from a document appended to it, showing that the widow of the donee, at a very early period, presented the same at the office of the Council of the Province, in order that it might be duly enrolled in the minutes of that tribunal.

Unimportant preliminary recitals in the concession will be omitted, as it is not controverted that it emanated from competent authority. It is addressed to the grantee, and purports to concede to him "The land of Grosse Pointe, to begin at and run along the course of Fowl River till it reaches the Oyster Pass which separates Massacre Island from the mainland." Enough appears, to warrant the conclusion that the land was regarded as suitable for grazing, and the express declaration is that the entire cession and transfer were made in the name of

His Majesty, "with its circumstances and dependencies," in order that the donee, his children, heirs and assigns may enjoy and use it forever, without being troubled or disturbed in the peaceable possession thereof. 3 Am. St. Papers, 20.

When the claim was first presented to the commissioners they described it as follows: the claim of the heirs of Nicholas Baudin to an island in Fowl River, being ten or twelve miles in length and from two to three miles wide, and they refer to the concession and the documents as the foundation of the claim.

Commissioners, with fuller powers, were subsequently appointed for the adjustment of land claims in the State where this tract is situated, and the plaintiffs gave in evidence their report upon the subject, entitled Special Report, No 2, as follows: Claim of the heirs of Nicholas Baudin to an island in Fowl River, called Grosse Pointe, or Isle Mon Louis, estimated to contain about fourteen thousand three hundred and sixty arpents. 5 Am. St. Papers, 130.

Extended report was made by those commissioners in favor of the claim, and it was declared valid pursuant to the 1st section of the Act confirming the reports of the register and receiver of the land-office for the district therein described. 4 Stat. at L., 358.

Proof of *mesne* conveyance to the plaintiffs was also introduced by them, and that the defendants were in possession of the premises. Documentary evidence was also introduced by the defendants in support of their title, as heirs of Henry Francois, for which purpose they read the entries in the third volume of the State Papers relating to the claim, as contained in the report of the register of the local land-office. They then read in evidence the supplementary Act of Congress providing for the confirmation of land titles in that State. 3 Stat. at L., 707. Also an abstract of locations from the records of the local land-office by the register, which was made a part of the bill of exceptions, and a duplicate copy of the patent certificate, with proof that it was correctly copied from the original. Evidence was also introduced by the defendants to authenticate the record of the survey and tract which they claim, and the same was read to the jury. Oral testimony was also introduced by the defendants, proving that the plat and field notes of the survey and location were correct, and they also read in evidence the patent to them from the United States, a copy of which is attached to the transcript. Both sides examined witnesses, whose testimony is duly reported; but it is not deemed necessary to reproduce it, as it is fully reported in the transcript and in the report of the case when first tried in the court of original jurisdiction. Full report was then made of the evidence, and the same was sent up to the Supreme Court of the State. 49 Ala., 442.

Matters of fact are determined by the verdict of the jury; and, inasmuch as the assignment of errors does not call in question any ruling of the court in admitting or excluding evidence, the re-examination of the record will be confined to the instructions of the court given to the jury, and the exceptions of the defendants to the rulings of the court in refusing the requests for instruction which they presented.

Exceptions, of a general character, to the entire charge of the court are not entitled to much favor, as they fail to inform the presiding justice what the matters are to which the objections apply, and frequently give rise to embarrassment in the appellate court for the same reason. Objections to the charge should be specifically pointed out before the jury retire, in order that the justice presiding may know what the supposed errors are, and have an opportunity to make any corrections that the circumstances may require, to enable the jury to determine the issue between the parties according to law and the evidence.

Six separate propositions were submitted by the court of original jurisdiction to the jury, in substance and effect as follows:

1. That the concession under which the plaintiffs claim is a complete grant, and that it vested in the donee a perfect title to the tract therein described as being in Fowl River, ten or twelve miles in length, and from two to three miles wide, and called Grosse Pointe; that if the jury believe from the evidence that the land of Grosse Pointe and Mon Louis Island are the same land, having the same boundaries and description, then the grant to the donee conveyed to him a complete title to the whole of the island, subject to the right of eminent domain, and that it is protected by the Treaty of Cession.

2. That the grant to the donee being perfect and complete, the land covered by it continued to be private property, the title to which is complete, unaffected and unimpaired by any of the subsequent changes in the sovereignty of the Province.

3. That the title of the donee was complete when the jurisdiction was ceded to the United States; which is sufficient to show that neither the Act of Congress referred to nor the patent could convey any title to the other donee.

4. That the right and title of the original donee were superior to the claim of the other donee, and that, if the jury believed from the evidence that the land in controversy is embraced in that concession, and that the plaintiffs derived their title to the same from that donee, then they are entitled to recover in this action.

5. That hearsay and reputation among those who may be supposed to have been acquainted with the facts as handed down from one to another, is competent evidence of pedigree and heirship to be submitted to the jury, who are the judges of its weight and sufficiency.

6. That the title to real property may be acquired by virtue of adverse possession and enjoyment, when taken under color of title and held in good faith openly, notoriously and continuously; that if the jury believe, from the evidence, that the plaintiffs had such possession of the premises for ten years before the entry of the defendants, then the plaintiffs are entitled to recover.

Exceptions were noted as having been taken to the charge of the court and to each and every part of it. Such an exception in the circuit court could not be regarded as sufficient; but, inasmuch as the case was reviewed and the judgment affirmed in the Supreme Court of the State, we are inclined to re-examine the errors assigned.

Suppose the matters set forth in the concession as descriptive of its location, extent and boundaries existed there, as it must be presumed they did, when the grant was made, no one, it is supposed, would deny that they would be sufficient to give validity to the title of the plaintiffs. Conceded or not, it must be so, as they show a compliance with two if not all of the modes in which such grants were made under the prior sovereigns of the Province.

Grants made by Mexican Governors, says *Mr. Justice Field*, were usually made in one of three ways: (1) Grants by specific boundaries, where the donee is entitled to the entire tract. (2) Grants by quantity, as of one or more leagues of land situated in a larger tract described by out-boundaries, where the donee is entitled only to the quantity specified. (3) Grants of a certain place or *rancho* by some particular name; which rule is well exemplified by the grant exhibited in the transcript as the grant of an island of a specified name in a particular river. *Alviso v. U. S.*, 8 Wall., 337-339 [75 U. S., XIX., 305].

Grant all that; and still it is insisted that the name of the tract is not remembered by the witnesses, and that such changes in the surroundings of the alleged locality have taken place that neither the locality of the concession nor its extent can be ascertained.

Two answers to that suggestion are made, both of which are entitled to great weight: (1) Whether the locality of the tract as described in the concession can be ascertained or not, presents a question of fact to be ascertained by a jury. Evidence in respect to that issue was introduced by both parties, which was properly submitted to the jury, whose verdict is not open to revision in this court. (2) Possession under claim of right and color of title was fully proved, and was plainly of a character to warrant the jury to find that it was adverse, uninterrupted, continuous, open and notorious for a period twice as long as was required by the rules of the common law to bar the writ of right.

Facts found by a jury under our system of jurisprudence can only be revised in one of two ways: (1) By a motion for a new trial in the court of original jurisdiction. (2) By writ of error in some appellate tribunal for the correction of errors. *Parsons v. Bedford*, 3 Pet., 433, 446.

Application for a new trial was made in the court below and was refused. Since then the cause has been removed here, where nothing is open to re-examination except the question of law presented in the assignment of errors.

Separate examination of the instructions given to the jury is not required, nor could it well be accomplished without extending the opinion to an unreasonable length. Suffice it to say, in that regard, that they have been read with care and that the court is of the opinion that they are correct; from which it follows that if any error has intervened it was the fault of the jury and not of the court, which cannot be remedied here, as it can only be corrected by a motion for a new trial.

Requests for instructions were made by the defendants, which were refused, and they excepted to the rulings of the court in refusing to instruct the jury as requested.

Two propositions arising out of the facts in the case cannot well be controverted: (1) That,

if both titles depended exclusively for their validity upon the action of Congress, the defendants must prevail, the rule being that he who first obtains the title and not he who first applied for it has the better right. *McCabe v. Worthington*, 16 How., 86. (2) That, if the title of the original donee was complete when the Province was ceded to the United States, it is the superior title and is protected by the Treaty of Cession; to which a third proposition may be added: that, inasmuch as Congress has confirmed the concession to the donee as one derived from a former sovereign of the Province, its genuineness and authenticity is established.

Even grant that; and still it is contended by the defendants that the land claimed was never segregated from the public domain. Proof of possession for a century and a half would seem to be a sufficient answer to that objection, but the claim of the plaintiffs does not rest solely nor even chiefly upon that ground. Instead of that the evidence introduced tended strongly to show that Grosse Pointe was the appellation given to the land embraced in the island now called Mon Louis.

Time has, doubtless, made some change in the topography of the place, but the description of the tract as given in the concession is as follows: beginning at and running along Fowl River till it reaches the Oyster Pass, which separates Massacre Island from the mainland. From the subsequent survey it appears that Fowl River separates the Island of Mon Louis from the mainland, and that the other boundaries are the bay and the gulf.

Grosse Pointe, it seems, must have referred primarily to some point of land formed by the waters of the bay and gulf, such as Cedar Point or some other of less notoriety. Objects of the kind would naturally attract attention, and it appears that Grosse Pointe was not distant from Fowl River, which serves to explain that part of the description that describes the course after mentioning the initial point as running along the river from the Pointe to the Oyster Pass. Beyond doubt, the Oyster Pass led into the gulf, as there is no other stream than the river whose waters border upon the island.

Nothing adverse to the authenticity of the concession can be inferred from its extent, as it was customary at that day to make large grants. Its situation as an island made it admirably adapted to the purpose of grazing, for which it was sought and conceded. Its claimants went into possession of the tract nearly a hundred years before the Province came within our jurisdiction, and on every change of the Sovereign they produced their title papers and demanded a recognition of their rights.

Fifty years after the grant, the widow of the grantee presented the title papers to the proper officer for registry, and it appears that they were properly recorded. Twenty years later, when another change of jurisdiction was about to be effected, another assertion of title was made, nor were they ever interrupted until the United States acquired the jurisdiction. Their title was complete when the ratifications of the Treaty of Cession were exchanged, and of course their title is protected by the treaty.

Want of survey since the Treaty is suggested; but the grant was of the island whose boundaries are the waters which surround it, and

which separate it as effectually from the public domain as could the most accurate official survey ever made.

Priority of recognition is claimed, in favor of the other donee; but the decisive answer to that suggestion is, that the Act of Congress making it reserves in terms the rights of others, and limits the operation of the Act to the relinquishment of any claim of the United States to the land.

Most of these views are much strengthened by historical researches of the court below, as exhibited in the opinion of the state court given in support of the judgment brought here by the present writ of error. *Trenier v. Stewart*, 55 Ala., 458.

Without entering further into the details of the case, it must suffice to say that we are all of the opinion that there is no error in the record.

Judgment affirmed.

UNION WATER-METER COMPANY,

Appt.,

v.

WILLIAM E. DESPER ET AL.

(See S. C., 11 Otto, 332-337)

Patent, when infringed—claims of patent—equivalents.

1. A patent for a combination is not infringed if any of the material parts of the combination are omitted; but if any one of the parts is only formally omitted, and is supplied by a mechanical equivalent, performing the same office and producing the same result, the patent is infringed.

2. The law requires the patentee to specify particularly what he claims to be new; and if he claims a combination of certain elements or parts, this court cannot declare that any one of these elements is immaterial.

3. The court can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent.

[No. 209.]

Argued Mar. 13, 19, 1880. Decided Apr. 26, 1880.

A PPEAL from the Circuit Court of the United States for the District of Massachusetts.

The case is stated by the court.

Mr. Andrew McCullum, for appellant.

Mr. J. E. Maynadier, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

This is a bill in equity filed by the appellant, the complainant below, to restrain the infringement of a patent and for an account of profits and damages. The letters patent alleged to be infringed are a re-issue of letters granted 23d November, 1870, to Phineas Ball and Benaiah Fitts for certain improvements in water-meters: the re-issue being made to the complainant as assignee, on the 24th of March, 1874. The defendants, by their answer, deny that the re-issued patent was for the same invention described in the original; aver that the invention claimed was covered by another patent granted 20th July, 1869, to the same patentees, Ball and Fitts; deny that they were the first and original inventors of the alleged improvement, specifying various older patents in which, as they allege, it was described, and divers persons who

had known and used it; deny infringement; and aver that all water-meters made by the defendants are constructed according to a patent, granted 18th November, 1873, to Henry A. Desper, one of the defendants, except in the omission of a certain adjusting screw.

The water-meter, which is the subject of the patent, consists of two parallel horizontal cylinders, each traversed by two pistons, connected together by a connecting rod of such length that when one piston is at one end of the cylinder the other is at a sufficient distance from the other end to leave the requisite space to be filled with the quantity of water to be measured at each stroke. This water being discharged, the pistons are made to traverse the cylinder and allow the opposite end to be filled with water, and discharged in like manner. By this reciprocating motion of the pistons, regulated quantities of water are constantly received and discharged into and out of the two ends of the cylinder alternately. The pressure of the water from the source of supply, admitted by means of proper valves, gives to the pistons this reciprocating motion. The valve gear between the two parallel cylinders is so arranged as to cause the pistons in one cylinder to move in an opposite direction from those in the other. A rotary valve is used for both cylinders, situated between and below them, being circular, or funnel-shaped, having holes or ports in its side for the induction and eduction of the water into and out of the cylinders, and being crowned with a bevel gear to give it a circular motion. Across and over the valve, extending from one piston-rod to the other, is placed a shaft, having a crank at each end, and a bevel pinion near one of the cranks, meshing into the bevel gear of the valve; the two cranks are arranged at right angles with each other, and each has a crank-pin which is inserted in a slot made in the center of the piston-rod with which it is connected; the side of the cylinder being removed, or open, between the end portions that receive the water. The slot which receives the crank-pin is perpendicular and at right angles with the length of the piston-rod, and is wider than the diameter of the pin and enlarged in the middle, in order to give the pin room and allow the crank to turn freely over after the piston has been stopped. The pistons are prevented from coming into contact with the ends of the cylinders by means of adjusting stops, slightly projecting therefrom inside. Projecting stops for arresting the movement of the pistons, and much of the mechanical arrangement between the crank shaft and the slots in the piston-rods, used for giving the proper motion to the crank shaft, are to be found described in a patent granted to Mr. Ericsson in 1851 for a water-meter having slide valves instead of a rotary valve, but in which a rotary motion was communicated to the indicator.

The patent in question does not cover any of the separate parts of the meter, it being conceded that these were all known and used before the application for the patent. The claim relied on by the complainant is for a combination only, being the fourth claim in the re-issued patent, which is in the following words:

"4. The combination in a liquid meter of the following instrumentalities, to wit: a rotary valve, *g*, provided with suitable ports or open-

ings, through which the liquid to be measured can be supplied to the meter and discharged therefrom; two cylinders, *b* and *b'*, for the reception and measurement of the liquid; the double acting pistons, *c* and *c'*, each carrying a rod, *d*, and each of these provided with a single cam slot, *e*, arranged as described, and of a width greater than the diameter of the wrist *n* of the crank shaft, so as to permit of the adjustment of the pistons, that they may discharge at each stroke, as nearly as possible, the exact quantity of water required of them, and so as to allow each of the crank wrists *n* freely to pass its dead center, after its own piston has ceased to act on it; adjusting stops, *o*, by means of which the adjustment of the length of the stroke of the pistons at either end is effected; and, lastly, a crank shaft, *i*, through which motion from the pistons is imparted to the valves, the whole operating in the manner substantially as described."

The combination here claimed consists of five parts or elements, viz.: 1, the rotary valve; 2, the two cylinders; 3, the double acting pistons, connected by a rod having a cam slot at right angles with the length of the rod; 4, the adjusting stops; 5, the crank shaft with its pinion, and cranks, by means of which rotary motion is imparted from the pistons to the valve. The rotary valve, and the combination of the cylinders, piston-rods, crank shaft and rotary valve, were the subjects of a previous patent granted to Ball and Fitts on the 20th of July, 1869. The only additional elements in the present patent are the adjusting stops and the rectangular position of the slots in the piston-rods.

It is a well known doctrine of patent law, that the claim of a combination is not infringed if any of the material parts of the combination are omitted. It is equally well known that if any one of the parts is only formally omitted, and is supplied by a mechanical equivalent, performing the same office and producing the same result, the patent is infringed.

The first question, therefore, is, whether the defendants infringe the claim referred to; whether they do, in fact, in their water-meters, use all the parts of the combination above specified.

The meter manufactured by the defendants is different in several respects from that described in the complainant's patent. It has a rotary valve like the latter, but without any bevel gear; it also has two cylinders, with an immaterial difference of position, being placed at right angles with each other instead of being parallel; each cylinder is likewise provided with two double acting pistons, connected by a piston-rod, the same as in the complainant's meter; the cylinder heads are also furnished with Ericsson's stops projecting inside for arresting the movement of the pistons, though these stops are fixed and not adjustable. But the meter of the defendants has no crank shaft, and no semblance of a crank shaft, for imparting motion from the pistons to the rotary valve; on the contrary, their valve is connected directly with the piston-rods in the following manner: the piston-rods cross each other at right angles, having transverse slots, and being halved together, one lying immediately on the other, so that the axes of the pistons are in the same plane. The valve below is connected directly with the piston-rods by a single crank which is keyed onto

its upper solid stem, and has a crank pin which works in the two slots of the respective piston-rods. Thus arranged, the successive reciprocating movements of the two double pistons impart a circular motion to the valve, which, by duly arranged induction and eduction ports, alternately fills and empties the respective cylinders.

From this it appears that, in the construction of defendants' meter, the crank shaft, with its two cranks, pinion and gearing connection, which is an essential feature of the complainant's meter, is altogether dispensed with. The defendants effect the desired result of communicating rotary motion to the valve without any such shaft, or anything equivalent thereto. The entire part, with all its appurtenances, is thrown out of their machine. They use a crank, it is true; but it is attached directly to the rotary valve, and is a part of it. The use of a crank in converting reciprocating into rotary motion is an old device. It was applied to the steam-engine a century ago, and has been applied to hundreds of different machines since that time. Ball and Pitts had no claim to it, but only to the particular method and device by which they employed it, in combination with the various other parts of their meter. Instead of the crank shaft, had they in their patented combination claimed every method and all methods of communicating motion from the piston-rods to the rotary valve by means of a crank, the defendants' meter would have been an infringement. But such a claim might not have been valid. At all events, it was not allowed.

The specification was evidently drawn with great care, and it is to be presumed that the patentees claimed all that the Patent Office considered them entitled to. We cannot say that the crank shaft was an immaterial part of their combination. The patent, as it stands, occupies very narrow ground. It requires the presence of every one of the elements specified in the combination secured by it. We think that the defendants do not use all of these elements, but that they dispense with one of them at least which is material in the complainant's meter. Our conclusion, therefore, is, that they do not infringe the complainant's patent.

It may be observed, before concluding this opinion, that the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent. We think no such equivalent is supplied in this case. The general construction of the defendants' meter, and the arrangement of its parts, are so different from that described in the complainant's patent, and claimed therein, that the defendants are enabled to dispense with the entire part referred to.

The decree of the Circuit Court is affirmed.

Cited—107 U. S., 648, 109 U. S., 421; 36 Ohio St., 393.

PIERRE NOUGUÉ, *Appt.*,

v.

EMORY CLAPP ET AL.

(See S. C., 11 Otto, 551-555.)

Power of Federal Court over State Court.

The U. S. Circuit Court cannot, upon a bill filed therein for that purpose, set aside a decree of a State Court and a sale, in a case in which the State Court had jurisdiction of the parties and the subject-matter.

[No. 249.]

Argued Apr. 8, 1880. Decided Apr. 26, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. Bentinck Egan and Enoch Totten, for appellant.

Mr. P. Phillips, for appellees.

Mr. Justice Miller delivered the opinion of the court:

This is a bill in chancery, filed in the Circuit Court of the United States for the District of Louisiana, which was dismissed by the decree of that court for want of jurisdiction.

The bill, though very informal, sets out certain proceedings in the State Court of Louisiana for the Parish of St. John the Baptist, under which real property on which he held a large mortgage had been sold, which, if permitted to stand, cut off the lien of his mortgage. These proceedings were based ostensibly on notes and mortgages given by himself to one Emory Clapp for the purchase money of the property. The bill alleges, however, that Schexuayder Brothers, to whom plaintiff had sold the property, had assumed the payment of those notes as part of the consideration of the sale to them, and had given him a mortgage for over \$14,000 in addition; that after said Schexuayder Brothers had, in fact, paid off said mortgage to Clapp, they entered into a fraudulent conspiracy with him to have the property sold under that mortgage for the purpose of cheating the complainant out of the \$14,000 due him by defeating his lien on the land; that a suit was commenced in a parish of which the complainant was not a resident, of which he had no sufficient notice, though he was by the petition made a party; that in this proceeding a summary order of sale was had; that before the sale plaintiff applied to the Judge and obtained an order for injunction, which the clerk refused to issue, and the property was sold to said Clapp for the sum of \$10,000. He charges that the refusal of the clerk to issue the writ of injunction was a part of the fraudulent conspiracy to cheat him out of his lien on the land, and that the whole proceeding is void. He also alleges that his loss or damage by this proceeding is \$20,000, for which he prays a judgment or decree.

To this bill Emory Clapp filed what is called an exception to the jurisdiction, a demurrer and a plea. Both the exception and the demurrer are founded on the proposition that the bill being the equivalent of a proceeding in the State Courts to procure a declaration of nullity of a judgment, can only be had in the court which rendered the judgment. The plea sets up a proceeding in the State Court on a motion whereby, under the laws of Louisiana, after a judicial

sale, certain proceedings in the nature of notice to all the world are had, and a judgment of confirmation of the sale is made.

The final decree of the court is thus set out in the record:

"PIERRE NOUGUÉ
vs.
EMORY CLAPP. } No. 7,852.

This cause came on to be heard on the plea in bar, exception and demurrer to complainant's bill, and was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed that the exception to jurisdiction of the court and demurrer be sustained and complainant's bill dismissed with costs.

Decree rendered March 20, 1877.

Decree signed March 24, 1877.

(Signed) EDWARD C. BILLINGS, *Judge.*"

It will thus be seen that the plea was not considered in the case, or, if considered, the decree was not founded on it. Indeed, this could not be so without error. The proper mode of treating a plea is to set it down for hearing as to its sufficiency to meet the bill, or so much of the bill as it purports to cover. If found to be sufficient, the complainant has a right to reply to it by denying the truth or otherwise putting it in issue. See Equity Rules, 32, 33 and 34, prescribed by this court. So, also, by these rules the charge of a fraudulent combination to cheat the complainant required that the plea should have been accompanied by an answer denying the fraud under oath. The plea may, therefore, be considered as out of the case.

The demurrer may be held to include the exception as one of its grounds, and thus the case stands on bill and demurrer, and the sole question is whether, though there may be things in the bill which, if specially demurred to, would be bad, it is a bill in which a court of equity could find relief.

As regards the claim to recover \$20,000 damages, we see no reason for going into equity. If such a recovery can be had at all, it can be had as well at law. It is a proper case for a jury to determine whether there has been a combination to cheat and defraud plaintiff, and the amount he should recover for such fraud. It would seem, also, that to such a suit the Schexnayder Brothers, for whose benefit the fraud was committed and who were its principal instigators and whose actions were essential to its success, should be made parties. The charge is that they had assumed to pay the mortgage to Clapp, and had paid it and then conspired with him to have the property, which was in their possession and to which they had title, sold to defraud complainant out of his \$14,000. However it may be at law, in chancery they are necessary parties to such a suit.

But the main purpose of this bill, perhaps its only real object, is, to have the proceedings in the State Court declared void.

That court had jurisdiction of the parties and of the subject-matter of the controversy. Complainant in this bill entered his appearance in that suit at a proper stage of it, to enable him to contest the right of Clapp to have the property sold. The debt for which it was to be sold was complainant's debt to Clapp.

The usual mode in the courts of Louisiana of contesting the right to foreclose a mortgage is by obtaining an injunction, after which the

rights of the parties are judicially determined by the court. Complainant appeared and obtained an order for such an injunction.

If this order was not obeyed, it was for that court, not this, to give remedy. If the court below refused to do it, there was an appeal to the Supreme Court of the State. After the sale, a motion to the court could have had the sale set aside; and that was the proper place for such a remedy.

The laws of Louisiana also provide a remedy by a special proceeding, to have a declaration of nullity of judgment in such cases as this in the court where the decree is entered. There is no allegation that the plaintiff sought any of these remedies.

We think that for this court, after all this has been done, to undertake to decree that what that court did is void, to sit in review on its judgment and reverse its decree and set aside its sale, in a case where its jurisdiction is undoubted, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practiced in the court, enable a party to retry in a Federal Court any case decided against him in a State Court.

We are not without precedent in such a case. In *Randall v. Howard*, 2 Black, 585 [67 U. S., XVII., 269], the owner of lands incumbered by a mortgage made a friendly arrangement with the mortgagee, by which the latter was to foreclose the mortgage and buy it in, ostensibly for his own use, but with an understanding that he was to hold it for the use of the mortgagor as if no sale had been made. Regular proceedings were had in the State Courts of Maryland, by which a decree of foreclosure and a sale were had, to all which the mortgagor made no defense. He afterwards filed his bill in chancery in the Circuit Court of the United States for the District of Maryland, charging that: by reason of this agreement, the mortgagee bought in the property for much less than its real value; that he now refuses to acknowledge any interest of complainant in the property and is trying to sell it, whereby it may come into the hands of innocent purchasers for value; that all this is in violation of his agreement and a fraud upon complainant's rights, and in furtherance of this fraudulent and oppressive course he has ejected complainant from the premises by a process of the State Court. He prays for an injunction to restrain the defendant from selling the property, for a sale of so much of the land as is necessary to pay the mortgage debt, and for a conveyance to complainant of the remainder, and for general relief. The bill was dismissed on demurrer.

The question whether that court had jurisdiction is answered in this language: "The bill in this case brings in review various matters passed on in the progress of the suit by the Cecil County Circuit Court, a court of general jurisdiction, having complete control of the parties and of the subject-matter of the controversy."

It seeks to annul a sale of lands made by virtue of a decree of the Cecil Court, sitting as a court of equity, in a cause depending between the same parties; to effect the distribution of the proceeds of the sale; to enjoin the

defendant from making any disposition of the lands purchased by him; to disturb his possession, to invalidate his title, and to have the property resold.

This is a direct and positive interference with the rightful authority of the State Court. If there was error in the proceedings of the court, a review can be had in the appellate tribunals of the State. If, as is charged, the decree is sought to be perverted and made the medium of consummating a wrong, then the court on supplemental bill can prevent it."

These views, we think, dispose of the present case, and require an *affirmance* of the decree of the court below. *It is so ordered.*

THOMAS J. HOLLINGSWORTH, *Plff. in Err.*,

v.

JOHN T. FLINT AND R. P. CHAMBERLAIN, *Admr. of DAVID T. CHAMBERLAIN, Deceased.*

(See S. C., 11 Otto, 591-596.)

Deed, as evidence—action to try title to land.

1. In an action to try title to land, a deed which did not convey, or purport to convey, the land in controversy, is irrelevant and inadmissible.

2. The plaintiff cannot avail himself in such action of a title acquired, or which did not subsist in him until, after he commenced suit. The title at the beginning of the action is the question to be tried.

[No. 217.]

Submitted Mar. 23, 1880. Decided Apr. 26, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Texas.

The action was commenced in the court below, by Hollingsworth, the plaintiff in error. Judgment having been rendered for the defendants, the plaintiff sued out this writ of error.

The case is stated by the court.

Messrs. P. Phillips, Bethel Coopwood, W. Hallett Phillips and W. P. Ballinger, for plaintiff in error.

Mr. A. W. Terrill, for defendants in error.

Mr. Justice Harlan delivered the opinion of the court:

This is an action in trespass to try the title to eleven leagues of land situated in the Counties of Bell, Milam and Williamson, State of Texas, on what was once called San Andres River, now known as Little River, a tributary of the Brazos.

In support of his claim the plaintiff read in evidence, without objection, certified copies from the General Land-Office in Texas, of numerous papers, constituting, together, a grant of the land in controversy to Miguel Davila, a native and resident of Leona Vacario, the Capital of the Department of Coahuila and Texas, as constituted in the year 1880. These papers, including the official survey made by the Surveyor General, show that the land embraced in that grant was "Located on the right or south bank of San Andres River, at the point where the creeks—Buffalo Creek and Donahoe's Creek—empty into said river." The limits, boundaries and corners of the land thus granted are given in detail.

The plaintiff then offered in evidence an original deed, in the Spanish language, purporting to have been executed by the grantee, Davila, to James Hewetson, at the City of Saltillo, on the 7th of May, 1839, before its acting mayor, and by which Davila sold and conveyed to Hewetson, for the consideration of \$200, "Eleven leagues of land, obtained from the public domain by virtue of a permit issued for them to him by the Executive of the State of Coahuila and Texas, by order of July 13, 1830, which leagues are situated *ten* on the waters of the creek called *Chocktau of the Red River*, and the *eleventh* between *Sulphur Fork Creek of Red River*, and the *south fork of said creek*, distant about twenty miles west of the road leading from Nacogdoches to Kiamichi, of the same *Red River*, the survey of which is embodied in the patent issued at *Angelina*, jurisdiction of *Nacogdoches*, on the 30th of January, 1836, by *Don Vicente Aldrete*, Commissioner appointed for that purpose by the aforesaid Executive." That patent, the officer before whom the deed was executed certified he had *seen, read and then passed and delivered to Hewetson.*

In connection with the offer to read that deed the court, by request of the defendants, and without objection upon the part of the plaintiff, considered certain other papers, also certified from the General Land-Office in Texas, which, together, constituted the title or grant to Davila of eleven leagues of land in the Red River region, the locality and boundaries of which, as set forth in those papers, corresponds exactly with the foregoing description of the eleven leagues embraced in the deed to Hewetson.

The defendants then objected to the introduction of the Hewetson deed, upon the ground that it did not convey or purport to convey the land in controversy, and was, therefore, irrelevant and inadmissible. The objection was sustained, and the deed excluded, to which action of the court the plaintiff excepted.

1. This ruling of the court below is the subject of the first assignment of error. We are of opinion that the deed was properly excluded. The plaintiff's petition alleged title in himself to eleven leagues of land, granted to Miguel Davila, described as eleven leagues of land "Situate on the right or south bank of the *San Andres River*, at the place where *Buffalo Creek and Donahoe's Creek empty into said river.*" The papers read in evidence by plaintiff, and constituting the final title, as shown upon the records of the General Land-Office, to the eleven leagues thus described, show that the survey of that body of land was made by Surveyor-General Johnson, and that the patent, based upon that survey, was issued October 18, 1833, by L. Lessassier, Mayor of the City of San Felipe de Austin. We have seen that the deed from Davila to Hewetson describes eleven leagues of land situated in a different part of the State, distant, as the court may judicially know, about two hundred miles from the land described in the petition and in the papers previously read in evidence as constituting the grant to Davila of the land in dispute. This is rendered absolutely certain by an examination of the several papers constituting the grant to Davila, of the eleven leagues of land on the waters of Red River.

From those papers it appears:

That, on the 10th of July, 1830, Davila made application for a grant by sale to him of eleven leagues of land of the public domain of the department of Coahuila and Texas;

That this application was granted on the 18th of July, 1830, with an order to the alcalde of the municipality to put Davila in possession after the land was located;

That, on the 17th of May, 1834, Davila executed to James Hewetson an irrevocable power of attorney, authorizing him to select out of the public domain of the State the eleven leagues of land conceded to Davila in the year 1830;

That, on the 5th of June, 1834, Hewetson executed to M. B. Menard, of Nacogdoches, a power of substitution, which, on the 24th of May, 1835, was revoked, and the authority which Hewetson had received from Davila was conferred upon one John Cameron;

That, on the 27th of July, 1835, George Aldrich, surveyor, under an order from the special commissioner, appointed by the Governor of the State, of date July 2, 1835, surveyed one of the eleven leagues "between Sulphur Fork of Red River and the south branch of said creek, about twenty miles west of the road leading from Nacogdoches to Kiamichi, of the Red River;" and on the 3d of November, 1835, he surveyed the remaining ten leagues "on the waters of the creek called Choctaw Bayou of Red River;"

That these surveys were transmitted to the special commissioner, who, by order of January 30, 1836, directed title to issue; and it was so issued on that day, the final paper describing the land exactly as set forth in the deed to Hewetson, and referring, by way of identification, to the field notes of the surveyor, Aldrich.

While the origin of the title of the eleven leagues on the San Andres River, as well as of the eleven leagues on the Red River, may have been an application of Davila on the 30th day of July, 1830, it is perfectly clear that there were, in fact, surveys of two distinct bodies of land, widely separated, resulting in grants to Davila of two different tracts of eleven leagues each. This is shown, partly, by the fact that the final document in the title for the eleven leagues on the San Andres River was executed by Lessassier on the 18th of October, 1833, at San Felipe de Austin, while that for the eleven leagues on Red River was executed by Special Commissioner Vicente Aldrete, at Angelina, and not until January 30, 1836. The former body of land was embraced in one survey, made by Surveyor-General Johnson, while the latter was surveyed by Aldrich, and was embraced in two surveys, one of which called for ten leagues, and the other for one league.

It thus appears that the plaintiff, in support of his title to eleven leagues of land on the *San Andres River*, offered to read a deed which upon its face clearly and, in connection with the papers relating to the *Red River* lands, incontestably showed that the land it purported to convey was not the land described in the petition, and the title to which was in dispute.

The contention of the plaintiff is that it was for the jury to say whether the land described in the Hewetson deed was the same land which, in the title papers read in evidence, was de-

scribed as situated on San Andres River. No such conclusion could, however, have been fairly reached by the jury consistently with the evidence. The deed was unambiguous in its terms and, whether interpreted by its own language or in the light of the papers constituting the grant to the Red River lands, there was no ground whatever to infer that Davila, by the conveyance of lands on Red River, intended to convey the title to lands on San Andres River.

Whether the grant to Davila of the lands on Red River was void by reason of the prohibition against uniting more than eleven leagues in the same lands, or because of the declaration in the Texas Constitution of 1836, to the effect "That all surveys and locations made since the act of the late consultation closing the land-offices and all titles made since that time are null and void," it is not necessary to inquire. For, if that proposition be conceded, it is, nevertheless, manifest that the papers constituting the grant to the Red River lands, read without objection, were evidence in illustration or explanation of the excluded deed; and they utterly negative the idea that the grantor, by a conveyance of eleven leagues, situated on the Choctaw and Sulphur Creeks of the Red River (quoting from the deed), "The survey of which is embodied in the patent issued at Angelina, jurisdiction of Nacogdoches, on the 30th day of January, 1836, before Don Vicente Aldrete, commissioner, etc.," intended to pass the title to eleven leagues of land on San Andres River, the final title to which passed by patent issued October 18, 1833, at the City of San Felipe de Austin, by L. Lessassier, mayor of said city and its municipality.

It is scarcely necessary to cite the authority of text writers, or of adjudged cases in the Supreme Court of Texas or elsewhere, to prove that the deed was inadmissible as evidence in support of plaintiff's title to the land described in the petitions and in the papers read in evidence by him as constituting the original grant to Davila of eleven leagues on San Andres River. The deed conveys lands that were surveyed and located in the Red River region. It was, therefore, inadmissible for the plaintiff in this action, in any view which may be properly taken of the case.

2. The plaintiff then offered in evidence a deed from Inez, the legitimate daughter and only heir at law of Miguel Davila, and her husband, dated September 28, 1869. It was acknowledged by the wife on the 12th of September, 1876, upon privy examination before the Consul of the United States for Saltillo and its dependencies, and by the husband a few days thereafter. That deed recited that Miguel Davila had many years before sold to James Hewetson his concession of eleven leagues of land on the San Andres River, and had on May 7, 1869, by public act, conveyed the same to said Hewetson, "Describing said land by mistake as being situated in another part of Texas instead of where it was in fact situated." The deed ratifies and confirms the sale to Hewetson, and releases and conveys to him all the right, title and interest of the grantors.

That deed, upon the objection of defendants, was also excluded, which ruling constitutes the next error assigned by the plaintiff.

No error was committed in rejecting that deed as evidence in support of plaintiff's claim. This action was commenced in 1874. At that time the deed had not been acknowledged so as to pass the title, if any, which the female grantee had in the premises in controversy. Her interest in the land, if any she had, was her separate estate, of which she could not, under the laws of Texas, be divested, except by the conveyance of herself and husband, and after her privy examination before the proper officer. Such examination had not taken place when this action was commenced. The plaintiff could not avail himself in this action of a title acquired, or which did not subsist in him until, after he commenced suit. The title at the beginning of the action was the question to be tried.

8. The plaintiff finally offered to read in evidence a deed purporting to have been executed in 1873 by the heirs of James Hewetson to the plaintiff and another. This deed was very properly excluded upon the ground that the plaintiff had failed to connect himself with the sovereignty of the soil, and declined to state that he expected to show any other title than that previously offered.

The court thereupon instructed the jury, as was its duty to do, to find for the defendants.

The judgment is affirmed.

CHARLES JONES, Assignee of the NEW YORK KEROSENE OIL CO., *Appt.*,

v.

NEW YORK GUARANTY AND INDEMNITY COMPANY.

(See S. C., 11 Otto, 622-633.)

Power of corporation to mortgage—ultra vires—lien of mortgage—contract by agent—parol evidence.

1. Where a New York corporation is authorized to secure the payment of its debts by mortgaging its real estate, it has the power to give a mortgage for future advances.

2. If the mortgage be *ultra vires*, no one but the State can take advantage of the defect of power involved.

3. Although a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid.

4. Where a party has entered into a written contract, it may be shown that he did it as the agent of another, though the agency was concealed and the principal not disclosed, and the principal, in such case, may be held liable upon it.

5. Parol evidence is admissible to show that a mortgage, apparently given to secure the debt of an individual, was really given to secure the debt of a company.

[No. 264.]

Argued Apr. 15, 16, 1880. Decided Apr. 26, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

Charles Jones as assignee in bankruptcy of the New York Kerosene Oil Company, a bankrupt Corporation, filed a petition in the District

Court of the United States for the Eastern District of New York, Jan. 13, 1869, to enjoin the New York Guaranty and Indemnity Company from proceeding in an action commenced by it in the Supreme Court of New York for the foreclosure of a mortgage on the property of the bankrupt Corporation.

An order was made by the circuit court that said assignee have leave to amend his said petition so as to make the same a bill in equity.

Under that order the said assignee filed his complaint in said district court and the Guaranty and Indemnity Company filed its answer.

In January, 1875, a decree was entered in the district court, adjudging that the mortgage was not a lien upon the property of the bankrupt Corporation, and enjoining the Guaranty and Indemnity Company from proceeding to foreclose the same.

From that decree the defendant appealed to the circuit court, where in June, 1877, a decree was made and entered reversing the decree of the district court, and directing that the mortgaged property be sold, and the proceeds, with the rents, be applied to the payment of the debt due to the defendant, as found and determined by the court.

From this decree of the circuit court the assignee has appealed to this court.

The grounds of the illegality of the mortgage alleged in the bill are: that it is a mortgage prohibited by the laws of the State of New York; that it was not given to secure the payment of debts contracted by it in the business for which said Company was incorporated; that it was not made in the form and manner required by the laws; that it was not made with the consent of said bankrupt Corporation; that it was given to secure the bond of Abraham M. Cozzens, and that no money had been loaned or advanced on it to said bankrupt Corporation.

All these averments of the bill are denied by the answer, which alleges that the mortgage was given to secure the debt of the bankrupt Corporation, contracted in the business for which it was incorporated, and not for the debt of Cozzens.

The mortgage is substantially as follows:

This indenture, made between the New York Kerosene Oil Company, of the first part, and the New York Guaranty and Indemnity Company of the second part.

Whereas, at a meeting of the Board of Trustees of the said The New York Kerosene Oil Company, it was resolved that Abraham M. Cozzens, the President of said Company, be authorized to borrow a sum not to exceed \$100,000 and, to secure the same, to execute a mortgage upon the factory and premises of the said Company at Newtown, Queens County, Long Island.

And whereas, the said Abraham M. Cozzens, has made and delivered to said parties of the second part, his certain bond bearing even date with these presents, to secure advances to be made by said parties of the second part, to the said Abraham M. Cozzens, in all not to exceed the sum of \$100,000, and the consent of the stockholders of said party of the second part, having been first duly given and filed pursuant to law and recorded herewith: Now, this indenture witnesseth that the said parties of the first part, for the better securing the payment of the said sum of money mentioned in

NOTE.—Mortgages for future advances; their validity and priority. See note to Lawrence v. Tucker, 64 U. S., XVI., 474.

the condition of the said bond, with interest thereon, according to the true intent and meaning thereof, have granted unto the said party of the second part, and to their successors and assigns forever. (Here follows description of property and usual *habendum* in fee.) "Provided always, and these presents are upon the express condition, that if the said parties of the first part, their successors or assigns, shall well and truly pay to the said parties of the second part, their successors or assigns, the said sum of money mentioned in the condition of the said bond, and the interest thereon, then these presents and the estate hereby granted shall be void. And the said Abraham M. Cozzens, for himself, his heirs, executors and administrators, doth covenant and agree to pay unto the said party of the second part, their successors or assigns, the said sum of money, and interest." (Then follows the usual clause for entry and sale in case of default.)

The bond of A. M. Cozzens, bearing the same date as the mortgage, is as follows:

"Know all men by these presents that I, Abraham M. Cozzens, of the City of New York, am held and firmly bound unto the New York Guaranty and Indemnity Company in the sum of \$100,000 lawful money of the United States of America, to be paid to the said New York Guaranty and Indemnity Co., their successors and assigns, for which payment well and truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, dated, etc.

This bond is to cover advances of money now or hereafter to be made by the said New York Guaranty and Indemnity Co. to the said Abraham M. Cozzens, for the sum of \$100,000, or any less amount, upon the condition that whenever any sum shall be advanced on this bond by the said New York Guaranty and Indemnity Co. to the said Abraham M. Cozzens, the amount of such advance and the date of the same shall be indorsed on this instrument and signed by the said Abraham M. Cozzens; and when the same or any part thereof shall be paid, such payment shall be indorsed on or under such statement of advance; and the amount which shall at any time appear by said indorsements of advance and payment to be then due, shall be taken and considered as the true amount due on said bond and for which the premises which have this day been conveyed to the said N. Y. Guaranty and Indemnity Company by the New York Kerosene Oil Company, by indenture of mortgage bearing even date herewith, shall be held liable, and for no greater sum.

(Signed) A. M. COZZENS." (L. S.)

The following indorsements appeared on the bond:

"NEW YORK, May 11, 1867.

The New York Guaranty and Indemnity Company have this day advanced me \$50,000 on the note of the New York Kerosene Oil Company, which amount is secured by this bond.

A. M. COZZENS."

"NEW YORK, May 18th, 1867.

The New York Guaranty and Indemnity Company have this day advanced me \$25,000 on the note of the New York Kerosene Oil Company, which amount is secured by this bond.

A. M. COZZENS."

"NEW YORK, June 22d, 1867.

The New York Guaranty and Indemnity Company have this day advanced me \$25,000 on oil, which amount is secured by this bond.

A. M. COZZENS."

It was insisted on the part of the complainant that the mortgage was void on its face, as in violation of the Statutes of New York, Act 1848, ch. 40, sec. 2, and Act of 1864, ch. 517, sec. 2.

Also that evidence extrinsic to the bond and mortgage was not admissible for the purpose of showing that the mortgage was intended to secure a debt of the bankrupt Corporation.

The principal facts extrinsic to the mortgage, shown by the evidence introduced, were as follows:

The N. Y. Kerosene Oil Co. was organized as a manufacturing Corporation under the Act of 1848, in the year 1860, with a capital stock of \$500,000, of which \$25,000 was paid in cash and \$475,000 issued for property, including the real estate described in the mortgage.

Its business consisted of manufacturing kerosene oil and other products of petroleum, and disposing of them in the market.

At about the same time, the firm of Cozzens & Co. was formed, consisting of Abraham M. Cozzens, since deceased, and his son, Thomas M. Cozzens. Their business was buying and selling kerosene oil and other products of petroleum, and they became the business agents of the Corporation, attending to all its business affairs, buying petroleum, selling oil and managing generally its financial affairs. The business of the Corporation constituted a large part of the business of Cozzens & Co. Up to some time in 1864, the Corporation kept a bank account. In that year it was closed, and from that time on, Cozzens & Co. received all its moneys and paid all its bills and accounts.

Its receipts were mainly from the sales of oil, and included the earnings of a steam-tug and lighters owned by it, and proceeds of sales of barrels and other things which it procured in the course of its business.

Its disbursements were mainly for crude petroleum, labor and materials and repairs. Cozzens & Co. were allowed a guaranty and sales commission of $7\frac{1}{2}$ per cent on all sales, as compensation for their services. The mode of keeping the accounts between the Corporation and Cozzens & Co. was as follows:

Cozzens & Co. opened in their books an account with the Corporation, in which they credited the Corporation at the end of each month with the gross proceeds of the sales of oil during the month, and with all moneys received from other sources on account of the Corporation, and charged their $7\frac{1}{2}$ per cent commission on all disbursements on account of the Corporation.

Large sums were required by Cozzens & Co. to carry on the business of the Corporation, and also in their other business. Moneys received by Cozzens & Co. on account of the Corporation went into Cozzens & Co.'s own bank account, being credited at the end of the month to the Corporation, as above stated.

The Corporation kept a separate set of books. Its accounts with Cozzens & Co. was a transcript of or made up from the account with the Corporation, in the books of Cozzens & Co.

For the better exhibition of its business several different accounts were opened, but these do not affect the relations between the Corporation and Cozzens & Co.

Abraham M. Cozzens was the principal and managing partner of Cozzens & Co. A. M. Cozzens was the largest stockholder of the Corporation, and for several years before the giving of the mortgage in question was its President. By the stock ledger, he was at the time the mortgage was given the holder of 3,590 shares out of 5,000.

During the year 1867, Cozzens & Co. were in advance to the Corporation, as appears by the accounts as follows: Jan. 1, '67, \$158,201.80; Jan. 31, 1867, \$91,000; Feb. 14, \$95,973.85.

From Feb. 28, to June 30, it at all times exceeded \$100,000.

The receipts and disbursements from Jan. to Aug., 1867, given by months. Excess of receipts over disbursements, interest and commissions from Jan. 1 to Aug. 31, was \$71,136.92.

This being the relation between the Corporation and Cozzens & Co., A. M. Cozzens made application to the New York Guaranty and Indemnity Company for a loan.

The application was first made to Mr. Babcock, one of the directors, who testifies to certain representations made by Mr. Cozzens at the time of this application, afterwards repeated by him to Mr. Henry, President, and Mr. Wallace, Vice-President. Mr. Wallace also testifies to the representations and application of Mr. Cozzens, in substance as follows:

He stated that the Kerosene Oil Co. was indebted to Cozzens & Co. in \$100,000. That the Company needed large advances to carry on the business; that he was the owner of nearly all the stock and virtually the owner of the concern, and had the sole management of its business; that he had a right to promise that the Corporation should give a mortgage to secure the advances. Mr. Wallace requested him to put the substance of his statement in writing, and he did so in the form of a letter, as follows:

"N. Y. Guaranty and Indemnity Co.,

Office No. 14 Broad Street,

February 15, 1867.

The N. Y. Guaranty and I Co.,

J. J. Henry, Esq., President:

DEAR SIR: It is understood that we will cause to be prepared a mortgage on the real estate of the Company on Newtown Creek, for the sum of \$100,000, in your favor, and to be held by you for the loan of \$50,000 made this day, and any future loan you may make to our Company. Your obedient servant,

A. M. COZZENS,

President of the N. Y. Kerosene Oil Co."

At the same interview, Cozzens produced a note of the Kerosene Oil Co., payable to the order of Cozzens & Co., and indorsed by Cozzens & Co., and stated that it represented a part of the debt of the Kerosene Oil Co. to Cozzens & Co., and asked to have it discounted; and promised that the Corporation should give a mortgage to secure this \$50,000, and further advances to the amount in all of not more than \$100,000.

After this interview, on the same day, Feb. 15, 1867, the defendant advanced \$50,000.

They took at the time of the advance a contract similar to that required by them on all loans which was signed either by A. M. Cozzens or by Cozzens & Co., probably by Cozzens & Co. The original contract is not found, but the renewal contract is.

These contracts, signed by Cozzens, acknowledge the receipt of the advance of money upon the note of the N. Y. Kerosene Oil Co., and promise to repay the same with interest, and certain stipulated commissions for keeping the note, subject to conditions indorsed on the contract. The conditions indorsed provide for a sale of the note in case of default. The register kept by defendant shows that the contracts given in February upon the first and second advances were signed by Cozzens & Co.

The counsel of the Guaranty and Indemnity Company required the formal consent of the stockholders to be prepared in conformity with the statute, and a recital of it to be inserted in the mortgage.

An account was made up of the interest due on the \$50,000 advance; a charge was made for commissions to May 11, at the same rate of $1\frac{1}{2}$ per cent for 60 days, and these sums, together with discount and commissions for the next 60 days, amounting in all to \$1,943.06, were paid by Cozzens & Co., and a contract was signed by A. M. Cozzens to conform to the bond.

May 18, a further advance of \$25,000 was made in a check to order of A. M. Cozzens on a similar contract signed by Cozzens. A similar contract and note were given. It was indorsed on the bond.

June 22, a further advance was made of \$25,000 in check to order of A. M. Cozzens, indorsed on the bond. For this no note was given, but what purports to be a warehouse certificate for oil signed by Cozzens, Pres.

The checks for these three advances were deposited in Cozzens & Co.'s bank account, and from it they drew indiscriminately their checks on their own account, and to pay bills and disbursements of the Kerosene Oil Co. In fact, as shown by the check-book, most of the money went to repay other loans due from Cozzens & Co. to other parties.

No part of this money was directly credited by Cozzens & Co. to the Kerosene Oil Company on their own books, or on the books of the Kerosene Oil Co., nor were the payments for interest or commissions paid to the defendant, charged to or made matter of account with the Kerosene Oil Co. in the books of Cozzens & Co., or of the Corporation. Cozzens was shown to have signed notes, and to have accepted drafts and indorsed notes and drafts as President of the Corporation, at about the time of this transaction, and money raised on this paper went into the bank account of Cozzens & Co., and was not a subject of account with the Kerosene Oil Co. in their books, or in those of the Kerosene Oil Co. The particulars of the negotiation of such loans were not in evidence.

The bill for examining the title, etc., was made out against the Kerosene Oil Co., and was paid May 27, 1867, and charged as a debt to the Kerosene Oil Co. in Cozzens & Co.'s books, and from them carried to the credit of Cozzens & Co., into the books of the Kerosene Oil Co. So was the expense, \$1.00, paid to the notary for

taking the acknowledgment of the secretary to copy of resolution furnished to Mr. Butler.

Messrs. B. F. Tracy and Wm. G. Choate, for appellant:

The statute authorizing the formation of manufacturing companies, and under which the New York Kerosene Oil Company was organized and incorporated, originally prohibited it from mortgaging its real estate. It provided that the Company should, by its corporate name, be capable in law of purchasing, holding and conveying any real estate whatever which might be necessary to enable it to carry on its operations, and then these words followed: "But shall not mortgage the same or give any lien thereon."

Laws of N. Y., 1848, ch. 40, p. 54.

In 1864 this statute was amended, and it is therein provided that any corporation formed under the Act of 1848 "May secure the payment of any debt heretofore contracted, or which may be contracted by it in the business for which it was incorporated, by mortgaging all or any part of the real estate of such corporation;" and every mortgage so made shall be as valid, to all intents and purposes, as if executed by an individual owning such real estate; *Provided*, That the written assent of the stockholders owning at least two thirds of the capital stock of such corporations shall be first filed in the office of the clerk of the county where the mortgaged property is situated.

Laws of 1864, ch. 517, sec. 2.

I. The mortgage does not, in terms, secure or purport to secure any debt of the Kerosene Oil Company, but is given expressly to secure the payment of the money mentioned in the bond or obligation of Abraham M. Cozzens, created or to be created by him, individually; and no covenant to pay the \$100,000 by the Kerosene Oil Company can be implied in the mortgage.

1 R. S., 738, sec. 139; 1 R. S., 738, sec. 140; *Salisbury v. Phillips*, 10 Johns., 57; *Culver v. Sisson*, 3 N. Y., 264.

The mortgage is given to secure future advances. It does not, and does not purport to secure an existing debt. Such a mortgage is not within the statute, and is void. The statute uses the word "debt," and that word has a well-settled meaning.

Newell v. People, 7 N. Y., 124; *Denny v. Manhattan Co.*, 2 Hill, 223; *Weston v. Syracuse*, 17 N. Y., 110; *Carpenter v. Black Hawk G. M. Co.*, 65 N. Y., 43.

That the mortgage, if it secured anything, was a security for future advances, is apparent.

Messrs. Wm. Allen Butler and Geo. F. Comstock, for appellee:

The mortgage of the Kerosene Company to the Guaranty Company was properly upheld by the circuit court, as having been given under the authority of the New York Statute, permitting a manufacturing company to mortgage its real estate and secure debts contracted in the business for which it was incorporated.

The mortgage shows upon its face that it was given in pursuance of the statutory authority.

The Statutes of New York applicable to the subject, are the general manufacturing Act, of Feb. 17, 1848, and the Act amendatory thereof, of May 2, 1864.

See, Laws of N. Y., 1848; ch. 40, p. 54, sec.

See 11 OTTO.

2; Laws of N. Y., 1864, ch. 517, p. 1154, sec. 2.

The Act of 1864, above cited, as judicially construed, removed the disability imposed by the Act of 1848, as to the mortgaging by manufacturing companies of their real estate, and granted to them a power which, in the absence of the previously existing statutory restriction, they might have exercised under their common law powers.

Carpenter v. Gold Mining Co. (1875), 65 N. Y. 43.

"Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money or their debts."

Ang. & Ames, Corp., 191; *De Ruyter v. St. Peter's Church*, 3 N. Y., 238; *Barry v. Merchants Exchange Co.*, 1 Sandf. Ch., 280; *King v. Same*, 5 N. Y., 547; *Richards v. R. R. Co.*, 44 N. H., 127; see, also, *Greenpoint Sugar Co. v. Whitin*, 69 N. Y., 328; *Gold Mining Co. v. Platt*, 3 Daly, 263.

The mortgage being executed by the New York Kerosene Oil Company, under its corporate seal, by its President and Secretary, is, presumptively, the deed of the Company, independently of any recital in the mortgage that it was made pursuant to an express direction of the Board of Trustees.

In the absence of all proof on the subject, it is to be presumed that the instrument had been regularly made, and that it had been signed by the President and Secretary, and the seal of the Corporation affixed thereto by the express authority of the trustees.

Jackson v. Campbell, 5 Wend., 572; Ang. & Ames, Corp., sec. 217; *Lovett v. Steam Saw-Mill Assn.*, 6 Paige, 54; *Bk. v. Warren*, 7 Hill, 91.

"The mortgage had the corporate seal attached, and the presumption was that it was there rightfully."

Koehler v. Black River Falls Co., 2 Black, 715, 717 (67 U. S., XVII., 340).

The requisite statutory proof that the seal had been affixed to the mortgage by authority of the Board of Trustees, forms a part of the record of the mortgage, and the instrument itself contains a recital that such authority had been duly given. Independently, therefore, of any question of the records of the Company the mortgage is the corporate act of the Company, and is binding upon it and its estate in bankruptcy.

Tr. of St. Mary's Ch. v. Cagger, 6 Barb., 576; *Cotton Mfg. Co. v. Adams*, 10 Mass., 360; *Melledge v. Iron Co.*, 5 Cush., 158; see pp. 161-171, 175-177, 179-181; *Moss v. Averell*, 10 N. Y., 454; *R. R. Co. v. Cowdrey*, 11 Wall., 459 (78 U. S., XX., 199).

The mortgage was, in fact, executed by express authority of the Board of Trustees of the New York Kerosene Oil Company, duly given by resolution passed at the meeting of Mar. 9, 1867, and the circuit court properly so found as a matter of fact.

If the record were that of a public corporation, parol evidence to impeach or contradict it would be wholly inadmissible.

The People v. Zeyst, 23 N. Y., 140.

The reason for the rule excluding parol evidence to contradict the record of a public corporation, is equally applicable to the record of a manufacturing corporation.

See, 3 Stark., Ev., part IV., p. 997, 3d Am. ed.;

also, *Taylor v. Henry*, 2 Pick., 397; *Buckley v. Bentley*, 48 Barb., 283; *Schultz v. Halsey*, 3 Sandf., 405.

The meeting was duly constituted; three members were a quorum. The resolution had the force of a by-law. *Ang. & Ames, Corp.*, sec. 328; *Bk. of Md. v. Ridgely*, 1 Har. & G., 324.

The Board of Trustees could delegate its authority to a quorum composed of less than a majority of its members.

Hoyt v. Thompson, 19 N. Y., 207.

The attempt to contradict the record of the meeting of Mar. 9, 1867, was manifestly dishonest and utterly failed. The fact of the meeting, and of the passage of the resolution, is established by competent proof.

The requirement of the Act of 1864, in respect to the consent of stockholders, was also fully complied with. The written consent prescribed by the statute was first filed in the office of the clerk of the county where the mortgage premises were situated.

The mortgage was given to secure a debt contracted by the New York Kerosene Oil Company in the business for which it was incorporated. This was fully established by the evidence.

Mr. Justice Swayne delivered the opinion of the court:

The analysis in the reporter's statement of this case [court below, as reproduced above] has divested it of all extraneous considerations, and presents it in the nakedness and simplicity of its material facts.

The central and controlling questions to be determined are:

Whether the Oil Company had the power to give a mortgage for future advances; and,

Whether the mortgage here in question is, in the view of a court of equity, for the debt of the Oil Company or for the debt of Abraham M. Cozzens.

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the circuit court, and shall pass them by without further remark.

At the common law, every corporation had, as incident to its existence, the power to acquire, hold and convey real estate, except so far as it was restrained by its charter or by Act of Parliament. This comprehensive capacity included, also, personal effects of every kind.

The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd, Corp., 69, 76, 78, 108; *Ang. & A.*, sec. 145; 2 Kent, Com., 282; *Reynolds v. Stark Co.*, 5 Ohio, 204; *Cunial Co. v. Vallette*, 21 How., 414 [62 U. S., XVI., 154].

A mortgage for future advances was recognized as valid by the common law. *Gardner v. Graham*, 7 Vin. Abr., 52, pl. 3; see, also, *Brinkerhoff v. Marvin*, 5 Johns. Ch., 320; *Lawrence v. Tucker*, 23 How., 14 [64 U. S., XVI., 474].

It is believed they are held valid throughout

the United States, except where forbidden by the local law.

The statute under which the Oil Company came into existence made it "Capable in law of purchasing, holding and conveying any real and personal estate, whenever necessary to enable" it to carry on its business; but it was forbidden to "mortgage the same, or give any lien thereon." This disability was removed by the later Act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is, therefore, to be construed liberally with reference to the ends in view.

The learned counsel for the appellant insisted that a mortgage could be competently given by the Oil Company only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law. *People v. Ins. Co.*, 15 Johns., 357; *U. S. v. Babbitt*, 1 Black, 55 [66 U. S., XVII., 94].

The view of the court in *Thompson v. R. R. Co.*, 3 Sandf. Ch., 625, was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the Company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars, would be the same, whether the transaction took one form or the other. According to our construction the Company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the State. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained.

Our view is not without support from the language of the statute, that "Every mortgage so made shall be as valid, to all intents and purposes, as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining, doubtless, would not have been brought before us for consideration.

When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity. *Sumner v. Hicks*, 2 Black, 532 [67 U.S., XVII., 355]. It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

The Statute of 1864 neither expressly forbids, nor declares void, mortgages for future advances.

If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the State. As to all other parties it must be held valid, and may be enforced accordingly. *Bk. v. North*, 4 Johns. Ch., 370; *Bk. v. Matthews* [ante, 188]. In the latter case this subject was fully examined.

A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

No one else can raise the question. All other parties are concluded. *Gordon v. Preston*, 1 Watts, 385.

Where money had been obtained by a corporation upon its securities which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. *In Re Magdalena, S. N. Co.*, Johns. [V. C.], 691. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the money thus raised is applied for the benefit of the company. *In re R. Co.*, L. R., 4 Ch., 748.

A court of equity abhors forfeitures, and will not lend its aid to enforce them. *Marshall v. Vicksburg*, 15 Wall., 146 [82 U. S., XXI., 121]. Nor will it give its aid in the assertion of a mere legal right, contrary to the clear equity and justice of the case. *Lewis v. Lyons*, 13 Ill., 117.

The second point to be considered is, whether the mortgage was for the debt of Cozzens or for the debt of the Oil Company.

Cozzens occupied a twofold relation to the latter. He owned all the stock but a trifle, and was the president of the Company. At the same time he was largely its creditor. When he applied to the Guaranty Company, he appeared in his official character, and proposed a present loan to the Oil Company of \$50,000 upon its note, and further advances thereafter to the amount of \$50,000, making in the aggregate the sum of \$100,000, the whole to be secured by a mortgage from the Company upon all its real estate.

This offer was accepted. The proposition See 11 OTTO.

as to the mortgage was in writing, and signed by Cozzens as president. It mentioned a loan of \$50,000 as already made to the Oil Company, and spoke of "any future loan you may make to our Company," as the liabilities to be secured.

Let us pause for a moment and consider the position of the parties at this point of time. So far, all that had been done and all that had been proposed and agreed to be done was in form and substance solely for the Oil Company. Nothing had been done or proposed for Cozzens individually. There is no ground for the allegation or suspicion that the transaction was in aught other-wise than as we have stated it. It is true, the Guaranty Company held the indorsement, not of Cozzens, but of Cozzens & Co., on the note of the Oil Company for \$50,000. But the Oil Company was primarily liable. Cozzens & Co. were responsible as indorsers and sureties, and were liable to be called upon only in the event of the default of the principal debtor. Until that occurred, they could not be required to respond; and in that contingency they would have been liable as any other sureties are under the same circumstances. The Oil Company was the principal debtor.

When the agreement between the Oil Company and the Guaranty Company came to be carried out, the scrivener by whom the papers were prepared, without the request or knowledge of the Guaranty Company, described in the mortgage the penal bond of Cozzens as the thing to be secured, but the mortgage recited that the president had been authorized to make the loan and to execute the mortgage to secure its payment, and that the requisite consent of the stockholders had been given; and the condition of the mortgage was, that the Oil Company and not Cozzens should pay whatever might become due upon the bond. It is true that Cozzens covenanted personally in the mortgage to pay, while there was no such covenant on the part of the Company.

The first indorsement upon the bond was made upon the renewal of the Company's note of \$50,000, held by the Guaranty Company. One of those of \$25,000 was for that amount advanced upon the note of the Oil Company for the like sum. The remaining indorsement was for that amount advanced upon a warehouse receipt for oil given by the Company to Cozzens and by him transferred to the Guaranty Company.

All the moneys thus advanced were applied exclusively for the benefit of the Oil Company.

There can be no question as to the first indorsement on the bond of \$50,000 being the debt of the mortgagor. It was the same debt which subsisted when the first note was delivered to the Guaranty Company, and the character of the debt was not changed by the renewal of the note and the indorsement on the bond then made.

If a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid. Changes in the form of the instrument are immaterial. Equity regards only the substance of things, and deals with human affairs upon that principle. The same state of things, in effect, occurred with respect to each of the other sums advanced by the Guaranty Company. The note

and warehouse receipt given for them were the note and receipt of the Oil Company, and it was responsible accordingly. Its needs were the motive, and were at the foundation of every loan that was made; and whether Cozzens acted as its agent in making them, or transferred the securities as a creditor acting for himself, is quite immaterial. The result is inevitably the same. In either case the Oil Company became directly liable upon the securities, and to that amount the principal debtor to the mortgagee.

The condition of the mortgage being that the Company should pay and not that Cozzens should, it could not be broken without the Company's default. Until that occurred, there could be no remedy upon it either by foreclosure or ejectment. If Cozzens made default, no such consequence would follow. He could be sued on his covenant, but the rights and remedies of the mortgagee with respect to the mortgaged premises would be neither more nor less on that account. The covenant of Cozzens was collateral to the liability of the Company. No such covenant was needed from the Oil Company, because the mortgage pledged its entire real estate, and the mortgagee held in addition a direct liability for each advance upon which a judgment at law could be taken. As before remarked, there could be no breach of the condition of the mortgage without the default of the Oil Company; and if it had paid the amount due that would have extinguished the collateral liability of Cozzens and of Cozzens & Co., and if the tender had been refused, it would have extinguished the mortgage, though not the debt. *Kortright v. Cady*, 21 N. Y., 343.

In all that Cozzens did, he acted as the agent of the Oil Company, and it would involve an utter perversion of the facts to hold that he and not that Company was the principal debtor to the Guaranty Company.

We are satisfied, beyond a doubt, that it was the debt of the Oil Company and not his debt that was intended to be secured and was secured by the mortgage.

In examining this point, it was proper to consider all the evidence in the record. This was objected to by the counsel for the appellant. He insisted that the scope of our view must be limited to the face of the mortgage and the obligation secured by it.

It is common learning in the law that parol evidence is admissible to show that a deed absolute on its face is a mortgage; to establish a resulting trust; to show that a written contract was without consideration; that it was void for fraud, illegality or the disability of a party; that it was modified as to the time, place or manner of performance or otherwise, or that it was mutually agreed to be abandoned; also to show the situation of the parties and the surrounding circumstances when it was entered into and to apply it to its subject, to show that a joint obligor or maker of a note was a surety, and that the acceptor or indorser of a bill or the maker or indorser of a note became such for the accommodation of the plaintiff. Where a party has entered into a written contract, it may be so shown that he did it as the agent of another, though the agency was concealed and the principal not disclosed, and the principal, in such case, may be held liable upon it. A mortgage or a judgment may be assigned by parol.

These are but a small part of the functions which such evidence is permitted to perform.

In no class of cases is it admitted with greater latitude and effect than in that to which the one here in hand belongs.

In *Shirras v. Caig*, 7 Cranch, 34, Chief Justice Marshall said: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount."

After remarking that such an instrument was liable to suspicion, he proceeds:

"But if, on investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person, claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been in fact injured by the misrepresentation. That cannot have happened in the present case."

The decree of the court was that the mortgagees were entitled to have the mortgaged premises sold, "and to apply the proceeds of said sale to the payment of what remains unsatisfied of their respective debts," etc.

In *Gordon v. Preston*, *supra*, it appeared that the mortgage was for a greater amount than was owing to the mortgagee. Chief Justice Gibson said the mortgage was good "for the sum actually due." He said further: "But the mortgage was, in fact, given for the benefit of other creditors, whose debts are not disputed, and though the trust is not expressed in the instrument, evidence was proper to explain the true nature of the transaction and negative any imputation of actual fraud."

In *Hurd v. Robinson*, 11 Ohio St., 232, the condition of the mortgage was: "Provided always, and these presents are upon the condition that, whereas the said Robinson is indebted to said bank for money loaned, and for divers bills of exchange and promissory notes; now if the said Robinson shall discharge his said several liabilities in six months from this date, these presents shall be void; otherwise, to remain in full force and virtue." The condition was held to be sufficiently definite, and the mortgage was sustained. The opinion of the court is able and elaborate. *Gill v. Pinney*, 12 Ohio St., 38, is to the same effect.

Other like cases might be multiplied to an indefinite extent. It is unnecessary to incur this opinion with further references. The grounds upon which they proceed are, that a thing is to be regarded as certain which can be made certain; that evidence can be adduced to apply the contract to its subject; that there is enough to put those concerned upon inquiry, and that in such cases the means of knowledge and knowledge itself are, in legal effect, the same thing.

A multo fortiori was it proper to receive the evidence referred to in the present case.

See, in this connection, also, *Chester v. Bk.*, 16 N. Y., 336, and *Horn v. Keteltas*, 46 N. Y., 605.

The decree of the Circuit Court is affirmed.

Cited—102 U. S., 569; 21 N. W. Rep., 840; 36 Ohio St., 357; 58 Am. Rep., 597.

TOWN OF SCIPIO, *Plff. in Err.*,v.
WILLIAM P. WRIGHT.

(See S. C., 11 Otto, 665-677.)

New York Statute for aid to railroads—valid bonds—exchange for stock—bona fide holder.

1. The New York Statute of April 16, 1852, to authorize the towns of Cayuga County to aid in the construction of a railroad, did not require that the tax payers should designate the company by its name.

2. The bonds were not void, because the written assent of the required number of tax payers on the assessment roll of 1852 was obtained, and they were not issued until after Aug. 1, 1853, when the assessment roll for that year was by law required to be completed.

3. The fact that the bonds were not issued for borrowed money, but were exchanged for stock of the railroad company is, according to the New York decisions, a defense for the town against a holder who, when he purchased, had notice of the manner of their issue; which decisions this court follows in this case.

4. A bona fide holder, who had no knowledge that the railroad company had received the bonds in payment for the stock taken for the town, would not be liable to such a defense.

[No. 190.]

Argued Mar. 11, 1880. Decided Apr. 26, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is fully stated by the court.

Messrs. S. E. Day and Geo. F. Comstock, for plaintiff in error.

Mr. David Wright, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

At the trial of this case in the circuit court, the extraordinary number of thirty-three exceptions were taken by the plaintiff in error, and signed by the Judge. It does not, however, always happen that the merits of a case brought in error are to be measured by the number of exceptions taken in the inferior court, or by the number of errors assigned. In this case, the real questions, the only ones that need particular attention, are few.

The plaintiff below brought suit upon twenty-five bonds, or rather notes, each for the sum of \$1,000, which, as he alleged, had been issued by the Township in pursuance of and under authority of law. Of course, it was incumbent upon him to prove that the Town was authorized to create the instruments, and to dispose of them in the manner in which disposition of them was made. The authority relied upon was an Act of the Legislature passed on the 16th of April, 1852, entitled "An Act to Authorize any Town in the County of Cayuga to Borrow Money for Aiding in the Construction of a Railroad or Railroads from Lake Ontario to the New York and Erie or Susquehanna and Cayuga Railroad." The 1st section enacted as follows:

"It shall be lawful for the supervisor of any town in the County of Cayuga (the Town of Scipio being one), and the assessors of such town, who are appointed by this Act as commissioners to act in conjunction with the said supervisor in effecting and executing the purposes of this Act, to borrow, on the faith and credit of said town, such a sum of money as they may deem necessary, not to exceed \$25,000,

See 11 Otto.

U. S., Book 25.

for a term of time not to exceed twenty years, with such rate of interest as may be agreed upon, not exceeding seven per cent per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annually during the term said money may be borrowed. * * * All moneys borrowed under the authority of this Act shall be paid over to the president and directors of such railroad company (now organized, or such company as may be organized, according to the provisions of the general Railroad Law, passed April 2, 1850), as may be expressed by the written assent of two thirds of the resident tax payers of said Town, to be expended by such president and directors in grading, constructing and maintaining a railroad or railroads passing through the City of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga Railroad, or the New York and Erie Railroad; *Provided always*, That the said supervisor and commissioners shall have no power to do any of the Acts authorized by this Act, until a railroad company has been duly organized according to the requirements of the general Railroad Law for the purpose of constructing the aforesaid described railroad, and the written assent of two thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are there-to attached and filed as aforesaid comprise two thirds of all the resident tax payers of said Town on its assessment roll next previous thereto."

The 2d section we also quote, as follows, so far as is needful:

"Section 2. It shall be lawful for the supervisor and commissioners of any town in said county, on obtaining and filing such assent, as provided in the 1st section, to subscribe for and take, in the name of and for said town, such a number of shares of the capital stock of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad or railroads, as will be equal to the amount of the bonds executed under the authority of this Act."

The 10th section made it the duty of the electors of the town to elect, at the next annual town-meeting, two commissioners to act in conjunction with the town supervisor in carrying into effect the provisions of the Act.

At the time when this Act was passed, so far as it appears, there was no organized company in existence with power to build such a railroad as the Act described; but on the 23d of August next following, articles of association of such a company, organized under the general railroad laws of the State for the purpose of constructing a railroad from Lake Ontario to the Cayuga and Susquehanna Railroad, passing through Auburn and Scipio, were filed in the office of the Secretary of State. Subsequently to the formation of this company, the supervisors and assessors of the Town obtained a

written assent of three hundred and one residents and taxables of the Town, appearing on the assessment roll for the year 1852, and on the 8th of December, 1852, two of the assessors made oath that the persons whose written assents were attached thereto comprised two thirds of all resident tax payers of the Town of Scipio on the assessment roll thereof for the year 1852. These assents and the affidavit indorsed thereon were filed in the clerk's office of Cayuga County on January 11, 1853. On the first of March, 1853, two railroad commissioners were duly elected for the Town, and on the 16th of May next following, they, together with the supervisor, in the name and for the Town, subscribed upon the books of the said railroad company for five hundred shares of \$50 each of its capital stock. On the 20th of the same month they executed by their official signatures the twenty-five bonds in suit, payable to bearer. Eight of these bonds were sold by the commissioners to Slocum Howland at par; and the proceeds of the sale were paid to the railroad company on account of the stock subscription, the commissioners taking from the company for the Town a certificate for the five hundred shares of stocks, which, so far as it appears, the Town now holds. To this extent money was borrowed upon the bonds, and paid over in accordance with the statute. Howland also bought the remaining seventeen bonds from the railroad company, to which they had been delivered by the railroad commissioners under an arrangement we shall notice hereafter, and the company indorsed the certificate of stock as full paid. It is out of these facts that the principal questions involved in the case arise.

It is contended by the plaintiff in error that the bonds were unauthorized; because, as it is alleged, the written assent of the tax payers did not conform in substance or meaning to the requirement of the statute, in that it did not "Express the railroad corporation to which the moneys to be borrowed by the Town should be paid." We think this position is quite untenable. The identification of the company in the written assent is as perfect as it would have been had it been described by its corporate name. The statute did not require that the tax payers should "express," that is, designate, the company by its name. Any mode of description that designated it was sufficient. The assent authorized the commissioners to pay the money borrowed, for which the bonds were to be given, "To the president and directors of a railroad company organized according to the requirements of the general railroad laws for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga Railroad, and passing through the City of Auburn." This was in strict conformity with the description given in the statute. It fitted exactly the company organized in August, 1852, and there cannot be a doubt that the assent was intended to designate that company. There was no other company in existence to which the description could apply. Unless, therefore, the word "express," as used in the statute, was intended to convey some other meaning than "described" or "designated," which can be maintained with no show of reason, the assent in form was all that required, for authority to issue the bonds.

A second position taken by the plaintiff in error is, that all the bonds except three are void, because they were issued after the assents of the tax payers as appearing on the assessment roll of the Town for the year 1852 had spent their force and ceased to be authority. This is founded upon the phraseology of the statute, which requires as a prerequisite to any action by the commissioners, that the written assent of two thirds of the resident persons taxed in said Town, as appearing on the assessment roll made next previous to the time such money may be borrowed, shall be obtained, verified and filed in the clerk's office. Recalling the facts, heretofore stated, the written assent of the required number of tax payers on the assessment roll of 1852 was obtained and verified, and it was filed on the 11th of January, 1853. Then the authority to issue the bonds, borrow the money, subscribe for the stock and elect railroad commissioners became perfect. The Town did elect railroad commissioners on the first of March, 1853, the subscription for the stock of the company was made, a debt of \$25,000 therefor was incurred, and the bonds or notes for an equal amount were executed, and at least some of them were sold at par and the proceeds of the sale were paid on account of the subscription, all before any new assessment roll could be completed and before the law required any to be made. For all this there was complete authority. Everything had been done which was required to authorize the creation of the indebtedness to the railway company. Did the Legislature intend that after the Town had lawfully created a debt and lawfully executed bonds with which to borrow the money necessary to pay it (bonds confessedly authorized at the time when they were made), the bonds should become void if the money could not be borrowed within two months and a half, or between May 20 and August 1, 1853? Did it intend thus to leave the debt in existence, and at the same time to take away the power to provide means for its payment? Such a construction of the Act would be most unreasonable. It would be standing upon the letter and ignoring the spirit of the statute. It would be closing our eyes to the only substantial reason for requiring the assent of two thirds of the resident tax payers before the commissioners could exert the power given to them by the Legislature. That was to ascertain whether the tax payers would consent to the creation of a town liability, not to ascertain how or when the debt, when incurred, should be evidenced. The substance of the power was the creation of a town debt. All the rest was formal. It may be admitted the Legislature did not intend that the power conferred upon the railroad commissioners should continue indefinitely. Hence the assent of two thirds of the resident taxables, as appearing on the assessment roll made next previous to the borrowing of the money, was required. But evidently by this was meant that the assent should be given by the tax payers appearing on the roll made next before any debt of the Township should be incurred. It was protection against a town debt that was intended, rather than protection against the form of the debt or the shape it might assume after it had been incurred or when the security for it should be given. Two

distinct powers were given by the statute, each dependent for its exercise, though not for its creation, upon the prior consent of the taxables. The one was described by the 1st section. It was to borrow money and execute bonds therefor, paying over the money borrowed to a railroad company to be expended in grading, constructing and maintaining its road. This section made no reference to a subscription for the stock or to a debt directly to the railroad company.

But the 2d section authorized a subscription to the capital stock and the consequent assumption of a legal liability to the company, equal to the amount of the bonds issued, which might be discharged afterwards by levying a tax, or by borrowing money, giving bonds therefor, and paying it over. Nothing in the Act postponed a subscription for stock until the money to pay for it could be borrowed. This debt was incurred before the assessment roll of 1853 had any existence. The right to incur it when it was incurred was, therefore, complete. The exercise of the power was warranted by the written assent filed. For these reasons we think the instruments sued upon are not invalid, because they were not issued until after August 1, 1853, when the assessment roll for that year was, by law, required to be completed.

The only other question raised by the assignments of error, and by the numerous exceptions, is, whether the circuit erred in refusing to rule, as requested by the defendant, that the plaintiff could not recover for the last seventeen bonds, because, instead of having been issued for money borrowed, they were issued directly to the railroad company in exchange for its stock.

This objection has no application to the first eight bonds, numbered from 1 to 8 inclusive. They were sold at par, and the proceeds were paid over to the company. This was, as we have said, a substantial borrowing. The facts respecting the remaining seventeen, as they appear in the record, may be thus summarized:

On the 7th of January, 1854, the railroad company received from the "railroad commissioners" of the Town the seventeen bonds, nominally at par, and indorsed on the certificate of stock, which the Town had previously taken, and upon which \$8,000, the proceeds of the first eight bonds, had been paid, "full paid." This arrangement was with an accompanying written understanding that the company might at any time within eight months from October 11, 1853, redeliver the bonds, or any part of them, to the Town, and reduce the amount of credit on the certificate accordingly; and that if the company should sell the bonds for more than par, it should account to the Town for the excess, but that the Town might, at any time within the said eight months and prior to the sale of the bonds by the company, have the right to demand the redelivery thereof on payment to the company of the par value. The bonds were never redelivered, nor were they demanded. Sometime after January 7, 1854, when does not exactly appear, Slocum Howland bought the seventeen bonds from the railroad company, with notice that money had not been borrowed upon them, but that they had been transferred by the town supervisor and railroad commissioners, or one or more of them, in the first instance to the company in exchange for its stock.

See 11 OTTO.

What Howland paid for them, whether the company obtained their full par value, is not proved.

Howland held the bonds until 1874, after they became due, when he sold them to the plaintiff, taking his note for the whole price, and that note remains unpaid. Neither Howland, therefore, nor Wright, the purchaser from him, stands in the position of a *bona fide* purchaser without notice of the exchange of the bonds for stock. Had either of them been such a purchaser, the plaintiff's right to recover could not be gainsaid. But the question now is, whether the fact that the bonds were not issued for borrowed money, but were exchanged for stock of the railroad company, is a defense for the Town against a holder who, when he purchased, had notice of the manner of their issue. Were the question an open one, it would seem that it ought not to be a defense. It might be regarded as a fair presumption that the bonds were sold to Howland for not less than their par value, and that the company received their full amount in money; or the transaction might be regarded as practically a borrowing of the money by the Town through the agency of the railroad company. So far as discharging the debt of the Town for its stock subscription is concerned, and so far as relates to obtaining a full paid certificate, the transaction is, in legal effect, the same as if the money had been borrowed by the Town directly and paid over to the company. And, if it had appeared affirmatively that Howland had paid the full face of the bonds and interest, without any discount, when he bought, every object which the statute could have had in view in enacting that it should be lawful for the town officers to borrow on the credit of the Town a limited amount of money and pay it over to the railroad company, executing town bonds therefor, would have been accomplished. In *Gould v. Sterling*, 23 N. Y., 456, it was said by Selden, J., when speaking of a transaction like that we have now under consideration, where there had been an exchange of town bonds for railroad stock: "If what was done was the same in effect as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material." Such a case, however, is not presented by this record.

The statute prescribed the manner in which the power it conferred should be exercised. The Town was at liberty to subscribe for stock, but if bonds were used to pay for it, the mode of use was directed to be borrowing money with them and paying the money to the railroad company. It is quite conceivable that the purpose of such a direction, instead of allowing an exchange of the bonds for the stock taken, was that the railroad company might obtain an amount of money equal to the amount of the bonds. This was important to the company, to the Town as a stockholder, and to the public as interested in the projected railroad. If the bonds might be delivered directly to the company in payment of the stock, it might sell them at a discount. Thus it would fail to obtain the assistance in building its road which the Legislature contemplated it should have. Its stock would be practically sold for less than par, and it would not be worth as much to the Town as it would be had all the money for which the bonds

were given come into the company's treasury. Whether such were the motives that induced the peculiar phraseology of the statute or not, the highest court of New York has repeatedly construed it as prescribing the manner in which the bonds might be used or issued, and as denying the power to exchange them directly with the railroad company for the stock taken by the Town. These decisions have been constructions of the identical statute we have now under consideration, and by which the bonds now in suit are alleged to have been issued. The construction given by the state court must, therefore, be our guide. *Starin v. Genoa*, 23 N. Y., 439, was a suit for interest upon town bonds made under the Act. They had been exchanged with a railroad company for capital stock taken for the town, and the exchange was accompanied by the same agreement as that made between the Town and company in the present case. The plaintiff was a purchaser from the railroad company, with knowledge that it had received the bonds in payment of stock. In these respects the case was exactly like the present. The Court of Appeals ruled that issuing the bonds by exchanging them for the company's stock was not an execution of the power and authority granted by the statute, but an appropriation of them in a manner not contemplated by the Legislature, or by the tax payer's assent. The court said: "It was evidently the intention of the Act that money should be raised and paid over to aid in the construction of a railroad, and no color is given to the idea or position that the credit merely of any town should be given, through and by which money might be raised." They, therefore, held that the bonds were issued without authority, and as the railroad company received them on a consideration not authorized, it was chargeable with a knowledge of their invalidity, and it never could have enforced them. It was further ruled that the plaintiff stood in no better position, that having purchased with notice of the manner in which they had been issued, he was not a *bona fide* holder. *Gould v. Sterling*, 23 N. Y., 456, is a similar case, and the ruling of the court was the same. In *People v. Mead*, 24 N. Y., 114, we find a re-assertion of the invalidity of bonds first negotiated by exchanging them for stock of the railroad company. The opinion was delivered by Denio, J. It was, however, said that a *bona fide* holder, who had no knowledge that the railroad company had received the bonds in payment for the stock taken for the Town, would not be liable to the defense which existed against the railroad company. *Horton v. Thompson*, 71 N. Y., 513, is another case in which the Court of Appeals gave the same construction to another similar statute, holding that bonds exchanged for stock were unlawfully issued, and that a purchaser, with knowledge that they had been thus issued, could not enforce them.

It thus appears to be the settled construction given by the courts of New York to the Act under which the bonds now in suit were issued, and to other similar Acts, that they do not authorize an exchange of bonds for shares of the capital stock of railroad companies, and that a purchaser who had notice at the time of his purchase that such a disposition of the bonds was made by the town officers or railroad com-

missioners, cannot recover in a suit brought upon them.

We find no decision of the Court of Appeals that is in conflict with what was ruled in the cases we have cited, or which weakens their authority, and as they are constructions of a state statute, we are constrained to follow them. *Gould v. Oneonta*, 71 N. Y., 298, to which we have been referred, presented an entirely different question. A statute enacted in 1859 had authorized the transfer of the bonds directly to the railroad company in payment of the stock.

Our conclusion, then, is that the circuit court erred in declining to instruct the jury, as requested, substantially, that upon the facts proven in the case, and not contradicted, the plaintiff was not entitled to recover upon any of the seventeen bonds, because the supervisor and commissioners did not issue them for borrowed money, but transferred them to the railroad company in payment of the stock subscription.

We find no other error in the record.

The judgment is reversed and the case is remanded for a new trial.

Dissenting, *Mr. Justice Clifford* and *Mr. Justice Swayne*.

Cited—103 U. S., 810; 109 U. S., 352; 20 N. W. Rep., 212.

JOHN G. PHILLIPS, Admr. *de bonis non* of
ROBERT G. SHEDD, Deceased, Adpt.,

v.

ALBERT ORDWAY.

(See S. C., "*Goddard v. Ordway*," 11 Otto, 745-754.)

Dismissal of suit after appeal—vacating appeal.

1. The Supreme Court of the District of Columbia had authority to set aside an order affirming a decree made at the previous Term, and give a new decree dismissing the suit, after an appeal to this court was allowed; the motion to vacate the order, and for a reargument having been made to, and recognized by the court at the same term the order was entered, and having gone over as unfinished business.

2. The court had the power during the Term, at the request of the appellant, to set aside the order of allowance, and thus vacate the appeal which had been granted in his favor.

[No. 137.]

Argued Jan. 6, 7, 1880. Decided Apr. 26, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. Walter D. Davidge, E. L. Stanton and A. S. Worthington, for appellant.

Messrs. R. T. Merrick, Geo. F. Appleby and M. F. Morris, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

This appeal presents the following case:

During the summer of 1871, Albert Ordway, the appellee, was engaged in securing a contract with the government to furnish and cut the granite for the then proposed new building to be erected in Washington for the use of the State, War and Navy Departments. His bid for the work was put in on the 19th day of June, and formally accepted about the first of August. He resided at Richmond, Va., and

late in July, 1871, negotiated with Robert G. Shedd, now deceased, for a loan, not exceeding \$50,000, to be used in preparations for the execution of the contract. As security, Shedd was to be given, in some appropriate way, a lien on the contract, and he was to be repaid in installments out of the profits. Under this arrangement, loans were made at various times during the summer and fall of that year, amounting, in the aggregate, to \$38,500, from moneys which Shedd had in his hands as trustee for others.

By the terms of the bid of Ordway, as accepted by the supervising architect, Ordway was to furnish the granite from either the James River or the Green & Westham quarries near Richmond, as the architect should direct. He was to be paid certain stipulated prices for the stone as measured before cutting, when delivered at the site of the building. He was also to furnish the labor, tools and materials necessary to cut, dress and box the granite at the quarry in such manner as should be required, and also shops and sheds sufficient to accommodate one hundred granite-cutters, with a proper proportion of other mechanics. For this he was to be paid "The full cost of the * * * labor, tools, shops, sheds and materials, and also the insurance on the granite, increased by fifteen per centum of the cost." At the time the bid was made and accepted, the erection of only that part of the building intended for the use of the State Department, being the south front, had been authorized, but Ordway was to furnish and cut, on the same terms and at the same prices, the granite for the whole building, as its construction should be provided for.

Ordway had control of the James River quarry, but not of the Green & Westham. The supervising architect required that the granite should be taken from the Green & Westham, which was owned by Andrews & Green. This made it necessary for Ordway to arrange, in some way, with Andrews & Green for the use of their quarry. The result was, that on the 7th of August these three persons entered into a copartnership under the name of Andrews, Ordway & Green, and Andrews & Green put into the business their quarry, on certain specified terms, and Ordway all his contract with the government except that part which related to the cutting, boxing, etc., for the south front, which, as between himself and the firm, he retained for his own use. The profits accruing to the firm from the execution of the contract were to be divided in the proportion of fourteen thirty-sixths to Ordway and eleven thirty-sixths to each of the other partners. All other profits and losses were to be shared equally.

On the 16th of November, 1871, the contract between Ordway and the government was executed in form by Ordway and the supervising architect. On the 25th of November, Ordway entered into what was called an agreement of copartnership with one Andrew Washburne, "For the purpose of cutting, dressing and boxing the stone to be furnished the United States under the contract of Ordway, dated November 16, 1871, for the new State Department," but which was, in reality, a transfer of that part of the contract from Ordway to Washburne. By the terms of the arrangement, Washburne

was to furnish all the capital, do all the work and get all the pay. The transfer, however, was expressly confined to work for the State Department proper; that is to say, the south front of the building. This arrangement was assented to and recognized by the Secretary of State on the 12th of December.

Work was begun under the contract of Ordway in January, that being as soon as the necessary plans were furnished. From the beginning, Washburne received the moneys realized from the cutting and boxing part of the contract. This yielded a large profit, but the price paid for the granite in the rough was less than the cost of quarrying and delivery, and entailed a loss on Andrews, Ordway & Green. The supervising architect required that the cutting should be done near the place of shipment on the river. This increased somewhat the expenses for transportation, and deprived the firm of some incidental advantages anticipated from having the work done at the quarry. For this reason Washburne, in March, or about that time, gave up to the firm six fifteenths of the fifteen per cent paid him in addition to the cost of cutting, etc., but retained the rest until he afterwards, during the latter part of the spring or in the summer, transferred all his remaining interest in the contract to Andrews, one of the firm of Andrews, Ordway & Green. For this he was paid a consideration by Andrews individually.

The entire amount paid Washburne and Andrews on account of the percentage on the cost of cutting for the south front was about \$94,000, and it nowhere appears that Ordway derived any advantage from this part of his contract with the government except indirectly through the six per cent given up to the firm of Andrews, Ordway & Green. The cutting for the south front was all finished in March, 1874, and the profits realized and paid over. The last payment on this account was made in February or March of that year.

On the 29th of May, 1872, Ordway entered into a written agreement with Shedd, by which, after reciting his contract with the United States for furnishing and cutting the granite for the State, Army and Navy Department building, and that he was then "filling said contract as rapidly as he can under government supervision, said contract being filled and performed with others, and especially with the firm of Andrews, Ordway & Green, of which he is a member," he conveyed to Shedd "three eighths of the profits that accrue to the said Ordway, either individually or as a partner in the firm of Andrews, Ordway & Green." He, also, in the same agreement, declared it to be his intention thereby, "From the income and profits of said government contract, to amply, fully and finally secure said Shedd, as said trustee, from any and all loss by reason of his said loan of \$38,500." Full provision was made for an examination of accounts by Shedd and for payments by Ordway, from time to time, out of the profits as they accrued to him from the contract as it was fulfilled.

During the commercial crisis of 1873, the firm of Andrews, Ordway & Green became financially embarrassed, and borrowed a large amount of money from J. Condit Smith. At his suggestion, the Westham Granite Company was

incorporated in March, 1874, and all the property of the firm, including the government contract, transferred to that company. Stock in the company was given to him for his debt, and to the firm for the estimated value of its property over what was owing him. The stock issued to the firm was held for the payment of outstanding debts, and then for distribution among the partners in proportion to their respective interests. The amount to which Ordway was entitled has never yet been ascertained. According to the evidence, that matter is still in the hands of a referee, mutually chosen by the parties, for adjustment.

On the 26th of July, 1874, Ordway was directed by the supervising architect to furnish and cut, under his contract, the granite required for the east wing of the building, an appropriation having been made by Congress for that purpose on the 23d of June previous. The Granite Company, as the successor of Andrews, Ordway & Green, immediately entered on the performance of this work.

On the 4th of January, 1875, Shedd, then in life, not having been paid anything by Ordway, commenced this suit for an account of the profits that had already been realized by Ordway from the contract, and for the appointment of a receiver to collect such moneys as should thereafter belong to him, Shedd, under his agreement. Upon the filing of the bill, Ordway was enjoined from making any further collections from the department. Various modifications of this injunction were made from time to time, and on the 7th of July, 1875, Ordway was permitted to collect all but three eighths of the fifteen per cent on the expenditures for labor, etc., under the cutting part of the contract, and a receiver was appointed to collect and hold this three eighths to await the result of the suit.

After answer and replication, proof was taken which established the foregoing facts. On the 24th of November, 1875, a decree was entered at Special Term declaring the right of Shedd to the moneys then in the hands of the receiver, and to three eighths of the fifteen per cent payable in the future progress of the work under the part of the contract which related to the cutting, until his debt was fully paid. The receiver was continued for the purpose of making future collections as the money from time to time fell due. From this decree an appeal was taken to the General Term. On the 18th of December, 1876, the death of Shedd was suggested on the record, and Goddard, the original appellant, his administrator, made complainant in his stead. On the same day a decree was entered affirming that made at the Special Term. Included in the same entry was an order of the court allowing an appeal to this court on the prayer of Ordway. No bond was ever executed, and nothing further was done under this allowance. On the 22d of December, and during the term, a notice was served on Goddard by Ordway to the effect that he would "Move that the order affirming the decree * * * be set aside, and the case reargued, on the ground that a motion for reargument heretofore made in open court had never been brought up in consultation, or determined by the court, at the time of making said order of affirmance, and that said order of affirmance

ought not to have been made in the premises, but was irregularly and inconsiderately pronounced and entered." On the 30th of December an entry was made on the minutes of the court to the effect that the appeal which had been allowed was withdrawn by Ordway. On the same day the following entry appears on the journal of the court:

"And now comes the defendant, and by his counsel, R. T. Merrick, moves the court to vacate the judgment of affirmance heretofore made in the above entitled cause, and for leave to argue the same before a full Bench; and assigns as reason therefor, in addition to reasons heretofore filed, that said cause was heard before only three of the justices, and that the judgment was rendered by only two of the Justices, with whom the third did not concur."

After this entry was made, and before the motion was heard or disposed of, the court adjourned for the term. On the 6th of January, 1877, which was at the next Term of the court, it was ordered that the cause be reargued and placed on the calendar of that Term. Goddard afterwards moved to vacate this order, because at the time it was made the court had no jurisdiction of the suit or of the parties; and also because the rules of court were not complied with in respect to the form of the motion and the time of filing. On the 19th of February this motion was overruled, and on the 28th of March, the cause having been reargued, the decree of the Special Term was reversed, the bill dismissed, and an order made on the receiver to pay over the moneys in his hands, \$24,931.72, to the defendant, Ordway, after deducting the receiver's commissions. From that decree Goddard, as administrator, appealed.

The first question presented for our consideration on the argument was as to the jurisdiction of the court below at its General Term in March, 1877, to set aside the order of affirmance made at the previous Term, and give a new decree dismissing the bill, the motion to vacate the order and for leave to reargue the cause not having been filed until after the affirmance had actually been entered and after an appeal to this court allowed. The objections urged to the jurisdiction were: 1, that a court cannot reverse or annul its final decrees or judgments for errors of fact or law after the term at which they were rendered; 2, that the motion was not either in form or substance such as is required by Equity Rule 88 of that court for a petition for rehearing; and, 3, that the appeal to this court allowed by the court below on the 18th of December, 1876, took from that court the power to proceed further with the cause, or to entertain a motion to vacate the decree appealed from.

So far as the first objection is concerned, it is sufficient to say that the motion to vacate the order of affirmance and grant a reargument was made to and recognized by the court at the same Term the order was entered, and before a final adjournment. This is evident from the fact that the motion was entered on the minutes of the doings of the court for the Term. A paper may be filed in the proper office and yet not brought to the attention of the court while sitting in judgment, but when what it calls for appears on the minutes of actual proceedings, it must be presumed that the court, in some

form, gave it judicial attention, and that it was presented in some regular way. In the Supreme Court of the District, as we are advised, if any matter in hand is not disposed of at one term, it is deemed to have been continued to the next. Whatever parties are bound to take notice of at one term they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance. In this case the motion to allow a reargument went over as unfinished business, and carried the parties with it. The proceeding was in all material respects like a motion for a new trial filed in time at one term and not disposed of until the next. Under such circumstances, a judgment or decree, although entered in form, does not discharge the parties from their attendance in the cause. They must remain until all questions as to the finality of what has been done are settled. The motion, when entertained, prolongs the suit, and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding.

The second objection is, as we think, equally untenable. The motion, as made, was nothing more than an application to the court to vacate a decree which had been entered at a former day in the Term, improvidently and without sufficient consideration. It was addressed entirely to the discretion of the court, and depended on facts within the knowledge of the justices. It was in no just sense a petition for rehearing, and even if it had been, we should not be inclined to reverse a decree because of what was, under the circumstances, an immaterial departure from technical rules. *Allis v. Ins. Co.*, 97 U. S., 144 [XXIV., 1008]; *Rice v. Edwards*, not reported. [This ed., ante, 976]. The grounds of the application were sufficiently stated, and a verification under oath might well have been omitted, since the records of the court showed everything that was claimed. In reality the whole matter resolved itself into the simple question of who should appeal to this court. Ordway would have appealed if the original decree had stood, and Goddard has done so since it was set aside.

The allowance of the appeal to Ordway was a judicial act of the court in term time. The order was entered on the minutes as part of what was done in the cause by the court while in session. In *Ex parte Lange*, 18 Wall., 163 [85 U. S., XXI., 872,] we said that "The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the Term at which they are first made is undeniable." *Bassett v. U. S.*, 9 Wall., 38 [76 U. S., XIX., 548]; *Doss v. Tyack*, 14 How., 297. As part of the "roll of that Term," they are deemed to be "in the breast of the court during the whole Term." *Bac. Abr.*, tit. Amendment and Jeofail, A. Under this rule, we think it clear that the court had the power during the Term, at the request of Ordway, to set aside the order of allowance and thus vacate the appeal which had been granted in his favor. This was done before any adverse rights had intervened. We are unable to see how the allowance of an appeal differs in this respect from any other judicial order made in the cause. If the one is subject to revocation or amendment while the Term continues, so, as it seems to us, must be the other.

See 11 OTTO.

There is nothing in this which interferes with the rule that, where an appeal is allowed, all jurisdiction of the suit appealed is transferred to this court. Here the question is, whether an appeal was, in legal effect, allowed. It is true an order of allowance was granted and entered on the minutes of the court. So long as this order continued in operation it bound the parties; but as it remained subject to the judicial power of the court during the Term at which it was entered, its revocation vacated what had been done, and left the decree standing with no appeal allowed. *Ex parte Roberts*, 15 Wall., 885 [82 U. S., XXI., 132]. Neither one of the parties was finally discharged from the court until the Term ended, and each was bound to take notice of whatever was done affecting his interests in the suit until a final adjournment actually took place.

Under these circumstances, we think the case is now here on its merits. The last decree at the General Term was the final decree in the cause, and the appeal which has been taken from that decree opens the whole case for our consideration.

Upon the merits, the decree below was right. Whatever may have been the original understanding with Shedd as to the security he was to have, it is clear that in the end he got only three eighths of the profits that accrued to Ordway from his government contract, either individually or as a partner in the firm of Andrews, Ordway & Green. All previous arrangements were merged in that finally reduced to writing. If the fund in court, therefore, does not, in legal effect, belong to Ordway, that is to say, does not represent his share of the profits growing out of the contract, it cannot be given to the representative of Shedd.

The testimony shows, conclusively, that down to the time the decree below was rendered, neither Andrews, Ordway & Green, nor the Westham Granite Company had realized any profits that were properly divisible to Ordway. Confessedly, the partnership had made nothing, and was largely in debt when the Granite Company was formed and took an assignment of the contract from the firm. If the company had, in fact, made anything, the individual partners in the old firm had not, because the outstanding debts of the firm were to be paid before they could claim any distribution among themselves. The dividends on the stock held for the firm were liable to the payment of the debts before the partners individually were entitled to anything.

All the profits on the cutting for the south front went to Washburne and his assignee, and never belonged to Ordway. Upon this question the evidence leaves no doubt. But whether that be so or not, nothing growing out of that part of the contract ever came into the hands of the receiver. That work was completed and the profits all received and paid over nearly a year before this suit was commenced.

As Ordway reserved from his transfer to Andrews, Ordway & Green only that part of the contract for cutting which had reference to the south front, it follows that the cutting for the east wing passed with the rest of the contract to the firm and its successor, the Granite Company. The percentage payable on that part of the work all belonged to that company, and

neither Ordway nor Shedd's representative could claim any part of it individually until it was due to Ordway as profits to be divided. The money collected by the receiver was three eighths of this percentage. As the contract for the work stood in the name of Ordway at the department, he alone was recognized by the government when payments were made; but in making the collections he acted as the agent of the Granite Company, and was bound to pay over at once to the proper representative of the company everything that came into his hands in this way. The receiver's title is no better than his would have been if the money had got into his hands. It follows that upon the case as it stands no decree can be rendered in favor of the present complainant for the money now in court.

Although Ordway is the only defendant in the suit, the controversy is about the fund in court. As he was the agent of the Granite Company authorized to make the collections from the government, he may defend the title of his principal. The suit is, in effect, the same as it would be if the money were now in his hands and the representative of Shedd was seeking to prevent his paying it over to the company. In such a case it is clear he could show that he was but a trustee, and so, we think, he can in this. If, when our mandate goes down, the court below shall deem it necessary, in order to insure the payment of the money in the hands of the receiver to the Granite Company or its proper representative, that some special order be made in that behalf, that court is hereby authorized to take such action therein as shall seem to be necessary. It is clear from the evidence that the fund does not belong to Ordway, and that its payment to the Granite Company or its successors or assigns should, in some form, be secured.

Decree affirmed.

Cited—102 U. S., 371; 105 U. S., 266; 112 U. S., 190.

MARK YOUNG, *Appt.*,

v.

POWELL M. BRADLEY ET AL.

(See S. C., 11 Otto, 782-789.)

Trust estate—duration of.

1. Whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust.

2. The language used in creating the estate will be limited and restrained to the purposes of its creation, and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct.

[No. 257.]

Argued Apr. 13, 1880. Decided Apr. 26, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. F. W. Jones and Enoch Totten, for appellant.

Messrs. Walter D. Davidge and R. Fen-dall, for appellees.

Mr. Justice Miller delivered the opinion of the court:

William A. Bradley, of Washington City,

made his will August 7, 1866, and died a year after. The will was duly proved by William A. Bradley and A. Thomas Bradley, who by its terms were made trustees and executors. The decision of the case turns upon the construction of the powers conferred by this will on the trustees named in it. The last clause of it, except the nomination of his executors, reads thus:

"Item Second. I give and bestow upon my said trustees and the survivor of them, the largest powers and discretion in taking charge of and managing my estate, and authorize them and the survivor to have, hold, direct and control the aforesaid trust property, according to their or the survivor's best judgment, and to sell and dispose of the same, or any parts thereof, from time to time, subject only to the aforesaid trusts, and as freely as I myself could do if living; and also in all things to have the same powers, rights, privileges, benefits, advantages as I myself have or might have, if living, in all and any contracts, bargains, agreements, companies, or other compacts to which I am now, or may become, a party."

Under this clause of the will, A. Thomas Bradley, the other trustee being dead, undertook as surviving trustee, in June, 1871, to convey to appellant certain mill property in Georgetown, which is the subject of this controversy, and to recover which this bill in chancery was brought by the children of William A. Bradley, Jr., son of the testator.

The Supreme Court of the District of Columbia, from whose decree this appeal is taken, held the conveyance void for want of power in the trustee to make it, and granted the relief prayed in complainant's bill.

As this question of power is the principal one in the case, a critical examination of the terms of the will as connected with the condition of the trust estate and of the *cestuis que trust*, at the time of the execution of the deed, becomes necessary.

The will begins by a declaration that the testator gives, devises and bequeaths all of his estate, real, personal and mixed, of whatever kind it may be and wherever situated, to William A. Bradley, Jr., his son, and A. Thomas Bradley, his cousin, and to the survivor and his heirs in trust. Then follows the distinct declaration of these trusts, the first of which is of the house in which he lived and its furniture, and one third of the net income of his estate besides, to his wife during her life. He next directs that the trustees shall divide all his estate immediately after his death into four equal parts, and allot them as follows: one part to his son, William, who shall receive his portion at once; one to the children then living or thereafter born to said William; one to Mrs. Linton, a married daughter; and one to Mrs. Edelin, another married daughter. The portions left to the two daughters were to include the homestead, for which each of them was to be charged \$5,000 in dividing the property; "And the trustees or the survivor of my said trustees shall also take into possession the said household effects and other chattels, and make, according to his or their best judgments, an equal distribution of the same in kind as to the whole or in part as to some, and in proceeds of sales as to others, among the parties entitled to real estate under this will, and in the same proportions."

He next directed the trustees to hold the portions of his daughters in trust for their sole and separate use, free from the control of their husbands and from liability for their debts; and he provided for such disposition of their respective shares, on their death, that all the interest of both of them and, in fact, all the beneficial interests under the will, had vested in the children of William A. Bradley, Jr., at the time the deed to Young was made by A. Thomas Bradley. This resulted from the successive deaths of the two daughters childless, and the death of testator's wife and son.

By the unanimous request of the persons interested under the will, no division into four parts and no distribution of the estate was ever made. As we have already said, by reason of the deaths of all the beneficiaries under the will except the children of W. A. Bradley, Jr., and by the payment of all the debts of the testator, the entire interest in the estate of the testator had become vested in them; and, under these circumstances, the inquiry is: what authority had the surviving trustee to sell real estate?

The legal title, it is argued, is vested in him by the will. The power conferred by item second is as ample as language can make it, with the single limitation that it is subject to the trusts of the will. The estate vested in the trustees was designed to enable them to execute these trusts. It was not an estate to last forever. The things to be done by the trustees were defined, and in the nature of things were to have an end.

What were the purposes for which this trust was created, and what remained for a trustee to do in execution of them?

1. They were to hold for the benefit of the widow, during her life, and see that she received the one third of the annual income of his estate. She is long since dead, and that trust has ceased.

2. We may suppose that in making the partition and distribution, sales to equalize and conveyance to the distributees were necessary. The whole interest has become vested in one of the four distributees of the will, and nothing remains to be done under the trust in regard to that distribution.

3. The trustees were to hold the shares of the daughters as a protection against their husbands, and for the children of these daughters until the youngest of such children should attain the age of twenty-one years, unless, in the discretion of the trustees, it should appear best to terminate the trust earlier. There were no such children of the daughters, and the daughters are both dead.

There was no such control over the distributive shares of the children of W. A. Bradley, deceased, and as the whole of it has come to them, the trustees are not their trustees as they were of the widow, the daughters, and their children if there had been such.

These are all the trusts declared by the will. They were all performed, superseded or terminated before the deed to Young was made. The trustee in making that deed was discharging no trust reposed in him and no duty required of him by the will. It is not suggested anywhere that any such purpose was in view. It is said that the property was dilapidated and needed repair. But as it belonged to Mrs. Bradley and her children, and as the will did not confer on

the trustees any guardianship or control over the property of Bradley's children after their share was allotted to them, the trustees had no power over it when it came to them by the other provisions of the will on the death of the other devisees.

The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirement of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest.

Mr. Perry, in his work on Trusts, supports, by a very full array of authorities, these two propositions in regard to the construction of instruments out of which trust estates arise: 1. "Whenever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not." 2. "Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires." Perry, Tr., sec. 312. Again he says: "In the United States, the distinction between deeds and wills in respect to the trustee's estate has not been kept up; and the general rule is, that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate in the execution of the trust, and no more nor less." Sec. 320.

The case of *Noble v. Andrews*, 37 Conn., 346, bears a strong analogy to the one before us in principle, where it was held that a gift to a person in trust for a wife during her life, and to her heirs forever, subject to her husband's curtesy, conveyed to the trustee only an estate for the life of the wife, and at her death the trust ceased.

This subject is considered and the authorities fully reviewed in the opinion of this court by Mr. Justice Swayne, in *Doe v. Considine*, 6 Wall., 458 [73 U. S., XVIII., 869]. "It is well settled," says he, "that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation."

We are satisfied that, at the time A. Thomas Bradley undertook to sell to Mark Young the property in controversy, the trust estate created in him by the will of William A. Bradley, Sr., had become extinct, and that his conveyance was void because his powers as such trustee had ceased.

Two minor objections are taken to the decree which require notice:

1. It is said that the amount charged to Young for the use and occupation of the property is excessive. It is a sufficient answer to this to say that the matter was referred to an auditor, on whose report the decree in that respect was based, and that no exception was taken to his report.

2. It is alleged for error, also, that no provision is made by the decree to refund to Young the purchase money, amounting to about \$10,000, paid by him under the contract. At first blush, this demand of Young to have his money or the property seems just.

The court below seemed to be impressed with this view of the matter, for in the order of reference to the auditor, who in that court performs the functions of a master in chancery, he was directed to report "How much, if any, of the money paid by said Mark Young, to A. Thomas Bradley went to the benefit and advantage of the complainants." And he reported that none of it did. To this branch of the report there was no exception, though an effort was made, after the time for it had passed, to except to other parts of the report. So that we are concluded by that report.

But in the view we have taken of the case the sale by Bradley was utterly void. The complainants are entitled to their property and compensation for its use, and the matter of the return of the money to Young is one solely between Bradley and him, with which these complainants have nothing to do. It is not the rescission of a valid contract, in which case the parties must be placed in *statu quo*, but the recovery of property held on a void deed with a declaration of its original nullity.

The decree of the court below affirmed.

FIRST NATIONAL BANK OF BRUNSWICK, MAINE, *Plff. in Err.*,
v.
COUNTY OF YANKTON.

(See S. C., 11 Otto, 129-135.)

*Power of Congress to legislate for Territories—
county bonds.*

1. Congress may legislate for Territories as a State does for its municipal organizations; it has full and complete legislative authority over the People of the Territories, and all the departments of the Territorial Governments.

2. The Act of Congress of May 27, 1872, validated the bonds of Yankton County, issued to the Dakota Southern Railroad Company.

[No. 269.]

Argued Apr. 20, 1880. Decided May 10, 1880.

IN ERROR to the Supreme Court of Dakota Territory.

The case is stated by the court.

Messrs. Grant & Grant and **S. W. Packard**, for plaintiff in error.

Messrs. M. H. Carpenter and *Jas. Coleman*, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

By the Act to organize a Government for the Territory of Dakota, it was provided that no one session of the Legislative Assembly shall

exceed forty days, 12 Stat. at L., 241, sec. 4; and in 1869 Congress provided that the sessions of all territorial Legislative Assemblies should be biennial, 15 Stat. at L., 300. The members of the Legislative Assembly of Dakota met on the 5th of December, 1870, and continued in regular session on all days except Sundays, until January 13, 1871, when they adjourned without day. The day of adjournment was called on the journals the fortieth day of the session, although there had been but thirty-five days of actual session for the transaction of business. On the 18th of April, 1871, the members of the Legislature, elected the preceding fall, again assembled at the call of the acting Governor of the Territory, and after organizing themselves as a Legislative Assembly, proceeded to legislate for the Territory, and among others, passed an Act entitled "An Act to Enable Organized Counties and Townships to Vote Aid to Any Railroad, and to Provide for the Payment of the Same." Under this Act, the voters of Yankton County, on the 2d of September, 1871, voted to donate the Dakota Southern Railroad Company \$200,000 in the bonds of the County. All the proceedings under which this vote was taken were conducted strictly according to the requirements of the law.

On the 27th day of May, 1872, 17 Stat. at L., 162, the following Act of Congress was approved and went into effect, to wit:

*"An Act in relation to the Dakota Southern
Railroad Company.*

Be it enacted By the Senate and House of Representatives of the United States of America in Congress Assembled, that the Act passed by the Legislative Assembly of the Territory of Dakota, and approved by the Governor on the Twenty-first day of April, eighteen hundred and seventy-one, entitled 'An Act to Enable Organized Counties and Townships to Vote Aid to Any Railroad, and to Provide for the Payment of the Same, be and the same is hereby disapproved and annulled, except in so far as is herein otherwise provided. But the passage of this Act shall not invalidate or impair the organization of the company heretofore organized for the construction of the Dakota Southern Railroad leading from Sioux City, Iowa, by way of Yankton, the Capital of said Territory, to the west line of Bon Homme County; or any vote that has been or may be given by the Counties of Union, Clay, Yankton and Bon Homme or any township granting aid to said railroad, or any subscription thereto, or anything authorized by and that may have been done in pursuance of the provisions of the aforesaid Act of the Legislative Assembly of said Territory towards the construction and completion of said railroad, and the said Dakota Southern Railroad Company, as organized under and in conformity to the Acts of the Legislative Assembly of said,

S., XV., 891; *Clinton v. Englebrecht*, 80 U. S., XX. 659.

The power of Congress to establish a territorial government is implied from the necessity of protecting persons and property beyond the limits of any State. U. S. v. Gratiot, 39 U. S. (14 Pet.), 537; *State v. Nav. Co.*, 11 Mart., 309; U. S. v. R. R. Bridge Co., 6 MeLean, 517.

Congress, within the limits fixed by the Constitution, may prescribe the form of the territorial government. *Dred Scott v. Sandford*, 60 U. S., XV., 691; *Ex parte Perkins*, 2 Cal., 424.

NOTE.—Power of Congress over the Territories.
In legislating for the Territories, Congress exercises the combined powers of the general and state governments. *Am. Ins. Co. v. Canter*, 26 U. S. (1 Pet.), 511.

It may either create a territorial government or pass laws operating directly on the Territory. *Edwards v. Panama*, 1 Or., 418.

Congress may give jurisdiction to territorial courts, but they are not courts of the United States. *Sere v. Pitot*, 10 U. S. (6 Cranch), 332; *Hunt v. Palas*, 45 U. S. (4 How.), 589; *Leitersdorfer v. Webb*, 61 U.

Territory, is hereby recognized and declared to be a legal and valid corporation; and the provisions of the Act of the Legislative Assembly first aforesaid, so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company for the construction, completion and equipment of the main stem of said railroad, between the *termini* aforesaid, are hereby declared to be and remain in full force, but no further; and for no other purpose whatsoever.

Sec. 2. That, for the purpose of enabling the said Dakota Southern Railroad Company to construct its said road through the public lands between the *termini* aforesaid, the right of way through said public lands is hereby granted to said company to the extent of one hundred feet in width on each side of said road; *Provided*, That nothing in this Act shall relieve said Dakota Southern Railroad Company from constructing and completing said railroad in accordance with the conditions and stipulations under which the citizens of the counties therein named voted aid to said railroad in accordance with the laws of said Territory, approved April 21st, eighteen hundred and seventy-one: *Provided further*, That said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad paid up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships."

Approved May 27, 1872.

After the passage of this Act, the bonds voted were delivered by the County Commissioners to the railroad company, and stock in the company for an equal amount issued to the County. The plaintiff in error is the *bona fide* holder and owner of ten of these bonds, amounting in the aggregate to \$10,000. This suit was brought to recover three installments of interest. The defense was that there was no law authorizing the issue of the bonds and, as a consequence, that the County was not bound for the payment of either principal or interest. Upon the trial of the cause in the District Court of the Territory, the facts were found by the court substantially as already stated and a judgment given in favor of the County. This judgment was afterwards affirmed by the Supreme Court of the Territory, and thereupon the plaintiff below brought the case to this court by writ of error.

We do not consider it necessary to decide in this case whether the Governor of Dakota had authority to call an extra session of the Legislative Assembly, nor whether a law passed at such a session or after the limited term of forty days had expired would be valid, because, as we think, the Act of May 27, 1872, is equivalent to a grant of power direct from Congress to the County to issue the bonds in dispute. It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power comes, but that it exists has always been conceded. The Act to adapt the ordinance to provide for the government of the Territory northwest of the River Ohio to the requirements of the Constitution, 1 Stat. at L., 50, is chapter 8 of the first session of the first Congress, and the Ordinance itself was in force under the Con-

federation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must, necessarily, be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the General Government that counties do to the States, and Congress may legislate for them as States do for their respective municipal organizations. The organic law of a Territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme and, for the purposes of this department of its governmental authority, has all the powers of the People of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic Act of Dakota there was no express reservation of power in Congress to amend the Acts of the territorial Legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial Legislatures, but it may itself legislate directly for the local government. It may make a void Act of the territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments. It may do for the Territories what the People, under the Constitution of the United States, may do for the States.

Turning, then, to the particular Act of Congress now under consideration, we find that the attention of that body was in some way brought to the fact that the Legislative Assembly of Dakota had, on the 21st of April, 1871, passed an Act to enable organized counties and townships to vote aid to railroads. In addition to this, it was known that the Dakota Southern Railroad Company had been organized as a corporation under certain Acts of the territorial Legislative Assembly, and that votes had been taken under the Aid Act in some of the counties and townships granting aid to or authorizing subscriptions of stock in this corporation. It is clear that Congress disapproved the policy of the Aid Act, and was unwilling to have it go into general operation; but to the extent it could be made available for the construction and completion of the main stem of the Dakota Southern Railroad the contrary is distinctly manifested. The Act, as a whole, was "disapproved and annulled," but in substance reenacted by Congress "For the purpose of validating any vote of aid or subscription" to that company, but "for no other purpose whatever." A careful examination of the statute leaves no doubt in our minds on this subject. To make it sure that the organization of the company was complete, the "Dakota Southern Railroad Company, as organized under and in conformity to the Acts of the Legislative Assembly of said Territory," was "recognized and declared to be a legal and valid corporation." It is, then, in terms, enacted that the provisions of the Aid Act, "So far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company, for the construc-

tion, completion and equipment of the main stem of said railroad, * * * are hereby declared to be and remain in full force." And again; "That said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad, paid-up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships." In the light of these distinct and positive declarations and enactments of Congress, it is impossible to bring our minds to any other conclusion than that, when the bonds now in controversy were put out, there existed full and complete legislative authority to bind the people of the county for their payment. No complaint is made of any irregularity in the proceedings under the law. The question in the case is one of power only. As we think, the vote of the People of the County was "validated" by Congress, and express authority given to issue the bonds for the purposes originally intended. The only change which Congress saw fit to make was to require the company to give stock in return for the donation as voted.

The judgment of the Supreme Court of the Territory is reversed and the cause remanded, with instructions to reverse the judgment of the District Court, and direct a judgment for the plaintiff on the facts found for such amount as shall appear to be due on the coupons sued for.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

B. HUNTINGTON WRIGHT, *Plff. in Err.*,

v.

LEVI BLAKESLEE, LATE COLLECTOR OF
INTERNAL REVENUE.

(See S. C., 11 Otto, 174-181.)

Succession — tax upon — remainder — penalty — limitation.

1. Where an estate was devised to one for life, with remainder in fee to her children surviving her, the devolution of the property to such children on her death was a "succession" within the meaning of section 127 of the Internal Revenue Act.

2. Where a remainder is dependent upon a life estate in the land, it does not take effect as an estate in possession until the life estate is determined. Until then, it is a mere expectancy.

3. The fifty per cent added to the amount of the succession tax, and exacted by way of penalty for refusing to make a return, was erroneously imposed.

4. No written notice or protest is required of one paying illegal taxes under the Internal Revenue laws, in order to entitle him to recover them. A verbal protest is sufficient.

5. Under the Act of June 6, 1872, a cause of action to recover illegal taxes did not accrue until the commissioner's decision, and is not barred, by limitation, until two years thereafter.

[No. 288.]

Argued Apr. 5, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The case is stated by the court.

Mr. Addison C. Miller, for plaintiff in error.

Mr. S. F. Phillips, *Solicitor-Gen.*, for defendant in error.

1048

Mr. Justice Bradley delivered the opinion of the court:

This is an action brought by B. Huntington Wright, the plaintiff in error, against the defendant, formerly Collector of Internal Revenue for the 21st Revenue District of New York, to recover the amount of a succession tax collected from the plaintiff and his sister in 1867, the latter having assigned her interest to the plaintiff.

A jury was waived, and the cause was tried by the court. From the findings the following facts appear: Henry Huntington, of Oneida County, New York, died in October, 1846, leaving a will, by which, amongst other things, he devised to his executors certain real estate, in trust, to receive the rents and profits, and apply the same to the sole and separate use of his daughter Henrietta (if a *feme covert* at his death) during the term of her natural life, and at her decease, if she should leave issue surviving, the testator gave and devised the said real estate to such issue absolutely and in fee. When the testator died, his daughter Henrietta was the wife of one Benjamin H. Wright and had two children living, B. Huntington Wright (the plaintiff) and a daughter. Henrietta died in September, 1865, leaving her said two children and her husband surviving. In June, 1867, the plaintiff and his sister were notified by the assessor to make return, as required by the 14th section of the Internal Revenue Act of June 30, 1864 18 Stat. at L., 226; and they both refused and declined to make any return, or give any knowledge or information as to the quantity, location or value of the real estate, and thereupon they were summoned to appear before the assessor in relation thereto. They appeared accordingly, and claimed that the estate was not liable to assessment for a succession tax. The assessor decided against them, and assessed a tax of one per cent on the full value of the property, and added thereto a penalty of fifty per cent and expenses, making in all \$595.59. In June, 1867, the assessor notified the parties of the tax imposed, the value of the property, and the penalty affixed. The assessment or tax, with the penalty, was placed upon the assessment roll, and delivered to the Collector (the defendant) for collection, and he notified the parties to pay the tax.

On the 31st of July, 1867, the parties paid the tax under protest, the tax paid amounting to \$595.59, of which \$389.56 was tax, \$194.78 was penalty, and \$11.25 was the expenses for making the assessment and valuation. The amount assessed upon each, viz.: B. Huntington Wright and Henrietta H. Wright, was \$297.29.

On the 5th of October, 1872, the Commissioner of Internal Revenue wrote the parties that the claim to have the tax refunded had not been submitted to the department, and forwarded them a blank to be filled up and transmitted to the department, and they would then pass upon the case upon its merits.

About the 3d of January, 1873, the appeal was perfected and filed with the commissioner.

On the 3d of July, 1873, the commissioner rendered his decision upon the merits, rejecting the whole claim, and gave notice thereof.

On the 15th of June, 1875, Henrietta H. Wright, one of the parties against whom one

101 U. S.

half of the tax had been levied and collected, transferred her claim to the plaintiff.

On the same day a summons was delivered to the sheriff of New York to serve on defendant.

On the 24th of June, 1875, the summons was actually served on defendant. The action was originally brought in the state court, but was removed into the circuit court, upon proceedings had under the statute.

Upon these facts the court decided, as matter of law, that the tax and penalty were properly assessed and collected, and that the plaintiff ought not to recover.

The first and principal question in the case is whether the devolution of the property to the children of Henrietta Wright on her death in September, 1865, was a "succession," within the meaning of the 127th section of the Internal Revenue Act then in force. 13 Stat. at L., 287.

The language of that section is as follows:

"That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passing of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession;' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the grantor, testator, ancestor or other person from whom the interest of the successor has been or shall be derived."

Comparing the terms of the devise of Henry Huntington with the language of this section, we do not see where there is any room for doubt. The will clearly gave to the trustees an estate for the life of Henrietta Wright, with remainder in fee to her children surviving her. At her death, in 1865, those children did "become beneficially entitled in possession," and every condition of the law was fulfilled. There was a "past" "disposition of real estate by will," "by reason whereof" the children of Henrietta Wright became "beneficially entitled in possession," to the property devised, "upon the death of [a] person dying after the passage of this Act." We think the case is directly within the terms and meaning of the Act. Up to the moment of Henrietta Wright's death, her children had no interest in the land except a bare contingent remainder expectant upon her death and their surviving her. At her death, it came to them as an estate in fee in possession absolute. We cannot imagine a plainer case of devolution, within the description of the law.

It is suggested that as the Act refers to the acquisition of estates "in possession or expectancy," it cannot mean to embrace estates which had already accrued as estates "in expectancy" before the Act was passed. But such an implication cannot be allowed to prevail against the express words of the Act, which include all estates to which a person should become beneficially entitled upon the death of any person dying after the passage of the Act. In the present case, the children of Henrietta Wright first became "beneficially entitled" to the property in question at their mother's death. They then became "beneficially entitled in possession."

It is also suggested that the case is more apt-

ly described in the 128th section of that Act, which is as follows:

"That where any real estate shall, at or after the passage of this Act, be subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase or benefit accruing to any person upon the extinction or determination of such charge, estate or interest shall be deemed to be a succession accruing to the person then entitled beneficially to the real estate or income thereof."

We do not assent to this view. This section is evidently intended to meet the cases of estates burdened by determinable incumbrances, such as rent charges, leases for years and qualified interests, which do not suspend the taking effect of the estate in the land, but only subject it to some burden. Where, however, a remainder is dependent upon a life estate in the land, it does not take effect as an estate in possession until the life estate is determined. Till then, it is a mere expectancy. The present case is one of this kind and, we think, clearly comes within the description of the 127th section.

Another point made by the plaintiff against the assessment relates to the fifty per cent added to the amount of the succession tax, and exacted by way of penalty for refusing to make a return as required by the statute. This penalty, we think, was erroneously imposed. The assessor evidently thought that he was authorized to impose the penalty prescribed by the 14th section of the Act of 1864, as amended by the Act of July 13, 1866, 14 Stat. at L., 98, which was, it is true, a penalty of fifty per cent of the tax for refusal or neglect to make a list or return. But an inspection of that section and of the context to which it belongs shows that it related to the annual and monthly lists and returns to be made by parties taxable under the law. So the 118th section, as amended by the Act of March 2, 1867, 13 Stat. at L., 471, which also imposed a penalty of fifty per cent for such neglect and refusal, and was relied on by the court below, related only to the income tax. But the penalty for failing to return and give notice of a succession tax is provided for in a distinct section, to wit: the 148th section of the Act of 1864, as amended by the Act of 1866, which is found in immediate collocation with the sections relating to the succession tax. This section declares that if any person required to give such notice (of a succession) should willfully neglect to do so within the time required by law, he should be liable to pay to the United States a sum equal to *ten per centum* upon the amount of tax payable by him. This is the specific penalty provided for the special case, and necessarily excludes any other. We are satisfied, therefore, that the penalty of fifty per cent which was actually imposed was wrong, and ought not to have been exacted. There is, therefore, no doubt of the plaintiff's right to recover the amount of this penalty, if, when paid the protest against its exaction was sufficient.

On this point it is to be observed that the case stands on a different ground from that of the illegal exaction of duties on imports. To recover these, the statute makes it necessary that the party interested should give notice, in writing to the collector, if dissatisfied with his

decision, setting forth distinctly and specifically the grounds of his objection thereto. Act of June 30, 1864, sec. 14, 13 Stat. at L., 214; R. S., sec. 2931; *Westray v. U. S.*, 18 Wall., 323 [85 U. S., XXI., 763]; *Barney v. Watson*, 92 U. S., 449 [XXIII., 730]; *Davies v. Arthur*, 96 U. S., 148 [XXIV., 758]. No such written notice or protest is required of a party paying illegal taxes under the internal revenue laws. He must pay under protest in some form, it is true, or his payment will be deemed voluntary. *Philadelphia v. Collector*, 5 Wall., 720 [72 U. S., XVIII., 614]; *Collector v. Hubbard*, 12 Wall., 1 [79 U. S., XX., 272]. But whilst a written protest would in all cases be most convenient, there is no statutory requirement that the protest shall be in writing. In the present case, the court merely finds that the payment of the tax and penalty was made under protest, which may have been either written or verbal. We think that this finding is sufficient to show that the payment was not voluntary. It is apparent from the findings, it is true, that the objection of the parties was particularly made against the legality of the tax, and not against the penalty as distinct therefrom. But, of course, the objection included the penalty as well as the tax; and as the latter was clearly illegal, we think that the plaintiff should have had judgment for the amount thereof, unless barred by the Statute of Limitations.

We think that the defense of the Statute of Limitations cannot be maintained. Under the 19th section of the Act of July 13, 1866, 14 Stat. at L., 152, no suit could be maintained for the recovery of a tax illegally collected until appeal should have been duly made to the Commissioner of Internal Revenue, and his decision had thereon. The Act contained other provisions not material to this case. In July, 1867, when the tax was paid, there was no statutory limitation of time for presenting claims for remission of taxes to the Commissioner of Internal Revenue.

On the 6th of June, 1872, an Act was passed, by the 44th section of which it was provided that all suits for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, should be brought within two years next after the cause of action accrued, and not after; and all claims for refunding any internal tax or penalty should be presented to the commissioner within two years next after the cause of action accrued, and not after; *Provided*, That actions for claims which had accrued prior to the passage of the Act should be commenced in the courts or presented to the commissioner within one year from the date of such passage. *And provided further*, That where a claim should be pending before the commissioner, the claimant might bring his action within one year after such decision, and not after. 17 Stat. at L., 257. When this Act was passed, the claim in the present case had not been formally presented to the commissioner, and so did not come within the last proviso; but, for the purpose of presentation to the commissioner, it was embraced in the first proviso. The parties, therefore, had by the Act one year to present their claim to the commissioner; and it was thus presented on the 3d day of January, 1873, within the time allowed for that purpose.

The commissioner rendered his decision on the 3d day of July, 1873, and then, for the first time, the parties had a right to bring suit against the Collector. Then their cause of action first accrued against him. It is manifest, therefore, that the cause of action against the Collector was not embraced within either the first or the second proviso of the section just cited; and that it stood upon the primary enactment of that section, requiring that suit should be brought within two years next after the cause of action accrued. This would give the plaintiff until the 3d of July, 1875, to bring his action. Thus the matter stood when the Revised Statutes went into effect on the 23d of June, 1874, and there is nothing in them to change the plaintiff's right. The 44th section of the Act of 1872 is substantially re-enacted in section 3227 of the Revised Statutes, which contains no modifications of phraseology that affect the present case. And as it appears from the findings of the court that this suit was commenced by delivery of the summons to the sheriff on the 15th of June, 1875, it is apparent that the defense of the Statute of Limitations cannot be maintained.

The judgment of the Circuit Court is reversed and the case remanded, with instructions to enter judgment in favor of the plaintiff for the amount of the penalties exacted from the plaintiff and Henrietta H. Wright, with interest and costs.

BAXTER WHITNEY, *Plff. in Err.*,

v.

CHARLES WYMAN ET AL.

(See S. C., 11 Otto, 392-397.)

Agent, liability of—contract of corporation.

1. Where the contract is made by an agent and the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable, unless he agreed to be so.
2. Where a corporation, at the date of a contract, had not filed its articles of association, as required by the statute, but subsequently ratified the contract by recognizing and treating it as valid, this made it in all respects what it would have been if the requisite corporate power had existed when it was entered into.

[No. 281.]

Argued Apr. 27, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is stated by the court.

Mr. J. W. Champlin, for plaintiff in error:

When the body of the contract contains apt words to charge the agent, he will be personally responsible for its fulfillment, notwithstanding the addition of qualifying words to his signature, implying that he is acting in an official or representative capacity.

Savage v. Rix, 9 N. H., 263; *Moss v. Livingston*, 4 N. Y., 208; *Fiske v. Eldridge*, 12 Gray, 474; *Ins. Co. v. Newhall*, 1 Allen, 130; *De Witt v. Walton*, 9 N. Y., 571; *Hall v. Cockrell*, 28 Ala., 507; *Titus v. Kyle*, 10 Ohio St., 444; 2 Smith L. C., 7th Am. ed., 379; *Simonds v. Heord*, 23 Pick., 120; *Kelner v. Baxter*, L. R., 2 C. P., 174; *Price v. Taylor*, 5 Hurl. and N., 540.

1. The obligatory words in the order of Feb.

1, 1869 are: "We now order from you," etc. It does not read that "The company now orders," nor is it in behalf of the company; and the company's name is not signed to the order, but the individual names of defendants, and adding thereafter, "Prudential Committee Grand Haven Fruit Basket Co." These words are merely *descriptio personarum*.

1 Am. L. Cas., 5th ed., 760, 761.

Messrs. Hughes, O'Brien and Smiley, for defendants in error.

Mr. Justice Swayne delivered the opinion of the court:

This action was brought to recover the value of certain machinery manufactured by the plaintiff in error, which he alleged he had sold and delivered to the defendants.

The defendants insisted that they had contracted for and received the machinery in behalf of a corporation of which they were officers, and that hence they were not personally liable.

The plaintiff lived in Massachusetts and the defendants in Michigan.

The latter addressed a letter to the former, which was as follows:

"GRAND HAVEN, Feby. 1, 1869.

BAXTER WHITNEY, Esq., Winchenden, Mass.:

SIR: Our company being so far organized, by direction of the officers, we now order from you, manufactured and shipped, at as early date as possible—for the manufacture of the Mellish fruit basket—1 large rounding lathe, 1 quart do. do., 2 lathes for peach basket bottoms, 3 do. do. quart do. do., pint do. do. Also the necessary small fixtures for claspings, &c., of which Mr. Whitney is advised, and will give you more definite order.

CHARLES WYMAN,
EDWARD P. FERRY,
CARLTON L. STORRS,

Prudential Committee Grand Haven Fruit Basket Co."

To which the plaintiff replied:

"WINCHENDEN, MASS., Feb., 10, 1869.

GRAND HAVEN FRUIT BASKET COMPANY:

GENTLEMEN: Yours of the 1st inst. is received, in which you order machinery for fruit baskets, etc. I had already anticipated your order by commencing on the machinery on Mr. Whitney's verbal order, and I am now driving it with all the force I can get on it.

Yours respectfully,

BAXTER D. WHITNEY."

The plaintiff wrote further, as follows:

"WINCHENDEN, April 14, 1869.

MESSRS. C. E. WYMAN, E. P. FERRY, C. L. STORRS:

GENTS: I herewith send bill of machinery ordered by you Feb. 1st, and have drawn on you at sight for the amount, \$6,375. The machinery was delayed two days in order to get into one of the Blue Line cars. It has gone from the depot now and I have to send to Fitchburg for through bill of lading, which I expect to-night, and will forward it as soon as I procure it.

Yours respectfully,

BAXTER D. WHITNEY."

The plaintiff charged the defendants individually on his books for the machinery. His draft was protested, and he thereupon wrote as follows:

See 11 OTTO.

"WINCHENDEN, MASS., May 14, 1869.

MESSRS. CHARLES E. WYMAN, EDWARD P. FERRY, CARLTON L. STORRS:

GENTS: I have just received notice of protest of my draft on you. Reason given, machinery not arrived. I doubt not the machinery has arrived before now, and if so, I hope you will forward me draft on New York at once. I need the money very much, from the fact that parties here on which I relied for money have been burned out and they are unable to pay me at present.

Yours respectfully,

BAXTER D. WHITNEY."

The last two letters were not answered.

The machinery was delivered at Grand Haven, and the freight was paid by Edward P. Ferry as the treasurer of the corporation. The draft of Baxter was protested, because it was addressed to the drawees individually. They claimed that he had no right so to draw on them.

The corporation was organized under a statute of Michigan which authorized mining and manufacturing companies to be created pursuant to its provisions. It took the name of *The Grand Haven Fruit Basket Company*.

On the 5th of Jan., 1869, thirty-two stockholders, including the defendants, subscribed the articles of association and acknowledged their execution before a notary public.

On the 21st of the same month there was a meeting of the stockholders, at which a code of by-laws was adopted. It provided for the election of seven directors, and of a president, secretary and treasurer; and that the directors should elect out of their number one who, with the president and treasurer, should be a prudential committee, and that the committee should be charged with such duties as might be devolved upon it by the Board of Directors. The defendants and four others were elected directors.

On the 25th of the same month the Board of Directors elected the defendant Storrs president; the defendant Ferry treasurer; and the defendant Wyman for the third member of the prudential committee.

The articles of association were filed with the Secretary of State on the 19th of February, 1869, and with the county clerk on the 12th of May following. The statute declares that they shall be so filed before the corporation shall commence business. The notary public who certified the acknowledgment of the articles was himself a subscriber, and his name is included in his certificate. It was proved, by parol evidence, that the directors authorized the prudential committee to contract for the machinery.

The corporation received the machinery, bought an engine to run it, manufactured baskets with it, and carried on the business until some time in the year 1870.

On the 8d of March, 1870, Lyman and Fairbanks, two of the directors, were authorized to settle with the plaintiff on the best terms they could obtain.

The court instructed the jury, in substance, that the letter of the prudential committee of February 1, 1870, bound the corporation and not the defendants, if there was then a corporation and the defendants were authorized by it to give the order, and that if the corporation had acted as such and exercised its franchises,

then it was a corporation *de facto*, and that in such case any irregularity in its organization was immaterial.

The plaintiff excepted to these instructions, and took numerous other exceptions in the course of the trial, which are set forth in the record.

The jury found for the defendants.

Where the question of agency in making a contract arises, there is a broad line of distinction between instruments under seal and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. *Stanton v. Camp*, 4 Barb., 274.

In the latter cases the question is always one of intent; and the court, being untrammelled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal or with the name of the principal by the agent or otherwise.

The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so.

Looking at the letter of the defendants of the first of February, 1869, and the answer of the plaintiff of the 10th of that month, we cannot doubt as to the understanding and meaning of both parties with respect to the point in question.

The former advised the latter of the progress made in organizing the corporation; that the order was given by the direction of its officers, and the letter is signed by the writers as the "Prudential Committee of the Grand Haven Fruit Basket Co.," which was the name in full of the corporation. The plaintiff addressed his reply to the "Grand Haven Fruit Basket Co.," thus using the name of the corporation as the party with whom he knew he was dealing, and omitting the names of the defendants, and their designation as a committee, according to the style they gave themselves in their letter.

It seems to us entirely clear that both parties understood and meant that the contract was to be and, in fact, was with the corporation, and not with the defendants individually.

The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Uiley v. Donaldson*, 94 U. S., 29 [XXIV., 54].

But it is said the corporation at the date of these letters was forbidden to do any business, not having then filed its articles of association, as required by the statute.

To this objection there are several answers.

The corporation subsequently ratified the contract by recognizing and treating it as valid.

This made it in all respects what it would have been if the requisite corporate power had

existed when it was entered into. *Ang. & A. Corp.*, sec. 804 and *n.*

The corporation having assumed, by entering into the contract with the plaintiff, to have the requisite power, both parties are estopped to deny it. *Ang. & A., Corp.*, sec. 635 and *n.*

The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one, but the State could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity. *Bk. v. Matthews* [*ante*, 188].

The instruction given by the court to the jury with respect to acts of user by the corporation in proof of its existence was correct. If there was any error, it was in favor of the plaintiff. *Ang. & A., Corp.*, sec. 635.

The record shows clearly that the plaintiff was not entitled to recover, and that the verdict and judgment are right. We, therefore, forbear to examine the other assignments of error. Conceding that all the exceptions to which they relate were well taken, the errors could have done him no harm. *Barth v. Clise*, 12 Wall., 400 [79 U. S., XX., 393].

The judgment of the Circuit Court is affirmed.

Cited—108 U. S., 422.

MATHIAS MOHR ET AL., *Plffs. in Err.*,
v.

ANNA N. MANIERRE.

(See S. C., 11 Otto, 417-426.)

Lunatic's real estate—sale of—order of court—state decision.

1. As against a lunatic, a license to his guardian to sell his real estate is not invalid for insufficient publication of notice of the hearing, the same being required only for the protection of other parties interested in the estate.

2. The publication of notice of the hearing is not essential, in Wisconsin, to the jurisdiction of the county court to grant the license to sell.

3. The authority of the court existed to license the sale whenever it appeared that the personal estate of the lunatic was insufficient to pay his debts, and that a sale of his real property was necessary for that purpose.

4. This court adheres to the correctness of its decision in *Grignon v. Astor*, 2 How., 319, and declines to follow an apparently contradictory state decision on the same point.

[No. 285.]

Submitted Apr. 29, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is stated by the court.

Messrs. F. W. Cotzhausen and James G. Jenkins, for plaintiffs in error:

Under the circumstances of this case, will this honorable court defer to the decisions of the state court in the construction of the laws constituting their local jurisprudence, as was done in *Beauregard v. New Orleans*, 18 How., 497 (59 U. S., XV., 469)?

As to this judicial comity on questions of local legislation, numerous instances may be cited among which are:

McKeen v. Delancy, 5 Cranch, 22; *Bk. v. Lowrey*, 93 U. S., 72 (XXIII., 806); *Peik v. R. Co.*, 94 U. S., 164 (XXIV., 97); *Adams v. Nashville*, 95 U. S., 19 (XXIV., 369); *Supervisors v. U. S.*,

101 U. S.

18 Wall., 71 (85 U. S., XXI., 771); *Cass Co. v. Johnston*, 95 U. S., 360 (XXIV., 416).

This spirit of accord and deference has even manifested itself to the extent that when the state courts have settled the construction of their laws differently from what the Supreme Court of the United States in previous cases had considered to be their rule, still this court conformed its adjudication to the latest exposition of the local law.

Green v. Neal, 6 Pet., 291; *Fairfield v. Gallatin Co.*, Oct. Term, 1879 (*ante*, 544), also, see, *Supervisors v. U. S.* (*supra*); *Suydam v. William son*, 24 How., 427 (65 U. S., XVI., 742); *Lef-jingwell v. Warren*, 2 Black, 599 (67 U. S., XVII., 261); *McKeen v. Delaney* (*supra*).

And even on questions of common law, especially when involving the title to real estate, or establishing a rule of property, authorities indicative of this disposition are not wanting.

Walker v. State Harbor Comrs., 17 Wall., 648 (84 U. S., XXI., 744); *Boyce v. Tubb*, 18 Wall., 546 (85 U. S., XXI., 757); *Parker v. Phetteplace*, 2 Cliff., 70.

Mr. S. U. Pinney, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

This was an action for the possession of certain land in the County of Walworth, in the State of Wisconsin. It was commenced in one of the state courts and, on the application of the plaintiff, was removed to the Circuit Court of the United States. It was there tried by the court, without the intervention of a jury, upon stipulation of the parties. The court was held by the Circuit and District Judges and, as they were opposed in opinion, the case is brought here upon a certificate of the points upon which they differed.

The facts out of which this division arose are briefly these: the plaintiff, Mohr, previously to the sale under which the defendant claims, was the owner of the premises in controversy. In 1869, he was, by legal proceedings in the County Court of Walworth, adjudged to be a lunatic incapable of taking care of himself and managing his property, and a guardian was appointed over him. In October, 1870, the guardian applied, by petition to the court, for license to sell the real estate of his ward for the purpose of paying his debts. The petition alleged that the goods, chattels, rights and credits of the lunatic in the hands of the guardian were insufficient to pay such debts and the charges of managing his estate. It set forth the amount of the debts and charges, the extent to which they exceeded the personal estate of the lunatic, and his opinion as to the necessity of using the whole or the greater part of the estate to pay the indebtedness, accompanied by a certificate of the supervisors of the town to the same effect; and it gave a description of the real property. Upon being filed, an order was made by the court requiring the next of kin of the lunatic, and all persons interested in his estate, to appear before the court on a day named, and show cause why a license should not be granted for the sale of the estate as prayed; and that notice be given by publication in a newspaper for four successive weeks prior to the day of hearing, and also by service upon certain persons named.

On the day appointed, January 2, 1871, there
See 11 Otto. U. S., Book 25.

being no appearance adverse to the application, and no objection interposed, the court made an order granting a license to the guardian to sell the lands. The order recited that, pursuant to the order made on the 21st of November, 1870, the petition was heard and considered; that the affidavits of two persons, who were named, were filed, showing that the notice required had been duly published; that it appeared, after full examination, that it was necessary, in order to pay the debts of the lunatic; that all his real estate should be sold, and that the supervisors of the town had certified to the Judge of the court their approbation of the proposed sale, and that they deemed it necessary. The order required the guardian, before the sale, to execute to the Judge a bond in the sum of \$15,000, conditioned that he would sell the property, and account for and dispose of the proceeds in the manner provided by law; also that he would take the oath required by statute; give notice of the terms and place of the sale, with a proper description of the property, by posting in three public places in the town where the property was situated, and by publication for three weeks in a weekly newspaper. It contained other directions not material to be mentioned, which were designed to secure a fair sale and a just price for the property; and it required the guardian to report his proceedings to the court. Under this license a sale was made and a deed executed to the purchaser, and a report thereof made to the court, which was confirmed. The defendant claims under the purchase at this sale.

Subsequently, the proceedings and commission in lunacy were superseded, and the plaintiff, Mohr, brought the present action to recover possession of the premises. After it was commenced, a party to whom he had transferred an undivided interest was joined with him as co-plaintiff.

The case turns upon the validity of the sale in question. The order of the County Court of Wisconsin, in granting the guardian license to sell the property, was assailed as having been made before notice of the time and place of hearing the petition of the guardian had been published for four successive weeks, as required by the court and the Statute of the State. It is insisted that such notice was in the nature of process to bring the parties before the court, and its constructive service by publication for the period mentioned was essential to give the court jurisdiction. The order recited, as already stated, that, by the affidavit of two persons named, the required publication was shown to have been made; but the Judges certify that it appeared from one of the affidavits that the notice was not thus published. It is to be regretted that the two affidavits are not embodied in the record. We might differ from the Judges in the conclusion reached by them. We might, perhaps, find that a publication was made once a week in four successive weeks, and hold that this was a sufficient compliance with the statute. Between the 21st of November, 1870, when the order for publication was made, and the 2d of January, 1871, when the petition was heard, more than four weeks had elapsed.

We shall assume, however, that the notice was not published for the full period prescribed, and the question for consideration is whether such omission, all other requisites of the statute

having been complied with, rendered the order of the court invalid *as against the plaintiff, Mohr*,* the then lunatic; or, in other words, whether such publication was essential to the jurisdiction of the court to grant the license to sell. The Supreme Court of the State, in a case brought by this plaintiff, *Mohr v. Tulip* [40 Wis., 66], which came before it in 1876, affecting a part of the premises sold at the same guardian's sale, upon substantially the same proofs here presented, held that the sale was invalid for want of sufficient publication of such notice. On the other hand, the Supreme Court of the United States, in considering the validity of a sale of a decedent's estate under a statute in force in what was then the Territory of Wisconsin, requiring the county court, before passing upon the application for a license to sell, to order notice of its hearing to be given to all parties interested who did not signify their assent to the sale, had held, as far back as 1844, after deliberate consideration, that the absence of such notice from the record, or the fact that no such notice was given, did not affect the jurisdiction of the court, but was merely a matter of error, to be corrected by an appellate tribunal; and this decision has been repeatedly recognized as correctly marking the distinction between matters of error and matters of jurisdiction in proceedings for the sale of such estates. *Grignon v. Astor*, 2 How., 319.

Under these circumstances, the Circuit and the District Judge differed in opinion upon the following questions:

1. Whether the county court had jurisdiction to make the order granting the license to sell; or whether the order was invalid by reason of the alleged defect in the publication of notice; and,

2. Whether, in view of the decision of the Supreme Court of the United States and the decision of the State Supreme Court in *Mohr v. Tulip*, the circuit court should follow the latter decision and hold the sale invalid.

The framers of the Constitution, in establishing the federal judiciary, assumed that it would be governed in the administration of justice by those settled principles then in force in the several States, and prevailing in the jurisprudence of the country from which our institutions were principally derived. Among them none were more important than those determining the manner in which the jurisdiction of the courts could be acquired. This necessarily depended upon the nature of the subject upon which the judicial power was called to act. If it was invoked against the person, to enforce a liability, the personal citation of the defendant or his voluntary appearance was required. If it was called into exercise with reference to real property by proceedings *in rem*, or of that nature, a different mode of procedure was usually necessary, such as a seizure of the property, with notice, by publication or otherwise, to parties having interests which might be affected. The rules governing this matter in these and other cases were a part of the general law of the land, established in our jurisprudence for the protection of rights of persons and property against oppression and spoliation. And when the courts of the United States were invested with juris-

isdiction over controversies between citizens of different States, it was expected that these rules would be applied for the security and protection of the non-resident citizen. The constitutional provision owed its existence to the impression that state prejudices and attachments might sometimes affect injuriously the regular administration of justice in the state courts. And the law of Congress which was passed to give effect to the provision, made it optional with the non-resident citizen to require a suit against him, when commenced in a state court, to be transferred to a Federal Court. This power of removal would be of little value, and the constitutional provision would be practically defeated, if the ordinary rules established by the general law for acquiring jurisdiction in such cases could be thwarted by state legislation or the decision of the local courts. In some instances the States have provided for personal judgments against non-residents without personal citation, upon a mere constructive service of process by publication; but the Federal Courts have not hesitated to hold such judgments invalid. *Pennoyer v. Neff*, 95 U. S., 744 [XXIV., 576]. So, on the other hand, if the local courts should hold that certain conditions must be performed before jurisdiction is obtained, and thus defeat rights of non-resident citizens, acquired when a different ruling prevailed, the Federal Courts would be delinquent in duty if they followed the later decision.

If these views be applied to the present case, there will be little difficulty in answering the questions which appear to have embarrassed the Judges below. The Statute of Wisconsin provides for the sale of the real estate of a lunatic to pay his debts when his personal property is insufficient for that purpose, and points out the steps which his guardian must take to obtain a license to make the sale. It is admitted that these steps were taken for the sale in question, except that the order of the county court to show cause why the license to sell should not be granted, issued upon filing the petition, was not published for four successive weeks before the petition was heard and the license granted. The statute on this subject says, in its 4th section, that "Every such order to show cause shall be published at least four successive weeks in such newspaper as the court shall order, and a copy thereof shall be served personally on all persons interested in the estate and residing in the county in which such application is made, at least fourteen days before the day therein appointed for showing cause; *Provided, however, if all persons interested in the estate shall signify in writing their assent to such* — sale the notice may be dispensed with." And the 6th section provides that "The Judge of the County Court, at the time and place appointed in said order, or at such other time as the hearing shall be adjourned to, upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale, of all persons interested, shall proceed to the hearing of such petition, and if such consent be not filed, shall hear and examine the allegations and proofs of the petitioner and of all persons interested in the estate who shall think proper to oppose the application."

It is apparent, from these sections, that the publication of notice of the hearing is only

*The record says *as against the defendant*, which is the same thing, for no one disputes his title but the plaintiff.

intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. It may be dispensed with if the parties having such interests consent to the sale. The consent could not be signed by the lunatic, for he, by his condition, would be incapable of giving a consent; and yet upon the others' consent, the court could proceed to act without notice to him.

Nor, indeed, was there any reason why publication of notice should be made for other parties than those who held adversary interests. The lunatic could not be affected by such publication any more than by his consent. The application of the guardian, to the county court, was required by the law only as a check against any improvident action by him. There was nothing in the nature of the proceedings which required a notice of any kind, so far as the rights of the lunatic were concerned. The law would have been free from objection had it simply authorized, upon the consent of the court, a sale of the lunatic's property for the payment of his debts. The authority of the court in that case, as in this, would have existed, to license the sale whenever it appeared that the personal estate of the lunatic was insufficient to pay his debts, and that a sale of his real property was necessary for that purpose.

There is no charge of fraud in the action of the guardian, nor is it suggested that the property sold did not bring a fair price. The simple question is, whether, as against the lunatic, the license to sell was invalid for insufficient publication of notice of the hearing, the same being, as already stated, required only for the protection of other parties interested in the estate. The decision of this court in *Grignon v. Astor*, to which we have already referred, would seem to be decisive on this point. Indeed, it goes beyond what is required for the affirmance of the judgment here. That was a case of an administrator's sale under a statute in force in the Territory of Wisconsin, which provided that the county court, previous to passing upon the presentation made by the petition of an executor, administrator or guardian, for license to sell the property in his hands belonging to the deceased or his ward, should order due notice to be given to all parties concerned or their guardians, who did not signify their assent to the sale, to show cause at such time and place as should be appointed why the license should not be granted. But, in the order granting the license, it did not appear that notice had been given as thus required, and various other omissions were mentioned as impairing its validity. This court, however, held that no other requisites to the jurisdiction of the county court were prescribed by the statute than the death of the intestate, the insufficiency of his personal estate to pay his debts, and a representation of these facts to the county court where he dwelt or his real estate was situated; that the decision of the county court upon the facts was the exercise of the jurisdiction which the representation conferred; that any irregularities or errors in the decision were matters to be corrected by an appellate court; and that the decision could not be collaterally attacked by reason of them. The court observed, in substance, that it was not necessary that the record should disclose the contents of all the papers before the county court, or its

See 11 OTTO.

action in preliminary matters; that it was sufficient to call its powers into exercise that the petition stated the facts upon the existence of which the law authorized the sale; that the granting of the license was an adjudication that such facts existed; and that a purchaser was not bound to look beyond the decree. The doctrine thus stated has ever since been adhered to by this court in like cases, and in 1865, in *Comstock v. Crawford*, which arose upon a similar statute in the same Territory, that decision was followed. 3 Wall., 396 [70 U. S., XVIII., 34]. Its maintenance was held to be essential to the security of numerous estates in Wisconsin, where it is said many defects are found in the records of the proceedings of the probate courts in the early period of her history. It was adopted for many years by her courts, after she ceased to be a Territory and became a State of the Union. It was well fitted for the repose of titles. Whether the reasoning of this court in other cases would not lead to some modification of its doctrine it is unnecessary to consider. As already intimated, there is no occasion to go to the full extent of the doctrine for the disposition of the present case. Here no parties claiming interests adverse to those of the lunatic are objecting to the license to sell, granted on his behalf and at his request through his guardian.

In *Mohr v. Tulip*, the Supreme Court of Wisconsin overlooked the distinction between the position of the lunatic, who was, in fact, the applicant through his representative, and that of parties having adversary interests in the property. He can no more object to the sale of his property for want of notice to them, if the provisions of law intended for his protection were followed, than a plaintiff in a personal action could object to a sale upon his own judgment, on the ground that the latter was prematurely entered. The object of notice or citation in all legal proceedings is, to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protection of the applicant or suitor.

The statute declared that, upon the existence of certain facts, the sale of the lunatic's estate might be made, and when these appeared in the petition of the guardian, the court had jurisdiction to act, so far as his rights were concerned, as fully so as if the statute had so declared in terms, whatever may be the effect of its proceedings upon the interests of parties not properly brought before the court. We see no reason, therefore, so far as his interests are affected, to depart from the doctrine of *Grignon v. Astor*.

Judgment affirmed.

Cited—6 Sawy., 285; 7 Sawy., 388, 399, 400; 3 McCrary, 447; 51 Wis., 489; 96 N. Y., 531, 532.

EZRA WHEELER ET AL., as EZRA WHEELER
& Co., *Appts.*,
v.

FACTORS' AND TRADERS' INSURANCE
COMPANY, WILLIAM A. JOHNSON,
DAVID N. BARROW, Admr. of FERDINAND M. GOODRICH, Deceased, AND JOSEPH P. ALEXANDER, Admr. of JOHN H. GREEN, Deceased.

(See S. C., 11 Otto, 439-443.)

Mortgagee's right to policy—equitable right—failure to assign policy.

1. The general rule is that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him.

2. But if the mortgagor is bound to insure the mortgaged premises for the security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed.

3. And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense.

[No. 211.]

Submitted Mar. 19, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

The case is stated by the court.

Messrs. E. T. Merrick, G. W. Race and Foster, for appellants.

Mr. Thomas Hunton, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

Johnson & Goodrich, commission merchants of New Orleans, being creditors of John H. Green, a planter, for advances made, suggested to him that he should authorize them to effect insurance on his buildings, gin-house, machinery and cotton in the gin-house, for their better security. He accordingly wrote them a letter authorizing them to effect such insurance; and they procured, from The Factors and Traders' Insurance Company of New Orleans, insurance on an open policy in their own names for \$5,500 on the buildings and machinery, and \$2,000 on the cotton. This was in November, 1872, and the insurance was for sixty days. In January, 1873, this insurance was renewed for sixty days longer; and before its expiration, in March, 1873, the buildings, machinery and a small quantity of cotton were destroyed by fire. Johnson & Goodrich took measures to recover the insurance, and received \$900 for the loss on the cotton, leaving a balance still due from Green of \$3,450, for the payment of which, Green having become insolvent, they relied on the insurance upon the buildings and machinery, and presented to the Insurance Company the necessary proofs to collect the same.

At this point the appellants, Ezra Wheeler & Co. interposed, and set up a claim to have the insurance money on the buildings and machinery paid to them, and for this purpose filed the bill in this case against Johnson & Goodrich, the Insurance Company, and Green. The defendants severally answered, proofs were taken, and upon due hearing the court below made a decree dismissing the bill of complaint. From that decree the present appeal was taken.

The case, as developed by the pleadings and the evidence, appears to be substantially as follows: prior to the employment of Johnson & Goodrich by Green as his commission merchants, he had employed the firm of Foster & Gwyn, of New Orleans, in the same capacity, and had become largely indebted to them. In 1870 he had given them his note for \$10,000; in 1871 another note for \$3,723.61; and in March, 1872, a third note for \$3,009.55. To secure the payment of each of these notes, with interest at eight per cent per annum, he gave successive

mortgages on his plantation, buildings, machinery and stock, with an agreement in the last two mortgages to insure the buildings and machinery and to transfer the policies of insurance to the mortgagees for their better security, or, in default of doing this, that the mortgagees and all subsequent holders of the notes secured by those mortgages should have the right to effect such insurance at his expense. These mortgages were all given and recorded before Johnson & Goodrich procured the insurance now in question. Foster & Gwyn, in July, 1871, under the reserved right contained in the second mortgage, effected an insurance for one year upon the buildings and machinery, but did not renew the same. In the spring or summer of 1872, Foster & Gwyn being largely indebted to the appellants, transferred to them the three notes and mortgages of Green by way of collateral security, and the appellants rely on this security for making their claim against Foster & Gwyn.

Being thus the holders of the notes and mortgages of Green, the appellants claim the insurance money in question on two grounds: first, on the ground that although the insurance was effected in the name of Johnson & Goodrich, they acted merely as agents of Green, and the insurance was really taken out for his benefit; and he having agreed in and by the last two mortgages to insure the property for the benefit of the mortgagees and to transfer the insurance to them, the appellants as holders of the notes and mortgages are equitably entitled to the insurance money. Secondly, on the ground, as the appellants alleged, that when the insurance in question was about to be renewed in January, 1873, they were assured, by Green and by Johnson & Goodrich, that it was effected for the benefit of them, the mortgagees, or at least they were led to believe that this was so done.

An examination of the evidence in the case fails to convince us that the latter charge is true, at least so far as Johnson & Goodrich are concerned. About the time of the renewal, Foster, on behalf of the appellants, called on Green at his plantation, and testified that he requested Green to have the property insured, and that Green promised that he would write to Johnson & Goodrich to renew the insurance. The witness does not say, and Green in his answer denies, that he promised to have any insurance effected for the benefit of the mortgagees or the appellants; and the evidence is clear that Johnson & Goodrich had no such understanding. They regularly renewed their policy, and on the same day Gwyn called at their office and asked a clerk whether they had taken out a policy on the cotton-gin and buildings of Green, and the clerk answered that they had; and nothing more appears to have been said. Johnson & Goodrich both swear that they had no knowledge of the stipulation about insurance in the mortgages, or that Green was under any engagement to effect insurance, and that their only motive for effecting insurance on the property was to protect themselves. They charged the premiums to Green, it is true; but this they had a right to do under the circumstances, inasmuch as he authorized them to effect the insurance, and was entitled to any benefit to accrue therefrom after their claim against him was satisfied.

The appellants insist, however, that Johnson & Goodrich had no insurable interest in the buildings and machinery and, therefore, that they have no lawful claim to any part of the insurance in question. But it does not lie in the mouths of the appellants to make this argument. If it has any force which it is not necessary for us to decide, it can only be urged by the Insurance Company, and they do not urge it.

Since, therefore, there is no proof that Johnson & Goodrich did not act with entire fairness in the whole transaction, and without notice of Green's covenant to insure; and since there was no privity between them and the appellants, we do not see how the latter can sustain any claim at law or in equity against them.

But as the debt due to Johnson & Goodrich will not exhaust the whole amount of the insurance, and as the balance rightfully belongs to Green, the question arises, whether, as to that balance, the claim of the appellants is not maintainable. It is, undoubtedly, the general rule that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him. *Carter v. Rockett*, 3 Paige, 437. But it is settled by many decisions in this country, that if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. *Thomas v. Vonkapff*, 6 Gill & J., 372; *n. to 3 Kent*, Com., 376; *Ang. F. and L. Ins.*, sec. 62; 2 *Am. L. Cas.*, 834, 5th ed.; 1 *Herman, Mortg.*, sec. 424, and cases there cited. And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense. *Nichols v. Baxter*, 5 R. I., 491. Of course, the mortgagee's equity will be governed by the scope and object of the agreement; as, if the agreement be to insure for a certain amount, the equity will not apply beyond that amount; and as its object is to afford better security for the payment of the debt, it will not be enforced further than is necessary for such security; if the debt is abundantly secured by the property which remains liable to the mortgage, a court of chancery would properly decline to enforce it. The present case, however, is not embarrassed by any questions of this sort. The appellants have proceeded to sell the immovable property mortgaged, which did not more than satisfy the first mortgage; and the amount of insurance money remaining after satisfying the claim of Johnson & Goodrich is less than the insurance stipulated for in the other mortgages.

The equitable doctrine upon which the appellants' claim is founded, undoubtedly obtains in Louisiana. It is derived from the principles of the civil law, which is the basis of the Civil Code of that State; and it is supported by the authorities cited from the Louisiana reports. See, *Civil Code La.*, art. 1965; *Williams v. Winchester*, 7 Mart. (N. S.) 22; *Citizens Bk. v. St. Bk.* 5 La. Ann., 13; *Braden v. Ins. Co.*, 1 La., 220.

Our conclusion is, that the decree of the Circuit Court should be reversed and the case re-

manded, with instructions to enter a decree in conformity with this opinion.

Decree reversed accordingly.

Cited—13 N. W. Rep., 139.

JOHN W. BROOKS ET AL., *Appls.*,

v.

BURLINGTON & SOUTHWESTERN
RAILWAY COMPANY, FARMERS'
LOAN AND TRUST COMPANY ET
AL.

(See S. C., 11 Otto, 443-452.)

Mechanics' lien—judgment on—extent of.

1. In Iowa, a mechanics' lien has preference over a prior recorded mortgage.

2. A judgment establishing the lien against a railroad company is conclusive of the formality of the prior proceedings, in a subsequent action to foreclose a mortgage on the same property.

3. The entire road is subject to a lien for work done on one part of it, although the road was built in sections.

[No. 258.]

Argued Apr. 13, 14, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Messrs. Jas. Grant & Grant, for appellants.

Messrs. B. J. Hall and Hubbard & Clark, for appellees.

Mr. Justice Miller delivered the opinion of the court:

The appellants here, who were plaintiffs below, are trustees in a mortgage made by the Burlington & Southwestern Railway Company on its road and other property to secure \$1,800,000 of bonds put on the market and sold. They bring this suit in the Circuit Court of the United States for the District of Iowa, to foreclose that mortgage and in addition to the Railroad Company, they brought in, during the progress of the suit, other parties who were asserting mechanics' liens on the road. Of these parties, only the interest of O'Hara Brothers and Wells, French & Co., whose liens were by the court held to be paramount to that of complainants, remain to be considered in the appeal of the trustees from that decree.

The Railroad Company was organized under the laws of Iowa to build a road from Burlington, on the Mississippi River, in a southwestern direction, to some point on the Missouri River.

NOTE—Priority between mortgage and mechanics' lien.

The priority as between mechanics' liens and mortgages depends to a great extent on the statutes of the several States. *Brooks v. Ry. Co.*, *supra*; *Mass. Gen. Stat.*, c. 150; *Cal. Code Civ. Pro.*, sec. 1186; *Davis v. Bilsland*, 85 U. S., 331, 969; *Cheshire Prov. Inst. v. Stone*, 52 N. H., 365; *Shepardson v. Johnson*, 60 Iowa, 239; *Chadbourne v. Williams*, 71 N. C., 450; *Mellor v. Valentine*, 3 Col., 258.

In some States the lien attaches from the commencement of the work, although the particular work for which the lien is claimed was done after the execution of the mortgage. *Neilson v. Iowa*, etc., R. R. Co., 44 Iowa, 71; *Dubois v. Wilson*, 21 Mo., 214; *Brooks v. Lester*, 36 Md., 65; *Hall v. Hinckley*, 32 Wis., 362; *Davis v. Alvord*, 94 U. S., 224, 283; *Meyer v. Const. Co.*, 100 U. S., 224, 283.

From the initial point, at Burlington, to Viele, in Lee County, Iowa, they, by contract, used the track of a road already built between Burlington and Keokuk. From Viele to Bloomfield, in Davis County, they built and paid for their own track. From Bloomfield to Moulton, in Appanoose County, fourteen miles, they used the road of another company, already built, and from Moulton to Unionville, in Missouri, they built their own road. It is for the work and labor done and materials furnished in the latter piece of the road, that the lien of the appellees was allowed by the court on the road and right of way, stations, etc., of the Company from Viele Junction, in Lee County, to the South Iowa State line, in Appanoose County, in favor of O'Hara Brothers for \$59,763.24, and in favor of Wells, French & Co., for \$8,528.83.

It is a conceded fact in the case, that the work for which these liens were allowed was done for the Company by the parties claiming it, and no question is raised here as to the value of the work and the liability of the Company to pay for it. It is also an undisputed fact, that before any of this work was done or the contract, was made under which it was done, the mortgage of plaintiffs was executed and duly recorded.

It is also undisputed that both the appellees, whose claim is now contested, were subcontractors who had no direct contract with the Railroad Company. The contract which that Company made was with another organization, known as the Mississippi & Missouri Construction Company.

This was a purely artificial being, composed of the officers and some of the stockholders of the Railroad Company organized for the purpose of building this road, and belongs to a class whose operations have become well known of late years as instruments to enable the officers of railroad companies to make contracts with themselves to build the roads for their stockholders. In the present case, this instrument having sublet all the contract to one J. W. Barnes, very soon took itself out of the way, and by an agreement between it and the Railway Company, of which the following extract is found in the record, its existence ceases to be of any further significance in this contest:

"Contract between B. & S. W. Railway Company and the M. & M. Construction Company. Dated February 6th, 1873.

The Railway Company assumes all outstanding liabilities of the Construction Company, except officers' salaries. All previous contracts between the two Companies are annulled.

The Railway Company assumes the contract of J. W. Barnes for construction of portions of

the main line and branch of the B. & S. W. Railway Company, and the payment of all estimates due and to become due thereon."

This leaves to be considered here the Railway Company, J. W. Barnes, the principal contractor for construction of the road, O'Hara and Brothers, and Wells, French & Co., subcontractors, and the trustees in this foreclosure suit. It is also to be observed that O'Hara & Co. and Wells, French & Co., had both commenced legal proceedings in the proper courts of the State to establish their liens before the present foreclosure suit was begun by appellants, and that in those courts, after a contest with the Railway Company, judgments were rendered establishing their liens, and it was after this that they were made defendants to the present foreclosure suit.

To these proceedings, Barnes, the principal contractor, and the Railway Company were parties, and we take it for granted that as against them the judgment of the state court establishes the validity of the lien. The appellants being no party to these proceedings are not bound by that judgment, and both the validity of the lien as against them, and whether the lien, if valid, is paramount to that of the mortgage, are the questions for consideration here. These questions must be determined by the statutes of Iowa, as construed in regard to the facts of this case.

By the law in force when these transactions took place, a mechanic has a lien for labor done or things furnished, on the *entire land* upon which the building, erection or improvement was made, which has been held to include railroads, shall be preferred to all other liens and incumbrances which shall be attached to or upon such building, erection or other improvement made subsequently to the commencement of said building, erection or other improvement. Revision of 1860, sec. 1853; Code of 1873, sec. 2139.

This provision, it will be observed, relates to the *land* on which the improvement is made and gives a paramount or preferred lien only as against other liens and incumbrances created *subsequent* to the beginning of the work of the mechanic. Those made *prior* to that time, are unaffected by it. But section 1855 of the Revision, now section 2141 of the Code, makes a different provision in regard to the lien of the mechanic on the *building, erection and improvement* for which the lien is claimed. It reads thus:

"The lien for the things aforesaid on work shall attach to the *building*, erections or improvements for which they were furnished or

Under other statutes, without actual or constructive notice as prescribed, the mortgagee is not affected by the mechanics' lien, and his being at work on the building is not notice. Gere v. Cushing, 5 Bush, 304; Foushee v. Grigsby, 12 Bush, 75.

Under the Massachusetts Statute, the lien relates back to the time of the making the contract for the labor or materials. Mortgages subsequent to the contract are subject to the lien. Dunklee v. Crane, 103 Mass., 470; Batchelder v. Rand, 117 Mass., 176; Manchester v. Crane, 121 Mass., 418.

A mechanics' lien for materials for improving or enlarging a building does not take priority over an existing mortgage. Jessup v. Stone, 13 Wis., 466; Getchell v. Allen, 34 Iowa, 559; Equitable L. Ins. Co. v. Slye, 45 Iowa, 615; Norris' Appeal, 30 Pa. St., 122.

A purchase money mortgage is prior to a me-

chanics' lien, although given subsequent to the commencement of the building. Campbell's Appeal, 36 Pa. St., 247; Rees v. Luddington, 73 Wis., 276; Clark v. Butler, 32 N. J. Eq., 664.

A mechanics' lien on a building is subordinate to the lien of a mortgage upon the land, executed before the building was commenced. Hershey v. Hershey, 15 Iowa, 185; Hazard Powder Co. v. Loomis, 2 Disn., 544; Jessup v. Stone, 13 Wis., 466.

Under statutes providing that lien shall attach from the commencement of the building, the commencement of the building is the first labor done on the ground which is made the foundation of the building, such as beginning to dig the foundation. Pennock v. Hoover, 5 Rawle, 291; Dunklee v. Crane, 103 Mass., 470; Conrad v. Starr, 50 Iowa, 481; Brooks v. Lester, 36 Md., 65.

done, in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter."

The mechanic, therefore, has a lien upon the land paramount to all rights accruing after the commencement of his work, and upon what he puts upon the land paramount to all other claims, whether created prior or subsequent to that time. The decisions of the courts of Iowa are to this effect and the proposition is not disputed in argument here.

Have the appellees taken the necessary steps to establish their lien?

What is required to initiate the lien as to all other persons but subcontractors is to be found in section 1851 of the Revision of 1860.

"Section 1851. It shall be the duty of every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, to file with the clerk of the district court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished, or work or labor done or performed, a just and true account of the demand due or owing to him after allowing all credits, and containing a correct description of the property to be charged with said lien and verified by affidavit."

This section was subsequently modified by the following statute:

"An Act to Amend Section 1851 of Revision of 1860 relating to Mechanics' Liens."

Section 1. *Be it enacted by the General Assembly of the State of Iowa,* That the following words are hereby added to section eighteen hundred and fifty-one of Revision of 1860, to wit: 'But the failure to file the claim, account, settlement or demand, in the time named in this section and in section 1847, shall not operate to defeat the claim or demand, nor the lien of the person supplying the labor or material, as against the owner, nor the contractor, nor as against anyone except purchasers or incumbrancers, without notice, whose rights accrued after the ninety days and before the account, or settlement, or claim, or lien is filed.'

Approved April 7, 1862."

The statute, however, makes provision that a subcontractor who shall do the work which his principal had contracted to do shall, by proper proceeding, secure to himself the lien which arises from the work done or materials furnished. In such case there is a more complex affair. There are, here, the owner of the property, the principal contractor and the subcontractor, who have rights to be affected, as well as prior and subsequent incumbrancers or lien holders. It may generally be supposed that the principal contractor has sublet his contract so as to leave a profit to himself. He is entitled, therefore, to see that his subcontractor does not take this profit. The owner is not bound for more than he agreed to pay the principal contractor. In view of these interests, section 1847 of the Revision, section 2131 of the Code of 1873, enacts that every subcontractor wishing to avail himself of the benefit of the Act, shall

give notice to the owner of the land, before or at the time he furnishes any of the materials or performs any of the labor, of his intention to perform or furnish the same, and afterwards he shall settle with the contractor therefor, and having made the settlement in writing, the same, signed by the contractor and certified by him to be just, shall be presented to the owner. He is also required, within thirty days from the time the things shall have been furnished or the labor performed, to file with the clerk of the district court of the county in which the building is situated a copy of said settlement, and a correct description of the property to be charged with the lien, the correctness of which shall be verified by oath. As we have already seen, the Act of 1862 declares a failure to file this settlement shall not operate to defeat the lien as against everyone except purchasers or incumbrancers without notice, whose rights accrued after ninety days, and before the account or settlement or lien claim is filed.

Appellants are not within this exception.

The record shows that there was filed in the office of the clerk of the District Court of Appanoose County, on the 31st of October, 1872, a statement by O'Hara and Brothers of a claim against J. W. Barnes, the principal contractor, and against the Railroad Company, of a mechanics' lien on their line of said road, from Viele, in Lee County, through Van Buren, Davis and Appanoose Counties, in the State of Iowa, for work and labor done and to be done and materials furnished under Barnes' contract, in which they said they had already done work to the amount of \$265,000, of which \$130,000 had been paid. This was verified by the oath of O'Hara. An agreed statement of facts in the present suit states that, in filing their respective claims for mechanics' liens, settlements had been made between the subcontractors and Barnes, and that the amounts claimed had been agreed to by Barnes in these several settlements.

It is now urged by appellants, against the validity of these liens, that the notice of the lien to the Railway Company, which the statute required from the subcontractor, was never given, and if any direct written notice was necessary to the establishment of the lien in this suit, it must be admitted that it is not proved.

But we think there are two sufficient answers to this objection:

1. It is obvious that this notice to the owner of the property is for the purpose of enabling him to protect himself in his dealings with the principal contractor, so that he shall neither overpay the amount of the contract with the subcontractor, nor embarrass himself by having to deal with two contractors. This dealing with two contractors instead of one being an obligation which the law imposes on him for the benefit of the subcontractor, this notice is required for his protection. It can have nothing to do with the validity of the lien beyond ascertaining the amount of it to which the subcontractor is entitled as between those three. With prior liens it has nothing to do, and can have no effect on the rights of the holders of them. The initial proceeding for the establishment of the lien, on which all others rest, is the claim filed in the clerk's office of the proper court. In the case of *Bundy v. R. Co.*, 49 Iowa, 207, the Supreme Court of the State held that the paper

thus filed by a subcontractor imparted notice, to the owner and principal contractor of the condition of the account between the parties.

2. Since this notice is designed for the protection of the owner, and was to be given to him, the judgment of the State Court of Iowa establishing this lien against the Railroad Company is conclusive on that subject, and with that question the complainants in this court have nothing to do.

The next objection, very strongly urged by counsel for appellants, is thus stated in the assignment of errors: the court erred in decreeing a lien on the property in Davis, Van Buren and Lee, the first division of the road, for work done in Appanoose County, the next division, on a contract which was dated and work begun after recording the mortgage in Appanoose County.

As we understand this objection, it is founded on the idea that while, if the whole road had been uninterruptedly built under one contract, the lien of the contractors and subcontractors would have been good against the whole road, though they had contributed only to the building of a limited portion of it, yet because these subcontractors were only employed on one division of the road, after another had been finished, and under a distinct contract with the Company made after that completion, the lien can only attach to the last section of the road, and even this is subordinate to the mortgage of the appellants.

One branch of the question here raised was very fully considered in the case of *Neilson v. R. Co.*, 44 Iowa, 71. That was a case where, after the building of a railroad had been commenced, a mortgage was executed on its whole line, both where work had been done and where none had been done. After this the building of the road was continued under new contracts by persons who did work on the other parts of the road, and the question was, whether they had any lien prior to that of the mortgage, and if so, whether it extended to all the road or only to that part built under the new contracts.

The court, after mature deliberation, decided both these questions in favor of the contractors. It held that the road was an entire improvement, within the meaning of the Act, and that the continuance of it was a matter to be taken into the calculation of the mortgages when the mortgage was made, and the lien for that work was, by the statute, given on the road as one improvement. The court, speaking of the policy of the statute, said "It is not desirable that the execution of a mortgage upon land on which a building or other improvement is in process of construction should arrest the work and prevent its completion. Both mortgagor and mortgagee are interested in its completion. Without it the money already expended must ordinarily to a great extent be lost. Take the present case as illustrative. The interveners are holders of mortgage bonds upon a road, sixteen miles of which had been graded at the time the mortgage was made. The value of their security depended upon the further construction of the work. They foresaw that work and materials must be furnished by somebody, or nothing could be realized from what had been done."

But the argument most confidently urged here is, that the road was built in sections and

that there was such a separation in space and time in the construction of these sections that they cannot be considered as one improvement within the meaning of the statute. The argument is that the road from Veleo to Bloomfield is one road; that then it is interrupted, and the track of another company is used from Bloomfield to Moulton; that there another road begins which was constructed under another contract, and that no lien for work done here can attach to the road between Veleo and Bloomfield.

The argument seems to us extremely technical, and at war with the principle in which liens are allowed for work done subsequently to the creation of a mortgage. That doctrine, or rather the statute giving a permanent lien under such circumstances, and the construction of it by the courts were in existence when the mortgage of the appellants was made. It entered into and became a part of their contract. They knew that the road was yet to be built, and that while such building would add to the value of their security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage. Now that the venture in which both embarked is to end in loss to one or the other of them, there is no judicial propriety in straining the law to limit the rights of one party rather than the other. If that law, by its fair construction, gives the mechanic a lien for a few thousand dollars on the whole road, instead of a part of it, the law should prevail.

In every respect, except this one of its construction, the road is a unit, an entirety. Its route is selected and surveyed as one road. It is owned and built and run by one corporation. Its trains run over it all. The mortgage of appellants can have no lien on any of the road beyond the first few miles upon any other theory, for its descriptive language refers to the road as to one and not as several subdivisions. It is not easy to see how it can be held to be one road for the purposes of the mortgage, and two or three pieces of road for the purposes of the mechanics' lien. This continuation of the road beyond Bloomfield was as useful to the security of that mortgage as the part between Veleo and Bloomfield. Though the work was done from Moulton under another contract, there was never any suspension of the work on the whole road beyond what is usual in roads built with limited means. There was never any permanent arrest of the work, nor any intention to cease work on the road. The intersection of fourteen miles of another road between Bloomfield and Moulton does not destroy the identity of the improvement, nor convert it into two railroads.

The case of the *Canal Co. v. Gordon*, 6 Wall., 561 [73 U. S., XVIII., 894], is much relied on by appellants, and in one of its features—that now under consideration—it bears some analogy to the one before us. In that case, however, the part of the canal first finished, and which was held not to be subject to a lien for work done on that constructed afterwards was not only finished but in full operation for some time. How long this was finished and in use before work was begun on the new part is not stated in the report of the case. It may have been long enough to justify the belief that for a time the further prosecution of the work was abandoned, and its resumption an afterthought.

In the case before us, the purpose of discontinuing the road was never for a moment entertained, and the actual work was resumed in a few months after its completion to Bloomfield. In that case the decision depended on the construction of a Statute of California which used the word "structure" where the Iowa Statute uses the word "improvement."

In that case, as was said in the opinion, we had no aid from any decision of the courts of the State. In the one before us we have several decisions of the Iowa court. *Neilson v. R. Co.*, 44 Iowa, 71; *Ins. Co. v. Slye*, 45 Iowa, 615.

"A mechanic's lien," says the court in the latter case, "can, it is true, become paramount to a mortgage executed upon a partially erected building, provided the work be done or materials furnished for the purpose of completing the building. This is the plain provision of the Statute and, to our mind, it is not unreasonable. Whoever takes a mortgage upon a building in the process of erection, should assume that the mechanics' work is to go forward, and he may form some estimate of the amount that will be required. The same is not true in regard to repairs or enlargements."

If the case of the *Canal Co. v. Gordon* is at variance with the decision of the courts of Iowa construing her own statute, we must follow the latter. They also meet our approval.

Without examining other objections to the decree, or those to the lien of Wells, French & Co., we think what we have said covers the case, and the decree of the Circuit Court is affirmed.

Copy, foregoing opinion, duly authenticated by James H. McKenny, Esq., Clerk, Supreme Court, U. S.

Cited—101 U. S., 730; 112 U. S., 11.

THE STEAMSHIP CITY OF PANAMA,
ETC., THE PACIFIC MAIL STEAMSHIP COMPANY AND WILLIAM B. SEABURY, Claimants, *Appts.*,
v.

JOHN S. PHELPS, Survivor.

See S. C., "The City of Panama," 11 Otto, 453-464.)

Territorial courts—damages.

1. The territorial courts of Washington Territory have such jurisdiction in admiralty causes as is vested in the Federal, District and Circuit Courts.

2. In a suit brought for personal injuries, the damages must be left to the good sense and deliberate judgment of the jury.

[No. 266.]

Argued Apr. 16, 19, 1880. Decided May 10, 1880.

APPEAL from the Supreme Court of Washington Territory.

The case is stated by the court.

The following were the assignments of error:

1. The court erred in holding that it had admiralty and maritime jurisdiction.

2. The court erred in holding that the Acts of Congress and the rules of the Supreme Court of the United States, governing the Circuit and District Courts of the United States in admiralty practice, were in force in the courts of the Territory, and regulated the practice therein.

See 11 OTTO.

3. The court erred in overruling the motion for, and denying the appellants' trial by jury.

4. The court erred in holding that the damages caused by the alleged tort constituted a lien upon the ship, City of Panama.

5. The court erred in holding that a contract to carry Mary Phelps was proven.

6. The court erred in holding that Mary Phelps was not guilty of contributory negligence, and that she was entitled to recover damages from the appellants.

7. The district court erred in allowing \$5,000, and the Supreme Court in allowing \$15,000, because both are excessive, and more specifically in allowing \$3,000 for injury to libelant's ability to labor and earn money, and \$2,000 for inconvenience and disfigurement resulting from the injury.

8. The court erred in overruling appellants' motion for leave to withdraw paper designated as libelants' notice of appeal, and in ruling that the libelants had appealed from the decree of the district court to the Supreme Court of the Territory.

9. The court erred in ruling that libelants could look into appellants' bill of exceptions for the purpose of furthering libelants' cause and in increasing the damages.

10. The court erred in overruling the exceptions and points contained in appellants' bill of exceptions.

11. The district court erred in ruling that the libelants were entitled to recover \$5,000 damages, or any damages, and the Supreme Court erred in holding that the libelants were entitled to recover \$15,000 damages, or any damages.

Mr. Austen G. Fox, Jas. McNaught and Andrew Boardman, for appellants.

Mr. P. Phillips, for appellees.

Mr. Justice Clifford delivered the opinion of the court:

Judicial power as well as legislative is conferred upon the territorial government by the organic Act establishing the territory, the provision being that the judicial power shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace. Appellate jurisdiction from the district courts to the Supreme Court is also given, and with that view the provision is that writs of error, bills of exception, and appeals shall be allowed under such regulations as may be prescribed by law, from which it plainly follows that the District Courts created by the Organic Act are and were intended to be courts of general original jurisdiction.

Provision is also made for writs of error and appeals from the territorial Supreme Court to the Supreme Court of the United States, in the same manner and under the same regulations as are required to remove here the judgment or decree of the Federal Circuit Court for re-examination, where the value of the property or the amount in controversy exceeds \$2,000, or where the Constitution of the United States or an Act of Congress or a treaty is brought in question.

Express power is also given to the District Courts of the Territory to have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts

of the United States, and also of all cases arising under the laws of the Territory. 10 Stat. at L., 175; R. S., secs. 1910, 1911.

Matters of fact of a preliminary nature, disconnected with the question of jurisdiction, are not controverted; as, for example, it is not disputed that the steamship is owned by the respondent Steamship Company, and that she is one of the line they employ in the transportation of passengers and freight between the Port of Seattle, one of the ports of Puget Sound, and the Port of San Francisco, in the State of California; nor is it denied that the complaining party purchased a ticket as a cabin passenger for a passage, at the time alleged, from the former to the latter port; nor that she went on board for that purpose, and that a stateroom was assigned to her for use during the voyage by the proper officer or agent in charge.

None of these matters are denied in the argument here, and the injured party alleges that, while she had stepped into her stateroom for a few minutes, a portion of a concealed hatchway in the floor of the cabin near the door of her stateroom was uncovered by some of the officers, agents or *employés* of the Company, and was, by their gross carelessness and negligence, left open and unguarded, in consequence of which and without fault she, in returning from her stateroom to the cabin, fell through the hatchway down into the hold of the steamship, a distance of about twenty feet, whereby she broke and crushed the bones of her right arm and received other grievous injuries, which, as she believes, will disable her for life.

Compensation for her injuries being refused by the Company, she, her husband joining with her, instituted the present suit *in rem* against the steamship in the proper District Court of the Territory to recover such redress as the law affords in such cases. Service was made and the respondents appeared and demurred to the libel for several causes, of which the following are the most material in this investigation: (1) That the District Court had no jurisdiction of the subject-matter alleged in the libel. (2) That neither the Acts of Congress nor the admiralty rules of practice promulgated by the Supreme Court apply in the courts of the Territory.

Hearing was had and the District Court overruled the demurrer, and the respondents excepted. Other proceedings took place before the respondents answered the libel, but they are omitted as now unimportant. Brief reference to the answer of the respondents will be sufficient, as the question of jurisdiction is the one chiefly discussed in this court. Apart from that, the material matters of defense set forth in the libel consisted of a denial that the allegations of the fourth and fifth articles were true, and the respondents expressly denied that the injuries of the complaining party were, in any respect, caused by the carelessness or negligence of the officers or *employés* of the steamship. Testimony was taken, hearing had, and the District Court having made a finding of facts, entered a decree in favor of the libelants for the sum of \$5,000. Both parties appealed to the territorial Supreme Court, where they were allowed to adduce evidence in open court. All of the testimony introduced was taken down by the order of the court and is reported in a document called a bill of exceptions. Certain motions were made by

the respective parties which are not deemed material, and the parties having been again fully heard, the Supreme Court entered a decree in favor of the libelants in the sum of \$15,000, from which the respondents appealed to this court. Since the cause was entered here the respondents have filed the assignment of errors set forth in their brief, numbered from one to eleven inclusive, of which the first two call in question the jurisdiction of the territorial courts.

Jurisdiction of the territorial Supreme Court cannot be successfully denied if it be established that the original jurisdiction of the cause was vested in the District Court, as the organic Act provides that writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of said District Court to the Supreme Court, under such regulations as may be prescribed by law; from which it follows that the present investigation is necessarily limited to the inquiry whether the District Court had jurisdiction to hear and determine the controversy.

Chancery, as well as common law jurisdiction, is, in terms, vested both in the Supreme and District Courts, and the same section provides that the District Courts shall have and exercise the same jurisdiction under the Constitution and laws of the United States as is invested in the Circuit and District Courts of the United States, which is a plain reference to the enactments of Congress defining the original jurisdiction of those courts. Appellate jurisdiction is in some cases exercised by the Federal Circuit Courts, but, inasmuch as the entire appellate judicial jurisdiction of the Territory had previously been given to the Supreme Court by the same section of the Organic Act, it is obvious that it is original and not appellate jurisdiction that is there conferred by that clause.

Cognizance of an original character was given to the District Courts, concurrent with the Circuit Courts, by the 9th section of the Judiciary Act as amended, long prior to the passage of the Organic Act in question, of all crimes and offenses against the authority of the United States, the punishment of which is not capital, whether committed in their respective districts or upon the high seas. 1 Stat. at L., 76; 5 Stat. at L., 517.

Admiralty and maritime cognizance, original and exclusive, was also vested in those courts of all civil causes of the kind, including all seizures under laws of impost, navigation, or trade, where the seizures are made on waters navigable from the sea by vessels of ten or more tons burden. R. S., sec. 563.

Original cognizance in certain cases, concurrent with the courts of the several States, was given to the Circuit Courts, in suits of a civil nature at common law or in equity, and of all crimes and offenses cognizable under the federal authority, except where that Act otherwise provides, and concurrent jurisdiction of the crimes and offenses cognizable in the District Courts. 1 Stat. at L., 88; R. S., sec. 629.

Such jurisdiction of the territorial District Courts within the respective districts is made co-extensive with both the Federal Circuit and District Courts, for reasons which will be obvious to anyone who will compare the two sections, one with the other, in their practical operation. Two classes of courts are created in the

federal system for the exercise of the necessary original jurisdiction, but in the Territory, as provided in the Organic Act, there is but one class of courts created for that purpose. Had Congress limited the jurisdiction of the territorial District Courts to that exercised by the Federal District Courts, then those courts could not have taken cognizance of controversies in patent cases nor of crimes or offenses against the authority of the United States, where the punishment is death, and if their jurisdiction had been limited to that exercised by the Circuit Courts, then those courts would have had no cognizance whatever of admiralty and maritime causes, or of seizures on water where the proceeding is according to the course of the admiralty law.

Power to make all needful rules and regulations respecting the public territory is vested in Congress, and in the frequent exercise of that power the usual form for an Organic Act in such a case has become a very complete and well digested preparatory system of government. Two examples of courts having such jurisdiction are found in the 10th section of the Judiciary Act, where the Federal District Courts in two districts were empowered to exercise jurisdiction in addition to what was conferred by the 9th section of the Judiciary Act of all other causes, except appeals and writs of error, made cognizable in a Circuit Court, and with authority to proceed therein in the same manner as a Circuit Court.

Argument to show that jurisdiction in admiralty cases is properly exercised by the Federal District Courts under the 9th section of that Act, is quite unnecessary, as everyone knows that jurisdiction in such cases has been exercised by those courts under that provision from the passage of the Act to the present time, with the sanction of every Federal Court organized pursuant to the Constitution and the laws of Congress. Doubt at one time was suggested whether those courts could properly exercise judicial cognizance in prize cases, inasmuch as the section does not in terms confer such jurisdiction; but the Supreme Court held that prize was a branch of the admiralty, and that as such, jurisdiction was vested in the District Courts by the 9th section of the Judiciary Act. *The Admiral*, 3 Wall., 609, 612 [70 U. S., XVIII., 58]; *Glass v. The Betsey*, 3 Dall., 16.

Prior to the Act of the 3d of March, 1863, the Supreme Court had no jurisdiction in prize cases, except when the same were removed here from the Circuit Courts, but the Act of Congress referred to provides that the decrees in such case may be appealed from the District Court directly to the Supreme Court, which leaves the Circuit Courts without jurisdiction in prize cases. Beyond all question, admiralty jurisdiction, including jurisdiction in prize cases, was vested in the territorial District Courts by the 9th section of the Organic Act, the explicit language of the Act being that the District Courts of the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States, and also of all cases arising under the laws of the Territory.

Earnest effort is made in argument to show that, inasmuch as a case in admiralty does not strictly arise under the Constitution and laws

of the United States, that the clause of the Organic Act referred to does not vest jurisdiction to hear and determine such cases in the territorial District Courts, for which proposition they refer to one of the decisions of this court. *Ins. Co. v. Canter*, 1 Pet., 511, 546.

Select passages of the opinion in that case, when detached from the context, may appear to support the theory of the respondents, but the actual decision of the court is explicitly and undeniably the other way.

Cotton, in bales, to a large amount was shipped at New Orleans for transportation to Havre de Grace, and it appears that the ship was wrecked off Florida, from which the cotton was saved and was carried to Key West, where it was sold by order of the Territorial Court to satisfy a claim for salvage amounting to seventy-six per cent of the property saved. Prior to the loss the shippers had effected insurance, and they abandoned the same to the underwriters. Part of the cotton subsequently arrived at Charleston, when the underwriters libeled the same as their property by virtue of the abandonment. Hearing was had and the District Court pronounced the proceeding of the Territorial Court at Key West a nullity, and ordered the property to be restored to the libelants, subject to a certain deduction for salvage. Both parties appealed to the Circuit Court, where the decree of the District Court was reversed and a decree entered restoring the cotton to the claimant, when the libelants appealed to the Supreme Court.

State Courts have no jurisdiction in admiralty cases, nor can courts within the States exercise such jurisdiction, except such as are established in pursuance of the 3d article of the Constitution; but this court in that case, *Marshall, Ch. J.*, giving the opinion, decided expressly that the same limitation does not extend to the Territories; that in legislating for the Territories, Congress exercises the unlimited powers of the General and of a State Government, which is a complete confirmation of the proposition that the construction given to the 9th section of the Organic Act by the Supreme Court of the Territory is correct.

Confirmation of that view is also derived from other remarks made by the *Chief Justice* in that same case. We think, then, he said, that the Act of the Territorial Legislature creating the court, by whose decree the cargo of the wrecked ship was sold, is not "inconsistent with the laws and Constitution of the United States," and that it is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed.

Admiralty jurisdiction in that case had been exercised by a court created by a territorial statute, but the court whose jurisdiction is called in question in this case was created by the Organic Act passed by Congress to establish the Territory. *Conk. Tr.*, 5th ed., 290.

Existing territories are all organized under Organic Acts containing similar provisions, and in most or all the federal power is vested in a Supreme Court, District Courts, Probate Courts and Justices of the Peace; and the Organic Act of each describes the jurisdiction of the District Courts in substantially the same language,

which is also found in the Organic Acts of former Territories since admitted as States.

Our Constitution, in its operation, is co-extensive with our political jurisdiction and, wherever navigable waters exist within the limits of the United States, it is competent for Congress to make provision for the exercise of admiralty jurisdiction, either within or outside of the States; and in organizing Territories Congress may establish tribunals for the exercise of such jurisdiction, or they may leave it to the Legislature of the Territory to create such tribunals. Courts of the kind, whether created by an Act of Congress or by a territorial statute, are not, in strictness, courts of the United States; or, in other words, the jurisdiction with which they are invested is not a part of the judicial power defined by the 3d article of the Constitution, but is conferred by Congress in the execution of the general power which the Legislative Department possesses to make all needful rules and regulations respecting the public territory and other public property.

Six days of every term of such District Courts, or so much thereof as shall be necessary, are required by the Act of Congress to be appropriated to the trial of causes arising under the Constitution and laws of the United States, which of itself is sufficient to show that, in the view of Congress, their jurisdiction extends to all such matters of controversy.

Cases arising under the Constitution, as contradistinguished from those arising under the laws of the United States, are such as arise from the powers conferred or privileges granted or rights claimed or protection secured or prohibitions contained in the Constitution itself, independent of any particular statutory enactment. Examples of the kind are given by *Judge Story* in his Commentaries, which fully illustrate what is meant by that constitutional phrase. On the other hand, it is equally plain that cases arising under the laws of the United States, are such as grow out of the legislation of Congress within the scope of their constitutional authority, whether they constitute the right, privilege, claim, protection or defense of the party, in whole or in part, by whom they are asserted or invoked. 2 Story, Const., sec. 1647.

Instances where such jurisdiction has been exercised by the territorial District Courts under such Acts are numerous, and they extend from the time our territorial system was organized to the present time, and the power has always been exercised without challenge from any quarter and without the least doubt of their constitutional or legal authority. Were the meaning of the Act doubtful, which cannot be admitted, the rule is universal that the contemporaneous construction of such a statute is entitled to great respect, especially where it appears that the construction has prevailed for a long period, and that a different interpretation would impair vested rights; *Contemporanea expositio est fortissima in lege*. Sedgw. Stats., 2d ed., 213.

Maritime cases, in every form of admiralty proceeding, have been heard and determined in the territorial District Courts, and by appeal in the Supreme Courts of the Territories. *Cutler v. The Columbia*, 1 Oreg., 101; *Price v. Frankel*, 1 Wash. T., 43; *Meigs v. The Northerner*, 1 Wash. T., 91; *Griffin v. Nichols*, 1 Wash. T.,

375; *Phelps v. The Panama*, 1 Wash. T., 320.

Two cases, being cross suits, were appealed to this court from decrees rendered by the Supreme Court of the Territory for re-examination as admiralty appeals. Nobody questioned the jurisdiction either of the subordinate courts or of this court, and the parties were fully heard in both cases. Both decrees were reversed, and the causes remanded with directions to dismiss the libel in the cross suit, and in the other to enter a decree in favor of the libelants for the amount of the damage. *The Northerner v. The Resolute*, Dec. Term, 1863, not reported. [This ed., as *Meigs v. Steamship Co.* 68 U. S., XVII., 496].

Judges of long experience heard and decided those cases, no one of whom ever intimated any doubt that the territorial courts had such jurisdiction in admiralty causes as is vested in the Federal, District and Circuit Courts. For these reasons we are all of the opinion that the objection to the jurisdiction of the courts below must be overruled.

Prior to the recent Act of Congress no provision was ever enacted for a trial by jury in an admiralty cause, and it is so clear that the existing provision does not afford any countenance to the complaint of the respondents, in view of the facts disclosed in the record, that it is not deemed necessary to give the subject any further consideration. 18 Stat. at L., 315.

Injuries of the kind alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel *in rem* against the ship; and the rule is universal that if the libel is sustained, the decree may be enforced *in rem*, as in other cases where a maritime lien arises. These principles are so well known and so universally acknowledged that argument in their support is unnecessary.

Owners of vessels, engaged in carrying passengers, assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise. Obligations of the kind in the former case are, in some few respects, less extensive and more qualified than in the latter, as the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety; but in most other respects the obligations assumed are equally comprehensive and even more stringent. Carriers of passengers by land, it was said in one of the early cases, are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but it was held in the same case that the smallest negligence would render the carrier liable, and that the question of negligence was for the jury. *Ashton v. Heaven*, 2 Esp., 533.

Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill and caution of the carrier, in the preparation and management of the means of conveyance, are unable to avert. *Hegeman v. R. R. Co.*, 13 N. Y., 9.

When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, the true requirement being that the personal safety of the passengers shall not be left to the sport of chance or the negligence of careless

agents. *R. R. Co. v. Derby*, 14 How., 468, 486.

Persons transported in such conveyances contract with the proprietors or owners of the conveyance and not with their agents as principals, and the question of the liability of the proprietor or owner is wholly unaffected by the fact that the defective ship, car, engine or other apparatus was purchased of another, if the defect is one that might have been discovered by any known means.

Mistakes sometimes occur, in the investigation of such a case, by overlooking the fact that it is the carrier, whether ship-owner, corporation or individual that assumes the obligation, for a breach of which a right of action accrues to the passenger. Proof of a formal contract is not required, as the obligation of the carrier is implied from his undertaking to transport the passenger.

Tested by these considerations, it is clear that the rulings and decision of the court below are correct, and that the fourth and fifth assignments of error must be overruled. *Pendleton v. Kinsley*, 3 Cliff., 416, 421; *Stokes v. Saltonstall*, 13 Pet., 181.

Comment upon the sixth assignment of error is unnecessary, as there was no satisfactory evidence introduced by the respondents to show that the libelant was guilty of any negligence whatever.

Complaint is also made that the amount allowed for injuries received is excessive, which makes it necessary to refer to the finding of facts exhibited in the transcript, from which it appears that the libelant was wholly unaware of the hatchway, and that in coming from her stateroom she, without fault on her part, fell through it into the hold of the ship, whereby her arm was broken, and she was greatly bruised and permanently injured, as is more fully set forth in the findings and evidence.

Exceptions were filed in the District Court setting forth the evidence, which was sent up to the Supreme Court with the transcript. Due appeal having been taken by each party, the cause was heard in the Supreme Court upon the findings and evidence made and given in the court of original jurisdiction, and sent up with the transcript, together with the evidence adduced in the appellate court. Application for a rehearing was made in the Supreme Court, which was denied, and the Supreme Court made an extended finding of facts as showing the basis of their judgment. Without entering into those details, it must suffice to say that it shows conclusively that the complaint of the respondents, that the amount allowed is excessive, is not well founded, and is, therefore, overruled.

Other minor objections are taken to the proceedings in the Supreme Court, all of which may be sufficiently answered by referring to that part of the Organic Act which allows an appeal from the District Court to the Territorial Supreme Court, and from the final judgment of the latter court to this court, in the same manner and under the same regulations as from the Federal Circuit Courts. 10 Stat., at L., 176.

Damages, in such a case, must depend very much upon the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain
See 11 OTTO.

and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted. *Railroad v. Barron*, 5 Wall., 90, 105 [72 U. S., XVIII., 591, 594]; *Curtis v. R. R. Co.*, 18 N. Y., 534, 543.

Viewed in the light of these suggestions, we see no just ground to conclude that the amount allowed by the Supreme Court is excessive, and accordingly overrule the remaining assignment of errors. *Wood, Maine*, 73; *Wright v. Comp ton*, 53 Ind., 337.

Decree affirmed.

Cited—11 N. W. Rep., 510.

SANFORD BAKER, *Appt.*,

v.

GEORGE H. HUMPHREY ET AL.

(See S. C., 11 Otto, 494-503.)

Estoppel as to title—quitclaim deed—purchase by attorney.

1. A conveyed lands to B, and took from him a mortgage upon the same and assigned the mortgage to C, who took possession of the lands, claiming title, and conveyed, with warranty to D. B took no possession and never claimed any title himself, but subsequently drew deeds of the premises from others claiming under A, and, as a justice of the peace or notary public, took the acknowledgment of such deeds, and upon these occasions was silent as to any defect in the title; held, that B and one to whom he gave a quitclaim deed, are estopped from claiming any title to the premises.

2. No one taking a quitclaim deed can stand in the relation of a *bona fide* purchaser.

3. An attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.

[No. 267.]

Argued Apr. 19, 20, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the Eastern District of Michigan.

The case appears in the opinion of the court.
Mr. Theo. Romeyn, for appellant.

Messrs. Geo. W. Dyer and John Atkinson, for appellees.

Mr. Justice Swayne delivered the opinion of the court:

This is an appeal in equity. A brief statement of the case, as made by the bill, will be sufficient for the purposes of this opinion.

On the 27th of February, 1851, one William Scott conveyed the premises in controversy to Bela Chapman, taking from him a mortgage for the amount of the purchase money, which was \$3,500.

Both the deed and mortgage were properly recorded. Chapman did not take possession of the premises. On the 29th of November, 1851, Scott assigned the mortgage to Jacob Sammons.

The assignment was duly recorded on the 19th of March, 1852. Sammons conveyed the premises with warranty to Wm. M. Belote.

NOTE.—*Estoppel* in pais. See note to *Stowe v. U. S.*, 86 U. S., XXII., 146.

From him there is a regular sequence of conveyances down to the complainant, Baker. Chapman lived near the property for years, and knew that Sammons and others were in adverse possession and claimed title, but never claimed or intimated that he had any title himself. He drew deeds of warranty and quitclaim of the premises from others claiming under Scott, and as a justice of the peace or notary public, took the acknowledgment of such deeds. Upon these occasions also he was silent as to any defect in the title.

The complainant entered into a contract with the defendants, Hurd & Smith, to sell and convey the premises to them for the sum of \$8,000.

He employed Wells S. Humphrey, a reputable attorney, who, for a long time, had been employed by the complainant when he had any legal business to do, to draw the contract. Humphrey accordingly drew the agreement and witnessed its execution. Hurd & Smith thereupon took possession and held it when the bill was filed. They employed Humphrey to procure an abstract of title. In examining the title he found there was no deed from Chapman.

He thereupon sought out Chapman, and by representing to him that the object was to protect the title of clients, procured Chapman to execute a quitclaim deed of the premises to George P. Humphrey, the brother of the attorney, for the sum of \$25. The deed bears date the 10th of June, 1872. George knew nothing of the transaction until some time afterwards. An action of ejectment was instituted in his name to recover the property. Baker tendered to him \$25, the amount he had paid for the deed; offered to pay any expenses incurred in his procuring it, and demanded a release. He declined to accept or convey.

The prayer of the bill is, that the deed to George P. Humphrey be decreed to be fraudulent, and to stand for the benefit of the complainant; that the grantee be directed to convey to Baker, upon such terms as may be deemed equitable, and for general relief.

Such is the complainant's case, according to the averments of the bill.

The testimony leaves no room for doubt as to the material facts of the case.

The direction for drawing the contract between Hurd & Smith and Baker, was given to the attorney by Robling, the agent of Baker. Baker resided in Canada. Hurd & Smith directed the attorney to procure the abstract of title. With this, Baker and Robling had nothing to do. The attorney disclosed the state of the title to Hurd & Smith, but carefully concealed it from Robling. Hurd & Smith, being assured by the attorney that whatever they might pay Baker could be recovered back if his title failed, executed the contract with Baker, and declined to buy the Chapman title, but gave the attorney their permission to buy it for himself. There is evidence in the record tending strongly to show that there was a secret agreement between them and the attorney, that if the Chapman title were sustained they should have the property for \$5,000, which was \$3,000 less than they had agreed to pay Baker. This would effect to them a saving of \$3,000 in the cost. They refused to file this bill, and declined to have anything to do with the litigation. It thus appears that, though unwilling to join in

the battle, they were willing to share in the spoils with the adversary if the victory should be on that side.

There is in the record a bill for professional services rendered by the attorney against Baker. It contains a charge of \$2 for drawing the contract with Hurd & Smith. The aggregate amount of the bill is \$43. The first item is dated July 5, 1871, and the last July 12, 1872. The latter is the charge for drawing the contract. There is also a like bill against Baker and Smith of \$45, and one against Baker and Mears of \$6. These accounts throw light on the relation of client and counsel as it subsisted between the attorney and Baker.

With respect to Chapman we shall let the record speak for itself. Vincent testifies: "I asked him: How is it, Chapman? I thought you owned that property" (referring to the premises in controversy). "He said: 'No; I never paid anything on it.' He said: 'Sammons has a right to rent. It is his property.' * * * 'I asked him how he came with the deed from Scott,' and he said: 'It was only to shield Sammons; that afterwards Michael Dansmon paid the debt and the property went back to Sammons.' * * * 'When I met Bela Chapman, and he asked for Sammons and wife, he said he had drawn a deed from Sammons and wife to Belote for the premises and wanted them to sign it.'"

Francis Sammons, a son of Sammons, the grantor to Belote, says: "A part of a house situated on that lot three was leased by my father to Bela Chapman, in 1851, for the purpose of storing goods, and he afterwards lived in it a while. I collected the rent. I think he occupied it with his goods and family about three months. He never occupied or had possession of the premises at any other time, to my knowledge. He came from Mackinac when he put the goods in that house. He remained here four or five years after he came from Mackinac. He lived in Mackinac until his death. He came over to Cheboygan several times after he went to reside at Mackinac. Sometimes he would stay a week or two, visiting. At the time he lived here he was a notary public, justice of the peace and postmaster. I know he was in the habit of drawing deeds and mortgages for any one that called on him. I don't think there was anyone else here during the year 1852 and 1853 who drew deeds and mortgages but Bela Chapman in this village. My father sold the premises to William S. M. Belote. My father was in possession of the premises from 1846 until he sold to Belote."

Medard Metivier says: "I hold the office of County Clerk and Register of Deeds for Cheboygan County; have held these offices since 1872. * * * I am in my sixtieth year. I came to live in this village in 1851. Lived here ever since, except about six years when I lived in Mackinac and Chicago during the war. I know Jacob Sammons and Bela Chapman; they are both dead. I remember being at the house of Jacob Sammons when a deed was executed by Sammons and wife to Belote. I witnessed the deed. That deed was witnessed by and acknowledged before Bela Chapman, as notary public. I think there was another deed executed by Sammons and wife to Belote, which I witnessed when Bela Chapman was present. I remember the circumstances, distinctly, of one

deed being executed, witnessed by myself and Chapman, from the fact that the room was very dark, owing to Mrs. Sammons having very sore eyes, and we had to raise the curtain for more light. There was not any other full-grown person there, unless Mr. Belote was there, about which I cannot state positively, than Mr. and Mrs. Sammons, Mr. Chapman and myself. A part of the deed which I witnessed was in print. It was an old-fashioned form of printed deed. Mr. Chapman brought the form from Mackinac or somewhere. He only had them here. I know the premises described in the bill in this cause, and Chapman was never in possession of them to my knowledge. I know Mr. Chapman's handwriting very well, and I remember particularly that the deeds witnessed by myself and Mr. Chapman and acknowledged before him were in his (Chapman's) handwriting, and that he drew both of them. I know one of the deeds then executed by Sammons and wife to Belote conveyed the premises in question and other property; cannot tell all of the other property."

These witnesses are unimpeached and are to be presumed unimpeachable. Their testimony is conclusive as to Chapman's relation to the property. If there could be any doubt on the point, it is removed by the fact that for \$25 he conveyed property about to be sold and which was sold by Baker to responsible parties for \$8,000. This fact alone is decisive as to the character of the transaction with respect to both parties. No honest mind can contemplate for a moment the conduct of the attorney without the strongest sense of disapprobation.

Chapman conveyed by a deed of quitclaim to the attorney's brother. The attorney procured the deed to be so made. It was the same thing in the view of the law as if it had been made to the attorney himself. Neither of them was in any sense a *bona fide* purchaser. No one taking a quitclaim deed can stand in that relation. *May v. LeClaire*, 11 Wall., 217 [78 U. S., XX., 50].

There are other obvious considerations which point to the same conclusion as a matter of fact. It is unnecessary to specify them, and we prefer not to do so.

The admissions of Chapman while he held the legal title, being contrary to his interest, are competent evidence against him and those claiming under him. He said the object of the conveyance to him was to protect the property against a creditor of Sammons. If such were the fact, the deed was declared void by the Statute of Michigan against fraudulent conveyances, 2 Comp. L., of Mich., 146; and it was made so by the common law. The aid of the statute was not necessary to this result. *Clements v. Moore*, 6 Wall., 299 [73 U. S., XVIII., 786]. Nothing, therefore, passed by the deed to Chapman's grantee.

Chapman's connection with the deed from Sammons to Belote would bar him, if living from setting up any claim at law or in equity to the premises. The facts make a complete case of estoppel *in pais*. This subject was fully examined in *Dickerson v. Colgrove*, not yet reported [*ante*, 618]. We need not go over the same ground again. See, also, *Cincinnati v. White*, 6 Pet., 431; *Doe v. Rosser*, 3 East., 15; and *Brown v. Wheeler*, 17 Conn., 353.

See 11 OTTO.

If Chapman had nothing to convey, his grantee could take nothing by the deed.

The latter is in exactly the situation the former would occupy if he were living and were a party to this litigation. The estoppel was conclusive in favor of Belote and those claiming under him, and this complainant has a right to insist upon it.

But there is another and a higher ground upon which our judgment may be rested.

The relation of client and counsel subsisted between the attorney and Baker. The employment to draw the contract with Hurd & Smith was not a solitary instance of professional service which the latter was called upon to render to the former. The bills of the attorney found in the record show the duration of the connection and the extent and variety of the items charged and paid for. They indicate a continuous understanding and consequent employment. Undoubtedly, either party had the right to terminate the connection at any time; and if it were done, the other would have had no right to complain. But, until this occurred, the confidence manifested by the client gave him the right to expect a corresponding return of zeal, diligence and good faith on the part of the attorney.

The employment to draw the contract was sufficient alone to put the parties in this relation to each other. *Galbraith v. Elder*, 8 Watts, 81; *Smith v. Brotherline*, 62 Pa., 461. But whether the relation subsisted previously or was created only for the purpose of the particular transaction in question, it carried with it the same consequences. *Williamson v. Moriarty*, 19 Week. Rep., 818.

It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive. *Hoopes v. Burnett*, 26 Miss., 428; *Jett v. Hempstead*, 25 Ark., 462; *Fox v. Cooper*, 2 Q. B., 827, 937; [See, *S. C.*, 6 Jur., 128].

In *Taylor v. Blacklow*, 3 Bing. (N. C.), 235, an attorney, employed to raise money on a mortgage, learned the existence of certain defects in his client's title and disclosed them to another person. As a consequence his client was subjected to litigation and otherwise injured. It was held that an action would lie against the attorney and that the client was entitled to recover.

In Com. Dig., tit. "Action Upon the Case for a Deceit, A, 5," it is said that such an action lies "If a man, being intrusted in his profession, deceive him who intrusted him; as if a man retained of counsel became afterwards of counsel with the other party in the same cause, or discover evidence or secrets of the cause. So if an attorney act deceptive to the prejudice of his client, as if by collusion with the demandant he make default in a real action whereby the land is lost."

It has been held that if counsel be retained to defend a particular title to real estate he can never thereafter, unless his client consent, buy the opposing title without holding it in trust for those then having the title he was employed to sustain. *Henry v. Raiman*, 25 Pa., 354. Without expressing any opinion as to the soundness of this case with respect to the extent to which the principle of trusteeship is asserted, it may

be laid down as a general rule that an attorney can, in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. He cannot in such a way put himself in an adversary position without this result. The cases to this effect are very numerous and they are all in harmony. We refer to a few of them. *Smith v. Brotherline*, 62 Pa., 461; *Davis v. Smith*, 43 Vt., 269; *Wheeler v. Willard*, 44 Vt., 641; *Giddings v. Eastman*, 5 Paige, 561; *Moore v. Bracken*, 27 Ill., 23; *Harper v. Perry*, 28 Wis., 57; *Hockenbury v. Carlisle*, 5 Watts & S., 348; *Hobday v. Peters*, 6 Jur. (N. S.), pt. 1, 1,794; *Jett v. Hempstead*, 25 Ark., 462; *Case v. Carroll*, 35 N. Y., 385; *Lewis v. Hillman*, 3 H. L. Cas., 607.

The same principle is applied in cases other than those of attorney and client.

Where there are several joint lessees and one of them procures a renewal of the lease to himself; the renewal inures equally to the benefit of all the original lessees. *Burrell v. Bull*, 3 Sandf. Ch., 15.

Where there are two joint devisees and one of them buys up a paramount outstanding title, he holds it in trust for the other to the extent of his interest in the property, the *cestui que* trust refunding his proportion of the purchase money. *Van Horne v. Fonda*, 5 Johns. Ch., 388.

Where a surety takes up the obligation of himself and principal, he can enforce it only to the extent of what he paid and interest. *Reed v. Norris*, 2 Myl. & C., 361.

Where a lessee had made valuable improvements pursuant to the requirements of his lease, and procured an adverse title intending to hold the premises in his own right, it was held that he was a trustee and entitled only to be paid what the title cost him. *Cleavinger v. Reimar*, 3 Watts & S., 486.

The case in hand is peculiarly a fit one for the application of the principle we have been considering. It is always dangerous for counsel to undertake to act, in regard to the same thing, for parties whose interests are diverse. Such a case requires care and circumspection on his part. Here there could be no objection, there being no apparent conflict of interests, but upon discovering that the title was imperfect it was the duty of the attorney promptly to report the result to Baker as well as to Hurd & Smith, and to advise with the former, if it were desired, as to the best mode of curing the defect. Instead of doing this, he carefully concealed the facts from Baker, gave Hurd & Smith the choice of buying and, upon their declining, bought the property for himself, and has since been engaged in a bitter litigation to wrest it from Baker. For his lapse at the outset there might be some excuse, but for his conduct subsequently there can be none. Both are condemned, alike by sound ethics and the law. They are the same upon the subject. Actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is "constructive fraud," and is sufficient. Story, Eq. Jur., secs. 258, 311.

The legal profession is found wherever Christian civilization exists. Without it, society could not well go on. But, like all other great instrumentalities, it may be potent for evil as well as for good. Hence the importance of keeping it

on the high plane it ought to occupy. Its character depends upon the conduct of its members. They are officers of the law, as well as the agents of those by whom they are employed. Their fidelity is guaranteed by the highest considerations of honor and good faith, and to these is superadded the sanction of an oath. The slightest divergence from rectitude involves the breach of all these obligations. None are more honored or more deserving than those of the brotherhood who, uniting ability with integrity, prove faithful to their trusts and worthy of the confidence reposed in them. Courts of justice can best serve both the public and the profession by applying firmly upon all proper occasions the salutary rules which have been established for their government in doing the business of their clients.

We shall discharge that duty in this instance by reversing the decree of the Circuit Court and remanding the case, with directions to enter a decree whereby it shall be required that the complainant, Baker, deposit in the clerk's office for the use of the defendant, George P. Humphrey, the sum of \$25, and that Humphrey thereupon convey to Baker the premises described in the bill, and that the deed contain a covenant against the grantor's own acts and against the demands of all other persons claiming under him; and it is so ordered.

Cited—103 U. S., 736.

WESTERN UNION RAILROAD COMPANY, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C., 11 Otto, 543-550.)

Claims of credit in suits by Government—tax on railroads—implied contract—tax on interest.

1. In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, unless it has been presented to the accounting officers of the Treasury, and by them disallowed.

2. A railroad company is liable to the tax of two and a half per cent on the amount received by it for the transportation of mails between July 1, 1866, and Jan. 1, 1870.

3. Although no express contract for carrying the mails was proven, such contract will be presumed.

4. Taxes are payable by such company on interest falling due on its bonds Aug. 1, 1870, at the rate of five per cent.

5. Such company is not liable to a tax on interest due and paid on its bonded debt Feb. 1, 1872.

[No. 287.]

Argued Apr. 29, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This action was brought in the court below, by the United States, to recover certain internal revenue taxes, alleged to have accrued from Aug. 1, 1862, to Dec. 31, 1871. The Circuit Judge made the following findings:

That the gross receipts of the said defendant, for passengers, from and after Aug. 1, 1862, until July 1, 1864, amounted to the sum of \$190,862.68, and that the said plaintiff was

entitled to a tax of 3 per cent thereon, amounting to the sum of \$5,725.91;

That the entire gross receipts of said Company, from and after July 1, 1864, until Aug. 1, 1866, amounted to the sum of \$1,427,685.36, and that said plaintiff was entitled to a tax thereon of $2\frac{1}{2}$ per cent, amounting to the sum of \$35,692.13;

That the gross receipts of said defendant from the fares of passengers from Aug. 1, 1866, until Jan. 1, 1870, amounted to the sum of \$544,094.98, and that the gross receipts for transportation of the mails during the same time amounted to the sum of \$61,676.61, together making the sum of \$605,770.09;

That there was no evidence that said mail was carried upon a contract dated prior to Aug. 1, 1866, or upon any express contract; but from the fact that it was carried and compensation paid therefor, it is found that there was an implied contract, and therefore that said plaintiff was entitled to a tax of $2\frac{1}{2}$ per cent upon said sum of \$605,770.09, amounting to \$15,144.20;

That, on or after Aug. 1, 1870, said defendant paid \$61,495, interest on its bonded debt, which became payable Aug. 1, 1870, and that the plaintiff was entitled to a tax of 5 per cent on that amount, amounting to the sum of \$3,074.75;

That, on or after Feb. 1, 1871, said defendant paid \$53,767.65 interest on its bonded debt which became payable Feb. 1, 1871, upon which amount the plaintiff was entitled to a tax of $2\frac{1}{2}$ per cent, amounting to the sum of \$1,344.19;

That, on or after Aug. 1, 1871, the said defendant paid \$52,929.37 interest upon its bonded debt, which became payable on said Aug. 1, 1871, upon which amount the plaintiff was entitled to a tax of \$1,323.23.

And that, on or after Feb. 1, 1872, the said defendant paid \$52,423.71 interest on its bonded debt, which became payable Feb. 1, 1872; and that said plaintiff was entitled to a tax on five sixths thereof, being the sum of \$43,686.83, the tax thereon being \$1,092.16;

That said taxes amount in all to the sum of \$63,396.62; that said defendant has paid thereon the sum of \$58,832.23, leaving a balance due the plaintiff of \$4,564.39, and that the said plaintiff is entitled to interest on said last amount, from Mar. 1, 1872, at 6 per cent, being the sum of \$1,369.31, making together the sum of \$5,933.70, for which said plaintiff is entitled to judgment in this action.

And it is further found that said defendant made no net earning subject to tax in this suit, and that no interest was paid upon any of its bonds or the bonds of the Northern Illinois Railroad Company, except the sum of \$2,360.62 prior to the year 1870, and that no tax became due or payable on account of such interest, except on the said sum of \$2,360.62, but that \$3,866.66 was paid to the plaintiff as a tax on account of such interest Nov. 7, 1865, by the Northern Illinois Railroad Company; that said last named company was, Jan. 1, 1866, consolidated with and became a part of defendant Company; and that said defendant Company became its successor and possessed of all its rights, interests, privileges and franchises, and subject to its liabilities; but that said defendant is not entitled to have the said sum of \$3,866.66, nor any part thereof, allowed as a set-off against the claim of the plaintiff in this action.

See 11 OTTO.

U. S., BOOK 25.

Therefore, judgment is directed in favor of the plaintiff and against the defendant in this action, for the sum of \$5,933.70.

Mr. John W. Cary, for plaintiff in error, made the following assignment of errors:

1. The court erred in refusing to allow the sum of \$3,866.66 paid Nov. 7, 1865, by the Northern Illinois Railroad Company, to be credited to the account of the defendant.

2. The court erred in ruling and deciding that a tax of $2\frac{1}{2}$ per cent was due the plaintiff on the sum of \$61,676.61, received by the defendant for transportation of the mails from July 1, 1866, to Jan. 1, 1870.

3. The court erred in ruling that a tax of five per cent was due plaintiff upon the amount of \$61,495 of interest, paid on the bonds of the Company on or after Aug. 1, 1870.

4. The court erred in admitting evidence to show that the sum of \$52,423.71 became due and payable for interest on the bonds of the defendant, Feb. 1, 1872, and that the same was paid.

5. The court erred in ruling and deciding that a tax of $2\frac{1}{2}$ per cent was due the plaintiff on five sixths of the amount of interest paid on its bonded debt Feb. 1, 1872.

Mr. S. F. Phillips, *Solicitor-Gen.*, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court:

The different assignments of error in this case will be considered in their order.

1. As to the claim for a credit of \$3,866.66 on account of taxes erroneously assessed and collected, November 7, 1865.

Section 951 of the Revised Statutes provides that "In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed in whole or in part," save under certain circumstances not material to this case. Section 3220 of the Revised Statutes authorizes the Commissioner of Internal Revenue, "On appeal to him made, to remit, refund and pay back all taxes * * * that appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected."

It does not appear that this claim was ever presented to the accounting officers of the Treasury for allowance, on appeal or otherwise, or that it has ever been disallowed. For this reason, notwithstanding its apparent equity, the credit was properly refused in this suit. *Halliburton v. U. S.*, 13 Wall., 63 [80 U. S., XX., 533]; *U. S. v. Giles*, 9 Cranch, 212.

2. As to the tax of two and one half per cent on the amount received for the transportation of mails between July 1, 1866, and January 1, 1870:

By the Act of July 13, 1866, 14 Stat. at L., 135, sec. 103 of the Act of 1864 as amended, "Every * * * corporation owning * * * any railroad * * * engaged or employed in * * * transporting the mails of the United States upon contracts made prior to August 1, 1866, shall be subject to and pay a tax of two and one half per cent of the gross receipts" from such service.

No express contract for carrying the mails was proven, but since the service for which the compensation was paid began before August 1, and was continued without interruption for the whole term in question, the court below implied a contract prior to that time. This, we think, was right. Had payment been refused and suit brought against the United States in the Court of Claims, to recover for the service rendered, there could be no doubt about the right to recover, notwithstanding the jurisdiction of that court is confined to suits on contracts, *Salomon v. U. S.*, 19 Wall., 17 [86 U. S., XXII., 46]; and this not alone because the service had been rendered, but because it is to be presumed that when the Company commenced the transportation it had been agreed that payment should be made for what was done.

3. As to whether taxes are payable on interest falling due August 1, 1870, at the rate of five per cent or two and one half per cent.

The ruling of the court below on this point was in accordance with our decisions in *Stockdale v. Ins. Co.*, 20 Wall., 323 [87 U. S., XXII., 348], and *R. R. Co. v. Rose*, 95 U. S., 78 [XXIV., 376].

4. As to the tax on interest due and payable February 1, 1872.

The Act of 1870, 16 Stat. at L., 260, sec. 15, provided "That there shall be levied and collected for and during the year 1871 a tax of two and one half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any" railroad company, "and on the amount of all dividends of earnings, income or gains hereafter declared," "whenever and wherever the same shall be payable," "and on all undivided profits * * * which have accrued and been earned and added to any surplus, contingent or other fund."

The interest in this case was neither payable nor paid in 1871, and as the tax is not leviable or collectible until the interest is payable, we see no way in which the Company can be charged on this account. The tax is not on the interest as it accrues, but when it is paid. No provision is made for a *pro rata* distribution of the burden over the time the interest is accumulating, and as the tax can only be levied for and during the year 1871, we think, if the interest is in good faith not payable in that year, the tax is not demandable, either in whole or in part.

There is no question here of earnings, for the finding is not as to what was earned by the Company during the year 1871, but as to what was paid in 1872 on account of interest then for the first time falling due. We are aware that at the present Term we held, in *R. R. Co. v. Collector* [*ante*, 647], that the tax levied under the Act now in question was essentially a tax on the business of the corporation, and that in order to secure its payment it was laid on the subjects to which the earnings were to be applied in the usual course of business; but as this tax could not be levied until 1872, and there is no finding of any earnings in 1871, we see nothing to be taxed under that rule. In *Barnes v. R. R. Co.*, 17 Wall., 309 [84 U. S., XXI., 548], it appeared expressly that the dividends were declared out of the earnings of 1869.

It follows that, to the extent of \$1,092.16 and the interest thereon, the judgment below was

wrong, but in all other respects right. Consequently, *the judgment below is reversed and the cause remanded, with instructions to enter a judgment against the Railroad Company for*

	\$5,933.70
Less - - - - -	1,092.18
Equal to - - - - -	\$4,841.54

And interest thereon at six per cent from March 1, 1872.

MAHLON B. CRAMPTON, *Appt.*,

v.

AUGUSTUS ZABRISKIE ET AL.

(See S. C., 11 Otto, 601-609.)

County liability—suit by tax payers.

1. The Board of Chosen Freeholders, of Hudson County, New Jersey, cannot incur for the county any obligations beyond its income previously provided by taxation.

2. Resident tax payers can invoke the interposition of a court of equity, to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay.

[No. 1070.]

Submitted Jan. 23, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the District of New Jersey.

This action was brought in the court below by the appellees, for the purpose of having certain bonds issued by the Board of Chosen Freeholders of the County of Hudson, N. J., delivered up and canceled, and for the purpose of having the said Board reconvey to Crampton, the appellant, certain lands and premises which had been purchased by the Board from Crampton, and paid for by the issue of the bonds in question.

The issue of the bonds was claimed by the complainants, now appellees, to be void as contrary to section 5 of the Act of the New Jersey Legislature of February 26, 1874; and also to an Act of February 7, 1876. Section 5, of the Act of 1874, is as follows:

"*And be it enacted*, That the expenditures of the Board of Chosen Freeholders in any fiscal year shall not exceed the amount raised by tax for said year, unless by the spread of an epidemic or contagious disease, a greater expenditure shall be required for the protection of the public health, and the Board may fix the amount to be raised by tax for county purposes at any meeting of said Board held prior to July 15, in any year."

The Act of 1876 is as follows:

"*Be it enacted*, by the Senate and General Assembly of the State of New Jersey, that if any Board of chosen freeholders, or any township committee, or any Board of aldermen or common councilmen, or any Board of education or any Board of commissioners of any county, township, city, town or borough, in this State, or any committee or member of such Board or Commission, shall disburse, order or vote for the disbursement of public moneys in excess of the appropriation respectively to any such Board or Committee, or shall incur obligations in excess of the appropriation and limit of expenditure provided by law for the purposes

respectively of any such Board or Committee, the members thereof and each member thereof thus disbursing, ordering or voting for the disbursement or expenditure of public moneys, or thus incurring obligations in excess of the amount appropriated and limit of expenditure, as now or hereafter appropriated and limited by law, shall be severally deemed guilty of malfeasance in office, and on being thereof convicted shall be punished by fine not exceeding \$1,000, or imprisonment at hard labor for a term not exceeding three years, or both, at the discretion of the court."

The facts are further stated in the opinion of the court.

See, also, *Seidler v. Hudson*, 39 N. J. L., 632.

Messrs. **Frederick T. Frelinghuysen**, **F. W. Hackett** and **Joseph D. Bedle**, for the appellant:

The Act of 1874 is only an Act to regulate the actual expenditures of money within the fiscal year, and is not intended to operate upon the validity of the contract. The Act may operate upon the members of the Board, but not upon those who sell property to the county.

See, *Weston v. Syracuse*, 17 N. Y., 110; *Memphis v. Brown*, 20 Wall., 289 (87 U. S., XXII., 264); *Hitchcock v. Galveston*, 96 U. S., 341 (XXIV., 659).

The Act of 1876 must receive a strict construction. Its object was only to reach the members of certain Boards and Committees, and not to disturb disbursements made or obligations incurred. It was not intended to make the contract void. The Legislature may well shape its enactments so as to permit justice in the contract to be done, while the public official may be punished.

See, *Harris v. Runnels*, 12 How., 83; *Moving & Reaping Co. v. Caldwell*, Ind. Sup. Ct., 16 Am. Law Reg., 555, note; *Pangborn v. Westlake*, 36 Ia., 546; *Lester v. Howard Bank*, 23 Md., 558; *Vining v. Bricker*, 14 Ohio St., 331.

Messrs. **Peter Bentley** and **J. H. Lippincott**, for appellees.

Mr. Justice Field delivered the opinion of the court:

On the 14th of December, 1876, the Board of Chosen Freeholders of the County of Hudson, in New Jersey, passed a resolution to purchase of the defendant, Crampton, certain real property in Jersey City, upon which to erect a court-house and other buildings for the county, at the price of \$2,000 for every 2,500 square feet, the price at which he had previously offered to sell the same, and to issue to him in payment thereof bonds of the county, payable out of the amount appropriated and limited for the expenses of the next fiscal year, the bonds to run for one year and to draw interest at the rate of seven per cent per annum. The bonds were to be signed by the director at large and the collector of the county, and to be issued under its seal. On the 18th of December, Crampton executed and delivered to the Board a conveyance of the property, which was accepted and recorded in the office of the register of deeds; and thereupon three bonds were executed and delivered to him, two of which were for the sum of \$75,000, and one was for \$75,720. No provision was made by the Board for the payment of the bonds beyond the general declara-

See 11 OTTO.

tion that they should be paid out of the amount appropriated and limited for the next fiscal year. By the law then in force, the fiscal year commenced on the first day of December of each year, and the expenditures of the Board were restricted to the amount raised by tax for that year, unless by the spread of an epidemic or a contagious disease a greater expenditure should be required; and the amount to be raised was to be determined at a meeting of the Board to be held prior to July 15th of each year. Some of the resident tax payers were dissatisfied with this issue of bonds without making definite provision for their payment by taxation, and accordingly obtained from the Supreme Court of the State a writ of *certiorari* to review the proceedings of the Board. The court adjudged the proceedings invalid, and set the same aside.

It does not appear that any attention was paid either by the Board or Crampton, to this judgment. The Board did not reconvey or offer to reconvey the land to Crampton; nor did the latter return or offer to return to the Board the bonds received by him. But, on the contrary, Crampton commenced an action in the Circuit Court of the United States to enforce their payment. The present suit, therefore, is brought by other tax payers of the county to compel the Board to reconvey the land and Crampton to return the bonds, and to enjoin the prosecution of the action to enforce their payment.

The facts here stated are not contradicted; they are substantially admitted; and upon them the court below very properly rendered a decree for the complainants. Indeed, upon the simple statement of the case, it would seem that there ought to be no question as to the invalidity of the proceedings of the Board. The object of the Statute of New Jersey defining and limiting its powers would be defeated if a debt could be contracted without present provision for its payment in advance of a tax levy, upon a simple declaration that out of the amount to be raised in a future fiscal year it should be paid. The law, in terms, limits the expenditures of the Board, with a single exception, to the amount to be raised by taxation actually levied, not by promised taxation in the future. And, as if this limitation was not sufficient, it makes it a misdemeanor in any member of the Board to incur obligations in excess of the amount thus provided. It would be difficult to express in a more emphatic way the will of the Legislature that the Board should not incur for the county any obligations beyond its income previously provided by taxation; in other words, that the expenses of the county should be based upon and never exceed moneys in its treasury, or taxes already levied and payable there.

Of the right of resident tax payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper

for courts of equity to interfere upon the application of the tax payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations.

Decree affirmed.

Cited—107 U. S., 360; 12 N. W. Rep., 424; 55 Wis., 172.

MASON LUMBER COMPANY, *Plff. in Err.*,
v.

WILLIAM BUCHTEL.

(See S. C., 11 Otto, 633-637.)

False representation—defective report of referee.

1. Where one agreed to sell to another certain pine lands, a deed to be made upon the payment of the purchase price, and cutting of the timber was meanwhile prohibited unless written permission was given by the vendors, and the vendee assigned the contract to a third person, to whom the vendor gave permission to cut and remove the timber upon his guarantying the payment of the purchase price, he cannot be released from such guaranty upon any false and fraudulent representation made to him by the agent of the vendee, of the making of which the vendor was ignorant.

2. Where the report of the referee is defective in form, the defect should have been called to the attention of the court below, and a more definite finding required of the referee. It cannot be considered here for the first time.

[No. 273.]

Argued Apr. 21, 22, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is stated by the court.

Messrs. Emory A. Storrs and E. S. Eggleston, for plaintiff in error.

Messrs. Simonds & Fletcher and M. J. Smiley, for defendant in error:

Mr. Justice Field delivered the opinion of the court:

On the 23d of September, 1874, William Buchtel, the plaintiff in the court below, the defendant in error here, contracted to sell to the Big Rapids Improvement and Manufacturing Company, a corporation created under the laws of Michigan, several hundred acres of pine land in that State for the sum of \$12,273.84, payable as follows: \$3,068.46 on the first of the following January, and the balance in three equal annual installments, with interest. Nothing was paid by the company at the time, and the contract provided for the execution of a conveyance to it only upon the payment of the sums stipulated as they became due, and it pro-

hibited in the meantime the cutting or removal of the timber without the written permission of the vendor.

Two days after its execution, the contract was assigned in writing by the Improvement and Manufacturing Company to the defendant, the Mason Lumber Company, also a Corporation of Michigan. To this assignment, the vendor assented and gave permission to the Lumber Company to enter upon the lands and cut and remove the timber; and in consideration of this permission, that Company guarantied the payments stipulated in the contract. In the negotiation which resulted in the execution of the guaranty, the Improvement and Manufacturing Company was represented by its Vice-President, Mr. Bronson; and the Lumber Company by its President, Mr. Mason.

The payment due on the first of January, 1875, not having been made, the present action was brought by the vendor, Buchtel, upon the guaranty, against the Lumber Company. The Company pleaded the general issue, and gave notice that it would give in evidence, and insist as a defense to the action, that it was induced to enter into the undertaking by the false and fraudulent representation of the plaintiff that the lands contained 5,700,000 feet of good merchantable pine timber; whereas, in fact, there were only 1,500,000 feet of such timber on the land, and that thereby it had sustained damages to the amount of \$20,000, which it would recoup against the claim of the plaintiff and ask to have the balance certified in its favor.

By the law of Michigan, damages, whether liquidated or not, claimed by a defendant as arising out of the contract or transaction upon which an action is brought, may be set up by way of recoupment against the demand of the plaintiff; and, if found to exceed such demand, the defendant can have judgment for the balance. The case was, by stipulation of parties, tried before a referee, who reported in favor of the plaintiff for the amount claimed, with interest. He also found, as a matter of fact, that Bronson, who acted for the Improvement and Manufacturing Company in the transaction in which the assignment and guaranty were made exhibited at the time to Mason, who acted for the Lumber Company, a plat of the lands in the presence of the plaintiff, and represented that they contained 5,000,000 feet of good merchantable pine timber; whereas, as a matter of fact, they contained only 1,237,197 feet of such timber; but that there was a large quantity of additional timber which was poor, the defects of which could not be discovered until after it was cut. He further found that the plaintiff had never seen the lands, and that the Lumber Company was aware of the fact; and that all the knowledge he had of the quantity of the timber was derived from an estimate furnished to him by his grantor. The referee also states in his report that "he does not find" that the plaintiff's attention was called to the plat exhibited; or that he made any representations in relation to the quantity of timber on the land; or that he had any knowledge of the quantity at the time; or that the estimate furnished to him by his grantor was before him, or that he alluded to it; or that the representations of Bronson to Mason as to the quantity of the timber were made in his hearing. Exceptions

were taken to the report, and overruled by the court below.

The only questions presented by the record which merit consideration are:

1. Whether the false and fraudulent representations, assuming that they were fraudulent as well as false, of the agent of the Improvement and Manufacturing Company to the agent of the Lumber Company, as to the quantity of timber on the lands purchased, in which representations the plaintiff did not participate, released the defendant from liability on its guaranty; and,

2. Whether the report of the referee is fatally defective because it finds certain facts inferentially and not directly.

Neither of the questions thus raised is at all difficult of solution. The contract of guaranty of the Lumber Company was executed to the plaintiff as a consideration for his permission to enter upon the land and cut and remove the timber in advance of the stipulated payments. The provision against the cutting or removal of the timber, without such consent, was a most important one to him. It secured him against a possible loss if the payments were not made. The granting of permission to the Lumber Company was releasing that security, and giving to the Company the principal value of the property in advance of payment. The guaranty was a reasonable exaction for it. The representations of the Improvement Company, through its officers, to the officers of the Lumber Company, as to the supposed amount of timber on the land, to induce the latter to execute the guaranty and thus obtain the permission of the plaintiff, cannot be allowed to mar or defeat the contract with him, as he knew nothing of their being made, and was ignorant of the subject to which they related. It was the same thing to him whether insufficient or adequate consideration passed between the two companies. He gave to the Lumber Company a valuable consideration for the guaranty, and has, therefore, a right to hold that Company to the liabilities it assumed.

The cases cited by counsel to show that a misrepresentation of material facts inducing a contract, though made in ignorance, may, in many cases, be the foundation of a suit for its cancellation or modification, have no bearing on the questions here presented. They apply only where the contract, of which a rescission or modification is sought, was obtained by the party claiming its benefit, and the misrepresentations related to the consideration given for it.

Thus, in the first case cited, that of *Smith v. Richards*, reported in the 13th Peters, 26, the misrepresentation related to land containing a gold mine, and was made by the owner to the vendee to induce its purchase by him. And so it will be found in all the other cases cited, that the misrepresentations came from the party holding the contract complained of and related to the consideration upon which it was executed.

In the case before us neither of these particulars exists. The misrepresentations alleged did not come from the plaintiff, the holder of the contract, nor relate to the permission given to cut and remove the timber. Neither as to the nature or value of his reserved right to withhold such permission were any representa-

tions made by him, nor could there have been any misapprehension of the nature and extent of the guaranty assumed. Whatever related to other matters which took place between the two companies was unknown to him and in no way concerned him.

The report of the referee is, undoubtedly, defective in the form in which the statement is made of the plaintiff's want of knowledge as to the misrepresentations of the officers of the Improvement Company. The findings should have the precision of a special verdict, and specify with distinctness the facts found, and not leave them to be inferred. "I do not find" that the plaintiff knew certain facts, is a defective statement, and ought not to be received as equivalent to a direct finding that the plaintiff did not know the facts mentioned; although it is probable that the referee intended it to have that meaning. But defects of this character in the finding should have been called to the attention of the court below, and a more definite finding required of the referee. They cannot be considered here for the first time. It was for the defendant to see that findings were had on all matters material to its defense, as it was for the plaintiff to see that findings were sufficient to support the judgment in his favor.

Judgment affirmed.

MASON LUMBER COMPANY, *P'ff. in Err.*,

v.

WILLIAM BUCHTEL.

(See S. C., 11 Otto, 638, 639.)

Referee's finding, effect of.

The finding of a referee, upon which a judgment was rendered, like the verdict of a jury, constitutes an essential part of the record of the case, and is conclusive as to the facts found in all subsequent controversies between the parties on the same contract.

[No. 274.]

Argued Apr. 22, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan.

The case is stated by the court.

Messrs. E. S. Eggleston and E. A. Storrs, for plaintiff in error.

Messrs. O. H. Simonds, N. A. Fletcher and M. J. Smiley, for defendant in error.

Mr. Justice Field delivered the opinion of the court:

In the preceding case between these parties we affirmed the judgment of the court below, recovered for the first installment of money due upon the contract of purchase of certain timber lands in Michigan, the payment of which had been guarantied by the defendant below, the Lumber Company. The present action was for the remaining installments of the purchase money.

NOTE.—*Conclusiveness of judgments.* See note to *Bk. of U. S. v. Beverly*, 42 U. S. (1 How.), 134.
Estoppel by judgment. See note to *Aspden v. Nixon*, 45 U. S. (4 How.), 467.

To the first action the defendant set up that it was induced to make the contract of guaranty by certain false and fraudulent representations of the plaintiff as to the quantity of merchantable timber on the land. To the present action it sets up the same defense, and also that the representation made as to the quantity of timber, to induce the execution of the contract, amounted to a warranty, upon breach of which it was entitled to recoup the damages sustained. To meet these defenses, the plaintiff produced the judgment in the former case; and the question presented for determination is, whether that judgment was conclusive.

As to the first defense, there can be no doubt that such must be the effect of the judgment. The case was between the same parties for the first installment on the contract guarantied, and a recovery was there resisted upon precisely the same ground here urged.

The extent and effect of a former recovery between the same parties upon the same question raised in a new action have been so often considered and determined by this court, that it would be a waste of time to go over the argument and repeat our views on the subject. Our latest expression of opinion, made after deliberate consideration, is found in the case of *Cromwell v. Sac Co.*, 94 U. S., 351 [XXIV., 195]. To the reasons there adduced we have nothing to add. And we are of opinion that the second defense is also concluded by the former adjudication. The finding of the referee, upon which the judgment was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff or in his hearing to induce the execution of the contract of guaranty. This finding, having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication.

Judgment affirmed.

Cited—88 N. Y., 654.

NASHVILLE AND CHATTANOOGA RAILWAY COMPANY, *Appl.*,

v.

UNITED STATES.

(See S. C., 11 Otto, 639-641.)

Set off against Government.

Where the United States obtained a decree for the payment of money against a railroad company, the successor of the Railroad Co. representing its debts and assets, cannot be permitted to set off a debt due it from the United States, against such decree, nor apply such debt in payment thereof.

[No. 115.]

Submitted Apr. 27, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the Middle District of Tennessee.

The case is stated by the court.

Mr. J. E. Bailey, for appellant.

1074

Messrs. Chas. Devens, *Atty-Gen.*, and **Edwin B. Smith**, *Asst. Atty-Gen.*, for appellee.

Mr. Chief Justice Waite delivered the opinion of the court:

On the 10th of November, 1871, the United States recovered a decree in an equity suit in the Circuit Court for the Middle District of Tennessee against the Nashville and Chattanooga Railroad Company, for \$1,000,000, to be paid one half in ten years, and one half in twenty years, with interest semi-annually at the rate of four per cent per annum. By an arrangement between the parties, bonds with coupons attached were issued by the Company to represent the amounts thus to be paid, and it was provided in the decree that if the Company should "Make default for the period of ninety days in the payment of any of the installments of interest or of principal of said debt, or any part thereof, after the same shall have become due and payable, according to the tenor and effect of said bonds and coupons, then the United States, on filing with the clerk of the court any of said coupons or bonds, past due and unpaid for ninety days, shall have the right to have issued an order for the execution of this decree to the extent of such default by the sale of the railroad," etc. Default having been made in the payment of fifty-seven coupons, of \$100 each, representing a part of the semi-annual interest on the bonds so issued, the United States, on the 12th of June, 1876, filed the coupons in the clerk's office, and asked for execution of the decree to that extent. Thereupon the Nashville, Chattanooga and St. Louis Railroad Company, the successor of the original defendant Company, and representing its debts and assets, appeared and, by petition, asked that a debt which the United States owed the petitioning Company for services performed in military transportation and carrying the mails since the date of the decree, might be applied to the payment and cancellation of the coupons in default and on file. From the petition itself it appears that the United States refused to make the application because of an alleged defense they had to the claim, and the evident purpose of the Company is to have the validity of that defense determined in this proceeding.

In our opinion, the court below properly declined to entertain the petition. The claim of the Railroad Company does not arise out of the decree. There is no connection between the demand of the United States on the one side and that of the Railroad Company on the other. The United States ask for no new decree, but execution because of default in the payment of an old one. Upon their application, the only question is, whether there has been default for the requisite time in the payment of the coupons filed. The Railroad Company admits the default, but insists, in effect, that the United States ought to apply the coupons to the payment of a debt they owe the Company, and thus cancel the default. This the United States decline to do, because they claim they do not owe the debt set up by the Company. Clearly, this dispute between the parties could not, even before final decree, be made the subject of a cross-bill, because it does not grow out of the original suit. A cross-bill cannot be used

101 U. S.

to bring in new and distinct matters. *Ayers v. Chicago*, not reported [*ante*, 838]; *Rubber Co. v. Goodyear*, 9 Wall., 788 [76 U. S., XIX., 566]; *Cross v. De Valle*, 1 Wall., 5 [68 U. S., XVII., 515]. Neither can the petition be treated as an original and independent suit, for the United States cannot be sued on contracts except in the Court of Claims. If the United States had sued the Railroad Company on the coupons, other questions might have arisen; but they did not do so. All they have done has been to file their coupons with the clerk in order to get execution on their old decree.

Affirmed.

HARVEY KENNEDY, *Exr.* of JAMES C.
KENNEDY, Deceased, *Appt.*,
v.

JOHN A. J. CRESWELL ET AL., COMMIS-
SIONERS OF THE FREEDMAN'S SAVINGS AND
TRUST COMPANY.

(See S. C., 11 Otto, 641-646.)

*Executor's liability—admission of—objection to
order—bill by creditor.*

1. Where a bill is filed by a creditor against an executor for the discovery of assets and the application thereof to his debt, and the executor answers, admitting sufficient assets and alleging that he is ready and willing to pay such debt, but that he disputes the justice thereof, and upon the trial the proof showed that the executor had not sufficient assets to pay such debt which was proved to be valid, a decree against the executor for the amount of the debt was proper.

2. The executor's admission was a good ground for charging him with the liability, although he could not urge it as evidence in support of his plea. Such admission of assets renders the executor personally liable.

3. The objection, that the bill was not formally dismissed as to the devisees, cannot be raised here by the executor, who alone appealed from the decree.

4. A creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back to a court of law to establish the validity of his claim.

[No. 277.]

Argued Apr. 23, 1880. Decided May 10, 1880.

APPEAL from the Supreme Court of the District of Columbia.

The case is stated by the court.

Messrs. R. T. Merrick and M. F. Morris,
for appellant.

Mr. Enoch Totten, for appellees.

Mr. Justice Bradley delivered the opinion of the court:

The appellees filed a bill in equity for themselves and other creditors against the appellant, as executor of James C. Kennedy, deceased, and against the devisees of his will, praying for an account of the personal estate of the testator, a discovery of his real estate and the application thereof to the payment of his debts. The bill stated that the complainants were the holders of a note of the testator for \$12,000, with interest, which was due and not paid; that the defendant, Harvey Kennedy, as executor, had

proved the testator's will, and entered upon the execution thereof; that the personal property was insufficient to pay the debts, and that the defendant was paying some debts in full and leaving others unsatisfied; and that the testator left a large amount of real estate, some of which is described and pointed out.

To this bill the defendants filed a plea, the material part of which is as follows:

"That the executor aforesaid has in his hands assets of the estate of the said James C. Kennedy, deceased, amply sufficient to pay and discharge the claims of the complainants and all other claims that have been brought to his notice, and that he is ready and willing to pay the said claim of the complainants whenever and as soon as the same shall have been proved and established by a tribunal of competent jurisdiction according to law; but the said executor disputes the said claim and denies the justice and validity thereof, and has for such cause rejected the same; and the said complainants have not sought in any manner to enforce the said claim against the said executor and the assets in his hands by proper proceedings at law.

Wherefore, these defendants aver and plead the premises in bar of the complainants' bill; and they pray that the complainants be required to enforce their claim against the said executor by proper proceedings at law; and they pray also the judgment of the court whether they (these defendants) should be compelled to make any further or other answer to the said bill, and that they be hence dismissed with their reasonable costs in this behalf wrongfully sustained."

To this plea the complainants filed a replication, and proceeded to prove the note held by them and its non-payment, and also produced in evidence the accounts filed by the executor in the office of the register of wills and the exceptions filed by the complainants thereto. In the executor's account he charged himself with assets to the amount of \$31,794.62, and claimed credit for moneys paid and for commissions to the amount of \$27,014.75, showing a balance in his hands of only \$4,779.87. The defendants offered no testimony, and the court, on final hearing, made a decree that the executor should pay to the complainants the full amount of their claim. From this decree the executor has appealed.

The appellant insists that, according to the rules of equity pleading, the complainant, by taking issue on the plea, admitted its sufficiency; and as the decree was based upon the admission of assets contained in the plea, it was an affirmation of its truth; and, therefore, it should have been in favor of the defendants, and the bill should have been dismissed.

This argument is very ingenious, but it is not sound. The defendants not only failed to prove the truth of their plea, but, on the contrary, the complainants, by the executor's own sworn accounts, filed in the probate office, proved, so far as such proof could go, that the plea was untrue. These accounts show that the executor had not sufficient personal estate in his hands to pay one third of the complainants' claim alone: so that, according to the strictest rules of equity pleading, the complainants were entitled to a decree in their favor. The executor may have had sufficient assets in fact; but he did not see fit to disclose them, or prove that he had them.

His admission that he had assets may be taken against him for the purpose of charging him with a liability, but it cannot serve him as evidence to prove the truth of his plea. His mere allegation cannot be received as proof of its own truth where the fact is directly in issue, and the burden of proof is on him.

Since, then, the complainants were entitled to a decree, the question is, what decree? If a defendant plead a false plea, and it be so found, what is next to be done? Is it to be merely overruled, and an order made that he answer further, as in case of overruling a demurrer, or of overruling a plea for insufficiency? This is not the usual course. Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it is found against him, claim the right to file an answer; although, if the complainant desires a discovery, which the plea sought to avoid, he may, undoubtedly, insist upon it. But that is the complainant's right, not the defendant's. Lord Hardwicke said: "All pleas must suggest a fact; it must go to a hearing; and if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct an examination on interrogatories in order to supply that." *Brownsword v. Edwards*, 2 Ves., 243. This statement is adopted by Lord Redesdale and by Mr. Beames, and by all subsequent writers on equity pleading. Mitf., 4th ed., 302; Beames, Pleas in Eq., 318; Story, Eq. Pl., sec. 697. If the plea is found to be false, it would seem to be just and equitable that the case should stand as if the defendant had admitted the allegations of the plaintiff. Sir Thomas Plumer states the matter thus: "Supposing a plea to be correct in form, but proved false, it seems to be conceived that the course at the hearing is to take it up just as if there was no answer. That is not correct. Upon a plea found false the plaintiff is entitled to a decree; and if a discovery is wanted, the defendant is ordered to be examined upon interrogatories." *Wood v. Strickland*, 2 Ves. & B., 150. Chancellor Walworth, in a case before him, where the defendant produced no evidence to establish the truth of his plea, said: "Where a plea in bar to the whole bill is put in, if the complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If, at the hearing, the plea is found to be true, the bill must be dismissed. But if the plea is untrue, the complainant will be entitled to a decree against the defendant in the same manner as if the several matters charged in the bill had been confessed or admitted. If a discovery is necessary to enable the complainant to obtain the relief sought for by his bill, the defendant cannot evade answering by putting in a plea which turns out to be false. In such a case, after the plea is overruled as false, the complainant may have an order that the defendant be examined on interrogatories before a master as to the several matters in relation to which a discovery was sought by the bill." *Dows v. McMichael*, 2 Paige, 345.

In the present case, the complainants did not see fit to insist on a further discovery. Being entitled to a decree *pro confesso* as to the principal charges of their bill, and the executor hav-

ing admitted sufficient assets to pay the debts of the estate, they were content to take a decree against him for the amount of the debt. The executor's admission, as we have before said, was a good ground for charging him with the liability, though he could not urge it as evidence in support of his plea. And as an admission of assets renders the executor personally liable, a decree against him was proper. The usual decree on a creditor's bill is for an account; but, as said by *Vice-Chancellor Wigram* in a similar case: "The reason for and the principle of the usual form of decree have no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for the payment of the plaintiff's debt; and the object of the special form of the decree in a creditor's suit fails. * * * I am satisfied that in this case there ought to be a decree for immediate payment." *Woodgate v. Field*, 2 Hare, 211; Story, Eq. Jur., sec. 548, *a*. Had it been contended or shown in this case that the estate of the testator was insolvent, so as to require a *pro rata* payment among all the creditors, there might have been room for the objection that the ordinary decree was not made. But no such point is made in the case, and we think that the decree was properly rendered for the debt of the complainants alone.

As to the objection that the bill was not formally dismissed as to the devisees, we do not think it can be raised here by the executor, who alone appealed from the decree.

The point taken by the appellant, that the court below, sitting as a court of equity, had no jurisdiction of the case, is not well taken. The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back to a court of law to establish the validity of his claim. The court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits. *Thompson v. Brown*, 4 Johns. Ch., 619; 1 Story, Eq. Jur., sec. 546; 2 Wms. Exrs., 1718, 1719. The allegations of the bill in this case were sufficient to give the court jurisdiction; and the accounts of the executor show that the complainants had reasonable cause for making those allegations. They went into the court for the discovery of assets; and the object of the bill was attained by the admission of the executor that he had sufficient assets. It would be strange, indeed, if that admission could be made a ground for depriving the court of its jurisdiction. If it could, the discovery, by proof of assets concealed by the executor, would have the same effect; and the result would be that a bill in equity could be defeated by proofs showing that there was good ground for filing it.

In conclusion, we will state that we have found nothing in the local law of the District of Columbia, or the jurisdiction of the Probate Court, that is, of the Supreme Court of the District acting as such, inconsistent with the views expressed.

The decree of the Supreme Court of the District of Columbia is affirmed.

EMILY MOULOR, *Plff. in Err.*,
v.
AMERICAN LIFE INSURANCE COM-
PANY.

(See S. C., 11 Otto, 708-711.)

Case, when must be submitted to jury.

Where the evidence as to the truth of the statements in an application for insurance is conflicting or doubtful, it must be submitted to the jury, and the court cannot direct a verdict.

[No. 255.]

Argued Apr. 12, 1880. Decided May 10, 1880.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case is stated by the court.

Messrs. James Parsons and F. Sheppard, for plaintiff in error.

Messrs. Henry Hazlehurst and Isaac Hazlehurst, for defendant in error.

Mr. Justice Strong delivered the opinion of the court:

As the judgment which was entered by the circuit court was in accordance with the verdict, the only assignment of error which we have to consider is the first, namely: that the court erred in giving to the jury a binding charge to return a verdict for the defendants.

The policy upon which the suit was founded contained the following stipulation: "And it is hereby declared and agreed that if the representations and answers made to this Company in the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in such case, this policy shall be null and void." The application referred to contained the following interrogatories and answers, among others: "Seventh. Has the party (Louis Moulor, the person whose life was insured) ever been afflicted with any of the following diseases? Answer yes or no to each. Insanity? No. Gout? No. Rheumatism? No. Palsy? No. Scrofula? No. Convulsions? No. Dropsy? No. Small-pox? No. Yellow fever? Yes. Fistula? No? Rupture? No. Asthma? No. Spitting of blood? No. Consumption? No. Any diseases of the lungs or throat? No? Or of the heart? No. Or of the urinary organs? No."

Interrogatory twelfth. "How long since the party was attended by a physician? For what disease or diseases?" Answer. "Not since the year 1847, when he had the yellow fever."

After these answers the application contained the following: "It is hereby declared and warranted that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned (Louis Moulor) that this application shall form a part of the contract of insurance, and that if there be in any of the answers herein made any untrue or evasive statements, or any misrepresentations, or concealment of facts, then any policy granted upon this application shall be null and void."

The defense set up at the trial was that some of the answers to the interrogatories contained in the application were untrue, and this defense

was attempted to be supported by the testimony of a single witness, Dr. Mathieu. He testified that he had been the family physician of Moulor since 1855 (the policy was issued June 17, 1872). He testified further, that in 1858 and 1859 he attended Moulor for chronic asthma, manifestations of the first stage of consumption, and also treated him for scrofula. The witness did not testify positively that Moulor had the diseases for which he treated him, but his testimony was that Moulor never learned from him or any other physician, and that he never suspected or had the remotest idea that he was affected with any such diseases; on the contrary, that he always boasted of himself as being a strong, healthy and robust man. The witness further testified that the asthma Moulor had was the dry, nervous asthma, attended by no expectoration; that there was nothing connected with it to make the patient believe he had it. As to the first stage of consumption, there was no softening of the tubercles and, therefore, no expectoration of the tuberculous matter. As to the scrofula, that his was very mild *diathesis*.

This was all the testimony adduced, and now relied upon to prove that the answers in the application were untrue.

There was, however, in evidence the statement of two medical examiners attending the application. They represented the assured as in perfect health, and as having never had any constitutional disease except yellow fever, and a curvature of the spine in his early youth, and as having no predisposition, either hereditary or acquired, to any constitutional disease.

We are of opinion that this evidence did not warrant a peremptory instruction to the jury to find a verdict in favor of the defendants. The testimony of Dr. Mathieu was parol. Its credibility as well as its effect was for the jury, especially as it was not positive and unqualified that Moulor had had the diseases for which the witness had treated him, and as the statements of the examining physicians which were in evidence tended in some degree to prove that he never had. The jury might, perhaps, have drawn the conclusion from Dr. Mathieu's testimony that there had been only predisposition to the diseases, and not the diseases themselves. He stated, in regard to the asthma for which he treated Moulor, that it was attended with no expectoration, and that there was nothing connected with it to make the patient believe he had it. In regard to the first stages of consumption, according to his statement, there was no expectoration of tuberculous matter. He does not state that there was any cough or pain in the chest. There were, then, no external symptoms of either of the three diseases mentioned. Had scrofula existed, it would seem probable the patient must have known it. Yet the doctor states he did not suspect, or have the remotest idea, that he was affected with either of the diseases. That he was treated for them is not conclusive that he had them. The most skillful treatment sometimes is given when the existence of a particular disease is only suspected, not known, and when afterwards it appears the physician was mistaken.

For these reasons we think the testimony was not such as to justify a withdrawal from the jury the inquiry whether the answer to the seventh interrogatory was untrue.

Nor was it sufficient to enable the court to conclude, without reference to the jury, that the answer to the twelfth interrogatory was untrue. The entire interrogatory should be considered as one. It was: "How long since the party was attended by a physician? For what disease or diseases?" To this the answer was: "Not since the year 1847, when he had the yellow fever." It may well be that the applicant understood the interrogatory as asking information respecting attendance for a particular disease or diseases and their description, especially as the thirteenth interrogatory sought information respecting the party's *usual medical attendant*, and the name of that attendant was truly given.

Upon the whole, therefore, we think the case should have been submitted to the jury on the evidence.

The judgment is reversed, and the case is remitted for a new trial.

Copy, foregoing opinion, duly authenticated by James H. McKenney, Esq., Clerk, Supreme Court, U. S.

LEWIS H. MEYER ET AL., Trustees, *Appts.*,
v.

HENRY EGBERT, Admr. of JOHN HORNBY,
Deceased.

(See S. C., 11 Otto, 728-730.)

Mechanics' lien, priority of—bondholders—lien on whole, for work on part of railroad.

1. That a contractor, who files a mechanics' lien for work on a railroad in Iowa, is a stockholder of a construction company which guarantied bonds and a mortgage to secure them, on the road, does not estop him from setting up that his lien is superior to that of the mortgage.

2. If the bondholders have suffered any loss for which the guaranty provides a remedy, the corporation is liable to suit for damages.

3. Where work is done upon part of a railroad, the lien attaches to the whole of it, and in Iowa takes precedence over a prior mortgage on the road.

[No. 263.]

Argued Apr. 15, 1880. Decided May 10, 1880.

APPEAL from the Circuit Court of the United States for the District of Iowa.

The case is stated by the court.

Messrs. Joseph H. Choate, Grant & Grant, and John W. Cary, for appellants.

Mr. James T. Lane, for appellee.

Mr. Justice Miller delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Iowa. Appellants, as trustees in a railroad mortgage, brought suit to foreclose it, and made Hornby a defendant on account of a claim for a mechanics' lien which he set up and was allowed. The corporation which made the mortgage and owned the road was the Davenport and St. Paul Railroad Company, incorporated to build a road from Davenport, in Iowa, to St. Paul in Minnesota. The route was surveyed from Davenport to St. Paul, and work was commenced some three miles out from the City of Davenport and prosecuted in the direction of St. Paul, until about forty-eight miles were

completed. The part of the road surveyed from Davenport to Pine Hill Cemetery, when this work was begun, included a difficult and expensive ascent from the river bottom, on which the town is mainly situated, to the prairie land above the bluff, and for this reason it was delayed, and a running arrangement made with another company for a while, by which the cars from the country came into the city. The work on that piece of road was, however, commenced on a contract with Hornby, of date of October 9, 1871, and finished prior to the first day of November, 1873. On the 28th of that month he filed his claim for a mechanics' lien in the proper court.

Two objections are taken to this lien. One of them is that Hornby himself was a stockholder in the Davenport Railway Construction Company, a corporation which placed the bonds secured by appellants' mortgage on the market, and which gave a guaranty that the local subscriptions and grants should be sufficient to prepare the road for the reception of the rails, and undertook to make good any deficiency in such local aid. Six gentlemen also signed an agreement to be personally bound to make good the guaranty of the construction company. Mr. Hornby was not one of them, and it is not charged that he ever made any personal representations on the subject to purchasers of the bonds or to any one else.

But it is argued, that because he was a stockholder of the construction company, he is now estopped to set up his lien for work and labor performed, to the detriment of these bondholders. It is difficult to see how any such claim can be sustained. It was the corporation, and not Mr. Hornby, who gave the guaranty. If the bondholders have suffered any loss for which that instrument provides a remedy, the corporation is liable to suit for damages. Even then it must be proved that there has been a loss, and that the loss was suffered because the local subscriptions and grants were not sufficient to prepare the whole of said line for the rails. Before Mr. Hornby can in any event be held liable, it must be shown that the construction company is liable and cannot respond to that liability.

Nothing of this kind is shown by the record. It might be otherwise if it were proved that Mr. Hornby used this guaranty fraudulently and with false statements to negotiate the bonds; but this is not alleged or proven. We see no place for an estoppel in the case.

The other error alleged concerns the fact that the part of the road on which Hornby did his work, namely: the three miles between Pine Hill Cemetery and the city, is a separate division and not a part of the principal road, and that no lien as against these mortgagees can be established for that reason.

We have considered this question so fully in the case of *Brooks v. R. Co.* [*ante*, 1057], that it is unnecessary to discuss it here. It is sufficient to say that, under the principle there laid down, that three miles is a part of the improvement, and the lien attaches to the whole of it. The fact that they consented that the court should limit it to the three miles can do appellants no harm.

The decree is affirmed.

Cited—112 U. S., 11.

JOHN B. STONE ET AL., *Plffs. in Err.*,
v.
STATE OF MISSISSIPPI, *ex rel.*, GEORGE E.
HARRIS, Attorney-General.

(See S. C., 11 Otto, 814-821.)

Police power—public morals—lotteries—suppression of.

1. No Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.

2. The police power extends to all matters affecting the public health or the public morals. Lotteries are proper subjects for the exercise of this power.

3. The Legislature of a State cannot, by the charter of a lottery company, defeat the will of the People, authoritatively expressed, in relation to the further continuance of such business in their midst.

4. The contracts which the Constitution protects are those that relate to property rights, not governmental. The right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion.

[No. 181.]

Argued Mar. 4, 5, 1880. Decided May 10, 1880.

IN ERROR to the Supreme Court of the State of Mississippi.

This was an information filed in the Circuit Court of Warren County by the Attorney-General of Mississippi, in behalf of the State, against the plaintiffs in error, the defendants in that court, requiring them to show by what warrant or authority they exercised the franchise or privilege of issuing and vending lottery tickets in contravention of the laws of that State.

The defendants below, in their answer set up, by way of defense, an Act passed by the Legislature of Mississippi Jan. 16, 1867, entitled, "An Act Incorporating the Mississippi Agricultural, Educational and Manufacturing Aid Society," which, it is claimed, conceded to them the franchise of issuing and vending lottery tickets.

The answer goes on to admit that there is, in the Constitution of the State, adopted in Convention May 15, 1868, and ratified by the People December 1, 1869, a provision, Art. XII., sec. 15, "Which declares that the Legislature shall never authorize any lottery; nor shall the sale of lottery tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." It further admits that the Legislature, by an Act entitled, an Act Enforcing the Provisions of the Constitution of the State of Mississippi Prohibiting All Kinds of Lotteries within Said State, approved July 9, 1870, it was made unlawful to conduct a lottery in the State of Mississippi.

They insist that they had complied with all the conditions imposed by the charter, and were conducting business in accordance with its provisions; that the terms of the Constitution and the legislative Act, above set forth, interfered with their vested rights and violated the Constitution of the United States, in attempting to impair the obligation of a contract.

The court decided against the respondents, and gave judgment of ouster. The case was then taken to the Supreme Court of the State, where the judgment was affirmed, and thence it comes, by writ of error, to this court.

Mr. P. Phillips, for plaintiffs in error.

Messrs. A. M. Clayton and Van H. Manning, for defendants in error.

See 11 OTTO.

Mr. Chief Justice Waite delivered the opinion of the court:

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. 1, sec. 10. The doctrines of the *Dart. Coll. v. Woodward*, 4 Wheat., 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has, in fact, been entered into, and if so, what its obligations are.

In the present case the question is, whether the State of Mississippi, in its sovereign capacity, did, by the charter now under consideration, bind itself irrevocably by a contract to permit "The Mississippi Agricultural, Educational and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscription which shall entitle the holders thereof to" "any lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable or useful," "awarded to them" "by the casting of lots, or by lot, chance or otherwise." There can be no dispute but that, under this form of words, the Legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that, in consideration thereof, the company paid into the State Treasury \$5,000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of \$1,000 and "One half of one per cent on the amount of receipts derived from the sale of certificates or tickets." If the Legislature that granted this charter had the power to bind the people of the State and all succeeding Legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists therefore, or not, depends on the authority of the Legislature to bind the State and the people of the State in that way.

All agree that the Legislature cannot bargain away the police power of a State. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y., 657; *Boyd v. Alabama*, 94 U. S., 645 [XXIV., 302]. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier

to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Co. v. Massachusetts*, 97 U. S., 25 [XXIV., 989]; *Patterson v. Kentucky*, 97 U. S., 501 [XXIV., 1115]. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through *Mr. Justice Grier*, in *Phalen v. Virginia*, 8 How., 163, 168, that "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that, with the same opportunities of indulgence, the same results would be manifested.

If lotteries are to be tolerated at all, it is, no doubt, better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the Provisional Government of that State, in 1867, at the close of the late civil war, the present Act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new Constitution with a view to the resumption of their political rights as one of the United States, provided that "The Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. 12, sec. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them. R. S., sec. 3894; 19 Stat. at L., 90, sec. 2.

The question is, therefore, directly presented, whether, in view of these facts, the Legislature of a State can, by the charter of a lottery company, defeat the will of the People, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No Legislature can bargain

away the public health or the public morals. The People themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Co. v. Massachusetts* [*supra*].

In *Dart. Coll. v. Woodward* [*supra*], it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "Would be an unprofitable and vexatious interference with the internal concerns of a State, would, unnecessarily and unwisely, embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which to subserve those purposes, ought to vary with varying circumstances" (p. 628); but *Chief Justice Marshall*, when he announced the opinion of the court, was careful to say (p. 629), "That the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is, in general, necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government, dependent on taxation for support, can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the People to the government, no part of which can be granted away. The People, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects

are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to stop them is governmental, to be exercised at all times by those in power, at their discretion. Anyone, therefore, who accepts a lottery charter, does so with the implied understanding that the People, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, and this whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has, in legal effect, nothing more than a license to continue on the terms named for the specified time, unless sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record and the judgment is, consequently, affirmed.

Cited—111 U. S., 752; 50 Conn., 329; 47 Am. Rep., 652.

CHARLES HOWARD, *Plff. in Err.*,

v.

MILWAUKEE AND SAINT PAUL RAILWAY COMPANY ET AL.

(See S. C., 11 Otto, 837-850.)

Evidence in ejectment—priority of lien—effect of sale—second lien.

1. In ejectment, evidence is admissible to show the title of the defendants, the creation of the liens, the transfers of the titles, or regularity of the proceedings by which the title was acquired or transmitted from one party to another.

2. Priority of lien gives priority of legal right.

3. A sale of property by one having only a subsequent lien, will not supersede or displace a prior lien held by another, and a sale in equity under a prior lien will not impair any rights which belong to the holder of the subsequent lien, if the latter duly asserts his rights in proper season.

4. Subsequent incumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree.

5. A decree of sale in equity is not void because a second incumbrancer is not made a party to the proceeding, and his lien remains in full force, notwithstanding a decree of sale entered pursuant to such proceeding.

[No. 288.]

Argued Apr. 29, 1880. Decided May 10, 1880.

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

This was an action of ejectment, brought in See 11 OTTO.

the court below by Howard, the plaintiff in error, to recover certain lots and blocks in the City of Milwaukee, occupied by the defendant Corporation.

The case is fully stated in the opinion.

Mr. H. M. Finch, for plaintiff in error.

Mr. John W. Cary, for defendants in error.

Mr. Justice Clifford delivered the opinion of the court:

Possession of the lands in controversy was held by the defendants at the time laid in the declaration, as the road-bed, depot site and other structures of their railroad, at the described locality, and the plaintiff brought ejectment to recover the premises, claiming title to the same by purchase at a sheriff's sale by virtue of a seizure to satisfy a judgment recovered in the name of Sebre Howard against the original Company owning and operating the railroad and under which both parties claim title.

Sufficient appears, to show that the Company became indebted to the judgment creditor in the sum of \$25,000, and gave him their promissory note for that amount. Payment being refused, he sued the same, and on May 1, 1858, recovered judgment for the amount. Execution in due form issued on the judgment, and the sheriff, by virtue thereof, seized and sold the property to the plaintiff, October 29, 1859, of the same year, as appears by the deed given in evidence.

Such a deed, it is claimed by the plaintiff, is, by the law of the State, made *prima facie* evidence that the title of the person, against whom the judgment was rendered and by virtue of which the sale and deed purport to have been made, in the lands and real estate described in the deed, passed to and vested in the grantee in such deed, and this without making other proof, either of the judgment or sale, than that furnished by the deed. Laws, Wis., 1869, 39; *Ehle v. Brown*, 31 Wis., 405, 412.

Title to the lands in controversy is also claimed by the defendants through a purchase pursuant to a prior lien made by a creditor of the Company, under whom they claim, at a sheriff's sale of a subsequent date, by virtue of an execution issued on a judgment docketed October 7, 1857, and the lawful deed of the sheriff executed to the creditor in pursuance of such sale. Without entering into details, suffice it to say that the judgment was rendered against the Company in that case for \$111,727.71, together with the costs of suit, and the evidence exhibited in the transcript shows that the title of the judgment in due form of law passed to the defendants by certain operative *mesne* assignments.

Suppose the law of the State to be such as is contended by the plaintiff; it is plain that it is as applicable to the purchase by the creditor under whom the defendants claim as to that under which plaintiff claims title.

Service was made, and the defendants appeared and filed an answer, denying each and every allegation in the complaint or declaration. Preliminary matters being settled, the parties went to trial, and the verdict and judgment were in favor of the defendants. Exceptions were filed by the plaintiff, and he sued out the present writ of error and removed the cause into this court for re-examination,

Since the cause was entered here, the plaintiff has assigned errors pursuant to the rule making that requirement: (1) Five of the assignments call in question the rulings of the circuit court in admitting evidence offered by the defendants. (2) Then follows the sixth assignment of error, which calls in question the ruling of the court that the title of the lands in controversy is in the defendants, and that the verdict of the jury should be in their favor. (3) Thirty-three requests for instruction were presented by the plaintiff, and he calls in question the ruling of the court in refusing each one of those requests.

When the plaintiff made the purchase under which he claims title, there were subsisting liens upon the property prior in date to the judgment for the satisfaction of which the sale was made, to wit: a mortgage dated August 17, 1857, executed by the original company to Bronson and Soutter to secure the payment of \$1,000,000, and a judgment in favor of Newcomb Cleveland, dated October 7, 1857, for the amount before described, and which was docketed on the day it was rendered.

Bonds to the amount of \$2,000,000 were issued by the Company, and June 21 of the next year they executed a mortgage upon its railroad and property to William Barnes as trustee, to secure the payment of those securities, and on the 11th of the next month they executed a supplemental mortgage to the same party for the same purpose. Interest having fallen due, which was not paid, the mortgage was foreclosed by advertisement, and on the 21st of May of the next year all the property, franchises and rights of the mortgagor were sold under the mortgage, and were bid off by the mortgagee in trust for the bondholders. By virtue of that sale, the bondholders and the mortgagee became the owners of the property, franchises and rights of the mortgagor; and they united two days later in organizing a corporation under the statutes of the State, which received the name of the Milwaukee and Minnesota Railroad Company, to which they transferred all the rights and interests they acquired by that purchase.

Enough appears, to show that the Bronson and Soutter mortgage covered the line of the road from Milwaukee to Portage City, and it appears that the mortgagees, December 9, 1859, filed a bill in the district court for the district to foreclose that mortgage, in which they made both the old Corporation and the new Company, together with Sebre Howard and the plaintiff in the present action, parties defendant in the suit. Somewhat protracted litigation followed, but it will be sufficient to say that it culminated in a decree of sale, with an order that if the successor Company should, before sale, pay into court certain sums of money, they should be let into possession of the road, rolling stock, and other property of the old Company from Milwaukee to Portage City, subject to prior liens. Pursuant to that order the new Company paid the specified sums into court, and on the same day took possession of the property and managed and operated it from that time until the same was sold to the defendants.

Other judgment creditors of the old Company, including Frederick P. James, on the 22d of April, 1863, filed a bill in the circuit court

against the successor Company, joining the old Company and Selah Chamberlain as parties respondent in the suit. What the bill prayed was that the sale to the new Company might be decreed fraudulent, and that the Company should be enjoined from exercising any control over the property and franchises mentioned in the mortgage. Hearing was had, and the bill was dismissed in the circuit court; but, on appeal to the Supreme Court, the decree of the circuit court was reversed, and the cause remanded for a decree in favor of the complainants.

It appears from the mandate that it was decreed that the foreclosure and sale of the mortgage be set aside and annulled as fraudulent, and that the new Company was perpetually enjoined from setting up any right or title under it to the railroad and other property sold under the mortgage, and that the mortgage remain only as security for bonds issued under it in the hands of *bona fide* holders without notice. Besides that, an order of sale was contained in the decree, but no sale of the railroad or property was ever made under that decree.

James became the assignee of the judgment rendered October 7, 1857, in favor of Cleveland, and on the 18th of April, 1866, he, the assignee, filed his bill in the circuit court against the successor Company to enforce the lien of that judgment, and to have the property covered by the lien sold to pay the judgment debt. Among other things, he set out the judgment, the mortgage, and the organization of the new Company, and alleged that the mortgage was fraudulent, and that the new Company was holding the property in fraud of the creditors of the original Company, and prayed that the property might be sold to satisfy the judgment, subject to certain prior liens and incumbrances.

Due process was served, and the respondent appeared and filed an answer. Litigation followed, which resulted in a decree that there was due to the complainant, as such assignee, \$98,801.51, and that the same was a lien and incumbrance as of the date of October 7, 1857, upon all the right, title and interest which the original Company had in and to the property situated between Milwaukee and Portage City. Provision was also made in the decree for the sale of all that portion of the railroad, the same being then in the possession of the successor Company, and that that Company and all persons claiming under it be barred from all equity of redemption. Explicit recitals were contained in the decree that the original Company had ceased to exist as a corporation, and that the new Company had succeeded to its property, subject to subsisting liens and incumbrances.

On the 2d of March, 1867, pursuant to that decree, a sale was made of the property, by the marshal, to the defendants for the sum specified in the transcript, and three days later the sale was confirmed by the circuit court, when the defendants received their deed of the premises, duly executed by the marshal. Demand of possession was made by the purchasers on the following day, which was duly surrendered by the occupants, and the defendants have continued to operate the road to the present time.

Separate exception was taken to the introduction of each of the documents offered by the defendants to prove the facts set forth in the preceding statement, and those exceptions

constitute the basis of the first five assignments of error. Without entering into details, suffice it to say in that regard, that the court is of the opinion that those assignments of error must be overruled, as it is clear that the entire evidence to which they relate was admissible either to show the title of the defendants, or to explain the changes made in the name of the Corporation, or the regularity of the judgments, or the creation of the liens, or the transfers of the titles, or regularity of the proceedings by which the title was acquired or transmitted from one party to another.

Suppose that is so; still it is insisted by the plaintiff that the circuit court erred in directing the jury to return a verdict for the defendants, as specified in the sixth assignment of error.

None of the facts were in dispute, nor was there any conflict of testimony. Nothing of the kind is pretended, as all the material facts were exhibited in the documents given in evidence, consisting of judicial proceedings, *mesne* conveyances, judicial sales and written assignments or conveyances, leaving nothing as an issue of fact to be determined by the jury.

Judges are forbidden to submit a question to the jury where there is no evidence to sustain the theory of the party making the request, nor are they any longer required to do so even when there is some evidence to support the theory, unless the evidence is of such a character that it would warrant the jury in finding a verdict in favor of the party presenting the request. *Imp. Co. v. Munson*, 14 Wall., 442, 448 [81 U. S., XX., 867, 872]; *Ryder v. Wombwell*, L. R. 4 Ex., 32.

Both parties set up a lien as the foundation of their title, and it is undeniable that the judgment, upon which the defendants rest their claim of title, was rendered and docketed so as to become a lien upon the premises in controversy more than six months earlier than that which constitutes the basis of the title claimed by the plaintiff. Nor can it benefit the plaintiff in this litigation that he first took the necessary steps to enforce his lien, unless he can show that by some means the prior lien of the defendants has been displaced or has become inoperative, which is not pretended. Priority of lien certainly gave priority of legal right, just as in the case of a first and second mortgage. Either may proceed in the case of mortgage, where the condition is broken, to foreclose; but if the second mortgagee proceeds first, his decree of foreclosure does not supersede or impair the rights of the first mortgagee, nor did the proceedings of the plaintiff to enforce the lien of his judgment have any effect whatever to supersede or displace the prior lien under which the defendants claim.

Concede that the judgment under which the defendants claim is prior in time and legal effect; still it is suggested by the plaintiff that it should have been enforced by seizure and sale instead of by a proceeding in equity.

Pending that litigation, the decree declaring the lien was appealed to this court, and this court, *Mr. Justice Nelson* giving the opinion, decided that judgments, by the law of the State, are liens on real estate, and that the judgment, being the one now in question, became a lien on the road from the time of its rendition, and that a sale under a decree in chancery and a con-

veyance in pursuance thereof, confirmed by the court, passed the whole of the interest of the Company, existing at the time of its rendition, to the purchaser. *R. R. Co. v. James*, 6 Wall., 750 [73 U. S., XVIII., 854].

Weighed in view of that decision, it is clear that the suggestion of the plaintiff cannot be adopted.

Failing in that, his next suggestion is that he is not bound by the decree, inasmuch as he was not made a party to the suit which resulted in the decree, to which several answers may be given: (1) That he was not a necessary party, even if within the jurisdiction. (2) That he was not within the jurisdiction, and did not ask to be made a party. (3) That the decree in the case, being a decree in equity, did not supersede or displace his lien. (4) That the decree left him still the right, as second lienholder, to redeem, which he may still do if his right is not lost by laches or lapse of time.

Much discussion of the mortgage to the trustee to secure the two millions of bonds is unnecessary, as it was subsequent to the judgment of the plaintiff. Nor is it necessary to add to what has already been remarked in respect to the foreclosure of the mortgage, as it left the judgment under which the sale to the plaintiff was enforced wholly unaffected as to priority and as to any rights accruing from priority. Evidence in that regard was not material to aid the alleged title of the defendants in any respect, except to show the origin of the new Company and the transfer of the property from the old Company to its successor.

Regular proceedings to foreclose the one million mortgage was also instituted; but there was no sale under that decree, the only result affected by it being to vest in the new Company the possession of the railroad and its appurtenances. By paying the amount ascertained as allowed by the court, the new Company acquired both the right of possession and the actual possession of the mortgaged property, and to that extent at least it stepped into the place of the old Company as mortgagor, and became by the decision of the court the owner of the equity of redemption.

Beyond doubt, such was the *prima facie* effect of the proceeding, but the possession and interest acquired by the new Company were, during all the time, subordinate and subject to subsisting prior liens and incumbrances, among which was the judgment of the plaintiff as enforced by the prior sale. Prior liens and incumbrances were not affected by that proceeding, nor is it of much materiality in the present controversy, except to show the relation which the new Company bears to the railroad and property in question.

Questions of various kinds arise in the case, but the main question throughout is: who holds the paramount legal title to the property which the plaintiff seeks to recover by his action of ejectment? and in determining that question it is evident that the controlling inquiry is: who has the prior lien? as it is clear that the sale of the property by one having only a subsequent lien will not supersede or displace a prior lien held by another; and it is equally clear that a sale in equity under a prior lien will not impair any rights which belong to the holder of the subsequent lien, if the latter duly asserts his

rights in proper season. Such propositions cannot be successfully controverted; but the plaintiff contends that, inasmuch as the new Company was enjoined from asserting any right or title to the property on account of the fraudulent character of the proceeding and, inasmuch as the plaintiff was not a party to the proceeding to enforce the prior judgment against the old Company, that the defendants did not acquire any superior legal rights by the sale under that decree.

Other suggestions of various kinds are made, to show that the sale under that decree is ineffectual to give effect to the lien secured by the judgment; but the principal one is, that the plaintiff was not made a party to the proceeding and has not had his day in court, in opposition to the final decision which ordered the sale. Mere equities are not involved in the controversy, but the court is required to deal with the strict legal rights of the parties.

Frequent reference is made in argument to the fact that the proceeding for the foreclosure of the larger mortgage was subsequently adjudged fraudulent, and to the injunction which followed; but it is, nevertheless, true that the new Company was duly organized, and that its actual existence as a corporation has been recognized in repeated instances by the courts in litigations of great importance. It was recognized as such in the proceeding to foreclose the smaller mortgage, and in the decree or order of the court in letting the new Company as such into the possession of the railroad and its property, and throughout the period, exceeding fourteen months, that its directors and agents possessed, controlled, managed and operated the railroad and all its fixtures and appurtenances. Public acts of the kind cannot be overlooked, and it was recognized in the proceeding to enforce the lien of the judgment under which the defendants claim title, both by the circuit court and the Supreme Court in three appeals here, as evidenced by the reported decisions of this court. *R. R. Co. v. Chamberlain*, 6 Wall., 748 [73 U. S., XVIII., 859]; *R. R. Co. v. James* [*supra*]; *James v. R. R. Co.*, 6 Wall., 752 [73 U. S., XVIII., 885].

Judicial recognitions of the kind are repugnant to the theory of the plaintiff, to which it may be added that it was the new Company that was in possession of the property when the proceeding was commenced to enforce the lien of the judgment under which the defendants claim title, and they were still in actual possession of the same when the first decree was entered.

Complaint is made by the plaintiff that he was not made a party to the proceeding, but the omission to make him a party did not displace any lien he had upon the property, nor did it give him any new or enlarged interest in the same. Coming to the question of priority of legal title, the court must look at the judgments from which the respective titles flow. In settling legal rights, the court must give the party superiority whose lien was first acquired and perfected by an appropriate proceeding.

By omitting to make the plaintiff a party to the equity proceeding to enforce their lien, the defendants did not deprive the plaintiff of any legal right, nor was he cut off from any equitable rights which under the law had accrued to

him in his position as a subsequent judgment creditor. Had the plaintiff been in possession of the premises when the decree was rendered and when the sale was made, he could not have been dispossessed by any process issued in the equity suit; the rule being that the writ of assistance cannot go against a stranger in a suit for foreclosure, and that the remedy of the party in such a case is ejectment.

Grant all that; and still it is suggested that the plaintiff lost his right to redeem which he could have exercised if the sale had been made at law; but it is not admitted that the suggestion as to loss of remedy is well founded, as it is clear that he might have had a remedy in equity after the sale as well as before. Equity in such a case is a convenient remedy, and it is obvious that the plaintiff could have filed his bill, and if there had been no other difficulty than priority of lien the court of equity would have granted him the right to redeem.

Subsequent incumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree; nor is that rule violated, in the least degree, when it is held that the title of the defendants is paramount, as that consequence flows from the fact that the lien of the judgment under which the defendants claim is prior to that under which the plaintiff claims his title. Whatever rights the plaintiff had prior to the sale in equity which gives the defendants the paramount title, he still has, wholly unimpeached by that sale or by any other cause, unless they are barred by lapse of time or laches.

Process against the plaintiff under that decree could not affect his rights, as he was not a party to the proceeding; consequently, the lien of his judgment still remained in full force. Even if the plaintiff had been made a party to that proceeding, the only effect would have been to cut off his equity of redemption; and as he was not made a party, his equity of redemption is not extinguished.

Authorities are scarcely needed to support these propositions, it being universally admitted that writs of assistance can only issue against parties affected by the decree, which is only saying that the execution cannot exceed the decree which it enforces; the rule being that the owner of property mortgaged which is directed to be sold can only be barred when he has had notice of the proceedings for its sale, if he acquired his interest prior to their institution. *Terrell v. Allison*, 21 Wall., 289, 292 [88 U. S., XXII., 634, 635].

Everybody admits the correctness of that rule; but it by no means follows that the decree of sale in equity is void because a second incumbrancer is not made a party to the proceeding, as it is clear that his lien remains in full force, notwithstanding the decree of sale entered pursuant to such a proceeding.

Tested by these considerations, it follows that the sixth assignment of error must be overruled.

Most of the material matters involved in the seventh assignment of errors have already been sufficiently examined. Many of the assignments of error under this number aimed to show that the circuit court erred in refusing to adopt the theory of the plaintiff, that certain portions of the premises in controversy occupied by the defendants for railroad tracks or as sites for their depot and other structures are not necessary for the

purposes suggested, or that the title to the same did not pass to the defendants. Careful efforts to examine these matters to the extent of the means exhibited in the transcript have been made, and it must suffice to say in that regard that the court is unable to perceive that it is shown that the circuit court erred materially in

any of those matters to the prejudice of the plaintiff.

Remarks already made cover all the other grounds of complaint, and are sufficient to show that there is no error in the record.

Judgment affirmed.

See 11 OTTO.

U. S., BOOK 25.

68

1085

END OF VOLUME 101.

CI UNITED STATES.

101 U. S. 1-6, 25 L. 979, NATIONAL BANK v. UNITED STATES.

Banks and banking.—Section 3413, revised statutes, imposing tax of 10 per cent. upon banks paying out notes of cities, etc., is constitutional as securing uniform currency, pp. 5, 6.

Approved in Legal-Tender Case, 110 U. S. 446, 28 L. 214, 4 S. Ct. 129, upholding constitutionality of legal-tender quality of treasury notes reissued under act of May 31, 1878.

Distinguished in *Manhattan Co. v. Blake*, 148 U. S. 426, 37 L. 509, 13 S. Ct. 645, where Federal tax upon bank deposits was held to include money of State; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 577, 39 L. 818, 15 S. Ct. 688, holding Federal law taxing interest on municipal securities, unconstitutional, because taxing power of State to borrow money.

United States.—Congress has power to provide uniform currency, and, to secure same, may restrain circulation of unauthorized notes, p. 6.

Approved in Legal-Tender Case, 110 U. S. 446, 28 L. 214, 4 S. Ct. 129, holding treasury notes reissued under act of May 31, 1878, legal tender.

Distinguished in *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 577, 39 L. 818, 15 S. Ct. 688, holding unconstitutional, Federal tax on interest on municipal securities, as limiting borrowing power of State.

Taxation.—Federal tax on banks paying out municipal notes is not on obligation itself, but circulation thereof as money, p. 6.

Cited and followed in *In re Aldrich*, 16 Fed. 372, holding merchants' certificates redeemable in goods not taxable under section 19 of act of February 8, 1875, because not payable in money.

Distinguished in *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 577, 39 L. 818, 15 S. Ct. 688, holding unconstitutional, Federal law taxing interest on municipal securities.

United States.—Circulation of State notes as money is against policy of United States, p. 6.

101 U. S. 7-15, 25 L. 820, *BABBITT v. FINN*.

Appeal and error.—Notice is necessary to perfect writ of error or appeal, unless appeal allowed in open court, p. 11.

Appeal and error.—Appeal bond, duly executed, is valid though omitting sureties' names in introduction, p. 13.

Cited in 38 Am. St. Rep. 704, note.

Appeal and error.—Affirmance of judgment fixes liability of sureties to appeal, without execution against principal, pp. 13, 14, 15.

Approved and followed in *Third Nat. Bank v. Gordon*, 53 Fed. 472, allowing execution against sureties on supersedeas, without suit; *Gordon v. Third Nat. Bank*, 56 Fed. 792, 796, 13 U. S. App. 554, sustaining motion for execution against sureties to appeal, and collecting cases; *Davis v. Patrick*, 57 Fed. 911, 912, 12 U. S. App. 629, where lower court failed to order execution of affirming judgment; *M'Claskey v. Barr*, 79 Fed. 419, reviewing cases, granting judgment against sureties, though principal's property but partly exhausted; *Trent v. Rhomberg*, 66 Tex. 254, 18 S. W. 512, construing prosecution of appeal "with effect" to mean "successfully;" *Bingham v. Mears*, 4 N. Dak. 451, 61 N. W. 813, 27 L. R. A. 263, where principal secured judgment by mortgage notes. See note in 38 Am. St. Rep. 714, 719.

Appeal and error.—As to obligee all obligors on appeal bond are principals, though not between themselves, pp. 14, 15.

Approved and followed in *Gordon v. Third Nat. Bank*, 56 Fed. 792, 796, 13 U. S. App. 554, sustaining motion for execution against sureties to appeal, and collecting cases; *Fuller v. Aylesworth*, 75 Fed. 703, 43 U. S. App. 657, where county was principal, obligee not bound to await tax levy; *M'Claskey v. Barr*, 79 Fed. 419, granting judgment against sureties where principal's property only partly exhausted; *Trent v. Rhomberg*, 66 Tex. 254, 18 S. W. 512, holding courts will do justice between two sets of sureties. Cited in *Fuller v. Aylesworth*, 75 Fed. 702, 43 U. S. App. 657, *arguendo*.

Appeal and error.—Sureties on appeal are not discharged by new bond for further appeal, pp. 13, 14.

Cited in 38 Am. St. Rep. 707, note, collecting cases.

Distinguished in *Nofsinger v. Hartnett*, 84 Mo. 558, where intermediate court, specifically named in bond, reversed, and Supreme court affirmed original judgment.

Appeal and error.—Nothing but reversal will discharge sureties on appeal bond, p. 13.

Followed in *Gordon v. Third Nat. Bank*, 56 Fed. 792, 796, 13 U. S. App. 554.

Appeal and error.—Sureties on appeal from special to general term are not liable for costs on further appeal, pp. 13, 14.

Cited in 38 Am. St. Rep. 716, note.

Appeal and error.—Sureties on appeal to court of appeals are alone responsible for costs thereof, p. 14.

Courts.—Appellant from District to Circuit Court must give new bond on appeal to Supreme Court, p. 15.

101 U. S. 16-22, 25 L. 980, *BOWDITCH v. BOSTON*.

Trial.—Whenever, in civil cases, evidence is insufficient to support verdict, judge should direct finding accordingly, p. 18.

Followed in *Randall v. Baltimore, etc.*, R. R., 109 U. S. 482, 27 L. 1005, 3 S. Ct. 324, action for injury to brakeman, alleging negligence of fellow employee; *Schofield v. Chicago, etc., Ry.*, 114 U. S. 619, 29 L. 225, 5 S. Ct. 1127, where plaintiff himself clearly established contributory negligence; *Ferguson v. Arthur*, 117 U. S. 490, 29 L. 982, 6 S. Ct. 865, collecting cases, directing verdict that bottled preparation of magnesia was dutiable as proprietary medicine; *Franklin Brass Co. v. Phoenix, etc., Co.*, 65 Fed. 776, 25 U. S. App. 119, where violation of fire insurance policy was indisputably proved; *Southern Pac. Co. v. Johnson*, 69 Fed. 565, 44 U. S. App. 1, collecting cases, reversing trial court for submitting to jury evidence too slight to justify verdict of negligence; *Travellers' Ins. Co. v. Selden*, 78 Fed. 290, 42 U. S. App. 253, where insured under accident policy died of apoplexy; *Smyth v. New Orleans, etc., Co.*, 93 Fed. 927, action to recover real estate involving evidence of title; *Gildersleeve v. Atkinson*, 6 N. Mex. 266, 27 Pac. 481, where only evidence submitted was incompetent; *Candelaria v. Atchison, etc.*, R. Co., 6 N. Mex. 284, 27 Pac. 503, where injury occurred on defendant's right of way; *United States v. Gumm*, 9 N. Mex. 616, 58 Pac. 399, action for conversion of timber; *Patton v. Southern Ry.*, 82 Fed. 985, 42 U. S. App. 567, dissenting opinion, majority deciding absence of guard-rail sufficient evidence for jury. Cited, *arguendo*, in *Hudson v. Charleston, etc., R. Co.*, 55 Fed. 256. Cited in 50 Am. Rep. 656, note.

Constitutional law.—At common law anyone may destroy property where necessary to check fire, and owner has no remedy, p. 18.

Followed in *Ralli v. Troop*, 157 U. S. 405, 39 L. 751, 15 S. Ct. 604, where burning ship was scuttled to protect port. Cited and approved in *Sentell v. New Orleans, etc., R. R.*, 166 U. S. 705, 41 L. 1172, 17 S. Ct. 696, holding State may, within police powers, limit right of property in dogs; *Phoenix Assur. Co. v. Fire Department*, 117 Ala. 649, 23 So. 848, 42 L. R. A. 472, upholding statute exacting penalty from fire insurance companies doing business without license. Cited in 47 Am. Dec. 208, note.

Constitutional law.—For commonwealth, individuals must suffer destruction of property or even life, rights of necessity being part of law, pp. 18, 19.

Rule applied in *Edgerly v. Concord*, 62 N. H. 20, 13 Am. St. Rep. 537, where city held not liable for injuries caused by firemen testing hydrant; *Moffitt v. Asheville*, 103 N. C. 258, 14 Am. St. Rep. 818, 9 S. E. 698, holding city not liable for tort of jailer; *Wallace v. Richmond*, 94 Va. 223, 26 S. E. 591, where plaintiff's liquor was destroyed by order of council before evacuation by Confederates. Cited in 32 Am. Rep. 620, note, and 30 Am. St. Rep. 401, note.

Constitutional law.—Massachusetts statute, providing compensation for property destroyed to check fire, gives as bounty, recourse otherwise non-existent, p. 19.

Courts.—Where local laws only are involved Supreme Court applies local jurisprudence like State court, p. 19.

Approved in *Grand Trunk Ry. v. Ives*, 144 U. S. 422, 36 L. 491, 12 S. Ct. 685, applying Michigan law of negligence as construed in Michigan courts.

Constitutional law.—State is solely competent, within police powers, to give compensation for property destroyed to check fires, p. 19.

Cited in 47 Am. Dec. 210, note.

Actions.—To charge city, where remedy is solely statutory, case must clearly fall within statute, p. 19.

101 U. S. 22-33, 25 L. 989, *MISSOURI v. LEWIS*.

Constitutional law.—Fourteenth amendment in prohibiting denial of equal protection of laws, contemplates persons and classes, and not local and municipal regulations which do not unjustly discriminate, p. 30.

Approved in *Hurtado v. California*, 110 U. S. 534, 28 L. 238, 4 S. Ct. 120, sustaining conviction under California statute, without indictment; *Pembina Mining Co. v. P.*, 125 U. S. 190, 31 L. 654, 8 S. Ct. 741, upholding right of State to exact license from foreign corporation maintaining office therein; *Marchant v. Pennsylvania R. R.*, 153 U. S. 389, 38 L. 756, 14 S. Ct. 897, confirming State decision denying damages against elevated railroad, for noise and dust; *Moore v. Missouri*, 159 U. S. 678, 40 L. 303, 16 S. Ct. 181, and *In re Boggs*, 45 Fed. 476, both upholding State statutes providing longer term upon second conviction; *Eldridge v. Trezevant*, 160 U. S. 469, 40 L. 499, 16 S. Ct. 349, upholding State law subjecting lands to servitude for levee without compensation; *Atchison, etc., R. R. v. Matthews*, 174 U. S. 105, 19 S. Ct. 613 (see dissenting opinion in 174 U. S.

116, 19 S. Ct. 617), collecting cases, upholding law adding attorneys' fees to damages against railroads for fires; *In re Langford*, 57 Fed. 575, invalidating arrest under dispensary law directed solely against carriers; *State v. Brown*, 19 Fla. 607, upholding law requiring local voters' signatures to application for liquor license; *Ex parte Swann*, 96 Mo. 51, 9 S. W. 12, upholding local license law not extending to sale of wine for sacramental purposes. Cited in 25 Am. St. Rep. 873, note.

Constitutional law.—Fourteenth amendment, guaranteeing equal protection of the laws, permits diversity in jurisdiction of State courts as to subject-matter, amount, and finality of decision, providing all persons within respective jurisdictions have equal right, in like cases, to secure redress, p. 30.

Approved in *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 169, 41 L. 392, 17 S. Ct. 67, holding appeal from supervisors' finding of benefits of irrigation, within legislative discretion; *St. Louis, etc., Ry. v. Worthen*, 52 Ark. 539, 13 S. W. 257, 7 L. R. A. 376, where no appeal given from valuation of railroad commissioners; *Hayes v. Missouri*, 120 U. S. 72, 30 L. 580, 7 S. Ct. 352, upholding provision for additional State challenges in cities exceeding certain population; *Chappell Chemical, etc., Co. v. Sulphur, etc., Co.*, 172 U. S. 475, 19 S. Ct. 269, where Maryland statute provided distinct rule for jury trials in Baltimore; *State v. Cram*, 84 Me. 275, 24 Atl. 854, upholding law endowing municipal courts with jurisdiction exceeding justice courts; *Sullivan v. Haug*, 82 Mich. 553, 46 N. W. 796, 10 L. R. A. 265, upholding statute denying appeal from Detroit police court in certain cases; *Taggart v. Claypool*, 145 Ind. 597, 44 N. E. 20, 32 L. R. A. 588, upholding jurisdiction of council to annex territory, though provision for appeal void; *State v. Saunders*, 66 N. H. 88, 25 Atl. 595, 18 L. R. A. 656, upholding statute conferring jurisdiction in equity in liquor nuisance cases; *In re McKee*, 19 Utah, 235, 57 Pac. 24, upholding law providing for jury of eight in certain cases. Approved in *Kentucky R. R. Tax Cases*, 115 U. S. 338, 29 L. 419, 6 S. Ct. 64, permitting special assessment laws for certain classes of property; *State v. Berlin*, 21 S. C. 296, 53 Am. Rep. 680, where statute prohibited sale of liquor outside of towns. Cited in *Robinson v. Oceanic, etc., Co.*, 112 N. Y. 325, 19 N. E. 627, 2 L. R. A. 638, without special application. See 25 Am. St. Rep. 887, note.

Constitutional law.—State may, without violating fourteenth amendment, subdivide territory for municipal purposes and regulate local government thereof, p. 30.

Approved in *Kelly v. Pittsburg*, 104 U. S. 80, 26 L. 659, upholding assessment of farm in city limits by usual method, though excessive; *State v. Broadbelt*, 89 Md. 584, 43 Atl. 775, upholding sanitary

regulations governing dairymen of certain localities; *Guild v. First Nat. Bank*, 4 S. Dak. 583, 57 N. W. 504, upholding law providing for higher rate of interest in certain counties.

Constitutional law.—Fourteenth amendment does not secure same laws and remedies, either in different States or same State, providing all are given same protection of laws enjoyed by others in same place and under like circumstances; hence Missouri act giving one court appellate jurisdiction from certain counties and another court from other counties does not violate this amendment, p. 31

Approved in *Hurtado v. California*, 110 U. S. 535, 28 L. 238, 4 S. Ct. 121, upholding provision for prosecution by information without indictment; *State v. Boswell*, 104 Ind. 543, 4 N. E. 677, to same effect; *Hallinger v. Davis*, 146 U. S. 322, 323, 36 L. 990, 991, 13 S. Ct. 108, reviewing cases, upholding statute dispensing with jury on plea of guilty; *State v. Brett*, 16 Mont. 367, 40 Pac. 876, upholding statute providing for prosecution by leave of court without preliminary examination; *Brown v. New Jersey*, 175 U. S. 175, 177, upholding provision for "struck juries" in certain cases, and permitting reduction of challenges in struck-jury cases; *Lewis v. Brandenburg*, — Ky. —, 48 S. W. 979, permitting different rules for annexation by cities of different classes; *Holden v. Hardy*, 169 U. S. 387, 42 L. 789, 18 S. Ct. 386, upholding eight-hour law operative solely against miners' employers; *State v. Broadbelt*, 89 Md. 580, 43 Atl. 773, upholding sanitary regulation operative against dairymen; *Davis v. State*, 68 Ala. 64, 44 Am. Rep. 133, upholding law regulating removal of cotton operative in certain counties only; *State v. Moore*, 104 N. C. 720, 17 Am. St. Rep. 701, 10 S. E. 145, upholding statute forbidding sale in certain counties of seed cotton unless evidenced by writing; *State v. Berlin*, 21 S. C. 296, 53 Am. Rep. 680, upholding liquor license law prohibiting sale in country districts; *State v. Burgdoerfer*, 107 Mo. 36, 17 S. W. 656, 14 L. R. A. 857, and n., upholding statute against bookmaking and pool-selling; *Northern Pac. R. R. v. Barnes*, 2 N. Dak. 338, 51 N. W. 393, affirming right of legislature to exact percentage on railroad earnings in lieu of taxes; *Guild v. First Nat. Bank*, 4 S. Dak. 583, 57 N. W. 504, upholding law permitting higher rate of interest in certain counties; *People v. Havnor*, 149 N. Y. 205, 52 Am. St. Rep. 713, 43 N. E. 544, 31 L. R. A. 692, upholding statute against barbering on Sunday except at certain places; *Dowdell, Petitioner*, 169 Mass. 389, 61 Am. St. Rep. 292, 47 N. E. 1034, upholding commitment of insane person, regular under State law; *State v. Call*, 121 N. C. 647, 28 S. E. 518, upholding medical license statute exempting certain classes of physicians; *Brown's case*, 173 Mass. 499, 53 N. E. 998, upholding law providing for commitment for contempt

in certain districts. Cited and approved in *State v. Pennoyer*, 65 N. H. 115, 18 Atl. 880, 5 L. R. A. 711, holding unconstitutional, medical license law exempting certain physicians for mere length of residence; *South, etc., Alabama R. R. v. Morris*, 65 Ala. 201, holding unconstitutional, law providing attorney's fee only when claimant wins appeal against railroad; *Railroad Tax Case*, 8 Sawy. 302, 13 Fed. 773, invalidating statute providing for deduction of mortgage from assessed value of all property except railroads; *Caldwell v. Wilson*, 121 N. C. 459, 28 S. E. 558, where railroad commissioner was suspended by governor, reviewing authorities as to meaning of "due process of law;" *Sturtevant v. Armsby Co.*, 66 N. H. 559, 49 Am. St. Rep. 628, 23 Atl. 368, extending Illinois plaintiff judicial protection enjoyed by New Hampshire litigants; *Apex, etc., Co. v. Garbade*, 32 Or. 589, 54 Pac. 367, construing "equal protection of the law" as referring to legislative rather than judicial action; dissenting opinion in *Carleton v. Rugg*, 149 Mass. 563, 22 N. E. 59, 5 L. R. A. 199, majority upholding law authorizing abatement as nuisance, of illicit liquor shop upon petition of ten voters. Cited in 23 Am. St. Rep. 27, note, and 25 Am. St. Rep. 884, note.

101 U. S. 34-37, 25 L. 948, *ARTHUR v. DODGE*.

Statutes.—Revised statutes are legislative declaration of what statute law was December 1, 1873, and, when clear, are final, p. 36.

Followed in *Viotor v. Arthur*, 104 U. S. 499, 26 L. 634, where certain dutiable goods were clearly classified by revised statutes; *Sixty-Five Terra Cotta Vases, etc.*, 21 Blatchf. 514, 18 Fed. 510, reconciling apparently conflicting statutory clauses to give effect to each.

Customs duties.—Tin-plates are dutiable as manufactures of metals within meaning of section 2503, revised statutes, p. 36.

Customs duties.—"Percussion caps, watches and jewelry, and other articles of ornament, made of metal," are manufactures of metal, within sections 2503, 2504, revised statutes, p. 36.

Customs duties.—Protest against payment of duties must be sufficiently specific to apprise collector of true nature of objection, p. 37.

Approved in *Heinze v. Arthur*, 144 U. S. 34, 36 L. 335, 12 S. Ct. 606, as to sufficiency of description of goods mentioned in protest; *Herman v. Schell*, 18 Fed. 892, where "prospective protest" was signed by H. H. and goods imported by H. H. & Co.; *In re Collector of Customs*, 55 Fed. 277, 14 U. S. App. 145, holding that board of appraisers cannot reverse collector on grounds not stated in protest.

101 U. S. 37-43, 25 L. 898, *THE FLORIDA*.

War.—Capture of ship in neutral waters is valid as between belligerents and their subjects, p. 42.

War.—Neutral sovereign whose territory is violated has right to restitution of capture, p. 42.

War.—Title of captured ship vests primarily in captor's government, his rights resting upon local laws, p. 42.

War.—Disavowal of capture by government concludes judiciary against theory that title ever passed, p. 42.

Action.—No action can be supported by illegal act, p. 43.

Not cited.

101 U. S. 43-51, 25 L. 822, *NATIONAL BANK v. HALL*.

Contracts.—Where misunderstanding exists as to terms of contract, neither party is liable, p. 49.

Followed in *Breckinridge v. Crocker*, 78 Cal. 537, 21 Pac. 181, where misunderstanding existed as to extent of land contracted for; *Edichal Bullion Co. v. Columbia, etc., Co.*, 87 Va. 646, 651, 13 S. E. 101, 103, where uncertainty existed as to time of payment.

A contract, if a unit, uncertain in one particular, is not binding, p. 50.

Followed in *Breckinridge v. Crocker*, 78 Cal. 537, 21 Pac. 181, where extent of land under contract was uncertain.

Contract.—Acceptance, varying terms of offer, is rejection, p. 50.

Approved in *Minneapolis, etc., Ry. v. Columbus, etc., Mill*, 119 U. S. 151, 30 L. 377, 7 S. Ct. 169, and *Davenport v. Newton*, 71 Vt. 21, 42 Atl. 1090, both holding such acceptance discharges offer; *Arthur v. Gordon*, 37 Fed. 560, holding invalid, acceptance of offer, preceded by counter proposal; *Kleinhaus v. Jones*, 68 Fed. 749, 37 U. S. App. 185, holding court may not disregard variation as of minor importance; *Breckinridge v. Crocker*, 78 Cal. 537, 21 Pac. 181, where offer was for "balance of Merced town property," and acceptance of "offer for Merced property;" *Wristen v. Bowles*, 82 Cal. 87, 22 Pac. 1137, where nineteen letters, introduced to prove contract, failed to show final consensus; *Barrow Steamship Co. v. Mexican, etc., R. Co.*, 134 N. Y. 24, 31 N. E. 264, 17 L. R. A. 362, where offer to transport passengers not clearly accepted as to number conditioned; *Egger v. Nesbitt*, 122 Mo. 676, 43 Am. St. Rep. 602, 27 S. W. 387, where offer of quitclaim accepted "providing other deeds turned over;" *Flomerfelt & Co. v. Hume Bros.*, 11 Tex. Civ. App. 32, 31 S. W. 680, where acceptance of offer to pay debt of another in specified installments, exacted part cash; *Morrell & Co. v. New England Fire Ins. Co.*, 71 Vt. 286, 44 Atl. 359, where

plaintiff returned drafts for alteration, and later asked their return; *Eggleston v. Wagner*, 46 Mich. 620, 623, 10 N. W. 42, 43, where partner's offer of interest in business was accepted after acquisition of further interest; *Clark v. Burr*, 85 Wis. 655, 55 N. W. 403, where acceptance provided for deduction of insurance from price, building being burned; *Tousey v. Etzel*, 9 Utah, 336, 34 Pac. 293, holding broker's commission contract not satisfied by arranging sale of option; *Edichal Bullion Co. v. Columbia, etc., Co.*, 87 Va. 651, 13 S. E. 103, where uncertainty existed as to time of performance. See 32 Am. Rep. 51, note.

Contracts.—Certainty of parties is essential to contract, and new parties cannot be imported or substituted, p. 50.

Approved in *Crittenden v. Armour, etc., Co.*, 80 Iowa, 223, 45 N. W. 889, holding substitution of new person in syndicate purchase, fatal *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 641, 49 U. S. App. 565, where change of beneficiaries was held to constitute new contract.

Distinguished in *Horst v. Røehm*, 84 Fed. 568, holding that retirement of partner does not terminate firm contracts.

101 U. S. 51-67, 25 L. 993, *MANUFACTURING CO. v. TRAINER*.

Trademarks and tradenames.—Anyone may adopt device not already appropriated, as trademark, to indicate origin and genuineness of product for protection of himself and public, p. 53.

Approved in *Columbia Mill Co. v. Alcorn*, 150 U. S. 463, 37 L. 1146, 14 S. Ct. 152, denying trademark in "Columbia" because previously in use; *Metcalf v. Brand*, 86 Ky. 345, 9 Am. St. Rep. 289, 5 S. W. 778, similarly holding regarding "Lexington" mustard; *Pepper v. Labrot*, 8 Fed. 39, holding name of distillery does not indicate origin of whiskey; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. 783, denying trademark in "LL," merely indicating grade of sheetings; *Laughman's Appeal*, 128 Pa. St. 19, 18 Atl. 416, 5 L. R. A. 601, holding "Sonman" geographical name not distinctive as to origin. Cited in notes in 47 Am. Dec. 287, and 17 Am. St. Rep. 499.

Distinguished in *Higgins v. Keuffel*, 140 U. S. 433, 35 L. 472, 11 S. Ct. 733, holding that mere label is not trademark.

Trademarks and tradenames.—Exclusive use of trademark will be protected by allowance of damages, injunction or accounting for profits, p. 53.

Approved in *Estes v. Worthington*, 24 Blatchf. 373, 31 Fed. 156, protecting "Chatterbox," as indicating distinctive origin of books; *Improved Fig-Syrup Co. v. California Fig. etc., Co.*, 54 Fed. 177, 7 U. S. App. 588, protecting "Syrup of Figs;" *Feder v. Benkert*, 70 Fed. 616, 44 U. S. App. 99, protecting use of "C. B. & Son" after "C. B." bought "Son's" interest, not being misrepresentation; *Investor Pub. Co. v. Dobinson*, 72 Fed. 608, enjoining "Investor,"

"published by Investor Publishing Co.," as infringing "United States Investor;" *Handy v. Commander*, 49 La. Ann. 1128, 22 So. 235, protecting use of "Aromatic Cocktail Bitters" as trademark; *Symonds v. Jones*, 82 Me. 311, 17 Am. St. Rep. 489, 19 Atl. 821, 8 L. R. A. 572, protecting purchaser against use by vendor of trademarks sold with business; *Leggett, etc., Tobacco Co. v. Reid, etc., Co.*, 104 Mo. 60, 24 Am. St. Rep. 315, 15 S. W. 844, protecting "Star" tag on plug tobacco against infringement by "Buzz Saw;" *Vulcan v. Myers*, 139 N. Y. 368, 34 N. E. 995, holding that owner need not await substantial damages to have relief. Approved in *Manhattan Medicine Co. v. Wood*, 108 U. S. 223, 27 L. 708, 2 S. Ct. 439, refusing to protect trademark containing misrepresentation; *Pepper v. Labrot*, 8 Fed. 39, holding "Old Oscar Pepper Distillery," indicates place of distilling and not distiller. Cited, arguendo, in *California Fig-Syrup Co. v. Stearns*, 67 Fed. 1013, and *State v. Hagen*, 6 Ind. App. 171; 33 N. E. 224.

Trademarks and tradenames.—Object of trademark being protection of both public and manufacturer, words tending to give monopoly, or merely generic or descriptive of nature or quality rather than origin of product, cannot be appropriated, p. 54.

Approved and applied in the following cases, holding words in question descriptive: *L. H. Harris Drug Co. v. Stucky*, 46 Fed. 625, "Cramp Cure;" *Bennett v. M'Kinley*, 65 Fed. 506, 26 U. S. App. 496, "Instantaneous Tapioca;" *California Fig-Syrup Co. v. Stearns & Co.*, 73 Fed. 815, 43 U. S. App. 234, 33 L. R. A. 58, "Syrup of Figs;" *Ball v. Siegel*, 116 Ill. 143, 56 Am. Rep. 766, 4 N. E. 668, "health-preserving" corsets; *Alff v. Radam*, 77 Tex. 540, 19 Am. St. Rep. 793, 14 S. W. 164, 9 L. R. A. 149, and n., "Microbe Killer;" *Gessler v. Grieb*, 80 Wis. 27, 27 Am. St. Rep. 24, 48 N. W. 1100, "Headache Wafers;" *Goodyear Co. v. Goodyear, etc., Co.*, 128 U. S. 604, 32 L. 537, 9 S. Ct. 168, "Goodyear Rubber" as indicating process of manufacture; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 547, 548, 34 L. 1003, 1004, 11 S. Ct. 400, affirming S. C., 31 Fed. 783, 785, 788, 789, "LL" used to designate quality of sheetings; *Beadleston, etc. v. Cooke, etc., Co.*, 74 Fed. 231, 46 U. S. App. 18, "Imperial" used in connection with trademark to indicate grade of beer; *Scott v. Standard Oil Co.*, 106 Ala. 490, 19 So. 75, 31 L. R. A. 378, "Fire-Proof," as indicating quality of oil. Cited and approved in *Brown Chemical Co. v. Meyer*, 139 U. S. 542, 35 L. 248, 11 S. Ct. 626, affirming S. C., 31 Fed. 454, holding "Iron Bitters" merely descriptive, and surname not subject to appropriation as against others of same name; *Coats v. Merrick Thread Co.*, 149 U. S. 572, 37 L. 852, 13 S. Ct. 969, affirming S. C., 36 Fed. 325, 1 L. R. A. 617, denying trademark in numerals and "Best Six Cord," designating quality and size; *Singer Mfg. Co. v. Stanage*, 2 McCrary, 512, 6 Fed. 279, denying exclusive use of "Singer" on expiration of patent; *Wilcox, etc., Machine Co. v. Gibbens Frame*, 21 Blatchf. 434, 17

Fed. 625, denying exclusive right to machine frame formed like "G," after patent expired; *Koehler v. Sanders*, 122 N. Y. 73, 25 N. E. 236, 9 L. R. A. 578, holding "International" generic; *Columbia Mill Co. v. Alcorn*, 150 U. S. 463, 37 L. 1146, 14 S. Ct. 152, denying exclusive right to "Columbia;" *Humphreys, etc., Medicine Co. v. Hilton*, 60 Fed. 758, denying trademark in number of remedy coupled with name of ailment; *Burton v. Stratton*, 12 Fed. 700, collecting cases, protecting use of "Twin Brothers' Yeast" by purchaser of name and business; *Hygeia, etc., Co. v. Hygeia, etc., Co.*, 70 Conn. 533, 40 Atl. 540, holding "Hygeia" not descriptive.

Distinguished in *Menendez v. Holt*, 128 U. S. 520, 32 L. 527, 9 S. Ct. 144, protecting "La Favorita" as indicating select flour specially approved by vendor, and *Metcalf v. Brand*, 86 Ky. 344, 9 Am. St. Rep. 288, 5 S. W. 778, holding geographical name may acquire secondary meaning and indicate origin of manufacture.

Trademarks and tradenames.—Letters or figures indicative of quality, cannot be appropriated as trademark, p. 55.

Cited and rule applied in *Deering Harvester Co. v. Whitmay, etc., Co.*, 91 Fed. 378, 379, 62 U. S. App. 693, 694, affirming S. C., 86 Fed. 765, denying trademark in letters and figures on various parts of machines; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 657, where numbers indicated size and letters quality. Cited and approved in *Scott v. Standard Oil Co.*, 106 Ala. 487, 19 So. 74, 31 L. R. A. 377, holding "Fire-Proof" merely indicative of quality; *Royal Baking, etc., Co. v. Sherrell*, 93 N. Y. 334, 336, 45 Am. Rep. 229, 231, where "Royal" was used to indicate grade of flavoring extract; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. 789, to point that mere user will not establish right to letters indicating quality. Cited, arguendo, in *Burton v. Stratton*, 12 Fed. 700, 702, reviewing cases. Cited in notes in 47 Am. Dec. 295, 34 Am. Rep. 598, and 37 Am. Rep. 366.

Distinguished in *Shaw Stocking Co. v. Mack*, 21 Blatchf. 6, 8 12 Fed. 711, 713, protecting arbitrary combination of numerals used to distinguish manufacture, and *Lawrence Mfg. Co. v. Lowell, etc., Mills*, 129 Mass. 326, 37 Am. Rep. 363, protecting arbitrary combination of numerals in connection with other devices. Qualified in *American, etc., Button Co. v. Anthony*, 15 R. I. 340, 2 Am. St. Rep. 900, 5 Atl. 628, protecting numerals with no acquired meaning, arbitrarily appropriated to indicate styles.

Trademarks and tradenames.—Equity will not intervene to protect trademark where similarity alleged is not calculated to deceive, p. 56.

Approved in *Pratt Mfg. Co. v. Astral, etc., Co.*, 27 Fed. 495, denying exclusive right to "Astral Oil;" *Richter v. Anchor Remedy Co.*, 52 Fed. 459, holding black anchor not infringement of red one, other marks being dissimilar; *Dennison Mfg. Co. v. Thomas*

Mfg. Co., 94 Fed. 656, holding essence of wrong, sale of goods as those of another; *Ball v. Siegel*, 116 Ill. 146, 56 Am. Rep. 769, 4 N. E. 670, declining to interfere where ordinary attention distinguishes difference.

Trademark is acquired by original application to some product of device not already used to designate such product, priority of adoption conferring exclusive right as to particular class of products to which it is applied, per Clifford, J., dissenting, p. 57.

Cited, *arguendo*, in *Schneider v. Williams*, 44 N. J. Eq. 394, 14 Atl. 814.

Trademarks and tradenames.—Phrases, or even words or letters in common use, may be adopted if not already employed by another to designate similar articles, per Clifford, J., dissenting, p. 59.

Approved in *Shaw Stocking Co. v. Mack*, 21 Blatchf. 7, 12 Fed. 712, protecting arbitrary combination of numerals.

Trademarks and tradenames.—Equity will relieve against infringement of trademark without proof of actual deception if resemblance be likely to deceive, per Clifford, J., dissenting, p. 63.

Followed in *Vulcan v. Myers*, 139 N. Y. 368, 34 N. E. 905, protecting "Vulcan Paraffin Matches," and *Liggett, etc., Tobacco Co. v. Reed, etc., Co.*, 104 Mo. 60, 24 Am. St. Rep. 315, 15 S. W. 844, both holding "Buzz Saw" tobacco tag so resembled "Star."

Trademarks and tradenames.—To infringe trademark, similarity of marks need not be such as to deceive when side by side, per Clifford, J., dissenting, p. 64.

Approved in *Liggett, etc., Tobacco Co. v. Hynes*, 20 Fed. 884, protecting star and device affixed to plug tobacco; *Avery v. Meikle*, 81 Ky. 109, both granting relief where indicia accompanying trademark were fraudulently imitated. See 47 Am. Dec. 296, note.

Trademark is infringed by copy of substantial portion thereof, per Clifford, J., dissenting, p. 65.

Followed in *Harper v. Holman*, 84 Fed. 225, restraining use of certain title to book.

101 U. S. 68-71, 25 L. 876, *TRUST CO. v. NATIONAL BANK.*

Banks and banking.—Defense exists to note given bank to secure credit as depositor, to extent of deposit on hand, p. 69.

Bills and notes.—Guaranty of bill or note does not constitute commercial negotiation thereof, p. 70.

Followed in *Omaha Nat. Bank v. Walker*, 2 McCrary, 570, 5 Fed. 403, where note was "transferred and collection guaranteed." and *Eastern, etc., Bank v. St. Johnsbury, etc., R. Co.*, 40 Fed. 426, holding guaranty of interest on negotiable bonds, not itself negotiable.

Distinguished in *Louisville Trust Co. v. Louisville, etc., R. Co.*, 75 Fed. 458, 43 U. S. App. 550, where negotiable bonds were payable to bearer; *Cover v. Myers*, 75 Md. 424, 32 Am. St. Rep. 402, 23 Atl. 853, holding separate guaranty of note does not affect indorsement; *Pattillo v. Alexander*, 96 Ga. 72, 22 S. E. 651, 29 L. R. A. 620, holding payee who indorses guaranty of attorney's fees, entitled to notice as indorser.

A guaranty contract, if complete, raises no presumption of further contract, pp. 70, 71.

Denied in *Dunham v. Peterson*, 5 N. Dak. 419, 57 Am. St. Rep. 561, 67 N. W. 295, 36 L. R. A. 236, and n., holding signed guaranty on note constitutes indorsement. Questioned in *Word v. Elwood*, 90 Tex. 131, 37 S. W. 415, decided on statutory grounds.

Bills and notes.—Assignee takes only rights of assignor, but indorsement creates new contract, p. 71.

Followed in *Omaha Nat. Bank v. Walker*, 2 McCrary, 570, 5 Fed. 403, where note was "transferred," but not indorsed in regular form; *Thomson-Houston Elec. Co. v. Capitol, etc., Co.*, 56 Fed. 854, holding transfer without indorsement is not negotiation; *De Hass v. Roberts*, 59 Fed. 856, holding "assignment and transfer," not negotiation; *Spinning v. Sullivan*, 48 Mich. 9, 11 N. W. 759, holding note not regularly indorsed open to defense if mistake in amount; *Haydon v. Nicoletti*, 18 Nev. 299, 3 Pac. 477, where note was indorsed by but one of two payees; *Davis v. Sittig*, 65 Tex. 501, admitting defense of fraud where lost note was assigned; *Taliaferro v. First Nat. Bank*, 71 Md. 209 17 Atl. 1037, where Virginia consols were hypothecated, with assignment and power of sale; *Goshen Nat. Bank v. Bingham*, 118 N. Y. 355, 16 Am. St. Rep. 767, 23 N. E. 181, 7 L. R. A. 598, and n., collecting cases, allowing defense of fraud, by maker, to unindorsed check; *Pavey v. Stauffer*, 45 La. Ann. 361, 12 So. 515, 19 L. R. A. 721, admitting defense to note transferred before, but indorsed after notice thereof; *More v. Finger*, — Cal. —, 58 Pac. 324, holding signed receipts indorsed on note by payee do not negotiate; *Pickering v. Cording*, 92 Ind. 309, 47 Am. Rep. 147, holding ineffectual mere delivery of note payable to maker with signed financial statement indorsed; *Hatch v. Barrett*, 34 Kan. 230, 8 Pac. 134, holding indorsement "assigning without recourse," not commercial indorsement.

101 U. S. 71-87, 25 L. 950, THOMAS v. RAILROAD CO.

Railroad charters authorizing contracts with other companies for transportation of goods or passengers, do not authorize sale or lease of entire road and franchises, p. 80.

Approved in *Central Transp. Co. v. Pullman, etc., Co.*, 139 U. S. 43, 35 L. 62, 11 S. Ct. 482, where company with power to lease cars attempted lease of whole plant; *Oregon Ry. v. Oregonian Ry.*, 130

U. S. 28, 32 L. 842, 9 S. Ct. 414, applied to general railroad incorporation law of Oregon in equally broad terms. Cited, *arguendo*, in *Taylor v. Philadelphia, etc., R. Co.*, 7 Fed. 391, *Railroad v. Furnace Co.*, 37 Ohio St. 331, 41 Am. Rep. 515, and *Street Ry. v. Ferguson*, 9 Tex. Civ. App. 619, 29 S. W. 65. See 35 Am. St. Rep. 402, 403, note, and 75 Am. Dec. 550, note.

Corporations.—Though what is fairly implied by statute is as much granted as what is expressed, charter of corporation is measure of its powers, and enumeration thereof implies exclusion of all others, p. 82.

Approved and rule applied in *Green Bay, etc., R. R. v. Union, etc., Co.*, 107 U. S. 100, 27 L. 314, 2 S. Ct. 223, holding whatever is fairly incidental to charter and general laws applicable, is not prohibited; *Pennsylvania Co. v. St. Louis, etc., R. R.*, 118 U. S. 307, 308, 30 L. 91, 6 S. Ct. 1101, 1102, where power to receive lease or guarantee rent was not granted; *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 25, 26, 32 L. 842, 9 S. Ct. 413, reversing S. C., 10 Sawy. 484, 23 Fed. 241, denying that articles of association authorizing lease, together with act of incorporation, constitute charter; *Central Transp. Co. v. Pullman, etc., Co.*, 139 U. S. 43, 35 L. 62, 11 S. Ct. 482, holding power to lease cars does not authorize lease of whole plant; *Snell v. Chicago*, 152 U. S. 199, 38 L. 411, 14 S. Ct. 492, limiting power of alienation by plankroad company under enabling statute, to life estate; *American Union Tel. Co. v. Union, etc., Ry.*, 1 McCrary, 201, 1 Fed. 753, holding unauthorized, lease by railroad of complete telegraph equipment; *Taylor v. Philadelphia, etc., R. Co.*, 7 Fed. 390, enjoining issue of bonds not authorized by charter; *Cass v. Manchester, etc., Co.*, 9 Fed. 641, denying right of private manufacturing corporation to lease plant; *Mackintosh v. Flint, etc., R. Co.*, 34 Fed. 615, enjoining purchase of railroad not authorized by Michigan statutes; *Louisville, etc., R. Co. v. Ohio Valley, etc., Co.*, 69 Fed. 434, holding express authorization to guaranty, negatives implication of guaranty powers from other sections; *Ross-Meehan Brake, etc., Co. v. Southern, etc., Co.*, 72 Fed. 965, permitting subscriber to unauthorized increase of stock, to plead ultra vires; *Tolman v. New Mexico, etc., Co.*, 4 Dak. 13, 22 N. W. 508, where corporation held unauthorized to purchase stock; *Cairo v. Bross*, 101 Ill. 479, invalidating ordinance licensing "merchants" where charter permitted license of specified classes; *First M. E. Church v. Dixon*, 178 Ill. 270, 52 N. E. 891, holding power to hold property "for religious purposes" excludes business block; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 141, 19 Am. St. Rep. 485, 25 N. E. 265, 9 L. R. A. 710, holding purchase by bank of cotton futures not authorized; *Goodland v. Bank*, 74 Mo. App. 370, denying right of Missouri savings bank to invest in bank stock; *George v. Nevada Central R. R.*, 22 Nev. 238, 38 Pac. 441, denying authority of railroad to contract for expert mining report; *Bowman Dairy Co. v. Mooney*, 41 Mo. App.

673, holding void contract of dairy company against engaging in oyster business; *Chicago Gas-Light Co. v. Peoples, etc., Co.*, 121 Ill. 546, 2 Am. St. Rep. 135, 13 N. E. 175, denying that power to make and sell gas implies power to transfer that privilege; *Weston v. Estey*, 22 Colo. 344, 45 Pac. 370, holding bank incapable of mining contract; *State v. Lincoln Trust Co.*, 144 Mo. 587, 588, 46 S. W. 598, 599, holding general checking business not implied from "powers usually exercised by trust companies;" *Penley v. Auburn*, 85 Me. 280, 27 Atl. 159, 21 L. R. A. 659, holding city contract to remove street obstructions ultra vires; *Davis v. Old Colony R. R.*, 131 Mass. 269, 41 Am. Rep. 232, holding guaranty by railroad or organ company of festival expenses not authorized, reviewing cases; *Heidelberg v. St. François Co.*, 100 Mo. 75, 12 S. W. 915, holding void contract for county bridge made without conforming to statute; *Nims v. Mount Hermon, etc., School*, 160 Mass. 179, 39 Am. St. Rep. 470, 35 N. E. 777, 22 L. R. A. 366, holding in action of damages that operating ferry was ultra vires of school; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 356, 38 Am. Rep. 596, refusing to compel transfer of stock to bank not authorized to acquire same; *Kennan v. Rundle*, 81 Wis. 226, 51 N. W. 430, denying power of insurance company to take bonds under authority to assess members; *Tram Co. v. Bancroft*, 16 Tex. Civ. App. 175, 40 S. W. 839, holding corporation partnership in lumber business unauthorized; *Mallory v. Oil Works*, 86 Tenn. 603, 8 S. W. 398, holding invalid partnership of oil company not authorized by charter; *Hardware Co. v. Manufacturing Co.*, 86 Tex. 150, 24 S. W. 17, 22 L. R. A. 807, and n., denying power of insolvent corporation to prefer creditors, as beyond purposes specified; *State v. Atchison, etc., R. R.*, 24 Neb. 162, 8 Am. St. Rep. 176, 38 N. W. 50, declaring void, lease of competing line not expressly authorized; *Railroad Co. v. Hinsdale*, 45 Ohio St. 572, 15 N. E. 671, holding power to sell railroad does not include conditional stock subscriptions; *Lagrone v. Timmerman*, 46 S. C. 410, 24 S. E. 299, holding fire association without power to organize branch association; *Naglee v. A. & F. R. Co.*, 83 Va. 713, 5 Am. St. Rep. 312, 3 S. E. 371, regarding power to transfer to trustees for bondholders; *North Point, etc., Co. v. Utah, etc., Co.*, 16 Utah, 264, 67 Am. St. Rep. 612, 52 Pac. 172, 40 L. R. A. 858, construing charter of canal company; *Perry v. House of Refuge*, 63 Md. 23, 52 Am. Rep. 498, where right to chastise was implied in charter of House of Refuge; *Eastern Township Bank v. St. Johnsbury, etc., R. Co.*, 40 Fed. 424, holding guaranty of interest on construction bonds valid where lease authorized, and coupons equalled rent; *Marbury v. Kentucky, etc., Co.*, 62 Fed. 346, 22 U. S. App. 267, upholding purchase of stock and guaranty of railroad bonds by land company with power to "consolidate;" *Tod v. Kentucky, etc., Co.*, 57 Fed. 51, holding corporation with power to issue bonds may guarantee. Cited, arguendo, in *State v. Railway*

Cos., 21 Mont. 228, 53 Pac. 625, 45 L. R. A. 277, and n., Morgan's Louisiana, etc., R. R. v. Barton, 51 La. Ann. 1340, 26 So. 272, Stockton v. Central R. R., 50 N. J. Eq. 65, 24 Atl. 969, 17 L. R. A. 103, and Lake Shore, etc., Ry. v. Cincinnati, etc., Ry., 116 Ind. 590, 19 N. E. 446. See 35 Am. St. Rep. 395, note, collecting cases.

Distinguished in *Citizens' State Bank v. Hawkins*, 71 Fed. 371, 34 U. S. App. 423, where bank authorized to acquire stock in certain ways, acquired it by unauthorized method. Qualified in *Union Pac. Ry. v. Chicago, etc., Ry.*, 163 U. S. 581, 41 L. 271, 16 S. Ct. 1180, permitting contracts incidental to or consequential upon authorized powers; *Atchison, etc., R. R. v. Fletcher*, 35 Kan. 248, 10 Pac. 605, to point that failure to make guaranty in stipulated manner will not defeat bona fide holder.

Corporation's contract beyond its charter powers cannot be made valid by assent of shareholders or part performance, p. 83.

Approved in *Central Transp. Co. v. Pullman, etc., Co.*, 139 U. S. 56, 35 L. 67, 11 S. Ct. 487, where, after part performance, similar lease was repudiated; *Germania Safety-Vault, etc., Co. v. Boynton*, 71 Fed. 801, 37 U. S. App. 602, holding acquiescence by shareholders in improper use of bonds does not validate transaction; *State v. Murphy*, 134 Mo. 568, 56 Am. St. Rep. 526, 31 S. W. 788, 34 L. R. A. 375, and n., holding receipt of money by city under ultra vires franchise does not validate it; *National Trust Co. v. Miller*, 33 N. J. Eq. 162, denying power of paper company, though authorized by shareholders, to pledge property gratuitously. Cited, *arguendo*, in *Davis v. Old Colony R. R.*, 131 Mass. 269, 41 Am. Rep. 232, and *Camden, etc., R. R. v. Mays Landing, etc., R. R.*, 48 N. J. L. 562, 7 Atl. 525. See 70 Am. St. Rep. 159, note.

Denied in *Goodland v. Bank*, 74 Mo. App. 377, enforcing stockholders' liability against savings bank enjoying stockholders' privileges.

Railroads.—Where corporation, like railroad, takes by charter franchise intended largely for public good, due performance of functions being consideration of grant, any contract disabling it from such performance and relieving it of public burdens by transfer of rights and powers without consent of State, is void against public policy, p. 83.

Rule applied in *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 21, 23, 32 L. 840, 841, 9 S. Ct. 412, reversing S. C., 10 Sawy. 485, 23 Fed. 241, denying public policy of Oregon does not forbid alienation of franchise, as charters not special; *Central Transportation Co. v. Pullman, etc., Co.*, 139 U. S. 44, 35 L. 63, 11 S. Ct. 482, where sleeping-car company leased whole plant and agreed to abandon business; *American Union Tel. Co. v. Union, etc., Ry.*, 1 McCrary, 261, 1 Fed. 753, where railroad leased whole telegraph equipment; *Blair v. St. Louis, etc., R. Co.*, 22 Fed. 38, where railroad transfer was

made to defeat creditors; *Stockton v. Central R. R.*, 50 N. J. Eq. 80, 24 Atl. 974, 17 L. R. A. 108, and *Dow v. Railroad*, 67 N. H. 16, 36 Atl. 518, both enjoining operation of one railroad by another, under lease; *Louisville, etc., R. R. v. Commonwealth*, 97 Ky. 695, 31 S. W. 479, holding such transfer may be enjoined; *Burke v. Railroad*, 61 N. H. 247, enjoining agreement for joint management of railroad; *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 458, 27 S. W. 196, holding railroad incompetent to lease part of road to bridge company; *State v. McMinnville, etc., R. R.*, 6 Lea, 376, denying authority of receiver to lease road; *Frazier v. Railway*, 88 Penn. 153, 12 S. W. 540, denying validity of railroad mortgage not made, as provided, to complete construction; *Visalia Gas, etc., Co. v. Sims*, 104 Cal. 330, 43 Am. St. Rep. 108, 37 Pac. 1043, denying to gas company recovery against surety of lessee of plant; *Louisville, etc., Ry. v. Boney*, 117 Ind. 507, 20 N. E. 434, 3 L. R. A. 438, and *n.*, denying right of contractor to sell right of way under lien; *Farmers' Loan, etc., Co. v. Canada, etc., Ry.*, 127 Ind. 261, 26 N. E. 786, 11 L. R. A. 745, and *n.*, but upholding decree for sale of entire road; *State v. Dodge City, etc., Ry.*, 53 Kan. 379, 42 Am. St. Rep. 296, 36 Pac. 748, enjoining railroad from tearing up its tracks; *Tilton v. Railroad*, 35 La. Ann. 1074, denying enlargement of railroad's powers by purchase of second road; *Chouteau v. Union Ry.*, 22 Mo. App. 299, refusing to enforce contract to furnish cars involving interference with general traffic; *Wiggins Ferry Co. v. Chicago, etc., Ry.*, 128 Mo. 246, 27 S. W. 571, avoiding such construction of railroad contract as would illegally prevent use of bridge; *Smith v. Cornelius*, 41 W. Va. 72, 23 S. E. 603, 30 L. R. A. 752, denying right of public corporation to lease State property for ninety-nine years; *Street Ry. v. Ferguson*, 9 Tex. Civ. App. 618, 29 S. W. 65, extending rule to street railroads; *State v. Street Ry. Co.*, 19 Wash. 526, 67 Am. St. Rep. 746, 53 Pac. 722, 41 L. R. A. 518, compelling street railroads to operate discontinued line; *Roper v. McWhorter*, 77 Va. 219, where ferry franchise was leased by city council; *Railway v. Morris*, 67 Tex. 699, 4 S. W. 158, refusing to enjoin judgment sale of railroad bought by plaintiff without authority; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 410, 32 L. 985, 9 S. Ct. 558, *State v. Portland Natural Gas, etc., Co.*, 153 Ind. 488, 53 N. E. 1091, and *Chicago Gas-Light Co. v. People, etc., Co.*, 121 Ill. 540, 2 Am. St. Rep. 130, 13 N. E. 173, all annulling contracts of gas companies limiting performance of public duties; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 793, 37 U. S. App. 586, 31 L. R. A. 420, holding void contract to sell factory to consolidated company and discontinue business; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. 171, collecting cases, *Texas, etc., Ry. v. Juneman*, 71 Fed. 943, 30 U. S. App. 541, *Singleton v. Southwestern R. R.*, 70 Ga. 467, 48 Am. Rep. 575, *Balsley v. St. Louis, etc., R. R.*, 119 Ill. 72, 59 Am. Rep. 786, 8 N. E. 861,

Brown v. Hannibal, etc., Ry., 27 Mo. App. 400, *Nugent v. Boston, etc., R. R.*, 80 Me. 73, 75, 6 Am. St. Rep. 155, 157, 12 Atl. 799, *Lakin v. Railroad Co.*, 13 Or. 440, 57 Am. Rep. 27, 11 Pac. 70, and dissenting opinion, *Griswold v. Illinois Central Ry.*, 90 Iowa, 277, 57 N. W. 847, 24 L. R. A. 654, all holding that railroads cannot disburden themselves of public duty of careful operation; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. 173, holding lessee under invalid lease is agent of lessor in cases of tort; *Naglee v. A. & F. R. Co.*, 83 Va. 711, 5 Am. St. Rep. 310, 3 S. E. 370, holding transfer of railroad to trustees, no defense against damage by fire; *Ricketts v. Chesapeake, etc., Ry.*, 33 W. Va. 436, 25 Am. St. Rep. 904, 10 S. E. 802, 7 L. R. A. 355, where plaintiff was assaulted by employee of another road operating defendant's line; *People v. Broadway R. R.*, 126 N. Y. 45, 26 N. E. 966, holding courts may declare franchises forfeited for non-user; dissenting opinion in *Union Pac. Ry. v. Chicago, etc., Ry.*, 163 U. S. 606, 41 L. 280, 16 S. Ct. 1189, majority distinguishing; dissenting opinion in *Bath Gas-Light Co. v. Claffy*, 151 N. Y. 44, 45 N. E. 396, 36 L. R. A. 671, majority enforcing covenant for rent past due. Cited, *arguendo*, in *State v. Hayes*, 61 N. H. 324, *Russell v. Railway*, 68 Tex. 652, 5 S. W. 690, *McLeod v. Normal School*, 152 Pa. St. 586, 25 Atl. 1113, and *Davis v. Old Colony R. R.*, 131 Mass. 269, 41 Am. Rep. 232. See 99 Am. Dec. 334, note, and 35 Am. St. Rep. 394, note.

Distinguished in *Jacksonville, etc., Ry. v. Hooper*, 160 U. S. 524, 40 L. 523, 16 S. Ct. 383, where exercise of power in question was fairly incidental to authorized powers; *Union Pac. Ry. v. Chicago, etc., Ry.*, 163 U. S. 581, 590, 41 L. 271, 274, 16 S. Ct. 1180, 1183, affirming S. C., 51 Fed. 317, 10 U. S. App. 98, 47 Fed. 20, 23, upholding contract for joint use of tracks as not alienating franchise; *United States v. Trans. Missouri, etc., Assn.*, 53 Fed. 453, upholding joint traffic agreement as not disabling; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. 175, where postal clerk was held passenger for hire solely by contract of government with lessee; *Hartford Ins. Co. v. Chicago, etc., Ry.*, 175 U. S. 100, where railroad leased ground to be used for warehouse purposes; *Seeber v. Commercial Nat. Bank*, 77 Fed. 960, enforcing guaranty of bank because not quasi public corporation; *Sioux City, etc., Co. v. Trust Co.*, 82 Fed. 134, 49 U. S. App. 541, holding mortgage, unlike lease, does not disable railroad from performance of duties; *Oregonian Ry. v. Oregon R., etc., Co.*, 10 Sawy. 485, 23 Fed. 242, where railroad incorporation laws are general, public policy being different; *Plant v. Macon Oil, etc., Co.*, 103 Ga. 670, 30 S. E. 569, as to private corporations without public duties, in emergencies; *Railroad v. Furnace Co.*, 37 Ohio St. 331, 41 Am. Rep. 515, holding railroad bound by continuing freight contract. Qualified in *Boston, etc., R. R. v. New York, etc., R. R.*, 13 R. I. 261, refusing cancellation of unauthorized conveyance after acquiescence and delay.

Railroads.—New Jersey act of April 10, 1867, amending railroad charter and forbidding excessive charges by directors, "lessees," or agents, is not ratification of unauthorized lease, p. 85.

Approved in *Pennsylvania Co. v. St. Louis, etc., R. R.*, 118 U. S. 311, 30 L. 92, 6 S. Ct. 1103, where subsequent statute concerning taxes uses word "lessees;" *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 31, 32 L. 843, 9 S. Ct. 415, where statute granting terminal facilities forbade sale by company, "or assigns;" *Central Transp. Co. v. Pullman, etc., Co.*, 139 U. S. 44, 47, 35 L. 63, 64, 11 S. Ct. 482, 483, holding amendatory act permitting lease of cars did not extend to whole plant; *Briscoe v. Southern Kansas Ry.*, 40 Fed. 279, where congressional grant of right of way was upon condition binding successors and assigns. Cited in 35 Am. St. Rep. 396, note.

Contracts.—Where invalid contract has been fully performed on both sides by payment of money or transfer of property, courts will generally not sustain action to set same aside, pp. 85, 86.

Approved in *Union Trust Co. v. Illinois, etc., Co.*, 117 U. S. 463, 29 L. 975, 6 S. Ct. 827, declining to avoid purchase of railroad by connecting road after completion of transaction; *De La Vergne Co. v. German Sav. Inst.*, 175 U. S. 59, where refrigerating company purchased stock in rival company to acquire control; *Taylor v. South., etc., Ala. R. R.*, 4 Woods, 579, 13 Fed. 155, where one railroad held stock of another for ten years; *American Union Tel. Co. v. Union, etc., Ry.*, 1 McCrary, 201, 1 Fed. 753, enjoining arbitrary reappropriation of equipment leased to plaintiff; *Nashua, etc., R. Co. v. Boston, etc., R. Co.*, 27 Fed. 826, where plaintiff sought to recover back its share of cost of joint improvements; *Hervey v. Illinois, etc., Ry.*, 28 Fed. 173, declining to discuss question of ultra vires where consolidation consummated; *Cincinnati, etc., R. Co. v. M'Keen*, 64 Fed. 44, 24 U. S. App. 218, refusing relief to railroad against vendor of stock of another company; *Long v. Georgia Pacific Ry.*, 91 Ala. 522, 24 Am. St. Rep. 933, 8 So. 706, refusing cancellation of deed to railroad after consideration passed; *Day v. Spiral, etc., Buggy Co.*, 57 Mich. 152, 58 Am. Rep. 356, 23 N. W. 631, giving judgment on quantum meruit for "Excelsior" actually delivered, contract being ultra vires; *Tacoma v. Lillis*, 4 Wash. 806, 31 Pac. 324, 18 L. R. A. 375, holding city cannot recover back money paid to councilman for services; *Fogg v. St. Louis, etc., R. Co.*, 5 McCrary, 450, 17 Fed. 872, to effect that such contracts may be void as to third parties. Cited, arguendo, in *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 153, 34 N. W. 559; *Camden, etc., R. R. v. Mays Landing, etc., R. R.*, 48 N. J. L. 562, 7 Atl. 525. See 70 Am. St. Rep. 166, note.

Railroads.—A continuing ultra vires contract of a railroad, such as a lease for years, when repudiated after part performance, will not be enforced by damages as to unperformed part where each party has received benefits thereof to time of repudiation, p. 86.

Rule applied in *Oregon Ry. v. Oregonian Ry.*, 130 U. S. 38, 32 L. 846, 9 S. Ct. 418, reversing S. C., 10 Sawy. 488, 23 Fed. 244, where the rule, though cited, was not applied; *Safety Insulated, etc., Co. v. Mayor, etc.*, 74 Fed. 366, 42 U. S. App. 64, permitting city to plead *ultra vires* to action for failure to perform contract; *McNulta v. Corn Belt Bank*, 164 Ill. 451, 56 Am. St. Rep. 214, 45 N. E. 961, refusing enforcement of contract giving bank president commission on shares floated; *Davis v. Old Colony R. R.*, 131 Mass. 275, 41 Am. Rep. 238, where guaranty by railroad of festival expenses, being without actual profit, held unenforceable; *Kilbreth v. Bates*, 38 Ohio St. 197, denying recovery on draft discounted by trust company at forbidden rate; *Tram Co. v. Bancroft*, 16 Tex. Civ. App. 175, 40 S. W. 839, declining to enforce executory partnership agreement *ultra vires* of corporation; dissenting opinion in *Camden, etc., R. R. v. Mays Landing, etc., R. R.*, 48 N. J. L. 581, 7 Atl. 534, majority holding railroad entitled to rent for road, lessee being empowered to lease. Cited, *arguendo*, in *Jacksonville, etc., Ry. v. Hooper*, 160 U. S. 524, 40 L. 523, 16 S. Ct. 383. Cited in 70 Am. St. Rep. 172, note.

Distinguished in *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 33 Fed. 447, denying equitable relief by cancellation on application of offending road; *Salt Lake City v. Hollister*, 118 U. S. 263, 30 L. 178, 6 S. Ct. 1059, and *Sacks v. Minneapolis*, 75 Minn. 36, 77 N. W. 565, both holding corporation liable for tort; *American Union Tel. Co. v. Union, etc., Ry.*, 1 McCrary, 196, 201, 1 Fed. 747, 753, holding equity will not relieve applicant from illegal contract while retaining consideration; *Camden, etc., R. R. v. Mays Landing, etc., R. R.*, 48 N. J. L. 566, 7 Atl. 529, holding rule not authority for denial of rent after enjoyment of possession; *Bath Gas-Light Co. v. Claffy*, 151 N. Y. 33, 45 N. E. 392, 36 L. R. A. 667, enforcing lease of gas plant as to past-due rent. Limited in *Maxwell v. Akin*, 89 Fed. 181, to unexecuted contracts, as opposed to contracts executed upon one side.

Corporations.—It is duty of railroad company to rescind contract forbidden by public policy and *ultra vires*, such as unauthorized lease, and rescission cannot create liability, p. 86.

Approved in *Pennsylvania Co. v. St. Louis, etc., R. R.*, 118 U. S. 317, 30 L. 94, 6 S. Ct. 1107, denying that such contract can, by reason of acquiescence, found right of action; *Central Transp. Co. v. Pullman, etc., Co.*, 139 U. S. 54, 55, 35 L. 66, 67, 11 S. Ct. 486, where, upon repudiation, lessee sued for rent; *McCormick v. Market Bank*, 165 U. S. 550, 41 L. 821, 17 S. Ct. 437, and *De La Vergne Co. v. German Sav. Inst.*, 175 U. S. 59, both holding that persons dealing with corporation must take notice of terms of charter; *California Bank v. Kennedy*, 167 U. S. 367, 42 L. 200, 17 S. Ct. 833, permitting bank to escape liability as stockholder by repudiating

ownership; *New Castle, etc., Ry. v. Simpson*, 21 Fed. 537, cancelling construction contract upon application; *Gunnison Gas, etc., Co. v. Whitaker*, 91 Fed. 194, compelling return of water-company bonds improperly issued, before negotiation; *McCormick v. Market Nat. Bank*, 162 Ill. 110, 44 N. E. 384, upholding surrender of ultra vires lease taken by banking association before organization; *Nat. Home Building Assn. v. Bank*, 181 Ill. 45, 54 N. E. 621, where loan company repudiated unauthorized trade by which it assumed mortgage; *Anthony v. Household, etc., Machine Co.* 16 R. I. 572, 18 Atl. 176, 5 L. R. A. 576, holding money paid on unperformed ultra vires contract recoverable on disaffirmance; *Mallory v. Oil Works*, 86 Tenn. 608, 8 S. W. 400, where oil company repudiated unauthorized partnership agreement; *Noel v. San Antonio*, 11 Tex. Civ. App. 586, 33 S. W. 266, where city repudiated liability for improvement unlawfully contracted for; dissenting opinion in *Union Pac. Ry. v. Chicago, etc., Ry.*, 163 U. S. 610, 41 L. 281, 16 S. Ct. 1191, majority distinguishing.

Railroads.—Twenty years' lease of railroad, with all appurtenances and franchises, unauthorized by charter, is void, and provision therein for damages upon resumption by lessor of possession cannot be enforced, p. 87.

Approved in *St. Louis R. R. v. Terre Haute R. R.*, 145 U. S. 402, 36 L. 752, 12 S. Ct. 955, where lease was for ninety-nine years; *Central Transp. Co. v. Pullman, etc., Co.*, 139 U. S. 42, 35 L. 62, 11 S. Ct. 482, denying recovery for rent under such contract; *Pennsylvania Co. v. St. Louis, etc., R. R.*, 118 U. S. 310, 30 L. 92, 6 S. Ct. 1102, *Louisville, etc., R. R. v. Kentucky*, 161 U. S. 692, 40 L. 856, 16 S. Ct. 720, and *McCormick v. Market Bank*, 165 U. S. 551, 41 L. 822, 17 S. Ct. 437, all holding contract ultra vires of one, void as to both; *Union Pac. Ry. v. Chicago, etc., Ry.*, 163 U. S. 582, 41 L. 271, 16 S. Ct. 1180, affirming S. C., 47 Fed. 22, holding question to be not whether contract is lease, but whether powers exceeded; *East St. Louis, etc., Ry. v. Jarvis*, 92 Fed. 744, refusing rent under such lease, but suggesting amended complaint for use and occupation; *State v. Nebraska Distilling Co.*, 29 Neb. 718, 46 N. W. 161, annulling franchise of distilling company for conveying plant to trust, without authorization. Cited, arguendo, in *Railway Cos. v. Keokuk, etc., Co.*, 131 U. S. 385, 33 L. 162, 9 S. Ct. 774, *Humphreys v. St. Louis, etc., Ry.*, 37 Fed. 312, *Toledo, etc., R. Co. v. Continental, etc., Co.*, 95 Fed. 525, *Memphis, etc., R. R. v. Grayson*, 88 Ala. 576, 16 Am. St. Rep. 71, 7 So. 122, and *Lee v. Southern Pac. R. R.*, 116 Cal. 103, 58 Am. St. Rep. 143, 47 Pac. 933, 38 L. R. A. 73, 58 Am. St. Rep. 148, note.

Qualified in *Campbell v. Argenta Gold, etc., Co.*, 51 Fed. 4, holding that contract not ultra vires, but not made in prescribed mode, is voidable, not void.

101 U. S. 87-92, 25 L. 878, **EMPIRE v. DARLINGTON.**

Municipal corporations.— Under Illinois act of February 28, 1867, authorizing municipal subscription to railroad stock "in any sum not exceeding \$250,000," subscription for part does not exhaust power and invalidate bonds for additional part, p. 90.

Followed in *Brokaw v. Board of Commrs.*, 73 Ind. 548, allowing second exercise of power to subscribe 2 per cent. of taxables "in any one period of two years." Cited in 98 Am. Dec. 679, note.

Municipal corporations.— Under Illinois act of February 28, 1854, permitting railroad consolidation and transferring rights, municipal power to purchase stock follows consolidation, being, in essence, railroad's right, p. 91.

Approved in *Tipton v. Locomotive Works*, 103 U. S. 533, 26 L. 344, holding power of municipality to subscribe may be right of company; *New Buffalo v. Iron Co.*, 105 U. S. 76, 26 L. 1025, where bonds voted to old company were delivered to consolidated company; *Livingston v. Portsmouth Bank*, 128 U. S. 122, 32 L. 366, 9 S. Ct. 25, a similar case. See 98 Am. Dec. 671, note, collecting cases.

Judgments.— State court decree enjoining municipal tax to liquidate bonds, and annulling same, does not conclude non-resident owners constructively served, p. 92.

Followed in *Livingston v. Darlington*, 101 U. S. 413, 25 L. 1018, denying authority of conflicting decision where interested parties were not in court; *Pana v. Bowler*, 107 U. S. 545, 27 L. 430, 2 S. Ct. 718, holding Illinois decree annulling bonds, invalid as to non-resident constructively served as "unknown holder;" *Smith v. Woolfolk*, 115 U. S. 149, 29 L. 360, 5 S. Ct. 1180, holding service by mailing copy of order will not support personal decree; *Enfield v. Jordan*, 119 U. S. 693, 30 L. 529, 7 S. Ct. 365, holding pendency of action involving validity of negotiable paper not constructive notice to holders before maturity; *Tregea v. Modesto*, etc., Dist., 164 U. S. 187, 41 L. 398, 15 S. Ct. 65, doubting conclusiveness of decision affirming validity of proposed bond issue, as against anyone; *Brooks v. Dun*, 51 Fed. 146, disregarding service by publication under State law, of non-residents, in personal actions; *Elsasser v. Haines*, 52 N. J. L. 29, 18 Atl. 1102, as against international law and fourteenth amendment; *National Bank v. Peabody & Co.*, 55 Vt. 497, 45 Am. Rep. 635, denying that judgment against non-residents, valid only in rem, merged personal cause of action.

101 U. S. 93-97, 25 L. 794, **BAST v. BANK.**

Pledges.— Where judgment is assigned as collateral, while collectible, with power of sale upon maturity of notes secured thereby, assignee need not issue execution sooner, though exigible property be, meantime, exhausted, p. 95.

Cited, *arguendo*, in *Murphy v. Bartsch*, 2 Idaho, 607, 23 Pac. 83.

Assignment.— Where judgment is assigned as collateral, salable on maturity of notes, assignor retains control of collection, p. 95.

Judgments.— Where judgment is assigned as collateral, salable on maturity of notes, assignor may call on assignee to enforce collection or to permit him, p. 95.

Evidence.— In Pennsylvania, parol evidence is inadmissible to change promise itself, without proof or even allegation of fraud or mistake, p. 97.

Approved in *Shea v. Leisy*, 85 Fed. 245, excluding collateral parol agreement to surrender bond on certain conditions.

Evidence.— In absence of fraud or mistake, proof of contemporaneous parol agreement is inadmissible to vary terms of written contract, p. 97.

Approved in *Singer Mfg. Co. v. Hester*, 2 McCrary, 420, 6 Fed. 807, rejecting parol evidence connecting two distinct contracts; *Chandler v. Thompson*, 30 Fed. 42, rejecting evidence of verbal representations concerning capacity of machinery sold; *Consumers' Gas Co. v. American Electric, etc., Co.*, 50 Fed. 780, 3 U. S. App. 111, affirming S. C., 47 Fed. 46, rejecting verbal promise to protect from infringement suits, upon sale of electric plant; *Stoddard v. Nelson*, 17 Or. 421, 21 Pac. 457, rejecting verbal agreement to remove obstruction to light, upon renewal of lease; *Tait v. Central, etc., Asylum*, 84 Va. 280, 4 S. E. 702, rejecting verbal understanding that lessee might remove improvements; *Union Stock-Yards, etc., Co. v. Western Land, etc., Co.*, 59 Fed. 57, 18 U. S. App. 438, excluding parol agreement to sell cattle delivered under written contract of bailment; *Harman v. Harman*, 70 Fed. 936, 18 U. S. App. 723, rejecting evidence of agreement to devise property held under lease; *Union Nat. Bank v. German Ins. Co.*, 71 Fed. 476, 34 U. S. App. 397, collecting cases, rejecting verbal waiver of limitation on fire insurance, antedating policy; *Smith v. American Nat. Bank*, 89 Fed. 837, 60 U. S. App. 441, rejecting evidence of negotiations preceding assignment of bonds exchanged for deposit certificates; *The Augustine Kobbe*, 37 Fed. 699, excluding verbal promise to pay drafts, not contained in charter-party; *Shea v. Leisy*, 85 Fed. 245, excluding collateral parol agreement to surrender bond upon certain conditions; *State v. Hoshaw*, 98 Mo. 360, 11 S. W. 760, rejecting parol agreement not to force judgment assigned, as against certain persons; *Shuey v. Adair*, 18 Wash. 200, 63 Am. St. Rep. 888, 51 Pac. 392, 39 L. R. A. 477, rejecting parol agreement not to collect note from defendant; *Michels v. Olmstead*, 4 McCrary, 550, 14 Fed. 219, holding fraud will not be presumed. Cited, *arguendo*, in *Standard Sewing-Machine Co. v. Leslie*, 78 Fed. 328, 46 U. S. App. 680.

Qualified in *Godkin v. Monahan*, 83 Fed. 119, 53 U. S. App. 613, holding admissible, independent oral agreement not inconsistent with, nor varying writing.

Evidence.—Where judgment is assigned as collateral, with power to sell on maturity of notes, parol to prove agreement to issue execution before then, is inadmissible, p. 97.

Approved in *Shuey v. Adair*, 18 Wash. 202, 63 Am. St. Rep. 889, 51 Pac. 392, 39 L. R. A. 478, where defendant alleged parol agreement not to collect note from him.

101 U. S. 98-99, 25 L. 860, *RAILROAD CO. v. WHITE*.

Courts.—Where circuit judges disagree, opinion of presiding judge controls, p. 99.

Courts.—When judges below cannot agree on material question of law, it may be certified up for determination by United States Supreme Court, p. 99.

Courts.—Where question is certified up on ground of disagreement between judges of Circuit Court, and record indicates that the judges were not really opposed on any question of law, Supreme Court will presume no actual disagreement and refuse cognizance, p. 99.

Approved in *United States v. Gleeson*, 124 U. S. 260, 31 L. 423, 8 S. Ct. 504, declining jurisdiction, where judgment below was against United States, merely to give right of appeal; *Columbus Watch Co. v. Robbins*, 148 U. S. 269, 37 L. 446, 13 S. Ct. 595, declining jurisdiction where court below had definite opinion, though adverse to decision in another circuit.

101 U. S. 99-107, 25 L. 841, *BAKER v. SELDEN*.

Copyrights.—Any author may express truths of a science, or explain and use methods of art which are common property of race, p. 100.

Followed in *Simms v. Stanton*, 75 Fed. 10, where work on "Scientific Physiognomy" was consulted, but not substantially drawn from.

Patents.—Exclusive right to invention or discovery of art or manufacture can only be secured by patent, p. 102.

Copyright.—Physician may copyright treatise on medicine and secure exclusive right to publish it, but exclusive right to medicine itself can be had only by patent, pp. 102, 103.

Approved in *Henry Bill-Pub. Co. v. Smythe*, 27 Fed. 921, declining to consider patent decisions as authorities on copyright.

Copyright of illustrated book on perspective gives no exclusive right to modes of drawing described, p. 103.

Copyright of mathematical work gives no exclusive right to methods or diagrams, p. 103.

Copyright.—Ornamental designs or pictorial illustrations addressed to the taste are subject to copyright, p. 103.

Distinguished in *J. L. Mott Iron Works v. Clow*, 82 Fed. 318, 53 U. S. App. 466, holding illustrated catalogue not subject to copyright.

Copyright.—Use by another, in similar treatise, of same methods of statement, whether in words or illustrations, infringes copyright, p. 104.

Approved in *Munson v. Mayor, etc.*, 18 Blatchf. 238, 3 Fed. 338, 339, holding copyright means right to copy.

Copyright may be construed with reference to words of Constitution, "to promote the progress of science and the useful arts," p. 105.

Reaffirmed in *J. L. Mott Iron Works v. Clow*, 82 Fed. 320, 53 U. S. App. 470, where illustrated catalogue was held not subject of copyright.

Copyright.—Blank account-books are not subject to copyright, p. 107.

Approved in *United States Credit-System Co. v. American, etc.*, Co., 53 Fed. 819, denying that contract of indemnity against bad debts is patentable.

Copyright of book on bookkeeping does not confer exclusive right to account-books, ruled and arranged as illustrated therein, p. 107.

Approved in *Griggs v. Perrin*, 49 Fed. 15, holding copyright on system of stenography does not protect system itself; *Amberg File, etc., Co. v. Shea, etc., Co.*, 82 Fed. 315, 53 U. S. App. 451, holding letter-file index not subject of copyright.

101 U. S. 108-112, 25 L. 899, *MEGUIRE v. CORWINE*.

Trial.—Where testimony is wanting or one-sided and undoubtedly conclusive, judge should not submit question to jury, but may direct finding accordingly, p. 111.

Contracts.—Illegal contract will support no action; e. g., contract to procure appointment as special counsel for United States in consideration of one-half of appointee's fee, p. 112.

Approved in *Teal v. Walker*, 111 U. S. 252, 28 L. 419, 4 S. Ct. 425, covenant for possession by mortgagee against public policy of Oregon; *Kohn v. Melcher*, 43 Fed. 644, 10 L. R. A. 441, contract for liquor sold, to be illegally retailed; *M'Mullan v. Hoffman*, 69 Fed. 516, agreement to share profits of public contract secured by collusive bidding; *Hyer v. Richmond, etc., Co.*, 80 Fed. 843, 42 U.

S. App. 522, collusive contract between rival applicants for street-railway franchise; *Elkhart County Lodge v. Crary*, 98 Ind. 244, 49 Am. Rep. 751, contract with adjacent property-owners to underbid competitors for post-office lease; *Glover v. Taylor*, 38 La. Ann. 638, agreement between rival candidates to divide sheriff's salary; *Simpson v. Normand*, 51 La. Ann. 1366, 26 So. 270, contract for wages by servant who lived in concubinage with defendant; *Brooks v. Cooper*, 50 N. J. Eq. 770, 35 Am. St. Rep. 801, 26 Atl. 981, 21 L. R. A. 620, contract between newspapers to divide State-printing contracts, reviewing cases; *Basket v. Moss*, 115 N. C. 457, 44 Am. St. Rep. 464, 20 S. E. 733, cancelling mortgage given to procure appointment as postmaster; *Chippewa Valley, etc., Co. v. Chicago, etc., R. Co.*, 75 Wis. 246, 44 N. W. 22, 6 L. R. A. 608, where railroad agreed to help another procure land grant, for share thereof; *Oscanayan v. Arms Co.*, 103 U. S. 276, 26 L. 545, where company agreed to pay consul for inducing his government to purchase arms; *West v. Camden*, 135 U. S. 521, 34 L. 258, 10 S. Ct. 841, where director of corporation contracted to keep plaintiff in office as vice-president.

United States.—Contract for half counsel fee in consideration of procuring public appointment and assisting in litigation, is void against public policy, p. 112.

Approved in *Murray v. Chicago, etc., Ry.*, 62 Fed. 41, where shipper sued railroad to recover excess above reasonable charges, others paying less. Cited in 66 Am. Dec. 509, and 21 Am. St. Rep. 26, notes.

101 U. S. 112-119. 25 L. 782, **MARKET CO. v. HOFFMAN.**

Appeal and error.—Where sworn pleadings show sale of market-stalls, enjoined in single decree by Supreme Court of District of Columbia, would have realized \$60,000, appeal lies to United States Supreme Court, though interest of no single plaintiff is sufficient to support appeal, p. 113.

Approved in *Estes v. Gunter*, 121 U. S. 185, 30 L. 885, 7 S. Ct. 855, where applicant for injunction against sale, under \$3,000 attachment, sought confirmation of assignment preferring him for \$10,000; *Texas, etc., Ry. v. Gentry*, 163 U. S. 362, 41 L. 191, 16 S. Ct. 1107, where statute created single liability covering different interests; *Herbert v. Rainey*, 54 Fed. 252, where life tenant and remainderman joined to ask injunction against coke ovens in neighborhood; *Gartside v. Gartside*, 42 Mo. App. 515, where appellate court, doubting their jurisdiction, transferred case to Supreme Court; *Home Ins. Co. v. Nobles*, 63 Fed. 642, refusing injunction, but allowing amendment of application to show amount of damage. Cited, *arguendo*, in *Mayor, etc. v. Postal Tel., etc., Co.*, 62 Fed. 502, and *Fleshman v. Fleshman*, 34 W. Va. 351, 12 S. E. 716.

Distinguished in *Ex parte Baltimore, etc., R. R.*, 106 U. S. 6, 27

L. 78, 1 S. Ct. 36, where admiralty practice required separate decrees in joint suit; *Henderson v. Wadsworth*, 115 U. S. 276, 29 L. 379, 6 S. Ct. 43, where separate judgments were rendered against heirs upon note of ancestor; *Gibson v. Shufeldt*, 122 U. S. 34, 30 L. 1086, 7 S. Ct. 1069, where several creditors attacking assignment had separate claims of less than \$5,000 each, reviewing cases; *Clay v. Field*, 138 U. S. 480, 34 L. 1050, 11 S. Ct. 425, where claimants of distinct estates in realty were joined; *Wheless v. St. Louis*, 96 Fed. 867, where several property-holders asked injunction against levying assessment exceeding in aggregate \$2,000; *Oswald, etc. v. Morris, etc.*, 92 Ky. 53, 17 S. W. 168, holding common interest not conclusively presumed where plaintiff sues for others.

Statutes.—Effect should be given to every word of statute, and every part thereof should be construed in connection with the whole, pp. 115, 116.

Approved in *United States v. Debs*, 64 Fed. 749, construing “conspiracy” with well-settled criminal significance.

Statutes.—Courts should ascertain legislative meaning from words and subject-matter of statute, and restrain its operation within narrower limits than words used import, where literal interpretation would extend to cases beyond legislative intention, p. 116.

Rule applied in *Petri v. Commercial Bank*, 142 U. S. 650, 35 L. 1146, 12 S. Ct. 326, construing grant of jurisdiction to Federal courts in national bank cases; *United States v. American Bell Tel. Co.*, 159 U. S. 550, 40 L. 256, 16 S. Ct. 70, construing law regarding appeal to Supreme Court in patent cases.

101 U. S. 119-129, 25 L. 880, **ROBERTS v. BOLLES**.

Municipal corporations.—Illinois act of March 18, 1874, permitting transfer of municipal bonds payable to bearer, and allowing holder to sue in own name, applies to transfers made prior thereto, and hence to township railroad-aid bonds, pp. 121, 122, 123.

Followed in *Ottawa v. National Bank*, 105 U. S. 344, 345, 26 L. 1127, 1128. See 98 Am. Dec. 672, 683, note.

Municipal corporations.—Under Illinois statute of March 6, 1867, providing for municipal railroad-aid bonds and waiving certain possible irregularities, notice of election in ten instead of twenty days, upon application of twelve instead of twenty voters, does not invalidate bonds, pp. 124, 125, 126.

Municipal corporations.—Purchaser of municipal bonds, issued under statute waiving irregularities in election and issue, has right to rely thereon, if not unconstitutional, p. 125.

Approved in *Lewis v. Comanche*, 35 Fed. 347, to point that recital in bonds of compliance with statute estops county.

Municipal corporations.—By settled construction of Illinois Constitution in 1869, legislature could not compel municipal authorities to subscribe to stock of railroad, but could authorize such subscription by them without vote by people, p. 126.

Followed in *Livingston v. Darlington*, 101 U. S. 415, 25 L. 1019, upholding Illinois statute authorizing bond issue upon resolution of county supervisors.

Municipal corporations.—Legislature may prescribe mode of ascertaining sense of voters as to bond issues, and may waive in advance such formalities or preliminaries as need not have been prescribed and are not essential to people's right of election, pp. 126, 127.

Courts.—Supreme Court is not bound to reverse Circuit Court upon new point under State Constitution, which State Supreme Court has meantime decided adversely, p. 129.

Followed in *Roberts v. Bolles*, 154 U. S. 670, 38 L. 1093, 14 S. Ct. 1210.

101 U. S. 129-135, 25 L. 1046, *NATIONAL BANK v. COUNTY OF YANKTON*.

Territories.—All territory within jurisdiction of United States, not included in any State, must be governed by or under authority of Congress, p. 133.

Approved in *Atlantic, etc., R. Co. v. United States*, 76 Fed. 192, holding congressional control of railroad traffic charges in territories, similar to State's; *Territory v. Scott*, 3 Dak. 396, 20 N. W. 405 (see dissenting opinion, 3 Dak. 422, 20 N. W. 420), holding territorial legislature may delegate to commission power to relocate capital; dissenting opinion in *Lincoln-Lucky, etc., Min. Co. v. District Court*, 7 N. Mex. 516, 38 Pac. 590.

Territories.—Organic law of territory takes place of Constitution, but Congress is supreme and has all powers of people of United States, except those reserved by Constitution, p. 133.

Approved in *Hepworth v. Gardner*, 4 Utah, 443, 11 Pac. 567, upholding jurisdiction of District Court under organic act; *Brereton v. Miller*, 7 Utah, 430, 27 Pac. 82, holding territorial legislature cannot abridge jurisdiction conferred by Congress on territorial courts; *Territory v. Scott*, 3 Dak. 395, 20 N. W. 405, holding Congress may delegate legislative powers to territorial government; *Higbee v. Higbee*, 4 Utah, 27, 5 Pac. 695, holding legislative divorces not authorized by section 1851, revised statutes of United States; *People v. Daniels*, 6 Utah, 292, 22 Pac. 160, 5 L. R. A. 445, and n., holding powers of territory more strictly construed than those of States; dissenting opinion in *Mackey v. Enzensperger*, 11 Utah, 170, 171, 39 Pac. 546, majority holding verdict concurred in by nine

jurors will support civil judgment. Cited, *arguendo*, in *Territory v. Cox*, 6 Dak. 506, *Lincoln-Lucky*, etc., *Min. Co. v. District Court*, 7 N. Mex. 516, 38 Pac. 590.

Territories.—Congressional power to annul, amend or validate acts of territorial legislature is incident of sovereignty and need not be reserved in organic law; hence, county bonds in aid of railroad, issued under territorial act passed at unauthorized session, were validated by saving clause of congressional statute annulling said act, pp. 133, 134.

Approved in *Murphy v. Ramsey*, 114 U. S. 45, 29 L. 57, 5 S. Ct. 764, where Congress disqualified polygamists from voting, after organic act; *Mormon Church v. United States*, 136 U. S. 43, 34 L. 491, 10 S. Ct. 803, affirming S. Ct., 5 Utah, 370, 15 Pac. 477, denying vested rights of Mormon Church in charter forfeited by Congress; *United States v. McMillan*, 165 U. S. 511, 41 L. 807, 17 S. Ct. 398, where Congress extended to territories act regulating fees of court officials; *Utter v. Franklin*, 172 U. S. 423, 19 S. Ct. 186, where bonds of doubtful validity under territorial laws were validated by Congress; *Endleman v. United States*, 86 Fed. 459, 57 U. S. App. 6, holding Congress has power to prohibit sale of liquor in territories; *Stevenson v. Moody*, 2 Idaho, 241, 12 Pac. 902, holding election of unauthorized assistant clerk by territorial legislature void; *Northern Pac. R. R. v. Barnes*, 2 N. Dak. 350, 51 N. W. 397, upholding territorial statute, not unauthorized or annulled, as act of Congress; *Wenner v. Smith*, 4 Utah, 244, 9 Pac. 297, upholding congressional act of August 7, 1882, vacating offices held by polygamists; *Enright v. Grant*, 5 Utah, 340, 15 Pac. 270, holding jurisdiction of courts under organic act cannot be abridged by legislature; *Williams v. Clayton*, 6 Utah, 91, 21 Pac. 400, holding absence of congressional disapproval does not validate territorial enactment; *Chapman v. Handley*, 7 Utah, 53, 24 Pac. 674, to point that right of disapproval need not be expressly reserved by Congress; *Downes v. Parshall*, 3 Wyo. 426, 26 Pac. 995, upholding congressional bankruptcy law for territory. Approved in *Central Baptist Church v. Manchester*, — R. I. —, 43 Atl. 845, where State legislature confirmed deed made to church before incorporation; dissenting opinion in *United States v. Jones*, 5 Utah, 566, 18 Pac. 241, majority upholding provision of territorial statute for separate trial on joint indictment for felony. Cited, *arguendo*, in *Shively v. Bowlby*, 152 U. S. 48, 38 L. 349, 14 S. Ct. 566, *Thompson v. Utah*, 170 U. S. 348, 42 L. 1066, 18 S. Ct. 622, *In re Thomas Baldwin*, 11 Sawy. 534, 27 Fed. 187, *Dunton v. Muth*, 45 Fed. 392, and *Territory v. Cox*, 6 Dak. Tr. 528; dissenting opinion in *Lincoln-Lucky*, etc., *Min. Co. v. District Court*, 7 N. Mex. 516, 517, 38 Pac. 590. See 64 Am. Dec. 429, note.

Cited, but not applied, in *People v. District Court*, 11 Colo. 151, 17 Pac. 300, holding that, upon admission of territory as State, congressional control ceases.

101 U. S. 135-143, 25 L. 807, **WOOD v. CARPENTER**.

Limitation of actions.—Sections of Indiana statute of limitations of 1876, requiring certain actions to be commenced within six years and suspending operation thereof when liability concealed, apply to actions for fraud, and statute begins to run when fraud is perpetrated, if not concealed, p. 138.

Approved in *Pearsall v. Smith*, 149 U. S. 233, 37 L. 716, 13 S. Ct. 834, holding that bar under State law is bar in Federal court.

Cited, *arguendo*, in *Rose v. Dunklee*, 12 Colo. App. 419, 56 Pac. 348.

Limitation of action.—Statutes of limitations are founded on public policy and favored in the law, p. 139.

Approved in *Amy v. Watertown*, 22 Fed. 420, holding that hiding to avoid service did not suspend statute; *New York, etc., R. R. v. Siegfried*, 7 Ohio C. C. 37, holding dismissal of action brought within statutory period does not suspend operation thereof; *Shain v. Sresovich*, 104 Cal. 406, 38 Pac. 53, where merchant by mistake overpaid defendant, who said nothing; *Norrs v. Haggin*, 12 Sawy. 53, 28 Fed. 280, St. Paul, etc., Ry. v. Sage, 49 Fed. 319, 4 U. S. App. 160, *Morgan v. Morgan*, 10 Wash. 104, 38 Pac. 1056, and *Thompson v. Whitaker Iron Co.*, 41 W. Va. 584, 23 S. E. 798, *arguendo*.

Limitation of actions.—Provision of Indiana statute of 1876, suspending running of statute when liability is concealed, being imported from equity, equitable and legal decisions are alike pertinent, p. 139.

Approved in *Jones v. Smith*, 38 Fed. 381, holding courts of equity, in cases of concurrent jurisdiction, bound by statute; *Kelley v. Boettcher*, 85 Fed. 62, 56 U. S. App. 375, 376, holding courts of equity not bound by, though usually conforming to, statute.

Cited *obiter* in *Etting v. Marx*, 4 Hughes, 323, 4 Fed. 684.

Limitation of actions.—To suspend statute of limitations by concealment, fraud must be secret, not patent, p. 141.

Limitation of actions.—Fraud, which suspends operation of statute of limitations, may precede wrong, if wrong be designed and consummated, p. 143.

Approved in *Jackson v. Jackson*, 149 Ind. 245, 47 N. E. 965, where misrepresentations and request of secrecy preceded sale of bank stock.

Limitation of actions.—Concealment of fraud to postpone operation of statute of limitations must be more than mere silence, p. 143.

Approved in *Felix v. Patrick*, 145 U. S. 331, 36 L. 726, 12 S. Ct. 867, where scrip and power of attorney were obtained and land

secretly located; *Bates v. Preble*, 151 U. S. 162, 38 L. 111, 14 S. Ct. 280, where broker wrongfully sold plaintiff's bonds at instance of her son; *Foster v. Mansfield, etc., R. Co.*, 36 Fed. 637, dismissing bill to open foreclosure ten years afterwards, proceedings being public; *Lant v. Manley*, 71 Fed. 19, holding, where facts are of record, there must be some affirmative act of concealment; *M'Kneely v. Terry*, 61 Ark. 545, 33 S. W. 958, where grantor of interest in land secreted deed and kept profits; *Wier v. Johns*, 14 Colo. 498, 24 Pac. 263, where conveyance was taken of larger tract than grantor intended; *De Mares v. Gilpin*, 15 Colo. 84, 24 Pac. 571, where New Mexican had grant approved by surveyor-general and confirmed by Congress; *Jackson v. Jackson*, 149 Ind. 213, 47 N. E. 964, action for damages for misrepresenting value of bank stock; *Shelby Co. v. Bragg*, 135 Mo. 300, 36 S. W. 602, where former county clerk was sued for receipts in excess of fees; *Eaton v. Cass*, 11 Neb. 231, 9 N. W. 60, where tax-title purchaser sued county commissioners for money paid on redemption; *Campbell v. Roe*, 32 Neb. 349, 49 N. W. 453, where money was collected and retained by agent.

Cited. *arguendo*, in *Norris v. Haggin*, 12 Sawy. 53, 28 Fed. 280, and *Thompson v. Whitaker Iron Co.*, 41 W. Va. 584, 23 S. E. 798.

Limitation of actions.—To avoid statute of limitations on ground of concealment of fraud, there must be diligence; and means of knowledge are equivalent of actual knowledge, p. 143.

Approved in *Ware v. Galveston City Co.*, 146 U. S. 116, 36 L. 910, 13 S. Ct. 38, collecting cases, where plaintiffs were put upon inquiry regarding fraudulent transfer of stock in defendant company; *Johnston v. Standard Min. Co.*, 148 U. S. 370, 37 L. 486, 13 S. Ct. 589, where attorney took deed from plaintiff to perfect title, and, after collusive suit, conveyed; *Pearsall v. Smith*, 149 U. S. 235, 37 L. 716, 13 S. Ct. 835, where assignee for creditors sought to set aside transfers previously attacked by others; *Shauer v. Alterton*, 151 U. S. 622, 38 L. 291, 14 S. Ct. 446, *Dyer v. Taylor*, 50 Ark. 320, 7 S. W. 260, and *Kansas Moline, etc., Co. v. Sherman*, 3 Okl. 214, 41 Pac. 626, 32 L. R. A. 62, and *n.*, all holding purchasers of insolvent's stock bound to investigate facts pointing to fraud on creditors; *Dannmeyer v. Coleman*, 8 Sawy. 58, 11 Fed. 102, where alleged acts of fraud of company's officers were matters of general notoriety; *Norris v. Haggin*, 12 Sawy. 53, 58, 59, 28 Fed. 280, 283, where suit was to recover lands long in open possession of defendants; *Teall v. Slaven*, 14 Sawy. 369, 40 Fed. 778, where after long years plaintiffs attempted recovery of land fraudulently obtained; *Yancy v. Cothran*, 32 Fed. 690, where circumstances of fraud alleged were as well known three years before; *Jones v. Smith*, 38 Fed. 382, barring claim of assignee in bankruptcy, where creditors had means of knowledge; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 503, imputing knowledge of terms from knowledge of fact of lease;

Rugan v. Sabin, 53 Fed. 419, 421, 10 U. S. App. 519, holding seven years' acquiescence in sale made on misrepresentation ratified it, and inquiry made of perpetrator of fraud insufficient; Percy v. Cockrill, 53 Fed. 875, 10 U. S. App. 574, where plaintiffs had notice that devisee claimed absolute ownership of realty charged with trust; Dugan v. O'Donnell, 68 Fed. 992, where claimant had notice of another's claim of title; Scheffel v. Hays, 58 Fed. 461, 19 U. S. App. 220, holding inquiry must be honest and reasonably calculated to discover facts; Fuller v. Montague, 59 Fed. 220, 16 U. S. App. 391, where extreme laches followed infancy; Swift v. Smith, 79 Fed. 713, 49 U. S. App. 187, where plaintiff knew her deceased father had property, and facts were of record; Curtis v. Lakin, 94 Fed. 255, and Thomas v. Sypert, 61 Ark. 589, 33 S. W. 1063, both holding conduct of alleged trustee notice of repudiation of trust; Bland v. Fleeman, 58 Ark. 91, 23 S. W. 5, where administrator purchased from his own vendee before confirmation; M'Kneely v. Terry, 61 Ark. 545, 33 S. W. 958, where grantor of interest in land secreted deed and kept profits for sixteen years; Wier v. Johns, 14 Colo. 498, 24 Pac. 263, where appellant conveyed larger tract than he thought and asked cancellation; De Mares v. Gilpin, 15 Colo. 84, 24 Pac. 571, where defendant had title approved by surveyor-general and confirmed by Congress; Board of Supervisors v. Vincent, 65 Mich. 507, 33 N. W. 46, imputing to supervisors having access to treasurer's books knowledge of money drawn; Duxbury v. Boice, 70 Minn. 121, 72 N. W. 840, action to subject real estate to judgment twelve years after transfer; Shelby Co. v. Bragg, 135 Mo. 300, 36 S. W. 602, where former county clerk was sued for money improperly retained, facts being of record; Effinger v. Hall, 81 Va. 106, imputing knowledge to purchasers tracing title through recorded will creating estates in remainder; Rogers v. Van Northwick, 87 Wis. 431, 58 N. W. 763, where corporation stock was fraudulently obtained from claimant's agent; Moore v. Boyd, 74 Cal. 171, 15 Pac. 672, where person lending money to corporation could have ascertained from books how stock stood; Lady Washington, etc., Co. v. Wood, 113 Cal. 487, 45 Pac. 810, where plaintiff sought to cancel release of debt made under trilateral contract, for conspiracy; Truett v. Onderdonk, 120 Cal. 589, 53 Pac. 29, where partner sought to reopen accounting after settlement made during litigation; Dole v. Wilson, 39 Minn. 332, 40 N. W. 162, holding facts of case did not warrant intervention of equity after judgment barred; Melms v. Pabst Brewing Co., 93 Wis. 174, 57 Am. St. Rep. 912, 66 N. W. 524, extending rule to cases of laches without regard to statute; Shain v. Sresovich, 104 Cal. 405, 38 Pac. 52, where, under California statute, mistake was claimed, in payment of money.

Cited, *arguendo*, in Credit Co. v. Arkansas Cent. R. Co., 5 McCrary, 33, 15 Fed. 55, Thompson v. German Ins. Co., 77 Fed. 262, M'Monagle v. M'Glinn, 85 Fed. 92, and Burling v. Newlands, 112 Cal. 500, 44 Pac. 817.

Distinguished in *Mercantile Trust Co. v. Kanawha, etc., Ry.*, 50 Fed. 877, where there was nothing to put claimant on inquiry, and *Richardson v. Green*, 61 Fed. 432, 15 U. S. App. 488, where will attacked as forgery had just been probated.

Limitation of actions.—To avoid statute of limitations for concealment of fraud, time, nature and circumstances of discovery must be fully stated and proved and delay shown to be consistent with requisite diligence, p. 143.

Approved in *Nat. Bank v. Carpenter*, 101 U. S. 567, 25 L. 815, a suit in equity involving same facts; *Boone Co. v. Burlington, etc., R. R.*, 139 U. S. 693, 35 L. 323, 11 S. Ct. 690, where county sued to vacate collusive judgment annulling taxes, without pleading circumstances of discovery; *Pearsall v. Smith*, 149 U. S. 236, 37 L. 717, 13 S. Ct. 835, where pleading failed to show proper diligence; *Felix v. Patrick*, 145 U. S. 332, 36 L. 726, 12 S. Ct. 867, where pleadings omitted circumstances of discovery of fraudulent location of plaintiff's scrip; *Hardt v. Heldweyer*, 152 U. S. 559, 38 L. 553, 14 S. Ct. 674, extending rule to case of laches outside statute, in attacking fraudulent transfer; *Taylor v. South., etc., Alabama R. R.*, 4 Woods, 584, 13 Fed. 159, where plaintiff stockholder plead ignorance of stock issued defendant being preferred; *Credit Co. v. Arkansas Cent. R. Co.*, 5 McCrary, 31, 15 Fed. 53, where bill charging fraud in sale of railroad to former president failed in averments; *Foster v. Mansfield, etc., R. Co.*, 36 Fed. 639, dismissing bill for laches, filed ten years after alleged fraudulent foreclosure; *St. Paul, etc., Ry. v. Sage*, 49 Fed. 319, 322, 323, 4 U. S. App. 160, where land-grant railroad claimed fraudulent selection by another, facts being of record; *Bangs v. Loveridge*, 60 Fed. 966, where defendant's decedent promised mortgage on land not his, averments being insufficient; *Rhino v. Emery*, 65 Fed. 835, where deed and will attacked were of record, and pleadings were not specific; *Lant v. Manley*, 71 Fed. 14, where material facts and conveyances complained of were of record; *Jones v. Perkins*, 76 Fed. 84, where plaintiff claimed from devisee, long in possession, half estate by decedent's agreement; *Thompson v. German Ins. Co.*, 77 Fed. 262, where fraudulent transfer of insolvent bank's stock was attacked long after; *Hubbard v. Manhattan Trust Co.*, 87 Fed. 60, 57 U. S. App. 746, holding averment of ignorance, and concealment by defendant of hypothecation, insufficient; *M'Monagle v. M'Glinn*, 85 Fed. 92, 93, where plaintiff, trusting defendant, who advised secrecy, delayed twelve years; *Murray v. Chicago, etc., Ry.*, 92 Fed. 872, where allegations amounted to "ignorance at one time and knowledge at another;" *School District v. Deweese*, 93 Fed. 602, a similar case; *Arnett v. Coffey*, 1 Colo. App. 39, 27 Pac. 616, where creditors attacked voluntary conveyance by debtor; *Stone v. Brown*, 116 Ind. 81, 18 N. E. 394, an action to subject to payment of debt, realty fraudulently transferred; *Douglas v. Corry*,

46 Ohio St. 354, 15 Am. St. Rep. 608, 21 N. E. 442, where decedent, as attorney, collected large amounts and retained them many years; *Glass Co. v. Child*, 10 Utah, 485, 37 Pac. 737, action to subject property sold under another creditor's execution, to plaintiff's claim; *Perkins v. Lane*, 82 Va. 64, where allegations in suit for proceeds of bond long ago collected were insufficient; *Robertson v. Burrell*, 110 Cal. 578, 42 Pac. 1088, where heirs of deceased partner seeking accounting failed to make clear showing; *Burling v. Newlands*, 112 Cal. 501, 44 Pac. 817, where plaintiffs claimed against estate of decedent as assignee for creditors; *Lady Washington, etc., Co. v. Wood*, 113 Cal. 487, 45 Pac. 810, where plaintiff alleged release of debt obtained by conspiracy; *Truett v. Onderdonk*, 120 Cal. 589, 53 Pac. 29, action for accounting between partners, settlement having been made during suit years before; *Rogers v. Van Nortwick*, 87 Wis. 429, 58 N. W. 762, holding courts of equity apply rule of laches according to merits of each case; *Melms v. Fabbst Brewing Co.*, 93 Wis. 173, 57 Am. St. Rep. 911, 66 N. W. 524, holding failure to investigate must have been blamable; *Lataillade v. Orena*, 91 Cal. 578, 25 Am. St. Rep. 224, 27 Pac. 927, where relationship of parties was confidential and averments held sufficient.

Cited, arguendo, in *Wollensak v. Reiher*, 115 U. S. 102, 29 L. 352, 5 S. Ct. 1140, and *Wickham v. Sprague*, 18 Wash. 471, 51 Pac. 1057.

Cited in 90 Am. Dec. 298, note.

Distinguished in *Rosenthal v. Walker*, 111 U. S. 190, 28 L. 397, 4 S. Ct. 385, and *Traer v. Clews*, 115 U. S. 538, 29 L. 470, 6 S. Ct. 159, both approving sufficiency of averment "that defendants kept concealed from plaintiff" fraud in question; *Forbes v. Overby*, 4 Hughes, 444, 445, F. C. 4,928a, asking discovery where circumstances were not known.

Limitation of actions.—Where judgment debtor fraudulently confessed judgments, mortgaged and transferred property, and swore he had nothing and had disposed of all his property in satisfaction of bona fide debts, and judgment creditor thereupon sold judgment to debtor's son-in-law at reduction, statute began to run from time of fraud, creditor not being reasonably diligent and concealment not being such as to suspend statute, p. 143.

101 U. S. 143-148, 25 L. 901, *PELTON v. NATIONAL BANK*.

Courts.—Question of constitutionality of State statute belongs to highest State court, and Federal courts will, where possible, avoid deciding in advance of it, p. 144.

Followed in *Cummings v. National Bank*, 101 U. S. 155, 25 L. 904, and *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. 1052.

Rule applied in *Western Union Tel. Co. v. Poe*, 61 Fed. 469, where court delayed decision four months, hoping that State Supreme Court might decide question; *Western Union Tel. Co. v. Poe*, 64

Fed. 11, reversing its own ruling, made before final judgment upon determination of such question by State Supreme Court.

Taxation.—Any system of assessing taxes which exacts from owners of national bank shares more, in proportion to actual value, than from owners of other moneyed capital similarly valued, contravenes section 5219, revised statutes, and to extent of excess such tax is void, pp. 146, 148.

Approved in *Puget Sound Nat. Bank v. King*, 57 Fed. 433, overruling demurrer on this ground; *Boyer v. Boyer*, 113 U. S. 694, 28 L. 1090, 5 S. Ct. 709, where State law exempted from county tax certain securities not given by corporations; *First Nat. Bank v. Treasurer*, 25 Fed. 750, 751, where such shares were assessed over 60 per cent., unlike other property; *Whitney Nat. Bank v. Parker*, 41 Fed. 409, where law exempted certain securities in hands of individuals, but not of banks; *First Nat. Bank v. Hungate*, 62 Fed. 549, where such shares were assessed above actual value and other moneyed capital not at all; *Rosenberg v. Weekes*, 67 Tex. 584, 4 S. W. 900, and *Wells v. Western Paving, etc., Co.*, 96 Wis. 126, 70 N. W. 1074, both holding party seeking relief must have paid what was just; *Bank v. City Council*, 86 Iowa, 38, 52 N. W. 337, where board of equalization cancelled deduction of debts from such shares; *Peavey v. Greenfield*, 64 N. H. 284, 9 Atl. 722, where selectmen refused to deduct indebtedness; *Evansville Nat. Bank v. Britton*, 10 Biss. 505, 8 Fed. 868, *McAden v. Commissioners*, 97 N. C. 359, 2 S. E. 672, and *Ruggles v. Fond du Lac*, 53 Wis. 440, 10 N. W. 566, all involving laws excepting such shares from rule deducting debts from assessment; *Richards v. Incorporated Town, etc.*, 31 Fed. 508, holding mode of taxing immaterial, if not imposing greater burden; *Richmond v. Crenshaw*, 76 Va. 940, holding city not entitled to levy tax under invalid assessment; *Trustees Cincinnati, etc., Ry. v. Guenther*, 19 Fed. 399, where railroad was assessed above and other property below real value; *Railroad, etc., Cos. v. Board of Equalizers*, 85 Fed. 307, where railroad and telephone properties were unfairly assessed at full value; *Chicago, etc., R. R. v. Commissioners*, 54 Kan. 789, 39 Pac. 1040, where railroad was assessed at full value and other property at 25 per cent.; *Walsh v. King*, 74 Mich. 355, 41 N. W. 1082, holding excessive tax, due to willful undertaxation of others, void as to excess.

Cited, *arguendo*, in *Richmond, etc., R. Co. v. Blake*, 49 Fed. 905, *Pollard v. State*, 65 Ala. 632, *Maguire v. Board of Revenue, etc.*, 71 Ala. 414, and *First Nat. Bank v. Richmond*, 39 Fed. 314.

Cited in 96 Am. Dec. 294, 295, note, and 69 Am. St. Rep. 49, note.

Distinguished in the following cases, on the ground that there was no system or statute discriminating against complainants: *National Bank v. Kimball*, 103 U. S. 735, 26 L. 470, *Exchange Nat.*

Bank v. Miller, 19 Fed. 374, *Stratton v. Collins*, 43 N. J. L. 569, *Wagoner v. Loomis*, 37 Ohio St. 582, and *First Nat. Bank v. Farwell*, 10 Biss. 272, 7 Fed. 520. Qualified in *Bressler v. Wayne*, 32 Neb. 836, 49 N. W. 787, 13 L. R. A. 615, and n., where Nebraska statute disallowed deduction of debts upon any bank shares; *Lemly v. Commissioners*, 85 N. C. 382, holding reduction of assessment of realty does not relieve such shareholder; *Rosenberg v. Weekes*, 67 Tex. 585, 4 S. W. 901, holding plaintiff asking relief because of law not allowing deduction of debts, must allege indebtedness.

Taxation.—National bank may enjoin collection from shareholders of illegal tax based on assessment intentionally much higher than on other personal property, including banking capital, it being in violation of section 5219, revised statutes, p. 148.

Approved in *Hills v. Nat. Albany, etc., Bank*, 12 Fed. 94, *Covington City Nat. Bank v. Covington*, 21 Fed. 491, and *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 554, 39 L. 810, 15 S. Ct. 679, where injunctions were asked by shareholders against payment by companies of illegal tax. See 96 Am. Dec. 296, note.

101 U. S. 149-153, 25 L. 848, *WORTHINGTON v. MASON*.

Appeal and error.—There is no error when one of several instructions for jury presented, refused and excepted to as a whole, is rightfully rejected, p. 149.

Followed in *United States v. Hough*, 103 U. S. 73, 26 L. 306, *Union Ins. Co. v. Smith*, 124 U. S. 424, 31 L. 505, 8 S. Ct. 545, and *Bogk v. Gassert*, 149 U. S. 26, 37 L. 636, 13 S. Ct. 741. Rule applied in *Cleveland, etc., Ry. v. Zider*, 61 Fed. 909, 18 U. S. App. 699, where there was one request, one refusal and one exception to "each and all;" *Vider v. O'Brien*, 62 Fed. 327, 18 U. S. App. 711, where defendants "excepted to said charge in entirety, and to following portion thereof;" *Pittsburgh, etc., Ry. v. Thompson*, 82 Fed. 728, 54 U. S. App. 236, where exception was to refusal "to give separately all of the requests asked."

Appeal and error.—Where judge charged that in certain state of facts plaintiff became free woman, and bill of exceptions set forth no evidence introduced or offered at trial, it cannot be presumed, against verdict, that plaintiff ever was slave, p. 151.

Appeal and error.—On review by writ of error, such error must appear by ruling on pleadings, or state of facts shown by special verdict, agreed statement duly signed and submitted to court below, or bill of exceptions, p. 152.

Cited, *arguendo*, in *People v. Boughton*, 23 Colo. 25, 46 Pac. 133, *New York, etc., R. R. v. Madison*, 123 U. S. 527, 31 L. 260, 8 S. Ct. 247, and *United States v. Wingate*, 44 Fed. 131.

Appeal and error.—On review by writ of error, objection to instructions of court given or refused, must be accompanied by state-

ment of testimony given or offered, relevant to such instructions, certified under hand of court, p. 152.

Reaffirmed in *People v. Boughton*, 23 Colo. 25, 46 Pac. 133, and *Myrick v. Merritt*, 22 Fla. 347. Rule applied in *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 196, 30 L. 649, 7 S. Ct. 506, and *New York, etc., R. R. v. Madison*, 123 U. S. 527, 31 L. 260, 8 S. Ct. 247, in each of which cases bill of exceptions omitted evidence relevant to charges complained of; *United States v. Wingate*, 44 Fed. 131, where bill of exceptions omitted evidence on vital point in determining correctness of charge; *Southwestern Virginia Imp. Co. v. Frari*, 58 Fed. 173, 8 U. S. App. 444, where the evidence was not part of bill of exceptions signed by judge.

101 U. S. 153-164, 25 L. 903, CUMMINGS v. NATIONAL BANK.

Taxation.—Where bill assailing tax of national bank shares, as violating act of Congress, does not, by positive averment or necessary implication, bring it within prohibitory clause, court need not decide question, p. 155.

Followed in *First Nat. Bank v. Farwell*, 10 Biss. 272, 7 Fed. 520, holding that bill must distinctly aver that shares are taxed as prohibited. Cited, without special application, in *Maguire v. Board of Commrs.*, 71 Ala. 414.

Courts.—National banks may resort to Federal courts for determination of State law, by reason of organization under act of Congress, p. 155.

Followed in *Covington City Nat. Bank v. Covington*, 21 Fed. 492. Approved in *Dundee Mtge., etc., Co. v. School Dist.*, 10 Sawy. 72, 21 Fed. 153, where complainant was an alien.

Equity.—Where State law requires national banks to pay stockholders' taxes on their shares, payment under protest of excessive tax and action to recover excess is not adequate remedy, and bank, being trustee of stockholder, and liable to multiplicity of suits by stockholders in event of such payment, may have relief in equity, pp. 155, 156.

Followed in *Pelton v. National Bank*, 101 U. S. 148, 25 L. 903, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. 1052, *Hills v. Nat. Albany Exchange Bank*, 12 Fed. 94, *Covington City Nat. Bank v. Covington*, 21 Fed. 492, *Whitney Nat. Bank v. Parker*, 41 Fed. 403, *Third Nat. Bank v. Mylin*, 76 Fed. 386, and *State Bank v. Board of Revenue*, 91 Ala. 219, 8 So. 853. Rule also applied in *Evansville Nat. Bank v. Britton*, 10 Biss. 504, 8 Fed. 868, *Nat. Albany Exchange Bank v. Wells*, 18 Blatchf. 484, 5 Fed. 254, and *Albany City Nat. Bank v. Maher*, 19 Blatchf. 184, 6 Fed. 426, all, under statutes, requiring banks to retain dividends equal to taxes; *Brown*

v. French, 80 Fed. 169, enjoining sale of national bank property where assessor assessed stock, not shares; *Street R. R. v. Morrow*, 87 Tenn. 427, 11 S. W. 353, 2 L. R. A. 860, where similar statute provided for payment by street railroad of tax upon shares; *Union Pac. Ry. v. Cheyenne*, 113 U. S. 526, 28 L. 1102, 5 S. Ct. 605, where railroad's legal remedy would involve suits in several counties; *Sanford v. Poe*, 69 Fed. 548, 37 U. S. App. 378, extending rule to individuals, to avoid suits against eighty-seven county auditors; *Shelton v. Platt*, 139 U. S. 598, 599, 35 L. 277, 11 S. Ct. 649, to point that special ground must appear for equitable relief; *Dimmick v. Register*, 92 Ala. 460, 9 So. 80, to point that remedy in equity depends upon inadequacy of legal remedy. Cited, *arguendo*, in *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 554, 39 L. 810, 15 S. Ct. 679, *Grether v. Wright*, 75 Fed. 745, 746, 43 U. S. App. 770, and *Nashville, etc., Ry. v. McConnell*, 82 Fed. 71. See 96 Am. Dec. 296, note.

Distinguished in *Schulenberg, etc., Lumber Co. v. Hayward*, 20 Fed. 425, denying injunction to individuals, because legal remedy adequate; *Sioux Falls Nat. Bank v. Swenson*, 48 Fed. 623, and *Northwestern Loan, etc., Co. v. Muggli*, 8 S. Dak. 161, 65 N. W. 442, on application for rehearing, affirming S. C., 7 S. Dak. 529, 64 N. W. 1122, both holding bank not expressly authorized to pay tax, mere volunteer; *Robinson v. Wilmington*, 65 Fed. 859, 25 U. S. App. 144, where shares were irregularly assessed against bank and State law provided means of correction.

Courts.—State statute cannot control procedure in equity cases in Federal courts, or deprive them of separate equity jurisdiction, but a new right or remedy created by State will be enforced either in law or equity in Federal courts, p. 157.

Approved in *Chapman v. Brewer*, 114 U. S. 171, 29 L. 88, 5 S. Ct. 805, upholding right to equitable relief, against adverse claimants, given by State statute; *Greeley v. Lowe*, 155 U. S. 75, 39 L. 76, 15 S. Ct. 28, and *Grether v. Wright*, 75 Fed. 746, 749, 43 U. S. App. 770, both denying right to jury in Federal court where State gives equitable remedy, except where Constitution forbids denial; *Wells, Fargo & Co. v. Miner*, 11 Sawy. 285, 286, 25 Fed. 536, permitting right to interplead in case to which State code extended it; *Hunton v. Equitable Life, etc., Soc.*, 45 Fed. 663, to point that Federal courts will not be governed by general State procedure; *Gregg v. Sanford*, 65 Fed. 155, 28 U. S. App. 313, following State authorities; *Missouri, etc., Trust Co. v. Krumseig*, 77 Fed. 43, 40 U. S. App. 620, where Minnesota statute waived requirement of tender to applications for relief against usury; *Darragh v. H. Wetter Mfg. Co.*, 78 Fed. 13, 14, 49 U. S. App. 12, 13, where State law permitted seizure of property of insolvent corporation at suit of simple contract creditor. Cited, *arguendo*, in *Standard Cattle Co. v. Baird*, — Wyo. —, 56 Pac. 600.

Courts.—Remedy by injunction against illegal tax, given by section 5848, revised statutes of Ohio, will be enforced by Federal courts in Ohio cases, p. 157.

Followed in *Western Union Tel. Co. v. Poe*, 61 Fed. 452, *Meyers v. Shields*, 61 Fed. 715, *Grether v. Wright*, 75 Fed. 745, 751, 43 U. S. App. 770, and *Brinkerhoff v. Brumfield*, 94 Fed. 426. Approved in *Union Pac. Ry. v. Cheyenne*, 113 U. S. 526, 28 L. 1102, 5 S. Ct. 605, and *Shelton v. Platt*, 139 U. S. 598, 599, 35 L. 277, 11 S. Ct. 649, both to effect that equity intervenes only on special grounds. Cited, *arguendo*, in *Norwood v. Baker*, 172 U. S. 291, 19 S. Ct. 195.

Taxation.—Where assessors adopt system of valuation designed to operate unequally, in violation of Constitution, and apply it to large class of individuals or corporations, equity will restrain operation thereof, pp. 157, 158.

Followed in *First Nat. Bank v. Treasurer*, 25 Fed. 750, 751. Rule applied in *Boyer v. Boyer*, 113 U. S. 694, 28 L. 1090, 5 S. Ct. 709, concerning uniformity of tax on bank shares, where indefinite amount of moneyed capital exempt; *First Nat. Bank v. Richmond*, 39 Fed. 314, where non-taxables were not deducted from value of bank shares; *Whitney Nat. Bank v. Parker*, 41 Fed. 409, where statute forbade such deduction; *Richards v. Rock Rapids*, 31 Fed. 508, *Bank v. City Council*, 86 Iowa. 38, 52 N. W. 337, *Ruggles v. Fond du Lac*, 53 Wis. 440, 10 N. W. 566, and *McAden v. Commissioners*, 97 N. C. 359, 2 S. E. 672, all extending to bank shareholders right of deducting debts granted others; *Grether v. Wright*, 75 Fed. 745, 43 U. S. App. 770, where it was sought to tax District of Columbia bonds; *Railroad, etc., Cos. v. Board of Equalizers*, 85 Fed. 307, as to railroad and telephone property; *Taylor v. Louisville, etc., R. Co.*, 88 Fed. 369, 371, 372, 373, 374, 60 U. S. App. 201, 204, 205, 206, 207, 208, as to railroad property; *Trustees v. Guenther*, 19 Fed. 399, and *Chicago, etc., R. R. v. Commissioners, etc.*, 54 Kan. 789, 790, 39 Pac. 1040, 1041, where railroad property was overvalued as compared to other county property; *Norwood v. Baker*, 172 U. S. 291, 19 S. Ct. 195, where strip of complainant's property was condemned for street and her property abutting assessed under rule excluding inquiry as to benefits; *Dundee Mtge., etc., Co. v. School Dist.*, 10 Sawy. 72, 21 Fed. 153, where tax arose under invalid law; *Dundee Mtge., etc., Co. v. Parrish*, 11 Sawy. 99, 24 Fed. 202, holding that no expressed design is necessary, if there be uniform custom; *Dundee Mtge., etc., Co. v. Charlton*, 13 Sawy. 27, 32 Fed. 193, where mortgages were assessed at face, and real estate at half value; *Andrews v. King*, 1 Wash. 52, 22 Am. St. Rep. 139, 23 Pac. 410, where mortgages were uniformly assessed at full value, but other property at one-fourth; *Ex parte Fort Smith, etc., Co.*, 62 Ark. 466, 467, 36 S. W. 1061, reducing assessment on bridge one-half where all other property so valued; *Hazzard v. O'Bannon*, 36 Fed. 855, where the overvaluation of complainant's property was willful;

Walsh v. King, 71 Mich. 355, 41 N. W. 1082, where, by agreement, ships were taxed at but one-tenth value; Carlton v. Newman, 77 Me. 415, 1 Atl. 197, enjoining collection of excess where, after vote of \$500, municipal officers erected school costing \$825; Scott v. Donald, 165 U. S. 112, 41 L. 653, 17 S. Ct. 263, Poindexter v. Greenhow, 114 U. S. 295, 29 L. 194, 5 S. Ct. 916, Allen v. Baltimore, etc., R. R., 114 U. S. 314, 29 L. 201, 5 S. Ct. 927, and Taylor v. Louisville, etc., R. Co., 88 Fed. 356, 60 U. S. App. 181, all to point that application for injunction of State tax officials is not proceeding against State; Union Pac. Ry. v. Cheyenne, 113 U. S. 526, 28 L. 1102, 5 S. Ct. 605, to point that equitable intervention is granted only on special grounds. Cited, *arguendo*, in Mercantile Bank v. New York, 121 U. S. 152, 30 L. 900, 7 S. Ct. 833, Dundee Mortgage, etc., Co. v. School District, 10 Sawy. 76, 21 Fed. 156, Balfour v. Portland, 12 Sawy. 124, 28 Fed. 739, Richmond, etc., R. Co. v. Blake, 49 Fed. 905, Puget Sound Nat. Bank v. King, 57 Fed. 433, Western Union Tel. Co. v. Poe, 61 Fed. 463, Lemly v. Commissioners, 85 N. C. 382, West Portland Park v. Kelly, 29 Or. 417, 45 Pac. 902, and dissenting opinion in State Board v. Central R. R., 48 N. J. L. 350, 4 Atl. 601. See 96 Am. Dec. 294, 295, note.

Distinguished in National Bank v. Kimball, 103 U. S. 735, 26 L. 470, Stanley v. Supervisors, 121 U. S. 551, 30 L. 1004, 7 S. Ct. 1239, Exchange Nat. Bank v. Miller, 19 Fed. 374, 375, Chamberlain v. Walter, 60 Fed. 790, 792, Stratton v. Collins, 43 N. J. L. 566, and Wagoner v. Loomis, 37 Ohio St. 582, where overvaluations alleged were not result of discriminating system or fraud; Biggs v. Board of Commissioners, 7 Ind. App. 145, 34 N. E. 501, where board of review in judicial capacity reduced valuation of realty one-half; Dundee Mtge., etc., Co. v. Parrish, 11 Sawy. 98, 24 Fed. 201, as not applying to act of Congress relating to taxation of national bank shares. Distinguished, *arguendo*, in Taylor v. Louisville, etc., R. Co., 88 Fed. 372, 60 U. S. App. 205, 206.

Taxation.—Sections 2 and 3 of article 12 of Ohio Constitution, providing for uniform taxation and at true value, requires uniformity in rate of taxation and mode of assessment, and uniformity co-extensive both with territorial application of tax and all property, p. 158.

Cited, *arguendo*, in Daly v. Morgan, 69 Md. 484, 16 Atl. 297, 1 L. R. A. 764.

Taxation.—Ohio statutes, providing separate boards of equalization for separate classes of property, does not violate sections 2 and 3, article 12 of State Constitution, requiring uniform taxation of property at true value, p. 158.

Approved in St. Louis, etc., Ry. v. Worthen, 52 Ark. 536, 13 S. W. 256, 7 L. R. A. 375, and Sawyer v. Dooley, 21 Nev. 400, 32 Pac. 440, both upholding special regulations for assessment of railroads.

Constitutional law.—Statutes cannot be held unconstitutional because capable of unfaithful administration, p. 161.

Approved in *Missouri, etc., Trust Co. v. Assessor*, 51 La. Ann. 424, 25 So. 446, upholding law providing for submission to voters of special tax in favor of railroad; *Central R. R. v. State Board, etc.*, 48 N. J. L. 8, 57 Am. Rep. 521, 2 Atl. 793, upholding statute creating separate mode of assessing railroads; *Christian Moerlein Brewing Co. v. Hagerty*, 8 Ohio C. C. 335, upholding law fixing value of taxables by average amount on hand at certain periods.

Cited, *arguendo*, in *Railroad, etc., Cos. v. Board of Equalizers*, 85 Fed. 309, *Taylor v. Louisville, etc., R. Co.*, 88 Fed. 369, 60 U. S. App. 201.

Distinguished in *Dundee Mtge., etc., Co. v. School District*, 10 Sawy. 75, 21 Fed. 155, where uniform taxation was provided for all except "two-county" mortgages.

Taxation.—Phrases "salable value," "actual value" and "cash value," used in reference to assessment of taxes, are interchangeable, p. 162.

Taxation.—Where national bank, authorized to pay tax of shareholders on shares therein, pays amount which is their true share of public burden, collection of balance wrongfully assessed will be enjoined, p. 163.

Followed in *First Nat. Bank v. Hungate*, 62 Fed. 549. Approved in *Balfour v. Portland*, 12 Sawy. 125, 28 Fed. 739, extending rule to individual; *Richmond v. Crenshaw*, 76 Va. 940, where plaintiff tendered correct amount due after reduction of assessment by hustings court; *Wells v. Western Paving, etc., Co.*, 96 Wis. 126, 70 N. W. 1074, holding whole tax not void because part excessive; dissenting opinion in *Norwood v. Baker*, 172 U. S. 300, 19 S. Ct. 199, majority citing this case as authority for equitable interference without payment of correct tax.

Cited, *arguendo*, in *Boody v. Watson*, 64 N. H. 185, 9 Atl. 811, and *De La Cuesta v. Insurance Co.*, 136 Pa. St. 665.

Distinguished in *Albany City Nat. Bank v. Maher*, 20 Blatchf. 343, 9 Fed. 886, waiving tender where assessment is wholly void; *Chicago, etc., R. R. v. Commissioners*, 54 Kan. 790, 39 Pac. 1041, extending rule to railroad as to method of seeking relief; *Bank v. Ferris*, 55 Kan. 123, 39 Pac. 1043, denying injunction where tax really due had not been paid.

Denied in *Farrington v. New England Inv. Co.*, 1 N. Dak. 118, 45 N. W. 196, on statutory grounds only.

Taxation.—Equity cannot enjoin collection of unequal tax, in absence of fraud, where State assessment law is constitutional and provides appropriate tribunals for correction of errors, per *Waite, C. J.*, dissenting, pp. 163, 164.

Followed in *West Portland Park v. Kelly*, 29 Or. 419, 45 Pac. 903, where by mistake plaintiff's lots were overvalued and no appeal taken; *Andrews v. King Co.*, 1 Wash. 52, 22 Am. St. Rep. 139, 23 Pac. 410, where land was assessed at \$2,000, and mortgage thereon at \$30,000.

101 U. S. 164-169, 25 L. 860, *UNITED STATES v. LAWSON*.

Customs duties.—Act of February 26, 1867, creating new collection district and providing salary for collector, does not deprive him of fees and allowances theretofore allowed in abolished district, pp. 164, 169.

Customs duties.—Revised statutes, section 2691, providing for payment into treasury of all custom dues in excess of \$3,000, with certain exceptions, does not permit collectors to retain excess of storage rent over rent of building where other fees reach \$3,000, p. 166.

Customs duties.—Collectors of customs are entitled to fees and allowances of office paid over to commissioner, if seasonably claimed or paid under protest, p. 168.

Approved in *United States v. Badeau*, 33 Fed. 579, where consular fees were paid over under mistake of intent of general order.

Customs duties.—Payments of official receipts by collectors to commissioner of customs upon peremptory order, are not irrecoverable as voluntary payments, p. 169.

Approved in *United States v. Ellsworth*, 101 U. S. 172, 25 L. 863, as to warehouse storage charges; *Morton v. United States*, 59 Fed. 352, where clerk of Circuit Court of Appeals paid in fees under compulsion and protest.

Distinguished in *United States v. Wilson*, 168 U. S. 276, 277, 42 L. 466, 18 S. Ct. 86, where consular fees were paid over without such demand or protest.

101 U. S. 170-174, 25 L. 862, *UNITED STATES v. ELLSWORTH*.

Customs duties.—Section 2647, revised statutes, allowing collectors of customs \$2,000 out of rent and storage receipts, extends to collectors for non-enumerated ports, and storehouses under their control, used as such, are public storehouses, though not owned by United States, pp. 172, 173.

Customs duties.—Payments of storage rents by collectors for non-enumerated ports, upon peremptory order of commissioner of customs, are not irrecoverable as being voluntary, pp. 173, 174.

Distinguished in *United States v. Wilson*, 168 U. S. 277, 42 L. 466, 18 S. Ct. 86, where consul voluntarily charged himself with fees.

101 U. S. 174-181, 25 L. 1048, **WRIGHT v. BLAKESLEE**.

Internal revenue.—Devolution of contingent estate in remainder upon death of life tenant is a "succession" within section 127 of internal revenue act (13 Stat. 287), and subject to tax as such, pp. 176, 177.

Internal revenue.—Section 128 of internal revenue act (13 Stat. 287) applies not to estates in remainder, but to estates burdened by determinable incumbrances, such as rent charges, leases for years, and qualified interests, p. 177.

Internal revenue.—Penalty applicable to failure to return succession tax under internal revenue act of 1864 (as amended, 1866), is provided in section 148 of such amended act, exacting 10 per cent., and excludes all others, p. 178.

Internal revenue.—Protest necessary to recovery back illegal exaction under inland revenue laws need not be specific or even written, p. 179.

Followed in *Stewart v. Barnes*, 153 U. S. 459, 38 L. 784, 14 S. Ct. 85, where excessive collection was upon spirits withdrawn from bond without allowance for leakage.

Internal revenue.—Remainderman who came into possession in 1865, paid succession tax under protest on 31st July, 1867, perfected appeal to commissioner of internal revenue on January 3, 1873, and brought suit within two years after adverse decision, was not barred by statute of limitations (14 Stat. 152, and 17 Stat. 257), pp. 179, 180.

Cited in *In re McPherson*, 104 N. Y. 317, 58 Am. Rep. 504, 10 N. E. 686, to point that succession tax laws have been uniformly upheld. See 41 Am. St. Rep. 580, note.

Appeal and error.—Where facts were found by trial judge, Supreme Court, in reversing judgment for defendant, ordered entry of judgment for plaintiff, pp. 180, 181.

Approved in *Fort Scott v. Hickman*, 112 U. S. 165, 28 L. 641, 5 S. Ct. 64, holding correct practice, where facts are found, is to render judgment, not grant new trial.

101 U. S. 181-184, 25 L. 907, **PEOPLE'S BANK v. NATIONAL BANK**.

Banks and banking.—National banking act (R. S. 999, § 5136), conferring on directors or duly authorized agents incidental powers necessary to carry on business by discounting and negotiating notes, includes transferring and guaranteeing, p. 183.

Followed in *Davenport v. Stone*, 104 Mich. 527, 53 Am. St. Rep. 471, 62 N. W. 724; *Auten v. United States Nat. Bank*, 174 U. S.

148, 19 S. Ct. 637, affirming S. C., 79 Fed. 299, 49 U. S. App. 72, where president of discounting bank misappropriated proceeds; *Thomas v. City Nat. Bank*, 40 Neb. 505, 58 N. W. 944, 24 L. R. A. 265, where note secured by mortgage was assigned and guaranteed; *Cochran, etc. v. United States*, 157 U. S. 297, 39 L. 708, 15 S. Ct. 632, holding guaranteed note is liability required to be shown in national bank report; *Irons v. Manufacturers' Nat. Bank*, 27 Fed. 597, where bank president indorsed collateral to creditors after liquidation decided upon; *Hawkins v. Fourth Nat. Bank*, 150 Ind. 125, 49 N. E. 960, upholding rediscount by cashier effected by new note directly payable to second bank.

Distinguished in *Nat. Bank v. Atkinson*, 55 Fed. 474, where bank was mere accommodation indorser to knowledge of plaintiff; *Farmers, etc., Nat. Bank v. Smith*, 77 Fed. 135, 40 U. S. App. 690, where bank cashier guaranteed mortgage bond; *Commercial Nat. Bank v. Pirie*, 82 Fed. 802, 49 U. S. App. 601, and *Thilmany v. Iowa, etc., Bag Co.*, 108 Iowa, 336, 79 N. W. 69, denying power of bank to guarantee payment for goods; *Bowen v. Needles Nat. Bank*, 94 Fed. 928, reversing (on other grounds), S. C., *Bowen v. Needles Nat. Bank*, 87 Fed. 438, 443, holding guaranty of cashier to pay checks, void, because ultra vires; *Gray v. Farmers' Bank*, 81 Md. 641, 32 Atl. 521, holding improper credit-entry by cashier did not constitute renewal of note and release surety; *Norton v. Bank*, 61 N. H. 592, 60 Am. Rep. 335, where bank guaranteed building contract.

Banks and banking.—Transfer and guaranty of notes by vice-president of national bank will be presumed to have been duly authorized, and bank is estopped to deny it, p. 183.

Followed in *City Nat. Bank v. Thomas*, 46 Neb. 866, 65 N. W. 896, upon second appeal of S. C., 40 Neb. 505, 58 N. W. 944, 24 L. R. A. 265, where note secured by mortgage was assigned and guaranteed.

Equity.—Where one of two innocent parties must suffer by wrongful act of another, it must be he who gave power to do the wrong, p. 183.

Banks and banking.—Doctrine of ultra vires has no application to irregular exercise by bank officer of lawful powers of bank, p. 183.

Followed in *Thomas v. City Nat. Bank*, 40 Neb. 505, 58 N. W. 944, 24 L. R. A. 265.

Banks and banking.—Where notes payable in one year were improperly transferred and guaranteed by vice-president of national bank to its correspondent, with notice that its account would be debited, the enjoyment of benefit of transaction and acquiescence till maturity, ratifies it, p. 183.

Approved in *Thomas v. City Nat. Bank*, 40 Neb. 505, 507, 58 N. W. 944, 945, 24 L. R. A. 265, 266, *Eastern Townships Bank v. Vermont Nat. Bank*, 22 Blatchf. 502, 22 Fed. 189, where president borrowed, giving his own railroad bonds as collateral and bank received proceeds; *Blanchard v. Commercial Bank*, 75 Fed. 253, 44 U. S. App. 556, where president borrowed of another bank and his bank received proceeds; *Hawkins v. Fourth Nat. Bank*, 150 Ind. 126, 49 N. E. 960, where rediscount being effected by new note to second bank, first bank received proceeds.

Miscellaneous.—Cited incidentally in *Fort Scott v. Hickman*, 112 U. S. 165, 28 L. 641, 5 S. Ct. 64.

101 U. S. 184-187, 25 L. 838, *AYERS v. CHICAGO*.

Removal of causes.—Where cause removed from State to Circuit Court is remanded, order remanding is appealable to Supreme Court, p. 187.

Equity.—Original bill and cross-bill constitute one suit, and cross-bill must grow out of original suit and can bring in no new matter, p. 187.

Followed in *Railway v. United States*, 101 U. S. 641, 25 L. 1075, denying right to file cross-bill to reduce judgment to extent of counter-demand; *Winters v. Ethell*, 132 U. S. 210, 33 L. 340, 10 S. Ct. 57, denying appeal on dismissal of cross-complaint where judgment on complaint not final; *Maish v. Bird*, 4 McCrary, 131, 48 Fed. 608, holding cross-bill alone cannot determine removal of cause for diverse citizenship. See 83 Am. Dec. 252, 253, note.

Removal of causes.—Where Illinois city sued G., citizen of Illinois, to enforce sale of real estate, and A., citizen of Alabama, was made a party and filed cross-bill to enforce a lien not disputed by G., interests of A. and G. were allied, and the suit, upon removal to Circuit Court, being indivisible and not wholly between citizens of different States, was properly remanded to State court, p. 187.

Followed in *Graves v. Corbin*, 132 U. S. 587, 33 L. 468, 10 S. Ct. 201, and *Sweeney v. Grand Island, etc., R. Co.*, 61 Fed. 6, in each of which plaintiff and one defendant were of same citizenship, and the action indivisible; *Merchants, etc., Press Co. v. Insurance Co.*, 151 U. S. 385, 38 L. 204, 14 S. Ct. 373, denying right of removal where citizens of same State and aliens were on each side of real controversy; *Hazard v. Robinson*, 21 Fed. 195, *Long v. Buford*, 24 Fed. 248, and *Anderson v. Appleton*, 32 Fed. 859, collecting cases, all remanded because controversy indivisible; *Burke v. Flood*, 6 Sawy. 222, note, remanded because citizens of same State on each side of real controversy; *Broadway Nat. Bank v. Adams*, 130 Mass. 434, holding all on one side must be of different citizenship from all on other;

Birdseye v. Shæffer, 37 Fed. 827, to point that upon remanding, jurisdiction of State court reverts. Cited, *arguendo*, in *Young v. Parker*, 132 U. S. 270, 33 L. 353, 10 S. Ct. 76.

101 U. S. 188-196, 25 L. 786, *STEAM ENGINE CO. v. HUBBARD*.

Statute of Connecticut, requiring semi-annual statements, by president, of affairs of corporations, and making him liable for its debts in case of intentional neglect, is penal and must be strictly construed, p. 191.

Rule applied in *Chase v. Curtis*, 113 U. S. 458, 28 L. 1040, 5 S. Ct. 556, holding judgment for tort; not a "debt" within such statute; *Larsen v. James*, 1 Colo. App. 317, 29 Pac. 185, and *State Savings Bank v. Johnson*, 18 Mont. 442, 56 Am. St. Rep. 592, 45 Pac. 662, 33 L. R. A. 553, both holding similar statute penal within statute of limitations; *Mitchell v. Hotchkiss*, 48 Conn. 18, 40 Am. Rep. 149, and *Diversey v. Smith*, 103 Ill. 398, 42 Am. Rep. 24, both holding such liability does not survive; *Weidenger v. Spruance*, 101 Ill. 285, holding statute making corporators of existing corporations liable till stock paid in, penal; *Globe Pub. Co. v. State Bank*, 41 Neb. 185, 59 N. W. 686, 27 L. R. A. 859, holding repeal of similar law abated action pending against stockholders. Cited, *arguendo*, in *Day v. Vinson*, 78 Wis. 200, 47 N. W. 270, 10 L. R. A. 206.

Distinguished in *Gans v. Switzer*, 9 Mont. 413, 24 Pac. 20, under statute expressly extending liability to prior debts.

Penalties.—Statutory liability for debts of corporation upon failure to report corporate affairs to the State, being penal, will not be enforced outside of State creating it, p. 192.

Qualified in *Huntington v. Attrill*, 146 U. S. 679, 36 L. 1132, 13 S. Ct. 232, reversing S. C., 70 Md. 202, 16 Atl. 655, 2 L. R. A. 783, and n., refusing to enforce in another State, judgment upon such penalty. Limited in *Cuykendall v. Miles*, 10 Fed. 344, to cases of corporation officers made liable for neglect of duty. Denied in *Whitman v. Nat. Bank*, 83 Fed. 292, 51 U. S. App. 543, enforcing in New York, Kansas judgment on stockholders' double liability. See 40 Am. Rep. 152, note, and 14 Am. St. Rep. 350, note.

Corporations.—Persons acting publicly as officers of corporation are ordinarily presumed to be rightfully in office, and are subject to liabilities of such officers, pp. 192, 193.

Approved in *Teutonia Nat. Bank v. Wagner*, 33 La. Ann. 733, holding sureties on bond of cashier, though bank non-existent when bond signed.

Penalties.—To hold president for debt of corporation under sections 404, 413, revised statutes Connecticut, neglect to file required statement must have been intentional, and debt contracted after default and during continuance thereof, pp. 194, 196.

Followed in *State v. Cox*, 88 Ind. 254, exempting officers from prosecution under similar criminal statute, for default of predecessors.

Distinguished in *Gans v. Switzer*, 9 Mont. 414, 24 Pac. 20, where statute made corporation trustees liable for prior debts.

101 U. S. 196-204, 25 L. 803, *POMPTON v. COOPER UNION*.

Municipal corporations.—Legislative ratification of municipal bonds is equivalent to original authority, p. 204.

Approved in *Schneck v. Jeffersonville*, 152 Ind. 217, 218, 220, 52 N. E. 216, 217, holding legislature has power to ratify city bonds for removal of county seat.

Statutes.—Clear implication of statute is equivalent to express statement. Hence, provision by New Jersey act of 1874, for interest payments on township bonds issued under prior statute, recognized authority of such township to issue bonds under such statute, and is legislative construction thereof, p. 202.

Approved in *Denison v. Mayor, etc.*, 62 Fed. 776, holding legislative provision for payment of railroad aid bonds to original railroad's successor, is legislative construction of authorization; *Hawthorn v. Board of Commrs.*, 5 Ind. App. 234, 30 N. E. 18, holding provision for payment by city of fines in certain cases, excluded liability in others; *Chesapeake, etc., Tel. Co. v. Baltimore*, 89 Md. 715, 43 Atl. 789, holding telephone franchise statute, providing that nothing therein should be deemed to modify provisions of ordinance regarding plaintiff company, recognized validity of ordinance.

Equity.—As between two innocent persons he who contributed to produce loss must bear burden thereof, p. 204.

Municipal corporations with power to issue bonds, which recite circumstances bringing them within such power, are estopped to deny truth of recitals as against bona fide holder, p. 204.

Followed in *Ronede v. Jersey City*, 20 Fed. Cas. 1152, *Rouede v. Jersey City*, 18 Fed. 719, *Meyer v. Brown*, 65 Cal. 591, 26 Pac. 284, *Eminence v. Grasser*, 81 Ky. 56, *Bank v. Statesville*, 84 N. C. 174. Approved in *First Nat. Bank v. Walcott*, 19 Blatchf. 371, 7 Fed. 892, construing "by virtue of" in bond recital. See 64 Am. Dec. 436, note, 98 Am. Dec. 688, note, and 51 Am. St. Rep. 823, note.

Municipal corporations.—Under New Jersey act of April 9, 1868, and supplementary act, authorizing commissioners for townships along route, or at termini of railroad, to issue bonds in aid thereof, such bonds were issuable before survey, commissioners being sole and final judges as to time, and were valid in hands of bona fide holders, notwithstanding subsequent change in proposed route, p. 204.

Approved in *Eminence v. Grassner*, 81 Ky. 56.

101 U. S. 205-215, 25 L. 885, *HATCH v. DANA*.

Corporations.—Unpaid subscriptions constitute a fund for payment of corporation's debts, p. 210.

Followed in *Kelly v. Clark*, 21 Mont. 323, 69 Am. St. Rep. 679, 53 Pac. 965, 42 L. R. A. 628, *Lewis v. Glenn*, 84 Va. 971, 6 S. E. 878. Rule applied in *Morgan v. Allen*, 103 U. S. 509, 26 L. 502, enforcing liability of county on railroad stock; *Meavity v. Lincoln, etc., Co.*, 82 Me. 511, 20 Atl. 83, allowing company's assignee to set off stock liability against claim of stockholder; *Lane's Appeal*, 105 Pa. St. 60, holding unpaid stock a trust fund; *Crofoot v. Thatcher*, 19 Utah, 229, 57 Pac. 175, holding such liability being trust fund. Statute of limitations does not run till notice of repudiation. Cited, *arguendo*, in *Flinn v. Bagley*, 7 Fed. 791, *Consolidated Tank, etc., Co. v. Kansas, etc., Co.*, 45 Fed. 10, *New York Life Ins. Co. v. Beard*, 80 Fed. 67, *Jones, etc., & Co. v. Arkansas Mechanical, etc., Co.*, 38 Ark. 25. See 43 Am. Dec. 695, note, and 3 Am. St. Rep. 808, note.

Corporations.—Liability on stock subscription is several, not joint, and may be separately enforced at law, or in equity, pp. 210, 211.

Followed in *Harmon v. Page*, 62 Cal. 463, *Baines v. Babcock*, 95 Cal. 590, 29 Am. St. Rep. 161, 27 Pac. 675, *Thompson v. Lake*, 19 Nev. 115, 3 Am. St. Rep. 803, 7 Pac. 72, *Brundage v. Monumental Gold, etc., Co.*, 12 Or. 327, 7 Pac. 317, and *Martin v. South Salem Land Co.*, 94 Va. 39, 26 S. E. 593. Rule applied in *Bennett v. Glenn*, 55 Fed. 958, 8 U. S. App. 419, where amount due from other subscribers had been compromised; *Coleman v. Howe*, 154 Ill. 474, 45 Am. St. Rep. 140, 39 N. E. 729, holding failure of one shareholder to keep others in court, no defense; *Shockley v. Fisher*, 75 Mo. 502, and *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 507, both holding unpaid subscriptions assignable to assignee for creditors; *Smith v. Johnson*, 57 Ohio St. 490, 49 N. E. 695, action by receiver of corporation. Cited in 43 Am. Dec. 702, note, 31 Am. Rep. 88, note, and 3 Am. St. Rep. 815, 816, 853, note.

Corporations.—Creditor's bill to enforce liability of shareholder on unpaid subscription, subrogates creditor to place of indebted corporation, and garnishes debt due it, without changing character of debt, p. 211.

Approved in *Patterson v. Lynde*, 112 Ill. 204, holding judgment must be taken against corporation before suing subscriber; *Morrison, etc. v. Savage*, 56 Md. 144, to point that stockholder's liability is discharged by bankruptcy. Cited, *arguendo*, in *Coleman v. Howe*, 154 Ill. 474, 45 Am. St. Rep. 140, 39 N. E. 729.

Distinguished in *James H. Rice Co. v. Libbey*, 85 Fed. 826, action to enforce additional statutory liability.

Corporations.—In suit on creditor's bill subscriber to corporation cannot be compelled to pay more than he owes on stock, p. 211.

Followed in *Hickling v. Wilson*, 104 Ill. 64, and *Brundage v. Monumental Gold, etc., Co.*, 12 Or. 327, 7 Pac. 317.

Corporations.—Stockholder sued by creditor of his corporation may have receiver appointed or bring in other subscribers and enforce contribution, p. 214.

Followed in *Brundage v. Monumental Gold, etc., Co.*, 12 Or. 329, 7 Pac. 318. Cited, *arguendo*, in *Martin v. South Salem Land Co.*, 94 Va. 39, 26 S. E. 593. See 3 Am. St. Rep. 815, note.

Limited in *Young v. Farwell*, 139 Ill. 332, 28 N. E. 845, to actions brought in State where corporation is.

Corporations.—Subscriber against whom judgment has been rendered for debt of corporation, has equitable right to contribution from other subscribers, p. 214.

Corporations.—Court of equity may enforce payment of stock subscriptions, in favor of creditors, though no call has been made by company, p. 214.

Followed in *Glenn v. Liggett*, 135 U. S. 546, 34 L. 268, 10 S. Ct. 872, *National Park Bank v. Peavey*, 64 Fed. 924, *Crawford v. Rohrer*, 59 Md. 605, *St. Louis Trust Co. v. Vincent*, 77 Mo. App. 85, *Thompson v. Crockett*, 19 Nev. 245, 3 Am. St. Rep. 885, 9 Pac. 122, *Lewis v. Glenn*, 84 Va. 975, 6 S. E. 880, and *McKay v. Elwood*, 12 Wash. 585, 41 Pac. 921. Rule applied in *Hawkins v. Glenn*, 131 U. S. 334, 33 L. 192, 9 S. Ct. 744, holding statute of limitations does not run until call or its equivalent; *Ross-Meehan Brake, etc., Co. v. Southern, etc., Co.*, 72 Fed. 960, in action to wind up insolvent corporation; *Glenn v. Semple*, 80 Ala. 161, 60 Am. Rep. 94, discussing time of commencement of statute of limitations; *Marson v. Deither*, 49 Minn. 426, 52 N. W. 38, where assignee made call; *Washington Sav. Bank v. Butchers, etc., Bank*, 107 Mo. 143, 28 Am. St. Rep. 409, 17 S. W. 645, holding statute of limitations runs from return of execution against corporation "nulla bona;" *Lionberger v. Broadway Sav. Bank*, 10 Mo. App. 507, action by assignee. See 100 Am. Dec. 555, note, and 3 Am. St. Rep. 811, 815, note.

Distinguished in *Glenn v. Semple*, 80 Ala. 164, 60 Am. Rep. 97, and *Semple v. Glenn*, 91 Ala. 257, 24 Am. St. Rep. 896, 9 So. 265, both concerning statute of limitations in suit by trustee.

Bankruptcy.—Assignee in bankruptcy of corporation may make call or assessment as successor to rights of bankrupt, p. 215.

Corporations.—Judgment creditor of insolvent corporation upon return of execution "nulla bona" may proceed by creditor's bill

against one or more stockholders upon their unpaid subscriptions, without joining all, pp. 210-215.

Followed in *Hickling v. Wilson*, 104 Ill. 64, and *Cornell, etc., Appeal*, 114 Pa. St. 164, 6 Atl. 258. Rule applied in *Hill v. Merchants' Ins. Co.*, 134 U. S. 527, 33 L. 998, 10 S. Ct. 592, under declaratory statute; *Handley v. Stutz*, 137 U. S. 369, 34 L. 708, 11 S. Ct. 118, holding bill maintainable only in behalf of all creditors; *Stutz v. Handley*, 41 Fed. 537, as to form of suit; *Ervin v. Oregon Ry., etc., Co.*, 22 Blatchf. 195, 20 Fed. 582, and *Clapp v. Peterson*, 104 Ill. 35, both holding property of corporation may be similarly followed in hands of shareholders; *Newberry v. Robinson*, 36 Fed. 842, enforcing in New York liability under Ohio statute; *Merchants' Nat. Bank v. Chattanooga Const. Co.*, 53 Fed. 316, though judgment obtained in different State; *Furnald v. Glenn*, 56 Fed. 375, holding extent of liability difference between face of stock and amount paid; *New York Life Ins. Co. v. Beard*, 80 Fed. 67, holding better procedure by bill in equity, to prevent multiplicity of suits; *Hall, etc. v. Henderson*, 114 Ala. 609, 62 Am. St. Rep. 145, 21 So. 1023, to point that decree would be money decree; *Kimball v. Richardson, etc., Co.*, 111 Cal. 396, 43 Pac. 1113, postponing attachment of insolvent company's funds by insolvent subscriber, to outside creditors; *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 533, 27 Pac. 891, denying recovery by garnishment; *Johnston v. Allis*, 71 Conn. 218, 41 Atl. 819, holding assignee may sue in his own name; *Coleman v. Howe*, 154 Ill. 474, 45 Am. St. Rep. 140, 39 N. E. 729, holding failure of appellant shareholders to keep others in court, no defense; *Trust Co. v. Loan Co.*, 92 Me. 450, 43 Atl. 25, where bill asked ratable contribution; *Hooper v. Central Trust Co.*, 81 Md. 580, 32 Atl. 510, 29 L. R. A. 268, holding that mere pretended payments for stock will be disregarded; *Wheeler v. Millar*, 90 N. Y. 361, holding debt due subscriber from corporation no defense if it can be set off against additional statutory liability. Cited, *arguendo*, in *Gilchrist v. Helena, etc., R. Co.*, 49 Fed. 522, *Young v. Farwell*, 139 Ill. 332, 28 N. E. 845, and *Lamb v. Laughlin*, 25 W. Va. 310. See 100 Am. Dec. 554, 555, note.

Distinguished in *Handley v. Stutz*, 139 U. S. 429, 35 L. 235, 11 S. Ct. 535, where stockholders in question took stock as bonus with bonds; *In re South Mountain, etc., Mining Co.*, 7 Sawy. 31, 5 Fed. 405, as to California mining companies; *Dornitzer v. Illinois, etc., Bridge Co.*, 6 Fed. 220, holding corporation necessary party to suit; *Friend v. Powers*, 93 Ala. 115, 116, 9 So. 393, concerning enforcement of additional statutory liability; *Glenn v. Howard, etc.*, 65 Md. 61, 3 Atl. 900, holding subscription unenforceable against subscriber's assignee in bankruptcy; *Pettibone v. Toledo, etc., R. R.*, 148 Mass. 414, 19 N. E. 338, 1 L. R. A. 792, and *n.*, holding agreement to advance money on bonds not so enforceable. See 43 Am. Dec. 703, note.

101 U. S. 216-218, 25 L. 864, *TERRY v. LITTLE*.

Corporations.—Individual liability of stockholders for corporation debts is purely statutory, and language and object of statute must determine nature of liability and remedy, p. 217.

Approved in *Fourth Nat. Bank v. Francklyn*, 120 U. S. 756, 30 L. 829, 7 S. Ct. 762, where Rhode Island statute required bill in equity or preliminary judgment against corporation; *United States v. Stanford*, 161 U. S. 429, 40 L. 758, 16 S. Ct. 583, holding stockholders not individually liable on subsidy bonds in absence of statutory provision; *Walton v. Coe*, 110 N. Y. 111, 17 N. E. 676, where plaintiff sued stockholder, whose stock was unpaid, pending action against company; *Hall v. Klinck*, 25 S. C. 351, 60 Am. Rep. 507, where statute made each stockholder jointly and severally liable; *Flenniken v. Marshall*, 43 S. C. 83, 20 S. E. 789, 28 L. R. A. 403, enforcing liability of street railroad shareholders to pay judgment on tort; *Brunswick, etc., Co. v. Nat. Bank*, 88 Fed. 609, holding nature of remedy granted should determine whether action is legal or equitable. Approved in *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 94, 24 U. S. App. 308, 26 L. R. A. 475, affirming S. C., 45 Fed. 551, upholding suit at law against corporators of company not completely organized; *Tuttle v. Nat. Bank*, 161 Ill. 506, 44 N. E. 987, 34 L. R. A. 754, *New Haven, etc., Nail Co. v. Linden, etc., Co.*, 142 Mass. 353, 7 N. E. 773, and *Crippen v. Loughton*. — N. H. —, 44 Atl. 542, collecting cases, all refusing to enforce such statute extra-territorially. Cited, *arguendo*, in *James H. Rice Co. v. Libbey*, 85 Fed. 825, *Kelly v. Clark*, 21 Mont. 327, 69 Am. St. Rep. 682, 53 Pac. 966, 42 L. R. A. 630. See 43 Am. Dec. 703, note, and 3 Am. St. Rep. 835, note, collecting cases.

Distinguished in *Cuykendall v. Miles*, 10 Fed. 344, where State statute permits suit by one creditor against one stockholder; *First Nat. Bank v. Peavey*, 69 Fed. 457, holding pre-existing remedy proper one where statute merely redeclares law; *Gilchrist v. Helena, etc., R. Co.*, 49 Fed. 523, and *Hauser v. Thompson*, 56 Mo. App. 89, both concerning stock subscription liability.

Corporations.—Bank charter providing for liability of each stockholder not exceeding twice amount of shares, creates separate proportionate liability of all stockholders to all the creditors. Hence, form of action to enforce payment should be adapted to protection of all, and suit at law by one creditor, for himself alone, is demurrable, pp. 217, 218.

Approved in *Friedl v. Powers*, 93 Ala. 116, 9 So. 393, holding all stockholders should be made parties under similar insurance statute; *Zang v. Wyant*, 25 Colo. 555, 560, 71 Am. St. Rep. 147, 152, 56 Pac. 566, 568, under similar Colorado statute; *Marshall v. Sherman*, 148 N. Y. 23, 27, 51 Am. St. Rep. 662, 665, 42 N. E. 422, 424, 34 L. R. A. 765, 766, under similar Kansas statute; *Eads*

v. Orcutt, 79 Mo. App. 518, extending rule to statutory liability of bank officers for deposits received after knowledge of insolvency; *Hirshfeld v. Fitzgerald*, 157 N. Y. 179, 51 N. E. 999, dismissing complaint where plaintiff, suing for all, sold his stock pendente lite, and purchaser released stockholders' liability. Approved in *Jacobson v. Allen*, 20 Blatchf. 527, 12 Fed. 456, and *Steinke v. Loofbourow*, 17 Utah, 256, 54 Pac. 120, both holding bank receiver not proper party to compel payment; *Van Pelt v. Gardner*, 54 Neb. 710, 75 N. W. 877, favoring view that all creditors and all stockholders should be made parties. Rule applied conversely in *Nat. Park Bank v. Peavey*, 64 Fed. 918, reviewing cases, where statute expressly gave action at law. See 31 Am. Rep. 88, note, and 3 Am. St. Rep. 855, note.

Corporations.—Where, under bank charter, double liability of stockholders is several, not joint, action at law by one creditor against two stockholders is demurrable, since stockholders separately liable must at law, though not in equity, be sued separately, p. 218.

Cited in 43 Am. Dec. 702, note.

101 U. S. 219-222, 25 L. 789, *GAS CO. v. PLATTSBURGH*.

Internal revenue.—Under section 94 of internal revenue act of 1864, permitting gas companies to add gas tax to contract price of gas furnished municipal corporations, latter are not liable where company has for valuable consideration contracted to furnish gas "free of charge," p. 222.

Not cited.

101 U. S. 223-225, 25 L. 840, *POLLARD v. RAILROAD CO.*

Judgment on action in assumpsit by husband and wife on contract by carrier to carry wife safely, for injuries to her, bars similar action by husband alone, for same injuries, p. 224.

Approved in *M'Connell v. Day*, 61 Ark. 474. See 33 S. W. 734, holding wife barred by judgment in real action against husband, though not party; *Henneger v. Lomas*, 145 Ind. 291, 44 N. E. 463, 32 L. R. A. 849, *arguendo*.

Judgment in action of tort by husband and wife against carrier for breach of public duty resulting in injury to wife, does not bar action by husband alone for such injuries, unless statute permits husband to add his claims to those of wife, pp. 224, 225.

Approved in *Central Trust Co. v. East Tennessee, etc., Ry.*, 70 Fed. 766, holding carrier liable in tort for negligence in carriage of goods. See 94 Am. Dec. 591, note.

101 U. S. 225-231, 25 L. 908, JONES v. CLIFTON.

Husband and wife.—Voluntary settlement on wife, child or parent, made in good faith, by direct conveyance or purchase, is valid if not affecting creditors' existing claims, pp. 227, 228.

Followed in Moore v. Page, 111 U. S. 118, 28 L. 373, 4 S. Ct. 388, and Bean v. Patterson, 122 U. S. 499, 30 L. 1127, 7 S. Ct. 1299. Cited, arguendo, in Waterman v. Higgins, 28 Fla. 669, 10 So. 100, Miller v. Miller, 17 Or. 433, 21 Pac. 942, and Albright v. Albright, 70 Wis. 534, 36 N. W. 256. Cited in 14 Am. St. Rep. 746, note.

Distinguished in Wilson v. Spear, 68 Vt. 150, 34 Atl. 431, where conveyance to wife was made to defeat creditors. Qualified in First Nat. Bank v. Swan, 3 Wyo. 375, 23 Pac. 751, holding such settlement prima facie fraudulent, and onus of proving contrary on debtor.

Husband and wife.—Intervention of trustees is not necessary to effectual conveyance from husband to wife, p. 229.

Followed in Metropolitan Nat. Bank v. Rogers, 47 Fed. 151, Luhrs v. Hancock, — Ariz. —, 57 Pac. 606, and Ogden v. Ogden, 60 Ark. 73, 46 Am. St. Rep. 152, 28 S. W. 797. Rule applied in Corr's Appeal, 62 Conn. 409, 26 Atl. 479, enforcing deceased wife's agreement to pay husband for realty conveyed direct; Waterman v. Higgins, 28 Fla. 669, 10 So. 100, where heirs by first marriage attacked conveyance to second wife; Polson v. Stewart, 167 Mass. 215, 57 Am. St. Rep. 453, 45 N. E. 738, 36 L. R. A. 774, enforcing contract of husband to convey to wife; Chadbourne v. Gilman, 64 N. H. 354, 10 Atl. 702, upholding mortgage from husband to wife, in equity; Siple v. Wass, 49 N. J. Eq. 467, 24 Atl. 235, holding such conveyance void at law but good in equity; Barrows v. Keene, 15 R. I. 486, 8 Atl. 714, where husband gave wife diamonds in payment of separate debt; Miller v. Miller, 92 Va. 514, 23 S. E. 892, where father conveyed direct to married daughter; Albright v. Albright, 70 Wis. 534, 36 N. W. 256, where brothers of decedent attacked conveyance to his wife. Cited in 88 Am. Dec. 55, note, and 90 Am. Dec. 369, note.

Qualified in Miller v. Miller, 17 Or. 433, 21 Pac. 942, holding legal estate remained in husband, and refusing equitable intervention where wife attempted fraud.

Husband and wife.—Reservation of power of revocation and appointment will not defeat voluntary settlement upon wife as against subsequent creditors, p. 229.

Approved in President, etc. v. Merritt, 75 Fed. 484, upholding such conveyance to college as against grantor's heirs; Hill v. Cornwall, etc., 95 Ky. 526, 26 S. W. 543, upholding such conveyance of interest in factory property to daughter as against creditors.

Husband and wife.—Absence of power of revocation and appointment in family settlement may be badge of fraud, p. 230.

Husband and wife.—Upon revocation of settlement on wife under power reserved therein, property reverts to husband and is liable for his debts, p. 230.

Powers.—Exercise of power of appointment reserved in settlement renders estate liable in equity to settlor's debts, p. 230.

Power of revocation and appointment in family settlement is not an interest in property, which can be transferred, sold on execution or devised, p. 230.

Power of revocation and appointment is not a chose in action, p. 231.

Bankruptcy.—Power of revocation and new appointment reserved in voluntary settlement on wife, made in good faith while solvent, is not an asset which passes to assignee of bankrupt husband, p. 231.

Approved in *Brandies v. Cochrane*, 112 U. S. 353, 28 L. 764, 5 S. Ct. 198, where creditors sought to hold property appointed by debtor to himself after discharge.

101 U. S. 231-239, 25 L. 797, *MAY v. SLOAN*.

Appeal and error.—Supreme Court has jurisdiction where record shows party objecting paid \$21,000 for land in question, and appellants' verified petition of appeal avers value more than \$5,000, p. 232.

Frauds, statute of.—Parol agreement to convey land is not enforceable, p. 237.

Cited, *arguendo*, in *Press Pub. Co. v. Falk*, 59 Fed. 327.

Frauds, statute of.—Answer denying parol agreement to convey lands, is as effective as plea of statute of frauds, p. 237.

Followed in *Dunphy v. Ryan*, 116 U. S. 496, 29 L. 704, 6 S. Ct. 487, *Buhl v. Stephens*, 84 Fed. 926, *Feeney v. Howard*, 79 Cal. 534, 12 Am. St. Rep. 169, 21 Pac. 987, 4 L. R. A. 829, collecting cases, *Von Trotha v. Bamberger*, 15 Colo. 14, 24 Pac. 888, and *Ryan v. Dunphy*, 4 Mont. 356, 1 Pac. 712.

Distinguished in *M'Donald v. Yungbluth*, 46 Fed. 837, where only part of contract was denied and performance of rest alleged.

Words and phrases.—"Trade" includes not only exchange by barter, but buying and selling for money, and commerce and traffic generally, p. 237.

Approved in *State v. Worth*, 116 N. C. 1010, 21 S. E. 205, holding power to tax trades includes ice manufacture; *Betz v. Maier*, 12 Tex. Civ. App. 220, 33 S. W. 711, holding iron safe of insurance agent exempt as tool or apparatus of trade.

Contracts.—Where B. and S., mortgagees, agreed with A., mortgagor, that S. would release separate parcel in his mortgage, and B. would pay off certain claims against it, and would buy in three tracts common to both mortgages, at face of his claim, but “not interfere with any trade” already effected by A. of one of such tracts, a prior agreement of A. to sell same to S. was “trade” enforceable against B., p. 239.

101 U. S. 240-247, 25 L. 850, *BANK OF AMERICA v. BANKS*.

Husband and wife.—Mississippi code, 1871, section 1780, binding separate estate of wife for plantation supplies, does not extend to plantation leased by her to husband, p. 245.

Followed in *Rudd v. Peters*, 41 Ark. 184, an almost identical case.

Husband and wife.—Under Mississippi code, 1871, married woman is not liable for family supplies and necessities unless she so agrees, or authorizes husband to buy them on her account, p. 246.

Frauds, statute of.—Under Mississippi code, 1871, section 2892, verbal leases not exceeding one year are valid, p. 247.

Husband and wife.—Married woman cannot, by her own contract or representations, enlarge capacity to convey or bind separate estate, pp. 246, 247.

Approved in *Lackett v. Rumbaugh*, 45 Fed. 38, where married woman consented to destruction of deed and mortgage, trustee not concurring; *Jefferson v. Edrington*, 53 Ark. 564, 14 S. W. 102, holding covenant in second mortgage does not estop widow from setting up title by purchase of prior mortgage; *Levering v. Shockey*, 100 Ind. 562, where wife mortgaged land to secure husband's debt, without capacity; *Evans v. Beaver*, 3 Ohio C. C. 58, and *Orr v. White*, 106 Ind. 345, 6 N. E. 911, both holding married woman incapable of suretyship, not bound as principal by recital in mortgage; *Cook v. Walling*, 117 Ind. 12, 10 Am. St. Rep. 20, 19 N. E. 533, 2 L. R. A. 770, and n., where married woman mortgaged without joinder of real husband, having remarried in his absence.

Evidence.—Recitals in instruments collateral to matter in suit are admissible against party making them, but not conclusive, p. 247.

Approved in *Devries v. Hiss*, 72 Md. 570, 20 Atl. 133, collecting cases; *Hadley v. Bordo*, 62 Vt. 290, 19 Atl. 478, where note recited that defendant was vendor of horse for which it was given; *Bingham v. Walla Walla*, 3 Wash. Ter. 85, 13 Pac. 414, where grantee of city continued to maintain title to strip excluded from grant. Cited in 43 Am. Dec. 428, note, and 57 Am. St. Rep. 174, note.

Deed.—To estop party to deed he must be sui juris competent to contract, p. 247.

Rule applied in *Robinson v. Bailey*, 26 Fed. 223, to prohibited conveyance by county; *Smythe v. Henry*, 41 Fed. 708, applied to prohibited conveyance by Indian. See 57 Am. St. Rep. 170, note.

Husband and wife.—Notes given by husband and wife in Mississippi to secure supplies for plantation leased by her to husband do not bind her, notwithstanding recitals in trust deed securing them, p. 247.

101 U. S. 247-256, 25 L. 826, *WATT v. STARKE*.

Equity.—Bill of exceptions cannot be taken on trial of feigned issue directed by court of equity, or, if taken, can only be used on motion for new trial, p. 250.

Approved in *Wilson v. Riddle*, 123 U. S. 615, 31 L. 283, 8 S. Ct. 259, declining to entertain formal exceptions to rulings.

Distinguished in *Dorr v. Tremont Nat. Bank*, 128 Mass. 354, on statutory grounds.

Equity.—On motion for new trial of feigned issue directed by court of equity, evidence or substance thereof should be made part of record for use on appeal, p. 250.

Equity.—Eighteenth Statute, part 3, 315, section 2, permitting trial of feigned issue in patent cases does not alter rule that evidence should be made part of record on motion for new trial, p. 250.

Equity.—When equity proceedings are suspended pending trial at law, new trial can be had only from court of law; but where trial of issue is directed, only from court of equity, p. 250.

Followed in *Brown v. Cranberry Iron, etc., Co.*, 72 Fed. 99, 25 U. S. App. 679, reversing S. C., 65 Fed. 641, 25 U. S. App. 107, and *Reed v. Axtell, etc.*, 84 Va. 236, 4 S. E. 589. Cited, *arguendo*, in *Brown v. Cranberry Iron, etc., Co.*, 65 Fed. 638, 25 U. S. App. 107, *Fishburne v. Ferguson*, 84 Va. 102, 4 S. E. 577, and *State v. Lichtenberg*, 4 Wash. St. 555, 30 Pac. 659.

Distinguished in *Dillingham v. Hawk*, 60 Fed. 496, 23 U. S. App. 273, 23 L. R. A. 519, holding judgment of State court against receiver conclusive of claim.

Equity.—On motion for new trial of feigned issue applicant must provide notes of proceedings and evidence, by having same reported with verdict or moving chancellor to send for notes of judge, p. 250.

Equity.—Court of equity unlike court of law will not grant new trial of issue for evidence improperly rejected or received, unless wrongful verdict results, p. 251.

Distinguished in *Dorr v. Tremont Nat. Bank*, 128 Mass. 357, on statutory grounds.

Equity.—Jury's verdict on feigned issue is advisory only, and not conclusive on court of equity, p. 252.

Followed in *Clyde v. Richmond, etc.*, R. Co., 72 Fed. 123, 25 U. S. App. 642, *Flippin v. Kimball*, 87 Fed. 259, 59 U. S. App. 5, and *Fishburne v. Ferguson*, 84 Va. 115, 4 S. E. 583. Approved in *Learned v. Tillotson*, 97 N. Y. 6, where question was submitted to jury in equity case under code; *Idaho, etc., Land Co. v. Bradbury*, 132 U. S. 516, 33 L. 437, 10 S. Ct. 179, holding finding of jury need not be formally set aside before adverse decree. Cited, *arguendo*, in *Hammer v. Garfield Min. Co.*, 130 U. S. 301, 32 L. 968, 9 S. Ct. 552.

Equity.—Verdict on issue out of court of equity can be set aside only on motion for new trial based, not merely on errors of judge, but on review of whole case, p. 252.

101 U. S. 256-260, 25 L. 865, *LEGGETT v. AVERY*.

Patent of particular combination of parts is infringed only by use of all such parts in same combination, p. 257.

Followed in *Huber v. Nelson Mfg. Co.*, 148 U. S. 292, 37 L. 454, 13 S. Ct. 611.

Patents.—It is error to allow, on reissue of patent, claim for device on plow, different from that in surrendered letters, and previously disclaimed by claimant, p. 259.

Patents.—*Quere*, whether reissue containing particular invention disclaimed in order to procure original patent is ever valid, p. 259.

Cited, *arguendo*, in *Goodyear Dental, etc., Co. v. Davis*, 102 U. S. 228, 26 L. 151, and *Smith v. Merriam*, 6 Fed. 719. Questioned in *Kells v. McKenzie*, 9 Fed. 291.

Patents.—Where, to obtain patent, applicant disclaims part of claim rejected, it cannot be mistake, and he is estopped from so claiming on applying for reissue, p. 260.

Followed in *Dobson v. Lees*, 137 U. S. 265, 34 L. 655, 11 S. Ct. 72, and *Arnheim v. Finster*, 26 Fed. 279. Cited in *Huber v. N. O. Nelson Mfg. Co.*, 38 Fed. 836, to point that court may review commissioner's finding of inoperativeness by reason of mistake. Cited, *arguendo*, in *Mahn v. Harwood*, 112 U. S. 359, 28 L. 667, 5 S. Ct. 177.

Patents.—Use of portion of plowing device covered by reissue, but expressly disclaimed to procure original patent, is not infringement, pp. 257-260.

Followed in *Cartridge Co. v. Cartridge Co.*, 112 U. S. 644, 28 L. 834, 5 S. Ct. 483 (reversing S. C., 7 Fed. 346), *Shepard v. Carrigan*, 116 U. S. 597, 598, 29 L. 724, 725, 6 S. Ct. 495, *Crawford v. Hey-singer*, 123 U. S. 606, 31 L. 274, 8 S. Ct. 408, *Roemer v. Peddie*, 132 U. S. 317, 33 L. 383, 10 S. Ct. 99, collecting authorities, *Yale Lock Co. v. Berkshire Bank*, 135 U. S. 371, 379, 34 L. 180, 183, 10 S. Ct.

894, 896 (reversing S. C., *Yale Lock Mfg. Co. v. Norwich Nat. Bank*, 19 Blatchf. 142, 6 Fed. 397), *Dobson v. Lees*, 137 U. S. 263, 264, 34 L. 654, 655, 11 S. Ct. 72 (affirming S. C., 30 Fed. 626), *Boland v. Thompson*, 28 Blatchf. 442, 443, 26 Fed. 634, 635, *Edgarton v. Furst, etc.*, Mfg. Co., 10 Biss. 406, 9 Fed. 453, *Reiter v. Jones, etc.*, 35 Fed. 422, *Coll v. Seneca*, 56 Fed. 156, and *Thomas v. Rocker, etc., Co.*, 77 Fed. 431, 47 U. S. App. 125, all applying same rule.

Approved in *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 429, 38 L. 502, 14 S. Ct. 629, and *Johnson v. Olsen*, 61 Fed. 833, rejected claim, in each case, containing fewer parts than one accepted; *Putnam v. Tinkham*, 4 Fed. 414, holding reissue void because covering different invention; *Moffitt v. Rogers*, 8 Fed. 149, estopping patentee whose patent described processes combined in it, as old; *New York Belting, etc., Co. v. Sibley*, 15 Fed. 389, holding applicant, if dissatisfied, must refuse amended claim and appeal; *Peoria Target Co. v. Cleveland, etc., Co.*, 47 Fed. 734, where reissue included inventions rejected on separate application; *Cochran v. Zimmerman*, 53 Fed. 803, holding enlargement, by introducing alternative devices, invalidates reissue; *Wheaton v. Norton*, 70 Fed. 842, 44 U. S. App. 118, where additional devices included after repeated rejection; *Frederick R. Stearns & Co. v. Russell*, 85 Fed. 225, 54 U. S. App. 610, and *Truman v. Holmes*, 87 Fed. 747, 56 U. S. App. 748, both holding patentee estopped to claim devices disclaimed at time of issue. Cited, arguendo, in *Edgarton v. Furst, etc., Mfg. Co.*, 10 Biss. 417, 9 Fed. 454.

Distinguished in *Atwater Mfg. Co. v. Beecher Mfg. Co.*, 8 Fed. 609, where evidence did not show disclaimer was made to procure issuance; *Rodebaugh v. Jackson*, 37 Fed. 884, holding such patentee not disentitled to benefit of doctrine of equivalents; *Reece Button-Hole, etc., Co. v. Globe, etc., Mach. Co.*, 61 Fed. 968, 969, 21 U. S. App. 244, collecting cases, where there was no disclaimer, no issue of novelty and amendment was incidental; *Rhodes v. Lincoln, etc., Co.*, 64 Fed. 220, where combination patented contains more parts than rejected combination. Limited in *Yale Lock Mfg. Co. v. New Haven Sav. Bank*, 32 Fed. 171, disregarding adoption by patent office of description "single disc" instead of "compound disc;" *Consolidated Roller, etc., Co. v. Coombs*, 39 Fed. 30, holding rejection by patent office merely excludes right to part rejected; *Palmer Pneumatic, etc., Co. v. Lozier*, 84 Fed. 666, holding disclaimer must be imposed as condition of issue, in order to estop.

101 U. S. 260-263, 25 L. 910, *SIMMONS v. WAGNER*.

Public lands.—Upon issue of final certificate, or payment of purchase money, land ceases to be part of public domain and is not subject to entry, or to sale by United States, p. 261.

Approved in *Cawley v. Johnson*, 21 Fed. 495, collecting cases, holding issue of final certificate sufficient conveyance to found title

by adverse possession; *Lake Superior, etc., Ry. & Iron Co. v. Cunningham*, 44 Fed. 838, applied to subsequent railroad grant; *Risdon v. Davenport*, 4 S. Dak. 564, 57 N. W. 484, sustaining answer setting up such purchase. Cited, arguendo, in *McNee v. Donahue*, 76 Cal. 506, 18 Pac. 442, and *Cornelius v. Kessel*, 53 Wis. 403, 10 N. W. 522.

Distinguished in *Doolan v. Carr*, 125 U. S. 634, 31 L. 850, 8 S. Ct. 1236, and *Horsky v. Moran*, 21 Mont. 361, 362, 53 Pac. 1069, 1070, where rights are merely possessory, not complete.

Appeal and error.—Review of finding of fact cannot be had upon evidence brought up by bill of exceptions, p. 261.

Public lands.—Under section 7 (2 Stat. 76), purchase-money certificate is good defense to ejectment suit by patentee under subsequent purchase, p. 261.

Approved in *Chamberlain v. Marshall*, 8 Fed. 409, holding unauthorized patent void and legal title in United States; *Horsky v. Moran*, 21 Mont. 360, 53 Pac. 1069, holding right of such defendant must be prior; *Stewart v. Altstock*, 22 Or. 188, 29 Pac. 555, holding patent passes no title to lands not included in land-grant act; *Weeks v. Milwaukee, etc., R. Co.*, 78 Wis. 519, 47 N. W. 742, holding issue of patent does not interfere with prior rights.

Public lands.—Under section 7, 2 Stat. 76, land-office certificate of purchase vests right to patent equivalent thereto, as regards government, issuance being ministerial, p. 261.

Approved in *Stimson Land Co. v. Rawson*, 62 Fed. 428, and *Horskey v. Moran*, 21 Mont. 361, 53 Pac. 1069, both holding execution and delivery of patent, ministerial acts; *Dibble v. Bellingham, etc., Land Co.*, 163 U. S. 74, 41 L. 75, 16 S. Ct. 943, and *Steele v. Boley*, 6 Utah, 312, 22 Pac. 312, both holding statute of limitations runs from issue of final certificate; *United States v. Freyberg*, 32 Fed. 197, where purchaser procured final certificate pending suit against him for timber cut; *Gilkerson-Sloss Co. v. Forbes*, 54 Ark. 149, 26 Am. St. Rep. 30, 15 S. W. 191, holding owner of certificate may make valid mortgage; *Godding v. Decker*, 3 Colo. App. 204, 32 Pac. 834, holding possession of final receipt sufficient title to support agreement for sale. Cited, arguendo, in *United States v. Des Moines, etc., R. Co.*, 84 Fed. 44, 55 U. S. App. 255.

Distinguished in *United States v. Steenerson*, 50 Fed. 507, 4 U. S. App. 332, and *American Mtge. Co. v. Hopper*, 64 Fed. 558, 29 U. S. App. 12, affirming S. C., 56 Fed. 70, where entry and certificate were procured by fraud; *McSorley v. Hill*, 2 Wash. 643, 27 Pac. 554, where question was whether right did vest. Qualified in *Stimson Land Co. v. Rawson*, 62 Fed. 428, holding United States may by proper proceeding annul patent unlawfully obtained.

Ejectment.—Defendant in ejectment may avail himself of weakness in plaintiff's title, without asserting his own, p. 262.

Appeal and error.—General finding of validity of certificate is equivalent to finding of due execution, pp. 262, 263.

Public lands.—Deed from entryman to final certificate holder is admissible in defense to ejectment to prove assignment, though not in form for registration, p. 263.

101 U. S. 263-273, 25 L. 809, *WEST v. SMITH*.

Removal of causes.—Under section 914, revised statutes, amendment of declaration by adding new counts after removal to Circuit Court, is permissible where allowed by State practice, pp. 265-267.

Approved in *Deford v. Mehaffy*, 13 Fed. 489, permitting amendment of imperfect removal bond; *Hodges v. Kimball*, 91 Fed. 849, 63 U. S. App. 695, allowing amendment showing taking out of ancillary letters; *Hammond v. Buchanan*, 68 Ga. 732, permitting amendment showing jurisdiction of Federal court at time of application for removal.

Distinguished in *United States v. Train*, 12 Fed. 853, and *Hughey v. Sullivan*, 80 Fed. 74, both holding practice of Federal courts as to granting new trials, not affected.

Evidence.—Where defendant claiming deduction from contract price of yarn for inferiority of grade, proved similar deduction from former month's invoice, plaintiff may testify whether he allowed such deduction by way of settlement or as admission of quality, pp. 268-273.

Evidence.—While construction of written instruments is for court, yet where collateral effect thereof depends partly on extrinsic circumstances, inference of fact is for jury and is open to explanation, p. 270.

Followed in *M'Namee v. Hunt*, 87 Fed. 301, 59 U. S. App. 14.

Evidence.—Admissions of parties or agents, in court or out, are admissible in evidence, and also circumstances, purpose and conditions thereof, pp. 270, 271.

Evidence.—Parol evidence is inadmissible to vary language of valid written instrument, but subject-matter and attendant circumstances may be shown, p. 271.

Approved in *Standard, etc., Mach. Co. v. Leslie*, 78 Fed. 328, 46 U. S. App. 680, rejecting parol evidence where language of contract was unambiguous; *Knick v. Knick*, 75 Va. 20, admitting evidence under obscure agreement as to ownership of real estate; dissenting opinion in *Senger v. Senger*, 81 Va. 704, majority excluding circumstances attending making of will.

Evidence.—Offers of compromise, though not expressly without prejudice, are generally inadmissible against makers, but, if admitted, are open to explanation, whether written or oral, p. 273.

Followed in Chicago, etc., *R. Co. v. Roberts*, — Colo. —, 57 Pac. 1077, and *Telegraph Co. v. Thomas, etc., Co.*, 7 Tex. Civ. App. 106, 26 S. W. 117. Rule applied in *Moffitt-West Drug Co. v. Byrd*, 92 Fed. 292, excluding unaccepted offer to confess judgment for part of claim; *Thomas v. Carey*, — Colo. —, 58 Pac. 1096, holding offer of compromise inadmissible as acknowledgment under statute of limitations; *State v. Lavin*, 80 Iowa, 558, 46 N. W. 554, admitting defendant's evidence in bastardy prosecution that money offered was by way of settlement; *Melby v. Osborne & Co.*, 35 Minn. 388, 29 N. W. 58, rejecting proposition to adjust machine in controversy, as evidence of defect; *Tennant v. Dudley*, 144 N. Y. 507, 39 N. E. 645, where proposed settlement fixed liability at certain figure. Cited, arguendo, in *Holmes v. Truman*, 67 Fed. 546, 29 U. S. App. 572.

Distinguished in *Smith v. Whittier*, 95 Cal. 298, 30 Pac. 534, where statement is made to third party not connected with controversy.

101 U. S. 274-277, 25 L. 790, *BRODER v. WATER CO.*

Waters and water-courses.—Act of July 26, 1866, confirming rights in ditches and canals, locally recognized, was unequivocal grant of canal established in 1853, as against pre-emptor of August, 1866, p. 275.

Approved in *Tynon v. Despain*, 22 Colo. 247, 248, 43 Pac. 1041, where canal was constructed in 1874 upon lands filed against, but not patented.

Waters and water-courses.—Rights to developed mines and to mining or irrigating ditches on arid public lands, having been recognized and encouraged by government, were entitled to its protection, and act of July 26, 1866, was rather acknowledgment of pre-existing rights than original grant, p. 276.

Followed in *Tynon v. Despain*, 22 Colo. 247, 248, 43 Pac. 1041, *Jones v. Adams*, 19 Nev. 88, 3 Am. St. Rep. 796, 6 Pac. 448, *Carson v. Gentner*, 33 Or. 519, 52 Pac. 508, 43 L. R. A. 133. Rule applied in *Glacier Mining Co. v. Willis*, 127 U. S. 482, 32 L. 175, 8 S. Ct. 1217, upholding local mining-location regulation prior to congressional legislation; *Northern Pac. R. R. v. Sanders*, 166 U. S. 634, 41 L. 1144, 17 S. Ct. 676, excluding mineral lands filed against, from railroad grant; *United States v. Krall*, 174 U. S. 388, 19 S. Ct. 713, dismissing appeal of S. Ct., 79 Fed. 242, 243, 48 U. S. App. 360, 361, holding establishment of government reservation farther down stream does not alter rule; *Osgood v. Water, etc., Co.*, 56 Cal. 580, postponing rights of pre-emptor as dating from patent, not settlement; *De Ne-cochea v. Curtis*, 80 Cal. 406, 20 Pac. 565, to point that act applies to antecedent appropriations; *Wells v. Mantes*, 99 Cal. 585, 34 Pac. 325, holding act confirmatory rather than prospective; *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 139, 40 Pac. 1069, holding act pros-

pective; Coffin v. Left-Hand, etc., Co., 6 Colo. 447, 449, where patent was issued prior to act of 1866; Denver v. Mullen, 7 Colo. 363, 3 Pac. 703, holding city's power to declare nuisance cannot invalidate acquisition of ditch over public land; Jarvis v. State Bank, 22 Colo. 313, 55 Am. St. Rep. 132, 45 Pac. 507, and Garland v. Irrigation Co., 9 Utah, 361, 34 Pac. 370, both holding mechanic's lien attached as construction of canal proceeded; High-Line Canal Co. v. Moon, 22 Colo. 563, 564, 45 Pac. 438, under similar statute, where ditch crossed squatter's location on school section before he had title; Carson v. Gentner, 33 Or. 517, 519, 520, 52 Pac. 507, 508, 43 L. R. A. 132, 133, holding appropriation and use of abandoned ditch across school section carried right to enter and repair; Drake v. Earhart, 2 Idaho, 723, 23 Pac. 543, holding prior appropriation entitled to whole stream where needed, though no custom established; Reno Smelting Works v. Stevenson, 20 Nev. 275, 19 Am. St. Rep. 367, 21 Pac. 319, 4 L. R. A. 62, holding rule applicable in Nevada; Isaacs v. Barber, 10 Wash. 131, 45 Am. St. Rep. 777, 38 Pac. 874, 30 L. R. A. 675, and n., applied to millrace; dissenting opinion in Natoma Water, etc., Co. v. Hancock, 101 Cal. 66, 31 Pac. 114, majority holding subsequent appropriator may tap slack water above dam if owner's ditch supply still ample; dissenting opinion in Lux v. Haggin, 69 Cal. 448, 449, majority distinguishing. Cited, arguendo, in Del Monte Min. Co. v. Last-Chance, etc., Co., 171 U. S. 62, 18 S. Ct. 898, Hewitt v. Story, 64 Fed. 515, 29 U. S. App. 155, 30 L. R. A. 270, and n., Union Mill, etc., Co. v. Dangberg, 81 Fed. 96, and Concord Co. v. Robertson, 66 N. H. 6, 25 Atl. 720, 18 L. R. A. 683. See 43 Am. Dec. 279, 280, note, and 60 Am. St. Rep. 800, note.

Distinguished in Sturr v. Beck, 133 U. S. 550, 33 L. 765, 10 S. Ct. 353, where homestead entry was filed prior to diversion of stream; Lux v. Haggin, 69 Cal. 345, 346, 347, 348, 349, 351, 353, 10 Pac. 725, 726, 729, 730, reviewing cases, where appropriation of water was on State land after 1866; Jacob v. Lorenz, 98 Cal. 336, 33 Pac. 121, as to prospective operation of act; Platte Water Co. v. Northern Colorado, etc., Co., 12 Colo. 530, 532, 533, 21 Pac. 712, 713, where use of waters of stream were abandoned for years; dissenting opinion in Krall v. United States, 79 Fed. 245, 48 U. S. App. 364, majority applying rule. Limited in United States v. Rio Grande Irr. Co., 174 U. S. 704, 19 S. Ct. 775, holding statute did not authorize local law permitting destruction of navigability of stream.

Public lands.—Under section 4, Pacific railroad grant, July 2, 1864, reserving pre-emption or other lawful claim, or improvements of bona fide settler, canal established in 1853, was excluded, pp. 276, 277.

Cited, arguendo, in M'Laughlin v. Menotti, 105 Cal. 575, 38 Pac. 974. See 43 Am. Dec. 280, note.

Distinguished in Lux v. Haggin, 69 Cal. 345, 346, 347, 348, 349, 351, 353, 10 Pac. 725, 726, 729, 730, where appropriation of water was on State lands and after 1866.

Public lands.—Reservation in Pacific railroad grant of July 2, 1864, owing to diversified character of lands, must be freely construed on principle that impairment of pre-existing meritorious, though imperfect rights, was not intended, p. 277.

Public lands.—Under section 4, Pacific railroad grant, July 2, 1864, reservation of "any other lawful claim" means any honest claim evidenced by improvements or other acts of possession, p. 277.

Distinguished in *Lux v. Haggin*, 69 Cal. 345, 346, 347, 348, 349, 351, 353, 10 Pac. 725, 726, 729, 730. where appropriation of water was on State lands and after 1866.

101 U. S. 278-285, 25 L. 845, *GREENLEAF v. GOODRICH*.

Statutes.—Rule that statutes in *pari materia* should be construed with reference to each other, and words repeated in later act are presumed to bear meaning recognized in former, does not apply where language is altered, p. 281.

Customs duties.—Goods woven in colors with cotton warp and worsted weft are "goods of similar description" to delaines under section 9, tariff act of July 14, 1862, pp. 280-285.

Customs duties.—Under section 9, tariff act of July 14, 1862, goods "of similar description" to delaines, are not determined by process of manufacture alone, but also by general appearance and uses, pp. 282, 283.

Followed in *Schmieder v. Barney*, 113 U. S. 646, 647, 28 L. 1131, 5 S. Ct. 625, and *White v. Barney*, 43 Fed. 477. Rule applied in *United States v. M'Creery*, 91 Fed. 116, 62 U. S. App. 337, holding fabrics of silk and worsted intended for trimmings not "of similar description" to dress goods. Cited, *arguendo*, in *Lloyd v. M'Williams*, 31 Fed. 263.

Customs duties.—Commercial designation of articles, when clearly established, fixes character thereof under tariff laws, p. 284.

Approved in *Schmieder v. Barney*, 113 U. S. 648, 28 L. 1131, 5 S. Ct. 625, holding competent to inquire commercial meaning, if any, "of similar description;" In *re Smith*, 55 Fed. 478, admitting testimony of commercial designation, but rejecting opinion of witness as to classification.

Customs duties.—Under section 9, tariff act of July 14, 1862, phrase "of similar description" is not technical, commercial term, but of popular meaning, pp. 284, 285.

Followed in *Schmieder v. Barney*, 113 U. S. 646, 647, 28 L. 1131, 5 S. Ct. 624, 625, and *White v. Barney*, 43 Fed. 476. Rule applied in *Forbes Litho. Mfg. Co. v. Worthington*, 25 Fed. 900, holding "printed matter" does not include iron show-cards; *Ullmann v. Hedden*, 38 Fed. 96, holding fabric of cotton dutiable as "cotton

cloth" though not commercially known as such; *Bogle v. Magone*, 40 Fed. 228, holding "pickles and sauces of all kinds" not technical; *Postal Tel., etc., Co. v. Northern, etc., R. R.*, 88 Va. 925, 14 S. E. 805, holding authority to construct telegraph lines "along and parallel to railroad" does not mean upon right of way.

Distinguished in *Cadwalader v. Zeh*, 151 U. S. 177, 38 L. 118, 14 S. Ct. 290, where "toys" had well-understood trade signification.

101 U. S. 285-289, 25 L. 785, *JEFFREY v. MORAN*.

Judgment liens are creatures of positive law and subject to State statutes, pp. 287, 288.

Liens.—Where there is no lien at law upon property, there is none in equity on proceeds thereof, p. 288.

Judgment.—Under Ohio act of 1861, making a judgment for injuries by a railroad, a lien upon its property and giving it preference over subsequent mortgage liens, such a judgment, obtained after foreclosure sale, does not become lien, pp. 286-289.

Approved in *Sloan v. Central Iowa Ry.*, 62 Iowa, 733, 16 N. W. 333, holding claim for injuries not lien upon railroad in receiver's hands; *Brockert v. Iowa, etc., Ry.*, 93 Iowa, 136, 61 N. W. 406, holding judgment rendered against railroad and receiver, after title passed to new company, unenforceable.

101 U. S. 289-300, 25 L. 932, *PACIFIC R. R. v. KETCHUM*.

Courts.—A consent decree in equity is appealable to Supreme Court, though errors waived by consent cannot be considered, p. 295.

Followed in *Indianapolis, etc., Ry. v. Sands*, 133 Ind. 438, 32 N. E. 723, and *Board of Commrs. v. Scott*, 19 Ind. App. 235, 49 N. E. 398. Rule applied in *United States v. Babbitt*, 104 U. S. 768, 26 L. 922, where consent judgment against United States was given to secure right of appeal; *Eustis v. Henrietta*, 74 Fed. 578, 41 U. S. App. 182, holding party removing case because value over \$2,000, cannot deny jurisdiction because judgment less; *McCafferty v. Celluloid Co.*, 61 U. S. App. 396, extended to interlocutory decree; *Lackett v. Rumbaugh*, 45 Fed. 31, holding appearance waives service, but not lack of jurisdiction.

Distinguished in *Schmidt v. Oregon Min. Co.*, 28 Or. 25, 52 Am. St. Rep. 762, 40 Pac. 408, denying appeal under Oregon practice.

Appeal and error.—Solicitor may consent to whatever client authorizes, and record showing client's assent through solicitor amounts to finding by court of authority and is conclusive on appeal, p. 296.

Followed in *Board of Commrs. v. Scott*, 19 Ind. App. 235, 49 N. E. 398, and *Schmidt v. Oregon Min. Co.*, 28 Or. 33, 52 Am. St. Rep. 767, 40 Pac. 1016, though decree provides fee for attorney.

Attorney and client.—Remedy for fraud or unauthorized consent of solicitor is in court where consent was acted on, p. 296.

Reaffirmed in *Board of Commrs. v. Scott*, 19 Ind. App. 235, 49 N. E. 398. Cited, arguendo, in *Schmidt v. Oregon Min. Co.*, 28 Or. 33, 52 Am. St. Rep. 767, 40 Pac. 1016.

Distinguished, arguendo, in *Kingsbury v. Buckner*, 134 U. S. 670, 33 L. 1055, 10 S. Ct. 644.

Appeal and error.—Consent to judgment is admission of facts supporting it, and only question appeal raises is whether such facts can support it, p. 296.

Mortgages.—Parties to foreclosure suit may agree to decree of sale without finding of amount due or without day of payment, and also that on purchase by bondholders payment may be made by surrender of mortgage bonds, pp. 297, 298.

Cited, arguendo, in *Ketchum v. St. Louis*, 101 U. S. 311, 25 L. 1001, *Brown v. Chesapeake, etc., Co.*, 73 Md. 599, and *Schmidt v. Oregon Min. Co.*, 28 Or. 29, 52 Am. St. Rep. 764, 40 Pac. 1015.

Action.—Parties may agree as to subject-matter of litigation, and court will give effect to agreement if within general scope of pleadings, p. 297.

Followed in *Schmidt v. Oregon Min. Co.*, 28 Or. 28, 52 Am. St. Rep. 764, 40 Pac. 1015. Approved in *Bigley v. Watson*, 98 Tenn. 357, 39 S. W. 526, 38 L. R. A. 680, holding consent decree not avoidable because broader than pleadings.

Appeal and error.—Effect of appeal by company from consent judgment is not altered because instigated by stockholders claiming consent was fraud by directors, p. 297.

Courts.—Under act of March 3, 1875, concerning diverse citizenship, as giving jurisdiction to Circuit Courts, parties may be arranged according to real interest in controversy, to see whether all on one side are of different States from all on other side, p. 298.

Followed in *Ayres v. Wiswall*, 112 U. S. 192, 28 L. 695, 5 S. Ct. 92, *Evers v. Watson*, 156 U. S. 532, 39 L. 522, 15 S. Ct. 432, *Dormitzer v. Illinois, etc., Bridge Co.*, 6 Fed. 217, *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. 531, *Covert v. Waldron*, 33 Fed. 312, *Pittsburgh, etc., Ry. v. Baltimore, etc., R. Co.*, 61 Fed. 709, 22 U. S. App. 359, *Shipp v. Williams*, 62 Fed. 7, 22 U. S. App. 380, and *First Nat. Bank v. Radford Trust Co.*, 80 Fed. 573, 47 U. S. App. 692. Approved in *Pacific R. R. v. Missouri, etc., Ry.*, 111 U. S. 522, 28 L. 504, 4 S. Ct. 584, and *Carey v. Houston, etc., Ry.*, 161 U. S. 132, 40 L. 644, 16 S. Ct. 543, both holding suit attacking decree for fraud within jurisdiction of decreeing court; *M'Bee v. Marietta, etc., Ry.*, 48 Fed. 247, assuming jurisdiction of separate suit to prevent wrongful decree in suit within jurisdiction. Cited in 6 Sawy. 222, note.

Distinguished in *Consolidated Water Co. v. Babcock*, 76 Fed. 248, where addition of necessary party would give each side citizen of same State.

Courts.—Where no objection is made to jurisdiction of Circuit Court and judgment is consented to, it is sufficient that jurisdiction existed at time of judgment, p. 298.

Rule applied in *First Nat. Bank v. Radford Trust Co.*, 80 Fed. 572, 47 U. S. App. 692, where court had jurisdiction when question first raised; separate opinion in *Richardson v. Green*, 61 Fed. 436, 15 U. S. App. 488, where answer established jurisdiction.

Distinguished in *Baltimore Bldg., etc., Assn. v. Alderson*, 90 Fed. 146, 61 U. S. App. 643, where, at time of decree, citizens of same State were on each side.

Courts.—Where plaintiff in foreclosure was of same State with undisputed prior mortgagees and trustees doubting power to foreclose, all defendants, but not hostile, and mortgagor was of another State, Circuit Court had jurisdiction, pp. 298, 299.

Rule applied in *Barry v. Missouri, etc., Ry.*, 27 Fed. 2, where trust company denied duty of procuring payment of scrip in similar suit; *Holly Mfg. Co. v. New Chester, etc., Co.*, 48 Fed. 890, retaining jurisdiction where parties of plaintiff's State were joined for form; *Bowdoin College v. Merritt*, 63 Fed. 216, where trustees, fearing fraud, refused to sue because limited to State court; *First Nat. Bank v. Radford Trust Co.*, 80 Fed. 572, 47 U. S. App. 692, holding trustee refusing to sell or be made party, adverse.

Attorney and client.—Purchases in name of attorneys at judicial sales of clients' property, though jealously scrutinized, will be sustained, if not unjust to clients, p. 300.

Cited in 3 McCrary, 86, note.

Railroads.—Purchase of railroad at judicial sale by attorney of company, for bondholders, is valid in absence of fraud on company, p. 300.

Distinguished in *Schroeder v. Young*, 161 U. S. 340, 40 L. 725, 16 S. Ct. 514, where purchase price was grossly inadequate.

101 U. S. 301-306, 25 L. 954, *FLEITAS v. COCKREM*.

Appeal and error.—Where record declares jury waived in writing, it is conclusive, on appeal, nothing appearing to contrary, of agreement to waive, p. 302.

Attachment.—In Louisiana, fixing of amount by judge does not validate insufficient attachment bond, p. 304.

Approved in *Griffith v. Harvester Co.*, 92 Iowa, 637, 54 Am. St. Rep. 575, 61 N. W. 244, holding lien not lost where defect cured by new bond.

Statutes.— Louisiana practice code, article 245, providing attachment bond must exceed "one-half" amount claimed, means "by one-half," being mistranslation, pp. 304, 305.

Judgment.— Personal judgment against non-resident who appears in suit is valid, pp. 305, 306.

101 U. S. 306-319, 25 L. 999, **KETCHUM v. ST. LOUIS.**

Lien.— Where, by concluded agreement, debtor sets apart to creditor specified amount of specific fund received, or to be received, by another, from designated source, and directs payment by that other, who assents, it is specific appropriation, binding on parties and subsequent claimants with notice, p. 307.

Rule applied in dissenting opinion in *Tompkins v. Little Rock, etc., Ry.*, 21 Fed. 371, 372, see majority holding, below. Cited, without special application, in *Central Trust Co. v. Florida Ry., etc., Co.*, 43 Fed. 758.

Distinguished in *Tompkins v. Fort Smith Ry.*, 125 U. S. 122, 124, 125, 31 L. 622, 623, 8 S. Ct. 769, 770, 771, affirming S. C., 5 McCrary, 612, 18 Fed. 353, reversing S. C., 15 Fed. 13, holding right to sequester railroads' revenues operated as assignment; *Mercantile Trust Co. v. Baltimore, etc., R. Co.*, 82 Fed. 369, 370, where stock subscribed by State guaranteed interest out of profits; *Brown v. Chesapeake, etc., Co.*, 73 Md. 594, 597, holding priority of lien on canal tolls does not extend to proceeds of canal on sale thereof; dissenting opinion in *The Canal Co.'s Case*, 83 Md. 589, 590, 35 Atl. 168, majority extending time to trustees operating canal for creditors with lien on tolls, though mortgage on canal in arrears.

Assignment.— Missouri act of January 7, 1865, authorizing loan of county bonds to railroad, and providing for payment of interest out of earnings collected by State commissioner, waived priority of State's mortgage and operated as equitable assignment, upon railroad's acceptance of bonds, p. 315.

Statutes.— All acts of general nature, or which affect community at large, are public, and charge public with notice thereof, pp. 315, 316.

Approved in *Tompkins v. Little Rock, etc., Ry.*, 15 Fed. 13, 18, and dissenting opinion in S. C., 21 Fed. 379, to point that statute creating lien on railroad is public.

Lien.— Where there is intention, and power, to create charge on real or personal property, equity will enforce same as against everyone charged with notice, pp. 316-318.

Approved in *French v. Gapen*, 105 U. S. 523, 26 L. 956, enforcing such lien on canal in favor of contractor as against State's lessee; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 578, 37 L. 855, 13 S. Ct. 938, where parties agreed to extend mechanic's lien to adjoin-

ing land; *Fourth St. Bank v. Yardley*, 165 U. S. 644, 41 L. 862, 17 S. Ct. 440, where, by agreement of parties, deposit is charged therewith, check constitutes equitable lien; *Walker v. Brown*, 165 U. S. 664, 41 L. 871, 17 S. Ct. 457, where property consisted of bonds; *Tompkins v. Little Rock, etc., Ry.*, 15 Fed. 12, holding act giving right to enforce State aid bond by sequestration of railroad's revenues, creates lien; *Bridgeport Electric, etc., Co. v. Meader*, 72 Fed. 118, foreclosing, as equitable mortgage, agreement to secure purchase money by mortgage of realty; *Fidelity Ins., etc., Co. v. Norfolk, etc., R. Co.*, 72 Fed. 706, holding agreement to apply profits of branch railroad to construction cost thereof is charge on profits; *Johnson v. Gordon*, 102 Ga. 364, 30 S. E. 512, where parties agreed that separate securities for separate notes should each be liable for both notes.

Distinguished, *arguendo*, in *Brown v. Chesapeake, etc., Co.*, 73 Md. 605.

Lien.—Equitable lienholder cannot be deprived thereof by statute or acts of debtor or subsequent claimants with notice, p. 318.

Cited, *arguendo*, in dissenting opinion in *Tompkins v. Little Rock, etc., Ry.*, 21 Fed. 372.

101 U. S. 320-332, 25 L. 955, *SMITH v. AYER*.

Executors and administrators.—Pledgee of intestate's personality is presumed to know legal limitations of executor's powers, p. 325.

Attorney and client.—Knowledge of attorney, actual or constructive, is knowledge of client, pp. 325, 326.

Followed in *Chicago, etc., Ry. v. Belliwith*, 83 Fed. 440, 55 U. S. App. 120. Rule applied in *Mayor, etc. v. Whittington*, 78 Md. 238, 27 Atl. 985, holding city collector bound by notice of attorney. Cited, *arguendo*, in dissenting opinion in *Edwards v. Carson Water Co.*, 21 Nev. 506, 34 Pac. 395.

Executors and administrators.—Where note securing loan to firm, is indorsed by partner as executor, lender must look to authority of executor, p. 326.

Cited in 86 Am. Dec. 602, note.

Distinguished in *Goodwin v. American Nat. Bank*, 48 Conn. 565, where pledgee was without notice of misappropriation when renewing loan to pay legacies.

Executor may sell or pledge testator's personal assets for purposes within will, and purchaser or pledgee is not bound by wrongful purpose, or misapplication of proceeds, unless he has actual or constructive knowledge thereof, pp. 326, 327.

Rule applied in *Jelke v. Goldsmith*, 52 Ohio St. 514, 49 Am. St. Rep. 734, 40 N. E. 170, where notes and mortgages were purchased

without notice of wrongful purpose; *Hemmy v. Hawkins*, 102 Wis. 60, 78 N. W. 178, where money borrowed was for executor's personal use, unknown to lender. Approved in *Gæger v. Langenberg*, 42 Mo. App. 12, decided on statutory grounds.

Executors and administrators.—Testator's personal assets are trust in hands of executor to pay testator's debts and discharge legacies, and on breach of trust may be followed in hands of third parties with notice, p. 327.

Rule applied in *Johnson v. Bank*, 56 Mo. App. 263, 265, where bank applied guardian's deposit to his personal debt; *Eastham v. Landon*, 17 Wash. 54, 48 Pac. 740, annulling executor's discharge of his own mortgage to testator as against new mortgagee. Cited, arguendo, in *Pulliam v. Pulliam*, 10 Fed. 71, *Scott v. Devlin*, 89 Fed. 975, and *Fridenburg v. Wilson*, 20 Fla. 369.

Trusts.—Law exacts most perfect good faith from all dealing with trustee, respecting trust property, and they do so at their peril where transaction may not reasonably be supposed within scope of trust, p. 327.

Rule applied in *Manhattan Bank v. Walker*, 130 U. S. 278, 32 L. 963, 9 S. Ct. 523, affirming S. C., 25 Fed. 254, where bank discounted special deposit note to pay personal debt of agent depositing it; *Clark v. First Nat. Bank*, 57 Mo. App. 286, where bank applied proceeds of receivership note to receiver's personal debt. Cited in 52 Am. St. Rep. 119, note.

Distinguished in *Peck v. Providence Gas Co.*, 17 R. I. 291, 23 Atl. 971, 15 L. R. A. 650, and n., holding corporation not liable for transfer of testator's stock where executor had ample powers.

Executors and administrators.—Payment of executor's private debts with testator's assets is devastavit, except where testator's debts to value thereof are paid with executor's money, p. 327.

Executors and administrators.—Executor's authority to continue existing interest in partnership business does not extend to use of other funds therein, unless specially authorized by unmistakable language, pp. 329, 330.

Followed in *Fridenburg v. Wilson*, 20 Fla. 369.

Rule applied in *Brasfield v. French*, 59 Miss. 638, holding designation of one fund excludes others; *Laible v. Ferry*, 32 N. J. Eq. 797, exempting residence, connected with brewery, from business debts.

Approved in *Jones v. Walker*, 103 U. S. 445, 446, 26 L. 404, exempting dividends paid out of such business as against subsequent creditors; *Marvel v. Phillips*, 162 Mass. 402, 44 Am. St. Rep. 373, 38 N. E. 1118, 26 L. R. A. 418, discharging estate from agreement to advance funds to manage patent business.

Cited, *arguendo*, in *Mason v. Pomeroy*, 151 Mass. 167, 24 N. E. 203, 7 L. R. A. 774. See 86 Am. Dec. 601, note.

Distinguished in *Eisenstadt Jewelry Co. v. Mississippi, etc., Trust Co.*, 72 Mo. App. 521, holding fund left after paying debts and legacies, liable to post-mortem creditors.

Executors and administrators.—Administrator *de bonis non* is entitled to assets of estate as against executor of original executor, p. 331.

Cited, *arguendo*, in *Smith v. Harvey*, 13 Fed. 17, 18.

Partnership.—Where assignment of estate securities, given to secure partnership debt, is set aside, assignee may subject interest of any partner in estate to payment of debt, p. 332.

Cited, *arguendo*, in *Smith v. Harvey*, 13 Fed. 18.

101 U. S. 332-337, 25 L. 1024, *WATER-METER CO. v. DESPER*.

Patents.—Claim of combination is not infringed if all material parts be not used, unless part omitted be supplied by mechanical equivalent, p. 335.

Followed in *Rowell v. Lindsay*, 113 U. S. 102, 28 L. 907, 5 S. Ct. 510, *Yale Lock Co. v. Sargent*, 117 U. S. 378, 29 L. 952, 6 S. Ct. 934, *Travers v. Palmer*, 23 Fed. 512, *Ott v. Barth*, 32 Fed. 91, *Dickinson v. Parker*, 38 Fed. 412, *Smith v. Putnam*, 45 Fed. 203, *De Loriea v. Whitney*, 63 Fed. 620, 21 U. S. App. 428, and *Norton v. Jensen*, 90 Fed. 429, 61 U. S. App. 369.

Rule applied in *Leary v. Hohenstein*, 37 Fed. 681, and *Reece, etc., Mach. Co. v. Globe, etc., Mach. Co.*, 61 Fed. 965, 21 U. S. App. 244, where parts omitted were supplied by mechanical equivalent; *Lapham Dodge Co. v. Severin*, 40 Fed. 764, *Sackett v. Smith*, 42 Fed. 853, and *M'Bride v. Kingman*, 72 Fed. 915, all construing patents strictly because not of pioneer class; *Campbell, etc., Mfg. Co. v. Duplex, etc., Co.*, 86 Fed. 323, holding doctrine of equivalents inapplicable where defendant's machine necessarily involves either more or less than combination patented; *Tod v. Wick Bros. & Co.*, 36 Ohio St. 393, holding variation must be substantial, not nominal, to avoid infringement. See 10 Biss. 229, 230, note.

Qualified in *Railway Register Mfg. Co. v. Broadway, etc., R. Co.*, 26 Fed. 527, lending broad construction to pioneer invention.

Distinguished in *Winchester, etc., Arms Co. v. American Buckle, etc., Co.*, 58 Fed. 311, and *Pacific Cable Ry. v. Butte City, etc., Ry.*, 58 Fed. 421, where patentee limited claim by language thereof.

Patents.—Water meters manufactured under Patent No. 144,747 are not infringement of reissue No. 5,806 of Patent No. 109,372, pp. 335-337.

Patents.—Specification of parts in combination patent, makes every part material thereto, subject to doctrine of equivalents, p. 337.

Followed in *Gage v. Herring*, 107 U. S. 648, 27 L. 604, 2 S. Ct. 826, *Fay v. Cordesman*, 109 U. S. 421, 27 L. 984, 3 S. Ct. 245, *Sargent v. Hall Safe, etc., Co.*, 114 U. S. 86, 29 L. 76, 5 S. Ct. 1034, *Brown v. Davis*, 116 U. S. 249, 29 L. 663, 6 S. Ct. 386, *Williams v. Stolzenbach*, 23 Fed. 41, *Kinzel v. Luttrell Brick Co.*, 67 Fed. 927, 31 U. S. App. 652, and *Muller v. Lodge, etc., Tool Co.*, 77 Fed. 629, 47 U. S. App. 189.

Rule applied in *Huber v. Nelson Mfg. Co.*, 148 U. S. 291, 37 L. 454, 13 S. Ct. 610, affirming S. C., 38 Fed. 839, holding omission of one part in reissue invalidates it; *Wright v. Yuengling*, 155 U. S. 52, 39 L. 66, 15 S. Ct. 3, even though not in fact material. Approved in *Griffith v. Shaw*, 89 Fed. 318, and *Norton v. Jensen*, 90 Fed. 422, 61 U. S. App. 360, both construing strictly patents narrowed by additional specifications to obtain issue; *Overweight, etc., Co. v. Improved, etc., Assn.*, 94 Fed. 159, holding substantial improvements, by change in combination of parts, not infringement.

Distinguished in *Page Woven Wire, etc., Co. v. Land*, 49 Fed. 941, avoiding such construction of patent as would give same effect to separate claims.

101 U. S. 337-341, 25 L. 960, *RAILROAD CO. v. TENNESSEE*.

State cannot be sued in its own courts without its consent, p. 339.

Rule applied in *Hans v. Louisiana*, 134 U. S. 18, 33 L. 848, 10 S. Ct. 508, denying right to sue State in Circuit Court; *Melvin v. State*, 121 Cal. 22, 53 Pac. 418, or for tort committed prior to statute permitting suit; dissenting opinions in *United States v. Lee*, 106 U. S. 227, 27 L. 184, 1 S. Ct. 266, majority limiting rule as below stated, and *Lee v. Harlow*, 75 Va. 35, majority upholding tender to tax collector of State bond interest coupon.

Limited in *United States v. Lee*, 106 U. S. 207, 27 L. 177, 1 S. Ct. 249, denying application to cases where relief is sought against United States officers; *Board of Public Works v. Gannt*, 76 Va. 461, or State officers.

Constitutional law.—Repeal of section 2807, Tennessee code, permitting suit against State, but not providing for enforcement of judgment, does not violate obligation of contract as against debt incurred before repeal, since Constitution protects only such remedies as will enforce contracts, p. 340.

Followed in *Railroad v. Alabama*, 101 U. S. 834, 25 L. 973, and *Horne v. State*, 84 N. C. 365, where jurisdiction was withdrawn pending suit; *Baltzer v. North Carolina*, 161 U. S. 242, 244, 40 L. 686, 687, 16 S. Ct. 501, affirming S. C., 104 N. C. 277, 10 S. E. 156, where repealed act gave jurisdiction "to hear claims;" *Maury v. Commonwealth*, 92 Va. 313, 23 S. E. 758, where provision to try genuineness of State bond coupons was repealed.

Rule applied in *In re Ayers*, 123 U. S. 505, 31 L. 229, 8 S. Ct. 183, holding State may prescribe conditions to action against itself; *Wooster v. Plymouth*, 62 N. H. 204, holding Constitution does not assure jury trial in action given against town.

Distinguished in *Day v. Madden*, 9 Colo. App. 469, 48 Pac. 1055, upholding attachment levied before repeal of attachment law; *State v. Young*, 29 Minn. 530, 531, 9 N. W. 742, holding State contract has legal obligation, though unenforceable.

101 U. S. 341-346, 25 L. 1010, *LANGFORD v. UNITED STATES*.

Courts.—Under revised statutes, section 1059, Court of Claims has no jurisdiction of claims against United States not founded on contract, pp. 342-346.

Rule applied in dissenting opinion in *United States v. Lee*, 106 U. S. 241, 27 L. 189, 1 S. Ct. 278, majority holding United States agents in possession of disputed lands may be sued; *Hill v. United States*, 149 U. S. 598, 37 L. 864, 13 S. Ct. 1013, where there was no admission of title in land taken for lighthouse; *United States v. Harris*, 77 Fed. 825, 46 U. S. App. 653, permitting set-off by government of money unlawfully obtained from post-office; *Comer v. Bankhead*, 70 Ala. 498, holding no State can be sued in its own courts without consent; *Wooster v. Plymouth*, 62 N. H. 205, holding plaintiff not constitutionally entitled to jury in action given by statute against city; *Houston v. State*, 98 Wis. 488, 74 N. W. 113, 42 L. R. A. 50, holding neither State nor United States answerable in damages for tort of agent or officer. Cited, *arguendo*, in *United States v. Jones*, 119 U. S. 479, 30 L. 441, 7 S. Ct. 284.

Distinguished in *Scranton v. Wheeler*, 57 Fed. 809, 16 U. S. App. 152, where action was for ejectment of government agent.

United States.—Maxim, "King can do no wrong," is non-existent in United States law, p. 343.

Cited, *arguendo*, in *Virginia Coupon Cases*, 114 U. S. 290, 29 L. 192, 5 S. Ct. 914.

United States.—No contract to pay for use and occupation arises from occupancy by United States under claim of title, p. 344.

Rule applied in *Hill v. United States*, 149 U. S. 599, 37 L. 864, 13 S. Ct. 1013 (see dissenting opinion in 149 U. S. 601, 602, 603, 604, 37 L. 865, 866, 13 S. Ct. 1014, 1015), where there was no acknowledgment of plaintiff's title; *Belknap v. Schild*, 161 U. S. 17, 40 L. 601, 16 S. Ct. 445, holding United States cannot be enjoined for infringement of patent; *Carpenter v. United States*, 45 Fed. 344, where employee sued government for rent of flat used as directed by superior, but not as authorized; *Young v. State*, 19 Wash. 636, 54 Pac. 37, holding State not bound by unauthorized contract of governor.

Distinguished in *United States v. Great Falls Mfg. Co.*, 112 U. S. 657, 28 L. 850, 5 S. Ct. 311, holding otherwise where title not claimed; *Brown v. United States*, 81 Fed. 57, where private land was taken under statute without claim of title.

101 U. S. 347-352, 25 L. 853, *CRESWELL v. LANAHAN*.

Bank is bound by bona fide exchange of securities effected by actuary in regular charge of such matters, p. 351.

Banks and banking.—Acquiescence of trustees of bank in exchange of securities by its actuary, after notice, is ratification, p. 352.

Followed in *Hadden v. Natchaug Silk Co.*, 84 Fed. 83. Rule applied in *Fitzgerald Const. Co. v. Fitzgerald*, 137 U. S. 109, 34 L. 613, 11 S. Ct. 40, to checks drawn by railroad president in charge of construction; *Nashua, etc., R. Co. v. Boston, etc., R. Co.*, 27 Fed. 825, though railroad records did not disclose formal vote of directors; *Park Bros. & Co. v. Kelly, etc., Mfg. Co.*, 49 Fed. 626, 6 U. S. App. 61, where contracts of limited partnership over \$500 were required to be signed by managers; *Edelhoff v. Horner, etc., Mfg. Co.*, 86 Md. 610, 39 Atl. 316, holding receipt and enjoyment of proceeds ratify mortgage.

Miscited in *New Orleans, etc., R. Co. v. New Orleans*, 14 Fed. 376.

Banks and banking.—Commissioners of bank in liquidation, like assignee in bankruptcy, have no greater rights than such banks, p. 352.

101 U. S. 352-362, 25 L. 888, *CHRISTIAN UNION v. YOUNT*.

Corporation of one State cannot exercise powers in another without consent thereof, express or implied, and right to hold and mode of acquiring land depend on local law, p. 354.

Approved in *Arndt v. Griggs*, 134 U. S. 321, 33 L. 920, 10 S. Ct. 559, upholding State law providing for service of non-residents by publication in real actions; *Williams v. Gold Hill Min. Co.*, 96 Fed. 463, holding foreign corporation's mortgage capacity limited by local law; *Gravelly v. Ice Machine Co.*, 47 La. Ann. 392, 16 So. 868, applying to foreign corporation, rules of service applicable to domestic; *White v. Keller*, 68 Fed. 802, 30 U. S. App. 275, arguendo.

Corporation of one State, not forbidden by its laws, may exercise charter powers in another State, unless prohibited by express law thereof, or by public policy deduced from general course of legislation, or adjudications of highest court, p. 356.

Followed in *Female Academy v. Sullivan*, 116 Ill. 382, 56 Am. Rep. 777, 6 N. E. 185, *Demarest v. Flack*, 128 N. Y. 214, 28 N. E. 647, 13 L. R. A. 856, *Kerchner v. Gettys*, 18 S. C. 525, and *Cone Co. v. Poole*, 41 S. C. 72, 19 S. E. 204, 24 L. R. A. 295, and n. Rule

applied in *White v. Keller*, 68 Fed. 806, 30 U. S. App. 275, holding foreign ecclesiastical corporation competent to take lands; *Reorganized Church v. Church*, 60 Fed. 941, holding Constitution forbidding organization, except under general law, does not limit powers of foreign religious corporation; *Stevens v. Pratt*, 101 Ill. 225, and *People v. Fidelity, etc., Co.*, 153 Ill. 34, 38 N. E. 755, 26 L. R. A. 298, both holding absence of incorporation law for domestic companies does not prohibit foreign; *Elston v. Piggott*, 94 Ind. 17, permitting foreign corporation to purchase land at judicial sale; *People v. Hawkins*, 106 Mich. 483, 64 N. W. 738, holding grant of privileges to foreign corporations filing articles does not prohibit others; *State v. Fidelity, etc., Ins. Co.*, 39 Minn. 543, 41 N. W. 110, declining to enforce retaliatory act where public policy of another State not clearly hostile; *Potter v. Rio Arriba, etc., Co.*, 4 N. Mex. 327, 17 Pac. 614, where alien corporation sought specific performance of contract for land made prior to act forbidding alien ownership; *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 143, 54 N. W. 545, upholding contract made before powers of foreign corporations limited; *Albitztigui v. Guadalupe, etc., Min. Co.*, 92 Tenn. 605, 22 S. W. 741, holding capital stock may be paid in realty outside State. Approved in *St. Louis R. R. v. Terre Haute R. R.*, 145 U. S. 406, 36 L. 753, 12 S. Ct. 957, doubting State's power to increase powers of foreign corporation; *United States v. Southern Pac. R. Co.*, 49 Fed. 301, extending railroad's citizenship for jurisdictional purposes to all States where it operates. Cited, *arguendo*, in *Black v. Caldwell*, 83 Fed. 883.

Distinguished in *People v. Howard*, 50 Mich. 248, 15 N. W. 104, where statute prescribed conditions for foreign corporations; *Seamans v. Temple Co.*, 105 Mich. 403, 405, 55 Am. St. Rep. 459, 460, 63 N. W. 409, 410, 28 L. R. A. 432, where forbidden contract sued upon was made through mail in another State; *Van Steuben v. Central R. R.*, 178 Pa. St. 373, 35 Atl. 993, 34 L. R. A. 579, where public policy did not recognize powers of foreign railroad to lease others; *Empire Mills v. Alston, etc., Co.*, 4 Tex. Civ. App. 350, holding repeal of incorporation law prohibited foreign corporation.

Corporations.—Illinois public policy of 1870 did not prevent acquisition of realty by religious corporation of another State, within charter purposes, while extending like power to similar domestic corporations, pp. 360, 361.

Cited, *arguendo*, in *Gilmer v. Stone*, 120 U. S. 591, 592, 30 L. 736, 7 S. Ct. 691.

Corporations.—State alone can question corporation's acquisition of realty in excess of charter right; hence, donor's heirs may not, p. 361.

Approved in *White v. Keller*, 68 Fed. 806, 30 U. S. App. 275, holding heirs may not question devise to trust, lawful when testator died; *South., etc., Alabama R. R. v. Highland Ave., etc., R.*

R., 119 Ala. 117, 24 So. 118, holding right to hold real estate cannot be questioned by private citizen; *Quitman v. Stritze*, 70 Miss. 323, 13 So. 36, holding donor of land to county board for purpose not authorized cannot question title; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 195, 8 N. W. 390, where purchaser of realty from incompetent corporation sought to avoid payment.

101 U. S. 362-369, 25 L. 813, *KAIN v. GIBBONEY*.

Charities.—Bequest to “bishop or successor” for unincorporated religious community attached to Roman Catholic Church is invalid in Virginia, p. 365.

Cited in 63 Am. St. Rep. 249, and 64 Am. St. Rep. 765, notes.

Charities.—Since Virginia repeal of forty-third Elizabeth, chapter 4, charitable bequests are like others, unenforceable, if objects are indefinite and uncertain, p. 367.

Followed in *Wilson v. Perry*, 29 W. Va. 192, 1 S. E. 319, reviewing cases, holding bequests in question void for uncertainty; *Wilmoth v. Wilmoth*, 34 W. Va. 437, 12 S. E. 735, where devise was to Methodist Conference, collecting cases. Approved in *Jones v. Habersham*, 107 U. S. 179, 27 L. 403, 2 S. Ct. 341, holding validity of charitable bequest depends on law of testator's domicile.

Limited in *Russell v. Allen*, 107 U. S. 168, 27 L. 399, 2 S. Ct. 331, to Virginia cases.

Distinguished in *Kelley v. Bourne*, 15 Or. 480, 16 Pac. 43, upholding deed to partnership in firm name; *In re John's Will*, 30 Or. 520, 47 Pac. 350, 36 L. R. A. 251, under Oregon law. See 63 Am. St. Rep. 255, note.

Charities.—Provision of Virginia civil code 1873, chapter 76, title 22, section 8, validating conveyances for certain religious uses, does not validate bequests, p. 368.

Judgment.—Trustee of doubtful bequest cannot claim under consent decree in action to set aside will, to which he was not party, p. 369.

101 U. S. 370-383, 25 L. 855, *PHELPS v. HARRIS*.

Quieting title.—Equity has jurisdiction to quiet title only where complainant has clear title, and pretended title is neither so clearly invalid as not to embarrass real title, nor of merely doubtful validity, pp. 374, 375.

Rule applied in *Mackall v. Casilear*, 137 U. S. 564, 34 L. 778, where deed was alleged to be void on its face; *Chamberlain v. Marshall*, 8 Fed. 400, where plaintiff had only naked legal possession; *Eiffert v. Craps*, 58 Fed. 471, 8 U. S. App. 436, denying equitable assistance where remedy by ejectment adequate; *Corey v. Schuster*, 44 Neb. 274, 62 N. W. 472, holding recorded judgments cloud on title of homestead.

Judgments.—Where court of equity passes on validity of title in determining question of jurisdiction to quiet title, such decision does not bar action of ejectment between same parties, p. 376.

Approved in *Embden v. Lisherness*, 89 Me. 579, 56 Am. St. Rep. 444, 36 Atl. 1102, admitting evidence aliunde to show former judgment based on want of notice. Cited in 96 Am. Dec. 779, note.

Partition.—Power to “sell or exchange” includes partition, p. 380.

Approved in *Carr, Petitioner*, 16 R. I. 647, 27 Am. St. Rep. 775, 19 Atl. 145, holding testamentary power to sell does not extend to partition; *Heard v. Read*, 171 Mass. 377, 50 N. E. 639, *arguendo*. See 92 Am. Dec. 127, note, and 38 Am. Rep. 343, note.

Partition.—In Mississippi power to “sell and dispose of * * * and invest proceeds” includes partition, p. 382.

Rule applied in *Hill v. Sumner*, 132 U. S. 123, 33 L. 286, 10 S. Ct. 43, holding lease of mine violates contract not to “sell or dispose” thereof; *Hunt v. Williams*, 126 Ind. 494, 26 N. E. 177, holding bequest of yearly “proceeds of farm” vests interest in land; *Gray v. Edwards*, 3 Tex. Civ. App. 346, 22 S. W. 537, holding complaint for lumber “sold and disposed of” does not limit recovery to lumber sold. Approved in *Trutch v. Bunnell*, 11 Or. 63, 50 Am. Rep. 459, 4 Pac. 590, excluding mortgage from probate power “to order renting, sale or disposal;” *Carr, Petitioner*, 16 R. I. 648, 27 Am. St. Rep. 775, 19 Atl. 146, holding testamentary power to sell does not include partition. See 92 Am. Dec. 127, note.

Courts.—State decision of precise point in determining collateral matter, though not absolutely binding on Federal court, is very strong evidence of State law, pp. 382, 383.

Approved in *Stearns v. Lawrence*, 83 Fed. 745, 54 U. S. App. 547, affirming S. C., 79 Fed. 884, permitting examination of State court's decision to determine question of *res judicata*.

Partition by trustee with power is valid to pass title, though improperly exercised, p. 383.

101 U. S. 384-391, 25 L. 982, THE SABINE.

Salvage is compensation for voluntary assistance, whereby ship at sea or cargo, or both, are saved in whole or part from impending sea peril, or recovered from actual loss, as of wreck, derelict or capture, p. 384.

Salvage.—Valid salvage claim has three essentials: Marine peril, voluntary assistance, apart from duty or contract, and success, partial, complete, or contributory, p. 384.

Approved in *The Strathnevis*, 76 Fed. 862, where vessel contributed to rescue by towing till cable broke and tow was lost.

Salvage is not compensation as in quantum meruit case, or *opere et labore*, but reward for voluntary and successful perilous service, p. 384.

Salvage.—Suits for salvage may be in rem against property saved or proceeds, or in personam against party both requesting and benefiting by salvage, but libel cannot be maintained in rem against ship and in personam against consignee, pp. 386, 387.

Approved in *The Steamship Zodiac*, 5 Fed. 223, declining amendment joining libel in rem to one in personam; *The Corsair*, 145 U. S. 342, 36 L. 729, 12 S. Ct. 950, holding ship and owner cannot be joined in same libel under admiralty rules 12 to 20.

Distinguished in *Atlantic Mut. Ins. Co. v. Alexandre*, 16 Fed. 280, holding libel in rem does not bar subsequent libel in personam; *The J. F. Warner*, 22 Fed. 344, where libel was for breach of af-freightment contract; *Providence, etc., Ins. Co. v. Wager*, 35 Fed. 364, where separate libels were filed against ship and owner.

Salvors have maritime lien on ship or cargo saved, independent of possession, for salvage not exceeding value thereof, enforceable in rem, pp. 380, 391.

Distinguished in *The Roanoke*, 50 Fed. 576, where salvors were employed by contract.

Salvage may be enforced against proceeds of saved property sold in admiralty and paid into court, or one salvor may be made party to another's libel, pp. 386, 387.

Salvors employed by owners or insurers, may proceed in personam for compensation for services and use of vessel, even though unsuccessful, pp. 387, 390.

Approved in *Wilmington, etc., Co. v. Old Kensington*, 14 Sawy. 108, 39 Fed. 500, and *The Elmbank*, 69 Fed. 109, 29 U. S. App. 718, both holding certainty of compensation properly considered in reduction of award. Cited, but not applied, in *The Roanoke*, 50 Fed. 577, where suit was in rem; *The Clatsop Chief*, 7 Sawy. 277, 8 Fed. 165, approving libel in rem against ship and in personam against owner who is also master.

Admiralty rules were promulgated under congressional act, and have effect of law, p. 388.

Salvage.—Proper remedy of voluntary salvors is in rem against ship or cargo, but if destroyed without their fault, or fraudulently removed from jurisdiction, they may proceed in personam against owners, p. 390.

Rule applied in *Hudson v. Whitmire*, 77 Fed. 847, where property was replevined in State court.

Salvage.—Nothing short of contract to pay, irrespective of success, will bar libel in rem for salvage, p. 390.

101 U. S. 391-392, 25 L. 841, *GAY v. PARPART*.

Appeal and error.—Under section 1000, revised statutes, condition of bond on supersedeas, providing that appellants "shall prosecute appeal with effect and pay costs and damages rendered and to be rendered in case decree affirmed in Supreme Court," is sufficient, p. 392.

Approved in *Gunn v. Black*, 60 Fed. 160, 19 U. S. App. 489, holding bond operates as supersedeas per se.

101 U. S. 392-397, 25 L. 1050, *WHITNEY v. WYMAN*.

Principal and agent.—Agent is liable under sealed contract not made in principal's name, and as his deed, but intention of parties governs liability under unsealed or parol contracts, pp. 395, 396.

Approved in *Ames v. Holderbaum*, 44 Fed. 226, holding circumstances attending execution may be considered in determining liability; *Anderson v. Timberlake*, 114 Ala. 386, 62 Am. St. Rep. 107, 22 So. 433, holding question of credit, under verbal contract, for jury; *Huffman v. Newman*, 55 Neb. 716, 76 N. W. 410, denying agent's liability to payor for money withheld from principal.

Cited, but not applied, in *Berwind v. Schultz*, 25 Fed. 919, determined upon other grounds.

Principal and agent.—Contract binding principal only cannot be changed by either party without consent of other, p. 396.

Corporations.—Incipient corporation's contract, inhibited till articles filed, is ratified by subsequent recognition, p. 396.

Followed in *Schreyer v. Turner, etc., Co.*, 29 Or. 16, 43 Pac. 723. Rule applied in *Stanton v. New York, etc., R. R.*, 59 Conn. 285, 21 Am. St. Rep. 118, 22 Atl. 304, where promoters contracted with plaintiff to procure right of way; *Bruner v. Brown*, 139 Ind. 602, 38 N. E. 318, affirming right of corporation to promise promoters payment for services; *Kelley v. Newburyport, etc., R. R.*, 141 Mass. 498, 6 N. E. 747, disallowing defense of incapacity because stock not paid up, where so certified; *Burns v. Order of United Workmen*, 153 Mass. 175, 26 N. E. 444, holding newly-organized grand lodge of beneficiary association, accepting old member's dues, liable on death; *Sterling v. Bock*, 40 Minn. 12, 41 N. W. 237, extending rule to ratification by firm, of partner's contract; *Rogers v. New York, etc., Land Co.*, 134 N. Y. 210, 32 N. E. 32, where company took real estate and sought to avoid obligations. See 13 Am. St. Rep. 29, note.

Cited, but not applied, in *St. Johns Mfg. Co. v. Munger*, 106 Mich. 94, 58 Am. St. Rep. 472, 64 N. W. 4, 29 L. R. A. 65, denying shareholder's right to sue corporation for misrepresentation of organizing committee; *Pitts v. Steele, etc., Co.*, 75 Mo. App. 230, reversed for error on another point.

Distinguished in *McCormick v. Market Bank*, 165 U. S. 552, 41 L. 822, 17 S. Ct. 437, where organization was never completed;

Davis, etc., Co. v. Hillsboro, etc., Co., 10 Ind. App. 44, 37 N. E. 550, where contract was neither primarily for company's benefit nor adopted, though benefits accepted.

Corporations.—Both parties to contract of incipient corporation assuming to have contractual power, are estopped to deny it, p. 397.

Rule applied in *Snider's Sons' Co. v. Troy*, 91 Ala. 230, 24 Am. St. Rep. 889, 8 So. 659, 11 L. R. A. 517, holding person dealing with company as corporation cannot hold members as partners; *Cravens v. Eagle Cotton, etc., Co.*, 120 Ind. 15, 16 Am. St. Rep. 306, 21 N. E. 984, applied to stock-subscription contract; *Staver, etc., Mfg. Co. v. Blake*, 111 Mich. 289, 69 N. W. 511, 38 L. R. A. 804, declining to extend limited partnership's liability because of defect in organization.

Distinguished in *Williams v. Hewitt*, 47 La. Ann. 1084, 49 Am. St. Rep. 398, 17 So. 498, where depositor sued as partners unincorporated association assuming to be bank.

Corporations.—Under Michigan statute, inhibiting unorganized corporation contracts, but not expressly annulling them or prescribing penalty, they are not void and can be questioned only by State, p. 397.

Approved in *Beekman v. Hudson River, etc., Ry.*, 35 Fed. 12, where defendants in foreclosure set up original mortgagor's defective organization; *McClinch v. Sturgis*, 72 Me. 295, 297, denying to stock purchaser right to question defective organization; *Washburn Mill Co. v. Bartlett*, 3 N. Dak. 146, 54 N. W. 546, applying principle to foreign corporations not complying with statutory condition; *American, etc., Mach. Co. v. Moore*, 2 Dak. 292, 8 N. W. 135, and *Probst v. Trustees, etc.*, 3 N. Mex. 268, 5 Pac. 704, arguendo. See 29 Am. St. Rep. 601, 33 Am. St. Rep. 186, and 48 Am. St. Rep. 915, notes.

Distinguished in *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 96, 24 U. S. App. 308, 26 L. R. A. 476, where statutory demand is of essence of incorporation.

Corporations.—Instruction by court that contract bound corporation as principal, and not its agent, if corporation, though unorganized, acted as such, is not erroneous, pp. 395, 397.

Principal and agent.—When principal is disclosed and agent known as such, latter cannot be held, however he sign; hence, order for goods signed by defendants as "Prudential Committee, G. H. F. B. Co.," accepted by letter to said company, does not bind agents, pp. 396, 397.

Rule applied in *Post v. Pearson*, 108 U. S. 422, 27 L. 775, 2 S. Ct. 801, holding partners liable under contract signed by "superintendent;" *Carroll v. Walton, etc., Co.*, 48 Fed. 126, holding agents signing charter-party as such, not liable for ship's injury; *Monticello Bank v. Bostwick*, 71 Fed. 644, 646, where brokers, acting for an-

other, innocently sold forged paper to bank; *Goodenough v. Thayer*, 132 Mass. 156, where T. signed "T., agent;" *Cook v. Gray*, 133 Mass. 111, where contract to build "for company on their land" was signed by "trustees for company;" *Bleau v. Wright*, 110 Mich. 185, 68 N. W. 115, where insurance agent's receipt promised premium's return if risk rejected; *Huston v. Tyler*, 140 Mo. 265, 36 S. W. 656, and rehearing S. C., 140 Mo. 268, 41 S. W. 795, where, unknown to agent, note sold by him was forged. Applied conversely in *Shuey v. Adair*, 18 Wash. 192, 63 Am. St. Rep. 882, 51 Pac. 390, 39 L. R. A. 475, holding agent liable on promissory note signed by him alone.

101 U. S. 397-403, 25 L. 1013, *ALDRIDGE v. MUIRHEAD*.

Bankruptcy.—Where, in bankruptcy suit to reach property in assignor's wife's name, both swear purchase made with her money exclusively, onus is on assignee to prove contrary, p. 401.

Bankruptcy.—Married women's property will not be disturbed long after acquisition, at suit of husband's assignee, for mere inability to trace exact history of investments, providing separate estate was sufficient to account for property, p. 402.

Approved in *De Grauw v. Mechan*, 48 N. J. Eq. 225, 21 Atl. 195, refusing donor's creditor relief against donee after delay and improvement of property; *Coyne v. Sayre*, 54 N. J. Eq. 709, 36 Atl. 98, denying creditor's right to question title of wife left in undisturbed possession eighteen years.

Bankruptcy.—Assignor's wife's property is not liable for his debts because managed by him, though bank account kept in his name and notes and mortgages executed jointly, if investments made and debts paid with her money exclusively, p. 403.

Approved in *Tresch v. Wirtz*, 34 N. J. Eq. 129, and *Trapnell v. Conklyn*, 37 W. Va. 252, 38 Am. St. Rep. 40, 16 S. E. 574, both extending rule to creditors' suits; *Hyde v. Frey*, 28 Fed. 823, holding husband cannot use wife's name as cover for his own business.

Distinguished in *Johnson & Co. v. Christie*, 79 Mo. App. 51, where business was really husband's, though in wife's name. Limited in *Talcott v. Arnold*, 54 N. J. Eq. 578, 35 Atl. 535, limiting husband's right to donate earning capacity, to cases of separate estate.

101 U. S. 403-407, 25 L. 866, *BANK v. SHERMAN*.

Bankruptcy.—Under revised statutes, section 5057, suits in bankruptcy to reach securities transferred by bankrupt must be brought within two years of assignee's appointment, p. 405.

Cited, *arguendo*, in *M'Can v. Conery*, 12 Fed. 319.

Bankruptcy.—Assignment relates back to filing of petition, and title to all bankrupt's property vests in assignee as of that date; hence, it covers securities transferred by assignor after petition for

involuntary bankruptcy, but before amendment alleging exact act of bankruptcy supporting adjudication, pp. 405, 406.

Rule applied in *Chapman v. Brewer*, 114 U. S. 168, 29 L. 87, 5 S. Ct. 803, where petition was filed prior to attachment of bankrupt's property; *Taylor v. Irwin*, 20 Fed. 617, holding trustee's delay in asserting title may evidence waiver of claim; *Taylor v. Robertson*, 21 Fed. 215, holding notice of foreclosure given after petition, and before trustee's appointment, invalid; concurring opinion in *Sheffield, etc., Ry. v. Newman*, 77 Fed. 794, 41 U. S. App. 766, subjecting purchaser pendente lite to decree based upon amendments; *Sullivan v. Rabb*, 86 Ala. 441, 5 So. 750, holding assignee's purchaser takes realty free from attachment levied within four months of bankruptcy; *Norris v. Ile*, 152 Ill. 204, 43 Am. St. Rep. 243, 38 N. E. 766, referring lien of lis pendens, under amended pleading, back to original, which stated material grounds. Cited in 8 Biss. 376, note.

Statutes, when clear and imperative, cannot be qualified by courts, whose part it is to execute law as they find it, p. 406.

Bankruptcy.—Power of amendment is incident to all judicial administration; hence, petition may be amended by addition of further acts of bankruptcy, p. 406.

Rule applied in *Adams v. Main*, 3 Ind. App. 240, 50 Am. St. Rep. 272, 29 N. E. 795, denying error in amendment of pleadings, after trial begun, unless prejudicing opponent. Cited, arguendo, in *In re Hovey*, 5 Fed. 358.

Bankruptcy.—Filing of petition is, in effect, attachment and injunction, and persons dealing with bankrupt's property thereafter, and before final adjudication, do so at their peril, p. 406.

Rule applied in *Conner v. Long*, 104 U. S. 230, 26 L. 724, holding title to goods levied upon within four months preceding bankruptcy vests in assignee; *Taylor v. Robertson*, 21 Fed. 214, 215, 216, holding invalid, published notice of foreclosure under power, after petition and before trustee's appointment; *In re Brooks*, 91 Fed. 509, assuming jurisdiction of trustee's petition for order restoring bankrupt's foreclosed property; *In re Nathan*, 92 Fed. 592, extending rule to mortgage taken with notice of actual or intended bankruptcy petition. Cited, arguendo, in *Williamson v. Selden*, 53 Minn. 77, 54 N. W. 1056.

101 U. S. 407-417, 25 L. 1015, *COUNTY OF LIVINGSTON v. DARLINGTON*.

Constitutional law.—Courts will not declare law void under Constitution, unless its repugnancy thereto is clear, p. 410.

Reaffirmed in *Powell v. Pennsylvania*, 127 U. S. 685, 32 L. 256, 8 S. Ct. 996, upholding Pennsylvania statute regulating manufacture of oleomargarine; *United States v. Boyer*, 85 Fed. 430, holding con-

gressional provision for inspection of slaughter-houses located in States, void; *Territory v. O'Connor*, 5 Dak. 413, 41 N. W. 752, 3 L. R. A. 361, upholding local option law (Laws 1887, chap. 70).

Municipal corporations.—By settled construction of section 5, article 9, Illinois Constitution, 1848, legislature could authorize municipal tax only for corporate purposes and only by municipal bodies enumerated, p. 411.

Reaffirmed in *Harter v. Kernochan*, 103 U. S. 570, 26 L. 414, under identical section, upholding act authorizing township donations to railroad. Approved in *O'Brien v. Wheelock*, 95 Fed. 894, applying similar restriction to section 9, article 9, Illinois Constitution, 1870; *Wetherell v. Devine*, 116 Ill. 635, 6 N. E. 25, holding conduct of election a corporate purpose.

Judgments.—Decree declaring municipal bonds void, in action to enjoin payment of interest by county treasurer, does not bar action by bondholders, not parties to former proceeding, upon same bonds, p. 413.

Cited in 94 Am. Dec. 769, and 85 Am. Dec. 363, notes.

Municipal corporations.—Under Illinois Constitution, 1848, vote of inhabitants was not necessary to validate municipal bond subscriptions, where legislature bestowed power directly upon municipal authorities, p. 415.

Constitutional law.—Legislature is sole judge on questions of pure policy or expediency, where no constitutional provision intervenes, pp. 416, 417.

Reaffirmed in *Guthrie v. Territory*, 1 Okl. 198, 37 Pac. 193, 21 L. R. A. 846, upholding territorial statute providing for payment by municipal corporations of debts contracted under provisional government; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192, where legislature directed refunding by township of funds lost in bank failure and made good by trustee.

Municipal corporations.—Illinois act of 1867, as amended by act of 1869, authorizing municipal bond subscription to secure location of State reform school, is for "corporate purpose," within section 5, article 9, Illinois Constitution of 1848, p. 417.

Principle applied in *Folsom v. Ninety-Six*, 159 U. S. 628, 40 L. 284, 16 S. Ct. 179, and *Coler v. Board of Commrs.*, 89 Fed. 265, both holding aid of railroad construction, public purpose; *Board of Commrs. v. State*, 147 Ind. 490, 46 N. E. 911, upholding law creating special taxing district to raise money for buildings upon relocation of county seat; *Lund v. Chippewa*, 93 Wis. 652, 67 N. W. 931, 34 L. R. A. 136, holding home for feeble-minded, public purpose. Principle approved conversely in *Cole v. La Grange*, 19 Fed. 873, holding acts in aid of private objects void. Cited, *arguendo*, in *Holt v. Antrim*, 64 N. H.

289, 9 Atl. 391. See 98 Am. Dec. 667, and 16 Am. St. Rep. 368, notes.

Distinguished in *Cole v. La Grange*, 113 U. S. 7, 28 L. 898, 5 S. Ct. 419, denying right of legislature to authorize municipal bonds in aid of private manufactory; *Floyd v. Perrin*, 30 S. C. 19, 8 S. E. 20, 2 L. R. A. 247, holding townships incorporated by railroad act, for single purpose of subscribing, are without corporate purposes. See 74 Am. Dec. 593, note.

101 U. S. 417-426, 25 L. 1052, *MOHR v. MANIERRE*.

Courts.—Federal courts, in administering justice, must observe settled principles which obtained in States when Constitution was made, including acquisition of jurisdiction by citation in personal actions, and in proceedings in rem by seizure of property and notice by publication or otherwise, pp. 421, 422.

Approved in *Gates v. Bucki*, 53 Fed. 967, 12 U. S. App. 69, refusing injunction against proceedings in State court which acquired jurisdiction in rem by attachment; *Sloane v. Martin*, 145 N. Y. 533, 45 Am. St. Rep. 635, 40 N. E. 219, 28 L. R. A. 360, holding service of infants interested not essential to proceedings in rem in Federal courts.

Judgments.—Personal judgments against non-residents of State, based on service by publication, are held invalid in Federal courts, p. 422.

Approved in *Brooks v. Dun*, 51 Fed. 147, denying validity of service on resident agent for non-resident partnership in personal action.

Insane persons.—Court's jurisdiction over lunatic's realty attaches upon filing of guardian's petition to sell, setting forth jurisdictional facts; and irregularities, such as want of due notice to parties interested, though appealable, are not open to collateral attack, pp. 424, 425.

Rule applied in *Thaw v. Ritchie*, 136 U. S. 548, 34 L. 538, 10 S. Ct. 1044, and *Myers v. McGavock*, 39 Neb. 862, 42 Am. St. Rep. 637, 58 N. W. 526, both extending rule to guardian's sale for education and maintenance of ward; *Simmons v. Saul*, 138 U. S. 455, 34 L. 1061, 11 S. Ct. 374, where administration was granted upon proper petition and land claim sold without notice; *Holmes v. Oregon, etc., Ry.*, 6 Sawy. 285, 5 Fed. 534, affirmed by S. C., 7 Sawy. 388, 399, 9 Fed. 234, 243, holding petition for administration containing jurisdictional statement of petitioner's residence confers jurisdiction and is not subject to collateral attack; *M'Arthur v. Allen*, 3 Fed. 324, holding decree setting aside will, being in rem, cannot be collaterally impeached; *Berrian v. Rogers*, 43 Fed. 468, upholding sale by administrator where non-resident heir claimed in-

sufficient notice; *Elliott v. Shuler*, 50 Fed. 456, **extending rule** to intestate's realty under special proceeding; *Garrett v. Böeing*, 68 Fed. 61, 37 U. S. App. 42, where petition for administration **showed necessary facts**; *Graff v. Louis*, 71 Fed. 595, denying right of collateral attack of attachment, based on irregular affidavit, **after judgment**; *Ryan v. Staples*, 76 Fed. 726, 40 U. S. App. 427, holding judicial sale to satisfy liens reviewable, but not void for inequitable distribution; *Apel v. Kelsey*, 47 Ark. 419, 2 S. W. 103, where decedent's lands were sold by court after notice in unauthorized newspaper; *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 531, where petition showed bona fide indebtedness, though subsequent proceedings irregular. See 43 Am. St. Rep. 537, note.

Distinguished in *Holmes v. Oregon*, etc., R. R., 7 Sawy. 400, 9 Fed. 244, where some further act is required of court to obtain jurisdiction.

Cited, *arguendo*, in *Woolridge v. McKenna*, 8 Fed. 670.

Insane persons.—Petition of lunatic's representative for sale of realty is lunatic's petition, and latter cannot afterwards object to sale for want of notice, pp. 425, 426.

Followed in *Scarf v. Aldrich*, 97 Cal. 365, 33 Am. St. Rep. 193, 32 Pac. 326, *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 532, and *Mohr v. Porter*, 51 Wis. 489, 497, 8 N. W. 365, 369.

Rule applied in *Daughtry v. Thweatt*, 105 Ala. 619, 53 Am. St. Rep. 149, 16 So. 921, in sale by guardian of ward's realty; *Mitchell v. People's*, etc., Bank, 20 R. I. 506, 40 Atl. 504, holding notice to non-resident ward unnecessary, where foreign guardian applies for removal of personality; *Cody v. Cody*, 98 Wis. 452, 74 N. W. 220, holding prospective heirs of lunatic not entitled to notice.

Distinguished in *Weld v. Johnson Mfg. Co.*, 84 Wis. 542, 543, 54 N. W. 337, as to proceeding adversary to ward, such as guardian's bond.

Process.—Notice or citation in legal proceeding is for protection of separate or adverse interests, not petitioner's. Hence, want of due notice under Wisconsin statute, permitting judicial sale of lunatic's realty upon notice to persons interested, does not invalidate sale as to lunatic, p. 426.

Followed in *Scarf v. Aldrich*, 97 Cal. 365, 366, 33 Am. St. Rep. 193, 194, 32 Pac. 326, and *Mohr v. Porter*, 51 Wis. 489, 490, 494, 495, 8 N. W. 365, 367, 368.

Rule applied in *Walker v. Goldsmith*, 14 Or. 143, 12 Pac. 553, under section 8, general laws Oregon, requiring service of ward's next of kin; *Cissell v. Pulaski*, 3 McCrary. 447, 10 Fed. 892, holding statutory notice of court's order calling in county warrants for reissue may be waived by holders.

101 U. S. 426-432, 25 L. 985, *GUNTON v. CARROLL*.

Limitation of actions.—Agreement to convey interest in realty after partition cannot be enforced till partition, and, delay being that of owner, statute does not run till then, p. 429.

Equity.—Where, under agreement to partition land and convey his share, vendor neglects partition for twenty years, six years' delay thereafter by vendee in seeking specific performance is not fatal laches, p. 429.

Principle applied in *Duke v. State*, 56 Ark. 497, 20 S. W. 603, where defendant, by procuring dismissal of prior suit, contributed to delay; *Townsend v. Vanderwerker*, 160 U. S. 186, 40 L. 338, 16 S. Ct. 262, holding laches not determined by mere lapse of time, apart from circumstances.

Vendor and purchaser.—Equity usually treats contracts for sale of land as if specifically performed, vendee being treated as owner of land, and vendor as his trustee, especially where purchase money in vendor's possession, p. 431.

Specific performance of agreement to arbitrate price cannot usually be enforced; otherwise, where vendor has received consideration, and provision for arbitration fails without fault of parties, e. g., where land was to be applied on debt at arbitrated price and vendor dies without appointing arbitrator, p. 432.

Distinguished in *Manning v. Ayers*, 77 Fed. 698, 46 U. S. App. 537, denying specific performance of land at price to be fixed by parties.

101 U. S. 433-438, 25 L. 937, *SOUTH CAROLINA v. GAILLARD*.

Constitutional law.—He who brings suit under statute concedes its validity, p. 436.

Action.—Where statute giving special remedy is repealed without excepting pending suits, all suits thereunder must stop forthwith, p. 438.

Rule applied in *Railway v. County Commrs.*, 88 Me. 227, 33 Atl. 988, superseding county commissioners' verdict requiring railroad flagman at certain point, after jurisdiction transferred; *Burlington v. Traction Co.*, etc., 70 Vt. 495, 41 Atl. 515, extending rule to proceeding to settle terms of railroad's use of streets; *Dulin's case*, 91 Va. 725, 20 S. E. 823, applying rule to criminal actions. Applied conversely in *Larkin v. Saffarans*, 15 Fed. 153, holding enlargement of jurisdiction of Circuit Court applies to pending cases.

Distinguished in *State v. Hicks*, 48 Ark. 520, 3 S. W. 525, where statute provides for different proceeding "hereafter."

Constitutional law.—States may change remedy, providing no substantial contractual right is impaired. Hence, repeal of South

Carolina act of 1877, providing special proceeding for enforcing acceptance of tax-receivable State bank bonds, is not unconstitutional, p. 438.

Rule applied in *United Cos. v. Weldon*, 47 N. J. L. 63, 54 Am. Rep. 116, applying rule to appeal from award of damages for condemned lands; *Whaley v. Gaillard*, 21 S. C. 569, holding statutory requirement of such proceeding does not impair contract.

101 U. S. 439-443, 25 L. 1055, **WHEELER v. INSURANCE CO.**

Insurance company alone can raise question of insurable interest, and not mortgagee claiming adversely. Hence, creditor insuring debtor's buildings is, in absence of bad faith, entitled to proceeds as against mortgagee, if without notice of mortgagor's covenant to insure for mortgagee, pp. 441, 442.

Cited in 54 Am. Dec. 699, note.

Insurance.—Mortgagee usually has no right to proceeds of mortgagor's policy not assigned to him, but equity gives him lien thereon where mortgagor agrees to secure him by insuring, even when mortgage permits him to insure upon mortgagor's neglect to procure and assign policy, p. 442.

Rule applied in *Grange Mill Co. v. Western, etc., Co.*, 118 Ill. 400, 9 N. E. 275, extending rule to vendee under agreement to sell; *Ætna Ins. Co. v. Thompson*, 68 N. H. 21, 40 Atl. 396, as against mortgagor's assignee in insolvency; *Ames v. Richardson*, 29 Minn. 333, 13 N. W. 139, where mortgagor assigned policy to third party after adjustment of loss. Approved in *Heller v. Marine Bank*, 89 Md. 621, 43 Atl. 805, 45 L. R. A. 445, holding express agreement necessary to lien; *Kirchgraber v. Park*, 57 Mo. App. 40, upholding mortgagor's right to procure additional insurance not exceeding property's value; *Nordyké, etc., Co. v. Gery*, 112 Ind. 539, 2 Am. St. Rep. 223, 13 N. E. 684, holding lien does not attach to additional insurance because policies effected for mortgagee prove uncollectible. Cited, *arguendo*, in *Lange v. Grabe*, 11 Ohio C. C. 175. See 54 Am. Dec. 698, note, and 84 Am. Dec. 431, note.

Distinguished in *Quarles v. Clayton*, 87 Tenn. 318, 10 S. W. 508, 3 L. R. A. 174, and *n.*, where widow claimed life estate in proceeds of policy payable to decedent's administrators. Qualified in *Swearingen v. Insurance Co.*, 52 S. C. 316, 29 S. E. 723, where agreement to insure is made after mortgage and without new consideration.

Insurance.—Mortgagee's equitable lien on insurance moneys is limited by scope of mortgagor's promise to secure him thereby, and also by necessity thereof to protect him where there is additional security, p. 442.

Insurance.—Mortgagee's equity to lien on policy of mortgagor agreeing to protect him, attaches to balance of proceeds after satis-

lying debt of creditor, who, by mortgagor's authority, procured policy, p. 442.

Approved in *Ames v. Richardson*, 29 Minn. 333, 334, 13 N. W. 139, holding lien attaches, though policy effected without mortgagee's knowledge, and not in pursuit of agreement.

101 U. S. 443-452, 25 L. 1057, *BROOKS v. RAILWAY CO.*

Mechanics' liens.—Sub-contractor's notice of lien, required by section 2131, Iowa code, 1873, is for protection of owner in settlement with principal contractor, and affects validity of lien only as to amount due; hence, prior mortgagee cannot question lien for want of such notice, p. 449.

Mechanics' liens.—Where notice of lien is required of sub-contractor for protection of owner, judgment establishing lien is conclusive on mortgagee, p. 449.

Mechanics' liens.—Under Iowa code, 1873, section 2139, granting preferred lien on entire land as against all other incumbrances made after commencement of work, sub-contractor's lien for work on one section extends to whole railroad and has priority over mortgage given after completion of separate, disconnected section, and before commencement of former section, p. 452.

Rule applied in *Beach, etc. v. Wakefield*, 107 Iowa, 581, 76 N. W. 692, where work was done on union depot; *Oriental Hotel Co. v. Griffiths*, 88 Tex. 584, 53 Am. St. Rep. 800, 33 S. W. 662, 30 L. R. A. 777, holding lien refers back, under Texas statute, to commencement of building. Approved in *Pacific, etc., Co. v. Bear Valley, etc., Co.*, 120 Cal. 96, 100, 65 Am. St. Rep. 160, 164, 52 Pac. 137, 139, upholding lien filed against canal system without including pipe-line originally intended to be separately operated. See 54 Am. St. Rep. 423, note.

Distinguished in *Pennsylvania Steel Co. v. J. E. Potts, etc., Co.*, 63 Fed. 15, 22 U. S. App. 537, denying validity of lien on railroad under Michigan statute; *Greenwood, etc., Ry. v. Strang*, 77 Fed. 500, same, under South Carolina statute.

Mechanics' liens.—Under Iowa code, 1873, section 2141, granting preferred lien on building, erection and improvement for which lien is claimed, as against prior incumbrances, lien of sub-contractor for improvement of one section extends to whole railroad, including disconnected section previously completed, p. 452.

Followed in *Meyer v. Hornby*, 101 U. S. 730, 25 L. 1078, and *Farmers' Loan, etc., Co. v. Canada, etc., Ry.*, 127 Ind. 262, 26 N. E. 787, 11 L. R. A. 745, and *n.*, both holding lien binds railroad as unit; *Adams v. Grand Island, etc., R. Co.*, 10 S. Dak. 248, 72 N. W. 580, under exactly similar statute. Rule applied in *Jarvis v. State Bank*, 22 Colo. 315, 55 Am. St. Rep. 133, 45 Pac. 507, upholding

builder's lien on flume as against prior mortgage of entire property; *Steger v. Arctic, etc., Co.*, 89 Tenn. 458, 14 S. W. 1088, 11 L. R. A. 581, applied to refrigerating plant, under similar statute, including pipes under city streets. Approved in *National Foundry, etc., Works v. Oconto Water Co.*, 52 Fed. 45, 46, 52, 53, holding act giving lien on machinery inapplicable to quasi-public corporations; *Gilchrist v. Helena, etc., R. Co.*, 58 Fed. 714, and *Church v. Smithea*, 4 Colo. App. 177, 35 Pac. 268, in support of constitutionality of mechanic's lien acts conferring priority. Cited, *arguendo*, in *Real Estate Inv. Co. v. Haseltine*, 53 Mo. App. 318, and *Haxtun Steam-Heater Co. v. Gordon*, 2 N. Dak. 252, 33 Am. St. Rep. 780, 50 N. W. 709. Cited in 65 Am. St. Rep. 171, note.

Distinguished in *Woodworth v. Blair*, 112 U. S. 11, 28 L. 616, 5 S. Ct. 7, holding mortgagee of part of railroad not entitled to proceeds of separate foreclosure made subject to his mortgage; *Buncombe County, etc. v. Tommey*, 115 U. S. 129, 29 L. 307, 5 S. Ct. 650, affirming *S. C. v. Tommey v. Spartanburg, etc., R. R.*, 4 Hughes, 645, 7 Fed. 434, under North Carolina statute; *Giant-Powder Co. v. Oregon, etc., Ry.*, 14 Sawy. 565, 42 Fed. 474, 8 L. R. A. 706, and *n.*, holding lienor may confine claim to section where material was used; dissenting opinion in *Kilpatrick v. Kansas City, etc., R. Co.*, 38 Neb. 645, 652, 57 N. W. 673, 675, upon statutory grounds, majority holding as above. Qualified in *Johnson v. Puritan Min. Co.*, 19 Mont. 39, 47 Pac. 338, holding lien yields to prior mortgages of land if improvement not severable. See 41 Am. St. Rep. 759, note.

Mechanics' liens.—Mortgagee of building in process of construction is charged with knowledge of contractors' right to lien for subsequent work and material, but not repairs, p. 452.

Followed in *Hydraulic-Brick Co. v. Bormans*, 19 Mo. App. 669, *Atlantic Dynamite Co. v. Ropes, etc., Co.*, 119 Mich. 263, 77 N. W. 939, both extending rule to miner's lien; *McAdow v. Sturtevant*, 41 Mo. App. 228, extending rule to purchaser; *Kilpatrick v. Kansas City, etc., R. Co.*, 38 Neb. 636, 41 Am. St. Rep. 753, 57 N. W. 669, where mortgage was made before railroad had acquired right of way; *Oriental Hotel Co. v. Griffiths*, 88 Tex. 582, 585, 53 Am. St. Rep. 798, 802, 33 S. W. 661, 663, 30 L. R. A. 776, 778, where mortgage bonds were issued to complete hotel. Approved in dissenting opinion in *Smith v. Shell Lake, etc., Co.*, 68 Wis. 109, 31 N. W. 704, majority refusing to enforce lien on logs as against bona fide purchaser for value without notice. Cited, *arguendo*, in *Farmers' Loan, etc., Co. v. Canada, etc., Ry.*, 127 Ind. 264, 26 N. E. 788, 11 L. R. A. 746, and *n.*, and *Deming-Colborn, etc., Co. v. Union, etc., Assn.*, 151 Ind. 467, 51 N. E. 937.

101 U. S. 453-464, 25 L. 1061, THE CITY OF PANAMA.

Courts.—Washington organic act of 1853, giving territorial District Courts same jurisdiction as Federal Circuit and District Courts

in Federal cases, confers admiralty jurisdiction; e. g., libel of ship for negligent injury to passenger, pp. 453-458.

Principle applied in *In re Cooper*, 143 U. S. 494, 36 L. 239, 12 S. Ct. 457, upholding Alaska District Court's admiralty jurisdiction; *Braithwaite v. Jordan*, 5 N. Dak. 210, 65 N. W. 704, 31 L. R. A. 245, under section 1910, revised statutes, in Dakota; *Perea v. Barela*, 6 N. Mex. 245, 27 Pac. 508, as to probate jurisdiction, under New Mexico organic act.

Distinguished, *arguendo*, in *Braithwaite v. Jordan*, 5 N. Dak. 246, 65 N. W. 718, 31 L. R. A. 257.

Admiralty.—Neither State courts, nor courts within States not established under article 3, Constitution, can have admiralty jurisdiction, but Congress has complete legislative control over public territory, including jurisdiction of courts, pp. 457-461.

Approved in *Braithwaite v. Jordan*, 5 N. Dak. 224, 65 N. W. 710, 31 L. R. A. 250, holding section 1910, revised statutes, valid.

Admiralty.—United States Constitution is co-extensive with political jurisdiction, and Congress may provide for admiralty jurisdiction wherever there are navigable waters, and may authorize territorial legislatures to create Admiralty Courts, p. 460.

Courts.—Territorial courts are not strictly United States courts, within article 3, Constitution, but derive jurisdiction from Congress, p. 460.

Rule applied in *McAllister v. United States*, 141 U. S. 184, 35 L. 696, 11 S. Ct. 952, holding section 1768, revised statutes, inapplicable to Alaska District Court; *Steamer Coquitlam v. United States*, 163 U. S. 351, 41 L. 186, 16 S. Ct. 1119, holding Alaska District Court not governed by article 3; *Suesenbach v. Wagner*, 41 Minn. 110, 42 N. W. 926, holding territorial court's records entitled to same credit as State court's. Cited, *arguendo*, in *United States v. Beebe*, 2 Dak. 303, 11 N. W. 510.

Admiralty.—Action for injuries to passenger may be by libel in rem against ship, and decree may be enforced as in other maritime lien cases, p. 462.

Followed in *The Wasco*, 53 Fed. 547. Principle applied in *The A. Heaton*, 43 Fed. 595, extending rule to seaman injured through master's neglect; *The Marion Chilcott*, 95 Fed. 689, holding ship liable for mate's continued ill-treatment of seaman; *The Anaces*, 93 Fed. 242, 243, extending rule to stevedore; *The Willamette*, 70 Fed. 879, 44 U. S. App. 26, 31 L. R. A. 720, where passenger was killed by collision and State law gave lien on offending ship.

Limited in *The Egyptian Monarch*, 36 Fed. 776, dismissing libel for injury on English ship in English waters, no maritime lien being given.

Shipping.— Vessel-owners are not insurers of passengers' lives or safety, as of merchandise accepted by them as common carriers, but are bound to use greatest possible care, p. 462.

Distinguished in *The Anchoria*, 83 Fed. 848, 51 U. S. App. 610, exculpating owner where drip from water-cooler caused steward to slip and injure passenger.

Damages.— Fixed measure of compensation for mental and physical suffering, and injury to health and constitution, is impossible, and each case must be left largely to judgment of trial court. Hence, verdict of supreme territorial court for \$15,000, for fall through hatchway resulting in permanent injuries, will not justify reversal, p. 464.

Rule applied in *Western Union Tel. Co. v. Engler*, 75 Fed. 104, 44 U. S. App. 517, affirming S. S., 69 Fed. 187, 188, holding \$15,000 not excessive for compound fracture of leg. Approved in *Behrens v. The Furnessia*, 35 Fed. 800, allowing \$1,600 for fracture of leg without probable permanent injury.

101 U. S. 465-471, 25 L. 987, *SILLIMAN v. UNITED STATES*.

Shipping.— Government's refusal to pay agreed rate for barges in its use, or to return them, does not constitute duress upon barge-owner who thereupon signs new charter-party, pp. 470, 471.

Cited and applied in the following cases, denying existence of duress: *White v. United States*, 154 U. S. 663, 26 L. 179, 14 S. Ct. 1192, where owner paid for services on vessel in use of United States without its authority; *Morton v. Morris*, 72 Fed. 398, 36 U. S. App. 550, where creditor obtained security by threatening suit and receivership during panic, collecting cases; *Menantic, etc., Co. v. Peirce*, 88 Fed. 312, where shipowner allowed charterer to use cattle stalls for fruit under protest; *McClair v. Wilson*, 18 Colo. 84, 31 Pac. 503, and *Dausch v. Crane*, 109 Mo. 333, 19 S. W. 63, both holding threat of lawsuit not duress; *W. W. Kimball Co. v. Raw*, 7 Kan. App. 19, 51 Pac. 790, threat to remove piano under terms of note; *Bent v. Weston*, 167 Mass. 530, 46 N. E. 386, refusal to deliver horse till boarding charges paid; *Hackley v. Headley*, 45 Mich. 576, 8 N. W. 514, refusal to pay full amount of debt. Approved in *Tucker v. Hart*, 72 Ind. 245, holding surety cannot plead duress against principal.

Distinguished in *Joannin v. Ogilvie*, 49 Minn. 568, 32 Am. St. Rep. 584, 52 N. W. 218, 16 L. R. A. 378, holding payment of unfounded mechanic's lien, filed to defeat loan, made under duress; *Ganz v. Weisenberger*, 66 Mo. App. 116, where ignorant German farmer signed note under threat of eviction through United States marshal.

United States.— Owner of barges in government's use who, under protest, signed new charter-party at less rate, upon quartermaster's

refusal to pay former rate or return barges, and afterwards received new rate and receipted "in full," forfeited rights to old rate, p. 471.

101 U. S. 472, 25 L. 868, *SCHOOL DISTRICT v. INSURANCE CO.*

Courts.—Supreme Court will set aside submission of cause under Rule 20, where State statutes are omitted from brief in violation of Rule 21, p. 472.

Cited, *arguendo*, in *Hygeia, etc., Water Co. v. Hygeia Ice Co.*, 70 Conn. 534, 40 Atl. 540.

Courts.—Supreme Court insists upon counsel's strict observance of rules facilitating examination of causes, p. 472.

101 U. S. 473-479, 25 L. 800, *MARQUEZ v. FRISBIE.*

Quieting title.—Complaint asking that trust be declared and defendant compelled to convey lands, and showing that legal title is not in defendant, but in United States, is demurrable, p. 474.

Principle applied in *Forbes v. Driscoll*, 4 Dak. 353, 31 N. W. 642, where defendant offered to show contest pending in land department; *McCord v. Hill*, — Wis. —, 80 N. W. 736, where complaint failed to show title had passed from United States.

Public lands.—Courts will not interfere with disposition of public lands by government officers, either by injunction or mandamus, nor should State courts assume jurisdiction by reason of control of parties, to annul patent before its issue, though it may afterwards enforce equities, p. 475.

Rule applied in *Casey v. Vassor*, 4 McCrary, 129, 50 Fed. 259, refusing interference in like case; *Forbes v. Driscoll*, 4 Dak. 354, 31 N. W. 642, and *Vantongeren v. Heffernan*, 5 Dak. 207, 38 N. W. 65, where contest still pending before land department; *Merriam v. Bachioni*, 112 Cal. 196, 44 Pac. 482, holding judgment of court, pending contest in land department, is not binding; *Bas-sick Min. Co. v. Davis*, 11 Colo. 134, 17 Pac. 296, holding equity will treat patentee as trustee in favor of another in equity entitled; *Widdicombe v. Childers*, 124 U. S. 405, 31 L. 430, 8 S. Ct. 520, and *Hedrick v. Atchison, etc.*, R. R., 167 U. S. 681, 42 L. 323, 17 S. Ct. 925, both holding patentee who availed himself of erroneous land-office entry, trustee for true locator; *Turner v. Sawyer*, 150 U. S. 586, 37 L. 1191, 14 S. Ct. 195, and *Brundy v. Mayfield*, 15 Mont. 211, 38 Pac. 1070, both holding mining patent wrongfully obtained by co-owner charged with trust; *Grandin v. La Bar*, 3 N. Dak. 448, 57 N. W. 241, declining to adjudge right to land claimed under railroad grant till selection approved; *Kimball v. McIntyre*, 3 Utah, 81, 1 Pac. 168, where mineral patent failed to state respective interests of grantees; dissenting opinions in *Chapman v. Quinn*, 56

Cal. 285, majority refusing to recognize claim to patented lands of claimant whose declaratory statement land office declined to file; *Sproat v. Durland*, 2 Okl. 52, 35 Pac. 888, majority enjoining interference with possession of one homestead claimant by another. Applied conversely in *In re Emblen*, 161 U. S. 57, 40 L. 616, 16 S. Ct. 488, denying land department's further jurisdiction after patent issues. Approved, but not applied, in *Thompson v. Ferry*, — Ariz. —, 56 Pac. 743, where claimant failed to assert claim against cotenant obtaining patent till property changed hands. Cited, arguing, in *Chapman v. Quinn*, 56 Cal. 286, and *Davis v. Magoun*, — Iowa, —, 80 N. W. 428.

Public lands.— Courts may deal with possession of lands prior to patent, or enforce contracts concerning them, but cannot thus transfer title still in United States, p. 475.

Rule applied in *Pappe v. Trout*, 3 Okl. 264, 41 Pac. 399, between lessor and lessee; *Reaves v. Oliver*, 3 Okl. 68, 41 Pac. 355, and *Wood v. Murray*, 85 Iowa, 506, 52 N. W. 356, both protecting by adjunction possession of pre-emptor; *Caldwell v. Bush*, 6 Wyo. 353, 45 Pac. 490, holding purchaser of entryman's interest takes subject to land department's approval of proofs; dissenting opinion in *McHenry v. Nygaard*, 72 Minn. 13, 74 N. W. 1109, majority distinguishing. Approved in *Woodruff v. Wallace*, 3 Okl. 365, 41 Pac. 361, holding courts have jurisdiction to extent to which United States has parted with title.

Distinguished in *McHenry v. Nygaard*, 72 Minn. 11, 74 N. W. 1108, where claimant was out of possession.

Public lands.— Land department decisions on questions of title, within scope of authority, are, in general, everywhere conclusive except on appeal within department, and, as to facts involved, even in courts, in absence of fraud or mistake of law, p. 476.

Followed in *Shanklin v. McNamara*, 87 Cal. 378, 26 Pac. 346, and *Porter v. Bishop*, 25 Fla. 760, 6 So. 866.

Rule applied in *Vance v. Burbank*, 101 U. S. 519, 520, 25 L. 931, and *Wiseman v. Eastman*, 21 Wash. 172, 57 Pac. 400, both holding fraud must be such as to have prevented presentation of real contest; *Baldwin v. Stark*, 107 U. S. 464, 465, 27 L. 526, 527, 2 S. Ct. 473, 474, *Bishop of Nesqually v. Gibbon*, 158 U. S. 166, 39 L. 936, 15 S. Ct. 784, and *Aurora Hill, etc., Co. v. Eighty-Five Mining Co.*, 12 Sawy. 363, 34 Fed. 520, all holding department's decisions of fact conclusive; *Maxwell Land-Grant Case*, 121 U. S. 380, 30 L. 959, 7 S. Ct. 1028, holding showing of fraud must be clear and convincing; *United States v. White*, 17 Fed. 563, holding department's decision final where fraud alleged consists of false affidavits used on contest; *Los Angeles Farming, etc., Co. v. Hoff*, 48 Fed. 344, holding patent in confirmation of Mexican grant conclusive; *American*

Mortgage Co. v. Hopper, 64 Fed. 556, 29 U. S. App. 12, *Diller v. Hawley*, 81 Fed. 653, 48 U. S. App. 468, and *Swigart v. Walker*, 49 Kan. 104, 30 Pac. 163, all holding land department may set aside entry any time before patent issues; *Stimson Land Co. v. Rawson*, 62 Fed. 430, but not arbitrarily to defeat rightful title to patent; *Empey v. Plugert*, 64 Wis. 612, 25 N. W. 563, holding that complaint charging perjury must allege that decision was result thereof; *Durango Land, etc., Co. v. Evans*, 80 Fed. 429, 49 U. S. App. 315, to same effect as to fraud and imposition; *Fuller v. Shedd*, 161 Ill. 492, 52 Am. St. Rep. 397, 44 N. E. 296, 33 L. R. A. 161, applying rule to decision as to character of lands claimed as swamp; *Knapp v. Thomas*, 39 Ohio St. 387, 48 Am. Rep. 467, holding impeachment for fraud must be in direct proceeding and in equity; *Woodruff v. Wallace*, 3 Okl. 361, 378, 41 Pac. 359, 365, enjoining entryman whose entry had been cancelled; *Keane v. Brygger*, 3 Wash. 350, 28 Pac. 657, holding decisions of secretary of interior under act of March 14, 1864, equally conclusive; dissenting opinion in *South End, etc., Co. v. Tinney*, 22 Nev. 44, 35 Pac. 97, majority holding that patent fraudulently obtained was not charged with trust in favor of stranger to application. Approved in *Germania Iron Co. v. United States*, 58 Fed. 336, 19 U. S. App. 10, on application of United States, vacating patent issued through inadvertence pending contest.

Distinguished in *Craig v. Leitensdorfer*, 123 U. S. 212, 31 L. 123, 8 S. Ct. 97, holding equity cannot interfere where complainant does not claim equitable title in disputed land; *Sloan v. United States*, 95 Fed. 194, under 28 Stat. 305, providing suit for Indian allotment claimant.

Public lands.—Though land department's decision is not conclusive on courts where mistake of law is clear on undisputed facts, yet upon questions of mixed law and fact not clearly separable it is conclusive. Hence facts and decision must appear in record, pp. 476, 477.

Followed in *Durango Land, etc., Co. v. Evans*, 80 Fed. 431, 49 U. S. App. 318, *United States v. Northern Pac. R. Co.*, 95 Fed. 882, *Green v. Hayes*, 70 Cal. 281, 11 Pac. 719, and *Wiseman v. Eastman*, 21 Wash. 174, 57 Pac. 401, collecting cases. Rule applied in *Glidden v. Union Pac. Ry.*, 30 Fed. 661, where department erred in law in cancelling pre-emptionist's entry; *Moss v. Dowman*, 88 Fed. 186, 60 U. S. App. 77, holding decision of land department must have been clearly wrong; *Emslie v. Young*, 24 Kan. 744, holding reinstatement of entry on lands abandoned, after grant to railroad, mistake of law; *Tatro v. French*, 33 Kan. 53, 5 Pac. 429, denying conclusiveness of decision that unlawful entry while minor, exhausted power of entry; dissenting opinion in *McLaughlin v. Heid*, 63 Cal. 216, majority admitting evidence to show land patented as railroad grant land, was excluded therefrom.

Courts need not pass upon fraud in procuring congressional act, where complaint alleging same does not ask relief of court against it, p. 478.

Public lands.—Complaint seeking relief against fraudulent patentee must be specific as to fraud, p. 478.

Followed in *United States v. Atherton*, 102 U. S. 375, 26 L. 214, *Plummer v. Brown*, 70 Cal. 548, 12 Pac. 466, *Wiseman v. Eastman*, 21 Wash. 176, 57 Pac. 402. Cited, *arguendo*, in *Downman v. Saunders*, 3 Okl. 231, 41 Pac. 106.

101 U. S. 479-494, 25 L. 939, *PLANING-MACHINE CO. v. KEITH*.

Patents.—Under section 35, act of 1870, abandonment prior to patent, or public use, or being on sale over two years before application, are pleadable to infringement action, pp. 483, 484.

Cited in 40 Am. Dec. 468, note.

Patents.—Abandonment may be express or implied and before or after application for patent, pp. 484, 485.

Cited, *arguendo*, in *Western Electric Co. v. Sperry, etc., Co.*, 58 Fed. 191, 18 U. S. App. 177. See 47 Am. Dec. 443, note.

Patents.—In absence of extreme poverty or sickness, or like cause, abandonment is presumed from long neglect to renew application, e. g., where patent was obtained twenty-four years after rejection of first application, pp. 485, 486.

Rule applied in *Rifle, etc., Co. v. Whitney, etc., Co.*, 118 U. S. 24, 30 L. 53, 6 S. Ct. 951, where applicant delayed renewing application eight years; *Consolidated Fruit, etc., Co. v. Bellaire, etc., Co.*, 27 Fed. 382, where delay was fifteen years; *Kittle v. Hall*, 24 Blatchf. 192, 29 Fed. 514, where claim was enlarged four years after application. See 47 Am. Dec. 451, note.

Distinguished in *American Bell Tel. Co. v. United States*, 68 Fed. 552, 33 U. S. App. 236, where United States sought to cancel patent because of patent-office delay, prolonging monopoly.

Patents.—Revised statutes, section 4920, does not require notice to plaintiff of names of witnesses to prior invention or use, pp. 491, 492.

Followed in *Allis v. Buckstaff*, 13 Fed. 884, *MacKnight v. M'Niece*, 64 Fed. 117.

Witnesses.—Objection to examination of witnesses should be specific, in order to enable opposing party to remove it, if possible, p. 493.

Distinguished, *arguendo*, in *MacKnight v. M'Niece*, 64 Fed. 116.

Patents.—Woodbury patent 138,462, for improvement in planing machines, held void for abandonment, and because in common use before patent, pp. 480-494.

Cited in *Pennsylvania R. R. v. Locomotive, etc., Co.*, 110 U. S. 494, 28 L. 223, 4 S. Ct. 222, and *Union Gas-Engine Co. v. Doak*, 88 Fed. 90, where old process was applied to analogous use; *Peters v. Active Mfg. Co.*, 129 U. S. 537, 32 L. 741, 9 S. Ct. 392, affirming S. C., 21 Fed. 320, and *Simonds Mfg. Co. v. E. C. Atkins & Co.*, 63 Fed. 587, all holding mere change of size not invention; *Wilgus v. Germain*, 72 Fed. 777, 44 U. S. App. 369, and *Newton Mfg. Co. v. Wilgus*, 90 Fed. 485, both holding change in sprinkler's size and application merely formal; *Tod v. Wick Bros. & Co.*, 36 Ohio St. 393, holding formal differences do not prevent infringement.

101 U. S. 494-503, 25 L. 1065, **BAKER v. HUMPHREY.**

Witnesses unimpeached are presumed unimpeachable, p. 498.

Deeds.—Quitclaim grantee cannot take as bona fide purchaser, p. 499.

Reaffirmed in *Runyon v. Smith*, 18 Fed. 582, though grantor had purchased in good faith and for value; *United States v. Sliney*, 21 Fed. 895, though tenant in possession had attorned to grantor; *Dunn v. Barnum*, 51 Fed. 361, 10 U. S. App. 86, where grantee paid \$100 for \$30,000 property; *Johnson v. Williams*, 37 Kan. 181, 1 Am. St. Rep. 245, 14 Pac. 538, collecting authorities. Approved in *McClung v. Steen*, 32 Fed. 374, holding quitclaim of government patentee before patent, passed nothing; *Beakley v. Robert*, — Mich. —, 79 N. W. 193, under section 8998, Michigan compiled laws 1897, concerning priority over unrecorded deeds, and dissenting opinion in *United States v. California, etc., Land Co.*, 49 Fed. 505, 7 U. S. App. 128, majority holding conveyance of present and future interest more than mere quitclaim.

Qualified in *United States v. California, etc., Land Co.*, 148 U. S. 45, 37 L. 361, 13 S. Ct. 463, denying universality of rule; *Knapp v. Bailey*, 79 Me. 205, 1 Am. St. Rep. 300, 9 Atl. 124, and *Bradley v. Merrill*, 88 Me. 335, 34 Atl. 163, both holding quitclaim, in Maine, merely one circumstance bearing on question of notice.

Evidence.—Admissions against interest are admissible against maker of deed, and those claiming under him, e. g., grantee's statement that conveyance was made to defeat creditor, p. 499.

Followed in *Henderson v. Wanamaker*, 79 Fed. 738, 49 U. S. App. 178, holding grantor's admission of prior conveyance to another competent against grantee.

Estoppel.—Holder of legal title, out of possession, who draws up deed from mortgagee in possession to third party, and claims no interest for a long period of time, although cognizant of another's adverse possession, is afterwards estopped, and so is his grantee, p. 499.

Approved in dissenting opinion in *Lake Superior Ship Canal, etc., Co. v. Cunningham*, 44 Fed. 843, majority holding State cannot be estopped by agent's act, to claim land received for special purpose; *Wehrman v. Conklin*, 155 U. S. 327, 39 L. 174, 15 S. Ct. 134, *arguendo*. See 49 Am. Dec. 388, note.

Attorney and client.—Attorney cannot, without client's consent, buy and hold except in trust, adverse interest touching the subject-matter of his employment, whether in his own name or not, pp. 501-503.

Rule applied in *Downard v. Hadley*, 116 Ind. 135, 18 N. E. 459, following rule; *Chaffin v. Hull*, 49 Fed. 528, extending rule to confidential agent; *Bergin v. Haight*, 99 Cal. 56, 33 Pac. 761, holding administrator's attorney trustee for heir's assignees; *Holmes v. Holmes*, 106 Ga. 860, 33 S. E. 217, holding law implies trust in client's favor; *Beedle v. Crane*, 91 Mich. 431, 51 N. W. 1071, where attorney obtained release of father's interest in daughter's estate; *Davis v. Kline*, 96 Mo. 406, 9 S. W. 725, 2 L. R. A. 79, and note, holding employment to draw trust deed creates relationship of attorney; *Eoff v. Irvine*, 108 Mo. 383, 386, 32 Am. St. Rep. 611, 614, 18 S. W. 908, 909, though attorney has ceased to act for client, he is entitled to reimbursements for amount laid out; *Yerkes v. Crum*, 2 N. Dak. 77, 49 N. W. 423, decided adversely on point of practice; *Humphrey v. Baker*, 103 U. S. 736, 26 L. 456, *arguendo*. See 3 McCrary, 83, note.

101 U. S. 503-514, 25 L. 829, **HALL v. RUSSELL.**

Public lands.—During joint occupancy treaty, Oregon settlers acquired no title to soil, and Congress, on assuming undisputed dominion, had right to limit bounty as it chose, pp. 508, 509.

Reaffirmed in *Shively v. Bowlby*, 152 U. S. 51, 38 L. 350, 14 S. Ct. 567, as to tide-water lands.

Public lands.—There can be no present grant without present grantee, and congressional grant indicating future grantee takes effect in future, e. g., under section 4, Oregon "donation act," p. 509.

Rule applied in *Spokane Falls, etc., Ry. v. Ziegler*, 61 Fed. 393, 15 U. S. App. 472, applying rule to railroad grant under act March 3, 1875; *Horsky v. Moran*, 21 Mont. 362, 53 Pac. 1070, applying rule to mineral location.

Public lands.—Congressional grant is also law, and while words therein "shall be and is hereby granted" are appropriate to present grant, they must be construed to give effect to congressional intent. Hence, grant of section 4, Oregon "donation act," takes effect only on settler's compliance therewith, including for years' residence, pp. 509, 510.

Rule applied in *Traver v. Tribou*, 8 Sawy. 518, 520, 15 Fed. 30, 31, 32, holding settler and wife became qualified grantees upon approval of proof; *Henry v. Lilliwaup, etc., Land Co.*, 83 Fed. 750, holding neglect of survey prevented vesting of title; *New York Indians v. United States*, 170 U. S. 18, 42 L. 933, 18 S. Ct. 534, holding treaty provision of June 15, 1838, for Kansas tract for New York Indians, present grant; dissenting opinion in *Wineman v. Gastrell*, 53 Fed. 705. 2 U. S. App. 449, majority holding Mississippi swamp-land grant of March 3, 1852, present guard. Cited, *arguendo*, in *Hershberger v. Blewett*, 55 Fed. 180.

Public lands.—Oregon territorial statutes providing for descent or devising of settlers' "donation act" rights as real estate, are in conflict with such act and inoperative, pp. 513, 514.

Approved in *Hershberger v. Blewett*, 55 Fed. 177, holding territorial legislature's construction of congressional grant invalid.

Public lands.—Settler's heirs under Oregon "donation act" take as donees from United States. Hence, interest of settler prior to four years' residence is not devisable, pp. 513-514.

Rule applied in *Vance v. Burbank*, 101 U. S. 520, 25 L. 931, holding both wife and children take as donees; *Maynard v. Hill*, 125 U. S. 215, 31 L. 600, 8 S. Ct. 731, and *Maynard v. Hill*, 2 Wash. Ter. 327, 5 Pac. 719, both holding residence of divorced husband does not inure to benefit of wife; *United States v. Tichenor*, 8 Sawy. 149, 12 Fed. 421, holding married settler may abandon claim without wife's consent; *Cutting v. Cutting*, 6 Sawy. 399, 6 Fed. 262, holding widow and children take as donees free from decedent's debts; *Hershberger v. Blewett*, 55 Fed. 177, 178, holding donation claim patented to "heirs," not subject to administration; *Stubblefield v. Menzies*, 8 Sawy. 43, 11 Fed. 270, holding daughter took interest in father's claim as donee; *Cooper v. Wilder*, 111 Cal. 195, 196, 52 Am. St. Rep. 165, 166, 43 Pac. 592, applying rule to timber culture claim.

Distinguished in *Brazee v. Schofield*, 124 U. S. 502, 31 L. 489, 8 S. Ct. 607, where heir after long delay sought to set aside sale by guardian.

101 U. S. 514-521, 25 L. 929, **VANCE v. BURBANK.**

Public lands.—Land department officers are special tribunal to decide land patent questions; their decisions are judicial or quasi-judicial, and, in absence of fraud, conclusive on questions of fact, e. g., whether petitioner has complied with Oregon "donation act," including residence and cultivation, p. 519.

Followed in *Steel v. Smelting Co.*, 106 U. S. 452, 27 L. 228, 1 S. Ct. 393. Rule applied in *Noble v. Union River, etc., R. R.*, 147 U. S. 175, 37 L. 127, 13 S. Ct. 274, holding determination of railroad's qualification to receive grant not subject to collateral attack;

Bishop of Nesqually v. Gibbon, 158 U. S. 166, 39 L. 936, 15 S. Ct. 784, holding existence and occupancy of missionary station questions of fact; Pacific Coast Mining, etc., Co. v. Spargo, 8 Sawy. 647, 16 Fed. 349, Northern Pac. R. Co. v. Cannon, 54 Fed. 258, 7 U. S. App. 507, Carter v. Thompson, 65 Fed. 331, German Ins. Co. v. Hayden, 21 Colo. 136, 52 Am. St. Rep. 210, 40 Pac. 456, and Colburn v. Northern, etc., R. R., 13 Mont. 485, 34 Pac. 1019, all holding character of land question of fact; United States v. White, 9 Sawy. 128, 17 Fed. 563, where United States sued to annul patent; Shively v. Welch, 10 Sawy. 141, 20 Fed. 32, applying rule to Oregon tide-land commissioners; United States v. Hancock, 12 Sawy. 384, 30 Fed. 853, holding land commissioner's designation of boundaries of Mexican grant final; Hershberger v. Blewett, 55 Fed. 177, assuming patent to "heirs" amounted to finding that they took in own right; Golden Reward Mining Co. v. Buxton, etc., Co., 79 Fed. 874, where adverse claimant failed to contest application for mining patent; Illinois Steel Co. v. Budzisz, 82 Fed. 161, applying rule to patents issued under president's proclamation in 1835; Bishop Iron Co. v. Hyde, 66 Minn. 31, 68 N. W. 98, on question of qualification to pre-empt; Talbott v. King, 6 Mont. 106, holding mining patent conclusive of regular discovery and location; Horsky v. Moran, 21 Mont. 352, 53 Pac. 1066, upholding townsite patent where placer claimant failed to assert right at proper time; Knapp v. Thomas, 39 Ohio St. 387, 48 Am. Rep. 467, holding pardon of convict procured by false representations, not subject to collateral attack; Myers v. Berry, 3 Okl. 619, 41 Pac. 583, holding findings of townsite trustees conclusive in lot controversy, under act of May 14, 1890; Keane v. Brygger, 3 Wash. 350, 28 Pac. 657, holding decision of secretary of interior final, under act of March 14, 1864; Caldwell v. Bush, 6 Wyo. 353, 354, 45 Pac. 490, holding purchaser after final proofs takes sub judice, and cancelling desert-land entry after issue of final certificate and sale. Approved in Hilton v. Guyot, 159 U. S. 207, 40 L. 123, 16 S. Ct. 160, holding foreign judgment prima facie evidence, and, in absence of fraud or special ground, conclusive.

Distinguished in Silver Bow, etc., Co. v. Clark, 5 Mont. 424, 5 Pac. 581, holding limitation of surface rights in mining patent void.

Public lands.—To impeach land department decisions fraud must have been upon unsuccessful party, and have prevented presentation of real controversy, even perjury or forged documents being insufficient if disputed matter was presented, pp. 519, 520.

Followed in Steel v. Smelting Co., 106 U. S. 454, 27 L. 229, 1 S. Ct. 395. Rule applied in United States v. White, 9 Sawy. 129, 17 Fed. 563, 564, dismissing bill to vacate patent obtained by false affidavits; United States v. Rose, 11 Sawy. 84, 24 Fed. 196, holding patent issued ex parte on false evidence, voidable at suit of United

States; *Hilton v. Guyott*, 42 Fed. 252, holding foreign judgment in personam not impeachable for false testimony; *Reed v. Stanly*, 89 Fed. 433, holding fraud presented in former suit will not support bill of review; *Wiseman v. Eastman*, 21 Wash. 170, 57 Pac. 400, where question of false testimony had been presented in land department; dissenting opinion in *United States v. San Pedro, etc., Co.*, 4 N. Mex. 310, 17 Pac. 422, majority holding want of notice of contest and time for appeal, sufficient fraud. Approved in *Sanford v. Sanford*, 139 U. S. 648, 35 L. 292, 11 S. Ct. 667, holding complainant must show that but for fraud he would have succeeded; *Kimberly v. Arms*, 40 Fed. 558, holding perjury will not support bill of review unless determination controlled thereby; *Durango Land, etc., Co. v. Evans*, 80 Fed. 429, 49 U. S. App. 315, holding fraud must be shown to have caused incorrect decision; *Northern Pac. R. Co. v. Cannon*, 46 Fed. 231, *Scott v. Lockey Inv. Co.*, 60 Fed. 35, and *Deweese v. Reinhard*, 61 Fed. 781, 19 U. S. App. 698, all holding fraud perpetrated on United States available only at its instance. Cited, *arguendo*, in *Plummer v. Brown*, 70 Cal. 548, 12 Pac. 466.

Distinguished in *Moffat v. United States*, 112 U. S. 32, 28 L. 626, 5 S. Ct. 14, where patent was obtained by conspiracy of land-department officers; *United States v. Minor*, 114 U. S. 241, 243, 29 L. 113, 114, 5 S. Ct. 839, 840, reversing S. C., 26 Fed. 673, dismissing bill to vacate patent obtained ex parte by false affidavits. Approved, but not applied, in *Craig v. Leitensdorfer*, 123 U. S. 212, 31 L. 123, 8 S. Ct. 97, where plaintiff alleged no equitable title in disputed land.

Public lands.—Failure to present evidence before land department will not render decision inconclusive, in absence of fraud, where there is laches, e. g., where six years intervened between first appeal and final hearing by department, p. 520.

Rule applied in *Manning v. San Jacinto, etc., Co.*, 7 Sawy. 433, 9 Fed. 738, holding ignorance of fraud will not excuse laches where facts are of public record; *Norris v. Haggin*, 12 Sawy. 61, 28 Fed. 285, where fifteen years elapsed between alleged incompetency and suit.

Public lands.—Oregon "donation act" grants to settlers possessory rights only in lands occupied, until compliance with requirements of act including residence and cultivation, p. 521.

Public lands.—Rights of wife and wife's heirs under Oregon "donation act" depend upon husband's compliance with requirements of act, and bar to him is bar to them, even if infants, p. 521.

Rule applied in *Maynard v. Hill*, 125 U. S. 216, 31 L. 661, 8 S. Ct. 732, holding divorced wife took no interest; *United States v. Tichenor*, 12 Fed. 421, holding husband might abandon or dispose

of rights without wife's consent (same act); *Henry v. Lilliwaup, etc., Land Co.*, 83 Fed. 751, holding settler's neglect of survey defeated daughter's right to patent. Cited, *arguendo*, in *Shively v. Welch*, 10 Sawy. 144, 20 Fed. 34.

101 U. S. 522-528, 25 L. 792, *CANAL CO v. RAY*.

Contracts.—Party to contract who accepts or acquiesces in performance differing from specification, is bound thereby, and cannot afterwards claim acquiescence was merely temporary, pp. 524, 525.

Approved in *Ballou v. Billings*, 136 Mass. 309, holding repudiation of contract by one party entitles other to rescind; *Carter v. Duncan*, 84 N. C. 679, holding creditor's agreement with principal to extend time of payment after suit, released surety.

Evidence.—Contracts under seal may be varied by subsequent parol agreement, p. 527.

Reaffirmed in *Brush-Swan Electric, etc., Co. v. Brush, etc., Co.*, 41 Fed. 169, where time of payment was extended; *Platte Land Co. v. Hubbard*, 12 Colo. App. 470, 56 Pac. 66, especially as to time and condition of payments; *Herzog v. Sawyer*, 61 Md. 354, either before or after breach; *Day v. Mechanics, etc., Ins. Co.*, 88 Mo. 332, 57 Am. Rep. 420, though contract provide against waiver of rights thereunder; *Kirchner v. Laughlin*, 4 N. Mex. 221, 17 Pac. 135, where situation was altered by acting upon new contract. Approved in *Doherty v. Doe*, 18 Colo. 460, 33 Pac. 167, providing parol agreement be executed. See 56 Am. St. Rep. 670, note.

Contracts.—Where in water contract with mill, canal company reserved right to require change in water gauge's location to prevent interference with navigation, change cannot be enforced except for such purpose, p. 528.

101 U. S. 528-540, 25 L. 912, *RAILWAY CO. v. PHILADELPHIA*.

Constitutional law — Taxation.—Statutory tax exemption or limitation made for valuable consideration received by State, is contract protected from repeal or modification within Constitution, article 1, section 10; but such exemptions are strictly construed, p. 532.

Applied conversely in *Railroad v. Alsbrook*, 110 N. C. 162, 14 S. E. 658, where State received no consideration.

Street railroads.—Ordinance requiring \$50 street-car license is valid police regulation, pp. 530, 535.

Approved in *Allerton v. Chicago*, 9 Biss. 557, reaffirming rule; *Denver City Ry. v. Denver*, 2 Colo. App. 40, 30 Pac. 1050, holding city empowered to impose license has large discretion as to amount.

Constitutional law.—Philadelphia street-railroad charter of April 8, 1864, requiring payment to city of "such license as is now paid by other companies," is not contract violable by subsequent act requiring higher license, p. 536.

Approved in *State v. Hilbert*, 72 Wis. 195, 39 N. W. 330, holding license fee alterable by ordinance under revised statutes, section 1862.

Taxation.—Statutory tax exemption being invidious, must be clear and unambiguous, and, if indirect, must be only consistent construction, and conclusive of legislative intention, p. 539.

Approved in *Sioux City, etc., Ry. v. Sioux City*, 138 U. S. 107, 108, 34 L. 901, 902, 11 S. Ct. 229, holding franchise ordinance requiring company to pave between tracks, did not prevent later requirement of additional foot outside; *Springfield v. Smith*, 138 Mo. 655, 60 Am. St. Rep. 574, 40 S. W. 759, 37 L. R. A. 448, 449, holding failure of franchise ordinance to require license does not exempt.

Constitutional law.—Acts of incorporation subsequent to Constitution are construed as if containing its provisions; hence, street-railroad charter subsequent to Pennsylvania Constitution, is alterable or revocable by legislature, p. 539.

Approved in *Mayor v. Twenty-third St. Ry. Co.*, 113 N. Y. 318, 21 N. E. 62, upholding act of 1873, exacting percentage of receipts instead of license; and *State v. Hilbert*, 72 Wis. 193, 39 N. W. 329, holding irrevocable contract under similar Constitution, ultra vires of legislature.

Constitutional law.—Private-corporation charters, when accepted, are usually executed contracts, but provisions thereof are strictly construed in public favor, p. 540.

101 U. S. 541-543, 25 L. 944, *LOVELL v. DAVIS*.

Shipping.—Recital in charter-party of ship "now in harbor," is representation, not warranty, and immaterial if known to be untrue; hence, it will not support rescission for delay in presenting ship for cargo, p. 542.

Shipping.—Where charter-party of ship at sea fixes no time for receiving cargo, reasonable diligence, and only such, is necessary in reaching port, p. 542.

Appeal and error.—Exception to overruling of question asked is unavailing, when witness did not answer, p. 543.

Not cited.

101 U. S. 543-550, 25 L. 1068, *RAILROAD CO. v. UNITED STATES*.

Internal revenue.—Under revised statutes, section 951, credit for taxes erroneously assessed and collected cannot be allowed de-

fendant in suit by United States, where not first presented to treasury as therein provided, pp. 548, 549.

Approved in *Savings Inst. v. Blair*, 116 U. S. 206, 29 L. 659, 6 S. Ct. 356, where claim was not presented within two years allowed; *United States v. Wade*, 75 Fed. 267, upon suit against former quartermaster for account; *Yates v. United States*, 90 Fed. 59, 61 U. S. App. 128, holding proof of presentation cannot be made by parol.

Internal revenue.— Under act of July 13, 1866, taxing receipts of mail-carrying contracts made before August 1, 1866, contract will be implied from payment of compensation commencing before such time, p. 549.

Internal revenue.— Railroad companies were liable for United States tax of 5 per cent. on bond interest paid August 1, 1870, p. 549.

Internal revenue.— Tax on bond interest under act of 1870, was not leviable or collectible in 1871 upon interest neither payable nor paid in that year, p. 550.

Approved in *United States v. Indianapolis R. R.*, 113 U. S. 712, 28 L. 1140, 5 S. Ct. 716, where interest was earned in 1871, but payable in 1872; *United States v. Louisville, etc., R. Co.*, 33 Fed. 832, holding assumption of debts upon consolidation is not payment out of earnings.

101 U. S. 551-555, 25 L. 1026, *NOUGUE v. CLAPP*.

Courts.— Federal courts cannot annul judgments of State courts having jurisdiction, for fraud. Recourse must be to State courts, e. g., where clerk of State court refused to issue writ of injunction upon court's order, and property in question was foreclosed, p. 555.

Rule applied in *Elder v. Richmond, etc., Min. Co.*, 58 Fed. 540, 19 U. S. App. 118, following rule; *Central Trust Co. v. St. Louis, etc., Ry.*, 41 Fed. 555, applying rule to State judgment against Federal court receiver; *Graham v. Boston, etc., R. R.*, 118 U. S. 177, 30 L. 204, 6 S. Ct. 1018, affirming S. C., 14 Fed. 760, where foreclosure still reviewable by State court; *Pennsylvania R. Co. v. Nat. Docks, etc., Ry.*, 58 Fed. 931, refusing relief against amendment in special proceeding, where State court had general jurisdiction; *Furnald v. Glenn*, 64 Fed. 54, 26 U. S. App. 202, affirming S. C., 56 Fed. 374, holding equity will not annul another court's proceedings for fraud where relief may be had therein; *Jackson v. Gould*, 74 Me. 574, holding action of review not removable to Federal court. Applied conversely in *Central Trust Co. v. Western, etc., R. Co.*, 89 Fed. 27, restraining interference with Circuit Court judgment. Approved in *M'Dermott v. Copeland*, 9 Fed. 537, unless where founded on both fraud and collusion; *Denton v. Baker*, 93 Fed. 49, holding relief against judgment obtained by fraud, barred by laches; *Edwards Mfg. Co. v. Sprague*, 76 Me. 62, holding suit to

enjoin action not removable, except in bankruptcy cases; *Hendrickson v. Bradley*, 85 Fed. 515, 55 U. S. App. 727, *arguendo*.

Distinguished in *Marshall v. Holmes*, 141 U. S. 600, 35 L. 874, 12 S. Ct. 65, where complaint alleged discovery of part proof of forgery after judgment; *M'Neil v. M'Neil*, 78 Fed. 835, holding Federal courts have equity jurisdiction to relieve against State judgments obtained by fraud.

101 U. S. 555-557, 25 L. 961, *DURANT v. ESSEX CO.*

Judgment, absolute in terms, dismissing bill on merits, is bar to further litigation, p. 556.

Cited in 85 Am. Dec. 689, note.

Appeal and error.—On mandate of Supreme Court, affirming decree, Circuit Court must execute, and not rescind or modify it, though not unanimously affirmed; e. g., absolute decree of dismissal, p. 557.

Rule applied in *Kingsbury v. Buckner*, 134 U. S. 670, 33 L. 1055, 10 S. Ct. 645, holding same matter cannot be reviewed again on second appeal; *In re Washington, etc.*, R. R., 140 U. S. 96, 35 L. 341, 11 S. Ct. 674, denying inferior court's right to add interest not specifically allowed; *Gaines v. Rugg*, 148 U. S. 242, 243, 37 L. 437, 13 S. Ct. 616, enforcing execution of decree by mandamus; *Franklin Sav. Bank v. Taylor*, 53 Fed. 866, 9 U. S. App. 406, whether relief sought by original bill or bill of review; *Bissell Carpet-Sweeper Co. v. Goshen, etc., Co.*, 72 Fed. 552, 43 U. S. App. 47, extending rule to mandate of Circuit Court of Appeals. Approved in *Seeligson v. Transportation Co.*, 70 Tex. 201, 7 S. W. 709, *arguendo*. See 85 Am. Dec. 689, note.

Limited in *Andrews v. National Foundry, etc., Works*, 61 Fed. 790, 24 U. S. App. 81, and dissenting opinion in *Standard Elevator Co. v. Crane, etc., Co.*, 76 Fed. 794, 46 U. S. App. 411, both excepting interlocutory injunctions; *Kolb v. Swann*, 68 Md. 521, 13 Atl. 380, holding authority of judgment by equally-divided court, not binding in analogous cases; *Gale v. Nickerson*, 144 Mass. 418, 11 N. E. 716, holding, in Massachusetts, petition to revise probate decree should be heard below first. Distinguished in *Cleveland v. Quilty*, 128 Mass. 579, where appeal was dismissed because of appellant's incapacity to appeal.

101 U. S. 557-567, 25 L. 892, *SHAW v. RAILROAD CO.*

Bills and notes.—Bona fide purchaser for value of lost or stolen bill or note, payable to bearer, or indorsed in blank, acquires good title, not as incident of negotiability, but because they circulate commercially as evidence of money, pp. 563, 564.

Rule applied in *Saloy v. Bank*, 39 La. Ann. 93, 1 So. 659, applying rule to purchase of negotiable bonds from bailee; *Hynes v.*

Winston, — Tex. Civ. App. —, 40 S. W. 1025, where notes were obtained by fraud. Approved in *Atlas Nat. Bank v. Holm*, 71 Fed. 492, 34 U. S. App. 472, holding willful avoidance of knowledge conclusive of bad faith; *Fairex v. Bier*, 37 La. Ann. 825, holding good faith presumed in purchaser of negotiable bonds before maturity; *Buchanan v. Wren*, 10 Tex. Civ. App. 572, 30 S. W. 1083, holding mala fides must be proven; *Pugh v. Moore, etc., Co.*, 44 La. Ann. 245, 10 So. 723, and *State v. Hart*, 46 La. Ann. 51, 14 So. 511, both holding instrument originating in fraud utterly void.

Bills and notes, when overdue, are negotiable, but purchaser takes subject to defenses against prior holders, p. 563.

Approved in *Allen v. O'Donald*, 12 Sawy. 32, 28 Fed. 26, holding assignee of matured notes may sue in own name.

Carriers.— Sale of lost or stolen bill of lading, like goods thereby represented, does not vest title in bona fide purchaser for value, unless owner be estopped by carelessness in enabling thief or finder to occupy position of owner, pp. 564, 565.

Rule applied in *Friedlander v. Texas, etc., Ry.*, 130 U. S. 424, 32 L. 994, 9 S. Ct. 572, holding railroad not liable for fraudulent bill issued by agents; *Weyand v. Atchison, etc., Ry.*, 75 Iowa, 579, 9 Am. St. Rep. 509, 39 N. W. 902, 1 L. R. A. 653, and n., holding carrier liable who delivered goods to holder of bill not named therein; *Knox v. Eden Musee Co.*, 148 N. Y. 456, 51 Am. St. Rep. 705, 42 N. E. 992, 31 L. R. A. 783, applying rule to lost or stolen stock certificate; *O'Herron v. Gray*, 168 Mass. 576, 60 Am. St. Rep. 413, 47 N. E. 430, 40 L. R. A. 500, to stock certificate fraudulently pledged by cashier; *Scollans v. Rollins*, 173 Mass. 279, 53 N. E. 864, to bond coupon, collecting authorities; *The Serapis*, 37 Fed. 438, holding bottomry bill only quasi-negotiable. Applied, conversely, in *Clay, etc. v. Gage, etc.*, 1 Tex. Civ. App. 663, 20 S. W. 949, holding owner of lost cotton receipts not estopped to maintain title if not negligent. Approved in *Montclair v. Ramsdell*, 107 U. S. 158, 27 L. 435, 2 S. Ct. 399, holding good faith of bond purchaser presumed; *Haas v. Kansas City, etc., R. R.*, 81 Ga. 796, 7 S. E. 630, holding assignor's knowledge of carrier's inability to deliver goods, binds assignee of bill. See 38 Am. Dec. 422, note.

Distinguished in *Raleigh, etc., R. R. v. Lowe*, 101 Ga. 330, 28 S. E. 868, holding owner not estopped where bill was stolen after delivery of goods by carrier.

Carriers.— Bill of lading is regarded as merchandise thereby represented, which may be sold or pledged by transfer of bill, but transfer of symbol can give no greater right than thing itself, pp. 564, 565.

Followed in *Raleigh, etc., R. R. v. Lowe*, 101 Ga. 329, 28 S. E. 868. Rule applied in *Mill Co. v. Burlington, etc., R. R.*, 102 Iowa,

267, 71 N. W. 257, holding delivery of goods vests title as against subsequent assignment of bill; *First Nat. Bank v. McAndrews*, 5 Mont. 329, 51 Am. Rep. 53, 5 Pac. 881, holding transmission of bill delivery of goods.

Statutes in derogation of common law are strictly construed; hence Missouri statute making bills of lading negotiable in same manner as bills and notes, does not confer other characteristics than negotiability, p. 565.

Principle applied in construing strictly statutes referred to in following cases: *Jasper Trust Co. v. Kansas City, etc.*, R. R., 99 Ala. 423, 42 Am. St. Rep. 79, 14 So. 549, section 1179, code of 1886; *Lal-lande v. His Creditors*, 42 La. Ann. 712, 7 So. 897, section 6, act 150, of 1868; *Nat. Bank v. Chicago, etc.*, R. Co., 44 Minn. 237, 20 Am. St. Rep. 577, 46 N. W. 560, 9 L. R. A. 269, general statutes of 1878, chapter 124, section 17, all similar statutes; *Yarwood v. Happy*, 18 Wash. 249, 51 Pac. 461, similar statute concerning warehouse receipts; *Gwathmay v. Clisby*, 24 Blatchf. 401, 31 Fed. 222, Alabama laws of 1828, page 37, regarding promissory notes; *Harrington v. Herrick*, 64 Fed. 471, 29 U. S. App. 103, sections 947-953, volume 2, Hill's Washington code, regarding administration of partners' estates; *Commercial Bank v. Hurt*, 99 Ala. 140, 42 Am. St. Rep. 45, 12 So. 571, 19 L. R. A. 704, section 1178, code of 1886, as to warehouse receipts; *Commercial Bank v. Lee*, 99 Ala. 496, 12 So. 574, same; *Nelson v. Owen*, 113 Ala. 382, 21 So. 78, section 1784, code of 1886, regarding pledges; *Canadian Bank v. McCrea*, 106 Ill. 294, section 24, act of 1871, regarding warehouse receipts; *Lyon v. Lyon*, 88 Me. 404, 34 Atl. 182, public laws of 1887, chapter 14, regarding rights of illegitimates; *Starnes v. Hill*, 112 N. C. 20, 16 S. E. 1017, 22 L. R. A. 604, applying strict construction to real estate statute. Approved in *Steiger v. Third Nat. Bank*, 2 McCrary, 499, 504, 6 Fed. 574, 579, limiting factor's power to pledge goods to charges and advances; *Robinson v. Memphis, etc.*, R. Co., 9 Fed. 136, holding indorsee of bill may sue carrier for non-delivery under Tennessee code, section 1967; *Munroe v. Philadelphia, etc., Co.*, 75 Fed. 546, holding Pennsylvania act of September 24, 1866, not limited to bills for goods in transit to warehousemen; *First Nat. Bank v. Mt. Pleasant, etc., Co.*, 103 Iowa, 522, 72 N. W. 690, upholding title of bank which discounted draft accompanied by bill, but advanced no money till after creditor attached; *Dymock v. Missouri, etc., Ry.*, 54 Mo. App. 410, holding assignor of bill is estopped to claim title as against assignee's innocent vendee; *Nat. Bank v. Railway*, 25 S. C. 223, holding bill of lading negotiable to extent of passing title to goods; *Landa v. Lattin Bros.*, 19 Tex. Civ. App. 250, 46 S. W. 50, holding pledgee of bill of lading takes subject to warranty of goods. See 38 Am. Dec. 420, 423, and 100 Am. Dec. 244, notes.

Distinguished in *Wood's Appeal*, 92 Pa. St. 391, 37 Am. Rep. 696, as to stock certificate accompanied by power of attorney. Cited in

Richmond, etc., *R. Co. v. Patterson, etc., Co.*, 92 Va. 676, 24 S. E. 263, 41 L. R. A. 514, *arguendo*.

Carriers.—Purchaser of stolen bill of lading, with reason to doubt vendor's title, cannot hold goods as against bank advancing money thereon, p. 566.

Approved in *Allen v. St. Louis Bank*, 120 U. S. 36, 38, 30 L. 577, 578, 7 S. Ct. 464, 466, applying rule to unauthorized pledge by factor; *Estate of Littell*, 50 La. Ann. 306, 307, 23 So. 317, where transferee has reason to believe note was wrongfully transferred; *State v. Ransberger*, 106 Mo. 140, 17 S. W. 292, *arguendo*.

Appeal and error.—Mistake in entering verdict, being amendable by trial court, does not, on appeal, invalidate properly-entered judgment, p. 567.

Approved in *Gay v. Joplin*, 4 McCrary, 463, 13 Fed. 653, holding informal verdict amendable under section 954, revised statutes; *Bowden v. Burnham*, 59 Fed. 755, 19 U. S. App. 448, holding jurisdictional amendment relates to suit's commencement. See 4 McCrary, 465, note, *arguendo*.

101 U. S. 567-568, 25 L. 815, NATIONAL BANK v. CARPENTER.

Equity.—Demurrer lies to bill showing on face fatal laches, or bar by statute of limitations with insufficient allegation of defendant's concealment of cause of action, p. 568.

Followed in *Speidel v. Henrici*, 120 U. S. 387, 30 L. 720, 7 S. Ct. 612, *Hinchman v. Kelley*, 54 Fed. 66, 7 U. S. App. 481, *Merrill v. Monticello*, 66 Fed. 166, and *Leavenworth v. Douglass*, 59 Kan. 422, 53 Pac. 124, all for laches; *Commrs. of Sinking Fund v. Buckner*, 48 Fed. 535, *Bangs v. Loveridge*, 60 Fed. 966, *Hayden v. Thompson*, 71 Fed. 69, 36 U. S. App. 361, *Belt v. Bowie*, 65 Md. 355, 4 Atl. 298, *Whittaker v. Southwest Virginia Imp. Co.*, 34 W. Va. 229, 12 S. E. 511, and *Thompson v. Whitaker Iron Co.*, 41 W. Va. 584, 23 S. E. 798, all showing statutory bar; *Foster v. Mansfield, etc., R. Co.*, 36 Fed. 637, *Lant v. Manley*, 71 Fed. 15, and *Jones v. Perkins*, 76 Fed. 84, all holding delay must be shown consistent with proper diligence. Approved in *Moore v. Boyd*, 74 Cal. 171, 15 Pac. 672, *arguendo*. See 23 Am. St. Rep. 149, note.

Distinguished in *Theroux v. Northern Pac. R. Co.*, 64 Fed. 88, 27 U. S. App. 508, denying motion for judgment because complaint shows bar, after answer failing to plead statute; *Rosenthal v. Walker*, 111 U. S. 190, 28 L. 397, 4 S. Ct. 385, as to action by assignee in bankruptcy under revised statutes, section 5057; *Amy v. Watertown*, 22 Fed. 420, *arguendo*.

Equity rule 29, of Supreme Court, does not apply where leave to amend bill is asked after demurrer is allowed, p. 568.

Equity.— Under equity rule 35, of Supreme Court, permission to amend is discretionary, and error must affirmatively appear, to justify review. Hence, record must show amendment asked, to secure review on appeal, p. 568.

101 U. S. 569-570, 25 L. 791, UNITED STATES v. DAWSON.

Appeal and error.— Circuit Court's finding of fact cannot be reviewed on error, p. 570.

Not cited.

101 U. S. 570-572, 25 L. 868, BUTTERFIELD v. SMITH.

Executors and administrators.— Final settlements of executors and administrators, when adjudicated, have force of judgment, but only as between parties thereto; hence, probate record showing mortgage note charged to executor is not conclusive of payment, in favor of defendant in foreclosure, p. 572.

Approved in *Litchfield v. Goodnow*, 123 U. S. 551, 31 L. 201, 8 S. Ct. 210, *Johnson v. Richmond, etc., Imp. Co.*, 63 Fed. 496, and *Farrell v. St. Paul*, 62 Minn. 277, 54 Am. St. Rep. 645, 64 N. W. 811, 29 L. R. A. 781, all holding judgments conclusive only on parties and privies.

101 U. S. 572-576, 25 L. 923, COWDREY v. VANDENBURGH.

Assignments.— Purchaser of non-negotiable demand takes subject to owner's rights, unless latter estopped by own acts; e. g., street contractor's credit certificate for work done, pp. 574, 575.

Rule applied in *Chase v. Whitmore*, 68 Cal. 547, 9 Pac. 944, where depositary sold overdue note.

Estoppel — Property.— Where owner clothes another with apparent title, as by indorsement in blank, and delivery of non-negotiable demand, law protects purchaser for value; aliter, where consideration not proved, pp. 575, 576.

Followed in *Cowdrey v. Vandeburgh*, 154 U. S. 659, 38 L. 1093, 14 S. Ct. 1199. Rule applied in *Looney v. District of Columbia*, 113 U. S. 261, 28 L. 974, 5 S. Ct. 464, and *Laughlin v. District of Columbia*, 116 U. S. 489, 491, 29 L. 702, 703, 6 S. Ct. 474, both protecting district honoring demand in hands of such purchaser; *Preston v. Witherspoon*, 109 Ind. 464, 58 Am. Rep. 423, 9 N. E. 588, where wheat depositor knew warehouseman was selling from commingled stock; *Hirsch v. Norton*, 115 Ind. 343, 17 N. E. 613, estopping collusive vendor from claiming title as against creditors; *Dymock v. Missouri, etc., Ry.*, 54 Mo. App. 410, applying rule to non-negotiable bill of lading. Approved in *Bangor Electric, etc., Co. v. Robinson*, 52 Fed. 521, construing Maine statute regarding transfer of corporate stock; and *Babcock v. People's Sav. Bank*, 118 Ind. 213, 20

N. E. 733, holding warehouseman on receipt promising delivery upon return thereof properly indorsed.

Limited in *Young v. Brewster*, 62 Mo: App. 633, holding indicia of ownership must have been required from owner. Distinguished in *Velsian v. Lewis*, 15 Or. 549, 3 Am. St. Rep. 194, 16 Pac. 636, where vendor had no indicia of title.

101 U. S. 577-590, 25 L. 963, *WALDEN v. SKINNER*.

Trusts.—Implied trusts rest on intention of parties, or arise by operation of law, independent of intention, p. 577.

Approved in *Lackett v. Rumbaugh*, 45 Fed. 37, implying trust where trust deed for married woman was destroyed and replaced by another.

Reformation of instruments.—Equity will always relieve against written contracts or instruments where mistake of facts is admitted, and when clearly proved, reasons seem equally satisfactory, p. 583.

Cited in 65 Am. St. Rep. 481, note.

Reformation of instruments.—Where, by draftsman's mistake of fact or law, instrument fails to express prior agreement of parties, oral or written, equity will correct mistake, p. 583.

Rule applied in *Norton v. Kellogg*, 41 Fed. 454, where formal execution of deed was defective; *Benson v. Markoe*, 37 Minn. 34, 5 Am. St. Rep. 819, 33 N. W. 40, where mortgage was drawn to "successors" instead of "heirs;" *Dennis v. Northern Pac. Ry.*, 20 Wash. 326, 55 Pac. 212, where grantor's agent, by mistake, used wrong form, omitting reservation of right of way. Approved in *Adams v. Reed*, 11 Utah, 503, 40 Pac. 724, treating warranty as executory contract where representation of title was innocent but untrue. See 65 Am. St. Rep. 482, 487, 488, note, collecting authorities.

Distinguished in *Citizens' Nat. Bank v. Judy*, 146 Ind. 340, 342, 43 N. E. 264, 265, where creditor procured mortgage of what he supposed all debtor's land.

Evidence.—In absence of fraud or mistake, parol evidence is inadmissible in equity as at law, to vary written contract, but equity admits proof of fraud or mistake in reducing it to writing, pp. 584, 585.

Cited in 65 Am. St. Rep. 492, note.

Reformation of instruments.—Trust deed, omitting certain beneficiaries by mistake, may be reformed, and conveyance directed thereunder, where evidently made under provision of former deed, and reformation asked harmonizes with mutual recognition of rights and division of expenses for many years, p. 586.

Reformation of instruments.—Laches are not imputed to beneficiary in possession who delays applying for reformation of trust deed pending ejectment action which, if defeated, might establish her title, p. 588.

Courts.—Federal jurisdiction depends on citizenship of real, not formal parties such as trustee's executors joined merely to execute conveyance asked, p. 589.

Rule applied in *Delaware County v. Diebold, etc., Co.*, 133 U. S. 486, 33 L. 679, 10 S. Ct. 403, where assignor of contract sued on was brought in and disclaimed interest; *Pond v. Sibley*, 19 Blatchf. 197, 7 Fed. 135, where directors were unnecessary parties to suit against corporation; *Patterson v. Mater*, 26 Fed. 32, holding marshal in possession, formal party to replevin; *Maynard v. Green*, 30 Fed. 644, holding incomplete corporation formal party to suit between partners attempting incorporation; *May v. St. John*, 38 Fed. 771, holding municipal authorities formal parties to action to annul judgment against city; *Dow v. Bradstreet Co.*, 46 Fed. 827, where sham party was joined to defeat jurisdiction. Applied, conversely, in *Duchesse D'Auxy v. Porter*, 41 Fed. 68, holding non-resident partners of defendant firm necessary parties; *Deere, etc., Co. v. Chicago, etc., Ry.*, 85 Fed. 879, holding poverty does not make party formal; *Popp v. Cincinnati, etc., Ry.*, 96 Fed. 467, holding foreign administrator suing for decedent's death, not nominal party. Cited, *arguendo*, in *Excelsior Pebble, etc., Co. v. Brown*, 74 Fed. 324, 42 U. S. App. 55.

Distinguished in *Blackburn v. Portland, etc., Min. Co.*, 175 U. S. 575, where defendant alleged to have sold interest was applying for mining patent; *Chester v. Chester*, 7 Fed. 4, holding neither mortgagor nor mortgagee formal parties to third party's suit; *Shipp v. Williams*, 62 Fed. 6, 7, 22 U. S. App. 380, where trustee refused to act.

101 U. S. 591-596, 25 L. 1028, **HOLLINGSWORTH v. FLINT.**

Trespass to try title.—In action to try title, deed which does not purport to convey land in question, is inadmissible, pp. 593-595.

Trial.—Married woman's deed invalid to pass title until acknowledged, is not admissible to show title if acknowledged pending suit, p. 596.

Approved in *Carn v. Haisley*, 22 Fla. 320, following rule; *Maryland Tube Works v. West End Imp. Co.*, 87 Md. 218, 39 Atl. 624, 39 L. R. A. 815, holding payment, pending suit, of tax essential to corporate existence, does not validate such suit; *Dean v. Metropolitan, etc., Ry.*, 119 N. Y. 545, 23 N. E. 1055, conveyance during action of trespass does not defeat plaintiff's right to damages.

Trespass to try title.—Deed to plaintiff is inadmissible to prove title when plaintiff fails to show grantor's title, and declines to state that he expects to, p. 596.

101 U. S. 597-601, 25 L. 1019, **BECHTEL v. UNITED STATES**.

Statutes, remedial and relating to procedure, are liberally construed with reference to purpose thereof; hence, revised statutes, section 5597, preserves admissibility of transcripts from books of treasury, and of bond copies attached thereto under act of 1797, notwithstanding repeal thereof by section 5596, p. 600.

Approved in *Smithmeyer v. United States*, 147 U. S. 358, 37 L. 200, 13 S. Ct. 326, holding act of October, 1888, did not destroy general jurisdiction of Court of Claims.

Appeal and error.—Error must be affirmatively shown. Where deduction is claimed under revised statutes, section 3425, to purchaser of internal revenue stamps who furnishes die, and record fails to show such act or admission thereof, it cannot be assumed, pp. 600, 601.

101 U. S. 601-609, 25 L. 1070, **CRAMPTON v. ZABRISKIE**.

Municipal corporations.—Under New Jersey act of February 26, 1874, restricting county expenditures to amount raised by tax for same fiscal year, bonds issued to purchase courthouse land, payable in one year, no provision for payment by taxation being made, are void, p. 609.

Rule applied in *Atlantic City Water Works v. Read*, 50 N. J. L. 668, 15 Atl. 11, annulling ordinances and water contracts based thereon for similar reason; *Howard v. Smith*, 91 Tex. 15, 33 S. W. 16, holding similar street-paving contract void, though city's debt-contracting capacity ample when payment due. Applied, conversely, in *Chapman v. Douglas*, 107 U. S. 360, 27 L. 383, 2 S. Ct. 73, holding "poor farm" vendor may force reconveyance from county where purchase unauthorized. Approved in *Marley v. State*, 58 N. J. L. 211, 33 Atl. 210, holding freeholders not guilty of "attempt," where thing done was nullity.

Distinguished in *Skirving v. Nat. Life Ins. Co.*, 59 Fed. 744, 19 U. S. App. 442, refusing to enjoin bona fide judgment creditor of school district, consideration being retained; *Weber v. Spokane Nat. Bank*, 64 Fed. 211, 29 U. S. App. 97, reversing S. C., 50 Fed. 737, as to national bank indebtedness beyond statutory limit.

Municipal corporations.—Resident taxpayers may maintain bill to prevent illegal expenditure, or creation of debt by county, p. 609.

Rule applied in following cases, upholding such right of taxpayer for purposes indicated: *The Liberty Bell*, 23 Fed. 845, to enjoin city appropriation for return of Liberty Bell to Philadelphia; *Russell v. Tate*, 52 Ark. 546, 20 Am. St. Rep. 195, 13 S. W. 132, 7 L. R. A. 183, and n., to prevent town council appropriating money for county courthouse; *Winn v. Shaw*, 87 Cal. 636, 25 Pac. 969, to enjoin warrant issue for land purchase, not founded on required notice; *Bradford v. San Francisco*, 112 Cal. 543, 44 Pac. 914, to

enjoin tax to pay debt incurred exceeding city revenue; *Catron v. Board of Commrs.*, 5 N. Mex. 234, 21 Pac. 68, to restrain warrant issue exceeding statutory debt limitation; *Nelson v. Garfield*, 6 Colo. App. 283, 40 Pac. 475, to restrain performance of county contract for bridge in incorporated town; *Handy v. New Orleans*, 39 La. Ann. 109, 1 So. 595, to annul ordinance and lease of wharves; *Telle v. School Board*, 44 La. Ann. 368, 10 So. 802, to annul improper sale of school section; *Tukey v. Omaha*, 54 Neb. 378, 69 Am. St. Rep. 716, 74 N. W. 615, to restrain construction of market-house in public park, vote authorizing purchase of site; *Laughlin v. County Commrs.*, 3 N. Mex. 300, 5 Pac. 818, to prevent delivery of railroad bonds; *Stratford v. Greensboro*, 124 N. C. 134, 32 S. E. 396, to prevent opening of streets for private gain; *Carman v. Woodruff*, 10 Or. 135, to have county funds returned; *Butler v. Ellerbe*, 44 S. C. 283, 22 S. E. 437, to restrain State officers from paying salaries under unconstitutional election law; *Graves v. Jasper School*, etc., 2 S. Dak. 418, 50 N. W. 905, to restrain removal of schoolhouse; *Krieschel v. County Commrs.*, 12 Wash. 438, 41 Pac. 189, to enjoin county seat's removal; *Times Publishing Co. v. Everett*, 9 Wash. 522, 43 Am. St. Rep. 868, 37 Pac. 696, to enjoin letting of contract to any but lowest bidder; *Lynchburg*, etc., *Ry. v. Dameron*, 95 Va. 546, 547, 28 S. E. 952, to enjoin levy of unauthorized tax; *Nevill v. Clifford*, 55 Wis. 172, 12 N. W. 424, to set aside collusive judgment against school district. Applied, also, in *Miller v. Perris*, etc., Dist., 92 Fed. 267, holding bill need not show return of consideration; *Stevens v. St. Mary's*, etc., School, 144 Ill. 348, 36 Am. St. Rep. 443, 32 N. E. 965, 18 L. R. A. 836, upholding taxpayer's right to apply for relief, independent of merits of case; *City Item*, etc., *Co. v. City*, 51 La. Ann. 716, 25 So. 315, holding taxpayer's standing in court not destroyed by payment of tax; *Davenport v. Kleinschmidt*, 6 Mont. 522, 13 Pac. 250, where city water contract was within debt-incurring limitation. Approved in *State v. Commrs. White Pine Co.*, 22 Nev. 87, 35 Pac. 487, holding any taxpayer may oppose allowance of claim against county; *Christie v. Malden*, 23 W. Va. 671, holding equity has jurisdiction where tax is ultra vires, not merely erroneous. See 2 Am. St. Rep. 97, note, collecting cases.

Distinguished in *Colorado Pav. Co. v. Murphy*, 78 Fed. 30, 49 U. S. App. 20, 37 L. R. A. 634, denying that lowest bidder may enjoin city contract with others; *Irvin v. Gregory*, 86 Ga. 607, 13 S. E. 120, where most of applicants voted for and acquiesced in school establishment; *Stevens v. St. Mary's*, etc., School, 144 Ill. 351, 36 Am. St. Rep. 446, 32 N. E. 967, 18 L. R. A. 837, refusing to restrain municipal legislative functions; *Hayes v. Davis*, 23 Nev. 320, 46 Pac. 888, where legislature authorized issue of duplicate certificate of indebtedness, original being lost; *Jones v. Reed*, 3 Wash. 63, 64, 27 Pac. 1069, as to State officers; dissenting opinion in *Davenport v. Kleinschmidt*, 6 Mont. 555, 566, 13 Pac. 266, 272, holding mere laying of pipes under water contract not restrainable.

101 U. S. 610-612, 25 L. 847, BIBLE SOCIETY v. GROVE.

Courts.—Federal courts take suits neither by removal nor originally, unless jurisdictional facts appear of record, p. 611.

Rule applied in Mackaye v. Mallory, 19 Blatchf. 174, 6 Fed. 752, holding facts may be shown by State court pleadings and petition taken together; Woolridge v. M'Kenna, 8 Fed. 677, holding facts cannot be shown by State court pleadings alone; White v. Holt, 20 W. Va. 808, compelling trial by State court of case removed without necessary showing.

Removal of causes.—Under revised statutes, section 639, subdivision 3, applicants cannot remove case for prejudice or local influence unless opponents are shown to be citizens of State sued in, p. 612.

Rule applied in Young v. Parker, 132 U. S. 271, 33 L. 353, 10 S. Ct. 76, and Thouron v. East Tennessee, etc., Ry., 38 Fed. 678, both holding all on one side, and none on other, must be citizen of State sued in; Aldrich v. Crouch, 11 Biss. 183, 10 Fed. 307, remanding case removed at instance of resident of State sued in.

Removal of causes.—18 Stat. 470, has not changed revised statutes, section 639, subdivision 3, upon which removals for prejudice or local influence still depend, pp. 611, 612.

Approved and relied upon in Hanrick v. Hanrick, 153 U. S. 197, 38 L. 687, 14 S. Ct. 837, Sutherland v. Jersey City, etc., R. Co., 22 Fed. 357, and Stix & Co. v. Keith, 90 Ala. 125, 7 So. 424, all holding revised statutes, section 639, subdivision 3, not repealed by 18 Stat. 470; Baltimore, etc., R. R. v. Bates, 119 U. S. 467, 30 L. 438, 7 S. Ct. 286, and Melendy v. Currier, 22 Blatchf. 503, 22 Fed. 129, both holding cause pending for second trial removable thereunder; Bates v. Railroad, 39 Ohio St. 165, both upholding right of removal thereunder any time before trial; Stone v. Sargent, 129 Mass. 512, and Elliott v. Stocks & Bro., 67 Ala. 299, both holding case removable thereunder, though twice continued by consent. Cited in Jefferson v. Driver, 117 U. S. 274, 29 L. 897, 6 S. Ct. 730, holding separable controversy provision of subdivision 2, without application to subdivision 3.

Distinguished in Duncan v. Associated Press, 81 Fed. 421, under 1 Supp. revised statutes, pp. 611, 612.

Removal of causes.—Removal act of March 3, 1875, section 3, requiring petition to be filed in State court "before or at term at which cause could be first tried and before trial," as to suits pending meant first such term after passage thereof. Hence, case once tried thereafter, and then continued at two different terms was not removable, p. 612.

Relied upon in Phoenix Mut. Life Ins. Co. v. Walrath, 11 Biss. 436, 16 Fed. 163, remanding case once tried, commenced after act

passed; *Neudecker v. Rosenbaum*, 19 Blatchf. 37, 6 Fed. 99, holding removal too late after new trial granted; *Ex parte Jones*, 66 Ala. 206, holding three continuances fatal to removal; *Johnson v. Brewers' Fire Ins. Co.*, 51 Wis. 579, 9 N. W. 658, upholding petition at first term after passage of act; *Jones v. Foster*, 61 Wis. 28, 20 N. W. 786, holding above act means before any trial.

101 U. S. 612-621, 25 L. 895, *GATES v. GOODLOE*.

Bankruptcy.—Where, after discharge, bankrupts sue out writ of error and assignee applies to be, and is, substituted as plaintiff in error, writ is maintainable, p. 613.

Approved in *Bowden v. Johnson*, 107 U. S. 264, 27 L. 391, 2 S. Ct. 257, substituting new receiver for predecessor in whose name appeal was taken; *United States v. Hopewell*, 51 Fed. 800, 5 U. S. App. 137, allowing substitution of attorney-general as appellant instead of collector; *Young v. Cardwell*, 6 Lea, 197, sustaining bankrupt's appeal from decree in suit pending during bankruptcy proceeding. And see 91 Am. Dec. 280, note.

War.—It is citizen's duty to return if abroad upon war breaking out, or, if civil war, to leave rebellious section, p. 617.

War.—Military seizure of rents in Memphis by Union army to prevent same being sent within Confederate lines is proper military precaution, consistent with established rules of war, pp. 617, 618.

Contracts.—Lessee dispossessed by competent military authority is not liable to lessor for rent accruing during dispossession, and notes given for rent are discharged, p. 621.

Miscellaneous.—Cited in *Insurance Oil, etc., Co. v. Scott*, 33 La. Ann. 952, and *Queen Ins. Co. v. Leonard*, 9 Ohio C. C. 51, without application.

101 U. S. 622-633, 25 L. 1030, *JONES v. GUARANTY & INDEMNITY CO.*

Corporations at common law might acquire, hold, convey and mortgage both personal and real estate unless restrained by charter or by Parliament, p. 625.

Approved in *Central Trust Co. v. Columbus, etc., Ry.*, 87 Fed. 824, upholding railroad mortgage reasonably within scope of charter powers; *Wright v. Hughes*, 119 Ind. 328, 12 Am. St. Rep. 416, 21 N. E. 909, corporations with general power to engage in business may borrow as individuals.

Approved, but not applied, in *Lowry Banking Co. v. Empire Co.*, 91 Ga. 627, 17 S. E. 969, where insolvent corporation attempted to secure director to prejudice of creditors.

Mortgages for future advances were valid at common law; hence, New York act of 1864, removing corporations' disability to mortgage, is liberally construed as remedial, and permits mortgages for future advances, p. 626.

Approved in *Berry v. O'Connor*, 33 Minn. 31, 21 N. W. 840, holding such mortgage not per se fraud on creditors; *Coon v. Bosque*, etc., *Cattle Co.*, 8 N. Mex. 131, 42 Pac. 80, holding breach of covenant regarding future advance renders whole amount due.

Qualified in *Lord v. Yonkers, etc., Gas Co.*, 99 N. Y. 554, 2 N. E. 912, holding above act does not authorize mortgage of franchise; *West v. Klotz*, 37 Ohio St. 427, holding subsequent mortgage takes priority over advances made after recording thereof; *Nicklin v. Betts Spring Co.*, 11 Or. 412, 50 Am. Rep. 481, 5 Pac. 55, lien of chattel mortgage for future advances attaches from date of advance.

Statutes.—Lawmakers' intent is law, p. 626.

Approved in *The Mamie*, 5 Fed. 818, excluding rented pleasure yacht from revised statutes, section 4289, limiting owner's liability for loss of life, and *Flint, etc., R. Co. v. Marine Ins. Co.*, 71 Fed. 215, holding revised statutes, section 4233, limiting steam vessel's speed in fog, applies to snowstorm.

Mortgages.—Deeds fatally defective for want of consideration are cured by subsequent existence thereof; so, also, mortgages for future advances, p. 627.

Corporations.—State alone can question mortgage ultra vires of corporation, p. 628.

Approved in *Manhattan Hardware Co. v. Phalen*, 128 Pa. St. 117, 18 Atl. 428, following rule; *Fitts v. Palmer*, 132 U. S. 293, 33 L. 321, 10 S. Ct. 96, holding grantor of unqualified foreign corporation cannot question its title; *Brittan v. Oakland Bank*, 124 Cal. 291 71 Am. St. Rep. 66, 57 Pac. 87, where bank director pledged stock for loan forbidden by civil code, section 578. See 70 Am. St. Rep. 178, note.

Limited in *Franklin Bank v. Commercial Bank*, 36 Ohio St. 357, 38 Am. Rep. 597, denying right of creditor bank to have shares of stock, collateral to loan, transferred on books of debtor bank.

Corporation's acquiescence in agent's mortgages cures defects in execution, p. 628.

Approved in *Railway v. Gentry*, 69 Tex. 632, 8 S. W. 102, where railroad received proceeds of promised mortgage, though not authorized by sufficient vote.

Equity enforces neither forfeitures nor mere legal rights opposed to equity, p. 628.

Approved in *King v. Doane*, 139 U. S. 172, 35 L. 87, 11 S. Ct. 467, holding renewal of note procured by fraud, is equally tainted, and *Case v. Fant*, 53 Fed. 44, 10 U. S. App. 415, holding acceptance by pledgee of renewal note relates back to original pledge.

Evidence.—Parol evidence is admissible to show party to contract is another's agent, and to negative fraud, e. g., to show that advances under corporation mortgage, which through clerical error secured president's individual bond, were applied to its use, p. 633.

Approved in *George v. Tate*, 102 U. S. 569, 26 L. 233, where bond assignment executed in firm's name was drawn in single partner's; *Pascault v. Cochran*, 34 Fed. 363, admitting parol evidence of actual date of mortgage as against recital; *Brown v. Grove*, 80 Fed. 567, admitting contemporaneous writings to explain trust deed; *Hall v. Tay*, 131 Mass. 195, where mortgage by husband and wife, securing future sales by partner, intended firm.

101 U. S. 633-637, 25 L. 1072, *LUMBER CO. v. BUCHEL*.

Contracts.—Misrepresentation as to quality of timber land made by B., vendee of the owner, in selling his purchase rights to C., are not available as defense against such innocent owner, suing C. on his guaranty of payment of purchase price, given to secure immediate right to timber, pp. 635, 636.

Cited in 63 Am. St. Rep. 328, note.

Contracts.—Right to rescind or modify contract for misrepresentations applies only where they relate to consideration, and are made by party claiming benefit of contract, pp. 636, 637.

Appeal and error.—Referee's findings should have precision of special verdict, but indefinite or inferential finding, e. g., "I do not find," etc., cannot be first questioned in Supreme Court, p. 637.

Cited, *arguendo*, in *Heath v. Griswold*, 18 Blatchf. 556, 5 Fed. 574.

101 U. S. 638-639, 25 L. 1073, *LUMBER CO. v. BUTCHEL*.

Judgment against one guaranteeing payment of purchase money for first installment is conclusive on same defense to second installment, p. 639.

Rule applied in *Davis v. Hart*, 66 Miss. 646, 6 So. 319, holding judgment on one note conclusive as to others based on same transaction.

Distinguished in *Norton v. Jensen*, 90 Fed. 421, 61 U. S. App. 358, where, after first suit for infringement, defendant obtained new patent.

Appeal and error.—Referee's finding, like verdict, is essential part of record, p. 639.

Distinguished in *United States v. Choctaw, etc., R. Co.*, 3 Okl. 462, 464, 41 Pac. 749, holding finding must be properly presented by bill of exceptions.

Judgment, based on referee's finding, is conclusive of facts found, in subsequent controversies between same parties on same contract; hence findings against alleged representations charged as fraud are conclusive against them in suit alleging warranty, p. 639.

Rule applied in *Wilson v. Deen*, 121 U. S. 534, 30 L. 982, 7 S. Ct. 1007, holding correctness of prior judgment immaterial; *Bissell v. Spring Valley Twp.*, 124 U. S. 231, 31 L. 412, 8 S. Ct. 498, where in former suit on other coupons same bonds were held invalid; *Johnson Co. v. Wharton*, 152 U. S. 258, 38 L. 433, 14 S. Ct. 610, though amount in first suit for royalties was insufficient to give Supreme Court jurisdiction; *Dowell v. Applegate*, 152 U. S. 344, 38 L. 469, 14 S. Ct. 618, where first defense failed to set up claim of title afterwards asserted; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 688, 690, 39 L. 862, 863, 15 S. Ct. 735, 736, holding only questions actually determined are conclusive where same part of mining claim not in dispute; *Forsyth v. Hammond*, 166 U. S. 518, 41 L. 1100, 17 S. Ct. 670, where landowner seeking to avoid city tax was party to annexation contest; *New Orleans v. Citizens' Bank*, 167 U. S. 396, 397, 42 L. 211, 17 S. Ct. 913, 914, holding judgment establishing tax exemption under bank charter conclusive in suit for subsequent year; *Southern Pac. R. R. v. United States*, 168 U. S. 49, 51, 42 L. 377, 18 S. Ct. 27, 28, wherever rights, questions or facts are distinctly in issue and determined; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 990, 991, 18 U. S. App. 349, distinguishing between judgment as bar to action and as conclusive of point involved; *Empire State Nail Co. v. American, etc., Co.*, 74 Fed. 868, 33 U. S. App. 522, where answer in first suit for infringement attacked title, and in second patent's validity; *Stearns v. Lawrence*, 83 Fed. 744, 54 U. S. App. 544, holding finding in action against bank and president of knowledge of defect in note, is conclusive in receiver's suit against president; *St. Joseph Union Depot v. Chicago, etc., Ry.*, 89 Fed. 653, 60 U. S. App. 684, holding judgment for depot rent-installment against railroad afterwards foreclosed concludes purchaser in suit on same lease; *Newton Mfg. Co. v. Wilgus*, 90 Fed. 488, holding judgment denying infringement because plaintiff's patent was mere adaptation is conclusive of infringement of defendant's patent; *Church v. Kidd*, 88 N. Y. 654, where first suit was to declare trust and second for damages; *Grunert v. Spalding*, — Wis. —, 78 N. W. 613, holding judgment against assignor conclusive on assignee of similar tax-sale certificate; dissenting opinion in *Conery v. Water-Works Co.*, 41 La. Ann. 944, 7 So. 21, collecting authorities, majority holding judicial decree interpreting contract cannot prevent legislation authorizing alteration.

101 U. S. 639-641, 25 L. 1074, RAILWAY CO. v. UNITED STATES.

United States — Equity.— Cross-bill cannot be used to bring in new matter; hence successor of railroad company, against which United States has money decree, cannot, on motion for execution, set off disputed claim against United States, p. 641.

Not cited.

101 U. S. 641-646, 25 L. 1075, KENNEDY v. CRESWELL.

Creditors' suit.— On creditors' suit for disclosure, executors' admission of possession of sufficient assets to pay all decedent's debts, is admission of liability but not evidence defeating creditors' right to maintain bill, p. 643.

Equity.— If defendant plead false plea and it is so found he cannot answer over as in case of demurrer, p. 644.

Equity.— Upon plea found false, plaintiff is entitled to decree but need not have discovery against his will, as where executor's plea admits possession of assets, p. 644.

Equity.— Complainant, who takes issue on plea in bar to whole bill, admits plea's sufficiency but not its truth; and if plea be found true, bill will be dismissed, but if untrue, complainant may have decree as by confession, p. 644.

Approved in *Lillenthal v. Washburn*, 4 Woods, 68, 8 Fed. 709, where only point of infringement bill controverted by plea, was found false, and *Earll v. Metropolitan, etc., Ry.*, 87 Fed. 529, holding decree limited accordingly where traversed plea found partly in defendant's favor.

Executor's admission of assets renders him personally liable, p. 645.

Appeal and error.— Where executor alone appeals from decree in creditor's suit, he cannot object that bill was not formally dismissed as to devisees, p. 645.

Creditors' suit.— Decedent's creditors may maintain bill for discovery of assets and payment of debt, and such right is not defeated by executor's admission of assets, p. 646.

Approved in *Beverly v. Rhodes*, 86 Va. 417, 10 S. E. 573, suit by single creditor; *Houston v. Levy*, 44 N. J. Eq. 8, 13 Atl. 672, where bill was against devisees by judgment creditor in tort; *Dodson v. Sevars*, 52 N. J. Eq. 618, 30 Atl. 480, where creditor's presentation of claim to executors was not within statutory time; *Pullman v. Stebbins*, 51 Fed. 12, sustaining bill of creditor at large against dissolved corporation. See 66 Am. St. Rep. 286, note.

Distinguished in *Johnson v. Powers*, 139 U. S. 157, 35 L. 113, 11 S. Ct. 525 (see dissenting opinion, 139 U. S. 165, 35 L. 115, 11

S. Ct. 528), affirming S. C., 13 Fed. 316, dismissing bill supported by foreign probate decree to which all were not parties.

101 U. S. 647-664, 25 L. 945, *IMHAEUSER v. BUERK*.

Patents of new combinations of old elements, producing new and useful results, include known equivalents of such elements, performing same function in same combination, pp. 655, 656.

Approved in *Campbell v. Bailey*, 45 Fed. 565, *Halloway v. Dow*, 54 Fed. 517, *Norton v. Jensen*, 81 Fed. 498, and *Beach v. Hobbs*, 92 Fed. 150, 63 U. S. App. 647, reaffirming rule; *Norton v. Jensen*, 49 Fed. 868, 7 U. S. App. 103, even though substitute perform additional function; *Gilbert v. Reinhardt, etc., Machine Co.*, 58 Fed. 976, where one element in defendant's machine is equivalent of two in patentees; conversely in *Electric Signal Co. v. Hall, etc., Co.*, 114 U. S. 98, 29 L. 99, 5 S. Ct. 1076, where substitute was not known or in use when patent issues. See note in 10 Biss. 229.

Distinguished in *Rowell v. Lindsay*, 113 U. S. 102, 28 L. 908, 5 S. Ct. 510, holding use of one element singly does not infringe combination; *Pacific Cable Ry. v. Butte City, etc., Ry.*, 58 Fed. 421, holding patent of double turntable does not include single.

Patents.—A weight substituted for a spring to produce pressure is mechanical equivalent; so also rod for endless chain, or lever for screw, where producing same results, p. 656.

Approved in *Westinghouse v. Boyden, etc., Brake Co.*, 170 U. S. 567, 42 L. 1147, 18 S. Ct. 722, where poppet-valve was substituted for slide-valve.

Patents.—Infringement defense showing separate prior inventions of the various parts combined in patent in dispute, is insufficient, p. 660.

Followed in *Rhodes v. Lincoln, etc., Co.*, 64 Fed. 219, and *National Folding-Box, etc., Co. v. Elsas*, 86 Fed. 919.

Patents.—Defendant, either at law or in equity, may deny that patentee was first inventor, but introduction of patent throws onus on him of showing prior invention or discovery in this country, pp. 660, 661.

Patents.—Introduction of patent in evidence relieves plaintiff of burden of showing new invention, but not infringement, p. 662.

Appeal and error.—Rulings of court on exceptions to master's report when not assigned for errors are not subject to re-examination, p. 664.

101 U. S. 665-677, 25 L. 1037, *SCIPIO v. WRIGHT*.

Municipal corporations.—Under New York act of 1852, requiring written assent of taxpayers to loan in aid of railroad construction

between specified points, failure of assent to name railroad intended where the description of it is exclusively applicable to it, will not invalidate bonds, pp. 670, 671.

Approved in *Knox v. Ninth Nat. Bank*, 147 U. S. 100, 37 L. 96, 13 S. Ct. 271, holding designation of route sufficient; *Lane v. Embden*, 72 Me. 364, *arguendo*.

Municipal corporations.—Under New York railroad-aid act of 1852, making assent of two-thirds resident taxpayers appearing on assessment-roll next previous to loan, prerequisite to any action by commissioners, duly-authorized bonds following authorized stock subscription, are not avoided because not negotiated till after next assessment-roll, pp. 671, 672.

Approved in 98 Am. Dec. 674, note.

Courts.—Construction of State statute by highest State court is followed by Federal courts, p. 675.

Municipal corporations.—Under New York act of 1852, authorizing municipal loan in aid of railroad, and stock subscription, bonds issued to railroad in exchange for stock are void in hands of purchaser with notice; otherwise, if without notice, pp. 673-677.

Approved in *Lewis v. Board of Commrs.*, 1 McCrary, 381, 2 McCrary, 467, 5 Fed. 273, holding statute authorizing loan to build courthouse does not authorize floating of bonds; *Lewis v. Comanche*, 35 Fed. 347, holding Kansas law authorizing county loans when deficit exists does not authorize anticipative issue; *Coffin v. Indianapolis*, 59 Fed. 228, holding illegality of part of bonds issued as series attaches to all; *State v. School Dist.*, 16 Neb. 190, 20 N. W. 212, denying school district's right to issue bonds direct to school-house contractor; *State v. Tomahawk, etc.*, Council, 96 Wis. 84, 71 N. W. 90, upholding State right to prescribe mode of municipal subscription to railroad stock.

Cited, but not applied, in *Thompson v. Perrine*, 103 U. S. 810, 26 L. 615, where defect cured by statute. Distinguished in *Bernards Township v. Stebbins*, 109 U. S. 352, 27 L. 960, 3 S. Ct. 260, and *Comanche v. Lewis*, 133 U. S. 207, 33 L. 608, 10 S. Ct. 290, both construing bond recitals literally in absence of strict State construction; *Bank v. Stavesville*, 84 N. C. 175, holding act requiring bond signature by town authorities merely directory.

101 U. S. 677-688, 25 L. 968, *DOUGLASS v. COUNTY OF PIKE*.

Elections.—Under Missouri Constitution, 1865, article 4, section 30, requiring vote by two-thirds of qualified voters to remove county seat, and subsequent statute using words "legally registered votes," two-thirds of votes cast are not sufficient, though general rule is otherwise, p. 681.

Approved in *Citizens, etc. v. Williams*, 49 La. Ann. 440, 21 So. 654, 37 L. R. A. 770, construing article 242 of Constitution.

Courts.—Federal courts usually treat highest State court's construction of statute as part thereof, but need not follow latest of conflicting decisions, if contract rights acquired under earlier decisions, either by citizens of that or other State, would be injuriously affected, p. 686.

Approved in *Post v. Pulaski*, 47 Fed. 285, and *Braun v. Board of Commrs.*, 66 Fed. 479, both holding State construction of statute binding on Federal courts; *Evansville v. Woodbury*, 60 Fed. 720, 18 U. S. App. 514, applying State construction of similar statute; *Western Union Tel. Co. v. Poe*, 64 Fed. 13, following State decision upholding tax law, made pending suit in Circuit Court; *German Bank v. Franklin*, 128 U. S. 538, 32 L. 524, 9 S. Ct. 163, invalidating bonds marketed after adverse decision of Illinois Supreme Court; *Anderson v. Santa Anna*, 116 U. S. 361, 29 L. 635, 6 S. Ct. 416, *Louisville Trust Co. v. Cincinnati*, 76 Fed. 301, 47 U. S. App. 36, and *Cesar v. Capell*, 83 Fed. 427, all holding Federal courts need not apply State construction to antecedent contracts; *Vermont, etc., R. R. v. Central Vermont R. R.*, 63 Vt. 23, 21 Atl. 267, 10 L. R. A. 565, upholding all acts done under existing law before annulment. See note in 98 Am. Dec. 682.

Courts.—Supreme Court applies change of judicial construction of State statute, like amendment thereto, prospectively, but not retrospectively; hence, county bonds issued in 1872, in aid of railroad, under Missouri act of 1868, are valid where State decisions then so held, p. 688.

Approved in *Green v. Conness*, 109 U. S. 105, 27 L. 872, 3 S. Ct. 69, *Knox v. Ninth Nat. Bank*, 147 U. S. 99, 37 L. 96, 13 S. Ct. 270, *Harmon v. Auditor*, 123 Ill. 136, 5 Am. St. Rep. 510, 13 N. E. 166, *Richardson v. Marshall*, 100 Tenn. 352, 45 S. W. 441, *Taylor v. Ypsilanti*, 105 U. S. 72, 26 L. 1012, *Louisiana v. Pillsbury*, 105 U. S. 295, 26 L. 1096, *Marshall v. Elgin*, 3 McCrary, 41, 8 Fed. 787, and *Loeb v. Trustees, etc.*, 91 Fed. 43, 44, all following rule under various statutes; *Ralls v. Douglass*, 105 U. S. 732, 26 L. 1221, sustaining bonds issued under Missouri railroad charter of 1865, after Constitution of 1865, without popular vote; *Burgess v. Seligman*, 107 U. S. 35, 27 L. 365, 2 S. Ct. 22, refusing to follow State Supreme Court's decision adverse to Circuit Court's prior decision; *New Orleans Water-Works Co. v. Southern, etc., Co.*, 36 Fed. 835, following State decision under water company's charter against United States Supreme Court's construction; *Southern Ry. v. North Carolina R. Co.*, 81 Fed. 602, sustaining railroad lease under State statute; *Jones v. Great Southern, etc., Co.*, 86 Fed. 372, reversing S. C., 79 Fed. 482, 483, where question arose on amendment of revised statutes of Ohio, section 3184; *German Ins. Co. v. Manning*, 78 Fed. 909, on demurrer, and S. C. on merits, 95 Fed. 602, denying validity of bond issue under Iowa Code, section 500; *Farrior v. New England, etc., Co.*, 92 Ala. 179, 9 So. 532, 12 L. R. A. 857,

and n., sustaining contract charging separate estate, later construction denying power of charging; *Haskett v. Maxey*, 134 Ind. 191, 33 N. E. 360, 19 L. R. A. 382, and *Stephenson v. Boody*, 139 Ind. 66, 38 N. E. 333, sustaining titles acquired under former construction of statute of descent; *Hardinsburg v. Cravens*, 148 Ind. 9, 47 N. E. 155, as to statutory proceeding to define highway requiring notice to owner; *Succession of Rixner*, 48 La. Ann. 565, 19 So. 602, 32 L. R. A. 190, as to treaty rights acquired under Constitution; *Levy v. Hitsche*, 40 La. Ann. 508, 4 So. 476, upholding jurisdiction of Probate Courts in partition; *Willoughby v. Holderness*, 62 N. H. 228, upholding validity of note given by town as bounty for enlistment; *Vermont, etc., R. R. v. Central Vermont R. R.*, 63 Vt. 24, 21 Atl. 267, 10 L. R. A. 565, protecting lessee in paying, and deducting taxes from rent, where law requiring it had been judicially approved; *Farmers' Loan, etc., Co. v. Toledo, etc., R. Co.*, 54 Fed. 772, 6 U. S. App. 469, holding bona fide purchaser of negotiable bonds does not take subject to pending suit; *Ray v. Natural Gas Co.*, 138 Pa. St. 590, 21 Am. St. Rep. 927, 20 Atl. 1067, 12 L. R. A. 293, and n., holding change of judicial construction not law impairing contract obligation; *Whaley v. Gaillard*, 21 S. C. 576, and *City Council v. Fowler*, 48 S. C. 17, 25 S. E. 903, holding prior construction of statute in case not questioning validity, does not prevent subsequent annulment; dissenting opinions in *Succession of Adam Thompson*, 42 La. Ann. 131, 7 So. 481, majority vacating probate order of sale in favor of mortgage creditor; *Sheriff v. Kearney*, 45 La. Ann. 154, 12 So. 141, 18 L. R. A. 598, majority extending construction of license law to planter selling exclusively to employees; *Verdin v. St. Louis*, 131 Mo. 174, 33 S. W. 520, holding city charter, providing for acceptance of lowest bid, binding, though bidder have monopoly on asphalt; *Gage v. Gage*, 66 N. H. 300, 29 Atl. 552, 28 L. R. A. 864, and n., extending rule to protect common-law rights of tenant in common; *Anthony v. Jasper*, 101 U. S. 695, 25 L. 1007, arguendo.

Distinguished in *Pleasant Township v. Ætna Life Ins. Co.*, 138 U. S. 71, 34 L. 866, 11 S. Ct. 216, and *Ætna Life Ins. Co. v. Pleasant, etc.*, 62 Fed. 719, 22 U. S. App. 510, where construction relied on was of distinguishable statute; *St. Louis, etc., Ry. v. Fowler*, 142 Mo. 687, 44 S. W. 776, where exact point in question had not been construed; *Pacific Rolling-Mills Co. v. James, etc., Co.*, 68 Fed. 969, 29 U. S. App. 698, where no conflict of construction existed as to statutory words in point; *Central Land Co. v. Laidley*, 159 U. S. 111, 40 L. 94, 16 S. Ct. 82, and *Bacon v. Texas*, 163 U. S. 221, 41 L. 137, 16 S. Ct. 1029, where appeals were from State Supreme Court; *Wade v. Travis*, 174 U. S. 509, 19 S. Ct. 719, following new construction, validating bond issue, though made after appeal; *Gordon v. Smith*, 62 Fed. 516, 23 U. S. App. 451, where agreement took case out of statute in question; *Sanford v. Poe*, 69 Fed. 548, 37 U. S. App. 378, following Ohio Supreme Court against prior Circuit Court

decision, contract not having been made in reliance thereon; *Bank v. Douglas*, 146 Mo. 52, 47 S. W. 946, where items sued were not contracted upon faith of former construction; *Alferitz v. Ingalls*, 83 Fed. 972, where prior construction did not lay down rule of property; *Allen v. Allen*, 95 Cal. 200, 30 Pac. 216, 16 L. R. A. 653, and n. (see dissenting opinion in 95 Cal. 206, 30 Pac. 218, 16 L. R. A. 655, and n.), where former decision held mortgage did not convey legal title; *Alferitz v. Borgwardt*, 126 Cal. 208, 58 Pac. 462, construing mortgage on increase of sheep as excluding wool; *Center School Township v. State*, 150 Ind. 174, 49 N. E. 963, holding appropriation to school township of special fund not vested right; *Peterson v. Kittredge*, 65 Miss. 39, 30 So. 67, in case of purchaser at tax sale; *Elizabeth v. Central R. R.*, 53 N. J. L. 497, 22 Atl. 49, under statute authorizing railroad grant; *Whaley v. Gaillard*, 21 S. C. 575, where former construction denied statute's conflict with another clause of Constitution.

101 U. S. 688, 25 L. 972, *DARLINGTON v. COUNTY OF JACKSON*.

Adjudged in conformity with *Douglass v. County of Pike*, *supra*.
Not cited.

101 U. S. 688-692, 25 L. 1004, *CASE v. BEAUREGARD*.

Creditors' suit.—Equity will not relieve where adequate legal remedy exists; hence, creditors' bill must show that legal remedies are exhausted, p. 690.

Approved in *Dahlman v. Jacobs*, 5 McCrary, 132, 15 Fed. 864, where general creditor, without judgment, attacked debtor's conveyance; *Baxter v. Moses*, 77 Me. 476, 52 Am. Rep. 785, 1 Atl. 351, sustaining demurrer to bill for equitable execution, failing to allege judgment and return of execution.

Distinguished in *Chadbourne v. Coe*, 51 Fed. 482, 10 U. S. App. 78, *arguendo*.

Creditors' suit.—Exhausting of legal remedies or need of equitable relief may be shown otherwise than by averment of judgment and execution's return nulla bona, especially where trust or lien exists in creditor's favor, pp. 690-692.

Approved in *Hickox v. Elliott*, 11 Sawy. 646, 27 Fed. 845, where bill averred no property in debtor's name in State; *Merchants' Nat. Bank v. Chattanooga, etc., Co.*, 53 Fed. 317, where bill averred insolvency and receivership; *Stutz v. Handley*, 41 Fed. 537, where bill is to reach unpaid stock subscriptions; *Bird v. Calvert*, 22 S. C. 296, permitting action to enforce stockholder's special charter liability upon averment of corporate insolvency; *Talley v. Curtain*, 54 Fed. 46, 47, 8 U. S. App. 347, upholding creditor's bill attacking general assignment; *Austin, etc., Co. v. Morris*, 23 S. C. 403, holding preference, under general statutes, section 2014, **assailable by**

creditors without judgments; *Miller v. Hughes*, 33 S. C. 540, 12 S. E. 422, where fraud, collusion and insolvency alleged; *Bank v. Motherwell Iron, etc., Co.*, 95 Tenn. 188, 31 S. W. 1006, 29 L. R. A. 169, where debtor's property shown to be in receiver's possession for creditors; *Hibernia Ins. Co. v. St. Louis, etc., Co.*, 5 McCrary, 400, 17 Fed. 480, and S. C., 3 McCrary, 371, 10 Fed. 598, where all corporate assets were fraudulently assigned to another corporation; *Johnson v. Powers*, 13 Fed. 316, holding simple contract creditor entitled to equitable discovery of decedent's assets; *Clapp v. Dittman*, 21 Fed. 18, where insolvent debtor assigns all assets to one creditor; *Consolidated Tank-Line Co. v. Kansas City, etc., Co.*, 45 Fed. 16, where assignment securing corporation officers conveyed all corporate assets; *Wyman v. Mathews*, 53 Fed. 680, where simple contract creditors attacked general assignment with preferences; *Foster v. Bank*, 68 Fed. 724, where bank made trust deed for all creditors; *Plume, etc., Mfg. Co. v. Baldwin*, 87 Fed. 786, where claim is against debtor's assigned estate; *Howe v. Robinson*, 20 Fla. 356, holding insolvent corporation's creditors may proceed in equity against assets, without prior judgment; *Taylor v. Riggs*, — Kan. —, 57 Pac. 46, permitting defendant creditors, in suit to marshal assets, to attack chattel mortgages, all debtor's property being involved; *Ogden State Bank v. Barker*, 12 Utah, 24, 40 Pac. 768, where insolvency is to be inferred from whole bill; *Enright v. Grant*, 5 Utah. 342, 15 Pac. 271, where bill alleged judgment by one plaintiff and judgment and execution by others; *Massachusetts Mut. Life Ins. Co. v. Chicago, etc., R. Co.*, 13 Fed. 862, where creditor asserts lien on property conveyed by trust deed; *Schofield v. Ute Coal, etc., Co.*, 92 Fed. 270, 271, where creditor has lien whose enforcement is hindered by fraudulent transfer; *Reyburn v. Mitchell*, 106 Mo. 378, 27 Am. St. Rep. 357, 16 S. W. 594, holding such steps necessary only where no lien or equitable claim exists; *Allen v. McRae*, 91 Wis. 233, 64 N. W. 891, where trust arises for creditors, under section 2078, revised statutes, on land paid for by debtor; *Livingston v. Dry-Goods Co.*, 12 Colo. App. 326, 56 Pac. 353, where judgment would be fruitless and defendants are fraudulently dissipating property; *Ryan v. Splith*, 18 Mont. 47, 44 Pac. 404, where absence and disposition of debtor's means are shown; *Early Times Distillery Co. v. Zeiger*, 9 N. Mex. 35, 49 Pac. 724, where bill shows legal remedy wholly useless; *National, etc., Bank v. Wetmore*, 124 N. Y. 248, 26 N. E. 549, in case such steps, though required by local statute, are impossible; *Montgomery v. M'Dermott*, 83 Fed. 577, where creditor has attachment lien, and debtor dying, foreign executors conspire to remove property; *Chicago, etc., Bridge Co. v. Anglo-American, etc., Co.*, 46 Fed. 588, where creditor first attached under foreign judgment; *New York Commercial Co. v. Francis*, 83 Fed. 772, 51 U. S. App. 668, where creditors with attachment lien, seek to prevent sale of property; *Hunt v. Weiner*, 39

Ark. 75, where creditor has lien through execution, and return thereof might extinguish it; *Merchants' Bank v. Greenhood*, 16 Mont. 442, 41 Pac. 264, upholding bill to avoid fraudulent assignment of attached property, where sale would involve several lawsuits; *Leopold v. Silverman*, 7 Mont. 286, 16 Pac. 587, holding prior chattel mortgages void on face do not defeat equitable jurisdiction; dissenting opinions in *Johnson v. Powers*, 139 U. S. 164, 35 L. 115, 11 S. Ct. 528, where creditor attacking conveyance had foreign judgment against debtor's administrator; *Cates v. Allen*, 149 U. S. 462, 37 L. 809, 13 S. Ct. 978, majority denying simple contract creditor's right to maintain bill in Federal court under State rule; *Fitzpatrick v. Flanagan*, 106 U. S. 655, 27 L. 213, 1 S. Ct. 375, *Fogg v. St. Louis, etc., R. Co.*, 5 McCrary, 451, 17 Fed. 872, *Chadbourn v. Coe*, 45 Fed. 827, and *Sickman v. Abernathy*, 14 Colo. 179, 23 Pac. 449, *arguendo*. See 43 Am. St. Rep. 380, and 66 Am. St. Rep. 285, notes.

Approved, but not applied, in *Wilson v. Harris*, 21 Mont. 405, 54 Pac. 55, 56, holding averment of attachment, without statement that garnishee had possession, insufficient.

Distinguished in *Fourth Nat. Bank v. Francklyn*, 120 U. S. 755, 30 L. 829, 7 S. Ct. 762, holding judgment creditor only can enforce stockholders' liability at law; *Hollins v. Brierfield Coal, etc., Co.*, 150 U. S. 381, 37 L. 1115, 14 S. Ct. 129, holding unpaid stock subscription not charged with such trust in creditor's favor; *Kittel v. Augusta, etc., R. Co.*, 65 Fed. 862, 863, where bill did not allege insolvency or other sufficient ground; *Putney v. Whitmire*, 66 Fed. 388, where creditor claims no lien or trust; *Brown v. John V. Farwell Co.*, 74 Fed. 765, where no special circumstances entitled creditor to neglect such steps; *Robinson v. Springfield Co.*, 21 Fla. 237, holding bill attacking realty never in debtor's name must show more than deficiency judgment. Denied in *Fairbanks v. Welsbaush*, 55 Neb. 380, 384, 75 N. W. 871, 873, holding judgment necessary to creditor's bill by general rule.

Judgment.—Doctrine of *res judicata* is unaffected by correctness of judgment, p. 692.

Approved in *Jenkins v. International Bank*, 111 Ill. 471, *Shumate v. Supervisors*, 84 Va. 577, 5 S. E. 571, *Tracey v. Shumate*, 22 W. Va. 510, and *Rogers v. Rogers*, 37 W. Va. 419, 16 S. E. 638, all applying rule; *Patterson v. Wold*, 33 Fed. 792, holding judgment upholding conveyance charged as voluntary, bars action charging same as preference; *Chavent v. Schefer*, 59 Fed. 232, holding decree distributing assets of dissolved corporation bars subsequent suit for unpaid subscriptions; *People v. Holladay*, 93 Cal. 251, 27 Am. St. Rep. 194, 29 Pac. 57, where judgment against city, clearly wrong, was held binding on State; *Ashuelot R. R. v. Cheshire R. R.*, 59 N. H. 411, extending bar to all matters within action's legitimate purview.

Judgment.—Decree dismissing creditor's bill to enforce lien, alleging debtor's insolvency, bars second bill for same relief, adding averment that legal remedies have been exhausted, p. 692.

Followed in *Fleitas v. Meraux*, 47 La. Ann. 241, 16 So. 852, holding decree dismissing bill is on merits, unless expressly "without prejudice."

101 U. S. 693-700, 25 L. 1005, **ANTHONY v. COUNTY OF JASPER.**

Municipal corporations.—Missouri act of 1872, section 4, requiring registration and certification of county bonds by State auditor, applies to bonds issued by county for township under township-aid act, pp. 695, 696.

Cited in *Lewis v. Commissioners*, 105 U. S. 750, 26 L. 996, **arguendo.**

Municipal corporations.—State may prescribe form of execution of municipal bonds as essential to validity thereof, e. g., by requiring county judge's signature and registration and certification by State auditor, p. 697.

Approved in *Young v. Clarendon Twp.*, 132 U. S. 348, 33 L. 360, 10 S. Ct. 109, under statute requiring governor's approval of railroad-aid bonds. See 98 Am. Dec. 679, note, collecting authorities, and 51 Am. St. Rep. 833, note.

Distinguished in *D'Esterre v. Brooklyn*, 90 Fed. 592, holding city estopped by unsigned indorsement certifying registration.

Municipal corporations.—Purchaser of municipal bonds may rely upon truth of certificate thereon signed by public agent empowered to issue them, p. 697.

Approved in *Menasha v. Hazard*, 102 U. S. 95, 26 L. 86, following rule; *Lewis v. Comanche*, 35 Fed. 348, holding recitals conclusive as to proportion of voters asking bond issue, though no poll-book existed to ascertain proportion. See 98 Am. Dec. 688, note.

Distinguished in *Hopper v. Covington*, 10 Biss. 493, 8 Fed. 781, in absence of recitals; *Johnson City v. Railroad*, 100 Tenn. 147, 44 S. W. 672, holding recital that bond issue is to domestic railroad does not validate them, if false.

Municipal corporations.—Bond purchaser is charged with notice of State laws as to municipal power to make bonds; but if a bona fide holder, he is protected against mere irregularities of execution, p. 697.

Approved in *Northern Bank v. Porter Twp.*, 110 U. S. 618, 28 L. 262, 4 S. Ct. 259, where Ohio statute authorized township to subscribe to stock only after county's refusal; *National Bank v. St. Joseph*, 24 Blatchf. 441, 31 Fed. 219, where law provided tender of principal should stop interest; *National Bank v. Grenada*, 48

Fed. 279, 280, holding failure to publish ordinance as required by Colorado law, invalidates bonds issued thereunder; *Coffin v. Board of Commrs.*, 57 Fed. 143, 12 U. S. App. 562, holding utter absence of power not cured by recitals; *Rathbone v. Board of Commrs.*, 73 Fed. 404, *Manhattan Co. v. Ironwood*, 74 Fed. 539, 43 U. S. App. 369, *Sutro v. Rhodes*, 92 Cal. 125, 28 Pac. 100, *Claybrook v. Commissioners*, 114 N. C. 460, 19 S. E. 595, *Commissioners v. Call*, 123 N. C. 311, 31 S. E. 482, 44 L. R. A. 253, and dissenting opinion in *West Plains Township v. Sage*, 69 Fed. 956, 957, 32 U. S. App. 725, all holding recital of act under which bonds are issued charges purchaser with notice of its provisions; *Farmers, etc., Nat. Bank v. School District*, 6 Dak. 264, 42 N. W. 769, where school district warrants were ultra vires; *Johnson City v. Railroad*, 100 Tenn. 148, 44 S. W. 672, where power did not exist to issue bonds to foreign railroad; *Irvine v. Board of Commrs.*, 75 Fed. 768, holding purchaser of unauthorized bonds, issued in exchange for county warrants, is subrogated to position of warrant holder.

Distinguished in *Moulton v. Evansville*, 25 Fed. 386, holding bond recitals binding where officers executing them had power to issue bonds.

Municipal corporations.—Public can act only through authorized agent and is not bound till all who are to participate have performed respective duties, p. 698.

Approved in *Louisiana v. Wood*, 102 U. S. 298, 26 L. 155, under same statute; *Hoff v. Jasper*, 110 U. S. 54, 56, 28 L. 68, 69, 3 S. Ct. 477, 478, where, under identical statute, it was expressly found that subscription had been made prior to act requiring registration; *Bissell v. Spring Valley Township*, 110 U. S. 169, 28 L. 108, 3 S. Ct. 559, holding county clerk's signature to bonds essential, if required, even though he be without discretion; *Marsh v. Nichols, etc., Co.*, 128 U. S. 611, 32 L. 540, 9 S. Ct. 170, where through inadvertence letters-patent issued unsigned by secretary of interior; *Young v. Clarendon Township*, 132 U. S. 352, 354, 33 L. 362, 363, 10 S. Ct. 110, 111, where railroad-aid bonds were issued without governor's approval; *Brown v. Bon Homme*, 1 S. Dak. 225, 46 N. W. 175, where bonds were signed before commissioner had provided for funding warrants. See 64 Am. Dec. 436, note, and 51 Am. St. Rep. 852, note.

Principal and agent.—Agent cannot bind principal by antedating after powers are revoked, p. 698.

Partnership.—Retiring partner cannot bind firm after due notice of dissolution upon antedated promissory note in hands of innocent purchaser, pp. 698, 699.

Municipal corporations.—Public agent's authority is limited by specific grant and he cannot, by antedating contracts, bind prin-

cipal under powers since withdrawn; such action partakes of character of forgery and is always open to inquiry, e. g., where county-judge antedated bond issue to precede law requiring registration, pp. 698, 699.

Approved in *Coler v. Cleburne*, 131 U. S. 173, 175, 33 L. 149, 9 S. Ct. 724, 725, where bonds issued and dated during ex-mayor's incumbency were signed after his term expired; *Lehman v. San Diego*, 83 Fed. 674, 675, 48 U. S. App. 689, 690, where bonds were antedated after repeal of authorizing act.

Distinguished in *State v. Moore*, 46 Neb. 592, 50 Am. St. Rep. 628, 65 N. W. 194, where antedating was part of proposition submitted to voters, and *Yesler v. Seattle*, 1 Wash. 323, 25 Pac. 1019, validating bonds negotiated months after dating, under statute requiring date of issue.

Municipal corporations.—Purchasers of municipal securities assume risk of genuineness of signatures and official character, and are charged with notice of signer's term of office, e. g., where bonds signed by judge antedated his term of office, p. 699.

Approved in *Morton v. Carlin*, 51 Neb. 213, 70 N. W. 970, where alleged precinct voting bonds, had no legal existence; *Merchants' Bank v. Bergen*, 115 U. S. 390, 29 L. 432, 6 S. Ct. 90, *State v. Tax Collector*, 39 La. Ann. 534, 2 So. 60, and *State v. Mayor*, 43 La. Ann. 110, 8 So. 900, *arguendo*. See 51 Am. St. Rep. 850, note.

Distinguished in *Flagg v. School District*, 4 N. Dak. 55, 58 N. W. 508, 25 L. R. A. 374, holding execution of municipal bonds by de facto clerk binds district.

101 U. S. 700-707, 25 L. 869, **DAUTERIVE v. UNITED STATES.**

Public lands.—Act of June 30, 1860, section 11, does not authorize confirmation of Spanish land grant from which neither location nor extent is ascertainable, p. 707.

Not cited.

101 U. S. 708-711, 25 L. 1077, **MOULOR v. INSURANCE CO.**

Trial.—Conflicting evidence as to untrue statement in life insurance application is for jury, p. 711.

Approved in *Beatty v. Mutual Reserve, etc., Assn.*, 75 Fed. 68, 44 U. S. App. 527, holding question whether company's conduct waived health certificate is for jury; *Fidelity Mut. Life Assn. v. Miller*, 92 Fed. 75, 63 U. S. App. 738, holding harmless, untrue statement innocently made and immaterial.

101 U. S. 711-721, 25 L. 872, **EX PARTE RAILWAY CO.**

Railroads.—Referring to decree in *Railway Co. v. Alling*, 99 U. S. 463, for history of case, p. 711.

Cited in *Sioux City, etc., Ry. v. Chicago, etc., Ry.*, 27 Fed. 776, and *Kansas City, etc., Ry. v. Kansas City, etc., Ry.*, 129 Mo. 69, 31 S. W. 453, both holding survey and grading part of railroad construction.

Mandamus—Appeal and error.—Supreme Court may by mandamus enforce prompt compliance with mandates, but will not so revise inferior court's action in discretionary matters, e. g., where mandate left open certain questions as to equities of parties arising after taking of appeal, p. 721.

Approved in *Ex parte Morgan*, 114 U. S. 175, 29 L. 136, 5 S. Ct. 825, holding mandamus lies to compel, but not to control, lower court's decision in pending suit; *Ex parte Burtis*, 103 U. S. 238, 26 L. 392, nor to reverse it; *State v. Kellogg*, 95 Wis. 679, 70 N. W. 302, granting mandamus compelling city council to revoke liquor license on undisputed evidence; *Wells v. Littlefield*, 62 Tex. 34, holding remedy for failure to obey mandate is by mandamus, not appeal; *Boody v. Watson*, 64 N. H. 186, 9 Atl. 812, *arguendo*. See 89 Am. Dec. 739, note, collecting cases.

101 U. S. 721-726, 25 L. 833, *PHILLIPS v. GILBERT*.

Mechanic's lien.—Unrecorded release of lien made to then prospective purchaser of land, with view to securing mortgage loan, does not, after collapse of negotiations, estop him to assert lien against owner or others advancing money on land with full knowledge of facts, pp. 723-725.

Mechanic's lien for material and work on row of houses in city of Washington is valid, under 11 Stat. 376, though filed against row as one building, p. 725.

Followed in *Premier Steel Co. v. McElwaine, etc., Co.*, 144 Ind. 619, 43 N. E. 878, *Maryland Brick Co. v. Spilman*, 76 Md. 342, 35 Am. St. Rep. 434, 25 Atl. 298, 17 L. R. A. 601, *Willamette Mills Co. v. Shea*, 24 Or. 50, 32 Pac. 762, *Lyon, etc. v. Logan*, 68 Tex. 525, 2 Am. St. Rep. 514, 5 S. W. 74, and *Sergeant v. Denby*, 87 Va. 208, 12 S. E. 402, where houses were on separate lots; *Fullerton v. Leonard*, 3 S. Dak. 121, 52 N. W. 326, though lots belonged to different parties, contract being single; *Meixell v. Griest*, 1 Kan. App. 148, 40 Pac. 1071, where person lets single contract individually and as agent, lien covers both houses; *Maynard v. Ivey*, 21 Nev. 246, 29 Pac. 1092, holding lien not void because claim too extensive.

Mechanic's lien.—When in city of Washington, lien is released by filing of undertaking under 11 Stat. 376, personal decree goes against landowner, with permission to sue sureties, pp. 725, 726.

Approved in *Smith v. Gill*, 37 Minn. 456, 35 N. W. 179, upholding right to personal judgment where lien was not perfected.

101 U. S. 726-728, 25 L. 835, UNITED STATES v. KIMBALL.

Internal revenue.—In suit against internal revenue collector on bond, for taxes charged to him under revised statutes, section 3218, uncollected taxes transferred to successor should be credited him if due diligence to collect be proved, p. 727.

Internal revenue commissioner's certificate, that collector used due diligence to collect uncollectible taxes, is condition precedent to allowance of credit by first comptroller of treasury before suit, but not defense on facts, p. 728.

Internal revenue.—Presentation to, and rejection by, internal revenue commissioner of claim for credit, entitles collector to prove claim, under revised statutes, section 951, when sued by United States for accounting, p. 728.

Not cited.

101 U. S. 728-730, 25 L. 1078, MEYER v. HORNBY.

Estoppel.—Holder of mechanic's lien on railroad, in absence of fraud, is not estopped to assert its priority over earlier mortgage securing bonds floated and guaranteed by company in which he owned stock, pp. 729, 730.

Cited in 54 Am. St. Rep. 423, note.

Railroads.—Mechanic's lien for construction of part of Iowa railroad extends to whole road and has precedence over prior mortgage, p. 730.

Followed in *Nat. Foundry, etc., Works v. Oconto, etc., Co.*, 52 Fed. 45, holding lien for machinery extends to whole plant of water company including pipes, and *Beach, etc. v. Wakefield*, 107 Iowa, 581, 76 N. W. 692, holding lien for constructing union depot extends to whole terminal railroad property.

Distinguished in *Woodworth v. Blair*, 112 U. S. 11, 28 L. 616, 5 S. Ct. 7, holding intervening prior mortgagee of part railroad not entitled to payment out of proceeds of foreclosure of whole road, and *Greenwood, etc., Ry. v. Strang*, 77 Fed. 500, holding railroad not subject to lien under South Carolina statutes.

101 U. S. 731-744, 25 L. 816, STEWART v. PLATT.

Chattel mortgages of firm property are void under New York statutes as against subsequent purchasers and execution creditors, unless filed in county where partners reside, notwithstanding recital describing firm as of another place, p. 737.

Followed in *Morris v. Ellis*, 16 Ind. App. 683, 46 N. E. 42, under similar statute; *Granger v. Adams*, 90 Ind. 89, and *Westlake v. Westlake*, 47 Ohio St. 317, 24 N. E. 413, where partners lived in different counties; *Aultman v. Guy*, 41 Ohio St. 600, where joint

owners lived in different townships; *Watson v. Thompson, etc.*, Co., 49 Ark. 87, 4 S. W. 64, where foreign corporation filed mortgage in county where it transacted business. Approved in *Burchinell v. Gorsline*, 11 Colo. App. 24, 52 Pac. 414, holding question of validity of mortgage's renewal not affected by attaching creditor's notice.

Chattel mortgages though void as to judgment creditors, are not void as between mortgagor and mortgagee for non-compliance with New York statute regulating filing thereof, p. 739.

Approved in *Brown v. Brabb*, 67 Mich. 23, 11 Am. St. Rep. 553, 34 N. W. 405, applying rule under similar statute, and *Lippincott v. Shaw, etc., Co.*, 34 Fed. 575, holding insolvent corporation's mortgage securing notes indorsed by directors, valid except as to creditors.

Bankruptcy.—Except in case of attachment within prescribed time prior to bankruptcy proceedings, and of fraudulent disposition of property, assignee takes bankrupt's property, subject to same equities as bankrupt; hence, chattel mortgage valid as against bankrupt is, in absence of fraud, valid as against assignee, and assignee's counsel fees are not payable out of mortgage fund, pp. 738, 739.

Approved in *Douglass v. Vogeler*, 6 Fed. 58, following rule; *Curry v. M'Cauley*, 11 Fed. 368, under Pennsylvania laws; *Hauselt v. Harrison*, 105 U. S. 406, 26 L. 1076, extending rule to equitable mortgage of goods; *Lloyd v. Foley*, 11 Fed. 411, extending rule to unrecorded bill of sale; *In re Huddell*, 47 Fed. 207, holding limited lien of Pennsylvania judgment binding debtor binds assignee in bankruptcy; *Laughlin v. Calumet, etc., Dock Co.*, 65 Fed. 446, 24 U. S. App. 573, upholding title of bankrupt's grantee by unrecorded deed as against assignee; *Tennessee, etc., R. R. v. East Alabama Ry.*, 75 Ala. 529, holding debtor's estoppel to deny title extends to assignee in bankruptcy; *Francisco v. Aguirre*, 94 Cal. 183, 29 Pac. 496, holding assignee cannot sue for property conveyed in fraud of creditors without enabling statute; *Newbert v. Fletcher*, 84 Me. 409, 24 Atl. 889, extending rule to assignee in insolvency; *Brown v. Brabb*, 67 Mich. 28, 11 Am. St. Rep. 557, 34 N. W. 408, *Lancaster County Bank v. Gillilan*, 49 Neb. 174, 68 N. W. 354, *Shaw v. Glen*, 37 N. J. Eq. 35, and *Keller v. Smalley, etc.*, 63 Tex. 520, all extending rule to assignee for creditors; *Martin v. Bowen*, 51 N. J. Eq. 457, 458, 26 Atl. 824, 825, holding equitable mortgage of real estate valid against assignee for creditors; *Walsh v. St. Paul, etc., Co.*, 60 Minn. 400, 62 N. W. 383, and *Ryder v. Ryder*, 19 R. I. 192, 32 Atl. 921, both extending rule to receivers; *Lamb v. Morris*, 118 Ind. 184, 20 N. E. 748, 4 L. R. A. 113, holding receiver bound by equitable lien on debtor's bank deposit; *Sanders v. Barlow*, 21 Fed. 837, holding mortgage good against decedent

good against administrator and creditors; *Epperson v. Robertson*, 91 Tenn. 411, 19 S. W. 230, upholding creditor's attachment lien against property fraudulently conveyed after judgment prior to bankruptcy; *Kimberling v. Hartly*, 1 Fed. 574, holding execution creditor's right to attack debtor's fraudulent conveyance not terminated by bankruptcy; *Platt v. Matthews*, 10 Fed. 281, overruling demurrer to bill of assignee in bankruptcy attacking fraudulent transfer; *Gilbert v. Vail*, 60 Vt. 265, 14 Atl. 544, *arguendo*.

Approved, but not applied, in *Simon v. Oppenheimer*, 20 Fed. 555. and *Rumsey v. Town*, 20 Fed. 560, both upholding, under Iowa laws, individual creditor's right to attack defective mortgage; *Webber v. Clark*, 136 Ill. 268, 26 N. E. 361, protecting purchaser at bankrupt sale against bankrupt's grantee with unrecorded deed. Distinguished in *Crampton v. Jerkowski*, 2 Fed. 493, in absence of statute authorizing chattel mortgage; *Lindeman v. Ingham*, 36 Ohio St. 11, holding mortgagee takes subject to subsequent assignee's right to sell under State statute.

Bankruptcy.—Assignee cannot assail husband's gift to wife, made three years before bankruptcy, when but one of bankruptcy debts existed, in absence of proof of intent to defraud existing or future creditors, p. 741.

Approved in *Metropolitan Nat. Bank v. Rogers*, 47 Fed. 151, holding gift to wife assailable only by creditor whose debt then existed; *Adams v. Collier*, 122 U. S. 391, 30 L. 1209, 7 S. Ct. 1211, so holding where gift was to children; *In re Warne*, 10 Fed. 379, *arguendo*.

Bankruptcy.—Neither husband's assignee nor creditor can object to wife's application of separate property to husband's debt, p. 741.

Followed in *Simms v. Morse*, 4 Hughes, 583, 2 Fed. 329.

Bankruptcy act does not forbid mere exchange of securities by insolvent, not fraudulent, or preferential, or wasting estate, p. 744.

Approved in *Reber v. Gundy*, 13 Fed. 57, upholding confessed judgment in favor of creditor with valid lien.

101 U. S. 745-754, 25 L. 1040, *GODDARD v. ORDWAY*.

Courts.—Superior Court of District of Columbia may reverse final decrees after term, when rendered upon motion duly filed and recognized by court during such term, even after decree is entered and appeal allowed, p. 751.

Approved in *O'Keefe v. Foster*, 5 Wyo. 352, 40 Pac. 526, applying principle; *New Orleans v. Fisher*, 91 Fed. 585, 63 U. S. App. 475, applying rule to motion for rehearing; *Cutting v. Tavares, etc.*, R. Co., 61 Fed. 155, where rehearing was allowed and reference made during term; *Schofield v. Horse, etc.*, Cattle Co., 65 Fed. 435, where motion was filed at same term, judge being absent.

Distinguished in *Draper v. Davis*, 102 U. S. 371, 26 L. 122, where bond had been accepted and citation signed; *Keyser v. Farr*, 105 U. S. 266, 26 L. 1026, where bond had been accepted and cause docketed above; *Morgan's Louisiana, etc., S. S. Co. v. Texas, etc., Ry.*, 32 Fed. 530, where appeal had been allowed and supersedeas bond taken; *Aspen Min., etc., Co. v. Billings*, 150 U. S. 36, 37 L. 988, 14 S. Ct. 6, sustaining allowance of rehearing after term on motion filed during term.

Courts.—Notice binding parties at one term of court extends to disposition of unfinished business at following term, p. 751.

Courts have general power over judicial acts till end of term, and may vacate appeal allowed and reverse decree, p. 752.

Approved in *Ayers v. Wiswall*, 112 U. S. 190, 28 L. 695, 5 S. Ct. 92, upholding Circuit Court's power to remand to State court after decree till end of term; *Aspen Min., etc., Co. v. Billings*, 150 U. S. 35, 37 L. 988, 14 S. Ct. 5, where order allowing appeal was vacated before it was perfected; *Ætna Life Ins. Co. v. Board of Commrs.*, 79 Fed. 576, 49 U. S. App. 125, vacating judgment entered by inadvertence; *Bishop v. Aborn*, 16 R. I. 570, 18 Atl. 203, amending decree as to costs on motion at same term; *Carr v. Dawes*, 46 Mo. App. 602, *arguendo*.

101 U. S. 755-772, 25 L. 915, **WOLSEY v. CHAPMAN**.

Public lands can be reserved from sale only by treaty, law or authorized act of executive department; and competent acts of department heads being president's acts, an order of proper department reserving lands is president's order; hence, lands so reserved prior to Iowa's selection thereof under land grant of 1841, did not pass thereby, pp. 767-770.

Approved in *Bullard v. Des Moines R. R.*, 122 U. S. 176, 30 L. 1126, 7 S. Ct. 1153, holding, under identical facts, pre-emptor acquired no title; *United States v. Missouri, etc., Ry.*, 141 U. S. 369, 35 L. 769, 12 S. Ct. 17, upholding reservation by act of Congress; *Hamblin v. Western Land Co.*, 147 U. S. 536, 37 L. 272, 13 S. Ct. 356, *Northern Pac. R. R. v. Musser, etc., Co.*, 168 U. S. 607, 42 L. 598, 18 S. Ct. 206, *Wisconsin Cent. R. Co. v. Forsythe*, 43 Fed. 885, and *Northern Pac. R. Co. v. Musser, etc., Co.*, 68 Fed. 1001, 34 U. S. App. 66, all upholding various reservations by interior department; *Wood v. Beach*, 156 U. S. 549, 39 L. 529, 15 S. Ct. 411, affirming S. C., 43 Kan. 430, 23 Pac. 650, holding patentee takes title as against prior entryman on land reserved for railroad; *Denny v. Dodson*, 13 Sawy. 85, 32 Fed. 910, holding filing of railroad route with secretary of interior withdrew land; *Northern Pac. R. Co. v. St. Paul, etc., Ry.*, 26 Fed. 561, excluding lands withdrawn after selection by one railroad, from grant to another; *Merrill v. Chicago, etc., R. Co.*, 70 Fed. 466, 34 U. S. App. 140, holding suspension of revocation of

withdrawal of lands reserves them; *Hewitt v. Schultz*, 7 N. Dak. 605, 606, 76 N. W. 230, 231, annulling patent based on entry of land withdrawn by commissioner; *Johnston v. Morris*, 72 Fed. 893, 44 U. S. App. 303, holding forfeited railroad grant not so reserved open to sale; *Lockhart v. Wills*, 9 N. Mex. 352, 54 Pac. 339, holding lands within alleged Spanish grant, not so reserved, open to entry; *Jones v. United States*, 137 U. S. 217, 34 L. 697, 11 S. Ct. 85, accrediting State department's determination that guano island belonged to United States; *United States v. Badeau*, 31 Fed. 699, holding determination by State department of official character of consular acts, binding on treasury department; *United States v. Owen*, 47 Fed. 798, upholding consul in paying clerk compensation allowed by State department; *Echols v. Tate*, 53 Ark. 15, 13 S. W. 254, upholding act of Indian agents in ousting unauthorized white person from Indian reservation; *Ard v. Pratt*, 43 Kan. 424, 23 Pac. 648, and *Ard v. Brandon*, 43 Kan. 426, 23 Pac. 649, *arguendo*.

Qualified in *Runkle v. United States*, 122 U. S. 557, 30 L. 1171, 7 S. Ct. 1147, where action required of president is judicial, not executive.

Public lands.—President's proclamation reserving lands from sale is his official public announcement of order to that effect, and no special form is required if publicity be sufficient, p. 770.

Public lands.—Grant to Iowa by joint resolution of 1861 and act of 1862, was for benefit of purchasers under Des Moines river grant of 1846, not general grant of 1841, p. 771.

Approved in *Litchfield v. Webster*, 101 U. S. 774, 777, 25 L. 926, 927, *Dubuque, etc., R. R. v. Des Moines, etc., R. R.*, 109 U. S. 331, 27 L. 953, 3 S. Ct. 189, and *United States v. Des Moines, etc., Co.*, 142 U. S. 533, 535, 35 L. 1105, 1106, 12 S. Ct. 313, 314, all holding act of 1862 vested title of identical land in Iowa as above stated; *Stryker v. Goodnow*, 123 U. S. 529, 31 L. 195, 8 S. Ct. 203, *arguendo*.

Public lands.—Adjustment of 1866 between United States and Iowa settled no rights of other parties, p. 772.

Public lands.—Iowa governor's grant to Des Moines Navigation and Railroad Company, under authority of Iowa joint resolution of 1858, in pursuance of original contract, passed title to lands approved and certified to State under Des Moines river grant of 1846, prior to December 23, 1853, p. 772.

101 U. S. 773-781, 25 L. 925, *LITCHFIELD v. COUNTY OF WEBSTER*.

Public lands.—Title to Iowa lands granted by joint resolution of Congress in 1861, and which had been previously reserved from sale, was till then in United States and hence not taxable, pp. 774, 775.

Approved in *United States v. Missouri, etc., Ry.*, 141 U. S. 369, 35 L. 769, 12 S. Ct. 17, and *Wisconsin Cent. R. Co. v. Forsythe*, 43 Fed. 885, *arguendo*.

Taxation.—Under Iowa laws public or State lands first became taxable in year following entry, location or purchase, p. 775.

Denied in *Goodnow v. Wells*, 67 Iowa, 659, 25 N. W. 866, holding lands taxable when earned, though before patent.

Taxation.—Grant to Iowa by congressional joint resolution of 1861 at once vested title in bona fide purchasers from State without further conveyance, and hence such lands became taxable, pp. 775, 776.

Approved in *Goodnow v. Wells*, 67 Iowa, 656, 25 N. W. 865, reaffirming decision; *United States v. Des Moines, etc., Co.*, 142 U. S. 534, 35 L. 1105, 12 S. Ct. 314, upholding same grant as against *United States*; *Wisconsin Central R. Co. v. Price*, 64 Wis. 592, 26 N. W. 98, holding location by railroad vested title and supported taxation, though patent issued to another; *State, etc. v. Insurance Co.*, 43 La. Ann. 144, 8 So. 893, remitting penalties for failure to take out license which city had previously claimed right to waive.

Taxation.—One paying taxes in mistake of title cannot recover them from real owner, p. 778.

Approved in *Irvine v. Angus*, 84 Fed. 131, holding stock assessment paid pending litigation not recoverable from real owner of stock.

Taxation.—Where State forbears enforcement of taxes pending determination of title to lands claimed by itself or United States, it can, after adverse decision, collect only legal interest or delinquent taxes, pp. 778-781.

Approved in *Union Pac. Ry. v. Cheyenne*, 113 U. S. 526, 28 L. 1102, 5 S. Ct. 605, upholding power of equity to relieve against excessive tax.

Taxation.—Federal courts may enjoin county officers from collecting illegal State tax, p. 781, note.

Approved in *Virginia Coupon Cases*, 114 U. S. 316, 29 L. 202, 5 S. Ct. 927, *Pennoyer v. McConaughy*, 140 U. S. 10, 35 L. 365, 11 S. Ct. 701, *Baltimore, etc., R. Co. v. Allen*, 17 Fed. 176, *Mills v. Green*, 67 Fed. 824, and *Western Union Tel. Co. v. Henderson*, 68 Fed. 597, all upholding right to maintain suit to enjoin State officers; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 389, 38 L. 1021, 14 S. Ct. 1051, upholding suit by non-resident against State railroad commissioners imposing unfair rates; *Tindal v. Wesley*, 167 U. S. 220, 42 L. 142, 17 S. Ct. 776, upholding action for possession of real property in custody of State officer.

Distinguished in *Stryker v. Goodnow*, 123 U. S. 536, 537, 31 L. 198, 8 S. Ct. 207, holding taxability of lands not reviewable on appeal from State Supreme Court; *Sparks v. Lowndes*, 98 Ga. 287, 25 S. E. 427, where statutory interest is not in nature of penalty.

101 U. S. 781, 25 L. 928, *LITCHFIELD v. COUNTY OF HAMILTON*.

Adjudged in conformity with *supra*.

Approved in *Baltimore, etc., R. Co. v. Allen*, 17 Fed. 176, holding Federal court may enjoin collection by county officer of illegal State tax.

Overruled in *Stryker v. Goodnow*, 123 U. S. 536, 537, 31 L. 198, 8 S. Ct. 208, distinguishing *Litchfield v. Webster*, *supra*, which came up from Circuit Court, not State Supreme Court.

101 U. S. 782-789, 25 L. 1044, *YOUNG v. BRADLEY*.

Trusts.—Nature and duration of trust, however expressed, are governed by requirements thereof; hence, devise to executor and heirs to hold in trust for several beneficiaries during respective disabilities, terminates upon death of such beneficiaries, and subsequent sale by executor is void, pp. 786-788.

Reaffirmed in *Harmon v. Smith*, 38 Fed. 485, *Chaffin v. Hull*, 49 Fed. 526, and *Daly v. Bernstein*, 6 N. Mex. 396, 28 Pac. 767, all following rule; *Potter v. Couch*, 141 U. S. 309, 321, 35 L. 729, 734, 11 S. Ct. 1008, 1012, where beneficiaries all agreed to take property in present condition as tenants in common; *Morffew v. San Francisco, etc., R. R.*, 107 Cal. 595, 40 Pac. 813, where trustee was individual owner of life estate; *Long v. Long*, 62 Md. 65, holding legal estate vests in beneficiary upon completion of active trust; dissenting opinion in *Abell v. Abell*, 75 Md. 69, 25 Atl. 390, majority holding trust to brothers for sisters and their children terminated on death of last sister. See note in 19 Am. St. Rep. 273.

Appeal and error.—Report of auditor to whom accounting is referred by court is not reviewable unless excepted to, p. 788.

Executors and administrators.—Executor's sale after trust ends is void and vendee cannot recover consideration from heirs, p. 789.

101 U. S. 789-791, 25 L. 805, *POWERS v. COMLY*.

Customs duties.—"Countries east of Cape of Good Hope" in section 2501, revised statutes, means countries with which commercial intercourse was had, prior to operation of Suez canal, around said cape; hence Persian opium imported from country west of cape was subject to additional 10 per cent. *ad valorem* duty, p. 790.

Treaties.—Revised statutes, section 2501, providing additional duty upon goods of countries east of Cape of Good Hope imported

from places west of it, does not conflict with Persian treaty (11 Stat. 709), since it does not affect importation direct from Persia, p. 791.

Not cited.

101 U. S. 791-797, 25 L. 921, *WRIGHT v. NAGLE*.

Courts.—Construction of State statute by highest State court is usually followed by Federal courts, but not where State contract is involved. State decision that a second grant of bridge franchise does not impair contract created by first grant, is not binding, pp. 793, 794.

Reaffirmed in *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 697, 29 L. 515, 6 S. Ct. 271, involving exclusive gas charter; *Douglas v. Kentucky*, 168 U. S. 502, 42 L. 557, 18 S. Ct. 204, refusing State construction of new Constitution repealing lottery privileges; *McCullough v. Virginia*, 172 U. S. 110, 19 S. Ct. 137, upholding Federal right to determine validity of State tax-receivable bonds; approved in *Lynn v. Polk*, 8 Lea, 251, holding question of legislative power to make irrevocable contracts, for State courts. See note in 66 Am. St. Rep. 335.

Franchises belonging to people collectively are alienable only by legislative grant, which may be direct or by constituted agencies, but when made are binding; e. g., in Georgia, right to collect bridge tolls, p. 794.

Approved in *Plank-Road Co. v. Railway*, 103 Mich. 588, 61 N. W. 881, upholding legislative power to grant plank-road company exclusive rights; *Mason v. Harpers Ferry, etc., Co.*, 17 W. Va. 414, upholding exclusive franchise where authorized by legislature; *Board v. Board*, 30 W. Va. 434, 4 S. E. 645, upholding legislative delegation to County Court of power to divide school district.

Distinguished in *Luxton v. North River, etc., Co.*, 153 U. S. 532, 38 L. 811, 16 S. Ct. 893, upholding congressional right to authorize interstate bridge.

Courts.—Where plaintiff claims exclusive bridge franchise under contract with County Court by legislative authority, subsequent grant of franchise by road commissioners, being equivalent to State law, raises question of impairment of contract obligations and gives Federal courts jurisdiction, p. 794.

Principle applied in *Vicksburg, etc., R. R. v. Dennis*, 116 U. S. 667, 29 L. 771, 6 S. Ct. 626, where railroad exempted from taxes "for ten years after completion" claimed exemption before completion; *Bryan v. Board of Education*, 151 U. S. 650, 38 L. 302, 14 S. Ct. 469, where legislative amendment of educational institution's charter, authorizing its relocation, was claimed to impair rights; *City Ry. v. Citizens' R. R.*, 166 U. S. 563, 41 L. 1116, 17 S. Ct. 655 (affirming S. C.,

56 Fed. 750), and *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. 533, where conflicting franchises were granted; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 9, 19 S. Ct. 81, where city, after stipulating against it in franchise, passed ordinance providing for water works; *Capital City Gas Co. v. Des Moines*, 72 Fed. 824, 836, where gas company claims ordinance fixing gas rate impairs franchise; *Baltimore Trust, etc., Co. v. Mayor*, 64 Fed. 160, collecting cases, where ordinance repeals double tracking privilege of franchise; *Cleveland, etc., Ry. v. Cleveland*, 94 Fed. 395, and *Iron Mountain R. Co. v. Memphis*, 96 Fed. 129, where ordinance forfeited street-railroad franchises; dissenting opinion in *Fergus Falls v. Fergus Falls, etc., Co.*, 72 Fed. 884, 36 U. S. App. 480, majority holding cancellation by city of water contract did not raise Federal question.

Distinguished in *Hanford v. Davies*, 51 Fed. 259, holding legislative act claimed as impairment must be subsequent to contract.

Statutes.—Exclusive rights to public franchises are never presumed; hence, Georgia statute of 1805, authorizing County Courts to establish bridges and fix tolls, does not authorize grant of exclusive franchise, p. 796.

Rule applied in following cases denying city's power to grant exclusive franchises for purposes indicated: *Citizens, etc., Ry. v. Detroit Ry.*, 171 U. S. 53, 18 S. Ct. 734, street railroad; *Parkhurst v. Capital City Ry.*, 23 Or. 479, 32 Pac. 306, same; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. 534, 536, gas lighting; *Gas Co. v. Parkersburg*, 30 W. Va. 438, 4 S. E. 652, same; *Grand Rapids, etc., Co. v. Grand Rapids, etc., Co.*, 33 Fed. 673, electric lighting; *Illinois Trust, etc., Bank v. Arkansas, etc., Co.*, 67 Fed. 200, and S. C. on appeal, 76 Fed. 280, 40 U. S. App. 257, 34 L. R. A. 524, water works; *Long v. Duluth*, 49 Minn. 287, 32 Am. St. Rep. 551, 51 N. W. 914, same; *Smith v. Westerly*, 19 R. I. 443, 35 Atl. 528, same.

Distinguished in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 18, 19 S. Ct. 83, upholding city's agreement not to erect water works during life of franchise.

101 U. S. 797-810, 25 L. 1021, *TRENIER v. STEWART*.

Public lands.—Genuineness of Spanish land concession is supported by appended document showing presentation for enrollment in office of council of province, pp. 803, 804.

Approved in *Sullivan v. Richardson*, 33 Fla. 109, 14 So. 706, upholding paper purporting to be original, found in trunk of title deeds.

Appeal and error.—General exception to entire charge is not favored, and in Circuit Court is insufficient, but when reviewed by highest State court will also be reviewed by United States Supreme Court, pp. 805-807.

Approved in *South, etc., Alabama R. R. v. McLendon*, 63 Ala. 276, holding exception to charge should be specific.

Trial.—Question whether tract described in Mexican deed can be located is one of fact for jury, and when evidence conflicts, and is properly submitted, finding of jury is not reviewable on appeal, pp. 806-808.

Public lands.—Title to lands within power of Congress depends upon priority of grant or confirmation, not of application therefor, p. 808.

Public lands.—Title of original donee, under Spanish grant, if complete at treaty of cession, is protected thereby, p. 808.

Approved in *Ainsa v. New Mexico, etc.*, R. R., 175 U. S. 81, upholding territorial courts' jurisdiction to try titles claimed to be perfect before treaty.

101 U. S. 810-813, 25 L. 875, *DUNCAN v. GEGAN*.

Removal of causes.—Upon removal, Circuit Court takes case up where State court left it off; hence, where removal in suit to determine mortgage priorities was taken after Louisiana Supreme Court settled that question, it was not open after removal, whether proceedings were part of original suit or not, pp. 812, 813.

Approved in *Hewitt v. Phelps*, 105 U. S. 396, 26 L. 1073, permitting retrial on merits where State Supreme Court allowed parties to amend pleadings; *Smith v. Schwed*, 2 McCrary, 442, 6 Fed. 456, holding bill supporting injunction in State court not assailable after removal; *Wertheim, etc. v. Continental Ry., etc.*, Co., 20 Blatchf. 510, 11 Fed. 691, holding defendant barred by expiration in State court of time for plea in abatement; *Milligan v. Lalance, etc.*, Mfg. Co., 21 Blatchf. 408, 17 Fed. 466, holding decision of State General Term, ordering inspection of defendant's books, final; *Loomis v. Carrington*, 18 Fed. 99, overruling motion for rehearing of motion overruled by State court; *Wolf v. Cook*, 40 Fed. 437, holding process amendable before, is amendable after removal; *Cleaver v. Traders' Ins. Co.*, 40 Fed. 713, holding State Supreme Court's decision conclusive as to evidence proper for jury; *Lookout Mountain R. Co. v. Houston*, 44 Fed. 449, holding State Supreme Court's prior disposition of demurrer final; *Chicago, etc., Bridge Co. v. Anglo-American, etc.*, Co., 46 Fed. 590, holding jurisdiction acquired by publication, over non-resident's realty, follows removal; *Elliott v. Shuler*, 50 Fed. 457, holding jurisdiction based on party's submission, follows removal; *Bragdon v. Perkins, etc.*, Co., 82 Fed. 339, holding State court's decision conclusive on question of annulling service on non-resident; *Hamilton v. Fowler*, 83 Fed. 324, holding Federal court has plenary jurisdiction after removal, petition filed, and before commencement of next term; *Sutro v. Simpson*, 4 McCrary, 278, 14 Fed. 372, hearing motion to dismiss for want of security, already filed, but applying Federal rule; *Judge v. Anderson*, 19 Fed. 886, where case is not at issue when removed, Circuit Court's rules

obtain; *Henning v. Western Union Tel. Co.*, 40 Fed. 658, where plaintiff amends complaint after removal, non-resident defendant may demand security for costs before answering; *Wilcox, etc., Guano Co. v. Phoenix Ins. Co.*, 60 Fed. 933, and *Pelzer Mfg. Co. v. St. Paul Fire, etc., Ins. Co.*, 40 Fed. 186, both holding Circuit Court rule as to time of answer obtains on filing bond and petition; *Porter Land, etc., Co. v. Baskin*, 43 Fed. 325, *arguendo*.

Distinguished in *King v. Worthington*, 104 U. S. 50, 26 L. 655, holding State rule as to competency of witness not binding on Circuit Court; *Ex parte Fisk*, 113 U. S. 725, 28 L. 1121, 5 S. Ct. 730, refusing to compel submission to order for preliminary examination not allowed by Federal practice.

101 U. S. 814-821, 25 L. 1079, *STONE v. MISSISSIPPI*.

Constitutional law.—Any contract contained in private corporation charter is within protection of prohibition against legislation impairing contract obligation; but charter itself is not, pp. 816, 817.

Approved in dissenting opinion in *Spring Valley Water Works v. San Francisco*, 61 Cal. 10, 17, majority holding provision of water company's charter, as to rates, repealable; *Illinois Cent. R. R. v. Illinois*, 146 U. S. 475, 36 L. 1051, 13 S. Ct. 127, majority upholding act repealing legislative grant of submerged land in Chicago harbor; *South Carolina v. Port Royal, etc., Ry.*, 56 Fed. 338, *arguendo*.

Distinguished in *Water Co. v. Water Co.*, 80 Me. 561, 15 Atl. 787, 1 L. R. A. 394, where rights granted by water company's charter were not exclusive.

Constitutional law.—Neither legislature, nor people themselves, can bargain away public health or morals, or legislative discretion concerning them; hence, grant of lottery privileges in corporate charter may be repealed, p. 819.

Approved in *Douglas v. Kentucky*, 168 U. S. 496, 42 L. 555, 18 S. Ct. 201, following rule; *Mugler v. Kansas*, 123 U. S. 664, 669, 31 L. 211, 213, 8 S. Ct. 299, 301, upholding Kansas prohibitory laws, though breweries thereby made valueless; *Crenshaw v. United States*, 134 U. S. 106, 108, 33 L. 828, 829, 10 S. Ct. 433, 434, holding legislature cannot create irrepealable public office; *Dunlap v. State*, 76 Ala. 466, holding exemption from jury service repealable; *State v. Beardsley*, 108 Iowa, 405, 79 N. W. 141, upholding law abating, as nuisance, dam without fishway; *West Point, etc., Imp. Co. v. State*, 49 Neb. 222, 66 N. W. 7, though mill be authorized by legislature; *Railroad v. County Commrs.*, 79 Me. 393, 394, 10 Atl. 114, and *Cleveland v. City Council*, 102 Ga. 243, 29 S. E. 588, 43 L. R. A. 642, both holding railroad for expense of change of grade at public crossing; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 570, upholding law empowering city to license ferries; *Portland v. Meyer*, 32 Or. 371, 67 Am. St. Rep. 540, 52 Pac. 22, upholding ordinance against slaughter-houses

in city; Villavaso v. Barthet, 39 La. Ann. 253, 1 So. 603, or in certain districts thereof; State v. Railroad, 50 La. Ann. 1204, 24 So. 271, upholding ordinance requiring street railroad to sprinkle right of way; Petz v. Detroit, 95 Mich. 181, 54 N. W. 648, upholding discontinuance of city market as against stall lessees; State v. Aiken, 42 S. C. 235, 20 S. E. 226, 26 L. R. A. 353, upholding dispensary act of 1893, providing for liquor sales by State alone; Dow v. Railroad, 67 N. H. 47, 36 Atl. 534, holding courts will not fix limit to legislative discretion; Garrett, etc. v. Mayor, 47 La. Ann. 630, 17 So. 243, holding legislature exclusive judge of time and manner of exercising police power; dissenting opinions in Bowman v. Chicago, etc., Ry., 125 U. S. 517, 31 L. 718, 8 S. Ct. 711, majority holding Iowa law, forbidding liquor importation, void against interstate commerce law; Leisy v. Hardin, 135 U. S. 128, 34 L. 139, 10 S. Ct. 691, majority annulling State law against liquor-selling as to importer's sales in original packages.

Distinguished in New Orleans Gas Co. v. Louisiana, etc., Co., 115 U. S. 669, 29 L. 523, 6 S. Ct. 262, holding exclusive gas franchise irrepealable; State v. Laclede, etc., Co., 102 Mo. 486, 22 Am. St. Rep. 795, 14 S. W. 980, holding irrepealable, ordinance contract fixing maximum price of gas.

Constitutional law.—Police power, though not easily defined, includes all matters affecting public health or morals; e. g., lotteries, p. 818.

Approved in Holden v. Hardy, 169 U. S. 393, 42 L. 791, 18 S. Ct. 388, upholding eight-hour law for miners; United States v. Moore, 19 Fed. 40, upholding law making matter concerning lotteries unmailable; Jamieson v. Indiana, etc., Oil Co., 128 Ind. 566, 28 N. E. 79, 12 L. R. A. 656, holding regulation of use of natural gas police power; Dunn v. Commonwealth, — Ky. —, 49 S. W. 813, 43 L. R. A. 702, upholding ordinance punishing prostitutes found on streets between 7 p. m. and 4 a. m.; Trageser v. Gray, 73 Md. 257, 25 Am. St. Rep. 591, 20 Atl. 907, 9 L. R. A. 785, and n., upholding restriction of liquor licenses to citizens of temperate habits; Ford v. State, 85 Md. 475, 60 Am. St. Rep. 339, 37 Atl. 173, 41 L. R. A. 552, upholding act making possession of policy tickets unlawful; Boston, etc., R. R. v. Cambridge, 159 Mass. 286, 34 N. E. 383, assuming legislative right to impose on railroad or municipality expense of railroad crossing; Commonwealth v. Vrooman, 164 Pa. St. 321, 44 Am. St. Rep. 611, 30 Atl. 220, 25 L. R. A. 255, upholding act of February 4, 1870, prohibiting fire insurance business without incorporation; Charleston v. Werner, 38 S. C. 495, 37 Am. St. Rep. 781, 17 S. E. 35, upholding ordinance requiring filling up of low lots injurious to health; Stehmeyer v. City Council, 53 S. C. 279, 31 S. E. 330, discussing nature of police power; dissenting opinion in Leisy v. Hardin, 135 U. S. 128, 34 L. 139, 10 S. Ct. 691, holding police power includes protection of life, health, property and welfare. See 1 Am. St. Rep. 644, note.

Approved, but not applied, in *Crutcher v. Kentucky*, 141 U. S. 61, 35 L. 653, 11 S. Ct. 855, denying State right to regulate foreign express companies; *In re Tie Loy*, 11 Sawy. 477, 26 Fed. 614, holding ordinance against laundries in habitable portion of city void; *Indianapolis v. Consumers, etc., Co.*, 140 Ind. 118, 49 Am. St. Rep. 191, 39 N. E. 437, 27 L. R. A. 518, holding inviolable, grant of right to lay and repair gas mains; *Leeper v. State*, 103 Tenn. 531, 53 S. W. 968, holding exclusive school-book contract for limited period not unconstitutional. Qualified in *New Orleans Gas Co. v. Louisiana, etc., Co.*, 115 U. S. 661, 29 L. 520, 6 S. Ct. 258, holding State cannot, by exercise of police powers, encroach on Federal powers.

Taxation.—State may, for consideration, within reasonable discretion, and for public good, exempt from taxation, p. 820.

Constitutional law.—Corporations are legislative creatures, with limited citizenship, and subject to subsequent legislation protecting health and morality, p. 820.

Approved in dissenting opinion in *State v. Butler*, 13 Lea, 418, 422, majority holding inviolable charter provision for percentage on capital stock, in lieu of all taxes.

Constitutional law.—Constitution protects contracts relating to property rights, not governmental, p. 820.

Approved in *Sprayberry v. Atlanta*, 87 Ga. 125, 13 S. E. 199, holding liquor license not contract; *Douglas v. Kentucky*, 168 U. S. 504, 505, 42 L. 558, 18 S. Ct. 205, *arguendo*. Cited, but not applied, in *Smith v. Atchison, etc., R. Co.*, 64 Fed. 279, denying legislative authority to alter cumulative stock voting allowed by company's charter.

Lotteries are not mala in se, but may be made mala prohibita, p. 821.

Approved in *Hatch v. Hanson*, 46 Mo. App. 339, upholding action by owner to recover from third party proceeds of ticket in lottery authorized by another State.

Lotteries.—Corporate charter permitting lottery is mere suspension of governmental rights, terminable at will by sovereign power of State, p. 821.

Approved in *Commonwealth v. Douglass*, 100 Ky. 123, 66 Am. St. Rep. 331, 24 S. W. 234, following rule; *Crenshaw v. United States*, 134 U. S. 108, 33 L. 829, 10 S. Ct. 434, holding naval officer does not hold office by contract; *Moore v. Indianapolis*, 120 Ind. 493, 22 N. E. 427, holding liquor licensee takes with notice of State's power to regulate; *Crescent City Slaughter, etc., Co. v. New Orleans*, 33 La. Ann. 939, applying rule to slaughter-house charter; dissenting opinion in *Lynn v. Polk*, 8 Lea, 222, majority holding legislative contract procured by bribery not judicially voidable. See 66 Am. St. Rep. 334, note.

Distinguished in *New Orleans Gas Co. v. Louisiana, etc., Co.*, 115 U. S. 667, 29 L. 522, 6 S. Ct. 261, upholding exclusive gas franchise as not bad in influences.

Constitutional law.—Legislative power extends only to irrevocable grants of property and franchises which do not impair sovereign right of police regulation; hence, Mississippi lottery charter of 1867 was validly abrogated by Constitution of 1869, though granted in consideration of money payment to State university, p. 821.

Approved in *Douglas v. Kentucky*, 168 U. S. 498, 503, 42 L. 556, 558, 18 S. Ct. 202, 204, similar case; *State v. Woodward*, 89 Ind. 113, 46 Am. Rep. 162, holding lottery privileges granted by territory annulled by criminal law under State Constitution; *Weil v. Calhoun*; 25 Fed. 872, *Kresser v. Lyman*, 74 Fed. 767, *La Croix v. County Commrs.*, 49 Conn. 602, *La Croix v. County Commrs.*, 50 Conn. 323, 47 Am. Rep. 652, *McKinney v. Salem*, 77 Ind. 214, *State v. Bonnell*, 119 Ind. 495, 21 N. E. 1101, *Moore v. Indianapolis*, 120 Ind. 492, 495, 22 N. E. 427, 428, and *Shea v. Muncie*, 148 Ind. 29, 46 N. E. 142, all denying irrevocability of liquor licenses; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 752, 28 L. 587, 4 S. Ct. 655, reversing S. C., 4 Woods, 97, 9 Fed. 745, denying exclusive slaughter-house rights, under charter; *Pearsall v. Great Northern Ry.*, 161 U. S. 666, 40 L. 845, 16 S. Ct. 710, upholding law limiting railroad's charter power of consolidating, to lines not parallel; *Platte, etc., M. Co. v. Dowell*, 17 Colo. 386, 30 Pac. 72, upholding legislative right to require covering of private canal through city; *Trageser v. Gray*, 73 Md. 260, 25 Am. St. Rep. 594, 20 Atl. 907, 9 L. R. A. 786, and n., holding limiting of liquor licenses to temperate citizens not unconstitutional; *Mathews v. St. Louis, etc., Ry.*, 121 Mo. 329, 24 S. W. 600, 25 L. R. A. 172, and n., upholding statute making railroad absolutely liable for fires, though charter allowed steam propulsion; *State v. Greer*, 9 Mo. App. 225, upholding new constitutional provision for election of corporation directors, conflicting with existing charter; *Railroad v. Transportation Co.*, 25 W. Va. 364, upholding general maximum fare law as against railroad charter provision; *Spring Valley Water Works v. San Francisco*, 61 Cal. 10, holding provision of water company's charter for fixing water rates repealable; *Lake Roland, etc., Ry. v. Mayor*, 77 Md. 381, 26 Atl. 516, 20 L. R. A. 134, denying irrevocability of ordinance permitting double tracking of streets; *State v. Murphy*, 130 Mo. 23, 31 S. W. 597, holding legislative grant of use of streets for electric lighting subject to city's regulation; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 148, 45 Am. St. Rep. 715, 28 S. W. 674, 26 L. R. A. 518, upholding statute curing invalid charter and thereby destroying corporator's liability to creditors. See 27 Am. St. Rep. 565, 42 Am. St. Rep. 542, and 66 Am. St. Rep. 335, notes.

Distinguished in *New Orleans v. Houston*, 119 U. S. 274, 275, 30 L. 414, 7 S. Ct. 203, 204, where Constitution granted lottery and legislature attempted repeal; *Walla Walla v. Walla Walla*, etc., Co., 172 U. S. 16, 19 S. Ct. 83, holding water contract innocuous in itself and properly performed, inviolable; *New Orleans Water-Works Co. v. St. Tammany*, etc., Co., 4 Woods, 142, 14 Fed. 199, upholding exclusive right of water company, under State contract, to supply city; *Indianapolis v. Consumers*, etc., Co., 140 Ind. 117, 49 Am. St. Rep. 190, 39 N. E. 437, 27 L. R. A. 518, holding grant of right to lay gas pipes not exercise of police power; *Indianapolis v. Central Trust Co.*, 83 Fed. 532, 53 U. S. App. 664, *arguendo*.

101 U. S. 822-831, 25 L. 836, UNITED STATES v. CLAMORGAN.

Public lands.—Act of June 30, 1860, section 4, does not authorize confirmation of Spanish land grant uncertain in extent and location, p. 831.

Not cited.

101 U. S. 832-835, 26 L. 973, RAILROAD CO. v. ALABAMA.

Constitutional law.—State statute, such as Alabama code provision, allowing suit against State, but providing no means of enforcing judgment, is not a remedy protected against repeal as to existing contracts, even although suit be already pending thereon, p. 835.

Followed in *Melvin v. State*, 121 Cal. 22, 53 Pac. 418, *Horne v. State*, 84 N. C. 365, and *Baltzer v. State*, 104 N. C. 277, 10 S. E. 156. Rule applied in *Hans v. Louisiana*, 134 U. S. 18, 33 L. 848, 10 S. Ct. 508, holding State cannot, without its consent, be sued in Federal court; *Smith v. Rackliffe*, 87 Fed. 967, 59 U. S. App. 433, holding California political code, section 3669, does not confer right to sue State in Federal courts; *Baltzer v. North Carolina*, 161 U. S. 244, 40 L. 686, 16 S. Ct. 501, holding North Carolina construction of constitutional amendment of 1879, as repealing right to sue, not impairment of prior contracts; *Ex parte Macdonald*, 76 Ala. 605, upholding statute giving State all legal remedies without bond or affidavit required of individuals; *Houston v. State*, 98 Wis. 487, 74 N. W. 113, 42 L. R. A. 49, denying right to sue State for tort, where action under local statute.

Distinguished in *United States v. Lee*, 106 U. S. 207, 27 L. 177, 1 S. Ct. 249 (but see dissenting opinion in 106 U. S. 227, 27 L. 184, 1 S. Ct. 266), where suit is against State officer in possession of property claimed by plaintiff; *State v. Young*, 29 Minn. 530, 531, 9 N. W. 742, where State Constitution provided for repudiation of existing bonds unless appropriation therefor approved by people.

101 U. S. 836, 25 L. 1009, **RAILROAD CO. v. TURRILL**.

Appeal and error.—Supreme Court decree of affirmance in patent case appealed from Circuit Court in Illinois, directing payment of interest thereon at same rate as “similar decrees” in Illinois State courts, means decrees for payment of money and not patent decrees, p. 836.

Approved in *Illinois Cent. R. R. v. Turrill*, 110 U. S. 303, 28 L. 155, 4 S. Ct. 5, holding interest runs upon decree for infringement.

101 U. S. 837-850, 25 L. 1081, **HOWARD v. RAILWAY CO.**

Ejectment.—Evidence is admissible in ejectment, of change in name of defendant corporation, or other matters necessary to prove title, p. 844.

Trial.—Judges should not submit to juries questions not supported by sufficient evidence to warrant verdict, but may direct finding accordingly, p. 844.

Judgment.—Subsequent judgment lienholder is not necessary party to foreclosure of prior lien, and, if not party, decree does not displace his lien or destroy right to redeem duly asserted in due time, pp. 845-849.

Approved in *Title, etc., Co. v. Railway*, 189 Pa. St. 370, 69 Am. St. Rep. 818, 42 Atl. 142, following rule; *Tug River Coal, etc., Co. v. Brigel*, 86 Fed. 822, holding neither prior nor subsequent incumbrances necessary; *Sheffield, etc., Ry. v. Newman*, 77 Fed. 793, 41 U. S. App. 766, holding parties to original bill not bound by decree on supplemental bill introducing new matter.

Assistance, writ of, issues only against parties affected by decree; hence, not against subsequent incumbrancer not party to foreclosure of judgment lien, p. 849.

Reaffirmed in *Comer v. Felton*, 61 Fed. 735, 22 U. S. App. 313. Approved in *Exum v. Baker*, 115 N. C. 244, 44 Am. St. Rep. 451, 20 S. E. 449, tax sale purchaser not in priority with purchaser at foreclosure sale; *St. Louis, etc., Ry. v. Wear*, 135 Mo. 264, 36 S. W. 366, 33 L. R. A. 350, awarding prohibition to prevent execution of writ against one not a party.

GENERAL INDEX

TO THE

FOUR VOLUMES CONTAINED IN THIS BOOK.

98, 99, 100, 101.

ABANDONED AND CAPTURED PROPERTY ACT.

SEE CONFISCATION, 2.

The Abandoned and Captured Property Act, as extended by the Act of July 2, 1864, authorizes a recovery in the Court of Claims for the proceeds of property captured and sold by the military authorities, without judicial condemnation, after July 17, 1862, and before March 12, 1863, but accounted for and credited by the Secretary of the Treasury to the abandoned and captured property fund in the Treasury.

U. S. v. Pugh,

322

ACTIONS.

SEE COUNTIES, 1.

DUTIES, 1.

STATUTES, 9.

1. Actions for debt will lie where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation.

Mills v. Scott,

294

2. Persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill.

Transportation Co. v. Chicago,

336

3. Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, do not entitle the owner of such property to compensation from the State or its agents, nor give him any right of action.

Idem,

336

4. A city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the Legislature.

Idem,

336

5. A riparian owner on a navigable stream, cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream in pursuance of legislative authority.

Idem,

336

6. Whoever undertakes to keep an animal *feræ nature* in places of public resort is liable for the injuries inflicted by it on a party who is not guilty of negligence. But if the animal is of a tame nature, there must be proof of notice to the owner, of its vicious habits, in order to make him liable.

Cong. & Empire Spring Co. v. Edgar,

487

7. At the common law everyone has the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there is no responsibility on the part of such destroyer, and no remedy for the owner.

Bowditch v. Boston,

980

8. A statute of Massachusetts on this subject construed.

Idem,

980

ADMINISTRATORS AND EXECUTORS.

1. An executor *de son tort* is liable only for what comes into his hands.

Blake v. Hawkins,

139

See OTTO 8, 9, 10, 11.

2. An executor guilty of a *devastavit* and a trustee guilty of a breach of trust, are held liable upon the same principle and to the same extent.

McBurney v. Carson,

378

3. Where a trust is created by a will and no trustee is appointed, the executor is bound to act as such trustee. In such case, the sureties in the bond of the executor are liable for his defaults, whether in one sphere of duty or the other.

Idem,

378

4. An executor by charging himself with a note as part of the assets of the estate and settling his accounts on that basis, shows that he supposed the debt to be valid in the hands of the testator.

Butterfield v. Smith,

868

5. Final settlements of administrators and executors, when adjudicated, have the force and effect of judgments as between the parties thereto, but as to no one else.

Idem,

868

6. A person dealing with an executor exercising his power of disposition of the personal assets, not for the estate but for other purposes, is held to a knowledge of all the limitations which the will as well as the law put upon his power.

Smith v. Ayer,

955

7. Property acquired from an executor by third parties, with knowledge of his trust and his disregard of its obligations, can be followed and recovered.

Idem,

955

8. The authority of an executor to continue a specifically designated existing interest in a firm does not extend to the use in its business of any other funds of the estate, nor to the use of any property which he received in his official character, to raise funds for that purpose.

Idem,

955

9. Applying notes held by an executor, or using them to obtain money for the purpose of such firm, was a misappropriation of them. The parties receiving them, knowing of the directions of the testator, cannot hold them against the claim of his representatives.

Idem,

955

10. Where a bill is filed by a creditor against an executor for the discovery of assets and the application thereof to his debt, and the executor answers, admitting sufficient assets and alleging that he is ready and willing to pay such debt, but that he disputes the justice thereof, and upon the trial the proof showed that the executor had not sufficient assets to pay such debt which was proved to be valid, a decree against the executor for the amount of the debt was proper.

Kennedy v. Creswell,

1075

11. The executor's admission was a good ground for charging him with the liability, although he could not urge it as evidence in support of his plea. Such admission of assets renders the executor personally liable.

Idem,

1075

12. The objection that the bill was not formally dismissed as to the devisees, cannot be raised here by the executor, who alone appealed from the decree.

Idem,

1075

ADMIRALTY.

SEE APPEAL AND ERROR, 23.

SEE COLLISION, *passim*.
JURISDICTION, 13, 37.
WAR, 3, 4.

1. Where property is seized in admiralty, as forfeited, and a bond is given for its return to claimant, such bond becomes the substitute for the property. In case the property is condemned, the remedy is transferred from the property to the bond.

U. S. v. Ames, 295

2. The property released cannot be recalled after it has been condemned and the libelants have proceeded to final judgment against the principal and sureties in the bond given for its release.

Idem, 295

3. A canal-boat laden with coal for transportation, having on board the wife and children of the captain, is not "a barge carrying passengers," within the meaning of section 4492, Revised Statutes.

Transportation Line v. Cooper, 382

4. There is no statute or rule which confers on a court of admiralty those powers of sequestering property which appertain to a court of equity.

Ex parte Phillips, 781

5. Libelants, who have recovered judgment in an admiralty suit, against stipulators for value and on an appeal bond, after execution thereon, returned unsatisfied, can resort to some other proper court to reach any property which the debtors may have. They cannot be required to bring the property into court.

Idem, 781

6. Salvors cannot proceed against the ship and cargo *in rem* and *in personam* against the consignees of the cargo in the same libel.

The Mayflower v. The Sabine, 982

ADVERSE POSSESSION.

The possession of one tenant in common is not adverse to his cotenants.

Union Consolidated Mining Co. v. Taylor, 541

AGENCY.

SEE PRINCIPAL AND AGENT, *passim*.

ALIENS.

1. Where a citizen of Switzerland removed thence to Virginia, and there is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland, his original citizenship is presumed to have continued.

Hauenstein v. Lynham, 628

2. Where such citizen leaves real estate in Virginia, his heirs, citizens of Switzerland, have by the Treaty between the United States and the Swiss Confederation, of the 25th of November, 1850, absolutely the right to sell said property, and to withdraw and export the proceeds thereof within such time as the laws of Virginia permit.

Idem, 628

ANIMALS.

SEE ACTIONS, 6.

APPEAL AND ERROR.

SEE ADMINISTRATORS AND EXECUTORS, 12.

APPEAL AND ERROR, PRACTICE ON, *passim*.

BANKRUPTCY, 6, 7.

JURISDICTION, *passim*.

JURY, 10, 13.

MANDAMUS, 1, 6.

PARTIES, 1.

PRACTICE, 3.

STATE LAWS AND DECISIONS, *passim*.

WITNESS, 4.

1. Where both parties agreed that there was no conflict of evidence, and that the question of fact was a matter for the court to determine, this court cannot review its finding thereon.

Bowen v. Chase, 47

2. The determination, by the court below, of questions as to the effect of evidence and burden of proof, is final and cannot be reviewed here.

Marsh v. Ins. Co., 90

3. Where the circuit court had jurisdiction of the action and of the parties, any wrong decision by it, or any error committed by it, can only be corrected by this court on appeal after final decree below.

Ex parte Schwab, 105

4. Under the Act of 1875, the finding of facts in the circuit court in admiralty causes is conclusive, and this court can review by bill of exceptions only questions of law.

The Abbotsford v. Johnson, 168

5. A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away.

Ball. & P. R. Co. v. Grant, 231

6. Where the charge of the judge to the jury is of a character to mislead the jury, the error is one of law, and may be corrected in an appellate court.

R. R. Co. v. Varnell, 233

7. In every such case, the part of the charge to which the exception is addressed ought to be distinctly pointed out. Unless that is done, the exception cannot be sustained as a ground for reversing the judgment.

Idem, 233

8. The judgment of the Court of Claims, as to the legal effect of the ultimate circumstantial facts in a case, may be reviewed in this court.

U. S. v. Pugh, 322

9. A court does not err in not submitting a case to a jury, where the issues to be tried are issues of law, or where the parties waive a jury trial.

Montgomery v. Samory, 375

10. An objection not made or a point not taken in the court below cannot be considered here.

Flournoy v. Lastrapes, 406

U. S. v. Morgan, 519

11. A judgment will not be reversed for error in excluding testimony which is cumulative only, if it is apparent that if received it would not affect the result.

Cannon v. Pratt, 446

12. Where appeals are being prosecuted to final judgment by order of the directors or trustees of a corporation, this court will not, upon the suggestion of strangers to the decrees appealed from, dismiss the appeals.

Railway Co. v. Alling, 438

13. This court will not disturb a judgment of nonsuit, where, if the case had been left to the jury and a judgment been rendered against the defendants, this court would set it aside as against evidence.

North v. McDonald, 535

14. The admission of immaterial or irrelevant evidence is not sufficient reason for reversing a judgment, when it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error.

Union Consolidated Mining Co. v. Taylor, 541

15. No appeal lies from a mere decree respecting costs and expenses.

Elastic Fabric Co. v. Smith, 547

16. Where there is no dispute as to the law, and the only question is one of fact, and the finding of the trial court has been affirmed by the higher state court, this court will not disturb the judgment of the state court unless the error is clear.

Lammers v. Nissen, 562

17. The refusal of the district court to grant a new trial on the evidence, cannot be re-examined here on a writ of error.

Railway Co. v. Twombly, 550

18. This court cannot send the case back to the court below, with instructions to enter a judgment of nonsuit, because since the judgment below, and while the writ of error has been pending, the statute authorizing the action has been repealed.

Idem, 550

19. Where no errors are found in the record, all this court can do is to affirm the judgment.

Idem, 550

20. This court may look into the opinions of the Supreme Court of Louisiana, for the purpose of determining whether a federal question was raised and decided in a case coming from that court.

Weatherly v. Bowie, 606

21. On the trial of an action at law, when the Judges of the Circuit Court are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; but the judgment rendered conformably thereto may, without regard to its amount, be reviewed on a writ of error, upon their certificate stating such question.

Dow v. Johnson, 632

22. It is error to submit to a jury to find a fact of which there is no competent evidence.

Manning v. Ins. Co., 761

23. An appeal in admiralty from the district court to the circuit court vacates the decree appealed from. The cause is heard *de novo* in the circuit court, and an entire new decree entered, which the latter court carries into execution. The cause is not remanded to the district court.

The Louisville v. Halliday, 771

24. The finding of facts by the circuit court is conclusive on this court. Where no exceptions are

taken to the rulings of the court in the progress of the trial, the decree will be confirmed.

Idem, 771

25. Where prayers for instructions were presented as a whole, refused as a whole, and excepted to in the same manner, if any one of them was rightfully rejected no error was committed.

Worthington v. Mason, 848

26. When complaint is made of the instructions of the court given or refused, the proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them. It is not sufficient to show that the judge assumed them in his charge to the jury.

Idem, 848

27. If it appears upon the record that no division of opinion actually existed among the Judges of the Circuit Court this court will not consider a question certified, even though it be certified in form.

Col. Cent. Railroad Co. v. White, 860

28. An order denying a motion to proceed no farther in a cause, on the ground of an alleged settlement, and directing that the cause proceed, is not a final decree from which an appeal will lie to this court.

Liano v. Gaines, 928

29. A consent decree in the circuit court can be appealed from, but this court cannot consider any errors assigned which were waived by the consent.

Pac. R. R. Co. v. Ketchum, 932

30. Where it appears of record that a defendant assented to a decree, this only leaves for our consideration under the appeal, whether the court below had jurisdiction of the cause so as to authorize it to enter any decree.

Idem, 932

31. It is not sufficient to reverse a decree in equity that, on overruling defendant's demurrer to the bill, no leave to answer was given, where no application was made for time to answer and no harm to defendant resulted.

Rice v. Edwards, 976

32. Error must be affirmatively shown. It is not to be presumed.

Bechtel v. U. S., 1019

APPEAL AND ERROR, PRACTICE ON.

SEE APPEAL AND ERROR, *passim*.

JURISDICTION, *passim*.

PRACTICE, 6, 17.

1. Where the cause was tried by the court, and there were no findings of fact, and no exceptions, and the only error assigned is that the general finding was for the wrong party, the whole testimony cannot be brought up for review by bill of exceptions.

Betts v. Mugridge, 157

U. S. v. Morgan, 519

2. Where, in a cause of admiralty jurisdiction, heard in the circuit court, since the Act of Feb. 16, 1865, the record contains no finding of facts, no statements of conclusions of law and no bill of exceptions, there is nothing for this court to review.

The Abbottsford v. Johnson, 163

3. Where the omission was through inadvertence, the case may be remanded to the circuit court, that the defect may be cured. If the appeal should be further prosecuted, it may be restored to its present place on the docket.

Idem, 163

4. Where the *supersedeas* bond is defective, the *supersedeas* will be vacated unless the plaintiff in error shall file a new bond, in such sum and within such time, as directed by the court.

Knox County v. U. S., 191

5. A citation is necessary to an appeal, except when the appeal is allowed in open court during the term at which the decree is rendered. When not so allowed, and there is no citation, the appeal will be dismissed.

Vansant v. Gas-Light Co., 265

6. Where the federal questions involved in a case were correctly decided by the State Supreme Court, the judgment of that court must be affirmed, without determining any other questions not of a federal character.

Myreck v. Thompson, 324

7. If a transcript is not filed and the cause docketed during the term to which it was made returnable, or some sufficient excuse given for the delay, the writ of error or appeal becomes inoperative and the cause will be dismissed. Appearance does not waive the objection.

Grigsby v. Purcell, 354

8. This court may allow a writ of error to be amended in its return day.

National Bank v. Bank of Commerce, 362

9. Where the return day of the writ is changed, a new citation should issue.

Idem, 362

10. The rules of this court requiring causes to be ready for hearing when reached will be rigidly enforced.

Alvord v. U. S., 399

11. Under the Act of April 7, 1874, on appeals to this court from the territorial courts, in cases where there has been no trial by jury, instead of the evidence at large, a statement of the facts and the rulings of the court is to be made and transmitted to this court.

Stringfellow v. Cain, 421

12. An affidavit for the continuance of a cause does not become a part of the record, unless it is properly introduced as evidence by one of the parties.

Campbell v. Rankin, 435

13. A motion to affirm may be united with a motion to dismiss, if there appears on the record some color of right to a dismissal.

Whitney v. Cook, 446

14. When the Supreme Court of Utah affirms the judgment of the District Court upon findings of fact made by the district court, the Supreme Court in effect adopts such findings as its own for the purposes of an appeal to this court.

Stringfellow v. Cain, 421

Cannon v. Pratt, 446

15. Where a judgment is severable as between the defendants, the bonds for a stay of execution on writ of error are sufficient, where they are far in excess in each instance of the amount recovered against the several defendants who seek the stay.

Ex parte French, 529

16. Where all the defendants want the judgment reviewed, but a part only desire to have the execution against them stayed, they may all join in the writ, and separate when they ask for a stay.

Idem, 529

17. If the writ is informal, the remedy is by motion to vacate it, and not by *mandamus* to have the judgment carried into execution.

Idem, 529

18. A transcript of the record is sufficiently authenticated for an appeal or a writ of error to this court, if it is signed by the deputy in the name of and for the clerk, and sealed with the seal of the court below.

Garnau v. Dozier, 536

19. This court will not decide motions to dismiss before the record is printed when there is any question about the facts on which the motion rests.

St. Louis National Bank v. Ins. Co., 547

20. Only such original papers can be transmitted to this court on appeal, as require actual inspection as originals in order to give them their full effect in the determination of the suit.

Craig v. Smith, 577

21. Where an appeal should have been taken in the name of the individual members of a commercial firm, but instead thereof is taken in the name of the firm, the defect is one that may be amended, and for that reason this court will not dismiss the appeal.

Moore v. Simmons, 590

22. This court will vacate a *supersedeas*, when the approval of the *supersedeas* bond by the justice of this court who allowed the appeal was obtained by fraud and perjury, and, in such cases, will refuse to accept a new bond.

Florida Cent. R. R. Company v. Schulte, 605

23. Where the appellant selected such of the papers and proofs used on the hearing below as he thought were necessary, and had them copied into the transcript, the court will order that he file in this court as part of the record, copies of such papers omitted as the appellee deems necessary, or the appeal will be dismissed.

Idem, 605

24. When the appeal is taken and perfected in open court during the term at which the decree complained of is actually entered, a citation is not necessary. When subsequently allowed, a citation is necessary.

Chic. & Pac. R. R. Co. v. Blair, 587

25. Where the appellants supposed that a citation would be waived, this court will not dismiss the appeal absolutely, but order that a citation be issued and served, or that the appeal be dismissed.

Idem, 587

26. A writ of error will be dismissed for the omission to state with certainty its return day.

See v. Conn. Mut. L. Ins. Co., 772

Although amendable, yet where no application is made by the plaintiff in error for leave to amend, and no citation has been served, this court will not, on its own motion, make any order in that behalf.

Idem, 772

27. What is a sufficient condition of a bond on appeal.

Gay v. Parpart, 841

28. Where the bond is sufficient, the appellee cannot couple with a motion to dismiss, a motion, under Rule 6, to affirm on the ground that the appeal was taken for delay only.

Idem, 841

29. Where a cause is submitted and Rule 21, which provides that "when a statute of a State is cited, it shall be printed at length," is disregarded by both parties, the submission will be set aside and the cause restored to its place on the docket.

School District v. Ins. Co., 868

30. Where the report of the referee is defective in form, the defect cannot be considered here for the first time.

Mason Lumber Co. v. Buchtel, 1072

APPEARANCE.

SEE JURISDICTION, 9.

ATTACHMENT.

In Louisiana, where an insufficient bond on attachment was given, a judgment so far as it gives a privilege on the property attached, with recourse on the bond on which the property attached was released, will be reversed.

Fleitas v. Cockrem, 954

ATTORNEYS.

1. An attorney who gave a certificate that B's title to a lot (describing it) is good, and the property is unincumbered, there being neither fraud, collusion nor falsehood on his part, nor privity of contract between him and C, who loaned money, relying upon a certificate, is not liable to the latter for any loss sustained by reason of the certificate.

Savings Bank v. Ward, 621

2. Information to an attorney is information to his client, and the latter is affected with notice of all facts, notice of which can be charged upon his attorney.

Smith v. Ayer, 955

3. An attorney can in no case, without the client's consent, buy and hold otherwise than in trust, any adverse title or interest touching the thing to which his employment relates.

Baker v. Humphrey, 1065

BAILMENTS.

SEE NEGLIGENCE, 1.

BANKRUPTCY.

SEE HUSBAND AND WIFE, 7.

LIMITATIONS, 1.

PARTIES, 4.

1. Creditors of a bankrupt can have no remedy which will reach property fraudulently conveyed by him, except through the assignee. Property thus fraudulently conveyed vests in the assignee, who may recover the same.

Glenny v. Langdon, 43

2. If the assignee will not sue for such property, the court having jurisdiction of the matter may direct him to proceed, or may remove him and appoint another.

Idem, 43

3. A purchaser of land from the assignee of a bankrupt acquired no greater rights than those possessed by his grantor.

Gifford v. Helms, 57

4. An assignee in bankruptcy, under the Bankruptcy Act of 1867, had authority to bring suit in the state courts, whenever those courts were invested with appropriate jurisdiction suited to the nature of the case.

Wilson v. Goodrich, 111

5. Where a debtor made an assignment of his property for the benefit of his creditors, which was set aside in favor of his subsequent assignee in bankruptcy, a creditor who had levied upon the assigned property under execution after the assignment and before the proceedings in bankruptcy, secures

thereby no priority over the other creditors of the bankrupt.

Reed v. McIntyre, 171

6. The only remedy for the correction of error of the District Court in an adjudication in bankruptcy is under the supervisory jurisdiction of the Circuit Court, whose action is final and not subject to review in this court.

Cleveland Ins. Co. v. Globe Ins. Co., 201

7. A writ of error is proper process to take the case to the Circuit Court for review under this jurisdiction.

Idem, 201

8. Fraud, as used in the section of the bankrupt law which provides that "No debt created by fraud shall be discharged in bankruptcy," means positive fraud or fraud in fact, involving moral turpitude or intentional wrong.

Wolf v. Stir, 309

9. A debt not created by the purchase of goods, but by a bond given in a replevin suit to pay their value if the party failed to sustain his title, is not created by fraud, but is a contingent debt provable under the Bankrupt Act.

Idem, 309

10. Although the principal in such bond is relieved from liability thereon by his discharge in bankruptcy, that does not exonerate the surety on the bond.

Idem, 309

11. An assignee in bankruptcy takes property subject to such liens or incumbrances as would have affected it had no adjudication in bankruptcy been made.

Stewart v. Platt, 816

12. A mere exchange of securities is not forbidden by the letter or the spirit of the bankrupt law.

Idem, 816

13. A claim against a foreign government vaguely described in the schedule of a bankrupt's assets, and denominated worthless but really of great value, does not pass on a general sale of his accounts, notes and judgments to a purchaser for the benefit of the bankrupt, with money furnished by him, where the price paid was a mere nominal sum.

Phelps v. McDonald, 473

14. The provision of the bankrupt law which requires that all suits by or against the assignee should be brought within two years from the time the cause of action accrued, relates only to suits by or against the assignee with respect to parties other than the bankrupt, and not to a suit against the bankrupt.

Idem, 473

15. A claim of a bankrupt against a foreign government passes to his assignee in bankruptcy.

Idem, 473

16. An assignment in bankruptcy relates to the commencement of the proceeding, and the title of the assignee to all the property and effects of the bankrupt became vested as of that date.

International Bank v. Sherman, 866

17. The time within which an assignee in bankruptcy can commence an action begins to run when the assignee is appointed.

Idem, 866

18. A transfer of property by the bankrupt after commencement of the bankrupt proceedings is void, although the act of bankruptcy upon which the adjudication was founded was introduced into the petition by an amendment made after such transfer.

Idem, 866

BANKS.

SEE TAXES AND TAX SALES, 21.

1. Where a payee of a note, secured by a deed of trust of lands, assigned the note and deed of trust to a national bank to secure a loan made by it to him thereon, the bank, on the loan being unpaid, may sell the lands, under the deed of trust, through the trustee, to pay the loan, although such deed of trust is in effect a mortgage to the bank.

Union Nat. Bank v. Matthews, 188

2. The payment of usurious interest to a national bank cannot be set up as an off-set or defense in an action brought by it on a bill of exchange.

Barnet v. Nat. Bank, 212

3. The remedy given by the statute for usury in such case is a penal suit. To that, the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure.

Idem, 212

4. A bank is authorized to make a loan with the

stock of another bank pledged as collateral security, and cannot set up its own violations of law to escape the responsibility resulting from its illegal action.

Germania National Bank v. Case. 448

5. The determination of the Comptroller of the Currency and his order to the receiver are conclusive of the extent of the liability of the stockholders of an insolvent bank.

Idem. 448

6. Where a national bank received a promissory note indorsed by its debtor, in consideration of an extension of time and for usurious interest, the consideration being partly legal and partly vicious; held, that the former was sufficient to sustain the contract and make the bank a holder for value.

Oates v. National Bank. 580

7. The National Banking Act subjects a bank to liability for taking usurious interest, but does not declare the contract of indorsement void, and no such penalty being prescribed, the courts cannot superadd it.

Idem. 580

8. The cashier of a bank, unless the charter or by-laws of the bank forbids it, may properly make or superintend the transfer of shares of its capital stock on its books. His refusal to allow such transfer binds the bank.

Case v. Bank. 695

9. If a bank be accustomed to take deposits of United States bonds, and this is known and acquiesced in by the directors, and the bonds deposited are lost by the gross carelessness of the bank, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter.

National Bank v. Graham. 750

10. A national bank, as a part of its legitimate business, may receive special deposits, including bonds of the United States.

Idem. 750

11. A national bank, on transferring a promissory note, may guaranty it.

People's Bank v. National Bank. 907

12. It is to be presumed that the vice-president had the power to make such guaranty in the name of the bank, and the bank is estopped to deny it.

Idem. 907

13. The retention and enjoyment of the proceeds of the transaction by the bank constituted an acquiescence in such act as effectual as would have been the most formal authorization in advance, or afterwards.

Idem. 907

BEQUESTS.

SEE CHARITIES. 2.

WILLS, *passim*.

BILLS OF REVIEW.

SEE TRUSTS AND TRUSTEES, 5.

1. A petition for a bill of review will be denied unless diligence is shown in making the application and where the evidence, alleged to have been discovered, might as easily have been found at the time of the controversy as now.

Dumont v. Des Moines. 520

2. A bill of review, on the ground of newly discovered matter, can only be filed on special leave, which depends on the discretion of the court to which the application is made.

Ricker v. Powell. 527

3. The party asking for a bill of review must generally show that he has performed the decree, especially if it be a decree for the payment of money, and he must likewise pay the costs.

Idem. 527

4. The right to file a bill of review without leave exists only when the bill is brought for error of law alone.

Idem. 527

5. There is no universal or absolute rule, which prohibits the courts from allowing the introduction of newly discovered evidence, under a bill of review, to prove facts which were in issue on the former hearing.

Craig v. Smith. 577

6. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and only when it is indispensable to the merits and justice of the cause.

Idem. 577

BILLS, NOTES AND CHECKS.

SEE BANKS, 1, 6.

BILLS OF LADING, 1-3.

JURISDICTION, 3.

SEE OTTO 8, 9, 10, 11.

1. A creditor who before its maturity accepts a negotiable note, so indorsed that he becomes a party thereto, as collateral security for a pre-existing debt, in consideration of an extension of time granted to the debtor, is a holder for value.

Oates v. National Bank. 580

2. Where a bill of exchange is addressed to "Messrs. C. & C., New York, N. Y.," as drawees, and is accepted by them, it becomes payable, when due, at the place designated by the address as that of acceptance, to wit: New York City.

Cox v. National Bank. 739

3. Presentment at the specified place as against the acceptor of a bill is not necessary.

Idem. 739

4. Where the notary public made diligent inquiry for such acceptors in New York City, and could not find them, and on the day of maturity demanded payment at the places frequented by them when in said city, which was refused, and mailed notices of protest to the drawers and indorser at their post-office address; held, that all necessary steps were taken to bind them.

Idem. 739

5. Where a firm in Chicago notified a bank in Quincy that thereafter they would accept drafts drawn on them only on actual consignments, and the cashier wrote the firm in effect that the bank would protect itself; held, that the firm was not liable for a draft on them not drawn on an actual consignment.

National Bank v. Hall. 822

6. A promissory note payable to A, or order, cannot be transferred so as to cut off the defenses of the maker, except by the indorsement of the payee.

Cent. Trust Co. v. National Bank. 876

7. A guaranty is not a negotiation of a bill or note as understood by the law merchant.

Idem. 876

BILLS OF LADING.

1. A statute of a State making bills of lading negotiable, means that they may be transferred by indorsement and delivery, so as to give to the indorsee a right to sue on them in his own name.

Shaw v. Merch. Nat. Bk. 896

2. Such statute does not charge the negotiation of them with all the consequences which attend or follow the negotiation of bills and notes.

Idem. 892

3. The purchaser of a bill of lading, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser and is not entitled to hold the merchandise covered by the bill against its true owner.

Idem. 892

BONA FIDE PURCHASERS.

SEE ADMINISTRATORS AND EXECUTORS, 6-9.

BANKRUPTCY, 13.

BONDS. 1-9, 12, 14, 16, 18, 19, 22, 27, 29, 34, 41, 46.

CHATTEL MORTGAGES, 1.

LANDS, 40, 64.

TAXES AND TAX SALES, 33.

1. A grantee by deed of quitclaim is not a *bona fide* purchaser.

Dickerson v. Coigrove. 618

2. The purchasers of non-negotiable demands, from others than the original owner of them, can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim.

Cowdrey v. Vandenberg. 923

BONDS.

SEE ADMINISTRATORS AND EXECUTORS, 3.

ADMIRALTY, 1.

JUDGMENT, 6.

LIMITATIONS, 9.

PRACTICE, 11-13.

PRINCIPAL AND SURETY, *passim*.

RAILROADS, 11, 13, 14, 25, 30.

STATE LAWS AND DECISIONS, 3.

1. Bonds of a county in Missouri are not void in the hands of a *bona fide* purchaser for value, because the railroad company to which said bonds were issued, in payment of its capital stock, was not created until subsequent to the favorable vote of the qualified voters and the order of subscription.

Dayless v. Huidekoper. 112

2. In Kansas it is not a defense to an action on coupons, by a *bona fide* holder for value, without notice that the amount of bonds issued by the town

was in excess of the amounts prescribed by the Acts of the State in relation to the taxable property of the town.

Wilson v. Salamanca, 330

3. It is not a defense to such action that after a favorable vote of the township to subscribe stock in a railroad company, the subscription and the issue of bonds without any further election were made to another company with which the company in whose favor the vote was had had become consolidated under a law existing at the time of said election.

Idem, 330

4. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued.

U. S. v. County of Macon, 331

5. Where a city was authorized to issue its bonds for public improvements to be paid by assessment upon the property specially improved and benefited, an owner of such bonds who has recovered judgment on them, is not confined to a special assessment on the property benefited, but is entitled to have a levy of a general tax on all the taxable property within the city, to pay such judgment.

U. S. v. Fort Scott, 348

6. Where a city, when instructed by a majority of its voters, had authority by its charter to borrow money for municipal purposes, and to issue its bonds therefor, and bonds issued by it by their recital of the titles of the ordinances under which they were issued, in effect assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city, the city is estopped to say, as against a *bona fide* holder of the bonds, that they were not issued nor used for municipal purposes.

Hackett v. Ottawa, 363

7. Negotiable promissory notes of a purchaser of municipal bonds are a sufficient consideration for their sale.

Orleans v. Platt, 404

8. Where a *certiorari* was granted to review the order of a County Judge for the issue of county bonds, and before the reversal of the order the commissioners appointed by the County Judge subscribed for the stock of a railroad company and issued the county bonds, they are valid in the hands of a *bona fide* holder although the order for their issue be subsequently reversed.

Idem, 404

9. Where a corporation has lawful power to issue bonds, and does so, the *bona fide* holder of them has a right to presume the power was properly exercised, and where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital.

Idem, 404

Pompton v. Cooper Union, 803

10. The doctrine of *lis pendens* has no application to commercial securities, such as municipal bonds.

Idem, 404

11. When the County Judge is the officer charged by law with the duty to decide whether municipal bonds can be legally issued, his judgment is conclusive until reversed by a higher court.

Idem, 404

12. Where the statute, under which bonds of a county in Missouri were issued, required that they should be made payable to a railroad company, its successors and assigns, and they were made payable to the company, or bearer, held: that the statutory requirement in this particular is only directory, and the county is estopped to take advantage of it by the recital, in the bonds, of conformity to the statutes.

Supervisors v. Galbraith, 410

13. Where no place of payment of the bonds was designated by the statute, it was competent for the supervisors to make them payable in New York, and the law of the place of performance governs their construction and effect.

Idem, 410

14. A town which has subscribed to the stock of a railroad and issued its bonds therefor, cannot, as against a *bona fide* purchaser, claim exemption from payment on the ground that the railroad company disregarded its promise to construct thereof, or that its own officers delivered the bonds in violation of special conditions, of which the purchaser had no knowledge or notice.

Brooklyn v. Insurance Company, 416

15. Where a suit was commenced against the holders and owners of such bonds, the decree therein cannot bind anyone not personally served with

process or who did not appear, nor affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service.

Idem, 416

16. Where the bonds recited the judgment ordering their issue, and that they were issued pursuant to the statute, for the object specified in the petition of taxpayers, and by persons appointed by law to subscribe for the stock and to issue them to pay for it, and the sufficiency of the statutory authority under which the proceedings were had is not denied, the recital is an estoppel against the obligor in favor of a *bona fide* holder.

Lyons v. Munson, 451

17. Railroad bonds, by which the company acknowledges the indebtedness to A or bearer, in the sum of either \$225 in London, or \$1,000, in New York or New Orleans, the place of payment to be fixed by the president of the company by his indorsement, but such place of payment left blank in the indorsement, are not negotiable paper.

Parsons v. Jackson, 457

18. Where such bonds were never issued by the railroad company, but were seized and carried off by a raid of soldiers during the war, and had past due coupons attached and were offered for a very small consideration, purchasers were affected with notice of their invalidity and cannot sustain the position of *bona fide* holders without notice.

Idem, 457

19. A town in Wisconsin, issuing its bonds, is estopped as against a *bona fide* holder for value, to show that the true date of the bonds was different from that named in them, or that the town clerk, who was in office at the date of the bonds, in fact, signed the bonds after he went out of office.

Weyawewaga v. Ayling, 470

20. It must be assumed that the bonds were delivered to the railroad company with the assent of the clerk. If the fact was otherwise, it was incumbent on the town to make the necessary proof.

Idem, 470

21. Where a judgment has been rendered by the State Supreme Court against the validity of coupons of county bonds, the owner, who was a party to such judgment, cannot, while still owning them, recover upon them in another action in a third person's name. Such judgment is a bar to the second suit.

Block v. Commissioners, 491

22. A *bona fide* holder for value of other coupons without actual notice of any defense against them, may enforce them if there was legislative authority for their issue, and the condition upon which it was allowed to be exercised had been fulfilled.

Idem, 491

23. For all legal purposes the result of an election for the issue of county bonds is what it is declared to be by the authorized Board of Canvassers empowered to make the canvass until their decision has been reversed by a superior power, and its reversal or a new election has no effect upon acts lawfully done prior to it.

Idem, 491

24. Under the Kansas Statute of 1865 it is not necessary to name any particular company in the submission to the popular vote. It is sufficient if it be described, without naming it.

Idem, 491

25. A breach of a paymaster's bond does not occur until he or his legal representatives or sureties are required to refund moneys in his hands, and until such breach there can be no interest recovered on account of it.

U. S. v. Curtis, 571

26. The Missouri Act of 1860, amending the general railroad law, does not apply to companies having a special charter, in which special power is given to counties and townships to subscribe stock in aid thereof and to issue bonds to pay for the same.

Cass County v. Gillett, 585

27. A *bona fide* purchaser of negotiable security, before maturity, is not affected with constructive notice of a suit respecting such paper.

Idem, 585

28. An actual manual subscription on the books of a railroad company is not necessary to entitle a county to the stock of such company, nor to bind it to pay its bonds issued to pay for the same.

Idem, 585

29. Where a corporation has lawful power to issue bonds, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence.

Inhabitants of Pompton v. Cooper Union, 803

30. Where the bonds on their face recite the circumstance which brings them within the power, the corporation is estopped to deny the truth of the recital.

Orleans v. Platt, 404

31. The township of Empire, in Illinois, by subscribing to the stock of, and issuing its bonds to, the Danville, etc., Railroad Company for \$50,000, did not exhaust its power under the charter of that company, but was authorized to subscribe an additional amount of \$25,000 to the stock of the Indianapolis, etc., Railway Company, formed by the consolidation of the first named and another company, and issue its bonds therefor, under the Illinois Statute of Feb. 28, 1854.

Empire v. Darlington, 878

32. A decree in an Illinois court perpetually enjoining taxation to pay such bonds, and declaring them void, did not conclude any bondholders proceeded against as unknown owners and holders who were not served and did not appear, nor bondholders residing in other States who were proceeded against only by constructive service.

Idem, 878

33. In Illinois, municipal bonds payable to bearer are negotiable by delivery only, and an action may be maintained thereon in the name of the holder thereof.

Town of Roberts v. Bolles, 880

34. In that State municipal bonds issued in pursuance of a popular election, defectively called and held, are not invalid in the hands of a *bona fide* purchaser.

Idem, 880

35. The rights of the parties in regard to municipal bonds are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

Douglass Co. v. Pike, 968

Darlington v. Jackson, 972

Foot v. Pike County, 972

36. In an action on bonds of a county issued in payment of its subscription to a railroad company, the point that the charter of the company had ceased before the company was organized is a question between the State and the company alone.

Dallas Co. v. Huidekoper, 974

37. Whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in an action on the bonds, particularly where the corporation did exist as matter of fact, and was at that time in the exercise of all its chartered franchises.

Idem, 974

38. Where bonds contain a stipulation that on default in payment of interest, the principal shall become due at the option of the obligee, the election by the bondholder to consider the principal sum due is sufficiently proven by bringing a suit by the trustee on the deed of trust given to secure them, and the production of the bonds at the hearing.

Rice v. Edwards, 976

39. The Missouri Act to provide for the registration of bonds issued by counties and towns, applies to bonds issued under the township aid law.

Anthony v. Jasper Co., 1005

40. It is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment, and if not so executed they create no legal liability.

Idem, 1005

41. Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market, and purchasers must take the risk of the genuineness of the official signatures and of the official character of those who execute the paper they buy.

Idem, 1005

42. Bonds not issued by the proper authorities are, in legal effect, forged.

Idem, 1005

43. The New York Statute of April 16, 1852, to authorize the towns of Cayuga County to aid in the construction of a railroad, did not require that the tax payers should designate the company by its name.

Town of Scipio v. Wright, 1037

44. The bonds were not void, because the written assent of the required number of tax payers on the assessment roll of 1852 was obtained, and they were not issued until after Aug. 1, 1853, when the assessment roll for that year was by law required to be completed.

Idem, 1037

45. The fact that the bonds were not issued for

borrowed money, but were exchanged for stock of the railroad company, is, according to the New York decisions, a defense for the town against a holder who, when he purchased, had notice of the manner of their issue; which decisions this court follows in this case.

Idem, 1037

46. A *bona fide* holder, who had no knowledge that the railroad company had received the bonds in payment for the stock taken for the town, would not be liable to such a defense.

Idem, 1037

47. The Act of Congress of May 27, 1872 validated the bonds of Yankton County issued to the Dakota Southern Railroad Company.

Nat. Bk. v. Yankton Co., 1046

BOUNTIES.

SEE CRIMINAL LAW, 2.

CARRIERS.

SEE FORMER ADJUDICATIONS, 2.

1. Carriers of passengers may, by specific regulations, brought to the knowledge of the passenger, which are reasonable, protect themselves against liability as insurers of his baggage which exceeds a fixed amount in value.

N. Y. C. & Hud. Riv. Railroad Co. v. Fra-loff, 531

2. They may require information from him as to its value, and demand extra compensation for any excess beyond that which may reasonably be transported as baggage under the contract to carry the person, and may be discharged from liability, by his evasion or artifice.

Idem, 531

3. In the absence of legislation, or of special regulations by the carriers, or of conduct by the passenger misleading them as to such value, his failure to disclose such value when no inquiry is made of him, is not, in itself, a fraud upon them.

Idem, 531

4. To the extent that articles, taken by him for his personal use when traveling, exceed in quantity and value such as are ordinarily or usually taken by passengers of like station and pursuing like journeys, they are not baggage for which the carriers are, by general law, responsible as insurers.

Idem, 531

CHANCERY.

SEE EQUITY.

CHARITIES.

1. The English Statute of Charitable Uses having been repealed in Virginia, the courts of chancery of that State have no power to enforce charities where the objects are indefinite and uncertain.

Kain v. Gibboney, 813

2. A bequest, to the Bishop of Wheeling or to his successor in said dignity, for the benefit of an unincorporated religious community, but not declared to be for religious uses, held invalid in that State.

Idem, 813

CHARTER-PARTIES.

1. Where a charter-party contains a recital that, at the date of its execution, the vessel was lying in the harbor of New Orleans, while she was then at sea; held, that that recital is not a warranty or contract, but a representation, and if the charterers knew that the vessel was not there, so that they were not deceived or misled by the recital, it was immaterial.

Bailey v. Davis, 944

2. Where the charter-party fixed no definite time for the vessel to be at New Orleans, ready to receive the cargo, the master was only bound to use reasonable diligence in bringing her to that port.

Idem, 944

CHATTEL MORTGAGES.

1. A chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside.

Stewart v. Platt, 816

2. The actual residence of the mortgagors, and not their residence as recited in the mortgage, controls.

Idem, 816

3. Although chattel mortgages, by reason of the failure to file them in the proper place, are void as against judgment creditors, they are valid and effective as between the mortgagors and the mortgagee.

Idem,

816

CITIZENSHIP.

SEE ALIENS, 1, 2.

CIVIL RIGHTS.

SEE CONSTITUTIONAL LAW, 16-30.

COLLECTORS.

An adjusted account made by the Secretary of the Treasury containing an allowance made by him to a collector of internal revenue for extra compensation, is conclusive on that question.

U. S. v. Morgan,

519

COLLISION.

Where a collision between a steamer and a schooner was due alone to the fact that the steamer undertook to pass between two schooners when she should have gone outside of them, the steamer is liable for the damages.

The Abbottsford v. Johnson,

168

CONFEDERATE STATES.

SEE PAYMENT, 3.

CONFISCATION.

1. In proceedings to condemn land under the Confiscation Act, where a particular parcel of the same is not mentioned either in the information, the monition, or the decree of condemnation, the Marshal's deed on the sale conveyed no title to such parcel, although purporting to convey the same.

Burbank v. Semmes,

315

2. By the Abandoned and Captured Property Act, the provisions for confiscating property, in the Confiscation Act of 1862, are not repealed.

U. S. v. Winchester,

479

3. No previous seizure of the property, under an order of the Executive, is essential to give jurisdiction to the court to adjudge its forfeiture and condemnation under the Confiscation Act.

Idem,

479

4. Where half the proceeds of cotton seized by the naval forces was distributed to the naval captors as prize money, the claimant is entitled to recover for such amount illegally distributed.

Idem,

479

5. Where cotton was seized under the Confiscation Act by order of the District Court, and that court ordered the cotton sold and the proceeds to be deposited in a bank to the credit of its clerk, and the bank failed, the United States is not liable to the owner of the cotton for such proceeds, although the condemnation proceedings against him were dismissed, and the bank was a designated depository of public money.

Branch v. U. S.,

759

CONSTITUTIONAL LAW.

SEE ACTIONS, 3, 4.

APPEAL AND ERROR, 5.

STATE LAWS AND DECISIONS, 2, 4, 5.

STATES, 1.

STATUTES, 3.

1. The Missouri Constitution of 1855, which forbids any county, city or town to become stockholders of, or to loan its credit to any corporation without the assent of two thirds of its qualified voters, was prospective only in its effect, and did not take away any right already given by statute.

County of Schuyler v. Thonas,

88

2. Where a county was authorized to become a stockholder of a corporation by virtue of its original charter, passed before the adoption of such constitution, no submission of the question to a popular vote was necessary.

Idem,

88

3. The Act of March 3, 1873, 17 Stat. at L., 509, is a valid and constitutional exercise of legislative power, requiring the Attorney-General to bring a suit in equity in the name of the United States, in any Circuit Court, against the Union Pacific Railroad Company and others.

U. S. v. Union Pacific R. R. Co.,

143

4. The provisions authorizing process to be served without the limits of the district where the suit was brought, and parties and subjects of contro-

versy to be united which, in an ordinary chancery suit, would render a bill multifarious, are not unconstitutional, but are regulations of practice and procedure which are subject to legislative control.

Idem,

143

5. Except in favor of the company or of the United States, there can, therefore, be no recovery, under the said Act of March 3, 1873, and none but such as was sanctioned by the principles of equity before it was passed.

Idem,

143

6. The interference, by the Attorney-General, with corporations, on the ground of a trust in the government, is limited to two classes: 1. To religious, charitable, municipal, or other corporations whose functions are solely public, and whose managers have destroyed or misappropriated the fund, or otherwise abused those two functions; 2. Where other corporations exercise powers beyond those to which they are limited by the law of their organization.

Idem,

143

7. The constitutional guaranty of religious freedom was not intended to prohibit legislation in respect to polygamy.

Reynolds v. U. S.,

244

8. A Statute of Illinois, passed in 1855, declares that all the property of the Northwestern University shall be forever free from taxation. A Statute of 1872 limited this exemption to land and other property in immediate use by the Institution; held, that the latter statute impaired the obligation of the contract of exemption found in the Statute of 1855.

N. W. University v. People,

387

9. Whether the Statute of 1855 is a valid contract, or is void by reason of its conflicting with the State Constitution of 1848, under which it was made, is a question on which the judgment of the Supreme Court of Illinois can be reviewed here.

Idem,

387

10. The lands, and other property of the University, the annual profits of which are devoted to the purposes of the Institution as a school, could under such State Constitution be exempted by statute from taxation, and the exempting power of the Legislature was not limited to real estate occupied or in immediate use by the University.

Idem,

387

11. The Constitution of the State of Mississippi of 1869, section 14, is wholly prospective and does not apply to an Act passed before its adoption.

Supervisors v. Galbraith,

410

12. Taxes levied by a State upon vessels, although enrolled, owned by the citizens of the State, based on a valuation of the vessel as property, are not within the constitutional prohibition against levying duties of tonnage.

Wheeling P. & Cin. Transportation Co.

Wheeling,

412

13. So long as a State, by its laws prescribing the mode and subject of taxation, does not trench upon the legitimate authority of the Union, nor violate any right recognized or secured by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive or onerous.

Kirtland v. Hotchkiss,

558

14. The Constitution does not prohibit a State from taxing one of its resident citizens, for a debt held by him, due by a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

Idem,

558

15. Section 643 of the Revised Statutes of the United States, which declares that "any civil suit or criminal prosecution commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, *** may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court," is not in conflict with the Constitution of the United States.

Tennessee v. Davis,

648

16. The Fourteenth Amendment of the Constitution of the United States was intended to secure to a recently emancipated race, all the civil rights that the superior race enjoy, and to give to it the protection of the General Government, in the enjoyment of such rights, whenever they should be denied by the States.

Strawder v. West Virginia,

664

17. The Amendment not only gave citizenship and the privileges of citizenship to persons of color

but denied to any State the power to withhold from them the equal protection of the laws, and invested Congress with power, by appropriate legislation, to enforce its provisions.

Idem.

664

18. The Statute of West Virginia, which denies to colored citizens the right and privilege of being jurors, because of their color, although qualified in all other respects, is a discrimination against them which is forbidden by the Amendment.

Idem.

664

19. Section 641 of the Revised Statutes is not in conflict with the Constitution of the United States.

Idem.

664

20. The object of sections 641, 1977 and 1978 of the U. S., R. S., as of the Constitution which authorized them, was to place, in respect to civil rights, the colored race upon a level with the white.

Ex parte Virginia.

667

21. The prohibitions of the Fourteenth Amendment have exclusive reference to state action. Section 641 was also intended to protect them against state action, and against that alone.

Idem.

667

22. Congress, by virtue of the 5th section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. It may secure the right, that is, enforce its recognition, by removing the case from a state court, in which it is denied, into a federal court, where it will be acknowledged.

Idem.

667

23. To judicial infractions of the constitutional Amendment after the trial has commenced, section 641 has no applicability. It was not intended to reach such cases. They were left to the revisory power of this court.

Idem.

667

24. The denial or inability to enforce, in the judicial tribunals of a State, rights secured to a defendant by any law providing for the equal civil rights of all persons, citizens of the United States, referred to in section 641, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State.

Idem.

667

25. The Constitution and laws of Virginia do not exclude colored citizens from service on juries.

Idem.

667

26. The defendant moved in the state court that the venire be so modified that one third, or some portion of the jury, should be composed of his own race. The denial of that motion was not a denial of a right secured to him by any law providing for the equal civil rights of citizens of the United States, or by any Statute, or by the Fourteenth Amendment.

Idem.

667

27. A mixed jury in a particular case is not essential to the equal protection of the laws. It is a right to which any colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against him, because of his color.

Idem.

667

28. The Act of March 1, 1875 (18 Stat., part 3, 338), which enacts that "no citizen shall be disqualified from service as grand or petit juror in any court of the United States, or of any State, on account of race, color or previous condition of servitude; and any officer who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor," is authorized by the Thirteenth and Fourteenth Amendments of the Constitution.

Ex parte Virginia.

676

29. The inhibition contained in the Fourteenth Amendment means that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within her jurisdiction the equal protection of the laws.

Idem.

676

30. The Act of a state officer in selecting jurors is ministerial, not judicial; and, although he derives his authority from the State, he is bound, in the discharge of that duty, to obey the Federal Constitution and the laws passed in pursuance thereof, that no person shall be disqualified as a juror on account of race, color or previous condition of servitude.

Idem.

676

31. A municipal corporation, owning and maintaining improved wharves and other property for the benefit of commerce upon the public navigable

waters of the United States, is not prohibited by the Constitution of the United States from charging and collecting from parties using its wharves and facilities, reasonable fees for the use of the property.

N. W. Union Packet Co. v. St. Louis.

688

32. The ordinance of Vicksburg, passed July 12, 1865, establishing the rate of wharfage of vessels at that city, is constitutional and valid. It does not trench upon the power of Congress to regulate commerce among the States, nor lay a duty of tonnage in the sense of the Constitution.

Vicksburg v. Tobin.

690

33. The Act of Ohio, passed Feb. 16, 1846, that, upon the fulfillment of certain terms and conditions by the Town of Canfield, in Mahoning County, the county seat should be "permanently established" at that town, does not constitute, a contract within the meaning of the Constitution.

Newton v. Commissioners.

710

34. There was no stipulation that the county seat should remain there in perpetuity.

Idem.

710

35. Congress had power, by the Constitution, to enact sections 5515 and 5522 of U. S. R. S., provided in the Enforcement Act of May 31, 1870, and the supplement thereto of Feb. 23, 1871, for supervising the elections of Representatives, and for preventing frauds therein, and the other sections of U. S. Rev. Stat., relating to the elective franchise, which they are intended to enforce.

Ex parte Siebold.

717

36. Congress has a supervisory power over elections for Representatives, and may make new regulations, or add to, alter or modify the regulations made by the State, or impose new duties on the officers of election, or additional penalties for breach of duty, or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted. The authority of Congress on the subject is paramount to that of a State.

Idem.

717

37. The provision which authorizes the deputy marshals to keep the peace at the elections is not unconstitutional. The National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

Idem.

717

38. The provisions adopted for compelling the state officers of election to observe the State laws regulating elections of Representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offense against the United States, which Congress may rightfully inhibit and punish.

Idem.

717

39. Congress had power by the Constitution to vest in the circuit courts the appointment of supervisors of election.

Idem.

717

40. An officer of election, at an election for a Representative to Congress in the City of Cincinnati, was convicted of a misdemeanor in the Circuit Court of the United States, under section 5515 of the Revised Statutes, for not conveying the ballot box, after it had been sealed, to the county clerk, and for allowing it to be broken open. *Held*, that Congress had power to pass the law under which the conviction was had, and that the Circuit Court had jurisdiction of the offense.

Ex parte Clarke.

715

41. A State cannot, in the exercise of her taxing power, impose upon the products of another State, brought within her limits for sale or use, a more onerous burden or tax than upon like products of her own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing in or selling them.

Guy v. Baltimore.

743

42. An ordinance of Baltimore, whereunder vessels laden with the products of other States are required to pay, for the use of the public wharves of that city, fees which are not exacted from vessels landing thereat with the products of Maryland, is in conflict with the Constitution of the United States.

Idem.

743

43. So far as it may be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin, the power of

the National Government over commerce with foreign nations and among the several States reaches the interior of every State of the Union.

Idem, 743

44. A state tax on peddlers of sewing-machines, which applies alike to sewing-machines manufactured in the State and out of it, is valid, and not repugnant to the U. S. Constitution.

Machine Co. v. Gage, 754

45. A clause in a charter of a city railroad company, that the company shall pay such license for each car run as is paid by other passenger railway companies in the city, which was thirty dollars, is not a contract that the license charged for such cars should never exceed the annual sum of thirty dollars, and protected from impairment by the United States Constitution.

Union Pass. Railway Co. v. Philadelphia, 912

46. A subsequent Act of the Legislature which requires such companies to pay the annual license of fifty dollars for each car, is not unconstitutional as violating a contract.

Idem, 912

47. Where power to alter, revoke or annul any charter of incorporation was vested in the Legislature by the Constitution of the State, before the defendant company was incorporated, the Legislature may increase such license fee.

Idem, 912

48. Where the right to sue, which a State gave its creditors, was not, in legal effect, a judicial remedy for the enforcement of its contracts, the obligation of its contracts was not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given.

Mem. & Cent. R. R. Co. v. Tennessee, 960

49. A State cannot be sued in its own courts without its consent. This is a privilege of sovereignty.

Idem, 960

50. Where, in suits against a State, the state courts are made little else than auditing Boards, and if funds are not voluntarily provided to meet the judgment, the courts are not invested with power to supply them, there is no such remedy for the enforcement of the contracts of the State as may not, under the Constitution of the United States, be taken away, by a law of the State.

S. & N. Railroad Co. v. Alabama, 973

51. Section 3413 of the Revised Statutes, that "Every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation paid out by them," is constitutional.

Merch. National Bank v. U. S., 979

52. The general objects and purposes of the Fourteenth Amendment to the U. S. Constitution are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities.

Bowman v. Lewis, 989

53. The constitution of a State may provide two courts of appeal for different portions of its territory, without violating such constitutional Amendment.

Idem, 989

54. No Legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.

Sione v. Mississippi, 1079

55. The police power extends to all matters affecting the public health or the public morals. Lotteries are proper subjects for the exercise of this power.

Idem, 1079

56. The Legislature of a State cannot, by the charter of a lottery company, defeat the will of the people, authoritatively expressed by the adoption of a new state constitution, in relation to the further continuance of such business in their midst.

Idem, 1079

57. The contracts which the Constitution protects are those that relate to property rights, not governmental. The right to suppress lotteries is governmental, to be exercised at all times by those in power, at their discretion.

Idem, 1079

CONTRACTS.

SEE CARRIERS, 1-3.

CONSTITUTIONAL LAW, 8, 33, 34, 45, 46, 48.

HUSBAND AND WIFE, *passim*.

EQUITY, 2-6, 12.

EVIDENCE, 2.

SPECIFIC PERFORMANCE, *passim*.

USAGE, 2, 3.

1. Where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract.

Little Rock v. National Bank, 108

2. Where it is a simple question of the authority of a corporation to make the contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity.

Union Nat. Bank v. Matthews, 188

3. Sufficient authority to contract for the sale of real estate may be given by letter.

Lyon v. Pollock, 265

4. A deed although invalid as a conveyance, may be good as a contract for the sale of the property described in it.

Idem, 265

5. Where a government contractor failed to do his work within the time stipulated, and his contract was rightfully terminated by the officer in charge, he cannot recover from the government the difference between the price at which he was to do it and the lower price at which it was re-let.

Quinn v. U. S., 269

6. But the government must pay to the contractor the ten per cent of the price of the work completed, retained by it as security, as the government sustained no loss but re-let the work at a lower price.

Idem, 269

7. The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear.

Southern Express Co. v. R. Co., 319

8. A receiver of a railroad appointed in a foreclosure action is the only necessary party defendant in an action to compel the specific performance of a contract made by the railroad company.

Idem, 319

9. Such receiver cannot be compelled to perform a contract for the transportation of persons and property over the road made by the railroad company.

Idem, 319

10. Construction of a government contract for making distillers' meters.

Tee v. U. S., 352

11. Notice of rescission of a contract is not void because given on Sunday, without a statutory provision to that effect.

Pence v. Langdon, 420

12. An oral demand of performance of a written contract is sufficient, where the contract does not contain the stipulation that the demand should be in writing.

Colby v. Reed, 484

13. Where a party demands more than he is entitled to receive, that circumstance alone will not justify the other party in refusing to deliver that part of the property to which the party making the demand is entitled.

Idem, 484

14. A contract, for the sale of specific, ascertained goods, vests the property immediately in the buyer and gives to the seller a right to the price, unless it is shown that such was not the intention of the parties.

Hatch v. Oil Co., 554

15. Where there has been a complete delivery of the property, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract.

Idem, 554

16. A contract for the sale of staves to be made, piled and counted, held to pass the title to the vendee upon those things being done.

Idem, 554

17. Where parties in the effort to fulfill an order for a large amount of ice for the use of the government, which by their contract they were bound to furnish, purchased ice which was lost by the suspension of the order, they are entitled to recover the cost of the ice so lost and the expense of the care and attempt to preserve it.

Parish v. U. S., 763

18. The terms of a contract under seal may be varied by a subsequent parol agreement.

Ches. & Ohio Canal Co. v. Ray, 792

19. Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity.

National Bank v. Hall, 822

20. A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer.

Idem, 822

21. Where new members are added to a firm, the new firm will not be bound by a contract previously made with the old firm.

Idem, 822

22. Where one agreed to procure the appointment of another as special counsel of the United States in certain litigated cases, and to assist him in managing and carrying on their defense, and in consideration thereof was to receive one half of the fees received by such counsel in such cases; held, that the contract was void as against public policy.

Mequire v. Corwine, 899

23. The Act of South Carolina of June 9, 1877, to prescribe the mode of proving bills of the bank of the State tendered for taxes, is not a new contract, but a new way of enforcing an old one.

So. Carolina v. Galliard, 937

24. Where claimants executed a new contract to the government in place of a former one, on the government refusing to carry out the former one, they cannot recover of the government the greater compensation provided by the former contract.

Silliman v. U. S., 987

25. Although no express contract for carrying the mails is proven, yet, where a railroad company has been carrying them and receiving pay therefor, such contract will be presumed.

West. Union R. R. Co. v. U. S., 1068

COPYRIGHT.

1. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. To infringe this right, a substantial copy of the whole or of a material part must be produced.

Perris v. Hexamer, 308

2. A copyright of a map does not give the publisher an exclusive right to the use upon other maps of the particular signs and key which he adopted for the purposes of his delineations.

Idem, 308

3. The exclusive property in a system of book-keeping cannot be claimed, under the law of copyright, by means of a book in which that system is explained.

Baker v. Selden, 841

4. The copyright of a book on book-keeping cannot secure the exclusive right to make, sell and use account books prepared upon the plan set forth in such book.

Idem, 841

5. The description of an art in a book, although entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself.

Idem, 841

6. Blank account-books are not the subject of copyright.

Idem, 841

CORPORATIONS.

SEE BONDS, 37.

CONTRACTS, 2, 7.

LIMITATIONS, 16.

MANDAMUS, 2.

MASTER AND SERVANT, 1.

RAILROADS, *passim*.

TAXES AND TAX SALES, 8, 10, 18, 26, 27, 32.

TOWNS, 1, 2.

1. If a city has power to bind itself by substituting a new liability for a canceled one, it may do so by any instrument which affords evidence of the debt.

Little Rock v. National Bank, 108

2. If a city issues its obligations for its debts, in an illegal form, such as bank notes, it may bind itself by bonds issued in a legal form, to a holder of such notes in lieu thereof.

Idem, 108

3. Where the indebtedness of a city is conclusively established by judgments recovered against it, the payment of the judgments is not restricted to any species of property or revenues, nor subject to any conditions.

U. S. v. New Orleans, 225

4. The only penalty to which a corporation is liable for default under the Internal Revenue Act for failure in making a return or in payment of a tax, is that of \$1,000 specially provided for in that section.

Elliott v. Railroad Co., 292

5. Where a village has ample authority to keep the streets and walks in a safe condition for passage, at all times, the power carries with it the duty of exercising it.

Evanson v. Gunn, 306

See OTTO 8, 9, 10, 11.

6. One to whom stock of a corporation has been transferred in pledge or as collateral security, and who appears on the books of the corporation as the owner of the stock, is liable to creditors as a stockholder.

Germania National Bank v. Case, 448

7. A shareholder who has transferred his stock for the mere purpose of avoiding his liability to the company or its creditors, still remains liable.

Idem, 448

8. By general comity, corporations created in one State or Territory are permitted to carry on any lawful business in another, and to acquire, hold and transfer property there equally as individuals.

Cowell v. Springs Co., 547

9. When a corporation is authorized by statute to hold real property necessary to enable it to carry on its business, the inquiry whether any particular real property is necessary for that business is a matter between the State and the corporation, which does not concern third parties.

Idem, 547

10. A special action on the case will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal, and its receiver may be ordered to pay the amount recovered.

Case v. Bank, 695

11. Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

Nat. Bk. v. Graham, 750

12. Individuals elected and serving as officers of a corporation may incur a statutory liability for the corporate debts, although irregularities occurred in their election.

Steam-Engine Co. v. Hubbard, 786

13. Under the Connecticut Statute, such officers are, for the neglect or refusal to make an annual report, liable only for debts contracted during the period of such neglect or refusal.

Idem, 786

14. Where a company borrowed money and its note was given for it by its actuary, and the fund was honestly applied in payment of pressing liabilities of the company, and the trustees individually were advised of the transaction and made no objection, the validity of the note cannot be effectually denied by the company.

Creswell v. Lanahan, 853

15. The individual liability of stockholders in a corporation is always a creature of statute.

Terry v. Little, 864

16. Where the language of the charter is that the stockholders are "liable and held bound for any sum not exceeding twice the amount of their shares," the provision is, in legal effect, for a proportionate liability by all stockholders.

Idem, 864

17. A creditor of an insolvent corporation can proceed against one or more delinquent stockholders to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution.

Hatch v. Dana, 885

18. A court of equity, may enforce payment of such stock subscriptions although there have been no calls for them by the company.

Idem, 885

19. Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed.

Wright v. Nagle, 921

20. Where a New York corporation is authorized to secure the payment of its debts by mortgaging its real estate, it has the power to give a mortgage for future advance.

Jones v. Guaranty & Ind. Co., 1030

21. If the mortgage be *ultra vires*, no one can take advantage of the defect of power involved but the State.

Idem, 1030

22. If a note secured by a mortgage be renewed or otherwise changed, the lien of the mortgage continues until the debt is paid.

Idem, 1030

23. Where a corporation at the date of a contract had not filed its articles of association, but subsequently to filing them ratified the contract by recognizing and treating it as valid, this made the contract valid.

Whitney v. Wyman, 1050

COSTS.

SEE APPEAL AND ERROR, 15,

1. Costs in criminal proceedings are a creature of statute, and a court cannot award them unless some statute has conferred the power. By the common law the State pays no costs.

U. S. v. Gaines,

733

2. A *mandamus* will not be issued to compel a state comptroller to issue his warrant for the payment of costs until they have been taxed, nor if the bill contains costs for which the State is not liable.

Idem,

733

COUNTIES.

1. In Kansas, counties are bodies corporate and politic, capable of suing and being sued. The name by which they can sue or be sued is, "The Board of County Commissioners of the County of—"

Co. Commissioners v. Sellev,

333

2. The Board of Chosen Freeholders, of Hudson County, New Jersey, cannot incur for the county any obligations beyond its income previously provided by taxation.

Crampton v. Zabriskie,

1070

3. Resident tax payers can invoke the interposition of a court of equity, to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay.

Idem,

1070

COUPONS.

SEE BONDS, 15, 18, 21, 23.

COURT OF CLAIMS.

SEE ABANDONED AND CAPTURED PROPERTY ACT, 1.

LIMITATIONS, 14, 19.

1. Where an act referring a claim for damages to the Court of Claims did not authorize it to allow interest, none can be allowed.

Tillson v. U. S.,

543

2. No interest can be allowed in that court on any claim, unless upon a contract expressly stipulating for interest.

Idem,

543

COURTS-MARTIAL.

1. A naval court-martial has jurisdiction to try a paymaster's clerk.

Ex parte Reed,

538

2. The Secretary of the Navy is authorized to establish "Regulations of the Navy," with the approval of the President, which regulations are the law of such court.

Idem,

538

3. The authority that ordered the court may direct it to reconsider its proceedings and sentence, before the court shall have been dissolved.

Idem,

538

4. Where such court has jurisdiction over the person and the case, its proceedings cannot be collaterally impeached for any mere error or irregularity, but an act beyond its jurisdiction is void.

Idem,

538

5. To warrant the discharge, by *habeas corpus*, from the sentence of such court under which one is held, such sentence must be, not merely erroneous and voidable, but absolutely void.

Idem,

538

COVENANTS.

SEE HUSBAND AND WIFE, 11.

1. The covenant of good right to convey is synonymous with the covenant of seisin. These covenants, if broken at all, are broken when they are made. They are personal and do not run with the land.

Peters v. Bowman,

91

2. The covenant of warranty runs with the land, and passes by assignment. When broken, it becomes a chose in action. A subsequent grantee may sue the warrantor in the name of the holder. There can be but one satisfaction. A sheriff's or a quitclaim deed will carry the covenant before its breach to the grantee.

Idem,

91

3. Upon a bill of foreclosure, or a bill to enforce a lien for purchase money, where there has been no fraud and no eviction, the vendee or a party in possession under him, cannot controvert the title of the vendor, but must rely solely upon the covenants of title in deed of the vendor.

Idem,

91

CRIMINAL LAW.

SEE COSTS, 1.

EVIDENCE, 3, 8, 9.

HABEAS CORPUS, *passim*.

JURISDICTION, 23-25.

1. The Act of Congress, R. S., sec. 4783, which defines the offense of embezzlement, by a guardian, of a ward's pension money, is valid and constitutional, and the Circuit Court is vested with the jurisdiction to try a person charged with such offense and sentence him to the punishment imposed by such Act.

U. S. v. Hall,

180

2. Wrongfully withholding back pay or bounty by an agent or attorney from a claimant, is not an offense under section 13 of the Act of July 4, 1864, 13 Stat. at L., 389.

U. S. v. Benecke,

192

3. The word "claimant" under that Act means a claimant before the pension bureau.

Idem,

192

4. A defendant cannot be punished under section 31 of the Act of March 3, 1873, where the money had already been withheld five years before the Act was passed.

Idem,

192

5. To constitute the crime by an agent or attorney, of wrongfully withholding a pension, there must be such unreasonable delay, or such refusal to pay on demand, or such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding capable of proof to a jury.

U. S. v. Irvine,

193

6. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution.

Idem,

193

7. Such crime is not a continuous one to the time of the indictment. Where defendant, in 1870, unlawfully withheld the money, after a demand, and the indictment was found in 1875, the two years Statute of Limitations was a bar to the prosecution.

Idem,

193

8. Religious belief cannot be accepted as a justification of an act made criminal by the law of the land.

Reynolds v. U. S.,

244

9. Section 5362 of the U. S. Revised Statutes, respecting bigamy, is within the legislative power of Congress.

Idem,

244

10. A criminal intent is generally an element of crime; but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does.

Idem,

244

11. A sentence for murder, that the prisoner be shot, was authorized, in Utah, by the laws prescribing the mode of execution.

Wilkerson v. Utah,

345

12. Accomplices, although admitted as witnesses for the prosecution, are not of right entitled to a pardon, but have only an equitable right to a recommendation to the executive clemency.

Whisky Cases,

399

13. Prisoners under such circumstances cannot plead such right in bar of an indictment against them, nor avail themselves of it as a defense on their trial, but it may be made the ground of a motion for putting off their trial, in order to allow time for an application to the pardoning power.

Idem,

399

14. The district attorney has no authority to make an agreement that if a person charged with an offense would testify against his accomplices, he should be exempt from prosecution.

Idem,

399

15. An indictment for extortion in taking fees from pensioners under section 12 of the Act of 1825, is not sustainable against a surgeon to examine pensioners.

U. S. v. Germaine,

482

16. The Commissioner of Pensions is not the head of a department within the meaning of the Constitution.

Idem,

482

17. The crimes, of a false classification of goods as to value and quality, and effecting an entry of goods at less than the true weight or measure, arise under the revenue laws and are barred by the five years' Statute of Limitations.

U. S. v. Hirsch,

539

18. A conspiracy to defraud the United States out of duties on imported merchandise is not a crime arising under the revenue laws, and is barred by the three years Statute of Limitations.

Idem,

539

CUSTOM.

SEE USAGE, *passim*.

DAMAGES.

SEE ACTIONS, 2, 4-8.

CONTRACTS, 5, 11, 16.

TRADE-MARKS, 1.

1. The jury, if they find for the plaintiff, cannot, in estimating the damages, consider the fees of counsel in prosecuting the case.

Stewart v. Sonneborn,

116

2. In an action for negligent shooting and wounding plaintiff, it is not error to charge the jury that, in computing the damages, they may take into consideration "a fair compensation for the physical and mental suffering caused by the injury."

McIntyre v. McGibbin,

572

3. In a suit brought for personal injuries, the damages must be left to the good sense and deliberate judgment of the jury.

City of Panama v. Phelps,

1061

DEBTOR AND CREDITOR.

SEE EQUITY, 1, 14, 15.

JUDGMENT, 8.

1. Where a debt already exists from one person to another, and a promise is made by a third person to the debtor to pay such debt (there being no novation), he has a right of action against the promisor for his own indemnity. The original creditor cannot sue on the promise.

National Bank v. Grand Lodge,

75

DEEDS.

SEE CONFISCATION, 1, 2.

CONTRACTS, 4.

ESTOPPEL, 5.

EVIDENCE, 22.

HUSBAND AND WIFE, 9-12.

LANDS, *passim*.

PATENTS FOR LAND.

1. In Louisiana, a sheriff's deed is good if executed by a deputy sheriff in his own name.

Flournoy v. Lastrapes,

406

2. A condition in a deed of land that intoxicating liquors shall never be manufactured or sold thereon, and that if this condition be broken, the deed shall become void and the title revert to the grantor, is not repugnant to the estate granted, nor unlawful.

Cowell v. Springs Co.,

547

3. Upon breach of the condition, the grantor has a right to treat the estate as having reverted, and, under a statute of Colorado, can maintain ejectment without a previous entry or a demand.

Idem,

547

4. In such a suit, the grantee is estopped from denying the validity of the title conveyed by the deed whereunder he took possession of the land.

Idem,

547

DEFINITIONS.

1. The word "trade" includes a sale of lands.

May v. Sloan,

797

DELIVERY.

SEE CONTRACTS, 12, 14.

DEMURRER.

SEE PLEADINGS, 1, 2, 4, 5.

DEPOSITS.

SEE BANKS, 9, 10.

DUTIES.

SEE CRIMINAL LAW, 17, 18.

1. An action against a collector for illegal exactions of duties made by him, is the only judicial remedy authorized by Congress for the redress of such grievances.

Andreae v. Redfield,

158

2. Actions of the kind must be commenced against the collector who made the illegal exaction, and such an action cannot proceed against the successor after the incumbent goes out of office.

Idem,

158

See OTTO 8, 9, 10, 11.

3. Promises or representations made by the Secretary of the Treasury or by officers of the customs in regard to the claims, do not preclude the collector, when sued, from pleading any defense, such as the Statute of Limitation.

Idem,

158

4. In section 3, of the Act of June 8, 1872, countries "east of the Cape of Good Hope" mean countries with which, at that time, the United States ordinarily carried on commercial intercourse by passing around that cape.

Powers v. Comly,

805

5. There is nothing in the Act of Congress which is in conflict with the Treaty with Persia.

Idem,

805

6. It is only when the products of Persia are first exported to some place west of the Cape, and from there exported to the United States, that the additional duty of ten per cent is imposed.

Idem,

805

7. Under the Tariff Acts of 1861 and 1862 duties at the rate of thirty per cent *ad valorem*, and two cents per square yard were chargeable upon goods known in trade as *poil de chevres*, reps, plaids, lustrés, Saxony dress-goods.

Greenleaf v. Goodrich,

845

8. Commercial designation of an article among traders and importers, where such designation is clearly established, fixes its character for the purpose of the tariff laws.

Idem,

845

9. Under sections 2503 and 2504 of the Revised Statutes, "tin plate" and "terne tin" are dutiable at only ninety per cent of the rate of fifteen per cent *ad valorem*.

Arthur v. Dodge,

948

10. A protest against the payment of illegal duties is sufficient if it is so distinct and specific as to apprise the collector of the nature of the objection made to the duty imposed.

Idem,

948

EJECTMENT.

SEE ADVERSE POSSESSION, *passim*.

DEEDS, 3.

LANDS, 31, 50.

1. In actions of ejectment in the United States Courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the Federal Courts.

Foster v. Mora,

191

2. In California continuous adverse possession of land for a period of more than five years subsequent to the time when the statute began to run and before the action was commenced, bars an action of ejectment.

Idem,

191

ELECTIONS.

SEE CONSTITUTIONAL LAW, 35-40.

EMINENT DOMAIN.

SEE LANDS, 17.

1. In determining the value of land appropriated for public purposes, the inquiry must be: what is the property worth in the market, from its availability for valuable uses, both now and in the future?

Boom Co. v. Patterson,

206

2. In estimating the value of lands sought to be taken by a boom company, its adaptability for boom purposes is a proper element of value for consideration.

Idem,

206

3. The exercise by the State of its sovereign right of eminent domain, cannot be interfered with by the United States; but when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed, is a proper one for judicial cognizance.

Idem,

206

EQUITY.

SEE CORPORATIONS, 17.

COUNTIES, 3.

HUSBAND AND WIFE, 2, 4.

JURISDICTION, 10, 11.

LACHES, 1.

LANDS, 44, 45.

LIENS, 3.

LIMITATIONS, 12, 13.

PARTNERSHIP, 1.

PRACTICE, 6-10.

RECEIVER, 1, 2.

TAXES AND TAX SALES, 35.

1. Where the question presented to the court by a bill in equity is merely an abstract one, and the bill shows no equity in the complainant, it must be dismissed.
Williams v. Hagood, 51
2. A bill may be maintained to reform a written policy, after loss, upon the ground that it does not express the intent of the contracting parties.
Snell v. Ins. Co., 52
3. Relief should not be granted where the party seeking it has unreasonably delayed bringing suit, nor where he acquiesced in the written agreement after becoming aware of the mistake.
Idem, 52
4. A mere mistake of law without other circumstances, constitutes no ground for the reformation of written contracts.
Idem, 52
5. Power to reform written contracts for fraud or mistake, belongs to courts of equity and cannot be exercised by common law courts.
Irvinson v. Hutton, 66
6. Such power should be exercised only in cases where the proof is entirely satisfactory.
Idem, 66
7. Relief in equity will not be granted merely because a security in an admiralty suit becomes ineffectual if it appears that it became so without fraud, misrepresentation or accident, which might have been prevented by due diligence.
U. S. v. Ames, 295
8. It is essential to a bill in chancery on behalf of the United States to set aside a patent for lands, or the final confirmation of a Mexican grant, that the Attorney-General brings it himself, or gives his authority for bringing it.
U. S. v. Throckmorton, 93
9. A creditor's bill must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant.
Smith v. R. R. Co., 437
10. It is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of a court of equity. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.
Phelps v. McDonald, 473
11. A bill to compel the conveyance of land cannot be maintained upon a parol agreement only. The Statute of Frauds would be a complete bar.
May v. Sloan, 797
12. Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments, when the defect or error arises from accident or misconception.
Walden v. Skinner, 963
13. In equity, a contract for the sale of land is treated, for most purposes, precisely as if it had been specifically performed.
Guntton v. Carroll, 985
14. Whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies.
Case v. N. O. & C. R. R. Co., 1004
15. A creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there, he will not be turned back to a court of law to establish the validity of his claim.
Kennedy v. Cresswell, 1075
3. Such defense is available at law, as well as in equity.
Idem, 618
4. When the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they will be protected.
Coudrey v. Vandemburgh, 923
5. Where A conveyed lands to B, and took back a mortgage and assigned the mortgage to C, who took possession of the lands claiming title, and conveyed, with warranty to D, and B took no possession and never claimed any title himself, but subsequently drew deeds of the premises from others claiming under A, and, as a justice of the peace or notary public, took the acknowledgment of such deeds, and upon these occasions was silent as to any defect in the title; held, that B and one to whom he subsequently gave a quitclaim deed, are estopped from claiming any title to the premises.
Baker v. Humphrey, 1065

EVIDENCE.

SEE ADMINISTRATORS AND EXECUTORS, 4, 11.

APPEAL AND ERROR, 2, 11, 14.

INSURANCE, 5-7.

LAWS, 1.

OFFICERS, 4.

PRACTICE, 3.

TAXES AND TAX SALES, 1.

WITNESSES, *passim*.

1. Declarations of a person having the possession and seisin of lands, in harmony with deeds which he had executed, and against his interest, in reference to property not conveyed, are admissible on the question of title.
Bowen v. Chase, 47
2. Parol proof should never be made the foundation of a decree, to reform a written contract, so as to vary it, except it be of the clearest and most satisfactory character.
Snell v. Ins. Co., 52
3. An admission of a servant of an inn that he had stolen the jewelry of a guest is not evidence against the innkeeper.
Elcox v. Hill, 103
4. In every action for malicious prosecution, it must be proved that the proceedings instituted against the plaintiff have failed; but their failure is not evidence either of malice or want of probable cause.
Stewart v. Sonneborn, 116
5. In an action against an officer for false imprisonment in causing plaintiff's arrest, every fact tending to show the motives of the officer in causing the arrest, or to show the existence of the grounds assigned for the arrest, is admissible in mitigation of damages, although such facts may not establish legal justification.
Beckwith v. Bean, 124
6. Evidence of a reasonable suspicion, and that which shows that the truth of the case as it actually existed at the time of the arrest, sustained the belief under which the defendant acted, is admissible.
Idem, 124
7. Evidence of an admission of the party arrested, not made until after his release from custody, and unknown to the party causing the arrest until after the commencement of the action against him, is admissible for the same purpose.
Idem, 124
8. If a witness is wrongfully kept away by the prisoner, his testimony, taken on a former trial of the prisoner for the same offense, but under another indictment, may be given in evidence.
Reynolds v. U. S., 244
9. Ignorance of the law is not evidence of a want of criminal intent.
Idem, 244
10. Where countries have been acquired by the United States, its courts take judicial notice of the laws which prevailed there up to the time of such acquisition.
U. S. v. Perot, 251
11. It is proper to prove by parol evidence, that a certificate of stock was issued as security for a loan and not upon a purchase.
Brick v. Brick, 256
12. The rule which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. It does not forbid an inquiry into the object of the parties in executing and receiving the instrument.
Idem, 256

ESTOPPEL.

SEE BONA FIDE PURCHASERS, 2.

BONDS, 6, 9, 12, 16, 18, 19, 22, 32.

CORPORATIONS, 13.

DEEDS, 1.

FORMER ADJUDICATIONS, *passim*.

HUSBAND AND WIFE, 11.

JUDGMENTS, 4.

MECHANICS' LIENS, 8.

UNITED STATES, 1.

1. He, who by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.
Dickerson v. Colgrove, 618
2. An estoppel in *pais* in regard to real estate may be created by letter disavowing all intention to claim the same.
Idem, 618

13. A record kept by a person employed by the United States signal service, is admissible in evidence.

Evanston v. Gunn, 306

14. In *trespass quare clausum fregit*, actual possession of the land by the plaintiff is sufficient evidence of title to authorize a recovery against a mere trespasser.

Campbell v. Rankin, 435

15. While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or the only evidence of the priority or extent of a party's actual possession.

Idem, 435

16. In ejectment, or *trespass quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor, prior to his eviction, is *prima facie* evidence of title, on which he can recover against a mere trespasser.

Burt v. Panlaud, 457

17. Experts are entitled to give their opinions in evidence as to conclusions from facts within the range of their specialties.

Cong. & Empire Spring Co. v. Edgar, 487

18. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and cannot be presumed.

Manning v. Ins. Co., 761

19. Evidence of a parol agreement, made contemporaneously with a written agreement, varying the same, is inadmissible.

East v. Bank, 794

20. Where it was doubtful what the precise intent of the writer of a letter was, the question of intention is open to explanation, and parol evidence of it may be given.

West v. Smith, 809

21. In a suit against a person accountable for public money, a transcript from the books of the Treasury Department is evidence, and a copy of the bonds sued on, when certified, may be annexed to such transcripts, and is entitled to the same degree of credit which would be due to the original.

Bechtel v. U. S., 1019

22. In an action to try title to land, a deed which did not convey or purport to convey the land in controversy, or a deed executed after the action is commenced, is irrelevant and inadmissible.

Hollingsworth v. Flint, 1023

23. Parol evidence is admissible to show that a mortgage, apparently given to secure the debt of an individual, was really given to secure the debt of a company.

Jones v. Guaranty & Indemnity Co., 1030

24. In ejectment, under a general denial, evidence is admissible to show the title of the defendants and the transfers thereof and liens thereon, and the regularity of the proceedings by which the title was acquired or transmitted from one party to another.

Howard v. R. R. Co., 1081

EXCEPTIONS.

SEE APPEAL AND ERROR, 4, 7, 24, 25.
JURY, 13.

A general exception to the charge to the jury cannot be regarded in this court.

Beckwith v. Bean, 124

EXECUTIONS.

1. Lands which are held by a municipal corporation for public purposes, and ground-rents which are part of the public revenues, cannot be levied on nor sold upon execution.

Klein v. New Orleans, 430

2. A public landing on a navigable river in a city used by the public for wharf and levee purposes, is not subject to seizure and sale on execution.

Idem, 430

EXECUTORS.

SEE ADMINISTRATORS AND EXECUTORS, *passim*.

FERRIES.

The statutes of Georgia do not confer on the inferior courts of its several counties the power of contracting away the right of the State to establish ferries and bridges in a particular locality. They give such courts the right to establish ferries and bridges.

Wright v. Nagle, 921

See OTTO 8, 9, 10, 11. U. S., Book 25.

FORMER ADJUDICATION.

1. The judgment of a court of competent jurisdiction is, as to every issue decided the suit, in conclusive upon the parties thereto; and in a subsequent suit between them, parol evidence, to show what was tried in the first suit, is admissible.

Campbell v. Rankin, 435

2. A judgment in an action of *assumpsit*, brought by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of *assumpsit* on the same contract, by the husband alone, to recover for the same injuries.

Pollard v. R. R. Co., 840

3. A decree in an action to remove a cloud upon a title, which was dismissed on the ground that the case was not one in which a court of equity could give relief, is not *res judicata*, so as to constitute a bar to a subsequent action of ejectment for the same land between the same parties.

Phelps v. Harris, 855

4. Where a bill filed to enforce a lien on property has been dismissed on the merits, it is a bar to a second suit for the same cause of action, although the second bill contains additional allegations that, after the dismissal of the former suit, the complainant has obtained judgments and issued executions on his demand.

Case v. N. O. & C. R. Co., 1004

5. The finding of a referee, upon which a judgment is rendered, is part of the record of the case, and is conclusive as to the facts found in all subsequent controversies between the parties on the same contract.

Mason Lumber Co. v. Buchtel, 1073

FRAUDS.

SEE BANKRUPTCY 8.

CARRIERS, 3.

LANDS, 57.

LIMITATIONS, 20, 21.

1. The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit.

U. S. v. Throckmorton, 93

2. The cases where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

Idem, 93

3. A purchase in the name of the solicitor of one whose property is sold, is not necessarily in and of itself fraudulent or invalid.

Pac. R. R. Co. v. Ketchum, 932

4. Where one agreed to sell to another certain pine land, a deed to be made upon the payment of the purchase price, and cutting of the timber was meanwhile prohibited unless written permission was given by the vendor, and the vendee assigned the contract to a third person to whom the vendor gave permission to cut and remove the timber upon his guarantying the payment of the purchase price, he cannot be released from such guaranty upon any false and fraudulent representation, made to him by the agent of the vendee, of the making of which the vendor was ignorant.

Mason Lumber Co. v. Buchtel, 1072

HABEAS CORPUS.

SEE JURISDICTION, 16, 22.

1. While a writ of *habeas corpus* cannot generally be made to subvert the purposes of a writ of error, yet when a prisoner is held without any lawful authority, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.

Ex parte Virginia, 676

2. The question of the constitutionality of U. S. laws is good ground for the issue, by this court, of a writ of *habeas corpus* to inquire into the legality of the imprisonment under a conviction for violating such laws; and if the laws are determined to be unconstitutional, the prisoner should be discharged.

Ex parte Siebold, 717

HIGHWAYS.

SEE ACTIONS, 2, 4.

CORPORATIONS, 5.

HUSBAND AND WIFE.SEE FORMER ADJUDICATION, 2.
LANDS, 58.

1. By the common law, if a husband and wife sell and convey her land, and he receives the consideration money without any reservation of rights on her part, the money belongs to him.

Kesner v. Trigg, 83

2. A post nuptial contract made upon sufficient consideration, and wholly or partly executed, will be sustained in equity.

Idem, 83

3. If a married woman conveys her land, and then chooses to rescind, she must restore what she has received, before she can recover. She cannot retain the benefits of a transaction which she has solicited, and at the same time disavow it.

Slaughter v. Glenn, 122

Canal Bank v. Partee, 390

4. In Texas, real property belonging to a married woman is her separate property, and she has in equity full power to dispose of it.

Slaughter v. Glenn, 122

5. A personal judgment against a married woman, in an action against her on her promissory note, is a nullity under the laws of Mississippi.

Canal Bank v. Partee, 390

6. In that State unless a married woman has a separate estate she is subject, as to her contracts, to the disability of coverture.

Idem, 390

7. A gift from a husband to his wife, at a time when his right to make it cannot be disputed, is not assailable by the assignee in bankruptcy.

Stewart v. Platt, 516

8. In Mississippi, the statute that makes a husband the agent of his wife to purchase plantation supplies for her, applies only to those plantations which are cultivated for the wife's account and benefit.

Bk. of America v. Banks, 550

9. Nor does the statute oblige her to pay for property purchased on credit, the rule being that such an obligation cannot be enforced.

Idem, 550

10. A married woman cannot, by her own act, enlarge her capacity to convey or bind her separate estate.

Idem, 550

11. A married woman is not estopped by her covenants.

Idem, 550

12. A husband has a right to settle a portion of his property upon his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors.

Jones v. Clifton, 908

13. Real or personal property may be given or devised to, or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees.

Idem, 908

14. A power of revocation and appointment to other uses, reserved to the husband in the deeds, does not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made.

Idem, 908

15. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will or which passes to his assignee in bankruptcy.

Idem, 908

16. The presence of the reservation in the deed does not tend to create an imputation upon his good faith and honesty in the transaction.

Idem, 908

17. A husband may manage the separate property of his wife, without necessarily subjecting it or the profits arising from his management to the claims of his creditors.

Aldridge v. Muirhead, 1013

18. In New Jersey, when the title to real estate is conveyed to a married woman and paid for out of her separate estate, she is the *bona fide* owner of it, as if she were single.

Idem, 1013

INJUNCTIONS.

SEE TAXES AND TAX SALES, 15, 35.

The courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or *mandamus*.

Marquez v. Frisbie, 800

INNKEEPERS.

1. In Illinois, a hotel keeper is exempt from liability for money, jewels and the like, lost by his guest, where a safe for the keeping of such articles is provided and notice given, as required by the statute, and the guest fails to take the benefit of the protection thus furnished him.

Elcox v. Hill, 103

2. To this rule the statute makes one exception. If the loss occurs "by the hand or through the negligence of the landlord, or by a clerk or servant employed by him in such hotel or inn," the liability remains.

Idem, 103

3. Where the loss is occasioned by the personal negligence of the guest himself, the liability of the innkeeper does not exist.

Idem, 103

INSURANCE.

SEE EQUITY, 2-4.

PRINCIPAL AND AGENT, 1.

QUESTIONS OF LAW AND FACT, 13.

1. It is only when the change in the surrounding circumstances increases the hazard that the assured is under an obligation to inform the company thereof.

Snell v. Ins. Co., 52

2. A policy "on account of whom it may concern" will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it.

Hooper v. Robinson, 219

3. An insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured need not also allege or prove that he was interested at the time of effecting the policy.

Idem, 219

4. Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into and yet the contract be valid.

Idem, 219

5. Where the insurers paid the loss, and sought to recover it back, the burden is upon them to show that the assured had no insurable interest.

Idem, 219

6. In an action on a policy of life insurance, where the pleadings admit the death of the insured, and place the defense on the ground that, under the facts of the case, his death was not covered by the policy, it is not necessary for the plaintiff, in order to recover, to show that he had notified the company of such death, and made the necessary preliminary proofs required by the policy.

Kniekerbocker L. Ins. Co. v. Schneider, 694

7. Where, in an application for life insurance, the statement of the insured was "no hereditary taint on either side of the house to my knowledge," in order to show the falsity of the statement in an action on the policy, it is necessary for the insurance company to prove that a hereditary taint alleged was known to the applicant when he made the statement.

N. W. Mut. Life Ins. Co. v. Gridley, 746

8. Where the contract between an insurance agent and the company is, that his commissions should accrue only as the premiums are paid to the company, in order to recover commissions from the company, he must prove not only that the premiums were due, but that they were actually paid to the company.

Manning v. Ins. Co., 761

9. The general rule is that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him.

Wheeler v. Ins. Co., 1055

10. But if the mortgagor is bound to insure the mortgaged premises for the security of the mortgage, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor, to the extent of the mortgagee's interest in the property destroyed.

Idem, 1055

11. And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense.

Idem, 1055

INTEREST.

SEE COURT OF CLAIMS, 1, 2.

JUDGMENTS, 10.

Where the local law allows the rate of interest to be fixed by the contract of the parties, the rule adopted by this court is to give the contract rate up to the maturity of the contract and thereafter the rate prescribed for cases where the parties themselves have fixed no rate.

Holden v. Trust Co., 567

INTERNAL REVENUE.

SEE OFFICERS, 1, 11, 12.

TAXES AND TAX SALES, 1, 9, 19, 22, 26, 27, 31, 32, 37-39.

JOINT DEBTORS.

A judgment against one or more joint contractors is a bar to an action against the others.

U. S. v. Ames, 295

JUDGMENTS.

SEE ADMINISTRATORS AND EXECUTORS, 5.

BONDS, 15, 32.

CONSTITUTIONAL LAW, 50.

FORMER ADJUDICATION, *passim*.

FRAUDS, 1, 2.

HUSBAND AND WIFE, 5.

JOINT DEBTORS.

LANDS, 18.

LIENS, 1.

SET-OFF, 2.

1. Where a judgment was obtained in the circuit court against an agent of the Treasury Department, who subsequently obtained a certificate of probable cause under the Acts of Mar. 3, 1863, and July 23, 1866, the United States is not under obligation to pay interest on the judgment from the time when it was rendered until such certificate was given.

U. S. ex rel v. Sherman, 235

2. It is not until the certificate is given that the judgment is converted into a claim against the government.

Idem, 235

3. That the execution of the judgment was suspended by writ of error directed by the Secretary of the Treasury, did not suspend plaintiff's power to obtain the certificate necessary to cast the liability upon the government.

Idem, 235

4. In Louisiana, a judgment confirming and homologating a judicial sale has the force of *res judicata*, and operates as a bar against all persons.

Montgomery v. Samory, 375

5. In a suit to quiet title to real property, judgment may be rendered in favor of defendant for the property in controversy.

Flournoy v. Lastrapes, 406

6. A judgment of a county judge, authorized to decide, for the issuing of county bonds, can no more be collaterally attacked than can any other judgment of a court of competent jurisdiction rendered with the parties properly before it.

Lyons v. Munson, 451

7. In Louisiana, if a person dies pending suit against him, and the proceedings are continued by his heirs becoming parties, the judgment should be against his succession or them; if it be entered only against the deceased *eo nomine*, and be so recorded, it is, as a judicial mortgage, void against third persons.

Montgomery v. Sawyer, 692

8. Where a judgment was assigned to a bank, as collateral security for the payment of certain notes, with authority, in case said notes were not paid at maturity, to sell the judgment and apply the proceeds to their payment, the bank was under no obligation to collect the judgment before the maturity of the notes.

Bast v. Bank, 794

9. The judgment of this court by a divided court is just as much its judgment for all the purposes of the case in hand as if it had been unanimous.

Durrant v. Storrow, 961

10. Where this court affirmed a decree in a patent suit, with interest at the same rate that similar decrees bear in the State, the circuit court could order that the decree affirmed be executed by its collection with interest according to the established rate in the State.

Chic. & A. R. R. Co. v. Turrill, 1009

JURIES.

SEE APPEAL AND ERROR, 6, 9, 13, 22, 25, 26.

DAMAGES, 1-3.

EXCEPTIONS.

See OTTO 8, 9, 10, 11.

NEGLIGENCE, 2.

PRACTICE, 1, 6-10, 14, 15, 18.

QUESTIONS OF LAW AND FACT, *passim*.

1. The number of grand jurors necessary to find an indictment in a Territory must be determined by the territorial laws, and not by the Acts of Congress.

Reynolds v. U. S., 244

2. It is good ground for a challenge for principal cause that a juror has formed an opinion as to the issue to be tried, but it must be founded on some evidence, and be more than a mere impression.

Idem, 244

3. The finding of the trial court upon the competency of a juror ought not to be set aside by a reviewing court, unless the error is manifest.

Idem, 244

4. That a juror believed he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony, does not necessarily disqualify him.

Idem, 244

5. On a trial for bigamy in Utah it is sufficient objection to a juror that he was or had been living in polygamy.

Idem, 244

6. A party has no right to a charge to a jury which assumes that the testimony is otherwise than it was given.

Orleans v. Platt, 404

7. If the facts in favor of plaintiff are clearly established and are sufficient and undisputed, the court may charge the jury to find for plaintiff.

Idem, 404

8. A verdict of a jury, "for the defendant," is equivalent to a special finding in favor of the defendant upon each and every one of the issues tried.

Flournoy v. Lastrapes, 406

9. A direction to a jury to find a verdict in favor of a party can properly be given only when the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly.

Pence v. Langdon, 420

10. An error committed in overruling an objection to a juror as legally disqualified is cured, where it appears affirmatively that he was not a member of the panel which tried the case, and it does not appear that by his exclusion therefrom the party's right of challenge was abridged.

Burt v. Panjand, 451

11. A person offered as a juror is not compelled to disclose under oath his guilt of a crime which would work his disqualification. If he declines to answer, the objecting party must prove such disqualification by other evidence.

Idem, 451

12. The right, under section 821 of the Revised Statutes, to require the panel of the jurors called to serve for a term to take the oath therein prescribed, or to be discharged from the panel, is limited to the district attorney, and is not a right of individual suitors in a case about to be tried.

Atwood v. Weems, 471

13. Instructions to a jury will not be considered erroneous on account of omissions or deficiencies not pointed out by the excepting party.

Cong. & Empire Spring Co. v. Edgar, 487

14. Where instructions to a jury are full and do not mislead, the judgment will not be reversed because detached sentences, read alone, need qualification.

Evanston v. Gunn, 306

15. Where the charge to the jury was full and correct and covered the entire case, the court is not bound to give any further instructions.

National Bank v. Burkhardt, 766

16. A judge has no right to submit a question to a jury where the state of the evidence forbids it.

Mequire v. Corvine, 899

JURISDICTION.

SEE ABANDONED AND CAPTURED PROPERTY ACT.

APPEAL AND ERROR, *passim*.

COURTS-MARTIAL, 4.

1. An action in a state court upon a policy of insurance to recover for the loss of a steam boat by fire, where the defense was that the fire was caused by plaintiff's carelessness in the use of turpentine, to increase the steam, presents no federal question, and this court has no jurisdiction to review it, although the carriage of the turpentine was forbidden by Act of Congress.

Marsh v. Ins. Co., 90

2. The Circuit Court of the United States has now no original jurisdiction to reform surveys made by

the land department of confirmed Mexican grants in California.

U. S. v. Throckmorton, 93

3. A decision of a state court upon the general principles of commercial law, as to what is sufficient notice to an indorser who abandoned his residence in loyal territory and went to reside permanently within the Confederate lines, does not raise a federal question which this court can review.

Bank v. McVeigh, 110

4. It is not enough to give this court jurisdiction over the judgments of a state court that a federal question was presented to that court for decision; but it must appear that the decision of the question was necessary to the determination of the cause, and that it actually was decided.

State, ex rel. v. Board of Liquidation, 114

5. A decision of a state court, that as between vendor and vendee, there could be a sale and delivery of cotton, before the payment of the government tax assessed upon it under the Act of July 1, 1862 (12 Stat. at L., 465), presents no federal question, and this court has no jurisdiction to review the same.

Carson v. Ober, 157

6. Objections to the jurisdiction of the circuit court, when they go to the subject-matter of the controversy, may be taken at any time.

Miss. & Rum Riv. Boom Co. v. Patterson, 206

7. The Act of Feb. 25, 1879, authorizing this court to review judgments of the Supreme Court of the District of Columbia, where the matter in dispute exceeds \$2,500, was a repeal of the provision of the Revised Statutes authorizing such review where the matter in dispute is of the value of \$1,000.

Balt. & P. R. Co. v. Grant, 231

8. A judgment for \$2,250 brought to this court, when that provision of the Revised Statutes was in force, cannot be re-examined here after the Act of Feb. 25, 1879, took effect, but the case must be dismissed on the ground that the jurisdiction has been taken away.

Idem, 231

9. Illegality in the service of process, by which jurisdiction is to be obtained, is not waived by the special appearance of the defendant to move that the service be set aside, nor, after such motion is denied, by his answering to the merits. Such illegality is waived only when he, without having insisted upon it, pleads in the first instance to the merits.

Harkness v. Hyde, 237

10. The Circuit Court of the United States has full equity jurisdiction and state legislation cannot affect it. The States, however, may create equitable rights, which that court will enforce where there is jurisdiction of the parties and of the subject-matter.

Smith v. Railroad Co., 437

11. Jurisdiction, as between the law side and the equity side of the Federal Courts, must be determined by the essential character of the case. Unless it comes within some of the recognized heads of equitable jurisdiction, the remedy of the party is at law.

Van Norden v. Morton, 453

12. The decision of a state court, that the Judge who pronounced a sentence was not liable for false imprisonment because he acted as a judge, does not present a federal question of which this court has jurisdiction.

Lange v. Benedict, 469

13. The admiralty jurisdiction of the district court extends to seizures on navigable waters but not to seizures on land.

United States v. Winchester, 479

14. Where the matter in dispute, in a case brought from the Supreme Court of the District of Columbia, is less than \$2,500, the judgment is not reviewable here.

National Bank v. Miller, 529

15. Where the only controversy was as to the liability of the defendant for the difference between what he admitted to be due and what the plaintiff claimed, or \$3,134.20, this is the amount actually in dispute, and as it is less than \$5,000, this court has no jurisdiction.

Tinstman v. National Bank, 530

16. A *habeas corpus* for discharge from imprisonment under a conviction under sec. 5515 of U. S. Rev. Stat. was rightfully issued by a justice of this court, returnable before himself; and he had the right to refer the matter to this court, it being a case which involved the exercise of appellate jurisdiction.

Ex Parte Clarke, 715

17. Had the case involved original jurisdiction only, this court could not have taken jurisdiction of it.

Idem, 715

18. In cases brought here by writ of error for the re-examination of judgments of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed without adding interest or costs.

Balt. & P. Railroad Co. v. Trook, 571

19. Where the judgment after \$1,500 had been remitted to avoid a new trial, did not exceed \$2,500, under the rule established in *Railroad Company v. Grant*, *infra*, 281, this court has no jurisdiction.

Idem, 571

20. In a suit in equity against two persons, in which there is no joint obligation and there cannot be a recovery against either of them separately for more than \$2,500, this court has no jurisdiction.

Ballard Paving Co. v. Mulford, 591

21. Where the New York Court of Appeals decided that, in the absence of fraud or intentional wrong, the assessors of a city were not personally liable in damages for any error in an assessment of national bank stock; held, that whether that court decided that question correctly or not, is not a federal question, which this court is authorized to review.

Williams v. Weaver, 708

22. The appellate jurisdiction of this court, exercisable by the writ of *habeas corpus*, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional Act of Congress; and when such court has no jurisdiction its proceedings are void whether this court has jurisdiction to review the judgment of conviction by writ of error or not.

Ex Parte Siebold, 717

23. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error and, of course, cannot be reviewed at all if no writ of error lies.

Idem, 717

24. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having power to award the writ.

Idem, 717

25. The U. S. Circuit Courts have jurisdiction of indictments under sections 5515 and 5522 of U. S. Rev. Stat. provided in the Enforcement Act of May 31, 1870, and the supplement thereto of Feb. 23, 1871, for supervising the elections of representatives and for preventing frauds therein, and a sentence in pursuance of a verdict of condemnation is lawful cause of imprisonment, from which this court has no power to relieve by *habeas corpus*.

Idem, 717

26. Where the plaintiff in a replevin suit recovered all the property sued for, except a portion which was found to be of the value of \$1,400, for the return or value of which defendants had judgment, and the plaintiffs brought the case by writ of error to this court, the matter in dispute is only of the value of \$1,400 and this court has no jurisdiction.

Pierce v. Wade, 735

27. To give this court jurisdiction in cases coming from the Supreme Court of the Territory of Wyoming, the value of the matter in dispute must exceed \$1,000.

Nagle v. Rutledge, 772

28. Where there are two hundred and six complainants suing jointly and the decree is a single one in favor of all, and in denial of the right claimed by defendant, which is of greater value than the sum which is the limit below which an appeal to this court is not allowable, this court has jurisdiction as to amount.

Wash. Market v. Hoffman, 782

29. The objection to the jurisdiction of this court, that it does not appear that the matter in dispute exceeds the value of \$5,000 is untenable, where it appears from the record that the appellee, who raises the objection, purchased the land in dispute for \$21,000, and claims it by that purchase, and the petition of appeal to this court, verified by the affidavit of the appellant, avers that the land is worth more than \$5,000.

May v. Sloan, 797

30. A decree that the plaintiff recover of defendant the highest market value of certain bonds, to be

ascertained by the court in special term, is not a final decree, where the amount has not been ascertained.

Follanshee v. Paving Co., 802

31. Consent cannot give the courts of the United States jurisdiction; but it may bind the parties and waive previous errors, if when the court acts jurisdiction has been obtained.

Pac. R. R. Co. v. Ketchum, 932

32. Mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different States.

Walden v. Skinner, 963

33. Where, in an equity action, a decree was rendered for the complainant for \$784.53, and the account involved a large number of items amounting to several thousand dollars, but the items in the master's report which were excepted to, amounted only to \$1,773.78: held, that that is the only amount in dispute and it is not sufficient, with interest from date of master's report to date of decree, to give this court jurisdiction.

Burr v. Myers, 976

34. The U. S. Circuit Court, cannot, upon a bill filed therein for that purpose, set aside a decree of a state court and a sale in a case in which the state court had jurisdiction of the parties and the subject-matter.

Nougue v. Clapp, 1026

35. The Supreme Court of the District of Columbia had authority to set aside an order affirming a decree made at the previous Term and give a new decree dismissing the suit after an appeal to this court was allowed; the motion to vacate the order and for a reargument having been made to and recognized by the court at the same Term the order was entered, and having gone over as unfinished business.

Phillips v. Ordway, 1040

36. The court had the power during the term, at the request of the appellant, to set aside the order of allowance and thus vacate the appeal which had been granted in his favor.

Idem, 1040

37. The territorial courts of Washington Territory have such jurisdiction in admiralty causes as is vested in the federal, district and circuit courts.

City of Panama v. Phelps, 1061

LACHES.

SEE LIMITATIONS, 13.

UNITED STATES, 5.

Complainants in an equity suit are not chargeable with the laches caused by the defendants therein.

Guntton v. Carroll, 985

LANDLORD AND TENANT.

1. Where one leased premises to the government, and the lease contained the clause that the rent should not be paid until an appropriation for its payment was made by Congress, he cannot recover for rent beyond the amount appropriated by Congress.

Bradley v. U. S., 105

2. Lessees, when dispossessed by military authority and deprived of the use and control of the leased property, are discharged from liability to the lessors for rent accruing during the period of such dispossession.

Gates v. Goodloe, 895

LANDS.

SEE BANKRUPTCY, 3.

CONFISCATION, 1.

CONTRACTS, 3, 4.

COVENANTS, 1, 2.

DEEDS, *passim*.

EJECTMENT, 1, 2.

EQUITY, 8, 11, 13.

ESTOPPEL, 2, 5.

EVIDENCE, 1, 22.

EXECUTIONS, 1.

FORMER ADJUDICATION, 3.

FRAUDS, 4.

HUSBAND AND WIFE, 1, 3, 4, 13-18.

INJUNCTIONS.

JUDGMENTS, 5.

JURISDICTION, 2.

LIMITATIONS, 2, 4, 27.

MINES, 10.

MORTGAGES, *passim*.

See OTTO 8, 9, 10, 11.

PRACTICE, 20.

QUESTIONS OF LAW AND FACT, 12.

RAILROADS, 2-5, 15-22, 25, 30.

STATE LAWS AND DECISIONS, 1, 2.

STATUTE OF FRAUDS.

TAXES AND TAX SALES, 1-3, 5, 14-16, 33.

1. Where there was not enough of the alternate odd sections within the primary limits to satisfy a grant to a railroad company, lands within the indemnity limits, prescribed in the Act, selected by the company, and a patent issued therefor, cannot be entered under the Homestead Act of 1862.

Ryan v. Railroad Co., 305

2. Under the Act of Congress March 2, 1867, the occupant of land in a city entered by the Mayor thereof in trust for the occupants thereof had an equitable interest in such land which he could sell and convey and mortgage.

Hussey v. Smith, 314

3. An agreement made by a holder of scrip, for land in Minnesota Territory set apart for the Sioux half-breeds, that he would secure the title to the land located under such scrip to be vested in another, is not void under the Treaty of July 15, 1850, made at Prairie du Chien, or the Act of Congress approved July 17, 1854.

Myrick v. Thompson, 324

4. An occupant might waive the condition that the scrip should not be located on premises occupied by him.

Idem, 324

5. An adjoining owner excavating on his own land must not remove the earth so near to the land of his neighbor that the latter's soil will crumble away under its own weight and fall upon his land.

Transportation Co. v. Chicago, 336

6. But this right of lateral support extends only to the soil in its natural condition; it does not protect whatever is placed upon the soil increasing the downward and lateral pressure.

Idem, 336

7. The Act of March 2, 1867, which provides that the land settled and occupied for a town site may be entered at the land-office, "in trust for the occupants thereof according to their respective interests," created a trust in favor of the occupants, or those entitled to the occupancy.

Stringfellow v. Cain, 421

8. A non-resident may, by purchase from an occupant, acquire such a right to the occupancy as would entitle him to a judgment for a conveyance under the trust.

Idem, 421

9. An inchoate right to the benefit of the town site law descended under the laws of Utah to the owner's widow and children, and they might lose their rights by a failure to keep possession.

Idem, 421

10. By the Act of Congress of July 1, 1862, incorporating the Union Pacific Railroad Company, lands were granted to the Company and it was enacted that all such lands "not sold or disposed of" by the company before the expiration of three years after the completion of the entire road should be subject to settlement and preemption, like other lands; held, that lands mortgaged by the company are not subject to preemption.

Platt v. Un. Pac. R. Co., 424

11. A testator in whom was the legal title to lands, which he had sold by a written contract, can transfer by his will both such title and the notes given for the purchase of them, and the devise will stand towards the purchaser in the same position that the testator did.

Atwood v. Weems, 471

12. Although the grant by the Act Sep. 28, 1850, of swamp and overflowed lands to the States, is declared to have been made for the exclusive purpose of enabling such States, with the proceeds thereof, to reclaim the lands by means of levees and drains, they may exercise their discretion in this behalf without affecting the title to the lands, and Congress alone has power, in a clear case of violation of the trust, to enforce the conditions of the grant, by revocation or otherwise.

Am. Emigrant Co. v. Co. of Adams, 563

13. A grant made by a State, of its swamp and overflowed lands, to the several counties in which they are situated, for general county purposes, is valid, and the county which has disposed of them in pursuance of the state grant cannot rescind its contract on the ground of its being a violation of the Act of Congress.

Idem, 563

14. In Iowa, such a contract, if approved by a vote of the people of the county, under the state

Act of 1858, is valid, although the lands be disposed of for less than a dollar and a quarter per acre.

Idem, 563

15. If the purchaser from the county under such a contract was bound thereby to introduce a certain number of settlers within a certain period, or to reclaim the lands, his obligation, if not made a condition of the sale, lies in covenant merely, and, if unperformed, does not avoid the sale.

Idem, 563

16. By the laws of Mexico in force in 1826, a *pueblo* or town became entitled to certain lands, to the extent of four square leagues, embracing its site and the adjoining territory.

Brownsville v. Cazazos, 574

17. By the Constitution of the Mexican State, Tamaulipas, in force in 1826, the land of an individual could not be devoted for an object of common recognized utility, without previous compensation.

Idem, 574

18. In Texas, a judgment against a plaintiff in an action for the possession of lands is conclusive, unless he commences, a second action within a year. Held, that, in an action for the same lands commenced within a year by the former defendant against the grantees of the former plaintiff, the latter are not precluded by that judgment from setting up their claim to them.

Idem, 574

19. Where, up to the commencement of the action, a mixed possession of the land, and a continued litigation respecting it, existed for many years and there was no actual occupation by either party of a large portion of it; held, that no prescription could be maintained by either party.

Idem, 574

20. Under the Act of March 3, 1853, a person, to acquire a preemption right in land should file the required notice of his claim in the land-office for the district within three months after the plats of the survey of the lands are returned to the land-office.

Lansdale Co. v. Daniels, 587

21. Such a notice, if given before the time allowed by law, is a nullity; but where it is filed subsequently to the period prescribed, by the amendatory Act it is operative and sufficient, unless some other person had previously commenced a settlement and given the required notice of claim.

Idem, 587

22. Where neither of the parties complied strictly with the law in filing the declaratory statement, but the plaintiff holds the legal title and the superior equity, the defendant has no such standing in court as will justify a court of equity in interfering in his behalf.

Idem, 587

23. A sale of lands in Texas, before its separation from Mexico, by a citizen to a non-resident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority.

Phillips v. Moore, 603

24. The history of the title of San Francisco to its municipal lands stated.

Trenouth v. San Francisco, 626

25. The Act to quiet the title to lands within the City of San Francisco, approved March 8, 1866 confirmed its claim, in trust that certain lands should be conveyed to parties in the *bona fide* actual possession thereof. Held, that trespassers in possession of the lands are not beneficiaries under the Act; but parties who recovered the possession from them are entitled to a conveyance from the city.

Idem, 626

26. A party cannot initiate a preemption right to public land by intrusion upon the actual possession of another.

Idem, 626

27. The record of alcalde grants of the *pueblos* lands of San Francisco, turned over to the county recorder's office, pursuant to the statutes of California, is primary evidence of a recorded grant.

Palmer v. Low, 60

28. A grant, by which the alcalde gives, grants and conveys unto one his heirs and assigns forever, etc., is a grant in fee simple.

Idem, 60

29. A grant to an infant is voidable, not void.

Idem, 60

30. When public lands have been opened to private acquisition, a person who complies with all the requisites to entitle him to a patent in a particular lot is to be regarded as the equitable

owner thereof, and the land is no longer open to location.

Wirth v. Branson, 86

31. A Spanish grant of land, which has been confirmed by the commissioners and which is indefinite, uncertain and vague as to its boundaries, attaches to no particular tract, and must be surveyed and the survey approved before the party can be entitled to a patent, and before a recovery in ejectment for it can be sustained.

Snyder v. Sickles, 97

32. Extrinsic proof of the boundaries of the land in such case cannot be admitted while the Act of Congress requiring the survey remains in full force.

Idem, 97

33. The Spanish or French title on which a suit can be sustained must be one which had been perfected under the Spanish or the French Government before the cession to the United States, and the lands separated from the public domain by actual survey, or where the lands are susceptible of such separation by a description which will enable a surveyor to ascertain and identify them by the boundaries found in the grant, or in an order of survey or instrument by possession.

Scull v. U. S., 164

34. A mere permit for possession and settlement of lands in the former Spanish province of West Florida, given by the commandant, upon which no title, grant, cession, survey or order of survey was ever issued, is no title, on which a claimant under section 11, of the Act of June 22, 1860, is entitled to recover.

U. S. v. McDonough's Legatees, 167

35. Where the City of San Francisco, prior to the adoption of the Van Ness Ordinance, made a conveyance of certain lots within the city to the United States, and another party sets up a claim to them, under the ordinance. Held, that the conveyance barred the claim.

Carr v. U. S., 209

36. A Mexican was not, by the revolution which resulted in the independence of Texas, nor by its Constitution of March 17, 1836, nor its laws subsequently enacted, divested of his title to lands in that State, but he retained the right to alienate and transmit them to his heirs, and the latter are entitled to sue for and recover.

Airhart v. Massieu, 213

37. The division of a country, and the maintenance of independent governments over its different parts, do not of themselves divest the rights which the citizens of either have to lands situated within the territory of the other.

Idem, 213

38. Before the title can be divested, proceedings for enforcing its forfeiture must be provided by law and carried into effect.

Idem, 213

39. In Texas, the protocol of a Mexican title is an archive which may be deposited in the General Land-Office at any time, and when so deposited, a certified copy thereof from the Land-Office is competent *prima facie* evidence of the title.

Idem, 213

40. Until a title is deposited in the Land-Office, or duly recorded in the proper county, *bona fide* purchasers not having notice thereof, although claiming under a junior Mexican grant, will be protected.

Idem, 213

41. The Act of Congress of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands and for other purposes," only confirmed to the owners of water-rights and of ditches and canals on the public lands the same rights which they held under the local customs, laws and decisions of the courts prior to its passage. The proviso conferred no additional rights upon the owners of ditches subsequently constructed.

Jennison v. Kirk, 240

42. Spanish grants made in Texas for lands in the "Neutral Ground," east of the Sabine, from 1790 to 1800, are valid.

U. S. v. Perot, 251

43. The Mexican league applicable to grants of such lands in Texas, being a square of 5000 varas on each side, has always been estimated at 4428.4 acres, the vara being considered 33 1-3 American inches. This varies slightly from the true Mexican vara or that used in California.

Idem, 251

44. After the United States has parted with its title to land and the individual has become vested

with it, the equities subject to which he holds it may be enforced, but not before.

Marquez v. Frisbie, 800

45. But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, the officers of the land department have, by a mistake of the law, deprived a man of his right, it will give relief.

Idem, 800

46. Under section 4, of the Oregon Donation Act, there was no grant of the land to a settler until he had qualified himself to take as grantee, by completing his four years of residence and cultivation, and performing such other acts in the meantime as the statute required in order to protect his claim and keep it alive.

Hall v. Russell, 829

47. Under such Act of Congress a settler cannot devise his interest in the land, unless the fee passed to him before his death.

Idem, 829

48. Uncertainty of location and vagueness of description of a Spanish claim are sufficient grounds for its rejection.

Clamorgan v. U. S., 836

49. Claims to land lying within the States of Florida, Louisiana or Missouri, by virtue of any grant, or other evidence of title bearing date prior to the cession of the territory out of which those States were formed, which contain no boundaries, nor any means to determine either the location or the extent of the supposed grant, and which were not legally surveyed before such cession, cannot be sustained.

D'Auterive v. U. S., 869

50. One in possession of public lands, under a certificate of the register that he had paid for the same, without a patent, can successfully defend against an action of ejectment to recover the possession by the holder of a patent issued upon a subsequent purchase of the land as part of the public domain.

Simmons v. Wagner, 910

51. The title of the Des Moines Navigation and Railroad Company to the lands donated to Iowa for the improvement of Des Moines River, by the Act of Aug. 8, 1846, is good as against the State and Railroad Companies under the railroad grant of 1856, and as against preemptors after 1855 under the Act of 1841.

Wolsey v. Chapman, 915

52. There can be no reservation of public lands from sale except by reason of some treaty, law, or authorized Act of the Executive Department of the Government; and an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order, reserving lands from sale.

Idem, 915

53. The grant by the United States to Iowa in 1861, was for the benefit of *bona fide* purchasers from the State, under the grant of Aug. 8, 1846, and not to purchasers under the school-land grant.

Idem, 915

54. The adjustment of 1866 between the United States and Iowa settled no rights as between any other parties than the State and the United States.

Idem, 915

55. The Governor had the right to convey to the Des Moines Company, under the Joint Resolution of March 22, 1858, all the lands which had before that time been approved and certified to the State under the river grant, excepting such as had been sold or agreed to be sold by the officers of the State prior to Dec. 23, 1853, "under said grant."

Idem, 915

56. Where the question is one of fact, as to whether one, when he demanded his patent certificate as against other contesting claimants, had conformed to the requirements of the Donation Act, and this was determined by the land department, after a contest in which the contending parties appeared, and full opportunity was given to be heard, such determination in the absence of fraud, is conclusive on all questions of fact.

Vance v. Burbank, 929

57. Fraud in respect to which relief may be granted in this class of cases, must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department. False testimony or forged documents, even, are not enough.

Idem, 929

58. The wife, or her heirs, get nothing before the husband, or some one for him, proves up the claim under the Act. Whatever would bar her will necessarily bar her heirs.

Idem, 929

See Otto 8, 9, 10, 11.

59. Where two titles to the same land depend exclusively for their validity upon the action of Congress, he who first obtains the title and not he who first applied for it, has the better right.

Trenier v. Stewart, 1021

60. If the title of the original donee was complete when the province was ceded to the United States, it is the superior title and is protected by the Treaty of Cession.

Idem, 1021

61. Where Congress has confirmed the concession to the donee, as one derived from a former Sovereign of the province, its genuineness and authenticity are established.

Idem, 1021

62. In an action to try title to land, the plaintiff cannot avail himself of a title acquired, or which did not subsist in him until, after he commenced suit. The title at the beginning of the action is the question to be tried.

Hollingsworth v. Flint, 1028

63. Where a remainder is dependent upon a life estate in the land, it does not take effect as an estate in possession until the life estate is determined. Until then it is a mere expectancy.

Wright v. Blakeslee, 1048

64. No one taking a quitclaim deed can stand in the relation of *bona fide* purchaser.

Baker v. Humphrey, 1065

LIENS.

SEE COVENANTS, 3.

MECHANICS' LIENS, *passim*.

1. A judgment against a railroad company, whose roadway had been sold under a decree upon a mortgage foreclosure and the sale confirmed more than a year before the rendition of the judgment, is not a lien thereon, nor a lien on the fund arising from the sale.

Jeffrey v. Moran, 785

2. Priority of lien gives priority of legal right.

Howard v. R. R. Co., 1081

3. A sale of property by one having only a subsequent lien will not supersede nor displace a prior lien held by another; and a sale in equity under a prior lien will not impair any rights which belong to the holder of the subsequent lien, if the latter duly asserts his rights in proper season.

Idem, 1081

LIMITATIONS.

SEE BANKRUPTCY, 17.

DUTIES, 3.

PLEADINGS, 4.

TAXES AND TAX SALES, 39.

1. As the right of an assignee in bankruptcy to sue for property is barred by the two years' Statute of Limitations, Rev. Stat., sec. 5057, so the rights of the purchaser from him is barred by the operation of the same statute.

Gifford v. Helms, 57

2. The California Statute of Limitations did not begin to run against a Mexican title until July 1, 1864.

Palmer v. Low, 60

3. The concealment of a cause of action *ex contractu* does not, in courts of law, interrupt or delay the running of the Statute of Limitations as a bar to the action.

Andreac v. Redfield, 158

4. No person can bring suit for lands under the Act of Congress of June 22, 1860 who, by himself or by those under whom he claims, has not been out of possession over twenty years.

Scull v. U. S., 164

5. The Act of June 7, 1860, was intended to provide a suit in the nature of ejectment against the United States whether out of possession or in possession, and to remove the bar of the Statute of Limitations.

Idem, 164

6. A state statute of limitations cannot bar the United States.

U. S. v. Thompson, 194

7. The Judiciary Act of 1789 that the laws of the several States shall be regarded as rules of decision in the courts of the United States, does not apply in such a case.

Idem, 194

8. The courts of the United States, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals.

Amy v. Dubuque, 238

9. The Iowa Statute of Limitation of ten years, applies equally to bonds and their coupons, although

the coupons have never been severed from the bonds, and are held, by the owner of the latter; it begins to run from the respective maturities of the coupons.

Idem, 228

10. The Georgia Statute of March 16, 1869, does not commence to run against administrators until twelve months from the date of their appointment and qualification.

Mills v. Scott, 294

11. When the Statute of Limitations once begins to run, it will continue without being impeded by any subsequent disability.

Harris v. McGovern, 317

12. Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the Statute of Limitations which govern courts of law in like cases.

Godden v. Kimmell, 431

13. Courts of equity, where no statute of limitations governs the case, often act upon their own inherent doctrine of discouraging antiquated demands by refusing to interfere where there has been gross laches.

Idem, 431

14. Claims against the United States, in the Court of Claims, are barred by statute unless filed within six years after the claim accrues.

Clark v. U. S., 481

15. Where there is no statute of limitations applicable to a case, there can be no default arising from lapse of time.

Hawenstein v. Lynham, 628

16. An action against a corporation for refusing to transfer shares on its books is not barred by the Louisiana prescription of one year.

Case v. Bank, 695

17. The Statute of California, which provides that no action for the recovery of real estate sold by order of a probate court "shall be maintained by any heir or other person claiming under the intestate," unless brought within three years after such sale, applies to the administrator who made the sale as well as to the heirs.

Meeks v. Olpherts, 735

18. When by lapse of time the action is barred against him, it is also barred against them, because the right of possession is, by the law of California, in him, and he represents their interests.

Idem, 735

19. The limitation prescribed by the Act of March 3, 1863, amendatory of an Act establishing the Court of Claims, does not bar in that court claims referred to it for determination by the head of an executive department, provided they were presented for settlement at the proper department within six years after they had first accrued.

U. S. v. Lippitt, 747

20. In Indiana, actions for fraud must be commenced within six years. The statute begins to run when the fraud is perpetrated or where there is concealment, by trick or contrivance intended to prevent inquiry; such actions may be brought within the time limited, after the discovery of the cause of action.

Wood v. Carpenter, 807

21. But there must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself, and the circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.

Idem, 807

LOTTERIES.

SEE CONSTITUTIONAL LAW, 55-57.

MALICIOUS PROSECUTION.

1. Malice and the want of probable cause are both essential to the maintenance of an action for malicious prosecution.

Stewart v. Sonneborn, 116

2. That the defendants in such a case acted *bona fide* upon legal advice, is a good defense.

Idem, 116

MANDAMUS.

SEE COSTS, 2.

INJUNCTIONS.

TAXES AND TAX SALES, 19.

1. *Mandamus* cannot be used to perform the office of an appeal or a writ of error.

Ex Parte Schwab, 105

2. Where a city has power to levy a tax for the

payment of judgments against it, it is its duty, through its authorities, to exercise the power. If that duty is neglected a *mandamus* should be issued to enforce its performance.

U. S. v. New Orleans, 225

3. Service of a copy of a writ of *mandamus* upon the clerk of the Board of Commissioners of a county in Kansas, is sufficient service on the members of the Board.

Commissioners v. Sewell, 333

4. A peremptory writ of *mandamus* may be directed to the Board of County Commissioners, or to the mayor and common council of a city, in their corporate capacity.

Idem, 333

Leavenworth v. Kinney, 336

5. A *mandamus* does not lie to control judicial discretion, except when that discretion has been abused. But it may be used to restrain inferior courts and keep them within proper bounds.

Ex Parte Commonwealth of Virginia, 667

6. This court has power by *mandamus*, to enforce prompt compliance with its mandates, but it will not, in that summary mode, revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion.

Ex Parte Railway Co., 872

MARRIED WOMEN.

SEE HUSBAND AND WIFE, *passim*.

MASTER AND SERVANT.

SEE OFFICERS, 8, 9.

1. A corporation is liable for the acts of its servants while engaged in the business of their employment to the same extent that individuals are liable under like circumstances.

Orleans v. Platt, 404

2. A master, whether a natural person or a corporation, is exempt from liability to a servant for injuries caused by the negligence of a fellow-servant.

Hough v. Railway Co., 612

3. But the master is under obligation not to expose the servants, when conducting his business to perils or hazards against which they may be guarded by proper diligence upon his part.

Idem, 612

4. He is bound to exercise the care which the exigency reasonably requires in furnishing such machinery as is adequate and suitable.

Idem, 612

5. A railroad company is liable when its officers or agents who are invested with a controlling or superior duty in furnishing suitable machinery are, in discharging it, guilty of negligence, from which injury results to a servant of the company.

Idem, 612

6. If the servant of such a company who has knowledge of defects in machinery, gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the belief that it will be put in proper condition within a reasonable time, does not make him guilty of contributory negligence.

Idem, 612

MECHANICS' LIENS.

1. By the laws of Iowa a mechanics' lien for work done under a contract takes precedence of all incumbrances put on the property, by mortgage or otherwise, after the work was commenced.

Meyer v. Construction Co., 593

2. A clause in a contract between a construction company and a railroad company that the money for the work was to be paid from a certain source, does not give the construction company collateral security, and thus vitiate the lien.

Idem, 593

3. A mechanics' lien for materials for and work upon a row of buildings is not void because of its being claimed on the whole row of buildings, and not on the buildings separately.

Phillips v. Gilbert, 833

4. Where an undertaking was filed in the suit to release the property from the mechanics' lien, the complainant may take a personal decree only against the defendant, and may bring an action at law against the sureties, on the undertaking.

Idem, 833

5. In Iowa a mechanics' lien has preference over a prior recorded mortgage.

Brooks v. Railway Co., 1057

6. A judgment establishing the lien against the railroad company is conclusive of the formality of the prior proceedings in a subsequent action to foreclose a mortgage on the same property.

Idem, 1057

7. The entire road is subject to a lien for work done on one part of it, although the road was built in sections.

Idem, 1057

8. That a contractor, who files a mechanics' lien for work on a railroad in Iowa, is a stockholder of a construction company which guaranteed bonds and a mortgage to secure them, on the road, does not estop him from setting up that his lien is superior to that of the mortgage.

Meyer v. Eghert, 1078

9. Where work is done upon part of a railroad, the lien attaches to the whole of it; and in Iowa it takes precedence over a prior mortgage on the road.

Idem, 1078

MINES.

1. The origin and general character of the customary law of miners stated and explained.

Jennison v. Kirk, 240

2. By that law, the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.

Idem, 240

3. By that law a person cannot construct a ditch to convey water across the mining claim of another, so as to prevent the working of the claim nor cut off his use of water previously appropriated by him.

Idem, 240

4. The cutting and washing away of a ditch, in order that a claim might be worked and the water used as before, was not an injury for which damages could be recovered.

Idem, 240

5. Under the Acts of July 26, 1866, and May 10, 1872, the location of a mining claim upon a lode or vein of ore, should be made along the same lengthwise of the course of its apex, at or near the surface.

Playstaff Silver Mining Co. v. Tarbel, 253

6. Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him beyond the side lines of the location, and it is bounded at each end by the end lines of the location crossing the lode or vein, and extending perpendicularly downwards, and indefinitely in their own direction.

Idem, 253

7. A location laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, will secure only so much of the vein as it actually crosses at the surface, and its side lines will become its end lines, for the purpose of defining the rights of the owner.

Idem, 253

8. A locator working subterraneously into the dip of the vein belonging to another, who is in possession of his location, is a trespasser and liable to an action for taking ore therefrom.

Idem, 253

9. The 5th section of the Act entitled "An Act to Promote the Development of the Mining Resources of the United States," approved May 10, 1872, 17 Stat. at L. 91, gives no greater effect to the record of mining claims than is given to the records kept pursuant to the registration laws of the respective States and does not exclude, as *prima facie* evidence of title proof, of actual possession and of its extent.

Campbell v. Rankin, 435

10. A written conveyance is not necessary to the transfer of a mining claim.

Union Consolidated Mining Co. v. Taylor, 541

11. Rights of miners and the rights of persons who had constructed canals and ditches to be used in mining operations and irrigation, are rights which the government had, by its conduct, recognized and was bound to protect, before the passage of the Act of 1866.

Brooder v. Water Co., 790

12. Congress, in making donation grants to the Pacific Railroad Companies cannot be supposed to have exercised its liberality at the expense of pre-existing rights of miners which, although imperfect, were still meritorious, and had just claims to legislative protection.

Idem, 790

See ORTO 8, 9, 10, 11.

MORTGAGES.

SEE BANKS, 1.

CHATTEL MORTGAGES, *passim*.

CORPORATIONS, 20, 21.

ESTOPPEL, 5.

EVIDENCE, 23.

INSURANCE, 9-11.

LANDS, 2.

MECHANICS' LIENS, 1, 5.

RAILROADS, 31.

TAXES AND TAX SALES, 23.

1. Where lands have been mortgaged, and parcels thereof subsequently sold at different times to different purchasers, the rule as to the order in which such parcels shall be subjected to the satisfaction of the mortgage, as established by the statute or the decisions of the State where the lands lie, is a rule of property binding on the courts of the United States sitting in that State.

Orvis v. Powell, 238

2. In Illinois, the rule has been established that the parcels first sold should be last subjected to the satisfaction of the mortgage.

Idem, 238

3. A decree of the Circuit Court of the United States sitting in Illinois, in a suit to foreclose a mortgage of lands in that State, must give effect to the equity of redemption after sale, provided by the statutes of that State.

Idem, 238

4. Where cars were sold and delivered to a railroad company on time, and the title of the cars was to remain in the vendor until they were paid for, the contract was valid and the cars are not subject to a prior mortgage given on the present and future acquired property of the company, and the seller may reclaim them.

Fosdick v. Schall, 339

Fosdick v. Car Co., 344

Huidelkoper v. Locomotive Works, 344

5. The amount due for their use and injured condition when returned is only a general debt of the company, with no special equities in its favor, and is not entitled to be paid from the proceeds of the sale on a prior mortgage as against the claims of the bondholders.

Huidelkoper v. Locomotive Works, 344

6. Where such cars were sold as part of the railroad on the foreclosure of such prior mortgage, an order to pay from the fund in court arising from such sale the price of said cars to the seller thereof, was proper.

Fosdick v. Car Company, 344

7. If the seizure and sale of mortgaged property in Louisiana does not result in full satisfaction of the debt, suit may be brought on the primary security in order to recover the balance.

Gordon v. Gilfoil, 383

8. Setting aside the sale for irregularity does not affect the order of seizure and sale, but a new writ may issue upon it.

Idem, 383

9. Proceedings on an order of seizure and sale interrupt the prescription of the personal action for the same debt.

Idem, 383

10. Although proceedings in the order of seizure and sale were pending in the State Court, the debt could be prosecuted in the Circuit Court of the United States.

Idem, 383

11. Where a mortgage of a railroad contained a covenant that the trustee named therein, should at the request of a majority of the bondholders, purchase the premises at a sale thereunder, for the benefit of the bondholders, and organize a new company, it was not error to decree on a foreclosure of the mortgage, that the trustee should be authorized and directed to bid at the sale, as trustee, for the first-mortgage bondholders at least the amount of the principal and interest of the first-mortgage bonds.

Sage v. Central R. R. Co., 394

12. Under the prayer for general relief, the court could direct the trustee, if he became the purchaser, to convey the property to a new corporation organized by and for the benefit of the bondholders according to the priority of their interests, giving the controlling interest and power of management to the first-mortgage bondholders.

Idem, 394

13. It was not error in the decree to require any other person than the trustee under the first mortgage, if he became the purchaser at the sale, to

pay at once in cash a part of his bid, as earnest money.

Idem, 394

14. It was proper to make a decree of sale subject to the rights and equities of parties to the suit under liens or judgments claimed by them, and to reserve such rights for further adjudication.

Idem, 394

15. A railway mortgage upon the present and future acquired property of a railway company and its incomes and profits, is a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road is in the possession of the company.

Hale v. Frost, 419

16. The net earnings of the road, while in the possession of the court, and operated by its receiver, are not necessarily the property of the mortgagees, but are subject to the disposal of the Chancellor in the payment of claims which have superior equities.

Idem, 419

17. Persons furnishing to the company supplies for the machinery department, which the receiver after his appointment continued to use, have superior equities to those of the mortgagees, for such supplies, but not for material for construction purposes.

Idem, 419

18. A mortgage on a vessel, under the Act of Congress, as between the parties, and as against persons having actual notice thereof, is valid without acknowledgment or record.

Morse v. Simmons, 590

19. Where real estate bound by a judgment or a mortgage has been aliened in separate parcels to various persons at different times, such parcels should be subjected to the satisfaction of the lien in the inverse order of their alienation.

National Savings Bank v. Cresswell, 713

20. The English and the American authorities on the subject considered and reviewed.

Idem, 713

21. Subsequent incumbrancers, when not made parties to a bill for foreclosure or sale, are not bound by the decree.

Howard v. R. R. Co., 1081

22. A decree of sale in foreclosure is not void because a second incumbrancer is not made a party to the proceeding, and his lien remains in full force notwithstanding a decree of sale entered pursuant to such a proceeding.

Idem, 1081

MUNICIPAL BONDS.

SEE BONDS, *passim*.

MUNICIPAL CORPORATIONS.

SEE CONSTITUTIONAL LAW, 31, 32, 47.
CORPORATIONS, *passim*.

NATIONAL BANKS.

SEE BANKS, *passim*.

NEGLIGENCE.

SEE ACTIONS, 6.

BANKS, 9.

DAMAGES, 2.

INNKEEPER, 2, 3.

MASTER AND SERVANT, 2-6.

1. Gross negligence on the part of a gratuitous bailee is a tort, and an action on the case is the appropriate remedy for such a wrong.

Nat. Bk. v. Graham, 750

2. In an action against a railroad company for negligence, an instruction to the jury that if the company undertook to run its trains by telegraph, it was bound to have suitable telegraph line and operators, and if it did not, and thus occasioned the injury, it would be liable, is proper.

Grand Trunk R. R. Co. v. Walker, 977

NOTES, INDEX TO.

BANKS.

Special deposits, responsibility for.

Nat. Bk. v. Graham, 750

BILL OF LADING.

Negotiability and transfer of; effect of transfer.

Shaw v. R. R. Co., 892

COLLISION.

Vessel overtaking another.

The Abbottsford v. Johnson, 168

CONSTITUTIONAL LAW.

Power of Congress over Territories.

Nat. Bk. v. Yankton Co., 1046

CORPORATIONS.

A municipal corporation is not liable for damages for destruction of building to prevent spread of fire.

Bowditch v. Boston, 980

Individual liability of stockholders for corporate debts.

Hatch v. Dana, 885

CRIMINAL LAW.

Homicide by officers in making an arrest; when justifiable.

Tennessee v. Davis, 648

INNKEEPER.

Liability of, for goods and money of guest.

Elcoex v. Hill, 103

INSURANCE.

Policy "for whom it may concern;" effect of; who may recover upon.

Hooper v. Robinson, 219

LANDS.

Lateral support of soil of adjoining lands; right to.

Trans. Co. v. Chicago, 336

LIENS.

Priority between mortgage and mechanics' lien.

Brooks v. R. R. Co., 1057

LIMITATIONS.

Effect of disability occurring after Statute of Limitations begins to run.

Harris v. McGovern, 317

MALICIOUS PROSECUTION.

When advice of counsel is a defense.

Stewart v. Sonneborn, 116

MASTER AND SERVANT.

Who are co-employés, or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant.

Hough v. R. R. Co., 612

MORTGAGES.

Order of sale of mortgaged premises.

Orris v. Powell, 238

Equitable mortgage by deposit of title deeds.

Biebinger v. Bk., 271

Record of mortgages on vessels of U. S.

Moore v. Simonds, 590

Priority between mortgage and mechanics' lien.

Brooks v. R. R. Co., 1057

NEGLIGENCE.

Liability of owner of animals for injury by them to persons.

Congress & Emp. Spring Co. v. Edgar, 487

Who are co-employés, or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant.

Hough v. R. R. Co., 612

OFFICER.

Acts of *de facto* officer; when valid.

Hussey v. Smith, 314

Homicide by officer in making an arrest; when justifiable.

Tennessee v. Davis, 648

REMOVAL OF CAUSES.

Under Act of 1875; citizenship.

Removal Cases, 593

TERRITORIES.

Power of Congress over.

Nat. Bk. v. Yankton Co., 1046

TORTS.

Liability of owner of animals for injury by them to persons

Congress & Emp. Spring Co. v. Edgar, 487

NOTICE.

SEE ADMINISTRATORS AND EXECUTORS, 6.

NUISANCE.

1. That which the law authorizes cannot be a nuisance such as to give a common law right of action.

Northern Transportation Co. v. Chicago, 336

OFFICERS.

SEE BANKS, 8.
CONSTITUTIONAL LAW, 35-40.
CORPORATIONS, 12.
EVIDENCE, 5.
INJUNCTIONS.
PAYMENTS, 4.
SALARIES, 1, 2.
STATUTES, 7.
WAR, 2.

1. A deputy Collector of Internal Revenue who performs the duties of the office of the collector, during the latter's suspension from office, is entitled to receive the compensation of a collector.

U. S. v. Farden, 267

2. A surgeon in the Continental Army, who did not continue in service until the end of the war, is not entitled to five years' pay, under the Resolutions of Congress of Oct. 21, 1780 and March 22, 1783.

Williams v. U. S., 309

3. The acts of the United States Marshal, as an officer *de facto* are valid.

Hussey v. Smith, 314

4. The law presumes that persons acting in a public office have been duly appointed and are acting with authority, until the contrary is shown.

Keely v. Sanders, 327

5. A surgeon appointed by the Commissioner of Pensions to examine pensioners and applicants for pensions is not an officer of the United States.

U. S. v. Germaine, 482

6. An officer whose duty is mainly judicial, is no more liable, personally, for a mistaken construction of an Act of Congress than he would be for mistaking the common law or a state statute.

Williams v. Weaver, 708

7. Pursuant to orders, the colonel of a regiment reported, July 25, 1863, to the headquarters of a department, there to "await further orders." While awaiting them, he was not furnished fuel or quarters. Held, that he is entitled to recover their commuted value.

U. S. v. Lippitt, 747

8. The Secretary may put an *employé* of a department on furlough without pay at any time, if the exigencies of the service require it.

U. S. v. Murray, 756

9. The Joint Resolution of Congress of June 23, 1874, gave extra pay only when discharges occurred in consequence of a reduction of clerical force, made necessary by the legislation of that Session of Congress.

Idem, 756

10. The acts of the Assistant Surgeon-General, appointed under the Act of Congress and located at St. Louis, are the acts of the Surgeon-General, and have the same validity until countermanded or revoked.

Parish v. U. S., 763

11. In a suit against a Collector of Internal Revenue on his bond for taxes charged to him under sec. 3218, Rev. Stat., he is entitled to a credit for all uncollected taxes transferred by him to his successor in office, if he proves that due diligence was used by him for their collection.

U. S. v. Kimball, 835

12. The certificate of the Commissioner of Internal Revenue is a condition precedent to a credit by the First Comptroller of the Treasury before suit, but not to a defense upon the facts if a suit is brought.

Idem, 835

OVERRULED CASES.

Town of Concord v. Portsmouth Savings Bank, 92 U. S., 625, XXIII., 628, overruled.

Fairfield v. Co. of Gallatin, 544

PARTIES.

See CORPORATIONS, 17.

1. An objection as to parties, not taken in the court below, cannot be taken here.

McBurney v. Carson, 378

2. A bill cannot be brought by heirs of a deceased person, to enforce a contract made by him in his lifetime with a railroad company for the construction of its railway and telegraph.

Crane v. Railway Co., 782

3. The contract formed part of his personal estate, and belonged to his personal representative, and can only be enforced by him.

Idem, 782

4. An assignee in bankruptcy may be substituted in this court as plaintiff in error where his assignor has received his discharge in bankruptcy.

Gates v. Goodloe, 895

PARTNERSHIP.

See ADMINISTRATORS AND EXECUTORS, 8.
CONTRACTS, 21.
TAXES AND TAX SALES, 9.

1. So long as a partner retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them.

Case v. Beaugerard, 370

2. If, before the interposition of the court, the property has ceased to belong to the partnership, by a *bona fide* transfer to one partner or to a third person, the equities of the partners are extinguished and, consequently, the derivative equities of the creditors are at an end.

Idem, 370

3. Every partner is under obligation to exercise due diligence and skill, and to devote his services to the promotion of the common benefit of the firm without any compensation, unless there be an express stipulation for compensation.

Denver v. Roane, 476

4. Where there is no stipulation in the partnership agreement for compensation to a surviving partner for settling up the partnership business, he is entitled to none.

Idem, 476

PASSENGERS.

See CARRIERS, *passim*.

PATENT-RIGHTS.

1. Where the actual invention described in the specification is larger than the claims of the patent, the patentees in a suit for infringement must be limited to what is specified in the claims.

Bates v. Cob, 68

2. Where the complainant introduced his re-issued patent in evidence, the burden of proof is cast upon the respondent to prove the defense, that the complainant is not the original and first inventor.

Idem, 68

3. Inventors may keep their inventions secret, and do not thereby forfeit their right to a patent, unless another, in the meantime, has made the invention and secured a patent therefor.

Idem, 68

4. Where the thing patented is an entirety and incapable of division or separate use, defenses must be to the whole invention, and not merely to one or more of the separate claims.

Idem, 68

5. Re-issued letters patent must be for the same invention as that which formed the subject of the original letters; or for a part thereof when divisional re-issues are granted; they must not contain anything substantially new or different.

Giant Powder Co. v. Powder Works, 77

6. Original letters for a process will not support reissued letters for a composition, unless it is the result of the process, and the invention of the one involves the invention of the other.

Idem, 77

7. Letters granted for a certain process of exploding nitro-glycerine will not support re-issued letters for a composition of nitro-glycerine and gunpowder or other substances, even although the original application claimed the invention of the process and the compound; they are distinct inventions.

Idem, 77

8. The last clause of section 53 of the Act of July 8, 1870, 16 Stat. at L., 205; Rev. Stat., sec. 4916, relates merely to the evidence to which the Commissioner of Patents may resort, but does not increase his power as to the invention for which a re-issue may be granted.

Idem, 77

9. Where the only question in a suit is, whether the plaintiff or defendant is the original and first inventor of a patented invention, and there is nothing to rebut the presumption arising from plaintiff's patent, a decree in his favor will be affirmed.

Garratt v. Seibert, 84

10. Where an invention is assigned before a patent is obtained therefor, and the assignment is recorded, the exclusive title to the invention vests in the assignee and the patent for the original and extended term may be issued to him.

Hendrie v. Sayles, 176

11. Such assignee may convey the entire interest in the patent to a purchaser, including any extension thereof. *Idem*, 176

12. This court will take judicial notice that a thing patented was known and in general use long before the issuing of the patent.

Terhune v. Phillips, 293

13. The substitution of metal for wood is destitute both of patentable invention and utility.

Idem, 293

14. A suit between citizens of the same State cannot be sustained in the Circuit Court as arising under the patent laws of the U. S., where the defendant admits the validity and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. Relief in such case is founded upon the contract and not upon the patent laws.

Hartell v. Tighman, 357

15. Saddle trees made according to a patent granted to Flora do not infringe the patent to Grimsley and Shelly.

Burns v. Meyer, 738

16. Courts should not enlarge by construction, the claim which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms.

Idem, 738

17. It is a fatal objection to the validity of re-issued letters patent, that the commissioner, in the re-issue, allowed the patentee a claim for an invention different from that which was described in the surrendered letters, and which he had disclaimed.

Leggett v. Avery, 865

18. The action of the commissioner in granting a patent is not conclusive of the question whether there had not been an abandonment.

Woodbury Planing-Machine Co. v. Keith, 939

19. An inventor may forfeit his rights by a willful or negligent postponement of his claims. There may be an abandonment as well after an application for a patent has been made and rejected or withdrawn, as before. *Idem*, 939

20. Where the applicant for a patent did nothing for sixteen years after the rejection of his first application, during which time his invention was in public use without objection from him, he must be held to have abandoned it.

Idem, 939

21. Mere enlargement is not invention.

Idem, 939

22. Only the names of those who had invented or used the anticipating machine or improvement, and not the names of those who are to testify of its invention or use, are required to be pleaded.

Idem, 939

23. Woodbury was not the original and first inventor of the improvement in planing-machines for which the patent was granted to him, and if he was, his invention had been abandoned to the public before his patent was granted.

Idem, 939

24. A party who merely substitutes another old ingredient for one of the ingredients of a patented combination, is an infringer, if the substitute performs the same function as the ingredient for which it is so substituted, and was well known at the date of the patent.

Imhaeuser v. Buerk, 945

25. Buerk's patent for an improvement in watchmen's time detectors is valid, and is infringed by Meyer's improvement in watchmen's time checks.

Idem, 945

26. A patent for a combination is not infringed if any of the material parts of the combination are omitted; but if it is only formally omitted and is supplied by a mechanical equivalent performing the same office and producing the same result, the patent is infringed.

Union Water-Meter Co. v. Desper, 1024

27. The law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, this court cannot declare that any one of these elements is immaterial. *Idem*, 1024

PATENTS FOR LAND.

See EQUITY, 8.

LANDS, 1, 31, 50, 56.

1112

When a patent issued by the United States adds to the name of the patentee the word "trustee," without mention of any trust upon which he is to hold the land, such addition does not prevent the legal title from passing by his conveyance.

Cowell v. Springs Co., 547

PAYMENTS.

SEE BONDS, 13.

PLEDGES.

RECEIVERS, 1, 2.

1. Where a claim against the government was awarded and paid to assignees of the claimant, the government cannot recover the amount paid on the ground that the assignment was contrary to law and void.

McKnight v. U. S., 115

2. A payment by the government of part of such claims to the assignees, was not a waiver of the objection to paying the residue that the assignment was illegal.

Idem, 115

3. A valid payment could not be made to an agent in the Confederate States, of a citizen of a loyal State, during the rebellion, in anything but lawful money of the United States or bank-notes, of the current value of their face.

McBurney v. Carson, 378

4. Where a collector of customs pays into the U. S. Treasury, upon the peremptory order of the commissioner of customs, moneys to which he is entitled as part of his official compensation, and was subject to a penalty for refusal to comply with such order, the payments cannot be regarded as voluntary so as to preclude him from maintaining an action to recover them back.

U. S. v. Lawson, 860

U. S. v. Ellsworth, 862

PENSIONS.

SEE CRIMINAL LAW, 1, 5, 6, 15, 16.

SOLDIERS' HOME.

PLEADINGS.

SEE EQUITY, 8.

1. When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto.

Giant Powder Co. v. Powder Works, 77

2. Mere legal conclusions are never admitted by a demurrer.

U. S. v. Ames, 295

3. An answer which denies that any such agreement was made, as alleged in the complaint is as effective for letting in the defense that the agreement is void by the Statute of Frauds as if the statute had been pleaded.

May v. Sloan, 797

4. Where it appears on the face of plaintiff's bill that the case which it makes is barred by the Statute of Limitations, the defect can be taken advantage of by demurrer.

Mercantile National Bank v. Carpenter, 815

5. Where it does not appear what amendment or amendments the appellant desired to make, nor that the court below, in anywise abused the discretion by refusing leave to amend, its judgment will not be set aside for such refusal.

Idem, 815

PLEDGES.

Where a bank, as collateral security for a debt, holds a note secured by mortgage, the payment of the amount of the debt to the bank, releases the note and mortgage from the pledge.

Biebinger v. Continental Bank, 271

POWERS.

SEE TRUSTS AND TRUSTEES, 6, 7.

PRACTICE.

SEE APPEAL AND ERROR, PRACTICE ON, *passim*.

CONSTITUTIONAL LAW, 4.

MANDAMUS, 3, 4.

WITNESS, 2.

1. The 3d section of the Act of March 3, 1875, 16 Stat., at L., part 3, 470, does not repeal the provision

98, 99, 100, 101 U. S.

of the Revised Statutes authorizing the court to try, upon the stipulation of parties, issues of fact without intervention of a jury.

Phillips v. Moore, 603

2. Process from a district court of Idaho cannot be served upon a defendant on an Indian reservation in that Territory.

Harkness v. Hyde, 237

3. Where a party objecting to evidence specifies his objection it must be considered that all others are waived, or that there was no ground upon which others could stand.

Evanston v. Gunn, 306

4. A special finding of facts by the court need only state the ultimate facts, not the evidence.

Union Consolidated Mining Co. v. Taylor, 541

5. In the courts of the United States, the union of equitable and legal causes of action in one suit is forbidden by the Process Act of May 8, 1792.

Hurt v. Hollingsworth, 569

6. A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken can only be used on a motion for a new trial. On such motion for a new trial, the evidence or the substance of it should be stated and made part of the record. The court cannot decide the case upon exceptions without the evidence.

Watt v. Starke, 826

7. If the court is satisfied that if, on the trial of an issue, evidence improperly received had been rejected or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds.

Idem, 826

8. The verdict of a jury upon an issue out of chancery is only advisory, and never conclusive upon the court. It may be disregarded, and a decree rendered contrary to it.

Idem, 826

9. The verdict can only be set aside on a motion for a new trial, based not merely on errors of the judge, but upon review of the whole case as submitted to the jury.

Idem, 826

10. Misdirection of the judge is a circumstance to be taken into consideration, but the evidence may be so preponderating as to sustain the verdict, notwithstanding the instructions.

Idem, 826

11. It is not necessary, in order to charge the sureties in an appeal bond, that an execution on the judgment recovered in the Appellate Court should be issued against the principal.

Babbitt v. Shields, 820

12. The sureties in a bond given in the District Court on an appeal to the Circuit Court are not liable for the costs incurred by a subsequent removal of the cause from the Circuit Court to the Supreme Court.

Idem, 820

13. Such new appeal will not diminish or discharge the liability of the sureties on the bond given in the District Court, unless the judgment rendered in the District Court is wholly reversed.

Idem, 820

14. Where there was a verbal mistake of the clerk in entering the verdict, but the judgment was entered properly, as the verdict was amendable in the court below, this court will regard the amendment as made.

Shaw v. Merch. Nat. Bk., 892

15. An agreement to waive a trial by jury sufficiently appears, if the record declares that the cause was called for trial by the court, "the jury having been waived in writing."

Fleitas v. Cockrem, 954

16. Where there is another suit pending for the same cause, the court may compel the plaintiff to elect whether he will submit to judgment on the plea, or discontinue the first suit and pay the costs thereof.

Idem, 954

17. On a mandate from this court affirming a decree of the Circuit Court that court can only record the order of this court and proceed with the execution of its own decree as affirmed.

Durant v. Storrow, 961

18. In the courts of the United States, whenever, in the trial of a civil case, it is clear that the evidence will not warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find for the party so entitled.

Bowditch v. Boston, 980

See OTTO 8, 9, 10, 11.

19. An agreement of compromise between the parties, not set forth or relied on in the pleadings, may be used in evidence, on the confirmation of the master's report and final decree in the cause, to show that the complainant had waived his objections to the amount of the recovery.

O'Reilly v. Edrington, 1009

20. As against a lunatic, a license to his guardian to sell his real estate is not invalid for insufficient publication of notice of the hearing.

Mohr v. Manierre, 1052

PREEMPTION.

SEE LANDS, 10, 20-22, 26.

PRINCIPAL AND AGENT.

SEE HUSBAND AND WIFE, 8.

1. Where an agent of the assured received the money on a policy from the insurers and paid it over to his principals, the insurers cannot recover it back from him but must look to the principals.

Hooper v. Robinson, 219

2. Where an agent of a company was held out to the world as competent to do what he did, and it was done in conformity to the established usage of the company in all such cases, and it was known to the individual trustees, who did not object, the company and its commissioners in insolvency cannot deny that he had the powers he habitually exercised, and thus assumed to have.

Creswell v. Lanahan, 853

3. Where a party has entered into a written contract, it may be shown that he did it as the agent of another, although the agency was concealed and the principal not disclosed; and the principal, in such case, may be held liable upon it.

Jones v. Guaranty and Ind. Co., 1030

4. Where a contract is made by an agent and the principal is disclosed; the agent cannot be made personally liable unless he agreed to be so.

Whitney v. Wyman, 1050

PRINCIPAL AND SURETY.

SEE BANKRUPTCY, 10.

1. A surety in a bond is only bound by its conditions. Where the condition is in the alternative, the bond is discharged as to him by the performances of one of the alternative conditions.

Dumont v. U. S., 65

2. Sureties of an Internal Revenue Collector are liable for moneys received by him under an Act passed subsequently to the execution of their bond.

Soule v. U. S., 536

3. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal.

Idem, 536

PROCESS.

SEE BONDS, 15, 32.

CONSTITUTIONAL LAW, 4.

JURISDICTION, 9.

PRACTICE, 2.

PURCHASERS.

SEE BONA FIDE PURCHASERS, *passim*.

QUESTIONS OF LAW AND FACT.

SEE APPEAL AND ERROR, 6, 9, 13.

1. The existence of malice, in an action for malicious prosecution, is a question exclusively for the jury.

Stewart v. Sonneborn, 116

2. Malice may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice.

Idem, 116

3. The question of probable cause is a mixed one of law and fact; whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.

Idem, 116

4. Whether a passenger has an excess of baggage beyond what is necessary or usual is a question of fact for the jury.

Railroad Co. v. Fraloff, 531

5. Whether or not an article imported is different from the one on which a duty is laid, is a question of fact for the jury.

Arthur v. Herold, 568

Wills v. Russell, 607

1113

6. It is a question for the jury whether a servant, using machinery after he knew its defective condition and after the master had promised to put it in repair, was in the exercise of due care.

Hough v. Railway Co., 612

7. Where the construction of letters was left to the jury and they found properly on the question, no harm was done by the omission of the court to construe them itself.

Pence v. Langdon, 420

8. Acquiescence and waiver are always questions of fact.

Idem, 420

9. Whether or not a check presented to a bank and left with the teller, was received by the bank on deposit, was a question of fact for the jury.

Nat. Bk. v. Burichardt, 766

10. Where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.

Marquez v. Frisbie, 800

11. On a question of fact, the finding of the circuit court cannot be reversed here.

U. S. v. Dawson, 791

12. Whether the locality of a tract as described in a Mexican grant can be ascertained or not, is a question of fact to be ascertained by a jury, whose verdict is not open to revision in this court.

Trenier v. Stewart, 1021

13. Where the evidence as to the truth of the statements in an application for insurance is conflicting or doubtful, it must be submitted to the jury and the court cannot direct a verdict.

Mouler v. Ins. Co., 1077

RAILROADS.

SEE BONDS, *passim*.

CONTRACTS, 8, 9.

LANDS, 1, 10.

LIENS, 1.

MASTER AND SERVANT, 2-6.

MECHANICS' LIENS, 6-9.

MORTGAGES, 4-6, 11-17.

NEGLIGENCE, 2.

RECEIVER, *passim*.

SET-OFF, 2.

TAXES AND TAX SALES, 5, 10, 26, 27, 28, 40.

TRUSTS AND TRUSTEES, 4, 5.

1. Where two railroad companies, each of which enjoyed by its charter an exemption from taxation, were consolidated by a state Act which continued to the consolidated company the franchises, privileges and immunities which the companies had held by their original charters; held, that by the consolidation the original companies were dissolved, and a new corporation was created, which became subject to a general state law authorizing the Legislature to alter the charters of corporations, and that a subsequent Act, taxing the property of such new corporation the same as other property, was not prohibited by the Constitution of the United States.

Atlantic & Gulf R. R. Co. v. Georgia, 188

2. The land grant to the Burlington and Missouri R. R. Co., by the Act of July 2, 1864, does not require the land to be contiguous to the road.

U. S. v. Burlington & Missouri R. R. Co., 198

3. If the land opposite to any section of the road has been taken up by and patented to others, the grant to the company can be satisfied by land situated elsewhere along the general line of the road.

Idem, 198

4. The amendment of the Act of 1864, enlarging the grant of 1862, to the Union Pacific Company, was intended to apply to the grants made to all the branch companies, except when it was otherwise specially stated.

Idem, 198

5. By the Act of Congress, one half of the land granted must be taken on each side of the road; and the land department cannot enlarge the quantity on one side to make up a deficiency on the other.

Idem, 198

6. Under the Act of July 1, 1862, for the issue of patents for land and of bonds to the Union Pacific Railroad Company and other companies, the liability of the Union Pacific Railroad Company, to make the payment of five per cent of its net earnings required by the Act, accrued when it reported and the President of the United States accepted its road as completed for the purpose of issuing the bonds, although the acceptance was provisional.

Un. Pac. R. R. Co. v. U. S., 274

U. S. v. Cent. Pac. R. R. Co., 287

7. The earnings of the road include all the receipts arising from the company's operations as a railroad company, but not those from the public lands.

Idem, 274, 287

8. The Act of July 2, 1864, authorized the payment of the interest accruing on the first-mortgage bonds out of the net earnings of the road, in preference to the five per cent payable to the government. "Net earnings," defined.

Idem, 274, 287

9. Only such part of the annual net earnings of the Kansas Pacific Railway as are due to the first 393 15-16 miles are in any event subject to the payment to the United States of the five per cent of the net earnings under sec. 6 of the Act of July 1, 1862.

U. S. v. Kansas Pacific R. R. Co., 289

10. Items, which should be allowed as proper charges, and items which should be disallowed, in the account of net earnings, stated.

Idem, 289

11. The lien of the subsidy bonds granted to the Kansas Pacific Railway only extends to the road in respect of which they were granted, and not to the extension of it west of the one hundredth meridian.

U. S. v. Denver, Pacific R. and Tel. Co., 291

12. The Denver Pacific Railway Company, is bound to perform the government service stipulated for by the Act of 1862, and is bound by such other provisions of the Act of 1862 and the amendatory acts, as are applicable to it.

Idem, 291

13. Where all the net earnings of the company defendant in this action were absorbed by the interest accruing on its first-mortgage bonds, under the decision of this court in the Union Pacific R. R. Co. v. United States (*infra*), the government cannot claim the five per cent which would otherwise be applicable to its subsidy.

U. S. v. Sioux City R. R. Co., 292

14. In Florida, where a railroad was sold and the proceeds applied to the extinguishment of the bonds issued by the company, the purchaser was only bound thereafter to pay to the receiver of the internal improvement fund of Florida, the one half of one per cent semi-annually upon the amount of such bonds as were still outstanding, pursuant to the Act of Florida to provide for internal improvements in such State, passed Jan. 6, 1855.

Doggett v. R. R. Co., 301

15. In section 3, of the Act of July 1, 1862, granting lands to the Union Pacific Railroad Company, the words "disposed of" indicate a transfer by mortgage.

Platt v. Union Pac. R. R. Co., 424

16. The deed of trust or mortgage executed by this company in 1867 was a disposition of the lands granted by the 3d section of the Act of 1862, and such lands were not open to preemption.

Idem, 424

17. By the Act of June 8, 1872, Congress granted to the Denver Company a present beneficial easement in the particular way over which its designated route lay, capable, however, of enjoyment only when such way was actually located, and, in good faith, appropriated for the purposes contemplated by its charter and the Act of Congress.

Railway Co. v. Alling, 438

18. Where such location and appropriation were made, the title, which was previously imperfect, acquired precision, and by relation took effect as of the date of the grant.

Idem, 438

19. Its surveys of 1871-72, followed by an occupancy of the cañon on the 19th of April, 1878, for the purpose of constructing its road through that defile, was a final appropriation of the way granted by Congress.

Idem, 438

20. By the provisions of the Act of March 3, 1875, any other railroad company may use and occupy the cañon, for the purpose of its road, in common with the road first located.

Idem, 438

21. In Louisiana, where a railroad, in a state of dilapidation was sold under a mortgage, under circumstances which induced the court to set aside the sale and order are sale, the purchasers are entitled to compensation for reconstructing and repairing the road and putting it in working order.

Jackson v. Vicksburg R. R. Co., 460

22. The rule of compensation in such a case is to allow credit to the possessors for the value of the

materials of such improvements as are yet in existence, and the cost of the labor bestowed thereon, not to exceed their value when delivered up; but not for the improvements which were consumed in the use.

Idem. 460

23. Interest on the outlay of the possessors will be allowed them, not exceeding the net earnings received from the improvements, and they will be accountable for the fruits received by them from the property, and have a lien on it for the balance found due them.

Idem. 460

24. That part of the Act of May 7, 1878, to aid in the construction of a railroad, etc., from the Missouri River to the Pacific Ocean, etc., which establishes in the Treasury of the United States a sinking fund is constitutional.

Un. Pac. R. R. Co. v. U. S., 496

25. Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment.

Idem. 496

26. By the Act of Congress of 1862, all the rights, privileges and franchises, including land grants and subsidy bonds, were given to the Central Pacific R. R. Co., a California corporation, that were granted to the Union Pacific Co.

Cent. Pac. R. R. Co. v. Gallatin, 504

27. The Act of Congress of 1864, granting to the company additional powers and resources, reserved to Congress full power of amendment.

Idem. 504

28. To the extent of the powers, rights, privileges and immunities granted to these corporations by the United States, Congress retains the right of amendment, and in this way may regulate their affairs, in a manner not inconsistent with the requirements of the original State charter.

Idem. 504

29. The establishment of a sinking fund by the Act of 1878 is within the power of Congress, and is not at all in conflict with anything contained in the state charters of such companies.

Idem. 504

30. In Illinois, donations by counties or other municipalities to railroad companies were not prohibited by the new State Constitution of 1870, where they had been authorized by a prior statute and by a vote of the people of the county or municipality before the adoption of such Constitution.

Fairfield v. Gallatin Co., 544

31. An improvement company, with authority to construct a railroad which it did construct and use, is within the meaning of the Act of Congress of July 13, 1866, a railroad company, and liable to the tax of five per cent imposed by such Act on coupons of bonds issued for its indebtedness.

Ky. Improvement Co. v. Slack, 609

32. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances.

Shaw v. R. R. Co., 757

33. The bare fact that some of the trustees were holders of bonds secured by their trust, is not sufficient of itself to make them incompetent to consent to a decree of foreclosure embodying a plan for reorganization.

Idem. 757

RECEIVERS.

SEE CONTRACTS, 8, 9.
MORTGAGES, 16, 17.

1. When a court of chancery appoints a receiver of railroad property, it may impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable.

Fosdick v. Schall, 339

2. It is within the power of the court to use the income of the receivership to discharge obligations for labor supplies and the like, which, but for the diversion of funds, would have been paid in the ordinary course of business.

Idem. 339

3. A receiver in a suit in a state court which was subsequently removed into the federal court, may be required to account in the latter court.

Hinckley v. Railroad Co., 591

4. Where the receiver deposited the fund to his private account, and when examined declined to make explanation, he was properly chargeable with interest on it.

Idem. 591

REMOVAL OF CAUSES.

SEE CONSTITUTIONAL LAW, 15.
JURISDICTION, *passim*.

1. A proceeding before commissioners appointed to appraise land when transferred to a state court by appeal from their award, becomes a suit at law, and is thenceforth subject to its ordinary rules and incidents, and may be transferred from the state to the Federal court if the controversy is between citizens of different States.

Boom Co. v. Patterson, 266

2. Under the Act of March 2, 1867, 14 Stat. at L. 568, a cause can be removed from a state court to the Circuit Court after a trial and judgment in the state court, if before the removal the first judgment has been set aside or vacated, and the right to a new trial perfected.

Chic. & N. W. Railroad Co. v. McKinley, 272

3. Where, after a petition for removal to the Circuit Court, has been filed, a rehearing was had in the state court and the judgment modified, such proceedings operated as a revocation of the order for a new trial, and took the case out from under the petition for removal.

Idem. 272

4. Under the Act of 1866, a cause may be removed from a state court to the Circuit Court at any time before trial; even after the jury is sworn.

Yule v. Vose, 355

5. Where A, a citizen of Florida, had been sued with other defendants by a citizen of New York, in the courts of New York, and a part of the other defendants with whom he had been joined were then citizens of that State, and the controversy, so far as it concerned A, had been, by judicial determination separated from that of the other defendants, this gave A a right to the transfer of his part of the suit to the U. S. Circuit Court.

Idem. 355

6. A proceeding in a state court of Louisiana to procure the nullity of a judgment of that court, for causes relative to the form of proceeding and not relative to the merits, cannot be transferred to the U. S. Circuit Court.

Barrow v. Hunton, 407

7. Under the Act of March 3, 1875, when the controversy about which a suit in the state court is brought is between citizens of one or more States on one side, and citizens of other States on the other side, either plaintiffs or defendants may remove the suit to the Circuit Court.

Meyer v. Construction Co., 593

8. The due form of a petition for removal considered,

Idem. 593

9. Where no objection was made in the state court on account of the petition not being signed, the objection comes too late in the Circuit Court.

Idem. 593

10. The Act of Congress does not make it necessary that two persons should sign the bond as sureties. One competent surety is sufficient.

Idem. 593

11. In suits pending when the Act was passed, the application was in time, if made at the first term of the court thereafter.

Idem. 593

12. The petition must be filed so as to be presented to the court before the trial is in good faith entered upon. The case must be actually on trial before the right of removal is gone.

Idem. 593

13. If a party fails in his efforts to obtain a removal and is forced to trial, he loses none of his rights by defending against the action in the state courts.

Idem. 593

14. If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the federal court does not invade State jurisdiction.

Tennessee v. Davis, 648

15. A denial of the right of the general government to remove, take charge of and try any case arising under the Constitution and laws of the United

ed States, is a denial of its conceded sovereignty over a subject expressly committed to it.

Idem. 648

16. A Collector of Internal Revenue, indicted in a state court for murder committed by him while enforcing the revenue laws, may remove the prosecution into the U. S. Circuit Court.

Idem. 648

17. Under section 641 of U. S. Revised Statutes the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings.

Ex parte Virginia. 667

18. Where a cause is removed from a State Court to the U. S. Circuit Court, the latter court may allow such amendments to be made to the declaration as would be allowable by the state practice.

West v. Smith. 809

19. This court has power to review an order of the Circuit Court remanding a cause to the State court, from which it had been removed.

Ayers v. Chicago. 838

20. Where a plaintiff is a citizen of the same State as the defendant, the suit is not removable from the state court, under the rule settled in "Removal Cases," *Infra*, 593.

Idem. 838

21. Suits cannot be removed from the state courts on account of "prejudice or local influence," unless the party opposed to him who petitions for the removal is a citizen of the State in which the suit is brought.

Am. Bible Society v. Grove. 847

22. Under the Act of March 3, 1875, in suits pending when the Act was passed, the petition must be filed at the first term of the court thereafter at which the cause could be tried.

Idem. 847

23. The transfer of a suit from a state court to the Circuit Court does not vacate what has been done in the state court previous to the removal. The Circuit Court takes the case up where the state court left it off.

Duncan v. Gegan. 875

24. Where the questions presented by new pleadings in the Circuit Court are in all respects the same as those settled by the Supreme Court of the State, the appellant is concluded by its decree.

Idem. 875

25. A case which has been removed from a State to a federal court, will be remanded to the State court, where the controversy is not wholly between citizens of different States.

Gage v. Carraher. 989

RES JUDICATA.

SEE ESTOPPEL, *passim*.

SALARIES.

1. A postmaster suspended from office, is not entitled to salary during such suspension, although subsequently restored.

Embry v. U. S. 772

2. Congress has full control of salaries, except those of the President and the judges of the courts of the United States.

Idem. 772

SALES.

SEE MORTGAGES, 4-10.

SALVAGE.

SEE ADMIRALTY, 6.

SET-OFF.

1. The government can set off against a claim, the amount due it by the claimant upon another obligation.

McKnight v. U. S. 115

2. Where the United States obtained a decree for the payment of money against a railroad company, the successor of the railroad company representing its debts and assets, cannot be permitted to set off a debt due it from the United States, against such decree, nor apply such debt in payment thereof.

Nashville & C. Railway Co. v. U. S. 1074

SHERIFF.

SEE DEEDS, 1.

SOLDIERS' HOME.

1116

Only invalid pensioners who had not contributed to the funds of the Soldiers' Home were bound to purchase its benefits by surrendering to it their pensions. U. S. Rev. Stat., sec. 4820.

U. S. v. Bowen. 631

SPECIFIC PERFORMANCE.

1. The principle is not inflexible that the court will not specifically enforce a contract where the price is not fixed or is left to be fixed by arbitration.

Guntton v. Carroll. 985

2. Where land is agreed to be taken in part payment of a debt, the value at which it is to be taken to be fixed by arbitration, and the owner dies before appointing arbitrators, the agreement may be specifically enforced. The court may substitute itself for the arbitrators.

Idem. 985

STATE LAWS AND DECISIONS.

SEE APPEAL AND ERROR, 16.

CONSTITUTIONAL LAW, 9.

1. In a controversy respecting the title to lands in a State, this court will administer the law of the State in all respects as if it were a court sitting there, and reviewing the decree of an inferior court in that locality.

Slaughter v. Glenn. 122

2. The judgment of the highest court of a State, that its statute has been enacted in accordance with the requirements of the State Constitution, is conclusive upon this court, and it will not be reviewed.

Atlantic & Gulf R. R. Co. v. Georgia. 185

3. This court will not follow a state judgment invalidating municipal bonds given after the bonds were issued, and after the rights of the holders thereof had become fixed, which is not in harmony with many rulings of this court made and repeated through a long series of years.

Block v. Commissioners. 491

4. This court will adopt and follow the decisions of the state courts in the construction of their own Constitution and statutes.

Fairfield v. Gallatin Co. 544

5. This court will change its decision construing a State Constitution when no rights have been acquired under it and when, before it was made, the highest tribunal of the State had interpreted the Constitution differently, and that interpretation has become within the State a fixed rule of property.

Idem. 544

6. The courts of the United States are not bound by the decisions of state courts upon questions of general commercial law.

Oates v. Nat. Bk. 580

7. This court does not feel bound, in any case in which a point is first raised in the court of the United States, and has been decided in a circuit court, to reverse that decision contrary to its own conviction, in order to conform to a state decision made in the meantime.

Idem. 580

8. This court treats the construction which the highest court of a State has given to a statute of the State as part of the statute.

Douglass v. Pike Co. 968

Darlington v. Jackson Co. 972

Foot v. Pike Co. 972

9. Where different constructions have been given to the same statute at different times, it will not follow the latest decisions if, thereby, contract rights which have accrued under earlier rulings would be injuriously affected.

Idem. 968, 972, 972

10. The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive.

Idem. 968, 972, 972

STATES.

SEE CONSTITUTIONAL LAW, 49.

STATUTE OF FRAUDS.

SEE EQUITY, 11.

The Statute of Frauds of New Hampshire requires that the memorandum in writing, of an agreement for the sale of lands which is signed by the party to be charged, must contain a sufficient

98, 99, 100, 101 U. S.

description of them, together with a statement of the price to be paid therefor, and also that in that memorandum or in some paper signed by him the other contracting party must be so designated that he can be identified without parol proof.

Grafton v. Cummings, 366

STATUTES.

SEE ADMIRALTY, 3.

APPEAL AND ERROR, 18.

CONFISCATION, 2.

CONSTITUTIONAL LAW, 3.

STATE LAWS AND DECISIONS, *passim*.

1. Where words in a statute have acquired a well understood meaning, through judicial interpretation, it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears.

The Abbotsford v. Johnson, 168

2. Where a statute creates a new right or offense, and provides specific remedies or punishments, they alone apply. Such provisions are exclusive.

Barnet v. Nat. Bk., 212

3. In the interpretation of statutes the rule is that, as against the State, nothing is to be taken as conceded but what is given in express and explicit terms, or by an implication equally clear.

Newton v. Commissioners, 710

4. Courts are to accord a meaning, if possible, to every word in a statute.

Platt v. Union Pacific R. R. Co., 424

5. In construing a statute, aid may be derived from attention to the state of things as it appeared to the Legislature when the statute was enacted.

Idem, 424

6. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word, and that every part of a statute must be construed in connection with the whole so as to make all the parts harmonize, if possible, and give meaning to each.

Wash. Market Co. v. Hoffman, 782

7. A statute imposing a liability for the debts of a corporation upon its officers, for a failure to make an annual report, is penal and should be strictly construed.

Prov. Steam-Engine Co. v. Hubbard, 786

8. No statute is to be construed as altering the common law, farther than its words import.

Shaw v. Merch. Nat. Bk., 872

9. If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.

S. Carolina v. Gaillard, 937

10. A remedial statute is to be liberally construed with reference to the purpose of its enactments.

Bechtel v. U. S., 1019

SURETIES.

SEE PRINCIPAL AND SURETY, *passim*.

TAXES AND TAX SALES.

SEE CONSTITUTIONAL LAW, 8-10, 12-14, 41-44, 51.

CORPORATIONS, 4.

MANDAMUS, 2.

RAILROADS, 1, 31.

1. The certificate which, by the Act of Congress of 1863, the Board of Tax Commissioners was required to give to purchasers, is *prima facie* evidence not merely of the regularity of the sale, but also of its validity and of the title of the purchaser.

De Treville v. Smalls, 174

Keely v. Sanders, 327

Sherry v. McKinley, 330

2. The Act contemplates a certificate of sale in cases where the United States was the purchaser, as fully as where the purchase was made by another.

De Treville v. Smalls, 174

3. The Tax Acts of Congress of Aug. 5, 1861, June 7, 1862, and Feb. 6, 1863, are constitutional.

Idem, 174

4. The payment of taxes under a written protest that they were illegal and that a suit would be brought to recover them back, but without any demand for or effort to collect the same, does not make the payment a compulsory one in such sense as to give the party paying the right to recover back the amount thereof, in the absence of a statute giving the right of recovery in such cases.

Union Pacific R. R. Co. v. Commissioners, 196

5. The charter of the Cairo and Fulton Railroad Company, which exempts forever from taxation the capital stock and dividends of the company, does not carry with it an exemption of the lands, so long

See OTTO 8, 9, 10, 11. U. S. Book 25.

as they remain unsold, granted by Congress to the State by the Act of Feb. 9, 1853, and transferred by the State to such company.

St. Louis, Iron Mt. & So. R. Co. v. Loftin, 222

6. Exemptions from taxation are never presumed. On the contrary, the presumptions are always the other way.

Idem, 222

7. The power of taxation belongs exclusively to the legislative branch of the government but may be delegated by the Legislature to municipal corporations.

U. S. v. New Orleans, 225

8. When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment accompanies it, without any special mention that such power is granted.

Idem, 225

9. Where a firm of brewers consisting of two partners has paid the special tax imposed by Congress, one of the firm who purchases the interest belonging to the other, may carry on the same trade or business at the same place for the balance of the term for which the tax is paid, without further payment of tax.

U. S. v. Glab, 273

10. The Legislature of a State has power to exempt particular parcels of property of individuals or of corporations from taxation, permanently or temporarily.

Hoge v. R. R. Co., 303

11. The intention of the Legislature to grant the immunity must be clear beyond a reasonable doubt.

Idem, 303

12. It cannot be inferred from uncertain phrases or ambiguous terms. If a doubt arises as to the intent of the Legislature, it must be solved in favor of the State.

Idem, 303

13. That the distilled spirits mentioned in a distiller's warehousing bond were entirely destroyed by fire without any fault, negligence, or carelessness on his part, does not relieve the obligors in the bond from liability to pay the government tax upon the liquors thus destroyed.

Farrell v. U. S., 321

14. A commissioner's certificate, as evidence of the regularity and validity of the sale, can only be affected by showing that the property was not subject to taxes, or that the taxes had been paid previously to the sale, or that the property had been redeemed.

Keely v. Sanders, 327

Sherry v. McKinley, 330

15. No state court can, by injunction or otherwise, prevent federal officers from collectingederal taxes.

Idem, 327, 330

16. The description of lands to be sold at a tax sale is sufficient if it identifies the land, and informs the owner of the claim made upon his property.

Idem, 327, 330

17. It is no objection to the validity of the sale that while the taxes due bore but a small proportion to the value of the property, the commissioners sold it as an entirety without subdivision, nor that the owner did not know of the sale.

Idem, 327, 330

18. It is to be presumed that tax sales were adjourned from day to day until the sale actually took place; if not it was but an irregularity which the Act of 1863 rendered ineffective to defeat the title of the purchaser.

Sherry v. McKinley, 330

19. This court has no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize.

U. S. v. County of Macon, 331

20. Where a tax long past due to the United States has been paid to the collector of internal revenue, he and his sureties are liable therefor, although the amount so paid had not then been returned to the assessor's office, nor passed upon by him, nor had a sworn return of the tax-payer been delivered.

King v. U. S., 373

21. The obligation to pay the tax on dividends or interest does not depend on an assessment by any officer, and a suit for such tax can be sustained without it.

Idem, 373

22. Where the question in the state court was whether a national bank was taxed on its United States legal tender notes, the burden of proof is on the bank to show that it has been unlawfully

taxed. The decision of the state assessor must stand, unless it can be affirmatively controverted.

Canal & Bkg. Co. v. New Orleans, 409

23. The owner of distilled spirits may sell the same while the spirits are deposited in the bonded warehouse, but the purchaser takes the property subject to the lien in favor of the United States for the tax created by the Act of Congress.

Hartman v. Bean, 455

24. A sale for direct taxes under the Act of 1862 is void, where, before the sale, the owner, or some one for him, was ready and offered to pay them, and was told that payment would not be accepted.

Atwood v. Weems, 471

25. Such offer to pay, made to a clerk of the Board of Commissioners at their office, who was authorized by them to receive delinquent taxes generally, is sufficient.

Idem, 471

26. A debt, for purposes of taxation, is situated at the domicile of the creditor, although secured by mortgage upon real estate situated in another State.

Kirtland v. Hotchkiss, 558

27. The tax on interest paid by corporations under section 122 of the Internal Revenue Law, as amended by the Act of July 13, 1866, 14 Stat. at L. 138, is an excise tax on their business, to be paid by them out of their earnings, income and profits.

Mich. Cent. Railroad Co. v. Slack, 647

28. Such tax is not invalidated by the provision that the amount of it may be withheld from the dividend or the interest due or payable to the stockholder or the bondholder, who is a citizen or a subject of a foreign government, with no residence in this country.

Idem, 647

29. The provision in section 5219 of U. S. Rev. Stat., that state taxation on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, includes the valuation of the shares as well as the rate of percentage charged thereon.

People of N. Y. v. Weaver, 705

30. The statute of a State, therefore, which establishes a mode of assessment by which such shares are valued higher in proportion to their real value than other moneyed capital, is in conflict with that section, although no greater percentage is levied on such valuation than on that of other moneyed capital.

Idem, 705

31. The Statutes of New York which permit a party to deduct his just debts from the valuation of his personal property, except so much thereof as consists of such shares, tax the shares at a greater rate than other moneyed capital, and are, therefore void as to them.

Idem, 705

32. Manufactured tobacco shipped in bond from the manufactory and stored in an export bonded warehouse on the 14th of June, 1872, was subject to the tax of thirty-two cents per pound, prescribed by the Internal Revenue Act of July 20, 1868. 15 Stat. at L. 152.

Jones v. Blackwell, 752

33. Section 94 of the Internal Revenue Act of 1864 15 Stat. at L. 264, levying taxes on illuminating gas, does not make a municipal corporation liable for the tax in a case where a gas company has, for a valuable consideration, contracted to furnish the corporation with gas "free of charge."

Pittsburgh Gas Co. v. Pittsburgh, 789

34. The lands which passed to the bona fide purchasers from the State of Iowa under the Joint Resolution of Congress approved March 2, 1861, did not become taxable by the laws of the State before that date.

Litchfield v. Webster Co., 925

Litchfield v. Hamilton Co., 928

35. Where a State, under whose authority a tax is levied, sets up a title in itself to the property taxed adverse to that of the true owner, and forbears to enforce the collection until the "title is adjusted," no claim can be made by it for extraordinary compensation on account of such delay in payment of the tax.

Litchfield v. Webster Co., 925

36. A court of equity may in such case enjoin the collection of the extraordinary compensation which the revenue laws of the State give for a delay in payment of taxes.

Idem, 925

37. Where an estate was devised to one for life, without remainder in fee to her children surviving her, the reversion of the property to such chil-

dren on her death was a "succession" so as to be liable to a tax within the meaning of section 127 of the Internal Revenue Act.

Wright v. Blakeslee, 1048

38. No written notice nor protest is required of a party paying illegal taxes under the internal revenue laws in order to entitle him to recover them back. A verbal protest is sufficient.

Idem, 1048

39. Under the Act of June 6, 1872, a cause of action to recover back illegal taxes did not accrue until the commissioner's decision, and is not barred, by limitation, until two years thereafter.

Idem, 1048

40. A railroad company is liable to the tax of two and a half per cent on the amount received by it for the transportation of mails between July 1, 1866, and Jan. 1, 1870, and to a tax on the interest due on its bonds Aug. 1, 1870, but not on interest due Feb. 1, 1872.

West Union R. R. Co. v. U. S., 1068

TERRITORIES.

Congress may legislate for Territories as a State does for its municipal organizations. It has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.

Nat. Bk. v. Yankton Co., 1046

TIME.

For most purposes the law regards the entire day as an indivisible unit. But when the priority of one legal right over another depending upon the order of events occurring on the same day is involved, this rule is necessarily departed from.

Nat. Bk. v. Burkhardt, 766

TORTS.

SEE ACTIONS, 7, 8.
CORPORATIONS, 10.

TOWNS.

1. Where a new town is formed from portions of an old one, the old corporation owns all the public property within her new limits, and is responsible for all the debts of the corporation contracted before the Act of separation was passed, unless the Legislature otherwise provides. The new municipality owns the public property which falls within her boundaries.

Mount Pleasant v. Beckwith, 699

2. Where one town is by a legislative Act merged in two others, unless the Legislature regulates the rights and duties of the latter two they succeed to all the public property and immunities of the extinguished municipality, and they become liable for all the debts previously contracted by her.

Idem, 699

TRADE-MARKS.

1. The right to a trade-mark is a property right, for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity; it was not created by Act of Congress.

Trade-Mark Cases, 550

2. The ordinary trade-mark has no necessary relation to invention or discovery.

Idem, 550

3. At common law the exclusive right to it grows out of its use, and not from its mere adoption.

Idem, 550

4. The Acts of 1870 and of 1876 in regard to trade-marks are not valid and constitutional.

Idem, 550

5. When a trade-mark is affixed to articles manufactured at a particular establishment, and that establishment is transferred to others, the right to the use of the trade-mark may be lawfully transferred with it.

Kidd v. Johnson, 769

6. The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied.

Amoskeag Mfg. Co. v. Trainer, 992

7. A right to the exclusive use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired.

Idem, 993

TREATIES.

SEE ALIENS, 2.
LANDS, 3.

1. Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred.

Hauenstein v. Lynham, 628

2. Every treaty made by the authority of the United States is superior to the Constitution and laws of any individual State. If a law of a State is contrary to a treaty, it is void.

Idem, 628

TRUSTS AND TRUSTEES.

SEE ADMINISTRATORS AND EXECUTORS, 2, 3, 6-9.
HUSBAND AND WIFE, 8, 9, 10, 11.
RAILROADS, 32, 33.
PATENTS FOR LAND.

1. That the price which property brought at a trustee's sale was grossly inadequate, does not alone invalidate the sale unless the inadequacy was such as to shock the conscience, or raise a presumption of fraud or unfairness.

Clark v. Trust Co., 573

2. That the trustee at the date of the deed to him, and when the sale was made, was the actuary of the trust company, whose debt it was given to secure, does not invalidate a sale made under it to the company, which was in conformity to the deed, and was free from fraud.

Idem, 573

3. When everything is honestly done by a trustee, and the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts.

Idem, 573

4. The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them.

Shaw v. R. R. Co., 757

5. To avoid what the trustee has done in his behalf, a bondholder must proceed in some other way than by bill of review.

Idem, 757

6. A power to sell and exchange includes the power to make partition of lands. Power to dispose of signifies more than "to sell," and includes power to make partition of lands.

Phelps v. Harris, 855

7. A trustee, with power to make partition of lands, may submit such partition to arbitration.

Idem, 855

8. Whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust.

Young v. Bradley, 1044

9. The language used in creating the estate of a trustee will be limited and restrained to the purposes of its creation; and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct.

Idem, 1044

UNITED STATES.

1. The United States cannot be estopped by proceedings against its tenants or agents; nor be sued without its consent, given by Act of Congress.

Carr v. U. S., 209

2. An officer of the United States cannot waive its privilege not to be sued, nor lawfully consent that a suit may be prosecuted so as to bind it.

Idem, 209

3. Therefore, when the pleadings or the proofs in an action against its officers or agents, disclose that its possession is assailed, the jurisdiction of the court ought to cease.

Idem, 209

4. Public property can only be subjected to claims against it, when it is in juridical possession by the act of the government or without violating its possession and it seeks the aid of the court to establish or reclaim its rights therein. In such cases the prior rights of others in the same property should be adjudicated and allowed.

Idem, 209

5. Delay or default cannot be attributed to the government.

U. S. ex rel. v. Sherman, 235

6. The United States, under sections 2154 and 2155 of the Revised Statutes, is not liable to pay the

See OTTO 8, 9, 10, 11.

value of property stolen by a negro from a friendly Indian, within the Indian country.

U. S. v. Perryman, 645

7. Where a right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute.

Idem, 645

8. The presentation to the Commissioner of Internal Revenue, by a collector, of a claim for credit in his account, and its rejection by him, will entitle the collector to prove his claim in a suit against him by the United States to collect what is due from him on his account.

U. S. v. Kimball, 835

9. In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, unless it has been presented to the accounting officers of the Treasury, and by them disallowed.

West. Union R. R. Co. v. U. S., 1068

USAGE.

1. The common usage of a country in reference to its measures should be followed in estimating them, when mentioned in grants taking effect there.

U. S. v. Perot, 251

2. Usage cannot make a contract where none was made by the parties.

National Savings Bank v. Ward, 621

3. Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law.

Nat. Bk. v. Burkhardt, 766

USURY.

SEE BANKS, 2, 3, 6, 7.

In Virginia, a party who avails himself of the defense of usury is required to pay the principal of the debt.

Kesner v. Trigg, 83

VENDOR AND VENDEE.

SEE COVENANTS, 3.

WAR.

SEE PAYMENT, 3.

1. During the late civil war, the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained.

Ketchum v. Buckley, 473

2. An officer of the Army of the United States, while serving in the enemy's country during the rebellion, was not liable to an action in the courts of the country for injuries resulting from military orders or acts; he was subject to the laws of war, and amenable only to his own government; a state judgment against him for such acts is void.

Dow v. Johnson, 632

3. The capture of a vessel in neutral waters is valid as between belligerents; but the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

City of Panama v. Phelps, 1061

4. The title to captured property always vests primarily in the government of the captors. When the capture is disavowed by such government it becomes as if it had not occurred, and a libel for the same as prize of war cannot be sustained.

Idem, 1061

WARRANTY.

SEE CHARTER-PARTIES, 1.

WHARVES.

SEE CONSTITUTIONAL LAW, 31, 32, 42.

EXECUTION, 2.

WILLS.

SEE ADMINISTRATORS AND EXECUTORS, 3.

CHARITIES, 2.

HUSBAND AND WIFE, 9.

LANDS, 11.

TAXES AND TAX SALES, 37.

1. An expressed intention in a will may serve to explain language afterwards used therein, but the intention must be found in the acts or dispositions of the testator, and not alone in any previously expressed purpose.

Blake v. Hawkins, 139

2. Although a will be expressed to be made in pursuance of a power, yet if the testator appears to dispose of his own property only, the power will not be executed by the will.

Idem, 139

3. On the other hand, if the will contains no expressed intent to execute the power, yet if it may be gathered from all the gifts and directions made that their object was to execute it, the will must be regarded as an execution.

Idem, 139

WITNESSES.

1. A party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated

1120

in his direct examination, except to show bias or prejudice in the witness or to lay the foundation to admit evidence of prior contradictory statements.

Wills v. Russell, 607

2. The order and time of introducing evidence are matters belonging very largely to the practice of the court where the case is tried.

Idem, 607

3. An objection to the examination of a witness should state specifically the ground of the objection.

Woodbury Planing-Machine Co. v. Keith, 939

4. Where a question is asked a witness, and objected to, and permitted to be answered, and an exception taken, but no answer of the witness is given, the exception is of no avail.

Bailey v. Davis, 944

98, 99, 100, 101, U. S.

